[2019] EWCA Crim 205

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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 16 January2019

B e f o r e:

LADY JUSTICE HALLETT DBE
(VICE PRESIDENT OF THE CACD)

LORD JUSTICE LINDBLOM

MRS JUSTICE CARR DBE

PROSECUTION APPLICATION FOR LEAVE TO APPEAL AGAINST A TERMINATING RULING UNDER S.58 OF THE CRIMINAL JUSTICE ACT 2003

Wokingham Borough Council
Keith Scott and others

Ms S Sheikh QC and Mr C Merritt appeared on behalf of **Wokingham Borough Council**
Mr S Stemp appeared on behalf of the **Respondents**

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J U D G M E N T
(Draft for approval)

THE VICE PRESIDENT: The Registrar has referred to the court an application by the prosecution, Wokingham Borough Council ("WBC"), for leave to appeal under section 58 of the Criminal Justice Act 2003 against a terminating ruling made by Her Honour Judge Morris on 13 June 2018.

The facts

The Respondents were charged with offences stemming from the breach of an enforcement notice. The Respondents Keith Scott and Yvonne Scott are the registered legal owners of a plot of land known as Hare Hatch Sheeplands in Berkshire. Mr Scott ran a garden centre on the land. The remaining Respondents all operated their own businesses on the site and moved onto the site at various times. The site is within the Green Belt and restricted planning policies apply. The authorised planning use included a horticultural nursery, a farm shop, a café and a house. The prosecution alleges that over several years, and in particular between 14 May 2015 and 21 February 2017, Mr Scott developed the site significantly and without authorisation, by, for example, allowing the operation of cafés or restaurants and a pet store, and providing a seating area, hardstanding and a children's play area. The development of the site provoked considerable public interest amongst the local community with those in favour of the development and those against any encroachment on the Green Belt.

"WBC" is the local planning authority. It issued an enforcement notice, EN/1, against Mr Scott in October 2012 but withdrew it in May 2013. It issued a further enforcement notice, EN/2, the subject of these proceedings, on 20 August 2013. It served it on Mr Scott. It ordered him, and others on the site, to cease the unauthorised use of the land. Mr Scott

appealed and a public inquiry was planned.

Over several months there was extensive email traffic and meetings between the elected councillors for Mr Scott's ward, Mr Halsall and Mr Pitts, Mr Kaiser, the executive or cabinet member for general planning officials, Mr Scott and other occupiers of the site.

The potential for a certificate of lawfulness of existing use or development, (referred to as CLEUD in our papers) under section 191 of the Town and Country Planning Act 1990 was discussed with a view to regularising some of the activities on Mr Scott's land. Mr Scott considered whether he should abandon his appeal so that this could happen. One condition of the grant of a CLEUD that was not uppermost in anyone's mind was that the landowner had to be immune from enforcement notice requirements to qualify for the issuing of a certificate.

An internal WBC email, dated 30 March 2014 and sent from Mr Halsall to Mr Kaiser, stated that in order for a compromise agreement to be reached Mr Scott needed to give notice that he would withdraw the appeal and apply for a CLEUD. He also needed to provide "compliance commitments" to the enforcement notice. He intended to ring Mr Scott that day to discuss the matter further.

On 31 March 2014 Mr Scott emailed Mr Kaiser asking if his understanding of the proposal was correct, namely that he would present his case for a CLEUD, and provided that one of the planning officers, Jenny Seaman, was satisfied that he had a substantive case for a CLEUD, he would withdraw his appeal, give notice to some of the concessions on the

land, and remove containers, a portacabin and a caravan. Further, he sought assurance that WBC would grant planning consent to his most recent set of proposals. Mr Kaiser responded on 1 April 2014 that, subject to two caveats (which are irrelevant for our purpose), Mr Scott's understanding was correct.

On 3 April 2014 "in the light of the progress made in negotiations", Mr Scott withdrew his appeal against EN/2 shortly before the public inquiry was due to start. At that time, although the council was in a position to proceed with the inquiry, Mr Scott had not gathered his evidence. Under the terms of EN/2, the Respondents were obliged to comply with its conditions by 4 October 2014.

On 30 June 2014, Mr Scott applied for a CLEUD on the grounds that the level of retail use had been taking place on the site for over a 10-year period before the issuing of EN/1. He believed it would be considered on its merits. In early 2015 WBC sought legal advice and was advised in February that no CLEUD could be issued as a matter of law when EN/2 was already in existence. On 31 March 2015 the application for a CLEUD was refused on that basis and a timetable for compliance with EN/2 was requested. Subsequent attempts by Mr Scott to obtain a CLEUD met with the same response.

On 31 March 2015, Mr Pitts responded to an email request from a journalist for clarification of Mr Scott's position stating that he and the other ward member, Mr Halsall, had been working to achieve a solution satisfactory to Mr Scott and the planning officers and that was "why he was encouraged to withdraw his planning appeal so that all avenues could be explored".

In April and May 2015, planning officers twice visited the site, the latter of the two visits on 14 May 2015 marking the start date of the period covered by the ultimate indictment, and WBC wrote to Mr Scott requesting a timetable for compliance. On 18 May 2015, a recommendation for prosecution was drafted by WBC officers. No steps were taken at that time to implement the recommendation and discussions continued as to whether Mr Scott's position could be regularised.

In October 2015, WBC declined to determine a planning application lodged for a children's play area and recreational farm.

In March 2016, the chief executive officer of WBC indicated that the council would work with Mr Scott to achieve a negotiated solution to the matter and required Mr Scott to apply for a mutually acceptable scheme.

In April 2016, WBC applied to the High Court for an injunction against Mr Scott and the other Respondents operating businesses on the site some of whom had moved on to the site after EN/2 had been issued - to secure compliance with EN/2.

In August 2016, a detailed plan for pre-application advice was submitted by Mr Scott to WBC, which it refused to consider. In September 2016, an appeal against the refusal of a CLEUD was heard, with a decision served by the planning inspector the following month adverse to Mr Scott.

On 20 February 2017, one day prior to the end of the date of the period covered by the indictment, Her Honour Judge Karen Walden-Smith, sitting as a Deputy High Court Judge, granted an injunction against Mr Scott and others requiring full compliance with EN/2 by 1 May 2017. The Court of Appeal refused permission to appeal that decision in March 2017. All the respondents save Mr Scott and Mr Parry left the site.

WBC lodged an application in June 2017 for an order for committal following further breaches of the injunction. A committal order was made against Mr Scott on 19 July 2017. Mr Parry also admitted breaching the injunction, but no penalty was imposed upon him. Mr Parry then left the site and there has been no suggestion of any further breaches of the enforcement notice by Mr Scott.

Meanwhile, following a second Expediency Report for prosecution prepared in March 2017, a summons was issued by WBC against each of the Respondents. The time period for the indictment as eventually drawn overlapped with the breaches of planning control relied upon to support the application for injunctive relief. There were three reasons given in the Expediency Report for the prosecution: (1) to support compliance of the enforcement notice and the injunction; (2) to allow a court to punish the respondents for the breach; and (3) to allow the court to make an order under the Proceeds of Crime Act 1992 ("POCA").

The Respondents applied to stay the criminal proceedings as an abuse of the process of the court. The hearing, at which evidence was to be called, was scheduled for 22 and 24 November 2017 but was ultimately adjourned as a result of outstanding disclosure issues. The final hearing of submissions took place on 9 February 2018.

The ruling hearing

At the hearing the Respondents submitted that the proceedings should be stayed on the grounds that (1) there was unfairness in the decision to institute proceedings; (2) the proceedings were a misuse of the process of the court; and (3) the prosecution had contributed to the commission of the alleged offences.

Mr Scott gave evidence in support of the application. At the time he gave his evidence the email between Mr Halsall and Mr Kaiser dated 30 March 2014 and from Mr Pitts to the journalist had not been disclosed. Mr Scott stated nonetheless that in February and March 2014 he was having meetings and telephone conversations with WBC and elected representatives. They had suggested to him that neither side would benefit from a public inquiry and they should discuss a mutually beneficial solution. He described Mr Halsall as being at the forefront of the discussions and he understood Mr Kaiser would make the ultimate decision.

Mr Scott indicated with reference to the emails that were available to him that he withdrew the appeal based on representations made by WBC that they would come to a mutually satisfactory agreement. Within three hours, he said, of WBC being notified that his appeal was withdrawn he was sent an email from Ms Seaman, about how he could submit "a certificate of lawful use for the site". Until he received a later notice, no-one from WBC had ever suggested to him there was a legal bar to a CLEUD being issued.

In cross-examination he was not challenged on his evidence. He agreed that he was aware that

the consequence of withdrawing the appeal could be "very bad" for him but he insisted he had made an agreement with people from WBC whom he knew and trusted and thus the consequences would not be "bad" for him and he had been given assurances from planning officers and councillors. At the time he withdrew his appeal against EN/2 he had been led to believe, supported by the evidence that he had provided and from what he had been told would happen, that a CLEUD would be issued.

In her ruling, the judge reviewed all the relevant principles that apply to abuse of process applications. She accepted that the Respondents could have a fair trial and therefore focused on the issue of whether allowing the prosecution to continue offended the court's sense of fairness and justice and undermined the integrity of the justice system. She noted that in the normal course of events the failure to obey an enforcement notice would render a landowner liable to criminal sanction. However, in the present case she found this was not the normal course of events because WBC had induced Mr Scott to act to his prejudice.

She concluded that as a result of WBC's actions Mr Scott had been denied the opportunity to have the matter tested in the appropriate planning forum and most importantly thereafter they had sought to take advantage of the situation to prosecute him for alleged transgression of EN/2 without recourse to the appeal process.

Furthermore, in the purported application of the Code for Crown Prosecutors, the judge found significant areas of concern. She was of the view that individually they may not amount to a sufficient reason to stay the proceedings but taken cumulatively, they had a significant impact on her ultimate decision.

Her first concern was that on the evidence before her WBC had failed to comply with its duty to consider the case of each defendant separately. It appeared to her to have 'lumped everyone together' irrespective of the quality of the evidence against them and the fact that there were very different considerations as to the public interest in prosecuting individual defendants.

Second, there was what she called the "inordinate delay between the preparation of the original Prosecution Report in May 2015 and the Expediency Report for Prosecution dated 6th March 2017" despite further non-compliance and it was the former report that appeared to have been the catalyst for issuing the proceedings. The delay was due in part, she acknowledged, to the determination of the injunction proceedings in the High Court. But whatever the reason and despite the voluminous correspondence between WBC and Mr Scott throughout, she found that at no time did WBC notify Mr Scott or any of the other Respondents that they would put themselves at risk of prosecution from 18 May 2015 onwards.

We interpose that during submissions this morning, Ms Sheikh QC for WBC challenged that finding. She produced correspondence which indicated that in March 2015 Mr Scott was put on notice that he was at risk of being prosecuted. However, he was told that such prosecution would be put in abeyance provided he supplied a timetable for compliance with the notice. Nonetheless, Ms Sheikh could not challenge the judge's finding that Mr Scott had been left in ignorance for the best part of two years of the fact that he was not only at risk of prosecution but that a decision had, in fact, been made on 18 May 2015 to

prosecute him. The judge found this "a most unsatisfactory state of affairs", particularly where there were proceedings continuing elsewhere. In her view, the effect of the failure to tell Mr Scott of the decision denied him the opportunity properly to consider the implications of his actions.

The third and very significant area of her concern was fact that the possibility of an order being made under POCA was one of the principal factors in the decision to prosecute. She accepted that by the conclusion of the High Court proceedings a considerable amount of public money had been expended on the case and expressed sympathy for hard-pressed local authorities facing competing claims on ever-decreasing resources. WBC had the duty to police planning controls and do so in the public interest.

If the prosecution resulted in a conviction and a POCA order made, WBC would have received 37½% of the fruits of the order. In the judge's view, this lent support to the defence submission that WBC was seeking to prosecute the Respondents to claw back public money already expended on the case. She observed that the POCA provisions apply only after conviction, and she stated that the possibility of an order should never form any part of the prosecutorial decision-making process, particularly where the prosecutor and the beneficiary are one and the same. To take into account the possibility of a financial benefit, in her view, ran contrary to an objective analysis of the merits of the case as required under the Code for Crown Prosecutors.

Having expressed those concerns, she turned to the principal issues she had to determine, namely whether Mr Scott was induced or wrongly encouraged to withdraw his appeal and, if so,

had he, and by extension the other respondents, suffered prejudice. Although she was prepared to accept the issue of the validity of the enforcement notice had been determined by the High Court, she rejected WBC's contention that she was bound by Her Honour Judge Walden-Smith's findings that Mr Scott was not induced to withdraw his appeal against EN/2 and did not act on any assurances given by WBC. She did so for three principal reasons: (1) the issue before the High Court was different, (2) the evidence was different, and (3) the Crown Court had an overriding duty to ensure the criminal trial process was fair.

She noted that before Her Honour Judge Walden-Smith, the Respondents had been denied the opportunity to call evidence because they had failed to make an application in time, as directed. Her Honour Judge Walden-Smith's decision, therefore, was based solely on the papers. Furthermore, the extent of the material before Her Honour Judge Walden-Smith was not clear to Her Honour Judge Morris. In particular, Her Honour Judge Walden-Smith made no mention of significant emails including the one dated 30 March 2014.

Her Honour Judge Morris, on the other hand, received evidence on oath from Mr Scott, which she accepted in its entirety. She considered the email of 30 March 2014 significant because it confirmed and supported what Mr Scott had said in his evidence. It was the clearest indication, in her view, that the impetus for withdrawing the appeal came from WBC. The notification of withdrawal was given just days later. She said that it was inconceivable that the email and the withdrawal were coincidental. It followed that she concluded that Mr Scott's withdrawal of the appeal was not "a self-inflicted wound" as

Her Honour Judge Walden-Smith had found, and that subsequently WBC had taken advantage of a situation they had created to prosecute him and others.

Even if she accepted WBC's proposition that Mr Scott should have taken better care to inform himself of the implications of withdrawing the appeal, Her Honour Judge Morris found that this did not abrogate WBC of its responsibility to ensure it did nothing to induce a person to act to his or her prejudice, particularly where WBC had the power to instigate criminal proceedings. WBC, in her view, sought to take advantage of the situation, clearly motivated in part by the financial consideration of a POCA order. That situation so offended her sense of justice that she decided proceedings had to be stayed to protect the integrity of the criminal justice system.

Even if the application to stay had not been granted on those grounds, she further concluded that an application in respect of two of the Respondents, Paul Woodhead and his company Deep End Pools, their application would have succeeded on the basis that WBC failed to comply with its duties (as set out in the Code for Crown Prosecutors) by analysing the evidence against them objectively and by its improper motivation in obtaining a POCA order. Mr Woodhead had left the site after the failure of the civil appeal process and before the criminal summons had been issued, taking his business, Deep End Pools, with him.

Grounds of Appeal

On behalf of the applicant, Ms Sheikh argued five grounds of appeal.

Ground 1

The principal ground is Ground 1, namely that Her Honour Judge Morris erred in law in finding that WBC induced Mr Scott to withdraw his appeal. Ms Sheikh described the judge's approach to the issue of inducement as fundamentally flawed and accused the judge of overstating the effect of Mr Scott's evidence. Her Honour Judge Morris did not find bad faith as such on the part of WBC and Ms Sheikh invited us to conclude that she should have found that the officers and elected councillors had simply attempted to resolve a situation created by Mr Scott's persistent determination to flout planning controls. The situation of which WBC was found to have taken advantage was not one of its making, Ms Sheikh insisted, but arose from Mr Scott's blatant breach of those controls by developing an unauthorised commercial complex within designated Green Belt land. The breaches were ongoing and wide-ranging from the time of development through the enforcement notices to the injunction and committal proceedings.

Ms Sheikh emphasised more than once, but perfectly properly, that at no point was Mr Scott given any expectation that he would be permitted to continue breaches of planning control. She suggested that we approach the negotiations, or discussions as she would call them, as simply an attempt by the elected councillors and WBC officials to offer Mr Scott advice. They did not offer him any assurances that he would be granted a CLEUD and they offered him no assurances that he would not be prosecuted.

Both sides had an interest in ensuring a settlement. Mr Scott, as much as WBC, had an interest in avoiding the public inquiry. If discussions between officers and landowners or those applying for planning consent, cannot take place, Ms Sheikh suggested that it would have

a "chilling and inhibiting effect" upon planning authorities around the country and they would be thwarted in their attempts to reach a sensible solution.

Ms Sheikh insists that the prosecution was as a result of Mr Scott's continued non-compliance with the enforcement notice and was not instigated or triggered by the withdrawal of the appeal against it. If so, for there to have been an abuse of process on the facts of this case there would have had to have been either (1) a promise made by WBC that Mr Scott could continue operating a breach of planning control or (2) a promise that he would not be prosecuted for being in breach of planning control. She accepted that a promise not to prosecute is in principle capable of being an abuse of process, albeit she did not, obviously, accept that WBC could give a promise to allow criminal behaviour to continue.

For the proposition that a promise not to prosecute may be an abuse of process she took us to the decision in R v Abu Hamza [2006] EWCA Crim 2918, in which the court stated:

> " ... it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."

This was the approach Ms Sheikh suggested was applied by Garnham J in Ceredigion County Council v Robinson [2018] EWHC 2121 (Admin). In Ceredigion the facts were similar to the instant case. During discussions between a planning authority and a party in respect of whom there was an enforcement notice, the authority made two alleged representations: (1)

an oral statement that if the respondent applied for planning permission “the whole lot would go, disappear” and (2) a written statement that “whilst the council do not propose to take any form of action in relation to the existing enforcement notices….”. The party elected to withdraw their appeal against the enforcement notice. After withdrawal, the planning authority prosecuted. Garnham J found that even though the party had withdrawn their appeal following discussion with the local planning authority and had suffered substantial prejudice because of that withdrawal, the prosecution was not an abuse of process. The offer of “advice” by planning officers did not amount to an undertaking or representation upon which the respondents in that case were entitled to rely.

Ms Sheikh described the crux of the case before Garnham J as being whether there was an unequivocal representation not to prosecute. Ms Sheikh took us to several aspects of the facts of this case to establish that there was here no solemn promise or binding commitment:

(1) She challenged the judge’s finding that the impetus for withdrawing the appeal came from the council. Mr Scott himself had considered the idea.

(2) At no point was Mr Scott told he could either continue in breach of planning control or would not be prosecuted.

(3) Any assurance given, if there was any, was that he could apply for a CLEUD but he was not assured that it would be granted, simply that it would be considered.

(4) Although the planning officers may have indicated the application for a CLEUD may have merit, this is very different from representing that it would be granted.

(5) Mr Scott was at all times aware of the potential consequences of withdrawing his appeal.

(6) Accordingly, any representation or assurance made by WBC falls far short of being properly described as unequivocal.

On that basis she invited us to find that the principal issue was determined wrongly by the judge.

Ground 2

Ground 2 is that the judge "erred in law in treating representations made by elected councillors or members of WBC as being capable of binding WBC as a local planning authority".

Ms Sheikh placed reliance on the decision of the House of Lords in Reprotech v East Sussex County Council [2003] 1 WLR 348 in support of the proposition that officers and elected councillors cannot bind a planning authority to behave in a particular way. The representations allegedly made by the elected representatives of WBC, properly understood, were not representations and even if they were representations, they were representations of individuals. They were not representations made by WBC and could not bind it.

Ground 3

Even if the judge was correct in finding Mr Scott relied on representations made, the judge was wrong to find that conclusion impacted on the other Respondents. None of them relied on the representations allegedly made.

Ms Sheikh insisted that a distinction should be drawn between Mr Scott, who negotiated with elected members of the council, and the other Respondents. The material upon which Mr

Scott relied was between him, the councillors and the officers. It did not involve the others. According to the defence case statements, Respondents 3 to 8 and 11 were "unaware of the enforcement notice and had no knowledge that he was acting unlawfully". Respondents 9 and 10 denied ever having been served the notice and stated that "all information about the progress of planning matters came second-hand via Mr Scott". As such, none of the Respondents 3 to 11 claimed knowledge of the representations made.

Ground 4

Her Honour Judge Morris recognised that as a matter of law, she could not question the validity of the enforcement notice. Yet Ms Sheikh contended that the effect of the judge's conclusions was to undermine the validity of EN/2. The only way in which the purported abuse of the process could be remedied was by a withdrawal of EN/2. If no injunction had been obtained, the staying of the proceedings as an abuse would amount to the grant of permission to continue in breach of planning control. There is said to be a public interest in the upholding of the statutory planning regime so that local authorities are not obliged to resort to injunctive relief and committal proceedings.

Ground 5

In Ground 5, Ms Sheikh criticised the length of time for the judge to deliver her ruling. She took us to the decision in Bond v Dunster Properties Ltd [2011] EWCA Civ 455, in which the Court of Appeal stated:

> "There is no statutory rule which provides that a judgment must be delivered within a specified time. It has to be delivered within a reasonable time and what is a reasonable time may well vary according to the complexity of the legal issues, the volume and nature of the evidence and other matters."

In this case there was a delay of over four months between the final hearing of the case and the decision. Ms Sheikh argued that given this was a specialised planning matter with a high volume of evidence covering a substantial period of time and the proceedings were criminal in nature, the judgment should have been given as quickly as possible. She does not accept that the delay was reasonable. Even if it was, the delay appears to have impacted upon the judge's findings. For example, Ms Sheikh challenged, as we have indicated, the judge's analysis of Mr Scott's evidence.

Finally, we should add that after the application to this court was made, the parties became aware of the decision of this Court in R v The Knightland Foundation [2018] EWCA Crim 1860 based on similar facts. Ms Sheikh did her best to distinguish the facts of Knightland from the instant case. Although the respondents in Knightland did not have a legitimate expectation that their planning application would be granted, they did have a legitimate expectation it would be decided on its merits and the authority's decision was based on other considerations, including the prosecution of the respondents and associated POCA proceedings. The evidence in Knightland pointed directly to improper influence having been brought to bear on the planning team to refuse the application.

Ms Sheikh attempted to persuade us that similar consideration did not apply here. First, albeit the application for the CLEUD was bound to be refused as a matter of law because of the extant enforcement notice, the application for a CLEUD was considered on its merits. Therefore although the merits did not feature as a ground for refusal, WBC had fulfilled Mr Scott's expectation. Second, Ms Sheikh did not accept that the possibility of a POCA order being made to the benefit WBC was one of the grounds for the decision to prosecute.

The possibility of a POCA order being made may act as a deterrent to those minded to breach enforcement notices and is therefore a legitimate consideration.

Our conclusions

We shall begin with what we consider to be one of the most important issues raised again in this application and addressed in Knightland, namely the role played by a POCA order in the decision to prosecute in the criminal courts.

It may come as a surprise to some that there are prosecuting authorities who may benefit financially from their decision to prosecute. It certainly came as a surprise to the members of the court in Knightland that a body given the power to prosecute should consider the possible financial advantage to itself as a relevant factor in the decision to prosecute. As the court held in Knightland, this flies in the face of the clear provisions of the Code for Crown Prosecutors, accepted by all prosecuting authorities as the applicable Code, that a prosecutor must be independent, fair and objective.

We endorse and repeat the observations of the court in Knightland. The decision to prosecute is a serious step and one that must be taken with the utmost care. We understand the argument that the making of a POCA order on conviction may act as a deterrent to offending and has the effect of extracting ill-gotten gains from offenders. This was no doubt Parliament's intent in enacting the POCA. But where there is a potential conflict of interest, namely a financial interest in the outcome of the prosecution set against the objectivity required of a prosecutor, the prosecutor must be scrupulous in avoiding any perception of bias. The possibility of a POCA order being made in the prosecutor's

favour should play no part in the determination of the evidential and public interest test within the Code for Crown Prosecutors. We hope that this message will be relayed to all those making charging recommendations and decisions as soon as possible.

On the facts of this case, given we have heard nothing to justify the decision to prosecute at least ten of the Respondents after the injunctive relief was granted and Mr Scott was made subject to a suspended sentence of imprisonment, it raises the distinct possibility that making of a POCA order in WBC's favour was one of the grounds for the decision to prosecute them. If it was, it should not have been. As far as Mr Scott is concerned, there may be a stronger argument that a POCA order generally was a legitimate consideration as a deterrent to continued breaches of planning controls, but we note that after the committal proceedings, any failure to comply with the enforcement notice could be met by a sentence of imprisonment. There were no further breaches and one must question what deterrent effect a POCA order might have.

We also have concerns about the approach taken by WBC to selecting those to be prosecuted. The Code for Crown Prosecutors also provides that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction of *each* suspect on *each* charge and that in every case there is a public interest in prosecuting.

In this case, the 2015 and 2017 Expediency Reports indicate, in our view, a failure properly to bear these considerations in mind. The original recommendation to prosecute suggested simply that "all those with an interest in the land or the business" should be prosecuted. We accept that the second Expediency Report rehearsed some of the details of the

occupiers of the site, for example when they came on to the site, but those who drafted the Report seem to have assumed that a criminal prosecution was justified by the very fact of the breach as opposed to other relevant considerations. No mention was made, for example, of Mrs Scott's position other than that she was one of the registered owners. We learned during the hearing that she has been divorced from Mr Scott for many years and has no interest in the site. She only remained as a registered owner with Mr Scott because the mortgage company refused to release her.

There were three groups of potential offenders: Mr Scott, the owner and operator of the site; Mrs Scott, a joint owner but in legal name only; and the businesses on the site. Yet they were, as Her Honour Judge Morris observed, simply 'lumped together' as the owners and occupiers of the land during a period of breaches. It is not appropriate when exercising a power to prosecute in the criminal courts, with its potentially serious consequences, to 'lump' individuals and businesses together in this way.

During the hearing, when we pressed Ms Sheikh on our concerns on this issue, far from those concerns being allayed, they were increased. We discovered that WBC purported to apply the evidential and public interest tests in the Code for Crown Prosecutors to all the Respondents in documents that have not been disclosed to us. They are said to be protected by legal professional privilege. We are told that officers of WBC found that both tests, evidential and public interest, were met for Mrs Scott and the Respondents 9 and 10. Yet Ms Sheikh could not direct us to any proper attempt made to clarify Mrs Scott's circumstances. Similarly, as far as Respondents 9 and 10 are concerned, Ms Sheikh conceded yesterday afternoon that nothing was put before Her Honour Judge Morris to

show that the public interest test had been met in the decision to prosecute. She could not therefore undermine the alternative basis on which Her Honour Judge Morris allowed the application to stay the proceedings against them. Accordingly, they were dismissed from these proceedings yesterday afternoon.

We then invited Ms Sheikh to reconsider the decision to proceed against Mrs Scott. Ever industrious, Ms Sheikh spent some time after we had risen investigating the legal and evidential position and discussing the matter with her instructing solicitors. This morning she informed us that having analysed the material, she was satisfied the evidential test was met as far as Mrs Scott was concerned but she accepted that in the light of the information that Mrs Scott is divorced from her husband and has no interest in the land other than the fact that she is a joint legal owner, the public interest test could not be met. She withdrew her application as far as Mrs Scott is concerned. Mrs Scott too was dismissed from the proceedings.

Albeit we appreciate Ms Sheikh's efforts, all this supports the Respondents' contention that the original decision to prosecute them all was not properly considered. The decision may well have been based in part on the financial advantage to WBC in obtaining convictions and subsequent POCA orders. We question the public interest in putting eleven individuals and small businesses in the dock at the Crown Court with all the implications for them and for the system on these facts.

Even if the decision to prosecute was not flawed, the decision to prosecute all the Respondents should have been reviewed, certainly after compliance with the enforcement notice had

been achieved by the injunction and committal proceedings.

In that context, we have addressed the individual grounds of appeal, starting with the principal ground 1 and the judge's finding that WBC induced Mr Scott to withdraw his appeal.

First, we reject the argument that, absent evidence of an unequivocal undertaking not to prosecute, the application to stay the proceedings as an affront to justice could not succeed. The giving of such an undertaking is but one example of circumstances when it may be an abuse of the process to allow a case to proceed. The examples given by the learned editors of Blackstone, including "tactical manipulation", (to which Ms Sheikh drew our attention), were not intended to be and are not exhaustive. The abuse of process jurisdiction is far wider than that, albeit we readily acknowledge that the hurdle for the individual making an application to stay proceedings is a high one. Stays should only be granted in exceptional circumstances.

However, in deciding whether to grant a stay, the judge must assess all the circumstances of the case, not just one. Lloyd-Jones J (as he then was), giving the judgment of the court in R v Gripton [2010] EWCA Crim 2260, analysed the jurisdiction to stay proceedings for abuse of the court's process. He considered the decisions in R v Bloomfield [1997] 1 Cr App R 135 and Abu Hamza amongst others. He observed (at paragraph 27) that there is no comprehensive binding rule as to when a stay may be granted. Nothing in the judgments before the court in Gripton suggested otherwise. There are no essential requirements, for example an undertaking not to prosecute, for an abuse of process argument to succeed other than the fact the court is satisfied that to allow the prosecution to proceed would

affront justice. As Lloyd-Jones J observed at the end of paragraph 27:

> "The reason for this is clear: the courts are here concerned with considerations of fairness and they must be free to respond to the circumstances of each case."

Garnham J referred to this paragraph in his judgment in Ceredigion without any shadow of dissent. Any reliance on Garnham J's judgment in support of the proposition that a solemn promise not to prosecute is always required to support an abuse argument under this heading is misplaced. Garnham J had before him a Case Stated in which he was bound to answer the questions posed for him by the District Judge. The principal question posed was whether the District Judge was entitled to find that the council in that case had made an unequivocal undertaking that the defendants would not be prosecuted. It was that question that he answered adversely to the respondents. He did not purport to, and could not, restrict the ambit of the abuse jurisdiction in the way suggested.

Thus, the very high burden on the Respondents before Her Honour Judge Morris was to establish that allowing the prosecution to proceed would amount to an affront to justice bearing in mind all the circumstances. We turn to that issue.

It is right to note, as Ms Sheikh invited us to do, that Mr Scott had been in breach of planning control for some considerable time and appeared to know a great deal about the planning process. Also, he was not forced to take the decision to abandon his appeal and he knew of the possible consequences. He had the benefit of professional advisers, certainly as far as the planning appeal was concerned. However, the judge's finding that an inducement occurred was based on her careful and fair analysis of all the evidence before her, in

particular the evidence of Mr Scott. She accepted his evidence that he was in fact induced by those representing WBC to abandon his appeal, supported, as it was, by emails, some of which had not been disclosed at the time he gave his evidence. She did not find that any specific representation had been made to grant planning consent or a CLEUD or not to prosecute, but she did find that the whole course of conduct of those purporting to represent WBC established that the inducement had been made for Mr Scott to act to his detriment.

As Mr Pitts observed to the journalist, Mr Scott had been "encouraged to withdraw his appeal" and, as Mr Scott himself said, he did so on assurances that his application for a CLEUD would be given proper consideration on its merits and it might well succeed. When he withdrew his appeal and could not obtain a CLEUD, he could not challenge EN/2. WBC then took advantage of that fact to prosecute. Accordingly, the judge's finding of an inducement is a difficult finding for Ms Sheikh to attack, made as it was by a trial judge analysing the evidence called before her. The judge gave a full, careful and fair ruling in which she analysed all the principles that should be applied appropriately.

Ms Sheikh faced a high hurdle to persuade us that the judge's finding was unreasonable and despite her valiant efforts, she has failed to overcome it. Accordingly, the judge's finding that WBC had induced Mr Scott to act to his detriment and then taken advantage of the situation, in our view, must stand.

That brings us to Ms Sheikh's second ground and the judge's treatment of the representations made by elected councillors. It is clear from all the material before us that the planning

department of WBC were well aware of the involvement of the elected councillors and hopeful that the elected councillors would be able to negotiate a fair settlement. It ill lies in the mouth of WBC now to complain that the judge bore in mind all that was said and done by the councillors. Mr Scott was led to believe that they were acting with the support and authority of WBC and that Mr Kaiser would be responsible for the ultimate decision.

In any event, the evidence did not begin and end with the councillors. Officers in the planning department played their own part in the negotiations, or, as Ms Sheikh preferred to call them, the 'discussions'. It was very much in the interests of WBC and the councillors to negotiate a settlement and avoid a public inquiry. By ensuring the appeal was abandoned they then held all the cards.

By finding that the 'discussions' amounted to an inducement, the judge has not found that the councillors and officers had bound the planning or prosecuting authority to any particular course of action in breach of the Reprotech principles; she has found that WBC's course of conduct as a whole meant that it would be an affront to justice to allow the prosecution to proceed. It was WBC's course of conduct on the particular facts of this case, taken together with the concern she had about the decision-making process to prosecute, that led her to conclude that the inducement was such, and all the circumstances of this case were such, that it would be an affront to allow the prosecution to proceed.

We accept the limited force of ground 3 in that the representations were undoubtedly only made to Mr Scott. However, Her Honour Judge Morris did not fall into the trap of lumping all the Respondents together and assuming they could rely on representations made to Mr

Scott alone. She specifically considered their individual positions (see, for example, her analysis of the case in respect of Respondents 9 and 10). In any event her conclusions in respect of Mr Scott were bound to impact upon the others. They were charged with offences arising from breaches of EN/2 with considerable possible consequences for them. If Mr Scott was unable to regularise his position and challenge EN/2 because of WBC's actions, so were the other Respondents. Furthermore, we have already indicated that we share the judge's concerns about the decision to prosecute.

In ground 4, Ms Sheikh effectively argued that Her Honour Judge Morris was obliged to allow the prosecution to proceed because the enforcement notice was valid. We acknowledge that Her Honour Judge Morris was bound to accept that the enforcement notice was valid, but that was the only limit upon her. She was not bound by the findings on inducement and representations made by Her Honour Judge Walden-Smith. Her Honour Judge Walden-Smith reached her decision on whether injunctive relief should be granted on the basis of the evidence and arguments placed before her. It was a different issue in a different context, and different evidence was put before the court. It is far from clear that Her Honour Judge Walden-Smith was provided with all the material, and the late disclosure of the emails in March suggests she was not. The Respondents applied to give oral evidence but were unable to do so. When the decision went against them, they tried to appeal. They did all that they could to ensure the court had the necessary information. In those circumstances, there can be no argument that any kind of issue estoppel arose, a concept that in any event has no place in criminal proceedings (see DPP v Humphreys [1977] AC 1).

Finally, in ground 5, Ms Sheikh attacked the delay in the judge giving her ruling. In a perfect world no doubt the ruling would have been given sooner. The judge was obviously embarrassed by the delay because she addressed it head on in her ruling and she gave reasons for it. However, judges are busy people and they are also subject to unfortunate accidents, as happened to Her Honour Judge Morris.

In any event, it is not clear to us what impact the delay has had on the decision. We pressed Ms Sheikh to explain the basis for this ground. Essentially, her argument amounted to little more than assertions that the judge overstated the effect of Mr Scott's evidence and did not place sufficient weight on material Ms Sheikh argued was significant; and it followed, the delay must have been significant. We disagree. As we have already stated, this was a full and careful judgment in which Her Honour Judge Morris not only applied the correct legal principles but considered all the material evidence and addressed all the principal arguments advanced by each party. Having read the transcript of Mr Scott's evidence in full, we are satisfied she was not obliged to interpret his evidence in the way that Ms Sheikh suggested. Accordingly, the delay had no impact.

For all those reasons, accepting as we must that the Respondents faced a high hurdle in advancing the application to stay, we are satisfied WBC has failed to surmount the high hurdle facing it in bringing this appeal. The judge's conclusions were open to her on the material before her.

We add this. We understand WBC's frustration at what they see as Mr Scott's persistent attempts to flout the planning controls in place for the Green Belt and to breach the enforcement

notice. We understand that other judges may have reached a different conclusion. We accept that Mr Scott may consider himself fortunate that the judge made the findings that she did, but they were clear and reasoned, and made on the basis of the evidence called before her. We see no reason to interfere with her judgment and or exercise of discretion. Our powers are limited. We may only reverse a ruling on an appeal against a terminating ruling under s. 58 of the Criminal Justice Act 2003 if satisfied (a) that the ruling was wrong in law, (b) that the ruling involved an error of law or principle, or (c) that the ruling was a ruling it was not reasonable for the judge to have made. We are not so satisfied.

Accordingly, the application for leave is refused and we order that all the Respondents be acquitted of the offences which are subject to the appeal.

Finally, we add two things. First, the self-contained code in Part VII of the Town and Country Planning Act 1990 confers on local planning authorities a wide range of powers for the enforcement of planning control. It is left to their judgment which power or powers it is appropriate to use in the particular circumstances of the case in hand. It should go without saying that in deciding which power or powers will best deal with a particular breach of planning control, having regard to the public interest, an authority should always act with fairness and realism.

Secondly, nothing we have said in this judgment should be seen as casting doubt on the value of informal discussions between officers of a local planning authority and an applicant for planning permission or a landowner who appears to be responsible for a breach of planning control. This judgment and Her Honour Judge Morris's ruling were based entirely on the

particular facts of this case. It is trite that discussions between planning officers and an applicant or landowner do not ultimately bind a local planning authority to a particular position or a particular course of action, in breach of the principles set out in Reprotech (see the speech of Lord Hoffmann, at paragraphs 27 to 38). But such discussions have, and will always have, an important role to play in the planning system – so long as they are conducted in good faith and with good sense on either side.

We see no reason, therefore, why Her Honour Judge Morris's ruling or the contents of this judgment should have the "chilling effect" on such discussions as suggested by Ms Sheikh. The judgment, as we have indicated, is entirely dictated by the cumulative effect of all the facts of this case, not simply the discussions.

Finally, we should like to add our gratitude to all counsel – particularly Ms Sheikh who bore the brunt of our questioning from the Bench and responded admirably and Mr Stemp – for their very considerable assistance.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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