

## BUSINESS CRIME BRIEFING NOTE

### *Private Prosecution Update*

**Date:** 9 November 2018

**Case:** R (on the application of Kay and Scan-Thors (UK) Limited) v Leeds Magistrates' Court

**Judgment:** [\[2018\] EWHC 1233 \(Admin\)](#)

**Costs Judgment:** [\[2018\] EWHC 2842 \(Admin\)](#)

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On 23 May 2018, the High Court (Gross LJ and Sweeney J) allowed an application for judicial review against the refusal of Leeds Magistrates' Court to dismiss summonses that had been issued upon the application of a private prosecutor. The Claimants successfully argued that a private prosecutor is subject to a duty of candour in applying *ex parte* for a summons in the Magistrates' Court; that the private prosecutor had failed to comply with that duty; and that the summonses should be quashed.

On 26 October 2018, the Court made an Order for costs against the Private Prosecutor in the sum of £250,000. The Court had "no hesitation" in concluding that all costs incurred by the Claimants, both in the High Court and the Magistrates' Court, should be assessed on an indemnity basis. From first to last, the prosecution had involved unreasonable conduct resulting in a significant waste of court time and resource.

This case underlines the importance of compliance by prosecutors, public and private alike, with their duty of candour. It also contains a useful exposition of the standards demanded of those conducting private prosecutions, and a stark reminder that the consequences of falling short can be severe.

### Case Overview

On 7 April 2016, the Private Prosecutor invited Leeds Magistrates' Court to issue summonses for four charges of fraud, contrary to s.1 of the Fraud Act 2006 - each in the period between 23 July 2007 and 30 July 2012, and each based on the assertion that an untrue or misleading representation had been made.

The Information revealed that the matter had been referred to the Polish Authorities and that the "District Prosecutor" had decided to discontinue the investigation. It stated that one of the offences that the prosecutor had considered differed to the applicable offences under the Fraud Act

2006 "...and thus the Polish decision not to investigate the allegations further act as no bar to the charges currently being sought".

The Information did not reveal that:

- (1) On 26 July 2012 the Private Prosecutor had entered into a binding 'Settlement Agreement' with the Claimants in which he had undertaken not to prosecute them for the matters the subject of the information and summonses.
- (2) The very matters raised had (at his request) twice been considered by a Polish Regional Public Prosecutor (over a total period of some five months) and thereafter reviewed by a Polish Regional Court, each of which (respectively in detailed written justifications and a detailed judgment) had reached the conclusion that there was no evidence of the Claimants having committed any criminal offences.
- (3) He had only attempted to initiate the Polish criminal proceedings after he had found himself at risk of losing nearly £560,000 in arbitration proceedings and had attempted to use the fact of the criminal complaint in Poland to bring about a stay of those arbitration proceedings.
- (4) His company, Adriana, had lost those arbitration proceedings and had been compelled to pay nearly £560,000 to the Claimants.
- (5) At the time of applying for the summonses, Adriana was the subject of further arbitration proceedings in Poland, in which the Claimants were seeking unpaid commission payments and damages in excess of £4 million, and that he had initiated the proceedings in this country only after he had found Adriana to be at risk of that further loss.
- (6) It was his intention (as shown by what later happened) to use the fact of the criminal proceedings in this country as the basis of an application to suspend the ongoing arbitration proceedings in Poland, or otherwise to gain a commercial advantage in that dispute.

The Claimants' applied to dismiss the summonses and/or stay the proceedings as an abuse of process. On 7 October 2016, that application was refused by Leeds Magistrates' Court. The Claimants sought judicial review of the Magistrates' Court decision on the basis that the DJ had erred in law.

The High Court quashed the DJ's decision and the summonses: a private prosecutor is subject to a duty of candour in applying *ex parte* for a summons in the Magistrates' Court and this private prosecutor had failed to comply with that duty. The Court emphasised that the grant of summonses can have far reaching consequences and that compliance with the duty of candour is the foundation stone upon which such decisions are taken.

The DJ undoubtedly had the power to deal with the breach of the duty of candour in this case by quashing the summonses. Logically, that was the first issue that she should have engaged with, but she failed to engage with it at all. Whether breach of the duty of candour comes under the broad umbrella of abuse of process, or falls to be dealt with in its own right, the inaccurate and/or non-disclosure would have made a difference to the judge's decision. In any event, this was plainly an appropriate case for the High Court to exercise its supervisory jurisdiction, and to quash the DJ's decision and the summonses.

On 26 October, the High Court made an Order for costs against the Private Prosecutor in the sum of £250,000. The Court had "no hesitation" in concluding that all costs incurred by the Claimants, both in the High Court and the Magistrates' Court, should be assessed on an indemnity basis. The private prosecution was commenced on foot of culpable breaches of the fundamental duty of candour. The Prosecutor had then sought to continue the prosecution on a wholly inappropriate basis. When the case came before the High Court there was deliberate non-disclosure of an obviously relevant document, followed ultimately by a wholly inappropriate attempt to argue that a deemed costs order had been made: "thus, from first to last, the Interested Party's prosecution of the litigation has involved unreasonable conduct which has resulted, overall, in a significant waste of court time and resource." In reaching its conclusion, the High Court referred to the case of *R (Haigh) v City of Westminster Magistrates' Court* [2017] EWHC 232, in which a costs Order of £190,000 was made against a Private Prosecutor, whose decision to launch a private prosecution was a "strikingly inappropriate step to take".

### Some Key Questions

#### ***What must a Magistrates' Court consider when it is asked to issue a summons?***

When considering whether to issue a summons:

- (1) The magistrate must ascertain whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are *prima facie* present; that the offence alleged is not time-barred; that the court has jurisdiction; and that the informant has any authority necessary to prosecute.
- (2) If so, generally the magistrate ought to issue the summons, unless there are compelling reasons not to do so – most obviously that the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay); or is an abuse of process; or is otherwise improper.
- (3) Hence the magistrate should consider the whole of the relevant circumstances to enable him to satisfy himself that it is a proper case to issue the summons and, even if there is evidence of the offence, should consider whether the application is vexatious, an abuse of process, or otherwise improper.

- (4) Whether the applicant has previously approached the police may be a relevant circumstance.
- (5) There is no obligation on the magistrate to make enquiries, but he may do so if he thinks it necessary.
- (6) A proposed defendant has no right to be heard, but the magistrate has a discretion to:
  - a. Require the proposed defendant to be notified of the application.
  - b. Hear the proposed defendant if he thinks it necessary for the purpose of making a decision.

***What did the High Court say about the duty of candour?***

It was argued on behalf of the Private Prosecutor that, in the context of the issue of summonses, there is no duty of "full and frank disclosure" of the type applicable to the obtaining of an *ex parte* civil freezing order and that the issue of a summons has no immediate effect. The High Court disagreed: the grant of summonses can have far-reaching consequences and there can be no doubt that the duty of candour applies. Compliance with that duty is the foundation stone upon which such decisions are taken and its importance cannot be overstated.

That duty has variously been described as one of "full and frank disclosure" which "necessarily includes a duty not to mislead the judge in any material way" and which requires the disclosure to the court of "any material which is potentially adverse to the application" or "might militate against the grant" or which "may be relevant to the judge's decision, including any matters which indicate that the issue....might be inappropriate". As Hughes LJ (as he then was) memorably put it in *In re Stanford International Bank Limited*:

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

The withholding of material information is, in itself, a critical factor in determining whether a summons should be set aside as an abuse of the process of the court

***What 'standards' are required of a private prosecutor?***

The 'standards' required of those conducting a private prosecution are of the highest order: *"...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” (R v Zinga [2014] 1 WLR 2228).*

Lawyers instructed by a private prosecutor are therefore expected, however difficult or inconvenient it may be, to ensure that the prosecution is conducted according to a set of principles established in 1986 by a committee tasked with reviewing the role of prosecuting counsel. In the introduction to its Report the committee wrote:

*“There is no doubt that the obligations of Prosecution Counsel are different from those of Counsel instructed for the defence in a criminal case or of Counsel instructed in civil matters ... though his description as a ‘Minister of Justice’ may sound pompous to modern ears it accurately describes the way in which he should discharge his function.”*

The principle clearly applies to the way in which any private prosecution is presented to the court - the actual conduct of the prosecution must be in accordance with the requirements imposed upon public prosecutors.

***Does a private prosecutor retain complete control over the prosecution?***

There is no place in a private prosecution for what could be described as “end to end” case management on behalf of the client who has initiated a private prosecution. Advocates and solicitors who have conduct of private prosecutions owe a duty to the public and to the Court to ensure that the proceedings are fair and in the overall public interest. That duty transcends the duty owed to the person or body that has instituted the proceedings and which prosecutes the case.

***If there is misconduct by the private prosecutor, will the CPS intervene?***

In general, the CPS will not take over a private prosecution because of misconduct or alleged misconduct by the private prosecutor. Its Guidance states that “it is not the role of the CPS to discipline private prosecutors but rather it is for the courts to control private prosecutors”.

***Were any of the Claimants’ costs paid out of central funds?***

No, although the Private Prosecutor did argue that it was the District Judge's failure to engage with whether the breach of the duty of candour should result in the quashing of the summonses which resulted in the judicial review proceedings and that he should not have to pay the costs which resulted from her error.

The Court found no merit in that submission. The private prosecutor was the driving force in obtaining the summonses in significant breach of his duty of candour, and in persuading the District

Judge to act as she did. The Court concluded that, put bluntly, the prosecutor's submissions were misconceived.

***Why were the costs of the Magistrates' Court proceedings dealt with by the High Court?***

The High Court had the power to order costs for both these proceedings and the proceedings in the Magistrates' Court. By determining the application, the High Court has avoided further time and expense being incurred by either party. It also had the advantage of having seen, in the recent past, all the material that was relevant to the costs application (whereas the Magistrates Court gave its decision two years earlier). Overall, it was the High Court that was best placed in time to consider the question of costs globally and far better placed generally to make a judgment on the conduct of the Private Prosecutor in the Magistrates' Court than the District Judge.

If the Private Prosecutor had acted properly then the Claimants would not have incurred the costs in both courts that they did. Ultimately, the Court took the view that it was "time to bring these proceedings to a close, without either party incurring further delay and costs."

*This briefing note was produced by [Adrian Darbishire QC](#) and [Rachna Gokani](#). Please direct any enquiries to our senior clerk, [Chris Emmings](#). For more information on our private prosecutions team please [see our website](#).*