Neutral Citation Number: [2021] EWCA Crim 1091

Case No: 201902937/8-B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HHJ TOMLINSON
T20190135

Strand, London, WC2A 2LL

Date: 15 July 2021

Before:

PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE HON. MR JUSTICE JAY
and
THE HON. MRS JUSTICE COCKERILL

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Between:

MUHAMMED ASIF	**Applicant**
- and –	
(1) ADIL IQBAL DITTA **(2) NOREEN RIAZ**	**Respondents**

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Charles Bott QC and Philip Kazantzis (Charles Bott QC instructed by Philip Kazantis acting on direct access (authorised to litigate) for the **Appellant**
Thomas Price QC (instructed by Watson Woodhouse Solicitors LLP) for the **First Respondent**
James Bourne-Arton (instructed by Watson Woodhouse Solicitors LLP) for the **Second Respondent**
Brendan Kelly QC (instructed by Paget-Brown and Co) for **Mohammed Safdar Gohir**
Angus Bunyan (instructed by Reynolds Porter Chamberlain LLP) for **Nasir Khan**

Hearing date: 15 April 2021

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Approved Judgment

DAME VICTORIA SHARP P.:

1. This is the judgment of the court to which all its members have contributed.

Introduction

2. On 21 February 2019 a private prosecution was commenced at the City of Westminster Magistrates' Court by Mr Muhammed Asif. The defendants to those proceedings were Mr Adil Ditta and Mrs Noreen Riaz, who are husband and wife. On 10 April 2019 the charges, including fraud, theft and concealing or transferring criminal property were sent to the Crown Court sitting at Southwark pursuant to section 51 of the Crime and Disorder Act 1988. On 26 July 2019 HHJ Tomlinson heard applications on behalf of both defendants to dismiss the charges on the grounds of insufficiency of evidence, alternatively to stay them as an abuse of the process of the court. On 2 August 2019 the judge handed down his written ruling. He stayed the proceedings as an abuse in relation to both defendants and dismissed the charges against Mrs Riaz alone.

3. On 7 August 2019 Mr Asif filed a notice of appeal and application for permission to appeal against the judge's terminating ruling pursuant to section 58 of the Criminal Justice Act 2003. This application was refused on 14 November 2019 by Davis LJ.

4. Mr Asif now renews his application for permission to appeal to the full court save that his application in respect of the dismissal ruling in respect of Mrs Riaz is no longer pursued. There has been considerable delay in listing this application which is not the fault of the parties.

5. For the reasons that follow, in agreement with Davis LJ, we refuse the renewed application. For the avoidance of doubt, the provisions restricting reporting of these proceedings, no longer apply. We address at the end of this judgment the various applications for costs that are made on behalf of the defendants.

The prosecution case

6. For the purposes of the abuse application, the judge had before him the evidence served on behalf of Mr Asif (in the form of various witness statements including from Mr Asif and Mr Mohammed Safdar Gohir and accompanying exhibits). No defence statements had been served, nor did the defendants put in evidence in opposition. What follows therefore is a summary of the prosecution case and some additional matters to which the judge referred (albeit we have considered the (voluminous) evidence on which Mr Asif has relied).

7. Mr Asif is a property developer residing in Lahore and owns a number of businesses in Pakistan and Dubai. Mr Ditta is a property developer, restaurant owner and a trader in mobile phones who resides in the United Kingdom. Before 2018, Mrs Riaz was the sole owner of the then matrimonial home, Chilton House in Stockton-on-Tees. Mr Gohir (known as 'Saff') is Mr Asif's cousin and resides in the United Kingdom. Mr Asif describes him as a property developer and as one of his representatives in this country.

8. It is material to note, as the judge did, that on 20 July 2007 the VAT and Duties Tribunal sitting at Manchester determined that Mr Gohir had played what was described by the judge as a subordinate role in a £18 million missing trader (MTIC) fraud involving

mobile phones. In 2015 Mr Gohir was convicted in Germany of being the ringleader in a €136 million international MTIC fraud and following his extradition from the USA, was given a three year prison sentence.

9. Mr Asif and Mr Gohir had collaborated in their business and property interests for many years. Mr Asif looked after Mr Gohir's business interests in Pakistan and their roles were reversed in the United Kingdom. They also invested successfully in several Dubai properties. In about 2006, Mr Gohir introduced Mr Ditta to Mr Asif. In the first instance, they collaborated in several joint ventures in Dubai, and their business and personal relationship flourished.

10. In this private prosecution, Mr Asif alleged that the defendants had defrauded him of more than £1 million. Two separate frauds were alleged: the first, relating to a joint venture investment in land, and the second, concerning Mr Asif's shares in a company called Advance Systems Training Ltd.

11. There were 8 counts on an Amended Indictment. Counts 1, 2 and 3 related to the first fraud; the remaining counts, Counts 4, 5, 6, 7 and 8 related to the second.

12. The account of the facts which follows derives from the case advanced by Mr Asif.

The first fraud

13. In 2007, so it was said, Mr Ditta proposed, and Mr Asif agreed to participate in a joint venture. The proposal involved the purchase and development of agricultural land in the Teesside area at a good price, using Mr Ditta's friendship with the local Mayor and the planning office to bring about a change in the permitted use of the land, to facilitate residential and commercial development. Mr Asif said he agreed to participate on the basis that some of the profits generated in a joint venture he had with another business partner of his, a Mr Zahid Iqbal, would be channelled through Mr Iqbal into the Teesside deal, using James Bloomer, solicitors.

14. Accordingly, in or around February 2007, Mr Asif instructed Mr Gohir to tell Mr Iqbal to transfer £450,000 to Mr Ditta. It is asserted that Mr Iqbal complied with these instructions. An undated completion statement (exhibit "MA1") shows, if genuine, that Mr Bloomer received the total sum of £595,000 from the "Sana Iqbal Trust", in which entity Mr Iqbal and/or his wife may have had an interest, and out of which £450,000 was then paid to "Abid Ditta (sic)". There is no evidence of money being sent by Mr Asif from Lahore for this transaction.

15. In his ruling, the judge commented that someone appears to have scanned or photocopied MA1 without removing it from a lever arch file. Whether or not that was the case, much of the typeface is blurred – although what we have set out is tolerably distinct.

16. According to Mr Asif's first witness statement:

> "There was no written agreement between myself and Adil for this investment as per previous ventures. The discussions were conducted orally and there was an oral agreement between us on his investment. It was agreed between us that this money would

> be used towards the purchase of the plot of land. It was also agreed that Adil would obtain planning permission. To start the development, further funds would be required to carry on and complete the project. We also considered an alternative that we could sell the land once planning permission was granted."

17. The location of this plot has never been satisfactorily identified. An email from Mr Ditta to Mr Gohir dated 22 March 2011 gives a postcode and encourages the reader to "have a look at google map". Mr Asif's evidence is that he later ascertained that the postcode provided (TS15 9PJ) did not in fact correspond to the plot that was supposed to be used for their joint venture. No further details are given.

18. Thereafter there was considerable delay. Apparently Mr Ditta did not provide proof that he had purchased the land, or that planning permission had been obtained or of any development at the site. Mr Asif had a number of telephone conversations with Mr Ditta about this, but he and his agents (Mr Gohir and the latter's brother, Jimmy) were continually fobbed off.

19. Count 1 of the Amended Indictment alleges fraud contrary to section 1 of the Fraud Act 2006. The particulars of the offence are that:

> "Adil Ditta between 16th day of January 2007 and 31st day of December 2013, dishonestly made false representations to Muhammed Asif, namely that he had invested £450,000 belonging to Muhammed Asif in the purchase of some land, knowing this to be untrue or misleading and intending thereby to make a gain for himself or to cause loss to another or to expose another to the risk of loss."

20. The witness statements of Messrs Asif and Gohir do not support these particulars however, since the core allegation is not that Mr Ditta purchased this plot and then failed to account to Mr Asif for his share in this asset or any profits generated, but of a lack of progress and "fobbing off:" see para 18 above.

21. In 2009 Mr Ditta allegedly proposed to Mr Asif that he would cause a charge to be registered over Chilton House; further, he offered to value the charge at £500,000 as a goodwill gesture as he had by then had Mr Asif's joint venture funds for some two years. Mr Asif's sole dealings were acknowledged by him to be with Mr Ditta rather than Mrs Riaz, the sole legal owner of Chilton House.

22. Legal arrangements for the charge were subsequently made through a conveyancing solicitor, Mr Andrew Bunting, with whom Mr Asif had no direct dealings. On 22 May 2009 a form CH1 was executed as a deed by Mrs Riaz as borrower in favour of Mr Asif (exhibit "MA2"). She agreed to pay Mr Asif the sum of £500,000 within ten years. The property to be charged was Chilton House. There was no provision for interest over the period of the loan.

23. On 29 June 2009 a form AP1 seeking registration of the charge was signed by Mr Bunting, but not by Mr Asif (exhibit "MA3"). This is a curiosity, but it may be inferred

from other evidence that the Land Registry accepted the application for the charge and that Mr Asif's interest was formally registered in due course.

24. In 2012 a meeting took place between Mr Ditta, the Gohir brothers and Mr Tanveer Hussain. At this meeting Mr Ditta apparently admitted that he had not used the money for the purchase of the land but for other purposes, agreed that he would repay the money over time, and that if he failed to do so Mr Asif could enforce his rights under the legal charge.

25. By a DS1 form dated 31 January 2013 (exhibit "MA5") Mr Asif purportedly acknowledged that Chilton House was no longer the subject of the charge dated 22 May 2009. There is expert evidence which indicates that the signature on this deed, apparently witnessed by Mr Ditta, was not that of Mr Asif. He is clear that he did not sign this deed and that he was in Pakistan at the time. The address given for him (wrongly spelt) was that of Mr Gohir.

26. By a CH1 form also dated 31 January 2013 (exhibit "MA6") Mrs Riaz executed a charge over Chilton House in favour of her father-in-law, Mr Allah Ditta, also in the sum of £500,000. Mrs Riaz agreed to repay that amount within 10 years, again without interest. By a AP1 form dated 31 January 2013 and signed only by Mr Bunting, an application was made to the Land Registry for Mr Asif's charge to be discharged and Mr Allah Ditta's charge to be registered.

27. Mr Asif says that he had no knowledge of this and was unaware of what he terms "the frauds" (by which he presumably means the January 2013 transactions, not the underlying 2009 transaction and the subsequent misrepresentations made in that connection) until after January 2018. By dint of these arrangements however, assuming that they were genuine, Mr Asif had become an unsecured creditor.

28. Mr Allah Ditta has provided a statement to Mr Asif. In that statement he said that he had understood the true lender (of the funds to Mr Adil Ditta) to be Mr Gohir; and that he (Allah Ditta) had discharged the liability to Mr Gohir by selling him £500,000 worth of shares in a restaurant he owned, which were put in the name of Mr Jimmy Gohir. Counsel for Mr Asif told the judge however that Mr Allah Ditta was not regarded as a witness of truth. Mr Asif's case was that the transaction was a sham because at the material time Mr Allah Ditta was a taxi driver working in Middlesbrough and did not possess this level of assets.

29. Count 2 of the Amended Indictment alleges fraud contrary to section 1 of the 2006 Act. The particulars of the offence are that:

> "Adil Ditta and Noreen Riaz on or about 31st day of January 2013 being persons in a position in which they were expected to safeguard or not act against the interests of Muhammed Asif, dishonestly abused their positions, namely by causing a charge registered by Muhammed Asif upon a property belonging to Noreen Riaz known as Chilton House to be removed without Muhammed Asif's knowledge or consent, intending thereby to make a gain for themselves or another or to expose another to a risk of loss."

30. On 19 January 2018 Chilton House was sold for £955,000. On the same day a new family home was bought in Mrs Riaz's sole name for £555,000.

31. Count 3 of the Amended Indictment alleges the concealing, disguising, converting or transferring of criminal property contrary to s. 327(1) of the Proceeds of Crime Act 2002. The particulars of the offence are that:

> "Adil Ditta and Noreen Riaz between 1st day of January 2018 and 1st of February 2018 concealed, disguised, converted or transferred criminal property, namely £500,000 belonging to Muhammed Asif, knowing or suspecting it to represent in whole or in part the proceeds of their criminal conduct."

This count proceeds on the premise that the discharge of Mr Asif's interest in 2013 had no effect in equity, and that he was effectively expropriated in 2018. It is difficult to see what count 3 adds to count 2.

The second fraud

32. Mr Ditta acquired Advance Systems and Training Ltd ("AST Ltd") in 2012. This company had a lucrative distribution agreement with Apple in Ireland to distribute their products in the United Kingdom and Europe. Mr Gohir allegedly set up Global Wide Int. Holdings Ltd (Global) in Hong Kong with the object of trading in mobile phones between Asia and Europe as a joint venture with Mr Ditta. The intention was to import and export mobile phones on a large scale between these regions through these corporate entities.

33. In 2013, Mr Ditta owned 50 per cent of the shares (i.e. 50 shares) in AST Ltd, the balance being held by Mr Ehsan Ul Haq. In early 2013, Mr Asif visited the United Kingdom and Mr Ditta proposed that Mr Asif buy out Mr Ul Haq, and invest further sums in AST Ltd to enable him to purchase stock.

34. In June 2013, Mr Asif bought Mr Ul Haq's shares in AST Ltd at a consideration of slightly less than £5,000. In October 2013 these shares were transferred to his Dubai-registered company, Corporate Infracon FZE ("Infracon"). In addition, Mr Ditta, AST Ltd and Infracon signed an investment agreement. The relevant document is undated, but Mr Asif's evidence is that this took place in 2013. This agreement provided that the parties' shareholdings in AST Ltd should be split 51:49 in Mr Asif's favour, although there is no evidence that this slight adjustment was ever effected.

35. Mr Asif says that he appointed Mr Gohir to act for him as he was unable to manage this investment here. He was aware of Mr Gohir's similar business in Hong Kong and felt that he would be the best person to manage his affairs in the UK.

36. In June and October 2013 another of Mr Asif's companies in Dubai, Fourth Generation Telecom FZE, lent the total sum of €400,000 to AST Ltd. According to the Annual Return of AST Ltd filed on 2 December 2013, on that date Infracon's 50 shares were transferred to Mr Ditta. This was said to be without Mr Asif's knowledge or permission. According to the Directors' Report for AST Ltd for the year ended 31st December 2014, on 15 June 2014 Mr Ditta transferred 49 shares in AST Ltd to Mrs Riaz.

37. Count 4 of the Amended Indictment alleges theft contrary to section 1 of the Theft Act 1968. The particulars of the offence are that:

> "Adil Ditta on or about 2nd December 2013 stole shares in [AST] Ltd belonging to [Infracon]."

38. Count 8 of the Amended Indictment alleges the concealing, disguising, converting to transferring of criminal property contrary to section 327(1) of the 2002 Act. The particulars of the offence are that:

> "Adil Ditta and Noreen Riaz between 1st day of December 2013 and 3rd of December 2014 concealed, disguised, converted or transferred disguised criminal property, namely shares in [AST Ltd] belonging to [Infracon], knowing or suspecting them to represent in whole or in part the proceeds of criminal conduct committed by Adil Ditta."

39. Mr Ditta approached Mr Asif for a further injection of capital. Mr Gohir was asked to send money on Mr Asif's behalf from Global. According to Global's HSBC bank statements, the sums of £192,000, £97,000 and £96,000 were sent to AST Ltd on 11 and 12 March 2014 (the second and third payments being made on the later date). These payments are also reflected in AST Ltd's financial statements for the year ended 31 December 2014, although there it is claimed that the funds were "introduced by Mr Ditta" through a company under his control, Global.

40. Mr Asif asserts that these funds were never returned by Mr Ditta or by AST Ltd, and that he did not receive any money or any profit from the trades that occurred with the use of these funds. What he really means is that the monies he arranged to be paid to AST Ltd have been dishonestly treated by the company as having been paid by Mr Ditta.

41. Count 6 of the Amended Indictment alleges the offence of fraud contrary to section 1 of the 2006 Act. The particulars of the offence are that:

> "Adil Ditta, on or about 7th September 2015, dishonestly made false representations in the financial statements of [AST Ltd] for the year ended 31st December 2014, namely that [Global] was a company under his control and that he had introduced £193,000 to [AST Ltd] through [Global] intending thereby to make a gain for himself or another or to cause loss to another or to expose another to the risk of loss."

This count omits reference to the payment of £192,000.

42. Furthermore, various financial statements filed on behalf of AST Ltd disclosed substantial profits, half of which Mr Asif says should have been his. However, no dividends were paid during the relevant periods and it is far from obvious that Mr Asif was wrongly denied benefits to which he was entitled.

43. Counts 5 and 7 of the Amended Indictment may be taken together. In summary it is alleged that Mr Ditta committed fraud contrary to section 1 of the 2006 Act by failing

to ensure that AST Ltd accounted to Mr Asif and Infracon for the dividends to which they were entitled over the period 31 December 2012 to 1 October 2015.

44. In 2016 AST Ltd encountered difficulties with HMRC in relation to non-payment of VAT. The sum due and owing was £631,123.64. In mid-2016 AST Ltd was placed into voluntary liquidation.

45. In 2017 the relationship between Mr Asif and Mr Ditta broke down. Mr Asif claims that "our investigations" showed that Mr Ditta used a large amount of AST Ltd's money for his personal use. It is not clear to whom "our" refers; but the investigations appear to have been carried out by Mr Gohir. His statement is replete with comments about the detail of the investigations, including such matters as analysing the Sage data relating to the finances of AST Ltd. Sometimes he describes them as "my investigations".

46. In 2017 and 2018 there were negotiations between the parties, some of which are evidenced by WhatsApp messages. These messages appear to show that it was Mr Gohir's belief that he was owed money personally by Mr Ditta. The messages do not mention Mr Asif at all. A similar point can be made in relation to the emails which passed between Mr Gohir and Mr Ditta. In particular there were certain of Mr Ditta's emails to Mr Gohir dated 8 May, and 4 and 23 November 2012, in which he accepted that he owed Mr Gohir £450,000. The negotiations seem to have broken down in late 2018.

47. No civil proceedings have been brought in respect of either alleged fraud. If such proceedings had been instituted in 2018, there would have been no Limitation Act difficulty in relation to the events of January 2013. Depending on the precise timings, the matters forming the basis of Count 1 would have been more problematic, because more than six years had elapsed and reliance on section 32 of the Limitation Act 1980 would have been met by the contention that on his own case Mr Asif was aware of the alleged fraud by 2012 at the latest.

The proceedings in Southwark Crown Court

48. On 21 February 2019, as we have said, a private prosecution was commenced at the City of Westminster Magistrates' Court.

49. On 29 March 2019 HHJ Hehir heard an application made on behalf of Mr Asif for a restraint order pursuant to section 41 of the 2002 Act against both defendants. During the course of the hearing, the judge expressed some disquiet about the prosecution, and asked a number of penetrating questions of Mr O'Neill QC (then instructed for Mr Asif).

50. HHJ Hehir said he was "satisfied not without hesitation, that there is reasonable cause to believe that both defendants have benefited from their criminal conduct". He refused the application however on the basis that a risk of dissipation had not been demonstrated. He said that he had concerns about the *bona fides* of Mr Gohir although he was prepared to accept that he was not the driving force behind this prosecution.

51. HHJ Hehir expressed concern that a tactical decision had been taken not to include the solicitor, Mr Bunting, on the Indictment. It led him to wonder whether "the private

prosecution in a sense might not be characterised as a rather heavy-handed business tactic". Finally he said:

> "It does seem to me that what this at the end of the day really is is a contractual or a business dispute. Mr O'Neill tells me that at the end of the day what the prosecutor wants is the restitution of his money and it may well be that he is perfectly entitled to bring a private prosecution to achieve that aim, but that, coupled with the position of Mr Gohir, does cause me concerns."

52. On 10 April 2019 the charges (including fraud, theft and concealing/ transferring criminal property) were sent to Southwark Crown Court pursuant to section 51 of the Crime and Disorder Act 1988.

53. On 8 May 2019 the defendants appeared before HHJ Tomlinson at a PTPH. There was no arraignment because both defendants indicated that they would be applying to stay and/or dismiss the proceedings.

54. Mr Asif also made an application for a witness summons in relation to Mr Ditta's bank statements. The judge did not deal with that application because, as he was later to say when ruling on the abuse application, he had insufficient time to read the papers. Subsequently, the application was relisted before HHJ Gledhill QC at short notice on 20 May 2019 but he declined to deal with it, apparently on the footing that HHJ Tomlinson had previously stated that the application should be considered after the determination of the stay/dismissal applications. In his ruling given on 2 August 2019, HHJ Tomlinson said HHJ Gledhill QC would have refused the applications had he been disposed to entertain them; and though the parties have made submissions to us about who said what and when, in our view, this is a peripheral issue at best and immaterial to the matters we have to determine.

55. On 26 July 2019, the stay applications were heard by HHJ Tomlinson. There were a number of strands to the applications, in particular: that Mr Asif was acting as a proxy prosecutor for Mr Gohir; that the most significant elements of the alleged frauds were undocumented, and that Mr Gohir's covert role meant that the court could have no confidence that the prosecutor's obligations as a Minister for Justice would be complied with. It was said further that the absence of civil litigation was telling, and that Mr Asif's motives were abusive. Further, as Mr Asif was out of the jurisdiction, any order for costs made against him (as opposed to the proxy prosecutor, Mr Gohir) would be difficult, if not impossible, to enforce.

56. Mr Asif's response was as follows. The combination of the available witness evidence (which stood uncontradicted) and the kernel of incontestable truth as evinced by the documents exhibited demonstrated that: (1) the counts on the Amended Indictment could lead to guilty verdicts before a properly directed jury (i.e. the first limb of the Full Code Test for public prosecutors was fulfilled); and (2) the true loser here was not Mr Gohir but Mr Asif. Further, this was a case of "mixed motives" rather than one where the sole or predominant motive was to secure a private advantage, in particular "leverage" in the settlement negotiations that had broken down. It was not incumbent on Mr Asif to bring civil proceedings, and the case of *Ewing v Davis* [2017] 1 WLR 3223 is authority for the proposition that the second limb of the Full Code Test does not apply to private prosecutions.

57. In written submissions made following the hearing, Mr Asif offered to pay £150,000 by way of "security for costs".

The judge's ruling on the abuse application

58. The judge's ruling was handed down on 2 August 2019. His essential reasoning was as follows.

59. The stay jurisdiction is only rarely and exceptionally to be exercised. It was his invariable experience that a private prosecution was coupled with parallel civil proceedings seeking financial recovery. This was an abject failure to do so, supported by reasons which were incomprehensible. Mr Asif's very late offer to provide security for costs in the sum of £150,000 rendered it harder, not easier, to understand why civil proceedings had not been instituted. Mr Gohir, a serial fraudster, was a witness who was "at the very least critical to the sheer probity of this prosecution". Mr Asif's motivation was all too obvious, namely to obtain financial recompense in his own private interests. More specifically:

> "where it is respectably arguable that the prime unambiguous motivation is leverage to enforce a person's liability as the prosecutor or those close to him see it, it becomes more improbable that such a prosecution could be thought to be in the public interest."

60. The prosecution bundle had been prepared to a high standard, but it was necessary to compare the witness statements with the contemporary messaging (the judge no doubt had in mind Mr Ditta's emails to Mr Gohir dated 8 May, and 4 and 23 November 2012 referred to above). The paucity of contemporary records was striking: in particular, "none bore directly on any count in the indictment. They certainly come nowhere close to showing not only that D1 obtained two lots of very large sums of money in the first place, but that it was Muhammed Asif's money that D1 had obtained". In relation to count 1, there was no evidence that Mr Asif provided the funds. There was also no evidence bearing on their business relationship in general or on this particular transaction.

61. On the other hand, the evidence came closer to indicating that the true provider of funds was Mr Gohir. In particular: "Taken in conjunction with the contemporary communications involving [Mr Gohir], D1 and others in which Mr Asif plays no role and where he is not mentioned in any context as being the party who is the real loser, a theory that Mr Asif's name had been deployed back in 2009 to enable [Mr Gohir] to maintain a hidden asset charge on the Chilton House address is not at all fanciful. It seems to me to be the much more logical explanation as to what was really going on here". [It will be recalled that it was in 2009 that Mr Gohir was embarking on fraudulent activity in Germany.]

62. Overall and also in relation to the later counts on the Indictment, the judge said he could be satisfied that Mr Asif was a front man or proxy prosecutor for Mr Gohir. It followed that the prosecution was an abuse of the process of the court.

63. The judge had made it clear at the start of his ruling that even if this prosecution was not an abuse of the process, there was no case for Mrs Riaz to answer. The primary

basis for that ruling was the absence of contemporary documentation illustrating that she played any significant part in any fraud. As already indicated, this aspect of the judge's ruling is no longer challenged. The judge did not make a comparable finding in relation to Mr Ditta.

The refusal of leave to appeal

64. Davis LJ gave detailed reasons for refusing leave to appeal. We set those reasons out in full.

> "1. This is a proposed appeal against a terminating ruling in respect of a private prosecution. The judge (Judge Tomlinson, sitting in the Southwark Crown Court) did not give leave to appeal. Accordingly, by s.57(4) of the CJA 2003, an appeal can only be brought by leave of the Court of Appeal. The papers have been referred to me as a judge of that court under Rule 38.9. I have decided to deal with the question of leave to appeal on the papers and not to refer the application directly to the Full Court.
>
> 2. On any view, this is a remarkable case.
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> 3. As the judge found, the whole flavour of the proceedings is civil in nature. True it is that the counts are framed in fraud, theft and laundering. Nevertheless, they in fundamentals rely on alleged oral agreements and representations on the part of the first defendant which are not evidenced in writing and on the defendants' alleged conduct thereafter.
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> 4. It is a feature of this case that there has been no prior attempt to bring civil proceedings against these defendants. Nor has there been any prior attempt to refer the matter to the police or SFO with a view to a prosecution being initiated.
>
> 5. Having considered the papers, I cannot conceive that this case would satisfy either limb of the Full Code Test applicable to public prosecutors. That said, however, I accept that a private prosecutor is not bound by the Full Code Test: see, for example, *R (Charlson) v Guildford Magistrates* [2007] 3 All ER 163. I also accept that a private prosecutor is not ordinarily required to show a public interest in commencing a private prosecution under a Public Act: *Ewing v Davis* [2007] 1 WLR 3223.
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> 6. The judge stayed the proceedings on the grounds of abuse of process (he also held that he would in any event dismiss them as against the second defendant). He did so under limb 2 of the well-known test relating to abuse of process. It is well established that the jurisdiction to stay on such a basis is only rarely and exceptionally to be exercised. Further, the general principles for stay on the ground of abuse are no different for private prosecutions.

7. I also bear in mind two other points in favour of the prosecutor:

(1) The Crown Court has the power to dismiss where, in its view, a case is insufficiently made out (as indeed occurred here with regard to the second defendant)

(2) The Crown Court has power of its own motion to refer a private prosecution for the consideration of the DPP, who may in an appropriate case then take over the prosecution and discontinue under s.6 of the PofO Act 1985 (see, for example, *Thakrar* [2019] 2 Cr. App. R. 171).

A stay on the ground of abuse of process limb 2 cannot be used as a mere substitute for those possibilities (It also follows, conversely, that the fact that the judge refused to dismiss as against the first defendant in this case has no real bearing on his decision on abuse of process. The relevant considerations are different.)

8. All that said, I consider that the judge was fully entitled to stay the proceedings as he did. This is essentially for the two (linked) reasons which he gave.

9. The first is that he was entitled, in my opinion, to conclude on the available evidence that the ostensible prosecutor Mr Asif was in truth a front or proxy for Mr Gohir. Mr Gohir has a significant background in fraud (including carousel fraud). The proceedings are designed to mask his true involvement. The judge placed principal reliance on this ground.

10. If that is not enough, the second (linked) point is in my view conclusive. That is that this private prosecution is being used for a collateral purpose and for an improper motive.

11. I can accept that mixed motives are not of themselves a bar to a private prosecution: see *R v Bow Street Magistrates* [1993] QB 645; *D Ltd v A* [2017] EWCA Crim 1172 at paragraphs 59 - 60. But that is not the position here. The criminal proceedings are, as I see it, being used *entirely* to achieve financial recovery from the defendants. That was in effect openly admitted by leading counsel for the prosecution in answer to highly pertinent questioning from Judge Hehir at the previous restraint hearing on 29 March 2019 (and the transcript of which hearing Judge Tomlinson expressly took into account): (see at p 4 lines 3 - 13 of that transcript). There, leading counsel accepted that what the prosecutor "wants at the end of the day is he wants his money back and…the criminal courts are ideally suited to catering for the ultimate remedy of the return of his funds…". He also frankly conceded that to litigate matters in the Crown Court was considered "much more cost-effective". See also at page 15 lines

5 – 22 of the transcript, being part of Judge Hehir's ruling. It is further admitted in paragraph 7 (x) of the Notice of Appeal that the purpose of the proceedings is to "recover property taken from the prosecutor" in what is said to be commission of a criminal act.

12. So the prosecutor is not in truth using the criminal proceedings as a means to obtain condign punishment for criminality. Rather, he is using them as "leverage" (in the word of the judge) to achieve recovery of money from the defendants said to be due to him. That is an abuse of the process of the Crown Court. Moreover, he is doing so entirely to avoid the inconvenient consequences (to him) of use of civil proceedings: such as uncertainty of success in civil proceedings, quantum of costs, giving security for costs (albeit I note the late voluntary offer of £150,000), perhaps not having to pay costs at all if unsuccessful, avoiding (by applying for a Restraint Order rather than a civil freezing order) having to offer a cross-undertaking in damages; and so on. This shows the oppressive nature of these criminal proceedings vis-à-vis the defendants.

13. This collateral purpose and this improper motive is yet further, to my mind, illustrated by the prosecutor's position adopted towards the solicitor, Mr Bunting (a point on which Judge Hehir had been understandably concerned). Mr Bunting was represented to Judge Hehir as "complicit in the fraud". Mr Bunting, however, is not a party to this prosecution. Yet he is a party to civil proceedings commenced against him and his firm, but to which civil proceedings the defendants in the prosecution conspicuously are *not* a party! That is revealing; as is the fact that, on the pleadings in the civil case (which I have seen), commenced in the name of Mr Asif as claimant, the allegation against Mr Bunting is solely one of negligence. So fraud is not asserted against Mr Bunting in the civil proceedings, where the standard of proof is lower, but is asserted against him in the prosecution, where the standard of proof is higher. This again demonstrates the entirely tactical manoeuvring underpinning this private prosecution.

14. Looked at overall, I thus conclude that the decision of Judge Tomlinson (even if some of his propositions, for example with regard to the public interest, may have been rather too widely stated) was justified. This private prosecution in the Crown Court is being pursued, in reality on behalf of Mr Gohir, simply as a device or lever to achieve monetary restitution from the defendants and with a view to evading the use of civil proceedings for that purpose. It is an affront to the process of the Crown Court and to the court's sense of justice that it should be used for such a purpose. The case is in this regard plainly

> distinguishable on the facts from a case such as *R (G) v SS* [2017] EWCA Crim 2119.
>
> 15. I can see no arguable basis, given the circumstances, for saying that the decision of Judge Tomlinson was wrong in law or principle or was one that it was not reasonable for him to have made. I therefore refuse leave to appeal".

The arguments before this court

65. Mr Bott QC (who appeared with Mr Philip Kazantzis for Mr Asif, neither having appeared below) presented a focused argument. Mr Bott emphasised that the legal principles in relation to a stay for abuse of process "apply in precisely the same way to private prosecutions as they do to public prosecutions." *D Ltd v A and another* (2017) EWCA Crim 1172 per Davis LJ at para 41. Although there are procedural differences between public and private prosecutions there is no difference in the way the court should approach a private prosecution, not least because it does not follow that it will be conducted in an inferior way. With the other options available, stay is a remedy of last resort. It should not be resorted to unless there is demonstrated "an oblique motive which is so dominant and so unrelated to the proceedings that it renders them an abuse of process." *R (on the application of G) v S* [2017] EWCA Crim 2119 at para 27.

66. In this case, he submitted that if the offences alleged have been committed the sums involved, the manipulation of public record and outright forgery provide more than a sufficient public interest for a prosecution, whereas the judge had allowed his own view of public interest to influence his conclusions throughout.

67. As to the absence of civil proceedings, he submitted that this factor had been overstated in circumstances where civil proceedings in parallel are very common, and there was a perfectly possible proper motive – not least where: on the face of it civil proceedings offered a lower hurdle evidentially, a less unpredictable tribunal and more guaranteed recovery.

68. In relation to the "proxy prosecutor" issue he submitted that there is no magic in the identity of the nominal prosecutor, unless it were established that the identity of the prosecutor was a device to "pull the wool over the Court's eyes". Here, on the facts, there was no proxy prosecutor, and in any event that was an issue which should properly have been before the jury as an issue classically capable of resolution within the trial process.

69. Mr Price QC for Mr Ditta commended both the judgment and the analysis of Davis LJ to the Court. He emphasised the absence of any civil proceedings and the evidence which he said told heavily in favour of a conclusion that this was not a prosecution brought for its own sake.

70. Mr Bourne-Arton for Mrs Riaz submitted that the issue as to whether Mr Asif was a proxy prosecutor for Mr Gohir should be looked at against the background of the timings of events in Mr Gohir's life – namely that the charge took place at a time when Mr Gohir was engaged in the VAT fraud in Germany and the Count 4 loan when he was awaiting trial there. This, he submitted, gave a compelling explanation as to why Mr Asif had been used as a proxy. He also emphasised the timeline, that is, the

breakdown of the WhatsApp negotiations being immediately succeeded by the commencement of proceedings (as opposed to a report to the police) and the immediate application for a restraint order.

Discussion

71. The starting point is the Court's discretion to stay for abuse of process. This is summarised in *Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 (a case involving serious misconduct by the police), (at para 13) :

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system …"

72. In *Warren v A-G for Jersey* [2011] UKPC 10, [2012] 1 AC 22, (at para 83) the Privy Council summarised some of the principles which have emerged from recent case law on abuse of process – again in the context of public rather than private prosecutions:

i) A stay in the second category of case should be granted where necessary to protect the integrity of the criminal justice system.

ii) A balancing of interests should be conducted in deciding whether a stay is required to fulfil this primary purpose. Where a stay is being considered in order to protect the integrity of the criminal justice system, the public interest in ensuring that those that are charged with grave crimes should be tried will always weigh in the balance, but a possible countervailing factor is that the impression should not be created that the court is giving its sanction to an approach that the end justifies any means.

iii) The "but for" factor (i.e. where it can be shown that the defendant would not have stood trial but for executive abuse of power) is merely one of various matters that will influence the outcome of the inquiry as to whether a stay should be granted. It is not necessarily determinative of that issue.

iv) The focus should always be on whether the stay is required in order to safeguard the integrity of the criminal justice system

73. We also have well in mind the warning of Davis LJ in *D v A* [2017] EWCA Crim 1172 at para 50 that:

> "applications for a stay of this kind cannot be judicially resolved by a process of "feel" or "instinct": … It remains the case that it is an exceptional step to stay a prosecution; and if a stay is to be

> granted it must be by a proper application of settled principles to the facts."

74. A number of authorities consider the stay jurisdiction in the context of private prosecutions, and here the focus turns to indirect or improper purposes.

75. It is well established that a private prosecutor can have another motive as well as being motivated by a public interest factor. Mixed motives are not of themselves a bar to a private prosecution: *R v Bow Street Magistrates* [1993] QB 645; *D Ltd v A* at paras 59 to 60. The question is where the line is to be drawn between the public interest motivation and the other "oblique" motive.

76. In *R (Dacre) v City of Westminster Magistrates' Court* [2008] EWHC 1667 (Admin), [2009] 1 WLR 2241, the Divisional Court considered abuse in the context of private prosecutions. Latham LJ (at [26]) cited the case of *Baines* [1909] 1 KB 258, noting the jurisdiction of the court to interfere where it is satisfied that its process is being used for an indirect or improper purpose. He then said that in deciding whether "it would offend the court's sense of justice for the prosecution to proceed … both motive and conduct can clearly be relevant. As far as motive is concerned, proceedings tainted by mala fides or spite or some other oblique motive may fall into this category."

77. At para 28 he quoted Auld LJ in *In re Serif Systems Ltd* [1997] CLY 1373:

> "In my view, it is arguable that improper motive is a relevant matter, depending on the circumstances, in considering whether criminal proceedings before magistrates are an abuse of process. This is not necessarily a matter of mixed motives. . . It is for consideration whether there is a primary motive and one which is so unrelated to the proceedings that it renders it a misuse or an abuse of the process. I found the reference .., to section 682 of the American Restatement, Second Edition, Torts, a useful touchstone for consideration of the issue: 'One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process'."

78. That test is then clearly reflected and applied in *R(G)v S* at para 27 where the Court distinguished mixed motives from "an oblique motive which is so dominant and so unrelated to the proceedings that it renders them an abuse of process."

79. The overarching question for us is whether the judge erred in law or in principle in his analysis, or whether his conclusion - judged against the overarching question of whether a stay is required to protect the integrity of the criminal justice system – was unreasonable. Having carefully considered the submissions made we conclude that the judge did not so err, that his decision is not unreasonable and should be upheld. In reaching that conclusion we agree with the reasons given by Davis LJ in refusing permission, which we have set out above.

80. We accept, as Davis LJ said, that it might well be said that some of the judge's propositions as to the public interest were too widely stated, and there was perhaps too much emphasis on that topic; but it must be borne in mind that the judge did not have

the advantage of the same citation of authority which we have had. Nonetheless, it is apparent from his ruling that the judge had the correct principles in mind and applied them. For example, at para 17 he referred to the question of motivation, identifying the question of whether "the prime unambiguous motivation is leverage to enforce a person's liability."

81. Further it was open to the judge on the material which he had, to conclude (as he did) that there was in relation to this prosecution a primary motive and one which was so unrelated to properly constituted proceedings that it renders it a misuse or abuse of process. The evidence plainly entitled the judge to reach a conclusion that this was a prosecution being brought primarily to accomplish a purpose for which it is not designed. The vulnerability of the applicant's case on this ground was perhaps tacitly acknowledged by Mr Bott's attempt to argue that because mixed motives are not offensive, the test is whether there was a sole improper motive. But that is not where the authorities stand.

82. Here, there is the striking anomaly of the absence of any civil proceedings. As Mr Bott noted in argument, on their face, civil proceedings would present a much better and easier route to recovery of the sums in question. Although in argument before HHJ Hehir counsel then instructed advocated the merits of the cost and time effectiveness of the criminal route, against that would have to be put the advantages of the civil route, including the lower burden of proof, the greater reliability of the tribunal and indeed the availability of tactical pressure points such as CPR Part 36.

83. Further, as Davis LJ noted, the transcript of the hearing before HHJ Hehir on 29 March 2019 is revelatory. There was an open admission by leading counsel for the prosecutor in response to some very probing questions from the judge that what the prosecutor wants:

> "… at the end of the day is he wants his money back and…the criminal courts are ideally suited to catering for the ultimate remedy of the return of his funds…". (p 4 lines 3 - 13 of that transcript)

84. It is plain that the evidence on this formed an important part of HHJ Tomlinson's reasoning. In particular, he referred to the:

> "unassailable reality that the private prosecutor … wants it to be brought … in his interests … against a background of … having made efforts over quite a lengthy period to come to agreement with D1 … it appears they lost confidence in any likelihood he would compensate them. So a prosecution was launched and the civil route bypassed altogether."

85. The prosecutor's concession is supported by the factual background as to the initiation of the proceedings. In particular, the prosecution was mounted very shortly after the WhatsApp negotiations failed, and the first thing which was done within the proceedings was an application for a restraint order – which is focussed on ensuring recovery.

86. There is further nowhere any evidence that the prosecution is brought with any public interest rationale. While a dominant public interest is not required, as the authorities make very clear, the absence of any expression of a public interest rationale, taken together with the clear expression of an oblique motive is telling.

87. We have of course considered the case of *R(G) v S* where the judge's analysis in the original terminating ruling was criticised, in particular as to what was to be taken from parallel civil and criminal proceedings, and as to his approach to the question of public interest. However that was a very different case to the present one, as there was there on the facts insufficient residual evidential material to justify a finding of a dominant oblique purpose.

88. In our judgment, this case is closer on its facts to the case of *R v Gloucester Crown Court ex p Jackman* [1992] Lexis Citation 2517 (CO/1275/91: 10 November 1992), referred to at para 33 of *R(G) v S*, where the judge agreed that a clear inference could be drawn from a letter written by the employers that the prosecution was an improper pressure on the defendant to drop an unfair dismissal action.

89. In this case, attempts to recover the moneys were made through negotiations, though civil proceedings had not been commenced, followed by an unsuccessful attempt to settle the dispute. Immediately thereafter these proceedings were started, combined with an application for a restraint order. This on its own provided powerful support for the conclusion reached by the judge that the Court's process was being used for a primarily indirect or improper purpose.

90. To this however can be added a number of further factors. The most significant of these is the question of proxy prosecutor. We have no hesitation in concluding that the judge was entitled to consider on the evidence before him that Mr Gohir was the moving force behind this prosecution and Mr Asif was no more than a proxy prosecutor. This was a matter going to conduct, and the attempt to "pull the wool over the Court's eyes". As the judge noted, having reviewed Mr Gohir's criminal background:

> "taken in conjunction with the contemporary communications involving [Mr Gohir], D1 and others in which [Mr Asif] plays no role and where he is not mentioned in any context of being the party who is the real loser, a theory that Mr Asif's name had been deployed back in 2009 to enable [Mr Gohir] to maintain a hidden asset charge … is not at all fanciful. It seems to me to be the much more logical explanation as to what was really going on here."

91. He concluded that he was *"*satisfied …. that [Mr Asif] has indeed been a front man for [Mr Gohir] and he has played a leading role in these proceedings; Mr Asif is indeed the proxy prosecutor".

92. This would itself provide a valid reason for the conclusion which the judge reached. This was not simply a question of conduct however: there was an advantage to be gained from using a proxy prosecutor, adding an extra dimension to the motive for the prosecution viz the impact that Mr Gohir's "background" would have on any prosecution brought by him, including the attention that it might attract from the DPP. Further, while evidence of Mr Gohir's bad character would almost certainly be

admissible in criminal proceedings, the prospects of confining that aspect of the evidence, and its impact would be much greater in any criminal proceeding where he appeared as a witness, than in civil proceedings in which he was a claimant.

93. As noted by Davis LJ, there are also a number of other litigation advantages which provide a further oblique and improper motive for not pursuing civil proceedings. One as is conceded, is that of cost effectiveness. First, unlike civil proceedings, the initiation of which involves the payment of a £10,000 court fee, criminal proceedings can be initiated without payment of such a fee. Secondly, as noted in the final section of this judgment, the recovery of the costs from the prosecutor of a failed prosecution is not straightforward, whereas in civil proceedings costs in general follow the event. Moreover, in civil proceedings the claimant might be vulnerable to an application for security for costs; and a claimant seeking a freezing order (the equivalent of a restraint order) would have to provide an undertaking in damages to court (and might well be required to provide fortification of that undertaking by way of a guarantee or payment into court).

94. The conclusion we have reached is that this prosecution is being used for private tactical and oppressive reasons and the judge made no arguable error in staying the proceedings as an abuse. A consideration of the merits of the prosecution (including the removal of the charge, mired as it is in the circumstances surrounding the factual issues raised under Count 1) simply reinforces our view. Like Davis LJ we could not *"conceive that this case would satisfy either limb of the Full Code Test applicable to public prosecutors."*

Costs

95. The defendants now seek their costs of the hearing before this Court and before the Crown Court. As a preliminary matter it should be noted that no application for costs was made on their behalf to HHJ Tomlinson after he gave his ruling. Though we understand the topic may have been mentioned in skeleton argument(s) this did not amount to an application for costs, nor therefore did the judge rule on it.

96. There have now been a series of applications. On 3 June 2020, the defendants applied for costs against Mr Gohir pursuant to section 19B of the Prosecution of Offences Act 1985 ("the 1985 Act"). On 3 June 2020, the defendants applied for costs against Mr Nasir Khan, Mr Asif's former solicitor, pursuant to section 19A of the 1985 Act. On 27 August 2020, the Second Defendant applied for costs against Mr Asif, pursuant to section 19. On 13 November 2020, the First Defendant applied for costs against Mr Asif pursuant to section 19.

97. By Application dated 13th November 2020, the defendants specified the amount of costs they sought from the respondents. Mr Ditta sought costs of £217,050.00, whilst Ms Riaz sought costs in the sum of £140,925.00

98. Each of the respondents to the applications has, in accordance with Costs P.D. paragraph 4.7.3 had the opportunity to make representations. Formal responses were served on behalf of Messrs Khan and Asif. Written and oral submissions were advanced on behalf of all respondents before us, as summarised below.

99. Both the absence of a costs determination below and the timeline for the determination of the applications now brought have an impact on the issues which arise.

Legal framework

Section 19(1) – costs incurred as a result of unnecessary or improper acts or omissions

100. Section 19(1) of the Prosecution of Offences Act 1985 ("1985 Act") is of central importance for the application against Mr Asif. It provides as follows:

> "(1) The Lord Chancellor may by regulations make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order as to" the payment of those costs."
>
> (2) Regulations made under subsection (1) above may, in particular—
>
> (a) allow the making of such an order at any time during the proceedings;
>
> (b) make provision as to the account to be taken, in making such an order, of any other order as to costs … which has been made in respect of the proceedings …;"

101. The relevant regulations are the Costs in Criminal Cases (General) Regulations 1986 ("the Regulations"). Regulation 3 provides that: "where at any time during criminal proceedings … the Court of Appeal is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, the court may, after hearing the parties, order that all or part of the costs so incurred by that party shall be paid to him by the other party." The order "shall specify the amount of costs to be paid in pursuance of the order."

102. The procedure to be followed is set out in rules 45.8 of the Criminal Procedure Rules. If the court makes an order, it must assess the amount itself. To help assess the amount, the court may direct an enquiry by the Registrar. When deciding whether to direct such an enquiry, the court must have regard to all the circumstances.

103. The Criminal Costs Practice Direction (2015) as amended, (the "Practice Direction") recommends, at paragraph 1.2.4:

> "Where the court orders a defendant to pay costs to the prosecutor; orders one party to pay costs to another party or a third party to pay costs; disallows or orders a legal or other representative to meet any wasted costs; or makes a defendant's costs order other than for the full amount; the order for costs must specify the sum to be paid or disallowed. Where the court is required to specify the amount of costs to be paid it cannot

> delegate the decision, but may require the assistance of the relevant assessing authority, in practice the National Taxing Team (for magistrates' courts and for the Crown Court) and the Registrar of Criminal Appeals (for the Court of Appeal): see CrimPR 45.8(8), 45.9(8) and 45.10(8)."

104. More specifically as to *Costs incurred as a result of unnecessary or improper act or omission* (i.e. under section 19(1) of the 1985 Act), paragraph 4.1 provides that:

> "4.1.1 … the Court of Appeal (Criminal Division) may order the payment of any costs incurred as a result of any unnecessary or improper act or omission by or on behalf of any party to the proceedings as distinct from his legal representative: s.19 of the Act and reg.3 of the General Regulations. The court may find it helpful to adopt a three stage approach. (a) Has there been an unnecessary or improper, act or omission? (b) As a result have any costs been incurred by another party? (c) If the answers to (a) and (b) are "yes", should the court exercise its discretion to order the party responsible to meet the whole or any part of the relevant costs, and if so what specific sum is involved? Criminal Procedure Rules 2020 (SI 2020/ 759), r.45.8 sets out the procedure. …"

Meaning of "an unnecessary or improper act or omission"

105. The central phrase "an unnecessary or improper act or omission" was set out in *DPP v Denning* [1991] 2 QB 532 at 541, where Nolan LJ said that the meaning of the word "improper":

> "… does not necessarily connote some grave impropriety. Used, as it is, in conjunction with the word "unnecessary", it is in my judgment intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly."

106. That formulation was re-stated with approval by Fulford J, as he then was, in *Bentley Thomas v Wingfield* [2013] EWHC 356 (Admin). In applying the test in *Bentley* the judge stated as follows:

> "24. The core issue on this appeal, in my view, is whether the prosecution ever stood any realistic chance of success and whether, in that sense, it was a reasonable and proper prosecution."

107. The test in *Bentley* was also applied by Hickinbottom J in *Serious Fraud Office v Evans* [2015] EWHC 263 (QB). At paragraph 148 the judge set out the considerations:

> *"*i) When any court is considering a potential costs order against any party to criminal proceedings, it must clearly identify the

> statutory power(s) upon which it is proposing to act; and thus the relevant threshold and discretionary criteria that will be applicable.
>
> ii) In respect of an application under section 19 of the 1985 act, a threshold criterion is that there must be "an unnecessary or improper act or omission" on the part of the paying party, i.e. an act or omission which would not have occurred if the party concerned had conducted his case properly or which could otherwise have been properly avoided.
>
> iii) In assessing whether this test is met, the court must take a broad view as to whether, in all the circumstances, the acts of the relevant party were unnecessary or improper.
>
> iv) ….
>
> v) The section 19 procedure is essentially summary; and so a detailed investigation into (e.g.) the decision-making process of the prosecution will generally be inappropriate.
>
> vi) Each case will be fact-dependent; …. Generally, a decision to prosecute or similar prosecutorial decision will only be an improper act by the prosecution for these purposes if, in all the circumstances, no reasonable prosecutor could have come to that decision."

108. This has been affirmed, save that proposition (ii) should be amended to refer to an act or omission "*which would not have occurred if the party concerned had conducted his case properly or which should otherwise have been properly avoided*": (*R (Haigh) v City of Westminster Magistrates' Court* [2017] EWHC 232 at paragraph 33).

109. The treatment of this wording was considered before the Administrative Court in *R (on the application of Aisling Hubert) v Manchester Crown Court* [2015] EWHC 3734 (Admin). It was concluded that "ordinarily a prosecutor should expect to have to bear the costs of a defendant in criminal proceedings where, on proper analysis, the prosecution never had any prospect of success and thus should never have been brought. The application of the test formulated in *Bentley* and applied in *Evans* … will determine the outcome in most such applications."

110. In *R v Cornish* [2016] EWHC 779 (QB) Coulson J, as he then was, reviewed the authorities on the meaning of unnecessary or improper act or omission in regulation 3, and derived from them the following principles:

> "(a) Simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of s.19.
>
> (b) Improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly.

> (c) The test is one of impropriety, not merely unreasonableness. The conduct of the prosecution must be starkly improper such that no great investigation into the facts or decision-making process is necessary to establish it.
>
> (d) Where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper, but even then, that does not necessarily follow because no one has a monopoly of legal wisdom, and many legal points are properly arguable.
>
> (e) It is important that s.19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions.
>
> (f) In consequence of the foregoing principles, the granting of a s.19 application will be very rare and will be restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him."

111. This summary was approved in *Najib and Sons Limited v CPS* [2018] EWCA Crim 1554.

112. The *Evans* and *Cornish* principles apply, mutatis mutandis, to private prosecutions (*R(Haigh) v City of Westminster Magistrates' Court* [2017] EWHC 232 (Admin); 181 J.P. 325, DC), and in *R (Holloway) v Harrow Crown Court* [2019] EWHC 1731 (Admin).), summarised in *Archbold* at 6-57:

S.19A of 1985 Act: Wasted costs order – costs against legal representatives

113. In relation to the application for costs against Mr Khan, so far as relevant, section 19A of the 1985 Act allows the Court of Appeal to disallow or order the legal or other representative to meet the whole or any part of the wasted costs. Rule 45.9(4) of the Criminal Procedure Rules 2020 sets out the procedure.

114. Paragraph 4.2.4 of the Practice Direction states that judges contemplating making a wasted costs order should bear in mind the guidance given by the Court of Appeal in *In re A. Barrister (Wasted Costs Order) (No 1 of 1991)* [1993] Q.B. 661. In summary:

> *"(i) There is a clear need for any judge or court intending to exercise the wasted costs jurisdiction to formulate carefully and concisely the complaint and grounds upon which such an order may be sought. These measures are draconian and, as in contempt proceedings, the grounds must be clear and particular.*
>
> *....*

> *(iv) A three stage test or approach is recommended when a wasted costs order is contemplated: (a) Has there been an improper, unreasonable or negligent act or omission? (b) As a result have any costs been incurred by a party? (c) If the answers to (a) and (b) are "yes", should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific sum is involved?*
>
> *…*
>
> *(vi) The judge must specify the sum to be allowed or ordered. Alternatively the relevant available procedure should be substituted should it be impossible to fix the sum..."*

115. Practice Direction 4.2.5 also references the guidance in *In re P. (A Barrister) (Wasted Costs Order)* [2001] EWCA Crim 1728; [2002] 1 Cr. App. R.:

> "(i) the primary object is not to punish but to compensate, albeit as the order is sought against a non party, it can from that perspective be regarded as penal;
>
> (ii) the jurisdiction is a summary jurisdiction to be exercised by the court which has "tried the case in the course of which the misconduct was committed";
>
> …
>
> (iv) because of the penal element a mere mistake is not sufficient to justify an order: there must be a more serious error;
>
> ….
>
> (vi) the normal civil standard of proof applies but if the allegation is one of serious misconduct or crime clear evidence will be required to meet that standard."

116. Echoing section 19(1), the Practice Direction 4.2.6 states that though the court cannot delegate its decision to the appropriate authority, it may require the assistance of that authority, in practice the National Taxing Team.

S.19B of 1985 Act: Costs against Third Parties

117. Because of the factor of Mr Gohir there has also been reference to section 19B of the 1985 Act. The provision allows for Regulations under which the Court of Appeal has the power to make a costs order against a party that is not a party to the proceedings ("the third party"). This is on the condition that:

i) There has been serious misconduct (whether or not constituting a contempt of court) by the third party, and

ii) The court considers it appropriate, having regard to that misconduct, to make a third party costs order against him.

Submissions

118. For the defendants, Mr Price stated that it follows that if the Court finds this has been a manufactured prosecution and an attempt to pull wool over the eyes of the court then the Defendants are entitled to costs against Mr Gohir and Mr Asif.

119. In relation to Mr Khan, Mr Price advanced the submission that it should have been quite apparent from the very beginning that he was advising and litigating where there was no real prospect of success; it was Mr Gohir who was managing these matters.

120. It was submitted on behalf of the Defendants that the Crown Court should have assessed the costs. Mr Bourne-Arton stated that he did make an application for costs before HHJ Tomlinson but that Mr O'Neill then immediately said he would be appealing the decision. In the end, costs were not dealt with by the Crown Court.

121. On behalf of Mr Gohir, Mr Kelly submitted that there was no evidence that Mr Gohir was the true prosecutor. The lower court had been persuaded by and considered the bad character of Mr Gohir, which gave rise to the foundation of abuse. Counsel invited the Court to consider that if there is merit to the idea that at the time Mr Gohir was laundering the proceeds of crime, the other persons facilitating this were the First and Second Defendants. He submitted that there was no evidence that Mr Gohir conspired with Mr Asif to pervert the course of justice. Mr Kelly submitted that costs should be remitted to the Crown Court.

122. Mr Bunyan, on behalf of Mr Khan, submitted that the application against him is a mere attempt to look for an insured party against whom costs may be recovered. He noted that it has taken an odd course - it materialised a year after the terminating ruling. Mr Bunyan emphasised that the court should consider Mr Khan's conduct as a solicitor in the circumstances prevailing at the time he acted and with the facts he was presented with. It was wrong to look at the conduct ex post facto, and in particular through the prism of two rulings which are adverse to the prosecution. Mr Khan did not have the benefit of submissions or the legal arguments of Mr Price and Mr Bourne-Arton or the defence position at all.

123. Mr Bunyan submitted that Mr Khan was instructed by Mr Asif; absent some clear and unambiguous pointer that led him to suspect some clandestine agreement between Mr Gohir and Mr Asif he had no alternative. If he had sought to discontinue, he would have faced criticism of a different type.

124. Mr Bunyan drew the court's attention to Judge Tomlinson's ruling in which he referred on more than one occasion to the proper way in which the case was prepared, and to the disclosure exercise which seemed to have the appearance of probity. In such circumstances, Mr Bunyan submits that the inexorable conclusion that Mr Khan should have known must be resisted. Even if the court were to conclude that the highest standard was not met and Mr Khan should have probed the case against the Second Defendant, he carried out his role in a manner which was above the standard required under section 19A of the 1985 Act. It was not "starkly improper".

125. Mr Bunyan also submitted that if the Court is minded not to dismiss the application then it should be remitted to the Crown Court because the Practice Direction makes

clear that the Wasted Costs jurisdiction is a summary one to be exercised by the court that tries the case.

126. On behalf of Mr Asif, Mr Kazantzis submitted that there was some blame on both defendants. His submission seemed to be that the Defendants were in some way complicit in assisting in hiding the asset and so brought suspicion on themselves. With regard to the Second Defendant there was a case to answer as the share assignment to her was a suspicious action. Mr Kazantzis submitted that costs should be remitted to the Crown Court.

Discussion

127. The first underlying question which can be simply disposed of is whether there is any difference with regard to costs between the fact that this is a private prosecution as opposed to a case brought by the Crown. We are satisfied that the result of the authorities which state that the legal principles applicable to public prosecutions apply straightforwardly to private prosecutions is that costs principles apply equally, mutatis mutandis.

128. The second question, and the one which has given us more pause for thought, is whether the Court of Appeal has the power to remit the costs which relate to the Crown Court proceedings back to the Crown Court – or indeed whether it is bound so to do.

129. In the end we are persuaded that we both have the power to determine the costs aspects of the case, and that we should do so.

130. It is clear that the Court of Appeal does have the power to make an order as to costs under section 19(1) and 19(2)(a) of the Prosecution of Offences Act and regulation 3 of the Regulation; subject to provision otherwise this can be done "at any time in the proceedings".

131. Under section 19B of the 1985 Act, the Court has the power to make a third party costs order at any time during or after the proceedings, but should only do so during proceedings where there are good reasons (Practice Direction para 4.7.2). The general rule is that it will do so at the end of the case, but it may do so earlier (CPR 45.10(7)).

132. Under section 19A and Practice Direction 4.2.7, a Wasted Costs Order can be made at the end of the case where it appears more appropriate to do so. However, Practice Direction 4.2.5(ii) indicates that this is a summary jurisdiction to be exercised by the court which has tried the case in the course of which the misconduct was committed. When read together with Practice Direction 4.2.2 that "the Court should have costs at the forefront of its mind at each stage of the proceedings" it seems that in it would certainly be more usual for this application to be remitted to the Crown Court. In the majority of cases one can plainly see that this would be the desirable and sensible approach - though we note that there does not seem to be any specific provision which allows the court to remit issues of costs to the Crown Court.

133. We do not however consider that any of the above deprives this court from dealing with costs under any of the different jurisdictions in an appropriate case.

134. In this case there are a number of factors which point towards all costs issues being determined by this court. The first is that remission is a slightly misplaced concept here, since there was no earlier determination. Further if we wished to remit this would present this Court with a difficulty as the express powers it has are to make an order, or under Practice Direction 4.7.10 (third party) and 4.2.10 (wasted costs) in relation to third party costs and wasted costs orders respectively, to vary or revoke an order. There also does not appear to be a specific provision that allows the Court of Appeal to remit part of the costs to the Crown Court.

135. The second factor is the delay which has occurred in bringing this case on for hearing, and the factors which have necessitated something of a further delay in the handing down of this judgment. As a result, the rationale which underlies the reasoning of the Practice Direction (that of the matter being dealt with by the trial judge who is best placed to deal with the details) can hardly be said to be operative. HHJ Tomlinson is hardly likely to have retained much familiarity with the details of a case where the ruling was made in August 2019.

136. Another factor is that it is clearly sensible that all matters of costs be dealt with in one venue, and the question as regards Mr Khan was never even arguably live before the trial judge. This is the more so where, as we conclude below, it is very clear that costs should not be awarded against Mr Khan and he should not be subjected to any further period of uncertainty.

137. We note that *Archbold* at para 6-15 queries "*whether the court has jurisdiction to entertain a fresh application for costs which has arisen as result of an afterthought*." However, despite some attempts to engage this line of argument in submissions we do not see this as applicable here; the question of costs was at least floated below. A costs application against Mr Gohir under section 19B was submitted reasonably promptly. It is true that there was considerable delay in bringing the application against Mr Asif. The reason which appears to be submitted on behalf of the Defendants is that it would be extremely difficult to recover costs against Mr Asif as he is resident in Pakistan. However, the application falls procedurally within the ambit of the rules. The scope under section 19 and 19A is wide enough to allow for an application to be submitted up until the end of the case and the defendants have complied with this. The application cannot properly be regarded as an afterthought given the circumstances.

138. The application as regards Mr Khan might potentially be said to be affected by this principle, but as already indicated, it would make no difference to the result.

139. We therefore proceed to deal with the three costs applications below.

Mr Gohir

140. This application turns on the question of serious misconduct. We conclude that there was serious misconduct in this case. Given the conclusion reached by this court, namely that: (i) there was a primary improper purpose and (ii) that Mr Gohir was the real prosecutor in this case, it follows that not only was the wrong process used but also that there was a deceptive approach. An attempt was made to "pull the wool over the Court's eyes". It also follows that approach was taken and this attempt was made to avoid a risk of costs being awarded and to increase the chances of a successful prosecution.

141. In those circumstances we conclude that it is plainly appropriate – one might even say particularly appropriate - having regard to that misconduct that Mr Gohir should be liable for costs.

Mr Khan

142. The Court agrees with Mr Bunyan's submissions. Mr Khan's decision to conduct the litigation cannot be said to be "improper, unreasonable or negligent" as that phrase is to be understood. The authorities are clear that the test is a high one and that a section 19A order is reserved for the clearest of cases: "*These measures are draconian, and …the grounds must be clear and particular*" (*Re A. Barrister (Wasted Cost Order) (No. 1 of 1991)* [1993] Q.B. 293.

143. This approach is reflected in numerous dicta including:

i) In *Ridehalgh v Horsefield* [1994] Ch. 205, CA (Civ.Div.), Sir Thomas Bingham MR, (giving the judgment of the Court of Appeal Civil Division but stating that it applied equally in criminal courts), noted that "improper" covered, but was not confined to, conduct which would ordinarily justify some serious professional penalty or be considered as improper according to the consensus of professional, including judicial, opinion.

ii) In *Davenport v Walsall Metropolitan Borough Council* [1997] Env LR 24 the Divisional Court (Keen J with whom Pill LJ agreed) said "When what is being contemplated is the making of an order that the legal representatives of a party do personally meet the costs of proceedings, one would expect to find that the failings on the part of the representatives have to be shown to be somewhat more serious in order to be considered improper conduct than would necessarily be the case in other contexts."

iii) In *R (on the application (Holloway) v Harrow Crown Court* [2019] EWHC 1731 (Admin), at paragraph 17, Males LJ noted that "*it is important to guard against hindsight…. We all have a tendency to suppose that what did happen was always going to happen, but all lawyers will have experienced cases which appeared at the outset to have good prospects of success, but which in the event proved to be utterly hopeless. ….*"

144. Whilst three courts have now found against the Prosecution, we conclude that the evidence so far as we have it suggests that Mr Khan acted properly when conducting this litigation; and certainly (bearing in mind the disadvantage under which he labours given the absence of waiver of privilege) that this high test is some way from being surmounted. The claim against him for costs seems to be based on the Defendants' desire to find a party who will pay the costs. The application for costs against Mr Khan is dismissed.

Mr Asif

145. We conclude that an order for costs against Mr Asif is appropriate in that his conduct was improper. In the first place Mr Asif fell short of the high standards that are required of private prosecutors. Those bringing and conducting a private prosecution must

conform to the highest standards, as "a Minister for Justice". In *R v Zinga* [2014] EWCA Crim 52, Lord Thomas of Cwmgiedd CJ said at paragraph 61:

> "Advocates and solicitors who have 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 (as described by Farquharson J) in preference to the interests of the client who has instructed them to bring the prosecution. As Judge David QC, a most eminent criminal judge, rightly stated in *R v George Maxwell (Developments) Ltd* [1980] 2 All ER 99, in respect of a private prosecution: "Traditionally Crown counsel owes a duty to the public and to the court to ensure that the proceeding is fair and in the overall public interest. The duty transcends the duty owed to the person or body that has instituted the proceedings and which prosecutes the indictment"".

146. We have concluded that the merits hurdle was not in this case met and that he therefore fell short of the standards of a public prosecutor. But as well - and more importantly - there is in this case an approach which was abusive, and in and of itself improper. Mr Asif did not bring civil proceedings which would have been the more appropriate forum for this case, and inferentially that was a decision taken for personal advantage to him and Mr Gohir. In addition, the conclusion reached by this Court, that he was a proxy prosecutor, is a finding which itself denotes abuse. Taken together these findings lead directly to the conclusion that his conduct was improper.

Disposal

147. We therefore uphold the judge's decision in the terminating ruling.

148. As to costs, we grant the applications for costs against Mr Asif and Mr Gohir but dismiss the application for costs against Mr Khan.

149. We note that paragraph 4.1 of the Practice Direction states that generally the Court should assess the costs itself. However, it need not do so:

> "In most cases it will be neither necessary nor desirable to do so, bearing in mind the summary nature of the court's jurisdiction, the delay and expense that is otherwise liable to be incurred, and the rules that require claimants to specify in a written application the amount claimed and that require opponents to respond in writing, thus exposing the extent of any disagreement. However, in a few, exceptional, cases it may better meet the overriding objective to secure the assistance of an assessing authority than for the court to embark upon a complex assessment without such assistance. The rules provide also that a party who has incurred costs as a result of an unnecessary or improper act or omission by another party should provide assistance to the court as to the amount involved, where the court considers making an order on its own initiative: CrimPR 45.8(5)(b)(iii)"

150. This Court in this case is ill-equipped to carry out a detailed assessment exercise without assistance, particularly in respect of the costs of the earlier stages of this case

– and where the sums sought are very substantial indeed. In relation to the costs assessment of the costs orders against Mr Gohir and Mr Asif in respect of the costs that have been incurred as a result of this appeal, and the costs incurred below, this Court is directing an enquiry by the relevant authorities (the Lord Chancellor for costs in the Crown Court and Magistrates Court; the Registrar of Criminal Appeals for the appeal), assisted by the relevant assessment authority for costs.

151. The matter will then be relisted for the Court (not necessarily the same constitution) to consider the assistance provided by the Registrar, and to make the assessment and specify the amount of the costs to be paid.