Neutral Citation Number: [2018] EWHC 1233 (Admin)

Case No: CO/5897/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2018

Before :

LORD JUSTICE GROSS

AND

MR JUSTICE SWEENEY

- -

Between :

THE QUEEN **on the application of** **MARTIN KAY** **and** **SCAN-THORS (UK) LIMITED**	**Claimants**
- and -	
LEEDS MAGISTRATES' COURT	**Defendant**
- and -	
MAREK KARWAN	**Interested Party**

- -
- -

Adrian Darbishire QC and Rachna Gokani (instructed by **Peters & Peters Solicitors LLP**) for the **Claimants**
Simon Myerson QC and George Hazel-Owram (instructed by **Kuit Steinhart Levy LLP**) for the **Interested Party**

Hearing date: 5 December 2017

- -

Approved Judgment

Mr Justice Sweeney :

Introduction

1. This case underlines the importance of compliance by prosecutors, public and private alike, with their duty of candour when applying *ex parte* for the issue of summonses in the Magistrates' Court.

2. By permission of Collins J, granted on 4 May 2017, the Claimants, Scan-Thors (UK) Limited ("Scan-Thors") and its Managing Director, Martin Kay ("Mr Kay"), seek judicial review of the decision of District Judge (Magistrates' Courts) Mallon ("the DJ") who, on 7 October 2016 in the Leeds Magistrates' Court, refused to:

   (1) Dismiss summonses for offences of fraud (in the period between 2007 and 2012) which had been issued against the Claimants in that court on 19 May 2016, on the basis of an information laid on 7 April 2016 at the behest of the Interested Party, Marek Karwan ("Mr Karwan"), a private prosecutor who is the President of Adriana SA ("Adriana"), a company registered in Poland.

   (2) Stay the proceedings as an abuse of process – finding that the appropriate venue for the determination of that issue was the Crown Court.

3. The Claimants assert (as they did before the DJ) that, although represented by solicitors when applying *ex parte* for the summonses, Mr Karwan failed, in breach of his duty of candour, to bring to the attention of the judge who dealt with the application that:

   (1) On 26 July 2012 he had entered into a binding 'Settlement Agreement' with the Claimants in which he had undertaken not to prosecute them for the matters the subject of the information and summonses.

   (2) The very matters raised had (at his request) twice been considered by a Polish Regional Public Prosecutor (over a total period of some five months) and thereafter reviewed by a Polish Regional Court, each of which (respectively in detailed written justifications and a detailed judgment) had reached the conclusion that there was no evidence of the Claimants having committed any criminal offences.

   (3) He had only attempted to initiate the Polish criminal proceedings after he had found himself at risk of losing nearly £560,000 in arbitration proceedings between Scan-Thors and Adriana in Poland, and had attempted to use the fact of the criminal complaint in Poland to bring about a stay of those arbitration proceedings.

   (4) Adriana had lost those arbitration proceedings and had been compelled to pay nearly £560,000 to Scan-Thors.

   (5) At the time of applying for the summonses, Adriana was the subject of further arbitration proceedings in Poland, in which Scan-Thors was seeking unpaid commission payments and damages in excess of £4 million, and that

he had initiated the proceedings in this country only after he had found Adriana to be at risk of that further loss.

(6) It was his intention (as shown by what later happened) to use the fact of the criminal proceedings in this country as the basis of an application to suspend the ongoing arbitration proceedings in Poland, or otherwise to gain a commercial advantage in that dispute.

4. The Claimants now challenge the DJ's refusal to dismiss the summonses and her conclusion that their abuse of process application should be determined in the Crown Court, and invite the Court to quash her decision and to dismiss the summonses. They argue, in summary, that the DJ erred in law in that:

(1) Whether a case is a proper one for the issuance of a summons is a matter for the Magistrates' Court, and for this Court on review. The Magistrates' Court also has the power to reconsider the decision to issue a summons, as well as the power to stay the proceedings, summonses having been issued, and this Court has recognised the importance of Magistrates' Courts taking action where it appears that a summons should not have been issued.

(2) The additional material before the court required her to reconsider the question of whether this was a proper case in which to issue summonses.

(3) Had she been the judge dealing with the initial application for summonses, and had she been provided (as she should have been) with the additional material, and thus the whole of the relevant circumstances, she would have been bound to consider and determine, on that material, whether this was a proper case for the issuance of summonses – and that would have been so even if the question was a complex one, which it was not. Hence it was not lawful for her to refer that question on to the Crown Court. The Magistrates' Court was the correct forum, in which the position should have been regularised at the earliest opportunity.

(4) She was asked to consider the conduct of the prosecutor in English proceedings – which analysis was one of English, not Polish, law.

5. The Defendant court has taken no part in these proceedings.

6. Mr Karwan argues, in summary, that:

(1) He complied with any duty of candour to which he was subject – choosing not to disclose the existence of the "Settlement Agreement" as it was irrelevant to the question of the issue of the summonses, and the Claimants knew that his position was that it was unenforceable.

(2) The DJ did not err in law in that she:

(a) Considered all the evidence, authorities and written submissions and dealt with all the issues.

(b) Considered and refused the Claimants' application to dismiss the summonses and declined to withdraw them, because the Claimants had failed to persuade her that it was appropriate to order withdrawal.

(c) Did not conclude that the issuance of the summonses, and whether they should be dismissed, was a matter for the Crown Court – but rather, having considered the abuse argument and the relevant authorities, concluded that she should not determine the abuse application and that the Crown Court was the proper forum for the determination of any abuse application.

(3) In reality, the Claimants' complaint was that the DJ should have determined the applications in their favour – which was not a matter that should be the subject of judicial review. Unless the judge simply accepted what the Claimants said about motive, failure to disclose, and the settlement agreement, she was bound to consider that those issues were fact dependent, whereas the Claimants had chosen not to submit evidence.

(4) In contrast, he had submitted evidence which showed, to the requisite standard, that, amongst other things, the alleged frauds had been committed; the settlement agreement was governed by Polish law (which prohibits undertakings not to prosecute); the Polish investigation concerned offences with a different actus reus and mens rea; he had an explanation for not disclosing the undertaking when applying for the summonses; and he had a genuine, legitimate motive for prosecuting the offences.

Background

7. The commercial relationship between Adriana and Scan-Thors appears to have begun in the late 1990s. Adriana is a furniture manufacturing business based in Poland. Scan-Thors is based in this country, and acted as a middle man in the purchase of furniture from Adriana, the import of that furniture into this country, and its onward sale to retailers – principally DFS.

8. The materials before the Court, including the materials which it is argued should have been disclosed to the court in accordance with Mr Karwan's duty of candour, indicate, amongst other things, that:

(1) On 14 September 2000 Scan-Thors and Adriana entered into a formal cooperation agreement.

(2) In 2003/4 Adriana began to get into financial problems.

(3) In September 2007, at a cost of around £1.5 million, Scan-Thors acquired a 30% shareholding in Adriana, Mr Kay was given a seat on Adriana's Management Board, and Mr David Johnson (another employee of Scan-Thors) was given a seat on Adriana's Supervisory Board.

(4) It is asserted that over the years that followed, Mr Kay represented in pricing negotiations that DFS required a discount of 5%, to which Mr Karwan agreed.

(5) Scan-Thors continued to give financial help, by way of substantial loans, to Adriana which, in January 2010, reached agreement with its creditors.

(6) By late 2011 / early 2012 the debt owed by Adriana to Scan-Thors was approximately £2 million, and it was around that time that it is alleged that Mr Karwan discovered that Mr Kay's claim that DFS required a 5% discount was false, and that the relationship between the two companies became increasingly acrimonious.

(7) Nevertheless, in May 2012 loan agreements were signed in relation to loans made by Scan-Thors to Adriana totalling in excess of £820,000.

(8) On 26 July 2012 Scan-Thors and Adriana concluded a set of six inter-related agreements, with a view to amending and gradually terminating their commercial relationship. Under the 'Share Purchase Agreement' Scan-Thors sold back, at a very considerable loss, its 30% shareholding in Adriana. The 'Settlement Agreement', which was signed by Mr Karwan personally and by (or on behalf of) the Claimants, and which did not seek to exclude any public prosecution, provided (my emphasis) that:

> "*1. <u>No 'further claims' clauses</u>*
>
> *1.1 The parties do hereby confirm that today's execution of: (1) a share purchase agreement, (2) a loan agreement, (3) a cooperation agreement – regulates all mutual relationships between them and is the result of the amicable settlement of any past or potential disputes between them.*
>
> *1.2 Therefore, for avoidance of any doubts, each of the parties do hereby confirms that it has no claims of whatsoever (either civil or criminal law) nature against other Parties especially related to: (1) holding by Scan-Thors 30 per cent shares in Adriana, (2) any actions undertaken by Mr Martin Kay as member of Adriana's management board, (3) any actions undertaken by Mr David Johnson as* [sic] *Adriana's supervisory board, (4)* ***pricing negotiations between Adriana and Scan-Thors***
>
> ……..
>
> *2.1 The Parties hereby expressly confirm that their any and all respective obligations hereunder cannot be altered, waived, or revoked in any manner whatsoever without a prior written consent of the other Parties.*
>
> *2.2 All disputes arising out of or in connection with this agreement shall be settled by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw pursuant to the Rules of this Court binding on the date of this Agreement.*
>
> *2.3 This document shall be governed by the laws of Poland*"

(9) On 8 July 2013 Adriana attempted unilaterally to terminate the 'Cooperation Agreement' signed on 26 July 2012.

(10) On 14 August 2013 Scan-Thors filed a statement of claim for payment of unpaid commissions, resulting in the First Arbitration proceedings before the Court of Arbitration of the Polish Chamber of Commerce in Warsaw.

(11) On 10 February 2014, during his evidence in the arbitration proceedings, Mr Karwan stated that he had given instructions to notify the Regional Prosecutor's office of an offence committed by Mr Kay and that, as at the date of the hearing, the notification had either already been filed or was about to be.

(12) By a Notification dated 5 March 2014 (copied in our papers) Adriana notified the Regional Prosecutor of the suspected commission of a crime by Mr Kay, contrary to Article 296 of the Criminal Code, and on 8 May 2014 the Regional Prosecutor commenced an investigation.

(13) On 3 June 2014 the First Arbitral Award was issued. Adriana was ordered to pay Scan-Thors nearly £560,000 (the whole of its claim). It was further held that Scan-Thors and Adriana were still bound by the 'Cooperation Agreement'.

(14) On 4 June 2014, before the First Arbitral Award was formally notified to the parties, Adriana applied to the Court of Arbitration for a temporary stay of proceedings - arguing that the decision in the arbitration proceedings depended on the outcome of the investigation commenced by the Regional Prosecutor.

(15) On 12 June 2014 the First Arbitral Award was formally recognised and confirmed to be enforceable, and an enforcement order was granted. Two days later Adriana appealed the court's decision on the recognition and enforceability of the First Arbitral Award.

(16) On 27 June 2014 the Regional Prosecutor discontinued the criminal investigation into Mr Kay – providing a sixteen-page written justification for her decision, including a number of observations about the evidence (to which I will return below).

(17) On 16 July 2014 the First Arbitral Award monies were transferred to Scan-Thors by a bailiff - following Adriana's failure to respect the award and its refusal to pay.

(18) On 12 August 2014 the Regional Prosecutor re-opened the criminal investigation into Mr Kay upon the application/appeal of Adriana/Mr Karwan.

(19) On 11 September 2014 Adriana challenged the First Arbitral Award before a Polish State Court, but its appeal was dismissed on 28 October 2014.

(20) On 5 November 2014 Mr Kay and Mr Johnson gave evidence to the Regional Prosecutor in Poland. Mr Karwan gave evidence on 24 November 2014.

(21) On 1 December 2014 the Regional Prosecutor discontinued her investigation again – this time providing a twenty-six-page written justification for her decision, including further observations about the evidence (to which I will return below).

(22) In early 2015 Adriana appealed to the Regional Court in Torun II Criminal Division against the decision of the Regional Prosecutor to discontinue the investigation. On 22 May 2015, in a sixteen-page judgment, the Court upheld the Prosecutor's decision to discontinue, and made various observations about the evidence (to which I will also return below).

(23) On 22 May 2015 Scan-Thors initiated a Second Arbitration, claiming, primarily, payment of commission accrued since April 2013 and damages - totalling more than £4 million.

(24) On 30 November 2015 the District Court (Sąd Okręgowy) dismissed a challenge by Adriana to the First Arbitral Award – which dismissal Adriana appealed against on 15 February 2016.

(25) On 7 April 2016 Mr Karwan's Information was laid at Leeds Magistrates' Court - seeking summonses against Scan-Thors and Mr Kay. Mr Karwan also signed a witness statement, as part of the application (I shall summarise the information, the summonses and the evidence relied on below).

(26) On 18 April 2016 Mr Kay gave evidence in the Second Arbitration. Mr Karwan gave evidence the following day, during which he stated that, to override the decision of the Polish authorities, he had initiated a private prosecution against Scan-Thors and Mr Kay in England. The Court of Arbitration thereafter indicated that it was likely to hand down its judgment by the end of July 2016. Adriana's counsel stated that they would apply for a temporary stay of the Second Arbitration until the appropriate court had given its judgment on the appeal of the court's decision to dismiss Adriana's challenge to the First Arbitral Award.

(27) On 3 May 2016 Leeds Magistrates' Court wrote to Mr Karwan's solicitors to request clarification as to whether West Yorkshire Police had been asked to investigate the situation, and if not why not; who was the named individual; and whether the firm were acting as agent.

(28) The following day Mr Karwan's solicitors wrote to Leeds Magistrates' Court to explain that West Yorkshire Police had not been asked to investigate the allegations made by Mr Karwan, because their client had not wished to utilise "*precious Police resources, nor delay the matters further.*"

(29) On 19 May 2016 the Claimants' solicitors wrote to Adriana and to Mr Karwan's Polish lawyers requesting that they be informed immediately in which court in England the information had been laid and who in the United

Kingdom represented the parties. It was, in fact, on that same day that the summonses were issued against Scan-Thors and Mr Kay in the Leeds Magistrates' Court.

(30) On 23 May 2016 the Claimants' solicitors wrote to various Magistrates' Courts local to Scan-Thors and Mr Kay, and the following day Bradford Magistrates' Court responded that summonses had been issued by Leeds Magistrates' Court, but not yet served.

(31) A few days later, the summonses were received by Scan-Thors and Mr Kay.

(32) On 17 June 2016 Adriana applied to the Court of Arbitration for a temporary stay of the second proceedings, pending the conclusion of its appeal against the decision to dismiss Adriana's challenge to the First Arbitral Award and of the criminal proceedings in the UK.

(33) As indicated above, the DJ gave judgment on 19 October 2016. (I will return to this below)

(34) On 28 February 2017 Adriana was ordered to pay more than £4 million to Scan-Thors in the Second Arbitration proceedings.

9. The Information laid on behalf of Mr Karwan on 7 April 2016 invited the issue of summonses for four charges of fraud, contrary to s.1 of the Fraud Act 2006 - each in the period between 23 July 2007 and 30 July 2012, and each based on the assertion that an untrue or misleading representation had been made to Adriana, namely that Scan-Thors required a 5% discount upon furniture products that Adriana was supplying because the ultimate customer, DFS, required such a discount. Scan-Thors and Mr Kay were alleged to be jointly involved in the first and second charges – said, respectively, to involve an intention to make a gain and an intention to expose Adriana to the risk of loss. Mr Kay alone was the subject of the third and fourth charges in respect of each of which he was said to have abused his position as a member of the Management Board of Adriana – said, respectively, to involve an intention to gain and an intention to cause loss.

10. Amongst other things, the information, which was supported by a small number of witness statements and exhibits:

(1) Gave brief outlines of the business of each company, the roles of Mr Karwan and Mr Kay, the fact of trading between the companies since 1999, and the agreement between the companies in September 2007.

(2) Referred to extracts from an email in July 2007, and from two emails in March 2008, all between Mr Kay and Mr Karwan, which were said to evidence the alleged false representation as to DFS requiring a 5% discount, and Mr Karwan's acceptance of that representation in pricing negotiations.

(3) Also set out an extract from an email sent on behalf of Scan-Thors to Mr Karwan in March 2012, in which it was stated that prices for fabric treatment "*will be subject to DFS's 5% settlement and our 2% early payment*".

(4) Asserted that Adriana had discovered that the 5% discount representation had been false, in consequence of which the relationship between the companies had broken down.

(5) Asserted that "*further to the breakdown in the relationship*" civil proceedings had resulted in arbitration between the companies, during the course of which the legal adviser to Scan-Thors had stated that; "*The plaintiff admittedly confirms that during the price negotiations with the defendant it used an argument concerning the discount used in favour of its DFS recipient that was not entirely true*."

(6) Stated that on 5 March 2014 Adriana had lodged a notification of suspected criminality to Polish prosecutors, and summarised or quoted extracts from the resulting evidence of Mr Johnson, Mr Kay and Andrew Vaughan Jones (from DFS), which were said to support the assertion that DFS had not requested a 5% discount.

(7) Referred to the fact that on 1 December 2014 the "*District Prosecutor*" had decided to discontinue the investigation as the act "*does not show constituent elements of a criminal act / prohibited act pursuant to article 17.1.2 of the Code of Penal Procedure*", and stated that no one had ever been declared by the prosecutor to be accused of a criminal offence.

(8) Stated that Adriana's contention that Mr Kay had abused his position on the Adriana Management Board had been dismissed by the prosecutor on the basis that Mr Kay had not exercised any obligations, and nor had he abused his position, in negotiating prices with Adriana on behalf of Scan-Thors.

(9) Asserted that, nevertheless, Mr Kay had gained inside knowledge of Adriana, and had duties of good faith towards it.

(10) Stated that the second offence that the prosecutor had considered was one which, under Polish law, required the direct and specific intent to make Adriana dispose of its assets to its disadvantage and, to that extent, the Polish Penal Code differed to offences under the Fraud Act 2006 "*...and thus the Polish decision not to investigate the allegations further act as no bar to the charges currently being sought*".

(11) Asserted the financial prejudice suffered by Adriana was estimated to be in the region of £3 million.

(12) Asserted that it was believed that both the evidential and public interest tests were met.

The DJ's judgment

11. The DJ recorded that the now Claimants had applied for the summonses to be dismissed, or for the proceedings to be stayed as an abuse of process, on four grounds, namely that:

"*(i) In his application the Prosecutor failed to disclose to the Court material which would undermine the application, namely the Settlement agreement;*

(ii) The Prosecutor's motive was to advance his position in the ongoing arbitration proceedings in Poland or to derail them;

(iii) The Defendants relied on an assurance from the Prosecutor that no criminal claims would be brought against them in respect of the conduct now alleged;

(iv) The only relevant venue for the resolution of these issues is Poland".

12. The DJ then went on to briefly summarise the arguments advanced by the parties – including the arguments on behalf of the now Claimants that Mr Karwan was bound to act as a Minister for Justice and should have put all relevant circumstances (including the 'Settlement Agreement' and the history of the arbitration proceedings) before the court when applying *ex parte* for the summonses, and that the fact of his not doing so was a powerful reason to review the issue of the summonses; and the counter-argument on behalf of Mr Karwan that, whilst a private prosecutor had to act fairly and had the same obligations as the CPS, he had acted fairly, as all he had to do on the application for the summonses was to put before the court evidence to show the commission of the offence.

13. The DJ concluded that:

> *"7. THE LAW:*
>
> *The legal principles applicable to the issue of a summons in these circumstances were summarised "incontestably" in the case of R (on the application of Chief Constable of Northumbria) v Newcastle upon Tyne Magistrates' Court*
>
> *(i) The decision of a magistrate to issue a summons involves the exercise of a judicial function, from which it follows that a magistrates' court has a discretion to refuse to issue a summons where the proceedings would be vexatious, improper or for some other reason an abuse of the process of the court;*
>
> *(ii) It is an abuse of the process to issue proceedings with an ulterior motive, for example, with a view to the prosecutor clearing his name rather than bringing alleged criminals to justice;*
>
> *(iii) If the magistrates' court would have had power to refuse to issue a summons on the ground that the proceedings were vexatious or an abuse of the process, then the court equally has jurisdiction to stay the proceedings at a later stage;*

> *(iv) The duty of the court under section 51 of the 1998 Act to send a case to the Crown Court does not preclude it from exercising its jurisdiction to stay proceedings as an abuse of process,* ***though it will very rarely be appropriate to do so*** *(my added emphasis).*
>
> *8. Dealing with the abuse point first, I note that the circumstances of the above case were entirely distinguishable from this case. It was held that the Chief Constable could not, as a matter of law, be held vicariously liable for the allegedly criminal acts of his subordinates. The summons did not disclose any offence known to law. It was in those "particular circumstances of this unusual and very striking case"(per Munby LJ, as he then was) that the Court held that the case should have been stopped as an abuse. Those circumstances do not apply to the present case and it is trite law to say that cases should be stayed as an abuse of process in the Magistrates' Court only in wholly exceptional circumstances and so this limb of the defence application should, and does, fail."*
>
> *9. Turning to the broader point of the Court's discretion, having now been referred to information to which the Judge who issued the summons was not privy, I read detailed written submissions and heard lengthy oral amplification of the same, which primarily revolved around a legal contractual document, drafted in Poland, on the face of it subject to Polish law, which purported to regulate future legal relations between the parties. This issue involves a complex legal analysis of an international legal issue. In no way is it the simple issue outlined in paragraph 8 above. I find, therefore, that the appropriate venue for the determination of this issue is the Crown Court. Accordingly, the summons will not be set aside and the Defendants shall appear before this Court in order that allocation may be dealt with in due course."*

Legal Framework

Statutes and Rules

14. The right of private prosecution is expressly preserved by s.6 of the Prosecution of Offences Act 1985.

15. Section 1(1)(a) of the Magistrates' Courts Act 1980, as amended, provides that:

> *"On an information being laid before a Justice of the Peace that a person has, or is suspected of having, committed an offence, the justice may issue—*
>
> > *(a) a summons directed to that person requiring him to appear before a magistrates' court to answer the information, …"*

16. Other provisions authorise the issue of such summonses by a District Judge (Magistrates' Courts), or a Justices Clerk.

17. Rule 4 of the Magistrates' Courts Rules 1981, as amended, provides that:

> "*(1) An information may be laid… by the prosecutor… in person or by his counsel or solicitor or other person authorised in that behalf.*
>
> *(2) Subject to any provision of the Act of 1980, or any other enactment, an information… need not be in writing or on oath.*
>
> *(3) It shall not be necessary in an information… to specify or negative an exception, exemption, proviso, excuse or qualification whether or not it accompanies the description of the offence… contained in the enactment creating the offence…"*

18. As in force at the material time, Part 7 of the Criminal Procedure Rules 2015 provided that:

> "*7.1(1) This part applies in a Magistrates' Court where –*
>
> *(a) a prosecutor wants the court to issue a summons … under section 1 of the Magistrates' Court Act 1980…*
>
> *7.2(1) A prosecutor who wants the court to issue a summons must –*
>
> *(a) serve an information in writing on the court officer; or*
>
> *(b) unless other legislation prohibits this, present an information orally to the court, with a written record of the allegation that it contains…*
>
> *……*
>
> *(6) Where an offence can be tried in the Crown Court then—*
>
> *(a) a prosecutor must serve an information on the court officer or present it to the court…*
>
> *Within any time limit that applies to that offence*
>
> *7.3(1) The allegation of an offence in an information … must contain –*
>
> *(a) a statement of the offence that*

> *(i) describes the offence in ordinary language, and*
>
> *(ii) identifies any legislation that creates it; and*
>
> *(b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.*

……

7.4(1) The court may issue or withdraw a summons…—

> *(a) without giving the parties an opportunity to make representations; and*
>
> *(b) without a hearing or at a hearing in public or in private.*

…….."

19. Part 46 of the Criminal Procedure Rules 2015, as in force at the material time, provided that:

> *"46.1(1) Under these Rules, anything that a party may or must do may be done—*
>
> *(a) by a legal representative on that party's behalf…".*

The issue of a summons

20. A decision whether to issue a summons is a judicial function involving the exercise of a discretion which is subject to control by judicial review (see e.g. *R v Wilson ex parte Battersea Borough Council* [1948] 1 KB 43; *R v Manchester Stipendiary Magistrate, ex parte Hill* [1983] 1 AC 328).

21. In the much-quoted case of *R v West London Metropolitan Stipendiary Magistrate, ex parte Klahn* [1979] WLR 933, Lord Widgery CJ, giving the judgment of the court, said at 935F – 936E:

> *"According to Stone's Justices' Manual, application for the issue of a summons is made ex parte in private and usually out of normal court hours. It is a step which is preliminary to the institution of proceedings and there is no provision for the giving of notice to a proposed defendant. Once a summons has been issued, the proceedings become and are Crown proceedings: see Rex v. Wilson, Ex parte Battersea Borough Council [1948] 1 K.B. 43,47.*

The duty of a magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding whether or not to issue a summons. As Lord Goddard C.J. stated in Rex. v. Wilson, at pp. 46–47:

> *"A summons is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons."*

It would appear that he should at the very least ascertain: (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not "out of time"; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute.

In addition to these specific matters it is clear that he may and indeed should consider whether the allegation is vexatious: see Rex v. Bros (1901) 85 L/T. 581. Since the matter is properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly he should consider the whole of the relevant circumstances.

In the overwhelming majority of cases the magistrate will not need to consider material beyond that provided by the informant. In my judgment, however, he must be able to inform himself of all relevant facts. Mr. Woolf, who appeared as amicus curiae, and to whom the court is indebted for his assistance, submitted that the magistrate has a residual discretion to hear a proposed defendant if he felt it necessary for the purpose of reaching a decision. We would accept this contention.

The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons. There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to be meet [sic]; no charge has been made. A proposed defendant has no locus standi and no right at this stage to be heard. Whilst it is conceivable that a magistrate might seek information from him in exceptional circumstance it must be entirely within the discretion of the magistrate whether to do so.

Accordingly in this case, whilst we take the view that the magistrate was in error in holding that he had no power if he wished to do so to hear representations from the applicant, we are of the opinion that he was correct in his view that the applicant had no right to address him, and furthermore was

> *fully justified in refusing to hear counsel on behalf of the applicant."*

22. We were referred to various authorities decided after the decision in ex parte Klahn, including *R v Clerk to Bradford Justices, ex parte Sykes and Shoesmith* (1999) 163 JP 224; *R v Belmarsh Magistrates' Court, ex parte Watts* [1999] 2 Cr.App.R. 188; *R (Mayor and Burgesses of London Borough of Stratford) v Stratford Magistrates Court* [2004] EWHC 2506 (Admin); *R (Charlson) v Guildford Magistrates' Court* [2006] EWHC 2318 (Admin); *R (Craik) v Newcastle upon Tyne Magistrates' Court* [2010] EWHC 935 Admin (quoted by the DJ); *Barry v Birmingham Magistrates' Court* [2010] 1 Cr.App.R. 13; *R (DPP) v Sunderland Magistrates' Court* [2014] EWHC 613 (Admin), and *R (Haigh) v City of Westminster Magistrates' Court* [2017] EWHC 232. For present purposes, *ex parte Klahn* and the above-mentioned authorities establish that, when considering whether to issue a summons:

(1) The magistrate must ascertain whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are prima facie present; that the offence alleged is not time-barred; that the court has jurisdiction; and whether the informant has the necessary authority to prosecute.

(2) If so, 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.

(3) Hence the magistrate should consider the whole of the relevant circumstances to enable him to satisfy himself that it is a proper case to issue the summons and, even if there is evidence of the offence, should consider whether the application is vexatious, an abuse of process, or otherwise improper.

(4) Whether the applicant has previously approached the police may be a relevant circumstance.

(5) There is no obligation on the magistrate to make enquiries, but he may do so if he thinks it necessary.

(6) A proposed defendant has no right to be heard, but the magistrate has a discretion to:

  (a) Require the proposed defendant to be notified of the application.

  (b) Hear the proposed defendant if he thinks it necessary for the purpose of making a decision.

The duties of a private prosecutor

23. It is not disputed that authorities such as *R v Belmarsh Magistrates' Court ex parte Watts* (above); *R (Charlson) v Guildford Magistrates' Court* (above); *R (Dacre) v City of Westminster Magistrates' Court* [2009] 1 W.L.R. 2241; *Barry v Birmingham Magistrates' Court* (above); *R v Zinga [2014] EWCA Crim 52*; and *R (Haigh) v City of Westminster Magistrates' Court* (above) (in which this court concluded that a

District Judge had been right to require a private prosecutor to put the subjects of an application for summonses on notice) establish that:

(1) Whilst the Code for Crown Prosecutors does not apply to private prosecutions, a private prosecutor is subject to the same obligations as a Minister for Justice as are the public prosecuting authorities – including the duty to ensure that all relevant material is made available both for the court and the defence.

(2) Advocates and solicitors who have the conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice in preference to the interests of the client who has instructed them to bring the prosecution – owing a duty to the court to ensure that the proceeding is fair.

The duty of candour

24. There is no doubt that the duty of candour applies to an *ex parte* application for the issue of summonses. In *R v Grays Justices, ex parte Low* 1988 3 AER 834 a refusal to dismiss summonses was quashed by this court because of a failure to comply with the duty of candour. Nolan J (as he then was), who gave the leading judgment, said at 837G (my emphasis):

> *"There are, however, two factors in this case which appear to me to take it outside the scope of the authorities to which I have referred. The first is that the court which issued the summons on April 8 was not made aware of the withdrawal of the original summons against the applicant, nor of the circumstances in which that withdrawal occurred. These were considerations which should have been brought to the attention of the court, so that it could consider whether the application for the fresh summons was a proper use of the process, or was merely vexatious. We do not know why the background to the matter was not disclosed to the court, but it is not necessary to inquire further because* ***it is now established that the withholding of material information is in itself a critical factor in determining whether a summons should be set side as an abuse of the process of the court****: see Bury Justices ex parte Anderton (1987) The Times, April 4, a decision of this court. This decision is not reported elsewhere and so was not brought to the attention of the justices on September 30, 1987."*

25. More generally, authorities such as *R v Crown Court at Lewes ex parte Hill* (1991) 93 Cr.App.R 60; *In re Stanford International Bank Ltd and another* [2011] Ch 33: *R v Zinga* [2012] EWCA Crim 2537; *R (Rawlinson and Hunter Trustees and others) v Central Criminal Court and others* [2013] 1 W.L.R. 1634; *R (Mills and Mills) v Sussex Police and Southwark Crown Court* [2014] 2 Cr.App.R. 34; *R (Hart) v The Crown Court at Blackfriars* [2017] EWHC 3091 (Admin); and *R (Daly) v The Commissioner of Police of the Metropolis and South East Magistrates' Court* [2018] EWHC 438 (Admin) variously describe the duty as being one of *"full and frank disclosure"* which *"necessarily includes a duty not to mislead the judge in any material way"* and which requires the disclosure to the court of *"any material which*

is potentially adverse to the application" or *"might militate against the grant"* or which *"may be relevant to the judge's decision, including any matters which indicate that the issue….might be inappropriate"*.

26. As Hughes LJ (as he then was) memorably put it in *In re Stanford International Bank Limited* (above) at [191]:

> "…*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. There are two lines of authority as to what a defendant alleging a breach of the duty of candour must demonstrate to persuade a court that the summons should be quashed. The first, including cases such as *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin) and *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin) indicates that it must be shown that the inaccurate and/or non-disclosure by the prosecutor would have made a difference to the judge's decision. The second, including cases such as *R (Dulai) v Chelmsford Magistrates' Court* [2013] 1 WLR; *R (Mills) v The Chief Constable of Sussex* (above); and *R (Hart) v The Crown Court at Blackfriars* (above) indicates that it is sufficient if it is shown that the inaccurate and/or non-disclosure by the prosecutor might have made a difference to the judge's decision.

28. Whilst it seems to me that the reasoning in the second line of cases is compelling, for reasons that will become obvious, it is not necessary in this case to express any concluded view as to which line is right.

The amendment of Part 7 of the Criminal Procedure Rules

29. I am fortified in a number of the above conclusions by the recent amendment of Part 7 of the Criminal Procedure Rules, which is intended to reflect the position at common law, and now provides, amongst other things, that:

> "……
>
> *7.2.—(3) An application for the issue of a summons or warrant must—*
>
> *(a) set out the allegation or allegations made by the applicant in terms that comply with rule 7.3 (Allegation of offence in application or charge); and*
>
> *(b) demonstrate—*
>
> *(i) that the applicant is made in time, if legislation imposes a time limit, and*
>
> *(ii) that the applicant has the necessary consent, if legislation requires it.*

……

(5) Paragraph (6) applies unless the prosecutor is—

(a) represented by a legal representative for the purposes of the application under this rule;

……

(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.

……

(12) The court may determine an application to issue or withdraw a summons or warrant—

(a) without a hearing, as a general rule or at a hearing (which must be in private unless the court otherwise directs);

(b) in the absence of—

(i) the prosecutor,

(ii) the defendant;

(c) with or without representations by the defendant.

(13) If the court so directs, a party to an application to issue or withdraw a summons or warrant may attend a hearing by live link or telephone.

……

7.3.—(1) An allegation of an offence in an application for the issue of a summons or warrant or in a charge must contain—

(a) a statement of the offence that—

(i) describes the offence in ordinary language, and

(ii) identifies any legislation that creates it; and

(b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant".

Abuse of process

30. We were referred to various cases, including *R v Belmarsh Magistrates Court, ex parte Watts* (above); *R (Salubi) v Bow Street Magistrates' Court* [2002] 1 WLR 3073; *R (Dacre & Another) v City of Westminster Magistrates' Court* [2009] 1 WLR 2241; *R (Craik) v Newcastle upon Tyne Magistrates' Court* (above); and *R v Crawley* [2014] 2 Cr.App.R. 1028, which establish, amongst other things, as to abuse of process (which is a jurisdiction to be exercised sparingly), that:

(1) This court and the Magistrates' court, in principle, have concurrent jurisdiction, save for a limited category of cases, identified in *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] AC 42 HL, involving infractions of the rule of law outside the narrow confines of the actual trial or court process – where magistrates do not have such jurisdiction, or should not exercise such jurisdiction.

(2) Thus, the wide category of cases over which the Magistrates' court has jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly – including, since a magistrate has jurisdiction to refuse to issue a summons that is vexatious, the jurisdiction to stay proceedings on such a summons at a later stage.

(3) It is, however, open to magistrates in a case outside the *Bennett* category to require the matter to be pursued in this court.

(4) The fact that the Magistrates' court has a duty to send an indictable only case to the Crown Court "forthwith" may not necessarily preclude it from exercising its abuse of process jurisdiction, but where the point is novel or complex, the Magistrates' court should normally leave it for resolution in the Crown Court, or this court, as appropriate.

The undisclosed material

31. I have set out the relevant extracts from the 'Settlement Agreement', and a summary of the history of the arbitration proceedings, in [8] above.

32. It is correct that in the Regional Prosecutor's first written justification, dated 27 June 2014, she concluded, as to an offence contrary to Article 296(1) of the Criminal Code (abuse of power by looking after the assets of Adriana in order to obtain financial benefit and to harm the assets of the company) that *"the act does not bear features of a forbidden act under Article 17 par.1 point 2 of CPC"*. However, she nevertheless recorded that:

(1) In his notification of the alleged crime, Mr Karwan had asserted that Adriana had been in a good financial position in 2007 when a joint venture agreement had been signed because Mr Kay had been impressed with Adriana's business dynamism and the quality of its production, and that it was after that that Adriana's results had deteriorated drastically as the result of Mr Kay's extraction of funds from Adriana.

(2) The facts that she had established included the following:

(a) The 30% Series B shares acquired by Scan-Thors in September 2007 carried a single vote per share, whereas the shares owned by Mr Karwan and two other members of his family carried 5 votes per share,

(b) Despite contractual provisions concerning the allocation of the purchase monies for the shares to share capital, the monies were allocated to current activity.

(c) After the share sale in 2007 the two companies continued to function and co-operate in the same way as before – in accordance with their cooperation agreement signed in 2000.

(d) Mr Kay could actually take no decisions in relation to the running of Adriana, including as to the company's financial matters, and could not (under Article 296(1)) be considered to be looking after the financial affairs of a third party.

(e) It was Mr Karwan who decided whether Adriana would manufacture and sell at a specific price or not.

(f) On 14 October 2008 Adriana had filed a petition to declare bankruptcy, and had reached agreement with its creditors on 15 January 2010.

(g) In May 2012 loans in excess of £800,000 previously made by Scan-Thors to Adriana were made the subject of formal loan agreements.

(h) By June 2012 Adriana's finances were improving.

(i) Various agreements had been signed on 26 July 2012, including the settlement agreement (the terms of which were referred to).

(j) Adriana had breached the co-operation agreement, leading to arbitration proceedings and the first Arbitral award.

33. Surprisingly, the Regional Prosecutor's second written justification for discontinuing the investigation, dated 1 December 2014, was not disclosed in the proceedings before the DJ, and nor had it been disclosed by the time of the hearing in this court. Rather, it was only after this court had raised the issue that it was eventually disclosed. In this justification the Regional Prosecutor also considered Mr Kay's potential guilt of an offence contrary to Article 286(1) of the Criminal Code (involving the detrimental disposal of the property of Adriana) and recorded, amongst other things, that:

(1) The May 2012 loan agreements reflected unsecured loans that Scan-Thors had made to Adriana in 2008.

(2) In the imminent insolvency of Adriana (in 2007/8) Scan-Thors had extended low interest rate, and unsecured, loans to Adriana, and had provided another form of financial aid via the payment for the shares (in 2007), such that there was no way in which it could be concluded that the actions of Scan-Thors and Mr Kay were aimed at the detrimental disposal of the property of Adriana (as defined in Article 286(1)).

(3) Nor were there any reasons to assume that the actions of Mr Kay amounted to the constituent elements of an offence contrary to Article 296(1), as he did not have the requisite powers or authorisations. In particular, Mr Kay could not decide on any issue on behalf of Adriana acting individually, and had never concluded any agreements whilst acting on behalf of both Adriana and Scan-Thors; no decisions regarding Adriana's financial matters or the company's assets could be taken by anyone other than Mr Karwan; it was Mr Karwan who was the only person who was authorised to represent Adriana individually; it was him who decided whether to manufacture and sell furniture for a specific price or not; the negotiations between the two companies did not differ from the negotiations between any supplier and any customer (although both shared common interests); and that using a false argument that could be called a negotiating tool could not be perceived as acting to the detriment of Adriana.

(4) The claim that Adriana had suffered a £3 million loss relied on assumptions that were theoretical / hypothetical.

34. The judgment of the Regional Court of Torun II Criminal Division, dated 22 May 2015 summarised the Prosecutor's ultimate decision and Mr Karwan's grounds of appeal against it. The Court concluded that Mr Karwan's complaint was ill-founded – finding, amongst other things, that:

(1) The Prosecutor had been wrong to conclude that Mr Kay did not hold the attributes that were necessary to fulfil an offence contrary to Article 296(1). However, in practice, Mr Karwan exclusively played the leading role in managing Adriana, and Mr Kay's attributes were negligible.

(2) Mr Kay's impact on Adriana's activity was minimal, and his prerogatives did not include taking binding decisions on price levels of furniture destined for the British market, his role was only advisory.

(3) Mr Kay's conduct which resulted in Mr Karwan developing the wrongful impression that DFS was demanding a 5% discount did not entail Mr Kay "abusing the rights conferred on him" within the meaning of Article 296(1).

(4) In justifying informing Mr Karwan about the alleged bonus Scan-Thors argued, with which it was not possible to disagree, that cooperation between the two companies had worsened at the end of 2007, despite Adriana being granted loans and credit (by Scan-Thors) and against the background of Mr Karwan's refusal to give Adriana any financial support, and thus in Scan-Thors's opinion the information could have been a negotiating tool.

(5) Mr Karwan's assumption that the 5% would have reached Adriana's pockets was erroneous. That would not have happened, as Scan-Thors would not have entered into what would then have been an unprofitable arrangement, and in the realities of the case such contentions were completely justified. Nor could Adriana have entered into a direct agreement with DFS.

(6) Mr Karwan had, like the Prosecutor, also omitted the fact that Adriana's financial problems in 2008 were caused by Adriana Benelux ceasing to pay its financial liabilities, and other matters that had nothing to do with Scan-Thors. Hence Adriana's financial issues did not result from Scan-Thors' 5%.

(7) As to Article 286(1) Mr Kay's conduct did not indicate, as the Prosecutor had correctly noticed, any direct targeted intention to induce Adriana to dispose of property – "*considering the fact that despite the wronged party's difficult financial situation it was financially supported by Scan-Thors Limited by being granted successive low interest and unsecured loans, or paying for wronged party's shares, thereby agreeing that these monies were not assigned for share capital but ongoing company activity. It should also be added that the amounts of funds granted by Scan-Thors to the wronged party to purchase the shares (over PLN 8 million) compared with the amount of resources recovered by Scan-Thors of (over PLN 1 million) which was regulated in the share sale agreement of 26 July 2012, decidedly contradicts that Scan-Thors defrauded the wronged party. The sale of these shares to Adriana by Scan-Thors in the agreement dated 26 July 2012 for an amount as indicated, was significantly lower than the one invested to purchase these shares and further financial support granted to Adriana by Scan-Thors contradicts the attempt of a hostile takeover of the wronged party.*"

The arguments

35. The Claimants' arguments are, for present purposes, sufficiently summarised in [4] above. The Claimants have also indicated the potential for their reliance on Article 54

of the Convention Implementing the Schengen Agreement in support of an argument that the matter has already been finally disposed of in Poland, but accept that, as that was not argued before the DJ, it cannot be a ground of challenge to her decision.

36. As to the duty of candour, and in addition to the summary in [6] above, it is argued on behalf of Mr Karwan that, in the context of the issue of summonses, the authorities make no reference to any duty of "full and frank disclosure" of the type applicable to the obtaining of an *ex parte* civil freezing order, and the issue of a summons has no immediate effect and involves no evidential decision about the prosecutor having a good case.

Discussion

37. In view of the decisions in *R v Bury Justices, ex parte Anderton* and *R v Grays Justices, ex parte Low* (see [24] above), and of the various other authorities cited (see [25] & [26] above) I have no doubt that when Mr Karwan's lawyers applied on his behalf for summonses to be issued, both he and they were subject to the duty of candour that I have identified. However, the carefully crafted Information which was put forward failed to comply with that duty in each of the respects alleged by the Claimants. Whatever the views of Mr Karwan and his lawyers as to the 'Settlement Agreement', it should have been obvious, applying any of the formulations of the test that I have set out (in [25] & [26] above) that there was a duty to disclose to the court – in order to enable the court to properly carry out its duty to consider whether the application was vexatious, an abuse of process or otherwise improper; to consider whether to make further enquiries; to require the Claimants to be notified of the application; and to hear the Claimants.

38. As this case demonstrates, the grant of summonses, typically conducted *ex parte*, can have far reaching consequences. Compliance with the duty of candour is the foundation stone upon which such decisions are taken. In my view, its importance cannot be overstated.

39. The DJ undoubtedly had the power to deal with the breach of the duty of candour in this case by quashing the summonses. Logically, that was the first issue that she should have engaged with, but she failed to engage with it at all.

40. Whether breach of the duty of candour comes under the broad umbrella of abuse of process, or falls to be dealt with in its own right, applying the test most favourable to Mr Karwan (see [27] above), namely whether the inaccurate and/or non-disclosure would have made a difference to the judge's decision, my answer is, unhesitatingly, "yes", Even if the application had not been refused without more, it would inevitably have resulted in more focussed enquiries, the notification of the Claimants, and (in my view) the Claimants being heard.

Supervisory jurisdiction

41. Even if I am wrong about the DJ's powers, this is in my view, and for the same reasons, plainly an appropriate case for this court to exercise its supervisory jurisdiction, and to quash the DJ's decision and the summonses.

Conclusion

42. For the reasons set out above, I would grant judicial review and quash the DJ's decision and the summonses.

43. If there is any further application for summonses in this case, at least 7 days before the application is made the Claimants must be given full details of it, including of the court at which it is to be made, and this judgment must be annexed to the application.

Lord Justice Gross

44. I agree.