Neutral Citation Number: [2021] EWHC 1648 (Admin)

Case No: CO/1374/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2021

Before:

LORD JUSTICE POPPLEWELL

and

MR JUSTICE GARNHAM

- -

Between:

The Queen (on the application of Asim Siddiqui and Raed Siddiqui)	**Claimant**
- and -	
Westminster Magstrates' Court	**Defendant**
	Interested
Bakhtiar Abbasi	**Party**

- -

David Perry QC and Victoria Ailes (instructed by **Edmonds Marshall McMahon**) for the **Claimants**
Rupert Bowers QC (instructed by **Berkeley Square Solicitors**) for the **Interested Party**

Hearing dates: 20th May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on 17 June 2021.

Mr Justice Garnham:

Introduction

1. Asim Siddiqui and Raed Siddiqui, the Claimants in these judicial review proceedings, seek to challenge a decision dated 13 January 2020 of District Judge Blake, sitting at Westminster Magistrates' Court, to set aside a summons he had granted on 9 February 2019, and to stay the criminal proceedings that resulted from the issue of that summons. The Claimants invite the Court to quash the decision of 13 January 2020 and remit the matter to the Westminster Magistrates' Court with a direction to proceed in accordance with the judgment of this Court.

2. The Grounds of the Challenge are threefold:

> (i) the District Judge erred in law in interpreting the term "all claims" in a settlement agreement between the parties as extending to criminal proceedings;
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> (ii) the District Judge erred in law in characterising the failure to disclose as fundamental in circumstances where he made no finding as to how this had come about and where all the evidence before the court was that it was not a deliberate attempt to suppress the agreement;
>
> (iii) the District Judge erred in law in that the remedy of a stay was disproportionate, and that once the Settlement Agreement was disclosed, there was no unfairness in allowing the proceedings to continue.

3. On 27 October 2020, Sir Ross Cranston, granted permission on Grounds 1 and 3 but refused it on Ground 2. The Claimants renewed their application on Ground 2 before us. I indicate now that we regard that Ground as at least arguable and would give permission for it to be argued.

4. Before us, the Claimants were represented by David Perry QC and Victoria Ailes; the Interested Party by Rupert Bowers QC. We are grateful to all counsel for their written and oral submissions.

The History

5. The background to this application is not significantly in dispute.

6. The Claimants, who are both British citizens, are brothers. The Interested Party, Mr Bakhtiar Abbasi, is a member of the Claimants' extended family by marriage. He was the director of New Global Investments UK Ltd ("New Global").

7. The Claimants allege that they are victims of a fraud perpetrated by Mr Abbasi. They allege that Mr Abbasi purported to be a successful property trader with access to high value London property, available for sale at below market value. Relying on Mr Abbasi's false representations, which it is said were supported by forged documents, the Claimants paid over substantial sums of money to him between October 2014 and July 2015. They understood that the money was to be invested in London properties

and that arrangements were in place for the property then to be sold on to identified purchasers at a profit. It is said that forged letters from the National Crime Agency were later used to explain delays in release of the expected funds to the Claimants.

8. The Claimants, it is said, were left with neither the anticipated profits nor an interest in the properties, and their capital was only partially returned. The Claimants allege that they transferred some £7.66 million to Mr Abbasi and New Global and received back some £3.6 million. Accordingly, they say they lost approximately £4 million as a result of his fraudulent scheme.

9. The Claimants sought to recover their losses by way of a claim for damages in the High Court. Those proceedings were compromised by a settlement agreement dated 22 February 2018 the recitals to which include the following:

> "WHEREAS
>
> (A) Asim and Raed brought proceedings against Mr Abbasi and New Global in the High Court of England and Wales in claim number HQ17X00049 ("the High Court Action") in respect of claims for (1) declarations and proprietary remedies following alleged frauds practised on them by Abbasi; and (2) damages for alleged deceit (again, practised by Mr Abbasi); and (3) sums due as debts under guarantees…
>
> (D) Various sets of legal proceedings (collectively hereafter "the Dubai Cases") have, in the interim, been instigated in Dubai, UAE as follows:
>
> a. A case against Mr Abbasi under assigned case number 782/2017 in the Courts of Dubai concerning a request to place a travel ban on Mr Abbasi, and an associated grievance case under assigned case number 173/2017 with next hearing for judgment to take place on 6th March, 2018 ("the Travel Ban Cases");
>
> b. A criminal case against Mr Abbasi in the Courts of Dubai under case number 66811, concerning a bounced cheque amounting to £11m (eleven million pounds sterling) decided in his favour over jurisdiction and now on appeal with next hearing to take place on 13th March, 2018 ("the Bounced Cheque Case");
>
> c. Cases against Mr Abbasi's brother-in-law, Aamir Hassan Qureshi, in the Courts of Dubai under case numbers 6881/2016, 6859/2016, 270/2017 and 271/2017 concerning 4 bounced cheques in the sum of AED20m and in respect of which Aamir is currently in prison ("the Aamir Cases")
>
> …

10. The relevant clauses of the settlement agreement are as follows:

> IT IS HEREBY AGREED AS FOLLOWS:
>
> 1 Save that nothing in this clause 1 or its sub-clauses or this Agreement shall in any way operate so as to limit or prevent any Party from enforcing the terms contained herein, and subject to clause 3 below (which provides that the claims made in the High Court Action will only be compromised upon payment (as provided for below) of the Settlement Sum (as defined below)),in consideration of the Parties' mutual assurances, obligations and promises contained herein this Agreement is in full and final settlement of:
>
> 1.1 All claims Asim and Raed have against Mr Abbasi and/or New Global in relation to monies loaned/advanced to Mr Abbasi / New Global.
>
> 1.2 Any and all claims, rights, actions, demands, costs and expenses and causes of action of whatsoever nature which Mr Abbasi and/or New Global and/or any third party/parties or entities controlled or associated or connected in any way with Mr Abbasi and/or New Global have or may have against Asim and/or Raed or any company or other entity with which Asim and/or Raed are in any way connected or involved.
>
> PAYMENT BY MR ABBASI
>
> 2 Mr Abbasi will pay to Asim the sum of £6.5m (six million five-hundred thousand pounds sterling – "the Settlement Sum") inclusive of interest in cleared funds on or before the date falling four months from the date of this Deed, although Mr Abbasi will use his best efforts to make or procure payment by 30th April 2018.
>
> 3 If Mr Abbasi makes payment of the Settlement Sum on or by such due date, then the Parties will jointly write to the High Court of Justice in London, requesting that the High Court Proceedings be dismissed with no order as to costs.
>
> …
>
> 5 In the event that the Settlement Sum is not paid on time, the claims made in the High Court Proceedings shall remain extant and Asim and Raed shall be at liberty to pursue those proceedings. In this respect it is agreed that such claims shall be compromised only upon receipt by Asim of the Settlement Sum by its due date in accordance with the terms of this Agreement.

11. On 6 February 2019, the Claimants, acting then through their solicitors, Scarmans, laid an information before the Westminster Magistrates' Court advancing against Mr Abbasi three charges of fraud by false representation, contrary to s.1 of the Fraud Act 2006 and four charges of forgery, contrary to s.1 of the Fraud and Counterfeiting Act 1981. They applied for the grant of a summons against Mr Abbasi.

12. In making that application, the Claimants failed to disclose the settlement agreement to the District Judge. It is accepted that that document should have been disclosed. The Claimants maintain that they had provided Scarmans with a copy of the settlement agreement and that Scarmans discussed with the First Claimant whether it was necessary to exhibit it to a witness statement prepared for the purposes of the proceedings. Scarmans advised the Claimant that the document did not need to be disclosed to the District Judge for the application for a summons.

13. On 9 February 2019, DJ Blake granted the summons and on 21 March it was sent to Mr Abbasi. On 23 August 2019, Mr Abbasi applied to set aside the summons on the ground that the settlement agreement, which precluded any prosecution, had not been disclosed.

14. On 5 December 2019 the District Judge heard the application. On 13 January 2020 he sent the parties the written ruling setting aside the summons and staying the proceedings. On 24 January 2020, he handed down his ruling in open court.

The District Judge's Ruling

15. The District Judge summarised the competing contentions and then set out his analysis from paragraph 21 of the ruling.

16. He held that persons making an ex parte application for the issue of the summons were under a duty of candour and that the respondents to the application to quash the summons (the claimants before us) were in breach of that duty by not bringing the settlement agreement to his attention.

17. He continued at paragraph 24

> "Had I been aware of the settlement agreement I would not have issued the summonses on the ex parte application. I do not accept the proposition by the respondents that parties cannot contract out of being subject to a private prosecution. Clearly no restriction could have been made with regard to a public prosecution. It is open for a private prosecutor to restrict their right to bring a prosecution against a party by a written agreement. The applicant's argument that this is what was agreed in this case is not fanciful and was a matter which I should have considered before issuing the summons."

18. He went on at paragraph 25 to indicate that he made "*no finding as to whether the failure to disclose the agreement was deliberate*" but he said that did not matter. The failure by the respondent in those proceedings to disclose the settlement agreement was "*a fundamental failure to meet their obligations to the court when making an application*."

19. He then turned to consider the consequence of the failure to disclose the settlement agreement. He held:

> "27. I am of the view that giving the words of clause 1.1 its normal meaning that it is an agreement to compromise all actions between the parties. I find it very difficult to now read into this agreement that there it was the intention of the parties to exclude criminal proceedings.
>
> 28. The whole issue of the conduct of the applicant, particularly his conduct since the agreement and whether there has been a repudiatory breach are matters I feel ill-equipped to reach a conclusion on at this stage. I question whether I have in fact powers to proceed to make alternative findings as to the meaning and effect of the clause as a result of the subsequent conduct of the parties. In any event the applicant makes in my view a powerful argument that the proper course for the respondent's is to seek a declaration in the High Court with regard to the agreement.
>
> 29. I am accordingly of the view that I should set aside and stay the proceedings (given unlike the High Court I have no power to quash them), in respect of the summonses that I issued on the 19 February 2019."

The Competing Arguments

Ground 1

20. Mr Perry argued that it is apparent from his ruling that the District Judge failed to grapple with the proper construction of the settlement agreement and instead was content to work on the basis that "arguably" it could be interpreted as precluding a private prosecution. That, he said, was an error of law.

21. In any event, Mr Perry argued, the District Judge's suggested construction of the settlement agreement was plainly erroneous and that too amounted to an error of law. He makes three points in support of that submission. First, he says that the word "claim" in Clause 1.1 is not apt to describe criminal proceedings. Second, he argues, citing Recital A, that the word "claim" is used elsewhere in the settlement agreement to refer to civil matters, but never to criminal matters. Third, he says, the Court should be slow to conclude that the contractual agreement precludes prosecution unless the terms of the agreement are clear and that it is far from clear that this was intention or effect of this agreement.

22. In response, Mr Bowers argues that a party is entitled to contract out of an entitlement to bring a private prosecution and that the District Judge needed to interpret the settlement agreement to determine its materiality to his decision to issue the summons. He says his conclusion that the word "claim" covered a private prosecution was one he was entitled to reach. He says the construction of the

settlement agreement is a question of fact for the District Judge and can only be reversed by this court if it found it to be *Wednesbury* unreasonable. He argues that, viewed against the relevant background of an evident intent to compromise all matters between the parties, the District Judge's interpretation was a reasonable one. He argues that "*if the District Judge was entitled to interpret the settlement agreements, then he was entitled to reach the conclusion he did with Clause 1.1.*"

23. It had been argued before the District Judge that Mr Abbasi was guilty of a repudiatory breach of the settlement agreement by failing to pay the monies due under it or alternatively that his bankruptcy on 14 August 2018 constituted a repudiatory breach by rendering the performance of the settlement agreement impossible. Mr Bowers' response before us was that there was no basis on which it could be said that, if the contract was repudiated by Mr Abbasi, that repudiation was accepted. On the contrary, the claimants had taken steps in the manner contemplated by clause 5 of the agreement to pursue the High Court proceedings.

Ground 2

24. Mr Perry argues that the District Judge erred in law in characterising the failure to disclose as "fundamental" when he had made no finding as to how it had come about. He ought to have made a finding as to whether the failure to make the appropriate disclosure was an error of judgment by the Claimants' solicitors or was a failure to disclose knowing that failure to be a breach of the duty of candour. He says that all the evidence before the court was to the effect that it was not a deliberate attempt to suppress the agreement.

25. Mr Perry says that had the District Judge made proper enquiries on this issue he would have been bound to conclude that the failure to disclose was an error of judgment by Scarmans and not a deliberate attempt to avoid proper disclosure. To conclude that "it mattered not" whether the failure was deliberate, was an error of law. He says that it mattered greatly to the question whether it would be unfair to allow the case to proceed.

26. Mr Bowers places much reliance on *R (Kay) v Leeds Magistrates' Court* [2018] EWHC 1233 (Admin), a decision on what was factually a very similar case. He says that non-disclosure was deliberate in the sense that it was the result of a conscious decision not to disclose. Whether it was a deliberate attempt to avoid proper disclosure is immaterial. Since the application for a summons had been made ex parte the duty of candour was of particular importance. The settlement agreement was of obvious relevance since, at least on one reading, it precluded a private prosecution. It was therefore correctly described by the District Judge as a fundamental failure.

Ground 3

27. Mr Perry contends the critical question on ground 3 is the disproportionate nature of a stay. He says there has to be a balancing exercise conducted between the public interest in prosecuting a serious allegation and the fairness of the proceedings. He points out that the District Judge identified no unfairness in allowing the proceedings to proceed.

28. He says that the District Judge erred in law in concluding that the appropriate remedy was to quash the summons and stay the proceedings. He says the failure to disclose was venial. Referring to *R v Crawley* [2014] EWCA Crim 1028, he submits that a stay is a remedy of last resort and that conduct which is a result of mere incompetence or negligence would not justify the abandonment of a trial of serious allegations. Had the District Judge properly addressed the question of whether the failures here were "deliberate" he would have recognised that the balance of competing public interests supported the prosecution being allowed to continue.

29. Mr Bowers indicated, at one stage of argument, that he was not submitting that the breach of candour would of itself justify setting aside the summons. Later, he withdrew that concession and argued that a failure of candour might justify the setting aside of a summons. He said that on the facts of this case, where the District Judge had found that the terms of the settlement agreement precluded a private prosecution, it would bring the administration of justice into disrepute to allow the prosecution to continue. He said that the breach of the duty of candour here was so fundamental as to justify the setting aside of the summons, notwithstanding the arguments about both the proper construction of the agreement and the alleged repudiation of the contract.

Discussion

30. In *R v West London Metropolitan Stipendiary Magistrate, Ex p Klahn* [1979] 1WLR 933 this Court considered the nature of the duty on a magistrate when considering an application to issue a summons under s.1(1) Magistrates' Court Act 1952. Lord Widgery said, at page 935;

> The duty of a magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding *whether or not to* issue a summons. As Lord Goddard C.J. stated in *Rex* v. *Wilson,* at pp. 46-47:
>
> > "A summons is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons."
>
> It would appear that he should at the very least ascertain: (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not " out of time "; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute.
>
> In addition to these specific matters it is clear that he may and indeed should consider whether the allegation is vexatious: see *Rex* v. *Bros* (1901) 85 L.T. 581. Since the matter is properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly he should consider the whole of the relevant circumstances."

31. S.1 of the Magistrates' Court Act 1980 reproduces s.1 of the 1952 Act in almost identical terms. It provides:

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

32. The circumstances in which a Magistrate can decline to issue a summons are limited. In *Barry v Birmingham Mag Crt* [2010] 1 Cr. App. R. 13, the Court said:

> The issue of a summons is one means of initiating criminal proceedings. Under the s.1 of the Magistrates' Courts Act 1980, on an information being laid before a justice of the peace that a person has or is suspected of having committed an offence, the justice may issue a summons directed to that person. The issue of a summons is a judicial function although it does not normally involve conducting any sort of preliminary hearing. It is a task which is often conducted in a straightforward manner. The discretion is not unfettered. The general principle is, as stated in Stone's Justices' Manual, that the magistrate ought to issue a summons pursuant to an information properly laid unless there are compelling reasons not to do so where, for example, there is an abuse of process or impropriety involved. There have been repeated statements by judges of this court that although justices ought to protect their process from abuse, they have no power to stay an otherwise regular prosecution.

33. It follows from *Ex p Klahn* and *Barry v Birmingham Mag Crt* that if an information is laid before a magistrate that a person has, or is suspected of having, committed an offence, the magistrate or District Judge should issue a summons unless there are compelling reasons not to do so where, for example, there is an abuse of process or impropriety by the prosecutor.

34. It is common ground here that the District Judge was entitled, on the material put before him by the Claimants, to issue the summons on 9 February 2019. It is also agreed that, whilst the Code for Crown Prosecutors does not apply to him, a private prosecutor is subject to the same duties as the public prosecuting authorities. Those duties include the duty to ensure that all relevant material is made available to both the court and the defence (*Kay* at *[23])*. It is, accordingly, also accepted that the Claimants, as private prosecutors, were under a duty to disclose the settlement agreement to the District Judge and that they breached that duty by not doing so.

35. The consequences of such a breach of duty were discussed in *Kay*. There the applicants sought judicial review of the decision of the District Judge to refuse their application for the dismissal of summons issued against them pursuant to the information laid by a private prosecutor alleging fraud. They referred, in particular, to a settlement agreement between themselves and the private prosecutor which confirmed that each party had "*no claim of whatsoever (either civil or criminal law)*

nature against other parties…". The grounds of challenge were that the prosecutor had failed to comply with the duty of candour when applying for the summons and that in the light of additional material before the District Judge, she had been required to reconsider the question whether the case was a proper one to issue summons. It was said that the District Judge had been wrong to find that the Crown Court was the appropriate venue for the determination of the abuse of process issue.

36. At paragraph 24, Sweeney J (with whom Gross LJ agreed) observed that:

> 24. There is no doubt that the duty of candour applies to an ex parte application for the issue of summonses. In R v Grays Justices, ex parte Low 1988 3 AER 834 a refusal to dismiss summonses was quashed by this court because of a failure to comply with the duty of candour.

37. At paragraph 27-28, Sweeney J summarised the caselaw as to what a defendant must establish if he is to demonstrate that a summons should be quashed because of a breach of the duty of candour:

> 27 There are two lines of authority as to what a defendant alleging a breach of the duty of candour must demonstrate to persuade a court that the summons should be quashed. The first, including cases such as *R (Rawlinson & Hunter Trustees) v Central Criminal Court* and *R (Golfrate Property Management Ltd) v Crown Court at Southwark* [2014] EWHC 840 (Admin); [2014] 2 Cr App R 12, indicates that it must be shown that the inaccurate and/or non-disclosure by the prosecutor would have made a difference to the judge's decision. The second, including cases such as *R (Dulai) v Chelmsford Magistrates' Court* [2012] EWHC 1055 (Admin); [2013] 1 WLR 220; *R (Mills) v Sussex Police*; and *R (Hart) v Crown Court at Blackfriars* indicates that it is sufficient if it is shown that the inaccurate and/or non-disclosure by the prosecutor might have made a difference to the judge's decision.
>
> 28 Whilst it seems to me that the reasoning in the second line of cases is compelling, for reasons that will become obvious, it is not necessary in this case to express any concluded view as to which line is right."

38. At paragraphs 37-40, Sweeney J considered the nature of the breach of duty:

> 37 In view of the decisions in R v Bury Justices, Ex p Anderton and R v Grays Justices, Ex p Low (see para 24 above), and of the various other authorities cited (see paras 25 and 26 above) I have no doubt that when Mr Karwan's lawyers applied on his behalf for summonses to be issued, both he and they were subject to the duty of candour that I have identified. However, the carefully crafted Information which was put forward failed to comply with that duty in each of the respects alleged by the

> claimants. Whatever the views of Mr Karwan and his lawyers as to the "Settlement Agreement", it should have been obvious, applying any of the formulations of the test that I have set out (in paras 25 and 26 above) that there was a duty to disclose to the court —in order to enable the court to properly carry out its duty to consider whether the application was vexatious, an abuse of process or otherwise improper; to consider whether to make further inquiries; to require the claimants to be notified of the application; and to hear the claimants.
>
> 38 As this case demonstrates, the grant of summonses, typically conducted ex parte, can have far reaching consequences. Compliance with the duty of candour is the foundation stone upon which such decisions are taken. In my view, its importance cannot be overstated.

39. Sweeney J ended his judgment by observing:

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

40. In *Kay,* the challenge was to a decision of a District Judge to refuse to set aside a summons she had issued on the grounds that the prosecutor had breached his duty of candour in failing to disclose the settlement agreement. We are concerned with the reverse, where the challenge is to the District Judge's decision that the summons should be set aside. In the present case, the District Judge says in his ruling that had he seen the settlement agreement, he would not have issued the summons on an ex parte application. That being so, the fact that there are two lines of authority as to the test to be applied when an application to discharge a summons is made to a district judge, as discussed at paragraph 27 of *Kay,* is of no relevance; it is apparent that disclosure of the settlement agreement would, in fact, have made a difference to the District Judge's decision.

41. The question for this court, therefore, is not *did* the failure to disclose make a difference to the District Judge's decision to issue the summons, or *might* it have done so, but *should* it have done so. *Kay* makes clear that the District Judge is obliged, on such an application, to consider the significance of the material which should have been disclosed; it does not dictate the outcome of that consideration. Insofar as this Court is simply reviewing the exercise of a discretion by the District Judge, it is exercising a public law reviewing function and applies the *Wednesbury* standard of review; insofar as the issue raised is a question of law, the Court exercises an original jurisdiction.

42. In my judgment, on the application to set aside the summons in circumstances such as the present, the District Judge ought to discharge the summons in any of three situations. First, where the settlement agreement, on its proper construction, precluded a private prosecution; second where the breach of the duty of candour was so serious that that breach in itself required the quashing of the summons; and third,

where that breach amounts to an abuse of process. We turn to examine whether any of those situations arose here.

The settlement agreement

43. The District Judge said it was open to the Claimants to restrict their ability to commence a private prosecution by contract. I agree. He said it was "*not fanciful to suggest that that was the effect of this settlement agreement*". I agree that it was not fanciful. However, there were a number of arguments of substance to the contrary and in addressing questions of construction we are determining a mixed question of fact and law.

44. First, there was an argument that the expression "claims" in clause 1.1 did not include the possibility of a private prosecution against Mr Abbasi. A private prosecution is not happily described as a "claim", an expression which, as Mr Perry submits, suggests a demand to pay monies due or an assertion of right by one individual over another. By contrast, private prosecutions, as much as public prosecutions, are proceedings brought in the name of the Crown with the intention of effecting punishment for wrongdoing; no claim is being made at all. Furthermore, the word "claim" is not used anywhere else in the settlement agreement to refer to criminal proceedings, but it is used in Recital A, to refer to civil matters. By contrast, criminal proceedings are referred to in Recital D as "cases". In this regard, this was a very different case from *Kay,* where the settlement agreement made express its application to criminal proceedings.

45. Second, as noted above, it had been argued before the District Judge that Mr Abbasi was guilty of a repudiatory breach of the settlement agreement and that breach was not accepted.

46. There seems to me a third argument potentially available to the Claimants, namely that, on the proper construction of the agreement, the obligation set out in Clause 1.1 was conditional upon the payment of the monies provided for in Clause 2. That, however, was not an argument run before the District Judge.

47. It is not necessary to resolve these potential arguments here. What matters is the District Judge's response to them. As to the first, he said, as noted above, that a construction of the settlement agreement which meant that the Claimants had curtailed their ability to commence a private prosecution was "*not fanciful*". He said that he was "*of the view that, giving the words their normal meaning, it was an agreement to compromise all actions between the parties*" and he said he found it "*very difficult to now read into this agreement that…it was the intention of the parties to exclude private criminal prosecutions*". I note, however, that he made no positive finding that, on its proper construction, the agreement did in fact preclude a private prosecution.

48. The District Judge's approach appears to have been, as demonstrated from those excerpts of his ruling, that it was sufficient for his purposes that it was properly arguable that the settlement agreement excluded the Claimants' ability to bring a private prosecution. In my judgment, however, to proceed to determining the application to set aside the summons on the basis of an arguable construction of the agreement was an error of law.

49. A failure to disclose the settlement agreement *might* justify a quashing order; whether or not it did so in fact would depend on the nature of the breach of the duty of the candour, an issue I turn to below. However, the fact that it was "*not fanciful*" to suppose that, on its proper construction, the agreement precluded a private prosecution was not of itself sufficient to justify the quashing of the summons.

50. In any event, when he came to deal the issue of repudiation, the District Judge said he regarded himself as "*ill-equipped to reach a conclusion*" and accordingly did not do so. In my judgment, that observation entirely undermined his analysis and his decision to quash the summons. If he could not exclude the possibility that the contract had been repudiated, he could not conclude that the contract remained extant. If it was not extant, it could not operate to protect Mr Abassi from a private prosecution. If that was, or might have been, the position the District Judge would only be justified in setting aside the grant of the summons, if the act of non-disclosure itself justified such a course.

The nature of the breach of the duty of candour

51. Central to the issue whether the breach of duty would itself justify the quashing of the summons is the question whether the failure to give disclosure was the result of a deliberate decision to avoid the obligation, or the result of mistake, over-sight or following poor advice. The District Judge considered the question whether the failure to disclose was "deliberate" but made "no findings" on the issue beyond observing that the failure was "fundamental".

52. It is plain from the evidence that the failure to disclose the settlement agreement was deliberate, in the sense that it was the result of a deliberate decision. It was not, for example, an oversight or the result of an accidental error in the preparation of the papers for the District Judge. It is not clear whether that is what the District Judge meant by "deliberate". In any event, we can see no proper basis on which he could have concluded that the Claimants or their solicitors intended deliberately to mislead the District Judge considering the application for a summons by keeping back a document they knew was relevant to that decision. Certainly, the District Judge did not set out the basis on which he might have reached such a conclusion.

53. I accept that the failure could be seen as fundamental in the sense that it went to the heart of the obligation of candour in this case. But it cannot fairly be said to have been fundamental to the fairness of the proceedings. That is so, if for no other reason than that Mr Abbasi had a copy of it and would have been able to deploy it at subsequent stages of the proceedings, notably in support of an application that the continuation of the proceedings was an abuse of process.

54. In those circumstances, I would regard as an error of law the District Judge's conclusion that this breach of the duty of candour was "fundamental", so to require the quashing of the summons.

Abuse of process

55. Criminal proceedings once issued may be stopped where their continuation would amount to an abuse of process. In *R v Crawley* [2014] 2 Cr. App. R 16, the Court of Appeal (Criminal Division) set out the circumstances in which the Court had the

power to stay proceedings for abuse of process. At [17]-[18], Sir Brian Leveson PQBD said:

> 17. As is clear from decisions such as Attorney General's Reference (No.2 of 2001) [2004] 1 Cr. App. R. 25 (p.317); [2004] 2 A.C. 72, there are two categories of case in which the court has the power to stay proceedings for abuse of process. These are, first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system. The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself.
>
> 18. Furthermore, it is clear from the authorities and beyond argument that there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort. As Lord Bingham of Cornhill observed in Attorney General's Reference (No.2 of 2001) supra (at [24G]):
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> > "The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances."

56. In *R v R* [2016] 1 WLR 1872, a case in which a stay of proceedings was sought following a failure to give proper disclosure, Sir Brian Leveson returned to the second category of case where the court has power to stay a prosecution on the grounds of abuse of process. At paragraph 71, he said:

> 71. As noted above, [the trial judge] focused on the prosecutorial failings in this case. That brings into play the balancing exercise identified by Lord Steyn in R v Latif [1996] 1 WLR 104, 113: ""in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justices any means."
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> 72 The problem arises because maintaining coincidence in the criminal justice system (or, as it has been put, avoiding ""an afront to the public conscience") is an aim or aspiration which

> has to be perceived from different directions. On the one hand, there is gross misconduct which the criminal justice system cannot approbate (as in cases such as R v Horseferry Road Magistrates" Court, Ex p Bennett [1994] 1 AC 42 and R v Mullen [2000] QB 520). On the other hand, however, it is important that conduct or results that may merely be the result of state incompetence or negligence should not necessarily justify the abandonment of a trial of serious allegations. As has been observed, there is no bright line and a broad brush approach is likely to be necessary.

57. It follows that proceedings will be stayed as an abuse if the court concludes (i) that the accused would not receive a fair hearing or (ii) that, irrespective of the potential fairness of the trial itself, maintaining the integrity of the criminal justice system requires that the accused should not be standing trial at all. In the former case no balancing exercise is required; in the latter the court will balance the seriousness of the prosecutorial misconduct against the seriousness of the allegations.

58. It cannot be argued that the failure of the present claimants to disclose the settlement agreement to the court meant it would not be possible for Mr Abbasi to have a fair trial; there is nothing to suggest the Claimants intended permanently to keep the settlement agreement from the court and, in any event, the defendant already had a copy of it because he was a party to it. The fact that it was not disclosed when it should have been when the summons was first sought, could not taint the conduct of the subsequent trial.

59. Nor can we see how it can be said that Mr Abbasi should not be standing trial at all. First, these were serious allegations and there is an obvious public interest in having them tried. That is a weighty consideration in favour of allowing the proceedings to continue notwithstanding the breach of the duty of candour. Second, there is no sense in which a trial would offend the court's sense of justice and propriety. The error made by the Claimants in not giving disclosure was not a deliberate attempt to keep the defendant from discovering an important document or to mislead the court. Third, Mr Abbasi is not prejudiced by the failure to disclose the document to the court; he has the document and can use it during the proceedings. And finally, a stay is not imposed as a disciplinary measure against a prosecutor, except in most serious of cases, and this case is most certainly not an example of that.

60. That being so, we see no proper basis on which the District Judge could conclude that it was appropriate to set aside the summons.

Conclusion

61. In my judgment, there was no proper ground for setting aside the summons and a stay was a wholly disproportionate response to the failure to disclose. There is a substantial public interest in the trial of these allegations. I would remit this case to the Westminster Magistrates' Court with a direction to proceed in accordance with the judgment of this Court.

Lord Justice Popplewell

62. I agree.