1 Contents in full

CASES

STATUTES

OTHER AUTHORITIES

2 Decision Appealed against

Wed, 10 Feb, 10:22

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk>

to me

Good morning,

I have checked with the court associate and it seems that all applications are refused. The District Judge does not work in Surrey anymore therefore I cannot contact him to double check. If it is an application you have not had a reply about already please send it again so that it can be referred to the legal team.

Kind regards

Amber Kennedy Lamb

Administrative Officer

3 Claim Form

Judicial Review
Claim Form

Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.

In the High Court of Justice
Administrative Court

Help with Fees - Ref no. (if applicable) H W F – – –

For Court use only	
Administrative Court Reference No.	
Date filed	

Seal

Is your claim in respect of refusal of an application for fee remission? ☐ Yes ☑ No

SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name and address(es)

name: Mark Guy Rostron

address:
17 Lower Guildford Rd
Knaphill
Woking
GU21 2EE

Telephone no.: 07956 935886
Fax no.:
E-mail address: markgrostron@gmail.com

Claimant's or claimant's legal representatives' address to which documents should be sent.

name: None

address:

Telephone no.:
Fax no.:
E-mail address:

Claimant's Counsel's details

name: None

address:

Telephone no.:
Fax no.:
E-mail address:

1st Defendant

name: Surrey Magistrates

Defendant's or (where known) Defendant's legal representatives' address to which documents should be sent.

name: Surrey Magistrates Court Clerk

address:
Mary Road
Guildford
GU1 4PS

Telephone no.: 01483 405 300
Fax no.: DX:97865
E-mail address:

2nd Defendant

name: None

Defendant's or (where known) Defendant's legal representatives' address to which documents should be sent.

name:

address:

Telephone no.:
Fax no.:
E-mail address:

SECTION 2 Details of other interested parties

Include name and address and, if appropriate, details of DX, telephone or fax numbers and e-mail

name: Guildford Borough Council	name:
address: Millmead House, Millmead, Guildford GU2 4BB	address:
Telephone no.: 01483 505050	Telephone no.:
Fax no.:	Fax no.:
E-mail address: customerservices@guildford.gov.uk	E-mail address:

SECTION 3 Details of the decision to be judicially reviewed

Decision:
Surrey Magistrates refused to set a date for committal hearing re allegations of fraud.

Date of decision:
10th February 2021.

Name and address of the court, tribunal, person or body who made the decision to be reviewed.

name: Surrey Magistrates	address: Mary Road Guildford GU1 4PS

SECTION 4 Permission to proceed with a claim for judicial review

I am seeking permission to proceed with my claim for Judicial Review.

Is this application being made under the terms of Section 18 Practice Direction 54 (Challenging removal)?	☐ Yes	☑ No
Are you making any other applications? If Yes, complete Section 8.	☑ Yes	☐ No
Is the claimant in receipt of a Civil Legal Aid Certificate?	☐ Yes	☑ No
Are you claiming exceptional urgency, or do you need this application determined within a certain time scale? If Yes, complete Form N463 and file this with your application.	☐ Yes	☑ No
Have you complied with the pre-action protocol? If No, give reasons for non-compliance in the box below.	☑ Yes	☐ No

Have you issued this claim in the region with which you have the closest connection? (Give any additional reasons for wanting it to be dealt with in this region in the box below). If No, give reasons in the box below. ☑ Yes ☐ No

Does the claim include any issues arising from the Human Rights Act 1998?
If Yes, state the articles which you contend have been breached in the box below. ☑ Yes ☐ No

European Human Rights Act 1998 Article 6(1) failed to provide a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and pronounce judgement publicly.

SECTION 5 Detailed statement of grounds

☐ set out below ☑ attached

See attached bundle.

SECTION 6 Aarhus Convention claim

I contend that this claim is an Aarhus Convention claim ☐ Yes ☑ No

If Yes, indicate in the following box if you do not wish the costs limits under CPR 45.43 to apply.

If you have indicated that the claim is an Aarhus claim set out the grounds below, including (if relevant) reasons why you want to vary the limit on costs recoverable from a party.

SECTION 7 Details of remedy (including any interim remedy) being sought

1 Order of Mandamus directing the Magistrates Court to hold a committal hearing. OR
2 Order to an appropriate Court to proceed at once to a determination of the issue of the fares fraud allegations.
3 Order for Costs against the Defendant.

SECTION 8 Other applications

I wish to make an application for:-
Application for extension of time to register application for Judicial Review of 28 days in case of clerical or other administrative error.

SECTION 9 Statement of facts relied on

See attached bundle.

Statement of Truth

I believe (~~The claimant believes~~) that the facts stated in this claim form are true.

Full name Mark Guy Rostron

Name of claimant's solicitor's firm None

Signed Mark Rostron Position or office held

~~(if signing on behalf of firm or company)~~

SECTION 10 Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

☑ Statement of grounds	☐ included	☑ attached
☑ Statement of the facts relied on	☐ included	☑ attached
☑ Application to extend the time limit for filing the claim form	☐ included	☑ attached
☐ Application for directions	☐ included	☐ attached
☑ Any written evidence in support of the claim or application to extend time		
☑ Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision		
☑ Copies of any documents on which the claimant proposes to rely		
☐ A copy of the legal aid or Civil Legal Aid Certificate *(if legally represented)*		
☑ Copies of any relevant statutory material		
☑ A list of essential documents for advance reading by the court *(with page references to the passages relied upon)*		
☐ Where a claim relates to an Aarhus Convention claim, a schedule of the claimant's significant assets, liabilities, income and expenditure.	☐ included	☐ attached

If Section 18 Practice Direction 54 applies, please tick the relevant box(es) below to indicate which papers you are filing with this claim form:

☐ a copy of the removal directions and the decision to which the application relates	☐ included	☐ attached
☐ a copy of the documents served with the removal directions including any documents which contains the Immigration and Nationality Directorate's factual summary of the case	☐ included	☐ attached
☐ a detailed statement of the grounds	☐ included	☐ attached

Reasons why you have not supplied a document and date when you expect it to be available:-

Signed _ Mark Rostron _ Claimant ('s Solicitor)_____

Print form Reset form

4 Essential documents for advance reading

a) Skeleton argument. (Please see page 14)

b) Application to Surrey Magistrates Court for committal hearing RE FARES FRAUD made 7th July 2020. (Please see page 112)

c) Surrey Magistrates Court state that all applications are refused. (Please see page 112)

5 Skeleton Argument

5.1 Duty to try case

5.1.1 Statutory duty to commit for trial

a) The District Judge (DJ) was bound by section 6 of the Magistrates Court Act 1980 to either,

> (a)commit the accused for trial if it is of opinion that there is sufficient evidence to put him on trial by jury for any indictable offence;
>
> (b)discharge him if it is not of that opinion and he is in custody for no other cause than the offence under inquiry;

But the Judge in error did neither and further in error did not consider the evidence provided to him before he refused to hold a committal hearing.

b) According to the precedent law set out below, the DJ had a duty to try the case.

(Please see pages referred to in the index re a Judge's duty to try case.)

c) The role of the justices is inquisitorial and of a purely administrative nature.

(Please see section 7.1.4Role of the justices was thus inquisitorial and of a purely administrative nature.)

(Also please Statutory duty to commit for trial section 7.1.1)

5.1.2 The DJ refused to hold a committal hearing or to try the case proposed, contrary to the law

(Please see Section 7.1.2)

5.1.3 No discretionary power to terminate the proceedings in a manner other than that provided

(Please see section 7.1.3)

5.1.4 Role of the justices was thus inquisitorial and of a purely administrative nature.

(Please see section 7.1.4Role of the justices was thus inquisitorial and of a purely administrative nature.)

5.1.5 DJ did not consider other procedural measures

(Please see section 7.1.5DJ did not consider other procedural measures.)

5.1.6 Duty to try case. Stay only exceptional for impossible to have a fair trial, or offends Court.

(Please see section 7.1.67.1.6)

5.1.7 Magistrates are bound to commit for trial

(Please see section 7.1.7Magistrates are bound to commit for trial)

5.1.8 Requirement of Magistrate to hear case

(Please see section 7.1.8)

5.1.9 Power to control proceedings should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures

(Please see section 0)

5.2 Trial except in exceptional circumstances

(Please see section 7.2)

The Magistrates power to refuse to hear a case is strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures.

And further

A Magistrate can only consider the fairness or propriety of the trial process or the ability to defend.

d) *The Magistrates only power is to decline to entertain a charge instituted in bad faith or oppressively.*

5.3 Public interest in trial of alleged criminals

a) The Public Interest is in the prosecution and punishment of crime.

b) The trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. (Please see section 7.3)

5.4 Duty to give reasons

a) The District Judge had a duty of candour to properly disclose his reasons and erred in not doing so. (Please see section 7.4)

5.5 Human right to a fair hearing

a) The District Judge had a duty to follow the European Human Rights Act 1998 Article 6(1) and provide a fair and public hearing within a reasonable time as an independent and impartial tribunal established by law pronounce judgement publicly. (Please see section 7.5)

5.6 Duty to refer to a higher Court

a) This application is about a complex fraud case should have been referred directly to Crown Court or to the High Court for guidance. (Please see section 0)

5.7 Duty to remedy problems with trial

a) Courts that are asked to exercise their inherent power to stay should first consider whether other procedural measures such as the exclusion of specific evidence or directions to the jury might prevent 'trial unfairness' and allow the prosecution to continue. (Please see section 0)

5.8 Duty of Candour

(Please see section 7.8)

5.9 The District Judge was in Error

No properly self directing Judge should have committed the errors of law set out in the Facts and Grounds and the Skeleton Argument (Please see section 7.9 **Error! Reference source not found.**)

6 Statement of Facts including Chronology

a) Application for Committal hearing

On the 22nd December 2020 an application by Mark Rostron (the Applicant) was made to Surrey Magistrates (SM) for the committal for trial of Officers and Councillors of Guildford Borough Council (GBC) (Please see document 8.23) following information alleging hackney carriage fares fraud (FARES FRAUD) by then. There was no reply to the application.

b) Magistrates refuse Committal hearing

On the 10th February 2021 after being reminded by the Applicant, Surrey Magistrates refused to hold a committal hearing or indeed any hearing saying the District Judge had left and was not contactable. See document 8.24)

c) First Information re FARES FRAUD by GBC Officers and Councillors

On the 2nd March 2018 District Judge Szagun's (DJS) refused the first application for summons for Fares Fraud by Guildford Borough Council Officers and Councillors made by Mark Rostron. (Please see document 8.1)

d) Police refused to act on information

On the 14th March 2020 Surrey Police refused to act on information supplied. (Please see document 8.4)

e) Second revised information

DJS's refusal objections were remedied in a second application for Summons.

f) Second application refused

On the 7th April 2018 District Judge Christopher James (DJCJ) gave different reasons for refusing the second application to issue summons.

g) Third application

DJCJ's objections were remedied in a third application to Central London Magistrates Court.

h) Third application refused

That application was returned by Bromley Magistrates Court referring it back to Guildford, without any other action on their part.

i) Fourth revised information re FARES FRAUD only

On 7th July 2020, a fourth application on the same basis as the third was made. (See document 8.28), this time to Guildford Magistrates Court again. This was an application about a different allegation of FARES FRAUD, NOT that of LIVERY FRAUD which had been made previously and separately on the 1st April 2020.

j) Reminder sent to Magistrates

On 16th October 2020 the Applicant asked what had happened to this application for a FARES FRAUD summons, and why a summons has not been issued after a delay of three months. (Please see document 8.16)

k) Fourth application refused re FARES FRAUD

On 28th October 2020 at Guildford Magistrates Court, District Judge's (DJ), without a hearing for the fourth application re FARES FRAUD by Mark Rostron, refused to issue a Summons. The Court said (Please see document 8.17)

> *"The District Judge has considered all of your information and has refused all applications."*

l) Application to State Case re FARES FRAUD summons

On the 2nd November 2020 an application was made to Surrey Magistrates for them to State their Case as to why the Summons for FARES FRAUD applied for should not be issued. (Please see document 8.18)

m) Refusal to state case re refusal to issue FARES FRAUD

On 4th November 2020 at Guildford Magistrates Court, DJ refused to state his case for refusing to issue a Summons deciding that the applications were out of time. (Please see document 8.19)

My decision to not issue any summons was made and communicated to Mr Rostron on 16/6/20.

Therefore this further application to state a case (dated 2nd November 2020) about my decision, is hopelessly out of time.

In any event I have already adjudicated upon Mr Rostron's application to state a case about my decision not to issue any summons.

I refused to state the case on 15th July 2020.

A certificate to that effect was issued to Mr Rostron on 29th July 2020, at his request.

This further application dated 2nd November 2020 is both out of time and otiose.

n) On 4th November the Magistrate was reminded by email (Please see document 8.20) that the application for Summons for FARES FRAUD had not previously been refused by him on the 11th June 2020 (although an application for LIVERY FRAUD had been), and therefore the application to State his Case could not be out of time. DJ had previously refused to issue a Summons for fraud re LIVERY, a different matter, on the 16th June 2020.

I am afraid there is some misunderstanding.

This summons application and request for case stated was for a DIFFERENT matter, that of FARES fraud.

The previous single application the District Judge referred to was about LIVERY fraud.

As it appears the application for summons has not been properly considered and decided, could you please deal with this request for a summons for FARES fraud now?

o) On 24th November 2020 the Magistrate referred to his previous refusal to issue a certificate of refusal that referred to an application for a different fraud, that of LIVERY FRAUD. (Please see document 8.21)

Mr Rostron may apply to the High Court if he wishes.

I have read all of the information that has been sent to me.

My decision not to issue any summons regarding all of his various allegations of fraud remains.

He has my certificate of refusal to state a case for the opinion of the High Court so he may rely on that if he wishes. (Please see page 101)

STATEMENT OF TRUTH

I believe that the facts stated in these statements of fact and the following grounds are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Mark Rostron 5th May 2021

Address for service
markgrostron@gmail.com
17 Lower Guildford Rd
Knaphill
Woking
Surrey
GU21 2EE

7 Statement of Grounds for Judicial Review

a) This application is for a Judicial Review (JR) of DJ's decision to refuse to hold a Committal hearing in connection with allegations of FARES POLICY FRAUD, that decision being wrong in law or in excess of the Magistrates jurisdiction or both.

b) All the points raised for JR under this and the following headings refer to a decision no reasonable properly self-directing Judge should have made, as they were either wrong in law, or outside the District Judges jurisdiction or both.

c) No unfairness of trial or process was claimed by the Judge. Neither was any exceptional reason given.

7.1 Duty to try case

7.1.1 Statutory duty to commit for trial

Magistrates Court Act 1980

6 Discharge or committal for trial.

F1 F2 [[(1) A magistrates' court inquiring into an offence as examining justices shall on consideration of the evidence—

(a) commit the accused for trial if it is of opinion that there is sufficient evidence to put him on trial by jury for any indictable offence;

(b) discharge him if it is not of that opinion and he is in custody for no other cause than the offence under inquiry, (Please see Page 171 Magistrates Courts Act 1980 s6 Discharge or committal for trial).

7.1.2 The DJ refused to hold a committal hearing or to try the case proposed, contrary to the law.

Please see Magistrates Court Act s6(1)(a) (Please see page 171)

Also,

It is well established that if a proper complaint that a crime has occurred is put to the Magistrate, then he has a duty to try the case. (Please see Index headlining "Duty to try Case" page 187)

It has consistently been held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of an executive or ministerial function. (Please see Bennett page 139)

7.1.3 No discretionary power to terminate the proceedings in a manner other than that provided.

Magistrates were required to act upon information. The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1 & 2 Philip & Mary c. 13; 2 & 3 Philip & Mary c. 10), they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial. Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

7.1.4 Role of the justices was thus inquisitorial and of a purely administrative nature.

(Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993))

There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which

he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform. Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

7.1.5 DJ did not consider other procedural measures.

Courts that are asked to exercise their inherent power to stay should first consider whether other procedural measures such as the exclusion of specific evidence or directions to the jury might prevent 'trial unfairness' and allow the prosecution to continue. (Please see page 175)

Doubts about power of Court to refuse to try or commit case. ""The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution. (Please see Page 139R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

Once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial (Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

The District Judge did not consider or decide whether the evidence was sufficient for committal.

7.1.6 Duty to try case. Stay only exceptional for impossible to have a fair trial, or offends Court.

I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

7.1.7 Magistrates are bound to commit for trial

BRENNAN J. I agree with Dawson J. that the magistrate, having made the findings which he did, was bound by s.41(6)(b) of the Justices Act 1902 (NSW) to commit the applicant for trial. I agree with the reasons which his Honour gives for that conclusion and, in particular, with his Honour's analysis of the function of committal proceedings in the administration of the criminal law in New South Wales. Please see Page 133, Grassby

The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires. The appellant argues that this was established, if it had been in doubt, by the decision of this House in Connelly v. Director of Public Prosecutions. ... Whatever may be the proper interpretation of the speeches in Connelly's case ... with regard to the extent of the power of a

trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. And that proposition has no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial. (Please see Page 153 GRASSBY v. THE QUEEN (1989) 168 CLR 1 12 October 1989)

7.1.8 Requirement of Magistrate to hear case.

""So far as the ground upon which they did dismiss the information was concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.""

Diplock L. J. expressed his agreement with this view, at p. 470F. In Reg. v. Canterbury and St. Augustine Justices, Ex parte Klisiak [1982] Q.B. 398, 411F, Lord Lane C.J. was prepared to assume such a jurisdiction. In Reg. v. West London Stipendiary Magistrate, Ex parte Anderson (1984) 80 Cr.App.R. 143, Robert Goff L.J., reviewing the position at that date said, at p. 149:

""There was at one time some doubt whether magistrates had jurisdiction to decline to allow a criminal prosecution to proceed on the ground that it amounted to an abuse of the process of the court: see D.P.P. v. Humphrys (1976) 63 Cr.App.R. 95, 144; [1977] A.C. 1, 19, per Viscount Dilhorne. However, a line of authority which has developed since that case has clearly established that magistrates do indeed have such a jurisdiction: see in particular Brentford Justices, Ex parte Wong (1981) 73 Cr.App.R. 67; [1981] Q.B. 445;

Watford Justices, Ex parte Outrim (1982) [1983] R.T.R. 26; Grays Justices, Ex parte Graham (1982) 75 Cr.App.R. 229; [1982] 3 All E.R. 653.

The power has, however, been described by the Lord Chief Justice as being 'very strictly confined': see Oxford City Justices, Ex parte Smith (1982) 75 Cr.App.R. 200, 204.""

The power has recently and most comprehensively been considered and affirmed by the Divisional Court by Reg. v. Telford Justices, Ex parte Badhan [1991] 2 Q.B. 78, 81.

Provided it is appreciated by magistrates that this is a power to be most sparingly exercised, of which they have received more than sufficient judicial warning (Please see, for example, Lord Lane C.J. in Reg. v. Oxford City Justices, Ex parte Smith (1982) 75 Cr.App.R. 200 and Ackner L.J. in Reg. v. Horsham Justices, Ex parte Reeves (Note) (1980) 75 Cr.App.R. 236.) it appears to me to be a beneficial development and I am unpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court who are daily in much closer touch with the work in the magistrates court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. (Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993))

7.1.9 Power to control proceedings should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures

I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

7.1.10 The duty of the Criminal Court to try the case.

Where, however, there is no suggestion that the charge is other than bona fide or that there is any unfairness in the trial process, the duty of the criminal court is simply to try the case and I can see no ground upon which it can claim a discretion, or upon which it ought properly to be invited, to discontinue the proceedings and discharge an accused who is properly charged simply because of some alleged anterior excess or unlawful act on the part of the executive officers concerned with his apprehension and detention. Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

7.2 Trial except in exceptional circumstances

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances: Attorney

General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL. The essential focus of the doctrine is on preventing unfairness at trial, through which the defendant is prejudiced in the presentation of his or her case. (Please see Crown Prosecution Guidance page 175)

7.3 Public interest in trial of alleged criminals

.....it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression ""a criminal court""), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason.

Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

. . . the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

It was emphasised that there is a strong public interest in the prosecution of crime and therefore ordering a stay of proceedings is a remedy of last resort. (Please see Page 176)

7.4 Duty to give reasons

But there are cases in which justices can properly form an opinion that an application as frivolous. Where they do, it will be very helpful to indicate, however briefly, why they form that opinion. A blunt and unexplained refusal, as in this case, may well leave an applicant entirely uncertain as to why the justices regard an application futile, misconceived, hopeless or academic. Such uncertainty is liable to lead to unnecessary litigation and expenditure on costs. (Please see page 167 Sunworld Ltd v Hammersmith & Fulham --[1999] EWHC QB 271 (23 November 1999); [2000] 1 WLR

...although the refusal to state a case has gone beyond the entirely unreasoned or bare initial refusal, it remains a refusal that has not been properly considered in accordance with the applicable legal test. In those circumstances, on any view, in my judgment, the refusal to state a request must be, and it is, quashed. (Please see page 170 Pegram, R (On the Application Of) v Bristol Crown Court & Ors [2019] EWHC 965 (Admin))

7.5 Human right to a fair and public hearing

The District Judge had a duty to follow the European Human Rights Act 1998 Article 6(1) and provide a fair and public hearing within a reasonable time by an independent and impartial

tribunal established by law pronounce judgement publicly, but failed to do so contrary to the law.

a) The refusal was contrary to the Article 6 Human Right to a fair hearing, as there was no fair public determination of application for summons or for committal hearing.
b) It is a civil right to bring a private prosecution and to apply for committal for trial.
c) The District Judge had no power to determine either the application for summons, or the application for committal without a hearing.
d) The refusal to issue the summons, to refuse to state a case, and the refusal to conduct committal hearings to determine the applications are an abuse of process because of incompatibility with Article 6 of the ECHR.
e) By his actions DJ gave the appearance of partiality towards GBC and its Officers and Councillors.
f) By his actions DJ called into question his impartiality because of the manner of his appointment and his continued appointment is only with the approval or acquiescence of the Local Authority.

The rights are set out in - Porter v. Magill; Weeks v. Magill [2002] 2 A.C. 357, HL.

> *87. The protections which article 6(1) lays down are that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..... The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law. This means that a complaint that one of these rights was breached cannot be answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no answer to a*

complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public: see Millar v Dickson, 2001 SLT 988, 994D-E per Lord Bingham of Cornhill and my own observations in that case, at p 1003C-F. Under this heading the question is whether the auditor lacked the independence and impartiality which is required by article 6(1).

88. There is a close relationship between the concept of independence and that of impartiality. In Findlay v United Kingdom (1997) 24 EHRR 221, 244, para 73 the European Court said:

"The Court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

The concepts of independence and objective impartiality are closely linked..."

In both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear in the objective sense to lack these essential qualities.

The rights are described here:

C. Applicability of Article 6 to proceedings other than main proceedings

53. Preliminary proceedings, like those concerned with the grant of an interim measure such as an injunction, were not normally considered to "determine" civil rights and obligations. However, in 2009, the Court departed from its previous case-law and took a new approach. In Micallef v. Malta ([GC], §§ 80-86), the Court established that the applicability of Article 6 to interim measures will depend on whether certain conditions are fulfilled. Firstly, the right at stake in both the main and Guide on Article 6 of the Convention – Right to a fair trial (civil limb) European Court of Human Rights 17/102 Last update: 30.04.2020 the injunction proceedings should be "civil" within the meaning of the Convention. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.

54. An interlocutory judgment can be equated to interim or provisional measures and proceedings, and the same criteria are thus relevant to determine whether Article 6 is applicable under its civil head (Mercieca and Others v. Malta, § 35). Please see Page 187 ***European Human Rights***

60. Execution of court decisions: Article 6 § 1 applies to all stages of legal proceedings for the "determination of … civil rights and obligations. Please see Page 187 ***European Human Rights***

7.6 Duty to refer to a higher court

7.6.1 Complex fraud case should be referred to Crown Court

a) Criminal Prosecution Rules require that complex or serious fraud cases be referred direct to the Crown Court. (Please see Page 147 Watts Section 24, 4)

b) DJ did not properly refer the case to the Crown Court.

7.6.2 Indictable offences should be referred to the Crown Court

a) The allegations include conspiracy to commit fraud, and should be referred to the Crown Court, or the High Court. (Please see Page 147 Watts Section 24, 4)

b) DJ did not properly refer the case to the Crown Court or High Court.

7.6.3 Abuse of process

7.6.3.1 There should be an objection to the justice hearing the committal and the matter should be pursued before the Divisional Court by way of an application for judicial review seeking an order of prohibition.

Per Griffiths L.J,

This court considers that it was wrong to invite a single lay justice to consider a matter such as this. Whether or not there has been an abuse of process of the sort raised in these proceedings is a matter far more fitting to be inquired into by the Queen's Bench Divisional Court than by a single justice. If a point such as this is to be taken in future it should be taken in the form in which it was in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24; that is, there should be an objection to the justice hearing the committal and the matter should be pursued before the Divisional Court by way of an application for judicial review seeking an order of prohibition. (Please see Page 139 R v

Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

7.6.3.2 Magistrates have no power to stay for abuse of process.

Per Dawson J

It would, of course, be convenient (as well as correct, in my view) if the examining magistrates could not stay for abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates had erred in their exercise of discretion. Moreover, their decision would not bind the court of trial, if the Attorney General were to prefer a voluntary bill. (Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993).

Such cases should, as in Bennett, be addressed by the wider supervisory jurisdiction of the Divisional Court. Such cases should, as in Bennett, be addressed by the wider supervisory jurisdiction of the Divisional Court (Please see Page 147 Watts, R (on the application of) v Belmarsh Magistrates' Court [1999] EWHC Admin 112)

7.6.3.3 Includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly

Per Watts

5. The wide category of cases over which magistrates have jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly. Please see Page 147

Watts, R (on the application of) v Belmarsh Magistrates' Court [1999] EWHC Admin 112 Watts

7.6.3.4 Abuse of process consideration not part of Magistrates function.

Per Grassby

From the conclusion that s.41(6)(b) determined the magistrate's duty, it follows that consideration of the question whether a prosecution of the accused on indictment would amount to an abuse of process was no part of the magistrate's function. Please see Page 153 GRASSBY v. THE QUEEN (1989) 168 CLR 1 12 October 1989

Dawson J. said at p. 10 that the magistrate's power to stay for abuse of process ""has been denied upon the highest authority in the United Kingdom."" He referred to Connelly v. D.P.P. [1964] A.C. 1254 and continued:

""See also Mills v. Cooper [1967] 2 Q.B. 459, per Lord Parker C.J. Whether such comments were correct in relation to inferior courts exercising ordinary judicial functions has been doubted (Please see Reg. v. Humphrys [1977] A.C. 1 per Viscount Dilhorne, per Lord Salmon; to the contrary Reg. v. West London Stipendiary Magistrate; Ex parte Anderson (1984) 80 Cr.App.R. 143, but it is clear that they do not extend to a magistrate hearing committal proceedings.

In Atkinson v. Government of the United States of America [1971] A.C.197,231 Lord Reid (with whom Lords MacDermott and Guest agreed) said:

'The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that

every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires.

""The appellant argues that this was established, if it had been in doubt, by the decision of this House in Connelly v. Director of Public Prosecutions . . .

'Whatever may be the proper interpretation of the speeches in Connelly's case . . . with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. And that proposition has no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial."""

In Ex parte Sinclair [1991] 2A.C. 64, another extradition case, Lord Ackner in his illuminating speech pointed out at p. 78E that Lord Reid's view of the magistrate's power to refuse to commit for trial by reason of abuse of process was obiter. Nonetheless a view expressed by such a high authority commends respect, and Lord Reid was making his point as an integral link in his argument, to show that in extradition proceedings a magistrate has no such power.

Dawson J. observed that it has been consistently held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of a judicial or ministerial function. Citing seven Australian cases, he continued at p. 11:

The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1 & 2 Philip & Mary c. 13; 2 & 3 Philip & Mary c. 10), they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial.

""With the establishment of an organised police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in The Indictable Offences Act 1848 (U.K.) (11 & 12 Vict, c.42), 'Sir John Jervis's Act', which provided for witnesses appearing before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his counsel.""

After an interesting and valuable historical review the judge said, at pp. 15-16:

""The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. A fortiori that must be the case when its functions are of an administrative character. In Reg. v. Forbes; Ex parte Bevan, Menzies J. pointed out that:

""Inherent jurisdiction"" is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as ""inherent jurisdiction"", which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have 'inherent jurisdiction'.""

Then, having emphasised the distinction between inherent jurisdiction and jurisdiction by implication, Dawson J. observed at p. 17:

""The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in s. 41 of the Justices Act. But the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial.""

Having referred to section 41 of the Justices Act, the learned judge then said at p. 18:

""There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform.""

It would, of course, be convenient (as well as correct, in my view) if the examining magistrates could not stay for abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates had erred in their exercise of discretion. Moreover, their decision would not bind the court of trial, if the Attorney General were to prefer a voluntary bill. Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

7.7 Duty to remedy problems with trial

Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try. (Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993))"

7.7.1 Courts should consider other procedural measures to prevent 'unfairness'

Courts should not use their inherent power to stay proceedings merely to discipline the prosecution or because the court has formed the view that the prosecution was unwise.

Please see Page 174 Crown Prosecution Service guidance

The burden of establishing that the bringing or continuation of criminal proceedings amounts to an abuse of the court's process is on the defendant. The standard of proof is the balance of probabilities: R v Telford Justices ex parte Badhan [1991] 2 Q.B. 78; R v Great Yarmouth Magistrates ex parte Thomas [1992] Crim. L.R. 116.Please see Page 174 Crown Prosecution Service guidance

In Crawley [2014] EWCA Crim 1028, the Court of Appeal clearly set out the scope of the two potential limbs that a stay for abuse of process can be brought under:

1. Where the court concludes that the accused can no longer receive a fair hearing - This focuses on the trial process itself;

2. Where it would be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system – This is where the Court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself. Please see Page 174 Crown Prosecution Service guidance

The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate. "There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform. Please see Page 139 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

7.8 Defendant's duty of candour and to provide proper reasons

The duty: A public authority defendant in judicial review proceedings has a duty "to co-operate and to make candid disclosure by way of affidavit of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged": Belize Alliance of Conservation NonGovernment Organisations v Department of the Environment [2004] UKPC 6 at §86. Put another way, the public authority must assist the court with full and accurate explanations of all facts relevant to the issue the court must decide: R (Quark Fishing Ltd) v SSFCA [2002] EWCA Civ 1409 at §50. *(Please see page 180)*

Lack of candour may allow the court to draw adverse inferences of fact. "[T]he court might simply decide that the [claimant] has made out a prima facie case and that, the authority having produced no sufficient answer, relief should be granted": Huddleston (cited above) at p.947. "If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the [defendant] upon points which remain obscure": Quark (cited above) at §50. *(Please see page 185)*

.....a public authority's objective should not be to win the case at all costs, but to assist the court in its role of ensuring the lawfulness of the decision under challenge, with a view to upholding the rule of law and improving standards in public administration. It must therefore fairly and fully disclose all relevant information, including that which is harmful to its own case. See R v Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941 at 945:

"This development [i.e. the remedy of judicial review and the evolution of a specialist administrative or public law court] has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.

…The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why. … Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands. Please see Page 180 D

The duty "endures from the beginning to the end of the proceedings": R (Bilal Mahmood) v SSHD [2014] UKUT 439 at §23. But when do "the proceedings" begin?

5. According to TSol's 2010 Guidance (§1.2), the duty applies as soon as the relevant body is aware that someone is likely to test a decision or action affecting them. It applies "to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance, witness statements and counsel's written and

oral submissions". It is an ongoing duty and must therefore be kept under review as the case progresses. (Please see Page 180 D)

A public authority must explain its decision-making process. Please see Page 180 D

25. Where a defendant fails to file evidence to explain its decision-making process and the reasoning underlying the decision, "[t]he basis for drawing adverse inferences of fact against the [Defendant] will be particularly strong" given the stringent duty of candour: R (Das) v SSHD [2014] EWCA Civ 45, [2014] 1 WLR 3538 at §80. Please see Page 180 D

7.9 The District Judge's decision was so unreasonable as to be unlawful

No reasonable Judge would commit the errors itemised above, and the resulting decision was so unreasonable as to be unlawful.

8 Documents referred to

8.1 2nd March 2018 First District Judge's refusal of first application for Summons for BOTH LIVERY AND FARES FRAUD

To: Mark Rostron <markgrostron@gmail.com>

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> 2 March 2018 at 13:16

Good afternoon

I have just received an email from one of our legal advisors to say that your application has been considered by a District Judge, who has made the following decision

In relation to the 2 applications to issue a summons by a private prosecutor namely Mark ROSTON:

1. The 'information' relating to Mike SMITH and Bridget PEPLOW has a number of difficulties.

a. The schedule of 29 allegations specify in each instance that the 'text' quoted from an historic council document contravenes multiple sections of the fraud act, namely sections 2, 3 and 4. This is clearly incorrect.

b. It is not clear in each instance how the 2 specified persons are said to be responsible for the alleged 'fraudulent' statements made.

c. Each of the 29 allegations does not specify any intention to make a gain by either Mike Smith or Bridget Peplow or to cause loss to another.

d. Therefore on the current information I am not satisfied that the schedule of allegations alleges valid criminal offences against either of the named individuals.

2. The 'information' relating to Justine FULLER, John MARTIN, Rajinder DEVANDRAN and Graham ELLWOOD also has a number of difficulties.

a. The schedule of 48 allegations specifies that 'text' purporting to be from an historic council document is misleading and therefore amounts to a criminal offence under the Fraud Act.

b. It is not clear how each of the named individuals are said to be responsible for the alleged 'fraudulent' or misleading statements.

c. Further it is not asserted that any of the named individuals have by such representations if they even made them] intended to make a gain for themselves or cause a loss to another.

d. It is alleged in a number of instances that 'omission' of certain information from the quoted document amounts to fraud. On the information provided I do not see how this can amount to a criminal offence.

e. Therefore on the current information I am not satisfied that the schedule of allegations discloses valid criminal offences against any of the named individuals.

In light of the Information that has been laid to date I would not issue a summons in either case.

8.2 14th March 2018 Request by Second District Judge for Police referral for BOTH LIVERY AND FARES FRAUD

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> 14 March 2018 at 16:34

To: Mark Rostron <markgrostron@gmail.com>

Good afternoon

The District Judge who has looked at your application has asked whether or not you have referred the allegations to the police for investigation, if not they would like to know the reasons why.

Kind Regards

8.3 7th April 2018 Refusal to issue Summons by Second District Judge for BOTH LIVERY AND FARES FRAUD

APPLICATION FOR THE ISSUE OF SUMMONS

MARK ROSTRON has applied for summonses to be issued against a number of persons associated with Guildford Borough Council.

The application is similar to a previous application for summons that was refused on the grounds that the charges were defective.

Having read the information and associated charges alleged I refuse to issue summonses.

REASONS

LIVERY ALLEGATIONS - JUSTINE FULLER [JF], JOHN MARTIN [JM] and RAJENDRA DEVANDRAN

[RD]

a. The proposed charged do not comply with Part 7 of the Criminal Procedure Rules

The information in respect of both JF and JM allege what purport to be 2 charges of Fraud contrary to Section 2 and Section 3, however the particulars also allege a conspiracy with others.

It is therefore unclear what precisely is being alleged. If it is said to be a conspiracy it is not stated who the others are, or when the conspiracy is alleged to have taken place.

If the allegations are 'Fraud' charges, they do not comply with the CPR Part 7 in that:

They do not adequately specify the precise nature of the offence alleged;

They do not give sufficient details of the date (or dates) of the offences;

They do not give sufficient details of the place of the offence;

b. It is not clear that the essential ingredients of the offence are made out relating to the 'misrepresentations'. The report referenced in the information and attached schedule is said to be a Guildford Borough Council document;

The status of the document is unknown. It appears to be a report from which extracts are taken which give opinions and explain reasons for coming to the conclusions that have been reached.

The intended audience for the document is unclear. It is not clear whether the purpose of the document was to influence a decision making process.

It is not clear from the 'information' how this document which contains opinions, reasons for those opinions, as well as policy aims, can be said to misrepresent fact or law, nor how the creation of this document will lead to an intentional loss for others.

Many of the purported misrepresentations are said to be 'untrue' on the basis of an opinion of Mr Rostron or the 'absence of evidence to the contrary'. This is unsatisfactory for the issue of criminal proceedings.

The omissions [numbered 31 to 48] are factors that Mr Rostron believes should have been in 'the document'. This is based upon his opinion. It is not clear how this would give rise to any alleged loss.

c. I am not satisfied that the information provided is sufficient to issue a summons given the lack of compliance with Part 7 CPR and the lack of prima facie elements of the offences.

FRAUD CHARGES – MIKE SMITH [MS] BRIDGET PEPLOW [BP] GRAHAM ELLWOOD [GE] JOHN MARTIN [JM] and JUSTINE FULLER [JF]

a. The proposed charged do not comply with Part 7 of the Criminal Procedure Rules

The information in respect of MS, BP, GE, JF and JM allege what purport to be charges of Fraud contrary to Section 2 and a schedule of omissions contrary to Section 3

The allegations under Section 2 include a Guildford Borough Council Executive Report, a Licensing Committee Report, and Summary Grounds for Contesting a claim in the High Court in response to allegations made by Mr Rostron. They refer to a schedule of allegations which appear to be statements taken from the various documents with a corresponding opinion why there are said to be misleading.

They are confused and do not follow the standard charging format;

They do not give sufficient details of the date (or dates) of the offences;

They do not give sufficient details of the place of the offence in respect of each allegation.

b. It is not clear that the essential ingredients of the offences are made out relating to the schedule of 'misrepresentations';

The status of the documents is unknown. They appear to be reports from which extracts are taken; they give opinions and explain reasons for coming to the conclusions that have been reached.

Many of the purported misrepresentations are said to be 'untrue' on the basis of Mr Rostron's' opinion.

The omissions [numbered 13, 18, and 27] are factors that Mr Rostron believes should have been in 'the documents'. This is based upon his opinion.

The information does not make it clear how such purported representations or omissions give rise to the loss as alleged or at all.

The purported charges are identical in respect of each person. It is unclear how each of the individuals made the representations which are attributed to them:

Graham ELLWOOD – the Lead Councillor.

Mike SMITH – the Licensing Team Leader

Bridget PEPLOW – a Lawyer employed by Guildford Borough Council

Justine FULLER – a 'Manager' employed by Guildford Borough Council

John MARTIN – Head of Health and Community Services of GBC.

I am not satisfied that the information provided is sufficient to issue a summons given the lack of compliance with Part 7 CPR and the lack of prima facie elements of the offences.

CHRISTOPHER JAMES

DJ(MC)

17th April 2018.

8.4 5th June 2018 Police letter refusing to prosecute for BOTH LIVERY AND FARES FRAUD

Police Reference: 45180039551

SURREY

Mr Mark Rostron
122D Heath Road
Twickenham
Richmond Upon Thames

TWI 4BW

POLICE

With you, making Surrey safer

5th June 2018

Dear Mr Rostron,

Following your initial report to Action Fraud, and subsequently passed to us in Surrey Police's Criminal Investigation Department (CID).

Thank you for taking the time to meet face to face with myself and

Investigating Officer Holbrook-King on the 3rd May, during which we discussed the criminal matters you raised concerning the previous Court cases brought against Guildford Borough Council (GBC), specifically the various points around taxi mileage and livery.

You subsequently provided the additional documentation I requested to be sent on for Police consideration.

During our meeting you elaborated on your allegations which were documented within your written submission.

These were under Sections 2, 3 and 4 of the Fraud Act, with:

48x points of allegation concerning the previous Livery Court cases.

28x points of allegation concerning the previous Fare Miles Court cases.

At the time of our meeting I explained my position that I did not necessarily believe the allegations being made were suitable or appropriate to be investigated by Police under the circumstances, however, I did advise that I would take additional advice and consideration from our legal team with regards to the matters for which you raised.

The matter has now been appropriately considered internally, and the decision remains in line with my original assessment that the matters are not appropriate or suitable for criminal investigation by the Police under the circumstances.

In coming to this decision the allegations have been carefully considered.

One of the elements of the offence's under the Fraud Act is the intention to make a gain or cause a loss to another, and gain and loss are defined as relating solely to money or property. It has been considered that the alleged loss is not "loss" for the purposes of the Fraud Act. This is considering that the alleged loss comprises the cost of the livery, and a reduction in fares which it is argued results in a lower income. The livery is a cost of the trade and a business expense of being a taxi driver; that there are expenses connected to a person's chosen occupation is to be expected and should be accepted. Equally, the rate table is a factor of being a taxi driver and relates solely to the profitability of the job. Neither is a dishonest attempt to extract money from taxi drivers, or to cause them to lose money.

GBC has a statutory power to set and vary maximum rates per mile. It is also permitted to set the terms of licencing, such as requiring taxis to be decorated with a livery.

The allegation you raise is specifically that the evidence on which CBC's policy relating to rates and livery was based contained untrue or misleading information and statements.

It is considered that the appropriate recourse for such a matter would be through a judicial review. It has been deemed that it is not the purpose of the Fraud Act, nor the remit of the Police, to review whether or not a public body's policy is reasonable or not, jurisdiction to perform such an exercise lies with the Court under the judicial review regime.

As part of the previous judicial review and other proceedings to challenge the GBC policy, the credibility of the evidence presented by GBC, and the representations made by CBC were considered by the Court.

If it is considered that inaccurate or misleading evidence was given to the Court during the proceedings, then that is contempt of Court, and the proper recourse is to the Court through the contempt of court regime.

In light of the above Surrey Police will not be formally recording a criminal investigation on Police systems. The matter will however remain recorded under the reference number I provide at the top of this letter.

I have no doubt you will be disappointed at the Police decision not to formally investigate the matters for which you have raised.

Should you disagree with this decision then you may be eligible to apply for the "Victim's Right to Review Procedure", details of which can be found on the Surrey Police Website under, Advice, Victims of Crime (www.surrey.police.uk)

Yours Sincerely,

Chris Potts

Police Sergeant

8.5 1st April 2020 Application for Summons re LIVERY FRAUD

APPLICATION FOR SUMMONS OR WARRANT FOR ARREST FOR ALLEGED OFFENCE (Criminal Procedure Rules, rule 7.2(6); section 1, Magistrates' Courts Act 1980)

This is an application by Mark Guy Rostron

for the court to issue a summons against the proposed defendants.

Applicant's address: 17 Lower Guildford Rd, Knaphill, Woking,Surrey, GU21 2EE

Email address: markgrostron@gmail.com

Phone: **N/A** Mobile: 07956 935886

Alleged offence of Fraud under the Fraud Act 2006 and the common law offence of Conspiracy to Defraud.

Date(s) of alleged offence(s): between the 1st January 2015 and the 28th March 2018

Proposed defendant 1

Name: Justine Fuller

Address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address (if known): Justine.fuller@guildford.gov.uk

Phone: 01483 01483 505050 Mobile: N/A

Proposed defendant 2

Name: Paul Spooner

Address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address (if known): rajinder.devandran@guildford.gov.uk

Phone: 01483 01483 505050 Mobile: N/A

Proposed defendant 3

Name: Graham Ellwood

Last known address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address not known

Phone: **Not known** Mobile: Not known

Proposed defendant 4

Name: John Martin

Last known address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address not known

Phone: **Not known** Mobile: Not known

Proposed defendant 5

Name: Bridget Peplow

Address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address (if known): bridget.peplow@guildford.gov.uk

Phone: 01483 01483 505050 Mobile: N/A

Proposed defendant 6

Name: Mike Smith

Address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address (if known): mike.smith@guildford.gov.uk

Phone: 01483 01483 505050 Mobile: N/A

1. Complete the box above and give the details required in the boxes below.[1]

2. Sign and date the completed form.

3. Send or deliver a copy of the completed form to the magistrates' court office.

Do not send this form to the proposed defendant unless the court tells you to do so.

[1] Forms for use with the Rules are at: www.justice.gov.uk/courts/procedure-rules/criminal/formspage.

The court may determine your application with or without a hearing and without receiving representations from the proposed defendant. The court will not usually arrange a hearing so it is important that the information you put in this form is complete and accurate.

(1) Consent to prosecute

Do you need consent to prosecute? ☐ **Yes** ☒ **No**

If yes, you must include with your application written evidence of that consent.

Some offences may not be prosecuted without the consent of the Attorney General, the Director of Public Prosecutions or another authority. The legislation that creates the offence will say whether such consent is required.

(2) Previous application(s)

Have you applied before for the issue of a summons or warrant in respect of any of the allegations you are making? ☒ **Yes** ☐ **No**

If yes, give details. Include the name of the court to which you applied, the date of the application and the name of the proposed defendant you gave that court if that was different to the name in this application.

15th January 2018 and 13th March 2018 at Guildford Magistrates Court

10th June 2019 to South London Magistrates Court (they referred me back to Guildford)

(3) Other proceedings

Has any other prosecutor ever brought a criminal case against the proposed defendant in respect of any of the allegations you are making? ☐ **Yes** ☒ **No**

(4) Details of the alleged offence(s)

CrimPR 7.3 requires that an allegation of an offence in an application for the issue of a summons or warrant must contain

(a) a statement of the offence that

(i) describes the offence in ordinary language,

Fraud Act 2006

At the Guildford Borough Council meeting of 9 December 2015, the accused Justine Fuller and Graham Ellwood made false statements (s2) or omissions (s3) that were designed to mislead the Applicant, Guildford Borough Council Councillors, the public of Guildford, Guildford taxi drivers and proprietors, and abused their positions (s4) in doing so. Those false statements and omissions and abuse of position resulted in the adoption and enforcement of an unjustified taxi license condition that they be required to be wrapped in a teal coloured plastic wrap, and that the fraud resulted in loss to the Applicant, other taxi proprietors and the general public.

Conspiracy to commit fraud under the Fraud Act 2006

The accused Paul Spooner, Graham Ellwood, John Martin, Justine Fuller, Mike Smith, and Brigit Peplow conspired together between January 2105 and January 2016 to commit the offences.

(ii) identifies any legislation that creates it;

These offences of fraud are created by the Fraud Act 2006, and the common law offence of Conspiracy to defraud.

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

The particulars as regards the charges under the Fraud Act 2006,are set out in the attached spreadsheet "Livery fraud charges Full Council Meeting v3".

The particulars of the conspiracy charges are that the accused Paul Spooner, Graham Ellwood, John Martin, Justine Fuller, Mike Smith, and Brigit Peplow between January 2015 and January 2016, by conspiracy, wrote, contributed to, approved or neglected to correct the fraudulent report to Guildford Borough Council at the meeting of 9 December 2015 and thereby committed the offences under the Fraud Act 2006 set out above.

(5) Summary of the circumstances

CrimPR 7.2(6) requires that an application for the issue of a summons or warrant for arrest must concisely outline the grounds for asserting that the proposed defendant has committed the alleged offence or offences. Summarise your grounds for alleging that the proposed defendant has committed the offence(s) for which you want the court to issue a summons or warrant. Give an indication of the evidence on which you will rely if the court agrees to do so.

The accused individually and in conspiracy with each other have made many false statements and failures to disclose (as set out in the attached schedule "Livery Fraud Charges against Guildford

Borough Council Officers" within the meaning of the Fraud Act 2006 and contrary to the criminal law of conspiracy to defraud, and they have been dishonest and abused their positions.

In general:

They lied about the reasons for imposing a license condition on Guildford taxis, that their taxis be clad in teal coloured livery for the public safety.

They lied about the costs and who would bear them.

They lied about their legal power to do so.

They imposed unlawful costs of livery on each taxi owner of between £1000 and £1500 approximately, and additional future costs for repair and replacement of the livery cladding. Further, a large proportion of the costs of livery were transferred to the fare paying public by means of inflated taxi fares.

They omitted information which showed the above.

They caused substantial legal costs for both parties to be paid by taxi drivers and the Complainant, and costs of lost time.

The many false statements and omissions by the accused set out in the attached demonstrate a pattern of criminal behaviour and conspiracy.

Those Accused listed above conspired from time to time in concert to carry out these fraudulent acts.

They abused their position in the above.

s2 Fraud by false representations set out in the attached spreadsheet, "Livery fraud charges against Guildford Borough Council officers". The defendants made false representations dishonestly knowing that the representations were or might be untrue or misleading with intent to make a gain for themselves or another, to cause loss to another or to expose another to risk of loss.

s3 Frauds by failing to disclose information set out in the attached spreadsheet, "Livery fraud charges Full Council Meeting v3". The defendants failed to disclose information to another person when they were under a legal duty to disclose that information, dishonestly intending, by that failure, to make a gain or cause a loss.

s4 Fraud by abuse of position set out in the attached spreadsheet, "Livery fraud charges against Guildford Borough Council officers". The accused occupied positions as Guildford Borough Councillor or Council Officers in which they were expected to safeguard, or not to act against, the financial interests of their licensees or the Courts, or the Public, abused that position dishonestly intending by that abuse to make a gain/cause a loss.

Conspiracy to defraud contrary to the criminal law by the accused for the false statements and omissions set out in the attached spreadsheet.

(6) Application for warrant

Complete this box only if you are applying for the court to issue a warrant for the defendant's arrest. Under s.1, Magistrates' Courts Act 1980 the court can issue a warrant for the defendant's arrest only where (a)(i) the offence to which the warrant relates can be, or must be, tried in the Crown Court, (ii) the offence is punishable with imprisonment, or (iii) the defendant's address is not sufficiently established for a summons to be served on him or her and (b) (in all cases) the Director of Public Prosecutions consents to the issue of the warrant.

(a) Conditions relating to the offence or the defendant. ***Tick as many boxes as apply.***

(i) the offence can be, or must be, tried in the Crown Court ☒

(ii) the offence is punishable with imprisonment ☒

(iii) the defendant's address is not sufficiently established for a summons to be served ☒

Guildford Borough Council have indicated that they will not provide the home addresses of the accused, so at the moment I have no home addresses for them. I have asked Guildford Borough Council for the address of John Martin, but they refused to provide it and I have had no reply from emails to the other accused apart from Graham Ellwood who said he passed my information to Guildford Borough Council.

Further, Guildford Borough Council say they will not respond till they hear from the Courts.

(b) The Director of Public Prosecutions consents to the issue of a warrant for the defendant's arrest

☐ **Yes** ☐ **No**

I have not applied to the DPP re issue of warrant but I do ask the Magistrates to issue them to all the Accused.

(7) Declaration. See Criminal Procedure Rules r.7.2(6), (7). You may be asked to make this declaration on oath.

To the best of my knowledge, information and belief:

(a) the allegations contained in this application are substantially true,

(b) the evidence on which I rely will be available at the trial, and will include:

documentary evidence of all the false statements made in Guildford Borough Council documents, including from official meetings and from those submitted to the High Court and Magistrates and Crown Court.

Independent inquiry CSE in Rotherham

Public reports pack 18032015 1900 Licensing Committee

Supplement AMENDED REPORT - Hackney Carriage and Private Hire Policy 18032015 1900 Licensing Committee

Public reports pack 18112015 1900 Licensing Committee

Public reports pack 09122015 1900 Full Council

TAG_minutes_January_2016

Item 05 1 - Review of Hackney Carriage Fares - App 1 - Taxi Fares Procedure

Hackney Carriage and Private Hire Policy March 2016

Press reports

Also, published statements by Councillor Ellwood and letters and emails from the Council Officers. Also a witness from the Surrey disabled group will be called re the lie about the choice of livery colour.

(c) the details that I have given in boxes (2) and (3) are true, and

(d) this application together with the "Chronology of Livery Fraud Charges" discloses all the information that is material to what the court must decide.

Signed

1st April 2020

Decision – this record must be kept by the court

I considered this application today [at] [without] a hearing.

[The applicant confirmed on oath or affirmation the declaration in box (7).]

[The applicant gave me additional information [the essence of which was:]][2]

[The proposed defendant gave me additional information [the essence of which was:]][3]

On the basis of the information contained in this application [as supplemented by the additional information described above]:

(a) I [am] [am not] satisfied that the requirements for the issue of a summons are met

[(b) I [am] [am not] satisfied that the additional requirements for the issue of a warrant are met][4]

and I [issue] [refuse to issue] a [summons] [warrant] accordingly.

My reasons are these: The court should give a brief indication of its conclusions.

[2] Include a brief summary of any information unless it is recorded elsewhere.

[3] Include a brief summary of any information unless it is recorded elsewhere.

[4] Complete only if the application includes an application for the issue of a warrant.

Signed: ……

Name: …… [Justice of the Peace]

[District Judge (Magistrates' Court)]

[Justices' Clerk / assistant clerk]

Date: ……

8.6 7th May 2020 First reply from DJ saying new information provided for ONLY LIVERY FRAUD

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> 7 May 2020 at 10:47

To: "markgrostron@gmail.com" <markgrostron@gmail.com>

Good morning,

Your documents have been passed on to the District Judge please see below for his response.

Dear Mr Rostron,

Re: your application for summonses to be issued for a private prosecution

You have provided new information in support of your application, as was requested.

You have itemised comments upon DJ James' reasons for refusal to issue, given in April 2018.

In your schedule of allegations you refer to 52 separate allegations.

You assert that these amount to false, fraudulent and/or misleading representations contrary to sections 2 and/or 3 of the Fraud Act 2006.

As these are all allegations of a similar type arising out of the same matter of complaint it would not be appropriate to issue a summons for each and every one of the allegations.

Therefore I would like you to identify your strongest 6 (say) allegations for me to rule upon.

You must also identify exactly which defendant is to be summonsed for each allegation.

Please advise.

Once you have done that I am going to have all of your documents sent to the would-be defendants for their information and comment so that I can make an informed decision about whether some or all of your summonses should be issued.

The putative defendants will have 21 days in which to respond.

I will then decide what should happen next.

I may make a decision about whether to issue on the papers - or it may be that I will require all parties to attend a court hearing.

You should be aware that there may be adverse costs consequences for you if your application for summons is unsuccessful. If in any doubt about that I would refer you to the case of *R (Haigh) v City of Westminster Magistrates' Court* [2017] EWHC 232, a case in which substantial costs were awarded against a would -be private prosecutor whose application failed.

Whilst I will rule upon your application if you wish to pursue it, it is recommended that you take independent legal advice before pursuing your application for summons any further.

DJ(MC) Wattam

Surrey courts

Kind regards

Surrey Courts Admin Team

Surrey Magistrates Court | HMCTS | Mary Road | Guildford | GU1 4AS

8.7 12th May 2020 Applicants reply to DJ setting out suggestions as to process for ONLY LIVERY FRAUD

Mark Rostron <markgrostron@gmail.com> 12 May 2020 at 20:32

To: SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk>

For the attention of District Judge Wattam

Dear Sir

I understand that in order to save time the Court may not wish to issue a summons for all 52 items.

Could I suggest that the 52 allegations as they are, be put to the defendants for their comments in a sworn reply, asking which they say is untrue, and a summary of their reasons and any evidence they will rely on?

They may concede all or some of the items and I could then propose 6 of the strongest remaining allegations.

That way all the allegations can be put to them and the Court will not have to deal with anything excessive at any hearings.

I have read reports of the Haigh case, and I understand that he was in a foreign prison, and the majority of the offence may have been committed abroad and that he did not apply to the UK police before commencing a private prosecution. None of those circumstances apply in this case.

Yours truly

Mark Rostron

8.8 26th May 2020 District Judge's asks Defendants for their views and observations for ONLY LIVERY FRAUD

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> 4 June 2020 at 11:35

To: Mark Rostron <markgrostron@gmail.com>

Good morning,

The District Judge has directed that the putative defendants be notified of the application in order to obtain their views and observations, and letters were sent out to them on 26th May 2020.

The Judge has requested that any response to these letters should be received at the court by 15th June 2020.

Thereafter the Judge will decide whether to issue some or all of the summons, refuse the application or whether to require parties to attend court for oral submissions to be made.

Kind regards

Claire Martin

Surrey Courts Admin Team

Surrey Magistrates Court | HMCTS | Mary Road | Guildford | GU1 4AS

Phone: 01483 405300

8.9 3rd June 2020 Letter from Guildford Borough Council in reply to District Judge for LIVERY FRAUD

3 June 2020

Dear Sirs

Mr Mark Rostron – Application for private prosecution summons

Thank you for your letter of 26 May 2020.

The application for a summons appears to be substantially a repeat of the application submitted by Mr Rostron in 2018, although there is a difference in the named Defendants and some of the allegations.

I attach an email from Guildford Magistrates' Court dated 2 March 2018 setting out the District Judge's reasons for refusing the application at that stage. The Council has heard nothing further since that time and assumes that Mr Rostron did not seek to challenge the decision. The Council believes the decision was correct for the reasons given by the District Judge. The current allegations relate to the same report (a copy of which is attached for information) and, in the Council's view, the same reasons apply to the current application.

The roles of the named proposed defendants are as follows:

Justine Fuller – Regulatory Services Manager.

Paul Spooner – Councillor. In 2015 he was Leader of the Council.

Graham Ellwood. In 2015 he was Lead Councillor for Licensing. He is no longer a Guildford Borough Councillor.

John Martin – In 2015 he was Head of Health and Community Care. He is now retired.

Bridget Peplow – Senior Specialist Lawyer (Employment & Litigation)

Mike Smith – Licensing Team Leader.

The Council's comments apply in respect of each proposed Defendant.

By way of background, this matter goes back to the introduction of a taxi licensing policy required all hackney carriages to be liveried. The Council is well aware that Mr Rostron was strongly opposed to the policy and has had ongoing correspondence on this point with him since the policy was initially proposed. Following the introduction of the policy on 9 December 2015, Mr Rostron chose not to challenge the policy by judicial review (despite indicating an intention to do so) and the policy has remained in force. The policy has since been challenged in a number of Magistrates' Courts appeals against the imposition of the livery condition on hackney carriage vehicle licences. All these appeals (one of which was taken as far as the Court of Appeal) have been decided in the Council's favour.

As a result of the persistent correspondence from Mr Rostron (including frequent and wide ranging claims of fraud and numerous emails copied to large numbers of officers and Councillors) Mr Rostron was notified by the Council that he would be considered a vexatious complainant and his means of communication with the Council were restricted. These restrictions were most recently re-imposed on 18 October 2019.

Yours faithfully

8.10 11th June 2020 Decision to refuse to issue Summons District Judge for ONLY LIVERY FRAUD

HM Courts & Tribunals Service

Surrey Magistrates' Courts

Business Centre

Correspondence address:

PO Box 36

The Law Courts

Mary Road

GUILDFORD

Surrey GU1 4AS

DX 97865 Guildford 5

T 01483 405300

E su-guildfordmcadmin @justice.gov.uk

www.justice.gov.uk

Mark Rostron

Information dated 1st April 2020 requesting summons to be issued for a private prosecution

Notice of Mr Rostron's revised application with supporting documents were sent to the 7 putative defendants c/o their last known address at Guildford Borough Council for information and comment.

Mr Rostron was so advised and this was done as it was necessary to give the 7 opportunity to make representation before I made an informed decision as to whether all or some of these summonses should be issued as requested. Any reply was required by 15/6/20.

On 3/6/20 a written response to the information and applications for summons was received from Sarah White, legal lead specialist at the Borough Council. This response was stated to be on behalf of each proposed defendant.

My power to issue a summons is discretionary and governed by s.1 Magistrates' Courts Act 1980.

I have reviewed leading cases concerning the exercise of this discretion, including R v West London Justices ex parte Klahn 1979] 1 WLR 933 and Johnson v Westminster magistrates' court 2019] EWHC 1709.

I am not required to conduct a hearing to determine the matter and on this occasion am content to deal with it on the basis of papers received.

Assessment of the information

The allegations of fraud and conspiracy refer to a decision of the Guildford BC made in 2015 to adopt a taxi licensing policy that all hackney carriages in Guildford be liveried.

I have had sight of the council report dated 9/12/15 that recommended adoption of the policy.

It is clear that Mr Rostron's various allegations of fraud and criminal conspiracy against officers of the council are substantially the same as those made in applications for summons made by him on at least 3 occasions:

By application dated 15/1/18 – application for summons refused by a District Judge (mc) in Guildford (at first sight), with written reasons given on 2/3/18;

On 13/3/18 – application for summons refused by District Judge (mc) James with written reasons given by the judge on 17/4/18;

18/6/18 – Bromley magistrates' court declined to issue a summons upon application by Mr Rostron.

Although not determinative of the matter I note that the police have declined to prosecute anyone as a result of Mr Rostron's complaint.

Decision

On reflection, and noting that Mr Rostron's information (although revised) is substantially the same, I am not minded to reverse the previous decisions made by other District Judges (mc) not to issue summons. That would be inappropriate. I do not sit in an appellate capacity regarding decisions of other District Judges.

It is apparent that Mr Rostron persists in his attempts to litigate the same decision of officers of Guildford Borough Council in the criminal courts. There is nothing new in his information requiring me to revisit the judicial decisions already made not to issue.

In passing I would say that the proper remedy might have been for Mr Rostron to apply for judicial review of the council's original decision - by reason of illegality, irrationality or procedural impropriety. Clearly, he has chosen not to do that.

His application for summons is refused – again.

District Judge (mc) Wattam 11/6/20

8.11 4th July 2020 Application to state case re LIVERY FRAUD

APPLICATION TO MAGISTRATES' COURT OR CROWN COURT TO STATE A CASE FOR AN APPEAL TO THE HIGH COURT

(Criminal Procedure Rules, rule 35.2)

Case details

Name of defendants: Justine Fuller, Paul Spooner, Graham Ellwood, John Martin, Graham Ellwood, Mike Smith, and Brigit Peplow

Court: Guildford Magistrates Court

Case reference number: None

Charge(s):

1 **Fraud Act 2006**

At the Guildford Borough Council meeting of 9 December 2015, the accused Justine Fuller and Graham Ellwood made false statements (s2) or omissions (s3) that were designed to mislead the Applicant, Guildford Borough Council Councillors, the public of Guildford, Guildford taxi drivers and proprietors, and abused their positions (s4) in doing so. Those false statements and omissions and abuse of position resulted in the adoption and enforcement of an unjustified taxi license condition that they be required to be wrapped in a teal coloured plastic wrap, and that the fraud resulted in loss to the Applicant, other taxi proprietors and the general public.

2 **Conspiracy to commit fraud under the Fraud Act 2006**

The accused Paul Spooner, Graham Ellwood, John Martin, Justine Fuller, Mike Smith, and Brigit Peplow conspired together between January 2105 and January 2016 to commit the offences.

These offences of fraud are created by the Fraud Act 2006, and the common law offence of Conspiracy to defraud.

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

The particulars as regards the charges under the Fraud Act 2006, are set out in the attached spreadsheet "Livery fraud charges Full Council Meeting v3".

The particulars of the conspiracy charges are that the accused Paul Spooner, Graham Ellwood, John Martin, Justine Fuller, Mike Smith, and Brigit Peplow between January 2015 and January 2016, by conspiracy, wrote, contributed to, approved or neglected to correct the fraudulent report to Guildford Borough Council at the meeting of 9 December 2015 and thereby committed the offences under the Fraud Act 2006 set out above.

This is an application by Mark Guy Rostron, the prosecutor, for the court to state a case for the opinion of the High Court on an appeal on a question of law or jurisdiction.

Use this form ONLY for an application to the court to state a case for the opinion of the High Court on a question of law or jurisdiction, under Criminal Procedure Rule 35.2. There are different forms for appealing from a magistrates' court to the Crown Court under Criminal Procedure Rules Part 34, or from the Crown Court to the Court of Appeal under Criminal Procedure Rules Part 39.

1. Complete the boxes above and give the details required in the boxes below. If you use an electronic version of this form, the boxes will expand[5]. If you use a paper version and need more space, you may attach extra sheets.

2. Sign and date the completed form.

3. Send a copy of the completed form to:

(a) the court, and

(b) each other party to the case.

You must send this form so as to reach the recipients **not more than 21 days after the decision about which you want to appeal to the High Court**. If that decision was by a magistrates' court, **the court has no power to extend that time limit**.

[5] Forms for use with the Rules are at: http://www.justice.gov.uk/courts/procedure-rules/criminal/formspage.

A party who wants to make representations about this application must serve those representations under Criminal Procedure Rule 35.2(3) **not more than 14 days after service of this application**.

1) Decision under appeal. Give brief details of the decision about which you want to appeal to the High Court (including the date of that decision).

On reflection and noting that Mr Rostron's information (although revised) is substantially the same, I am not minded to reverse the previous decisions made by other District Judges (mc) not to issue summons. That would be inappropriate. I do not sit in an appellate capacity regarding decisions of other District Judges.

It is apparent that Mr Rostron persists in his attempts to litigate the same decision of officers of Guildford Borough Council in the criminal courts. There is nothing new in his information requiring me to revisit the judicial decisions already made not to issue.

In passing I would say that the proper remedy might have been for Mr Rostron to apply for judicial review of the council's original decision - by reason of illegality, irrationality, or procedural impropriety. Clearly, he has chosen not to do that.

His application for summons is refused – again.

District Judge (mc) Wattam 11/6/20

2) Question(s) for the High Court. What question(s) of law or jurisdiction do you want the court to state for the

opinion of the High Court?

1	Was the Judge wrong in law to refuse the application for Summons, when the requirements set out by the Magistrates Court Act and High Court precedent were met?
2	Did the Judge have proper reason in Law to refuse the application for Summons?
3	Was the Judge wrong in Law to decide complex or novel matters of Law by his own authority, rather than referring them to the Crown Court?
4	Was the Judge wrong in Law to consider reasons for refusal of the application that were outside those set out in the Magistrates Court Act and other precedent Law?
5	Was the Judge wrong in law to decide that to issue a Summons based on a new Information would be a reversal of previous decisions made on different applications, with different format?
6	Was the Judge wrong in law to find that he was being asked to act as an appellate Judge on previous refusals, when considering a renewed information correctly amended on the prompting of previous Judges?
7	Was the Judge wrong in law to find that this application was an attempt to litigate the decision of Guildford Borough Council Officers?
8	Was the Judge wrong in law and perverse to find that there was nothing new in this Information, when he had previously stated that the requirement of the previous Judge had been met with new information?
9	Was the Judge wrong in Law to invite the accused to give their observations, without stating what the exceptional circumstances were that warranted such a request?
10	Was the Judge wrong in Law to find that the proper remedy for fraud, which by its nature is a hidden crime, is Judicial Review?

11	Was the Judge wrong in Law to find that the proper remedy for fraud, which by its nature is a hidden crime, is Judicial Review?
12	Was the Judge wrong in Law to decide that persons accused of fraud can avoid being Summonsed for fraud if there has been some other legal proceedings between the parties, not about fraud?
13	Was the judge wrong in law to refuse to continue the proceeding when he had no evidence that the offences alleged had not occurred?
14	Was the Judge wrong in law to accept a response on behalf of the accused which contained no evidence, and which was not made on oath by each of the accused?
15	Was the Judge wrong in law to find that he had discretion outside that given him by Act of Parliament or the Common Law, at this pretrial stage in this case?
16	Was the Judge's supposed authority exercised properly in law?
17	Was the Judge wrong in law to dismiss the application without any sworn denial of the charges by the accused?
18	Was the Judge wrong in law to find that the allegations of fraud referred to a Guildford BC decision, when the information provided to him refers to fraudulent statements by Council Officers made in an official Council report?
19	Was the Judge wrong in law to consider unspecified content in a council report as grounds for dismissing an information regarding fraud?
20	Was the Judge wrong in law to consider errors in the format of the previous informations to be grounds for refusal to issue summons after this Information?
21	Was the Judge wrong in law not to consider the reasons for the refusal of previous applications, or to consider that the criticisms of those Judges had been remedied by the subsequent application?
22	Was the Judge wrong in Law not to consider the reasons for the Court's refusal of previous application, or not to consider that the criticisms of those Judges had been remedied by the subsequent application?
23	Was the Judge wrong in law to not consider the reason that Bromley Magistrates declined to issue a Summons?
24	Was the Judge wrong in law not to consider that the reasons for the Police refusal in that application?
25	Was the Judge wrong in law not to consider that the reasons for the previous applications refusals by the Magistrates Courts were not because of the substance?
26	Was the Judge wrong in Law to accept without any sworn evidence, the Defendants assertion that any conclusive litigation of the livery decision of officers of Guildford Borough Council in the courts took place?
27	Was the judge wrong in law to consider irrelevant facts?
28	Was the Judge wrong in Law to notify the Accused in the way he did?

29	Was the Judge wrong in Law to accept the assertion by Guildford Borough Council that the reasons for the refusal of previous applications could be applied to this one?
30	Was the Judge wrong in Law to accept Guildford Borough Council's reply in respect of all the proposed Defendants?
31	Was the Judge wrong in Law to accept the unsworn assertion made by Sarah White that previous legal action was about the Council's Policy?
32	Was the Judge wrong in Law to accept the unsworn assertion made by Sarah White that the applicant was vexatious when the evidence is that the Council have refused to understand or deal properly with serious allegations?
33	Was the Judge wrong in Law to accept that Sarah White had any lawful standing to make unsworn representations on behalf of the accused?

3) Grounds of appeal. Explain briefly why you think the decision against which you want to appeal was wro

and how that decision depended on the question(s) specified in box 2 above.

1	The Judge did not explain the grounds under which he had Statutory or other Judicial authority to refuse to issue the Summons. The Judge did not follow a relevant legal test. Particularly the requirement that "the magistrate ought to issue the summons, unless there are compelling reasons not to do so."
2	The Judge stated that "My power to issue a summons is discretionary and governed by s.1 Magistrates' Courts Act 1980. I have reviewed leading cases concerning the exercise of this discretion, including R v West London Justices ex parte Klahn 1979] 1 WLR 933 and Johnson v Westminster magistrates' court 2019] EWHC 1709." But none of the apparent reasons given for the Judge's decision to refuse, refer to any particular Statutory or Common Law authority. The Judge merely refers to some parts of the general law, without specifying or applying the particular legal authority he relies on. The Judge does not refer to a compelling reason not to issue the Summons.

3	Legal Precedent is that complex or novel matters should be referred to the Crown or High Court and not decided at preliminary viewing of the papers in the Magistrates Court. The Judge decided to decide contrary to the Law.
4	Should the Magistrate decide complex matters at a sitting to determine application for Summons. Precedent is that if legal criteria are met the Summons should be issued as set out in Bennett and affirmed in the High Court Leeds Case, which suggested that litigation must have been to determine exactly the same question.
5	When the Judge decided, "I am not minded to reverse the previous decisions made by other District Judges (mc) not to issue summons. That would be inappropriate," he did so without any legal authority.
6	When he ruled "I do not sit in an appellate capacity regarding decisions of other District Judges", he did so without any legal authority.
7	When he found that "It is apparent that Mr Rostron persists in his attempts to litigate the same decision of officers of Guildford Borough Council in the criminal courts." The Judge was wrong in Law, and contrary to precedent High Court case Law because the precedent is that Prosecutors are allowed to prosecute cases where the exact point in question has not been otherwise decided.
8	In May 2020 the Judge wrote: "<u>You have provided new information in support of your application, as was requested</u>. You have itemised comments upon DJ James' reasons for refusal to issue, given in April 2018." In June 2020 the Judge wrote: "<u>There is nothing new in his information requiring me to revisit the judicial decisions already made not to issue</u>. "The Judge's finding of fact that there was nothing new in this Information, was entirely contrary to the evidence and his own previous finding, when he had previously stated that the earlier requirements of the previous Judges had been met in the current application by new information.
9	The Judge invited the Accused to provide "Any written observations as to whether it would be appropriate to issue the summons requested should be received in writing at this court by 15th June 2020." But ex Parte Klahn said that while "The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons. There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet; no charge has been made. A proposed defendant has no locus standi and no right at this stage to be heard. Whilst it is conceivable that a magistrate might seek information from him in exceptional circumstances it must be entirely within the discretion of the magistrate whether to do so." No exceptional circumstances were cited by the Judge. In R v West London Magistrates, the Court held that there was "no obligation on the magistrate to make enquiries, but he may do so if he thinks it necessary". But the Judge in refusing the application for Summons did not specify any necessity for the enquiry of the Defendants. The Judge simply gave them an opportunity to state their objections outside the Statutory framework set out in the Magistrates Court Act.

10	The Judge wrote that "In passing I would say that the proper remedy might have been for Mr Rostron to apply for judicial review of the council's original decision - by reason of illegality, irrationality or procedural impropriety. Clearly, he has chosen not to do that. "The Judge had no lawful authority for his proposition that the remedy for fraud is Judicial Review.
11	The Judge wrote that "In passing I would say that the proper remedy might have been for Mr Rostron to apply for judicial review of the council's original decision - by reason of illegality, irrationality or procedural impropriety. Clearly, he has chosen not to do that. "The Prosecutor was advised by a Barrister not to pursue Judicial Review, as he thought that the Council had made their Policy Judicial Review proof. Unfortunately, neither the Barrister nor the Prosecutor knew the extent of the fraud by the Accused, at that stage.
12	The Judge wrote that "In passing I would say that the proper remedy might have been for Mr Rostron to apply for judicial review of the council's original decision - by reason of illegality, irrationality or procedural impropriety. Clearly, he has chosen not to do that." The Judge had no lawful authority for his proposition that a failure to Judicially Review a fraudulent decision protects the accused from a prosecution for fraud under the Criminal Law.
13	Where there is prima facie evidence that a Criminal offence has occurred, it is the duty of the Magistrate to issue a Summons. The duty or authority of the Magistrates to decide whether or not to issue a Summons is set out in the parameters provide by the Magistrates Court Act and Case Law. The decision made did not fall within the ambit of the Magistrates Court Act properly construed or the precedent Case Law.
14	Mr Rostron was so advised, and this was done as it was necessary to give the 7 opportunity to make representation before I made an informed decision as to whether all or some of these summonses should be issued as requested. Any reply was required by 15/6/20. On 3/6/20 a written response to the information and applications for summons was received from Sarah White, legal lead specialist at the Borough Council. This response was stated to be on behalf of each proposed defendant
15	The Judge said, "I have reviewed leading cases concerning the exercise of this discretion, including R v West London Justices ex parte Klahn 1979] 1 WLR 933 and Johnson v Westminster magistrates' court 2019] EWHC 1709." But he did not identify the point he relied on.
16	The Judge said, "I have reviewed leading cases concerning the exercise of this discretion, including R v West London Justices ex parte Klahn 1979] 1 WLR 933 and Johnson v Westminster magistrates' court 2019] EWHC 1709." But if had authority he did not say why he applied it.
17	The Judge said, "I am not required to conduct a hearing to determine the matter and on this occasion am content to deal with it on the basis of papers received." But the accused did not deny the charges.
18	The Judge said, "The allegations of fraud and conspiracy refer to a decision of the Guildford BC made in 2015 to adopt a taxi licensing policy that all hackney carriages in Guildford be liveried." But there is no evidence to support the Judge's finding of fact

19	I have had sight of the council report dated 9/12/15 that recommended adoption of the policy
20	Authority to refuse is limited to the content of the current application.
21	By application dated 15/1/18 – application for summons refused by a District Judge (mc) in Guildford (at first sight), with written reasons given on 2/3/18;
22	The Judge said "On 13/3/18 – application for summons refused by District Judge (mc) James with written reasons given by the judge on 17/4/18;"
23	The Judge said "18/6/18 – Bromley magistrates' court declined to issue a summons upon application by Mr Rostron." But Bromley had bever been asked. That application to West London Magistrates, in the hope of getting an impartial decision. The application was for no apparent reason redirected to Bromley who simply suggested it be presented to Guildford.
24	The Judge said, "Although not determinative of the matter I note that the police have declined to prosecute anyone as a result of Mr Rostron's complaint."
25	The Judge failed to make a proper finding of fact.
26	The decision appealed to the Magistrates Court was about a licence condition under s47 of the Local Government Miscellaneous Provisions Act 1976, not about the decision of the Officers.
27	The number of applications for summons is not mentioned in the Act as a reason for disallowing an application. The facts found do not fall within the ambit of the Magistrates Court Act or the legal precedent properly construed.
28	The Court said, "District Judge Wattam has directed that the putative defendants be notified of this application." But there is no evidence that there were any exceptional reasons for this decision, as required by legal precedent, and the Judge did not have the authority to do so.
29	Guildford Borough Council wrote, "I attach an email from Guildford Magistrates' Court dated 2 March 2018 setting out the District Judge's reasons for refusing the application at that stage. The Council has heard nothing further since that time and assumes that Mr Rostron did not seek to challenge the decision. The Council believes the decision was correct for the reasons given by the District Judge. The current allegations relate to the same report (a copy of which is attached for information) and, in the Council's view, the same reasons apply to the current application." But the reasons given for refusal were different each time. And those reasons were dealt with in the fresh applications as accepted by the Judge.
30	Sarah White wrote that "The Council's comments apply in respect of each proposed Defendant." But there is no evidence that the Accused have agreed to Ms White's writing on their behalf, or that the Council has the authority to do so. Some of the Accused have no current relationship with Guildford Borough Council, so there is no reason for her to reply on behalf of Guildford Borough Council

31	Sarah White wrote, "The policy has since been challenged in a number of Magistrates' Courts appeals against the imposition of the livery condition on hackney carriage vehicle licences. All these appeals (one of which was taken as far as the Court of Appeal) have been decided in the Council's favour." But the appeal was not against the policy, it was against a licence condition under s47 of the Local Government Miscellaneous Provisions Act 1976, and was refused because the Counsel for Guildford Borough Council persuaded the Magistrates Court that an appeal against a licence condition was the same as an appeal against the policy of Guildford Borough Council.
32	Sarah White wrote that, "As a result of the persistent correspondence from Mr Rostron (including frequent and wide ranging claims of fraud and numerous emails copied to large numbers of officers and Councillors) Mr Rostron was notified by the Council that he would be considered a vexatious complainant and his means of communication with the Council were restricted. These restrictions were most recently re-imposed on 18 October 2019." But the correspondence referred to was generally in connection with allegations of fraud which have not been denied by the Council, and the Council has failed to implement its own policy on investigations of Criminal conduct by Councillors. Indeed it cannot do so, even though its Constitution mandates it, because their draft "Police Reporting Protocol" has never been adopted.
33	Sarah White wrote, "The Council's comments apply in respect of each proposed Defendant." But there is no evidence that the Accused have agreed to Ms White's writing on their behalf, and as some of the Accused have no current relationship with Guildford Borough Council, there is no reason for her to do so on behalf of Guildford Borough Council. And she has no standing with this Court.

4) Other applications. I am also applying for:

☐ **an extension of time for asking the court to state a case for the High Court.**

You can ONLY apply for an extension of the 21 day time limit if this is an application to the Crown Court.

☐ **pending my appeal, the suspension of a disqualification.**

For example, a disqualification from driving. You can ONLY apply for the suspension of a disqualification which the court imposed in this case. ☐ **pending my appeal, bail**.

You can only apply for bail pending appeal if the court sentenced you to imprisonment or detention.

Give reasons for any of these applications you are making:

Signed[6]

Mark Rostron **prosecutor**

Date: 4th July 2020

8.12 7th July 2020 Application for Summons re FARES FRAUD

APPLICATION FOR SUMMONS OR WARRANT FOR ARREST
FOR ALLEGED OFFENCE
(Criminal Procedure Rules, rule 7.2(6); section 1, Magistrates' Courts Act 1980)

This is an application by Mark Guy Rostron for the court to issue a summons against the proposed defendants.

Applicant's address: 17 Lower Guildford Rd, Knaphill, Woking, Surrey, GU21 2EE

Email address: markgrostron@gmail.com

Phone: **N/A** Mobile: 07956 935886

Alleged offence of Fraud and Conspiracy to commit fraud

Date(s) of alleged offence(s): between the 1st January 2015 and the 31st December 2018

Proposed defendant 1

Name: Mike Smith

Address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address (if known): mike.smith@guildford.gov.uk

Phone: 01483 505050 Mobile: N/A

Proposed defendant 2

Name: Graham Ellwood

Last known address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address not known

Phone: **Not known** Mobile: Not known

Proposed defendant 3

Name: John Martin

Last known address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address not known

Phone: **Not known** Mobile: Not known

Proposed defendant 4

Name: Justine Fuller

Address: Guildford Borough Council, Millmead House, Millmead, Guildford, Surrey GU2 4BB

Email address (if known): Justine.fuller@guildford.gov.uk

Phone: 01483 505050 Mobile: N/A

1. Complete the box above and give the details required in the boxes below.[7]
2. Sign and date the completed form.
3. Send or deliver a copy of the completed form to the magistrates' court office.

Do not send this form to the proposed defendant unless the court tells you to do so.

The court may determine your application with or without a hearing and without receiving representations from the proposed defendant. The court will not usually arrange a hearing, so it is important that the information you put in this form is complete and accurate.

(1) Consent to prosecute

Do you need consent to prosecute? ☐ Yes ☒ No

If yes, you must include with your application written evidence of that consent.

Some offences may not be prosecuted without the consent of the Attorney General, the Director of Public Prosecutions, or another authority. The legislation that creates the offence will say whether such consent is required.

(2) Previous application(s)

Have you applied before for the issue of a summons or warrant in respect of any of the allegations you are making? ☒ Yes ☐ No

If yes, give details. Include the name of the court to which you applied, the date of the application and the name of the proposed defendant you gave that court if that was different to the name in this application.

15th January 2018 and 13th March 2018 at Guildford Magistrates Court 10th June 2019 to London Magistrates Court

[7] Forms for use with the Rules are at: www.justice.gov.uk/courts/procedure-rules/criminal/formspage.

(3) Other proceedings

Has any other prosecutor ever brought a criminal case against the proposed defendant in respect of any of the allegations you are making? ☐ No ☒ Yes

(4) Details of the alleged offence(s)

CrimPR 7.3 requires that an allegation of an offence in an application for the issue of a summons or warrant must contain

(a) a statement of the offence that

(I) describes the offence in ordinary language,

The offences are that over the specified period of time the accused jointly and severally made or conspired to make false statements or omissions in the Council Report to the Licensing Committee dated 14th September 2016, and report to the Executive Report dated 27th September 2016, that were designed to mislead the Applicant, Guildford Borough Council Councillors, the public of Guildford, Guildford taxi drivers and proprietors, and abused their positions in doing so. Those false statements resulted in the adoption and enforcement of an unlawful hackney carriage fare chart, and that the fraud resulted in loss to the Applicant, other taxi proprietors.

(ii) identifies any legislation that creates it;

These offences of fraud are created by the Fraud Act 2006 and the Common Law offence of conspiracy to commit fraud.

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

The particulars as regards the charges under the Fraud Act 2006 are set out in the attached spreadsheet "Fares Fraud Charges July 2020" lines 1 to 21 containing details of the false statements or omissions.

The particulars of the conspiracy charges are that the accused Graham Ellwood, John Martin, Justine Fuller, and Mike Smith, between January 2016 and January 2017, by conspiracy, wrote, contributed to, approved or neglected to correct the fraudulent reports to the Licensing Committee dated 14th

September 2016, and the Council Executive at the meeting of 27th September 2016, and thereby committed the offences under the Fraud Act 2006 set out above.

(5) Summary of the circumstances

CrimPR 7.2(6) requires that an application for the issue of a summons or warrant for arrest must concisely outline the grounds for asserting that the proposed defendant has committed the alleged offence or offences. Summarise your grounds for alleging that the proposed defendant has committed the offence(s) for which you want the court to issue a summons or warrant. Give an indication of the evidence on which you will rely if the court agrees to do so.

In general:

They lied about the authors authority to make the reports.

They lied about the source of the method to calculate fares.

They lied about reliability of the data used.

They made untrue claims set out in the attached spreadsheet.

They omitted or misrepresented information set out in the attached spreadsheet, that was unfavourable to their objective.

The many false statements and omissions by the accused set out in the attached demonstrate a pattern of criminal behaviour and conspiracy.

They abused their position as Officers and Councillor of Guildford Borough Council in the above acts of fraud.

They caused the creation of a fare chart that did not comply with their stated policy objective in recompensing Guildford taxi drivers and caused them and the applicant loss.

The accused contrary to the Common Law, individually and in conspiracy with each other have made many false statements and failed to disclose information within the meaning of s2, and s3 of the Fraud Act 2006, and they have been dishonest and abused their positions, contrary to s4 Fraud Act .

s2 Fraud by false representations the false statements set out in the attached spreadsheet lines1 to 17, "Fares Fraud Charges July 2020". The defendants made false representations dishonestly knowing that the representations were or might be untrue or misleading with intent to make a gain for themselves or another, to cause loss to another or to expose another to risk of loss.

s3 Frauds by failing to disclose information, the omissions set out in the attached spreadsheet, lines 18 to 21, "Fares Fraud Charges July 2020". The defendants failed to disclose information to the Applicant, the Council, the Public in Guildford, and the other Hackney Carriage proprietors of Guildford Borough Council licensees, when they were under a legal duty to disclose that information, dishonestly intending, by that failure, to make a gain or cause a loss.

s4 Fraud by abuse of position by making the false statements or omissions set out in the attached spreadsheet, lines 1 to 21 "Fares Fraud Charges July 2020", The defendants occupied positions as Councillor or Council Officers in which they were expected to safeguard, or not to act against, the financial interests of their licensees, and abused that position dishonestly intending by that abuse to make a gain, or cause a loss.

The evidence relied on will be the written reports to the Council Executive and the Licensing Committee and other documentary evidence and witnesses.

(6) Application for warrant

Complete this box only if you are applying for the court to issue a warrant for the defendant's arrest. Under s.1,

Magistrates' Courts Act 1980 the court can issue a warrant for the defendant's arrest only where (a)(i) the offence to which the warrant relates can be, or must be, tried in the Crown Court, (ii) the offence is punishable with imprisonment, or (iii) the defendant's address is not sufficiently established for a summons to be served on him or her and (b) (in all cases) the Director of Public Prosecutions consents to the issue of the warrant.

(a) Conditions relating to the offence or the defendant. *Tick as many boxes as apply.*

(i) the offence can be, or must be, tried in the Crown Court ☒ (ii) the offence is punishable with imprisonment ☒

(iii) the defendant's address is not sufficiently established for a summons to be served ☒ *Explain why, including what you have done to find an address for the defendant.*

I have asked Guildford Borough Council for the last known address of the Accused, and the Council have refused to provide it.

(b) The Director of Public Prosecutions consents to the issue of a warrant for the defendant's arrest

☐ Yes ☒ No

If yes, you must include with your application written evidence of that consent.

(7) Declaration. See Criminal Procedure Rules r.7.2(6), (7). You may be asked to make this declaration on oath.

To the best of my knowledge, information, and belief:

(a) the allegations contained in this application are substantially true,
(b) the evidence on which I rely will be available at the trial,
(c) the details that I have given in boxes (2) and (3) are true, and
(d) this application discloses all the information that is material to what the court must decide.

Signed

7th July 2020

Decision – this record must be kept by the court

I considered this application today [at] [without] a hearing.

[The applicant confirmed on oath or affirmation the declaration in box (7).]

[The applicant gave me additional information [the essence of which was:]][8]

[The proposed defendant gave me additional information [the essence of which was:]][9]

On the basis of the information contained in this application [as supplemented by the additional information described above]:

(a) I [am] [am not] satisfied that the requirements for the issue of a summons are met

[(b) I [am] [am not] satisfied that the additional requirements for the issue of a warrant are met][10]

and I [issue] [refuse to issue] a [summons] [warrant] accordingly.

My reasons are these: The court should give a brief indication of its conclusions.

[8] Include a brief summary of any information unless it is recorded elsewhere.

[9] Include a brief summary of any information unless it is recorded elsewhere.

[10] Complete only if the application includes an application for the issue of a warrant.

Signed: ……..

Name: …….. [Justice of the Peace]

[District Judge (Magistrates' Court)]

[Justices' Clerk / assistant clerk]

Date: ……..

8.14 20th July 2020 District Judge's decision to refuse to state a case re LIVERY FRAUD

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> 20 July 2020 at 15:32

To: "markgrostron@gmail.com" <markgrostron@gmail.com>

Good afternoon,

Your application has been passed on to the District Judge and he has sent the below response.

I have been asked to state a case for the opinion of the High Court by Mr Mark Rostron.

The application is in writing and is dated 4 July 2020.

The decision complained of is my refusal to issue a summons for a private criminal prosecution, a decision made on 11 June 2020.

In refusing to issue any summons I have given my reasons in writing.

MCA 1980, s.111 provides that a decision of the magistrates' court may be appealed by way of case stated if it is wrong in law or in excess of jurisdiction.

Therefore I am refusing to state a case on the basis that the application is frivolous - MCA 1980, s111(5).

District Judge (mc) Wattam 15/7/20

Kind regards

Claire Martin

Surrey Courts Admin Team

Surrey Magistrates Court | HMCTS | Mary Road | Guildford | GU1 4AS

Phone: 01483 405300

Web: www.gov.uk/hmcts

8.15 29th July 2020 District Judge's certificate of refusal to state a case for LIVERY FRAUD

(MCA 1980, s 111(5))

Surrey Magistrates' Court

On the 1st day of April 2020, an information was preferred by Mark Rostron alleging 52 offences of 'fraud' committed by up to 7 named officers and former officers of Guildford Borough Council.

In exercising my discretion to refuse to issue any summons under Magistrates' Courts Act 1980, s.1 I gave my reasons in writing.

The decision now complained of is my refusal to issue any summons for a private criminal prosecution, a decision made on 11th June 2020 and communicated to Mr Rostron by the court office on 16th June 2020.

The said Mark Rostron being aggrieved by this determination as being wrong in law *or* in excess of jurisdiction] has applied to me pursuant to section 111 of the Magistrates' Courts Act 1980 to state a case for the opinion of the High Court on the question of law *or* jurisdiction] involved.

I am of the opinion that the application of the said Mark Rostron is frivolous and I hereby certify that such application to state a case is refused.

Dated the 29th day of July 2020 District Judge
(MC) Wattam

8.16 16th October 2020 Enquiry as to status of the application for FARES FRAUD

From: Mark Rostron <markgrostron@gmail.com>

Sent: 16 October 2020 19:10

To: SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> **Subject:** Re: Application for Summons, GBC and Fares Fraud

Dear Sirs

Could you let me know urgently what has happened to this application for summons, and why a summons has not been issued.

It's been three months.

Thanks

Mark Rostron

PS I also sent a revised application form a few days later.

On Tue, 7 Jul 2020 at 22:59, Mark Rostron <markgrostron@gmail.com> wrote:

> Dear Sirs
>
> Please find attached a revised application taking into account criticism of previous applications.
>
> Yours truly
>
> Mark Rostron

8.17 28th October District Judge considered all of your information and has refused all applications

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> 28 October 2020 at 15:55

To: "markgrostron@gmail.com" <markgrostron@gmail.com>

Good afternoon,

Apologies for the delay in replying to your email. The District Judge has considered all of your information and has refused all applications.

Kind regards

Administrative Officer

Surrey Magistrates Court | HMCTS | Mary Road | Guildford | GU1 4AS

8.18 2nd November 2020 Application to state case re FARES FRAUD

APPLICATION TO MAGISTRATES' COURT OR CROWN COURT TO STATE A CASE FOR AN APPEAL TO THE HIGH COURT

(Criminal Procedure Rules, rule 35.2)

Case details

Name of defendants: Justine Fuller, John Martin, Graham Ellwood, Mike Smith

Court: Guildford Magistrates Court

Case reference number: None

Charge(s):

The accused individually and in conspiracy contrary to the Common Law, with each other have made many false statements and failed to disclose information within the meaning of s2, s3, and s4 of the Fraud Act 2006, and they have been dishonest and abused their positions, contrary to s4 Fraud Act .

s2 Fraud by false representations set out in the attached spreadsheet lines1 to 17, "Fares Fraud Charges July 2020". The defendants made false representations dishonestly knowing that the representations were or might be untrue or misleading with intent to make a gain for themselves or another, to cause loss to another or to expose another to risk of loss.

s3 Frauds by failing to disclose information set out in the attached spreadsheet, lines 18 to 21, "Fares Fraud Charges July 2020". The defendants failed to disclose information to the Applicant, the Council, the Public in Guildford, and the other Hackney Carriage proprietors of Guildford Borough Council licences, when they were under a legal duty to disclose that information, dishonestly intending, by that failure, to make a gain or cause a loss.

s4 Fraud by abuse of position set out in the attached spreadsheet, lines 1 to 21 "Fares Fraud Charges July 2020",. The defendants occupied positions as Councillor or Council Officers in which they were expected to safeguard, or not to act against, the financial interests of their licensees, and abused that position dishonestly intending by that abuse to make a gain, or cause a loss.

This is an application by Mark Guy Rostron, the prosecutor, for the court to state a case for the opinion of the High Court on an appeal on a question of law or jurisdiction.

Use this form ONLY for an application to the court to state a case for the opinion of the High Court on a question of law or jurisdiction, under Criminal Procedure Rule 35.2. There are different forms for appealing from a magistrates' court to the Crown Court under Criminal Procedure Rules Part 34, or from the Crown Court to the Court of Appeal under Criminal Procedure Rules Part 39.

4. Complete the boxes above and give the details required in the boxes below. If you use an electronic version of this form, the boxes will expand[11]. If you use a paper version and need more space, you may attach extra sheets.

5. Sign and date the completed form.

6. Send a copy of the completed form to:

(a) the court, and

(b) each other party to the case.

You must send this form so as to reach the recipients **not more than 21 days after the decision about which you want to appeal to the High Court**. If that decision was by a magistrates' court, **the court has no power to extend that time limit**.

A party who wants to make representations about this application must serve those representations under Criminal Procedure Rule 35.2(3) **not more than 14 days after service of this application**.

1) Decision under appeal. Give brief details of the decision about which you want to appeal to the High Court (including the date of that decision).

Message from the Surrey Magistrates, unsigned by any Judge or Magistrate stating that "The District Judge has considered all of your information and has refused all applications." Decision by email dated 28th October 2020

2) Question(s) for the High Court. What question(s) of law or jurisdiction do you want the court to state for the

opinion of the High Court?

b) Did the District Judge have a duty to issue a summons?

c) Did the District Judge have a duty to give reasons for his refusal to issue a summons?

d) Did the District Judge have a duty to assess whether the basic requirements before

issuing a summons had been met.?

e) Did the District Judge have a duty to try case proposed?

f) Did the District Judge have a duty to follow the European Human Rights Act 1998 Article 6(1) and provide a

fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

pronounce judgement publicly?

g) Was this application about a complex fraud case that should be referred directly to Crown Court or to the High Court for guidance?

3) Grounds of appeal. Explain briefly why you think the decision against which you want to appeal was wrong,

and how that decision depended on the question(s) specified in box 2 above.

a) There is well established case law showing that the District Judge did have a duty to issue a summons.

b) There is well established case law showing that the District Judge did have a duty to give reasons for his refusal to issue a summons.

c) There is well established case law showing that the District Judge did have a duty to assess whether the basic requirements before issuing a summons had been met.

d) There is well established case law showing that the District Judge did have a duty to try case proposed.

e) The District Judge did have a clear statutory duty to follow the European Human Rights Act 1998 Article 6(1) to provide a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law pronounce judgement publicly.

f) Was this application about a complex fraud case that should be referred directly to Crown Court or to the High Court for guidance?

4) Other applications. I am also applying for:

☐ **an extension of time for asking the court to state a case for the High Court.**

You can ONLY apply for an extension of the 21 day time limit if this is an application to the Crown Court.

☐ **pending my appeal, the suspension of a disqualification.**

For example, a disqualification from driving. You can ONLY apply for the suspension of a disqualification

which the court imposed in this case. ☐ **pending my appeal, bail**.

You can only apply for bail pending appeal if the court sentenced you to imprisonment or detention.

Give reasons for any of these applications you are making:

Signed[12]

Mark Rostron **prosecutor**

Date: 2nd November 2020

8.19 4th November 2020 District Judge decides application for case to be stated out of time and otiose

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> 4 November 2020 at 13:17

To: Mark Rostron <markgrostron@gmail.com>

Dear Mr Rostron,

We have passed your application to the judge, and they have responded with the following:

My decision to not issue any summons was made and communicated to Mr Rostron on 16/6/20.

Therefore this further application to state a case (dated 2nd November 2020) about my decision, is hopelessly out of time.

In any event I have already adjudicated upon Mr Rostron's application to state a case about my decision not to issue any summons.

I refused to state the case on 15th July 2020.

A certificate to that effect was issued to Mr Rostron on 29th July 2020, at his request.

This further application dated 2nd November 2020 is both out of time and otiose.

Kind Regards

Phil James

Surrey Courts Admin Team

8.20 4th November 2020 Re misunderstanding about application for case to be stated for review by the High Court

Mark Rostron <markgrostron@gmail.com> 4 November 2020 at 21:03

To: SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk>

Dear Sirs

I am afraid there is some misunderstanding.

This summons application and request for case stated was for a DIFFERENT matter, that of FARES fraud.

The previous single application the District Judge referred to was about LIVERY fraud.

As it appears the application for summons has not been properly considered and decided, could you please deal with this request for a summons for FARES fraud now?

I look forward to hearing from you urgently.

Yours truly Mark Rostron

8.21 24th November 2020 Refusal to issue summons or to state case Judge relies on certificate from a decision on a DIFFERENT CASE, that of LIVERY FRAUD

SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> 24 November 2020 at 09:35

To: "markgrostron@gmail.com" <markgrostron@gmail.com>

Good morning,

Your emails have been passed on to the District Judge and he has sent the below response.

Mr Rostron may apply to the High Court if he wishes.

I have read all of the information that has been sent to me.

My decision not to issue any summons regarding all of his various allegations of fraud remains.

He has my certificate of refusal to state a case for the opinion of the High Court so he may rely on that if he wishes.

Nick Wattam

District Judge (Magistrates' Courts) - Surrey

Kind regard

Claire Martin

Surrey Courts Admin Team

Surrey Magistrates Court | HMCTS | Mary Road | Guildford | GU1 4AS

8.22 25th November 2020 Application for committal hearing LIVERY FRAUD

Mark Rostron <markgrostron@gmail.com> 25 November 2020 at 16:12
To: SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk>

Dear Sirs

As I understand it, the District Judge has refused to issue a summons for fraud re FARES for reasons which he gave when refusing (after he decided the first application for LIVERY fraud) a different application for summons re a different offence of fraud re LIVERY.

Please correct me if I am wrong.

He has also refused to state his case in any event against both different applications for summons.

In that case, as I have provided you with information about indictable offences re fraud conspiracy to commit fraud regarding this time, the FARES (not the LIVERY) of Guildford taxis.

I ask the Magistrates Court to hold a hearing under section 6(1) of the Magistrates Court Act 1980 to decide if there is sufficient evidence to commit the accused for trial.

6 Discharge or committal for trial.

1) A magistrates' court inquiring into an offence as examining justices shall on consideration of the evidence— (a) commit the accused for trial if it is of opinion that there is sufficient evidence to put him on trial by jury for any indictable offence;

(b) discharge him if it is not of that opinion and he is in custody for no other cause than the offence under inquiry; It is a matter for the Magistrate to decide (subject to any appeal) whether or not to issue a summons, but it is not in the Magistrates power to refuse to inquire into offences at a hearing for committal.

If the Magistrates wish the committal hearing fraud in respect of FARES to go ahead without giving the accused notice by summons, so be it, subject to any appeal to the High Court. I look forward to your confirmation of a date of a committal hearing.

Yours truly

Mark Rostron

8.23 22nd December 2020 Application for committal hearing re FARES FRAUD

Mark Rostron <markgrostron@gmail.com> 22 December 2020 at 18:14
To: SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk>

Dear Sirs

I am applying for a hearing to commit the accused for trial. Please confirm a date.

Yours truly Mark Rostron

8.24 10th February Magistrates refuse all applications, District Judge has left

1 SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk> Wed, 10 Feb, 10:22

to me

Good morning,

I have checked with the court associate and it seems that all applications are refused. The District Judge does not work in Surrey anymore therefore I cannot contact him to double check. If it is an application you have not had a reply about already please send it again so that it can be referred to the legal team.

Kind regards

Amber Kennedy Lamb

Administrative Officer

8.25 11th February 2021 reminder re Application for committal hearing re FARES FRAUD

Mark Rostron markgrostron@gmail.com
Letter before action Mark Rostron v Surrey Magistrates re taxi fares
Mark Rostron markgrostron@gmail.com
11 February
To: SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk>

Hi

I applied for a summons re allegations of fraud re taxi fares and that was refused. I subsequently asked that a committal hearing take place, but had no reply to that request, please see copy below.
Could you let me know whether you will list the allegations for a committal hearing or not please?

Thanks
Mark Rostron

Mark Rostron <markgrostron@gmail.com>
Wed, 25 Nov 2020, 16:12
to SU-Guildfordmcadmin

Dear Sirs
As I understand it, the District Judge has refused to issue a summons for fraud re FARES for reasons which he gave when refusing (after he decided the first application for LIVERY fraudifferent application for summons re a different offence of fraud re LIVERY.

Please correct me if I am wrong.

He has also refused to state his case in any event against both different applications for summons.

In that case, as I have provided you with information about indictable offences re fraud conspiracy to commit fraud regarding this time, the FARES (not the LIVERY) of Guildford taxis.

I ask the Magistrates Court to hold a hearing under section 6(1) of the Magistrates Court Act 1980 to decide if there is sufficient evidence to commit the accused for trial. 6 Discharge or committal for trial.
1) A magistrates' court inquiring into an offence as examining justices shall on consideration of the evidence—

(a) commit the accused for trial if it is of opinion that there is sufficient evidence to put him on trial by jury for any indictable offence;
(b) discharge him if it is not of that opinion and he is in custody for no other cause than the offence under inquiry;
It is a matter for the Magistrate to decide (subject to any appeal) whether or not to issue a summons, but it is not in the Magistrates power to refuse to inquire into offences at a hearing for committal.
If the Magistrates wish the committal hearing fraud in respect of FARES to go ahead without giving the accused notice by summons, so be it, subject to any appeal to the High Court. I look forward to your confirmation of a date of a committal hearing.
Yours truly Mark Rostron

8.26 18th March 2021 Further reminder re Application for committal hearing re FARES FRAUD

Mark Rostron markgrostron@gmail.com

Letter before action Mark Rostron v Surrey Magistrates re taxi fares

Mark Rostron
<markgrostron@gmail.com>18 March 2021 at 05:09
To: SU-Guildfordmcadmin <su-guildfordmcadmin@justice.gov.uk>

Dear Sirs
Could I have a reply please?
Many thanks
Mark Rostron

8.27 7th April 2021 Letter before legal action re Application for committal hearing re FARES FRAUD

LETTER BEFORE LEGAL ACTION

1) To: Guildford Magistrates

Guildford Magistrates Court

Mary Road

Guildford

GU1 4PS

Tel: 01483 405 300

Email: su-guildfordmcadmin@justice.gov.uk

2) The claimant

Mark Rostron

3) Reference details

None

4) The details of the matter being challenged

The decision by email dated 10th February 2021 from the Surrey Magistrates, unsigned by any Judge or Magistrate, stating that after the application for a hearing to commit the accused (various Officers and ex Councillors of Guildford Borough Council) for trial:

"that all applications are refused. The District Judge does not work in Surrey anymore therefore I cannot contact him to double check."

Guildford Magistrates have refused to hold a committal hearing, contrary to the Magistrates' Courts Act 1980, section 6 Discharge or committal for trial, which requires that:

(1) A magistrates' court inquiring into an offence as examining justices shall on consideration of the evidence—

(a)commit the accused for trial if it is of opinion that there is sufficient evidence to put him on trial by jury for any indictable offence;

(b)discharge him if it is not of that opinion and he is in custody for no other cause than the offence under inquiry; but the preceding provisions of this subsection have effect subject to the provisions of this and any other Act relating to the summary trial of indictable offences.

5) The issues

a) Did the District Judge have a duty to hold a committal hearing?

b) Did the District Judge have a duty to give reasons for his refusal to hold a committal hearing?

c) Did the District Judge have a duty to try case proposed?

d) Did the District Judge have a duty to follow the European Human Rights Act 1998 Article 6(1) and provide a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law pronounce judgement publicly?

e) Was this application about a complex fraud case that should be referred directly to Crown Court or to the High Court for guidance?

6) The details of the action that the defendant is expected to take

Confirm in writing by email within fourteen days that they will hold the said committal hearing.

7) The details of the legal advisers, if any, dealing with this claim

None

8) The details of any interested parties

Guildford Borough Council representing the ex or current Officers and Councillors.

9) The details of any information sought

None

10) The details of any documents that are considered relevant and necessary

Information about the alleged crimes.

Application for committal hearing.

Guildford Magistrates email refusing all applications.

11) The address for reply and service of court documents

17 Lower Guildford Rd, Knaphill, Woking, Surrey, GU21 2EE

Communications by email to markgrostron@gmail.com

12) Proposed reply date

23rd April 2021

8.28 7th July 2020 Fraud Charges re Taxi Fares (Not livery)

	Source of text	Report Section	Text	Fraud Act 2006 Sections	Grounds
1	GBC Executive 27.9.2016	5	Agenda Item 5, Report of Head of Health and Community Care Services Author: Mike Smith	2 and 4	False representation. Mike Smith wrongly presents himself as being authorised to make the report, when under the scheme of delegation it was John Martin.
2	GBC Executive 27.9.2016	4.1	In 2013, the GBC Executive approved a methodology which provided a transparent process for calculating taxi fares based upon the system used to set fares for black cabs in London.	2 and 4	False representation. The methodology was copied from the Isle of Wight and is not the one used by TfL.
3	GBC Executive 27.9.2016	4.30	It is also important to emphasise that the fare methodology, including use of AA figures, was approved in 2013 to allow taxi drivers to recover their costs associated with running a taxi. The approval of this methodology followed nearly two years of consultation with the taxi trade with proposed amendments to the methodology subject to a number of reports to the Licensing Committee and GBC Executive, and an independent audit	2 and 4	False representation. There was no independent audit of the methodology.
4		3.6		2 and 4	

	GBC Executive 27.9.2016		The Department for Transport Best Practice Guidance (2010) indicates that it is good practice for a local authority to use a simple formula to calculate taxi fares.		False representation, that portrays a suggestion as a recommended practice. But the report actually says, "Authorities may wish to consider adopting a simple formula for deciding on fare revisions as this will increase understanding and improve the transparency of the process."
5	GBC Executive 27.9.2016	4.14	It is worth noting that the figures for the AA were produced in March 2015	2 and 4	False representation. The AA table was produced in 2014, and secondly there is no evidence as to the source of the data.
6	GBC Executive 27.9.2016	4.25	Both sets of data are from reliable sources	2 and 4	False representation. Of the two sets of data, TfL data is from the Government statistical office. The other AA data is from unknown sources. The AA is a car breakdown recovery firm.

	Source of text	Report Section	Text	Fraud Act 2006 Sections	Grounds
7	GBC Executive 27.9.2016	4.26	It is important to highlight that the TfL figures use a cost index relating to running a London style cab, such as a TX, and not an average vehicle in the £26,000 to £36,000 price bracket. Currently there are 193 licensed taxis, of which only 9 are London cab style models.	2 and 4	False representation, as it implies that the other 184 vehicles did not have similar characteristics to London cabs, when approximately half the vehicles were converted light goods vehicles with similar characteristics to London style cabs, and NOT to ordinary saloon cars.

8	GBC Executive 27.9.2016	4.27	…….At a typical average consumption of 50 miles per gallon for a diesel car,	2 and 4	False representation as it assumes without any factual basis that Guildford taxis average 50 mile per gallon
9	Licencing 14.9.2016	4.31	When the calculator was run in 2015, the trade questioned the use of AA data because, as at that time, a reduction in fares was proposed. The trade requested that running costs be calculated using TfL data. This would produce a higher cost and subsequently higher fares despite a reduction in motoring costs for the year 2015. During this current consultation, no evidence has been provided about the costs associated with running a taxi.	2 and 4	False representation, as it wrongly implies that the taxi trade only objected to unjustified fare decreases when they also objected to unjustified fare increases.
10	GBC Executive 27.9.2016	4.34	With regard to this point, this appears to be a "standard" disclaimer about the intended use of this information absolving the AA from any risk of liability in the event of a dispute. It is important to emphasise that this data is used to estimate the running costs associated with a taxi.	2 and 4	False representation, implies that the AA data is appropriate to estimate the running costs associated with a taxi. The AA actually say, "AA running costs tables have no official status and are not intended to be used as the basis for setting mileage rates for business use of private cars." On the Council's own interpretation the AA did not wish to be risk being held responsible for their data in the event of a dispute. A dispute which has now occurred.

	Source of text	Report Section	Text	Fraud Act 2006 Sections	Grounds

11	GBC Executive 27.9.2016	4.38	According to the NPHA, the average fares nationally and locally are detailed below: Area Fare over 2 miles Current Guildford fares £6.90 South England average £6.24 National average £5.68	2 and 4	False representation, as it compares data from Boroughs that have a lower cost base. The petition of over 100 taxi drivers made the point that "Guildford is one of the most expensive areas to live".
12	GBC Executive 27.9.2016	4.4	The potential reduction was mainly due to the decrease in the cost of fuel, as the current fares were set when fuel costs were at 141.2p per litre; and to a lesser extent the motor vehicle running figures from the Automobile Association (AA) showing a reduction in the costs associated with running a motor vehicle.	2 and 4	False representation, as the fuel price change accounted for only 4.32 pence per mile of the 32 pence per mile reduction or only 13.5%, not MAINLY by any means. The balance of 10p Total of standing charge & running costs as pence per mile reduction or 31% IS due to AA cost reduction not fuel price changes. The further 18p reduction in running costs is mainly due to the removal of the Radio Rent £3920 cost.
13	GBC Executive 27.9.2016	5.10	Changes to taxi fares were also discussed with trade representatives at the Guildford Taxi Advisory Group Meeting on 26 April 2016. Two members of the trade (one Hackney Carriage driver and one Private Hire driver) supported a modest fare increase, but one Hackney Carriage driver did not support an increase as they felt it might drive customers towards cheaper competitors. During the meeting, participation in the consultation was encouraged.	2 and 4	False representation, as it omits to mention the petition of over 100 taxi drivers who objected to the fare decrease.

14	GBC Executive 27.9.2016	5.5	On the basis that the consultation was intended to seek views from the trade on their true costs of running a taxi, the level of response is disappointing. However it does not indicate widespread opinion amongst the trade that the current costs used to calculate fares are inappropriate.	2 and 4	False representation. The petition signed by over 100 taxi drivers said "We believe that, the proposed fare decrease based on the calculations by the motor agency used by the Council is not relevant to the taxi trade"
15	GBC Executive 27.9.2016	5.7	....on the basis of the consultation responses, there is no overwhelming evidence to suggest that we should not continue to use the AA costs under the current approved methodology	2 and 4	False representation, as such evidence as there is , is against the use of the AA data.

	Source of text	Report Section	Text	Fraud Act 2006 Sections	Grounds
16	GBC Executive 27.9.2016 Hackney Carriage (Taxi) Table of Fares Methodology 2016/2017	29	Previous consultation with taxi drivers provided information to show that dead mileage accounts for between 33 per cent and 50 per cent of the total mileage travelled by the taxi.	2 and 4	There is no evidence that a taxi driver when consulted, said that his dead mileage was 33 per cent.

17	GBC Executive 27.9.2016 Hackney Carriage (Taxi) Table of Fares Methodology 2016/2017	32	……..and the consultation responses do not provide any evidence in order to justify any changes to this figure.	2 and 4	False representation, the consultation did provide evidence to justify changes to the arbitrary dead mileage figure adopted by Guildford Borough Council.
18	GBC Executive 27.9.2016	4.30	It is also important to emphasise that the fare methodology, including use of AA figures, was approved in 2013 to allow taxi drivers to recover their costs associated with running a taxi. The approval of this methodology followed nearly two years of consultation with the taxi trade with proposed amendments to the methodology subject to a number of reports to the Licensing Committee and GBC Executive, and an independent audit	3 and 4	Omits that the consultation did not result in agreement with the taxi trade association.

	Source of text	Report Section	Text	Fraud Act 2006 Sections	Grounds

19	GBC Executive 27.9.2016 Hackney Carriage (Taxi) Table of Fares Methodology 2016/2017	32	The consultations and additional enquiries have not provided sufficient evidence to identify the exact amount of dead mileage travelled by taxis in Guildford. The rate of dead miles was set at 45% for fare reviews in 2013 and 2015.....	3 and 4	Omits that the draft internal audit report recommended dead mileage of 65% not 45% as the Council report.
20	GBC Executive 27.9.2016	4.14	It is worth noting that the figures for the AA were produced in March 2015	3 and 4	Omitted to mention that the AA stopped publishing the table in 2014.
21	Omitted from any document		Failed to disclose that the provision by the AA of cost data was permanently discontinued in 2014	3 and 4	Fraud by omission

8.29 11th June 2020 Decision to refuse to issue Summons District Judge re taxi LIVERY

HM Courts & Tribunals Service

Surrey Magistrates' Courts

Business Centre

Correspondence address:

PO Box 36

The Law Courts

Mary Road

GUILDFORD

Surrey GU1 4AS

DX 97865 Guildford 5

T 01483 405300

E su-guildfordmcadmin @justice.gov.uk

www.justice.gov.uk

Mark Rostron

Information dated 1st April 2020 requesting summons to be issued for a private prosecution

Notice of Mr Rostron's revised application with supporting documents were sent to the 7 putative defendants c/o their last known address at Guildford Borough Council for information and comment.

Mr Rostron was so advised and this was done as it was necessary to give the 7 opportunity to make representation before I made an informed decision as to whether all or some of these summonses should be issued as requested. Any reply was required by 15/6/20.

On 3/6/20 a written response to the information and applications for summons was received from Sarah White, legal lead specialist at the Borough Council. This response was stated to be on behalf of each proposed defendant.

My power to issue a summons is discretionary and governed by s.1 Magistrates' Courts Act 1980.

I have reviewed leading cases concerning the exercise of this discretion, including R v West London Justices ex parte Klahn 1979] 1 WLR 933 and Johnson v Westminster magistrates' court 2019] EWHC 1709.

I am not required to conduct a hearing to determine the matter and on this occasion am content to deal with it on the basis of papers received.

Assessment of the information

The allegations of fraud and conspiracy refer to a decision of the Guildford BC made in 2015 to adopt a taxi licensing policy that all hackney carriages in Guildford be liveried.

I have had sight of the council report dated 9/12/15 that recommended adoption of the policy.

It is clear that Mr Rostron's various allegations of fraud and criminal conspiracy against officers of the council are substantially the same as those made in applications for summons made by him on at least 3 occasions:

By application dated 15/1/18 – application for summons refused by a District Judge (mc) in Guildford (at first sight), with written reasons given on 2/3/18;

On 13/3/18 – application for summons refused by District Judge (mc) James with written reasons given by the judge on 17/4/18;

18/6/18 – Bromley magistrates' court declined to issue a summons upon application by Mr Rostron.

Although not determinative of the matter I note that the police have declined to prosecute anyone as a result of Mr Rostron's complaint.

Decision

On reflection, and noting that Mr Rostron's information (although revised) is substantially the same, I am not minded to reverse the previous decisions made by other District Judges (mc) not to issue summons. That would be inappropriate. I do not sit in an appellate capacity regarding decisions of other District Judges.

It is apparent that Mr Rostron persists in his attempts to litigate the same decision of officers of Guildford Borough Council in the criminal courts. There is nothing new in his information requiring me to revisit the judicial decisions already made not to issue.

In passing I would say that the proper remedy might have been for Mr Rostron to apply for judicial review of the council's original decision - by reason of illegality, irrationality or procedural impropriety. Clearly, he has chosen not to do that.

His application for summons is refused – again.

District Judge (mc) Wattam 11/6/20

8.30 9th October 2020 Mark Rostron v various GBC Officers and Councillors re Livery Policy Fraud

Mark Rostron <markgrostron@gmail.com> 9 Oct 2020, 20:26 (6 to Customer

Dear Sirs

Following Sarah Whites letter to District Judge's at Surrey Magistrates, purporting to reply on behalf of the accused; Justine Fuller, Paul Spooner, Graham Ellwood, Jo and Mike Smith.

Please confirm that Guildford Borough Council (GBC) are acting as legal representatives on behalf of those parties, and that GBC should be named as the sole interested par Judicial Review, and that only one bundle of documents will be required to be served on GBC for use by all the proposed accused.

Please also confirm by what authority GBC is acting on behalf of the accused.

Yours truly

Mark Rostron

8.31 18th July 2018 Solicitors reply

Your enquiry

3 messages

Katherine Galza <KGalza@kingsleynapley.co.uk> 18 July 2018 at 13:21

To: Mark Rostron <markgrostron@gmail.com>

Dear Mark

I apologise for the delay in getting back to you following our discussions the other week, it has taken some time to review the documents. Unfortunately having now done this, we do not believe this is a case on which we can assist.

When we spoke you explained that you are the secretary of the Guildford Hackney Association, an organisation which had brought a judicial review against decisions taken by Guildford Local Authority to implement two new policies which affected taxi-drivers in the area: 1) to change the livery of the taxis to a teal colour; and 2) to reduce taxi fares by 18%. You believed that these decisions had been reached on the basis of false or misleading information provided by the councillors at Guildford LA and the officers preparing the consultation document. You helpfully prepared a schedule of the statements made and the reasons why they were incorrect/wrong/misleading. The JR was unsuccessful but you believed that the statements made amounted to a fraud and therefore consider that a private prosecution against the cllrs and officers at the LA could be an appropriate remedy, and you have gone some way already in drafting the informations and approaching a magistrate and the police.

On the basis of the information you have provided us, our view is that the full code test would not be met. This is for the following reasons:

1) it will be very difficult proving to a criminal standard (beyond all reasonable doubt) that the statements were deliberately false so as to mislead the council when making its decision, and there does not appear to be any conclusive evidence of this other than your own disagreement with the LA's interpretation of the information.

Moreover, if you have already been unsuccessful in bringing a judicial review on these facts, we do not feel that your chances of success in the criminal courts would be much greater;

2) from a public interest perspective, there is an argument that Local Authorities should be allowed to express or reach opinions in council documents, even if those opinions are incorrect/misleading, without risk of criminal prosecution. There are alternative remedies available where a cllr is believed to have reached a decision unlawfully or on the basis of incorrect information (i.e. JR).

I am sorry that we are unable to help you with this case, and thank you for your time discussing the issues.

Should it be of any interest or use to you going forward, I attach our private prosecutions fact sheet which might assist you should you still wish to pursue the matter.

Kind regards

Katherine Galza

Associate

Kingsley Napley LLP

8.32 31st August 2018 eMail to local solicitor re representation

Private prosecution re fraud

2 messages

Mark Rostron <markgrostron@gmail.com> 31 August 2018 at 16:31 To: Stan Baring <stan@stanbaring.com>

Hi Stan

I was wondering if you know of a reasonable solicitor who could draw up the information for a private prosecution for fraud?

Any suggestions would be much appreciated.

Regards

Mark Rostron

Stan Baring <stan@stanbaring.com> 31 August 2018 at 17:15

To: "markgrostron@gmail.com" <markgrostron@gmail.com>

Hi Mark

Try Frame Smith & co. We recommend them for all criminal matters. Speak to either David or Anthony.

All the best

Stan Baring

Stan Baring Solicitor

8.33 18th June 2019 Refusal by South London Magistrates to accept the Information

Application for summons re Guildford Borough Council

Mark Rostron <markgrostron@gmail.com> 10 June 2019 at 16:50 To: southlondonmc@justice.gov.uk

Dear Sirs

Please find attached my application.

Yours truly

Mark Rostron

southlondonmc <southlondonmc@justice.gov.uk> 18 June 2019 at 13:16

To: "markgrostron@gmail.com" <markgrostron@gmail.com>

Good Afternoon

Re the above

The application for the summons Is not for Bromley.

Please see email address for Guilford you could send it to them su-guildfordmcadmin@justice.gov.uk, there telephone number is 01483 405 300

Regards

Karen Miller

Admin Officer

South East London Justice Area|HMCTS

Bromley & Bexley Magistrates Court|1 London Road|Bromley|Kent|BR1 1RA Web:

Hi

It was intended for Westminster Magistrates Court. How come it went to Bromley?

8.34 18th October 2019 Reply from Guildford Borough Council Managing Director

Contact: James Whiteman
17 Lower Guildford Road Phone: 01483 444801
Woking Email: James.Whiteman@guildford.gov.uk
GU21 2EE
18 October 2019

Dear Mr Rostron,

Guildford Borough Council — Complaints policy and procedure — Unreasonable complainant policy.

I write in response to the several emails you have sent to officers of this authority, and an ex member.

In your emails you state an intention to bring private prosecutions for fraud against the individuals named in the emails and include a table containing a general commentary on putative offences, which fails to describe or particularise those offences in an intelligible form. I also note that the Magistrates' Court has previously rejected similar attempts from you to prosecute officers.

I note that you have:

a) Sought, by response, statements from officers;
b) Sought the private contact details of a named third party.

Response

No doubt if the court accepts the informations from you, the Council can consider what (if any) action it should take in response to your submissions. Unless and until that time, the Council declines the opportunity to engage with you.

Unreasonable/vexatious complainant

I note, further, my letter to you of 21 February 2018, in respect of the above policy, which imposed restrictions on your contact with the Council. These restrictions were subsequently lifted following a reduction in vexatious contact from you.

However, noting that your current emails seem to be repetitive, aggressive, personalised in tone, and to comprise unsubstantiated allegations, and refer to core issues which have been the subject of exhaustive resolution, I have decided to reinstate those measures.

You are therefore asked to note that:

- The Council will not respond to:

- Correspondence or complaints from you or a representative of you which repeat matters which are the subject or theme of earlier complaints, which reveal no new issues or which relate to separate rights under a legal process before a court;
- Correspondence (on any matter) from you or a representative of you which are directed to individual officers or contact points beyond those described below:

○ customerservices@quildford.gov.uk ○ in respect of any request for information under the Freedom of Information Act 2000, foi@quildford.gov.uk

In respect of legal proceedings, Guildford Borough Council does not accept notice of proceedings by email or fax. Should you wish to serve notice of proceedings, of whatever nature, you should write to:

Legal Services

Guildford Borough Council

Millmead House

Millmead

Guildford

GU2 4BB

The application of this policy will be subject to a review six months from the date of this letter.

Yours sincerely,

James Whiteman

Managing Director

8.35 15th November 2019 Letter to Chief Monitoring Officer

15th November 2019

Dear Mr Parkin

Following complaints by me of fraud by a Guildford Borough Councillor and Officers, which I am sure you, as Chief Monitoring Officer, are aware of, and to explore all possibilities before a private prosecution takes place, I am drawing your attention to what appears to be Guildford Borough Council policy under their Police Protocol, a copy of which is attached.

Application

1. This policy applies to Guildford Borough Council and to the Police in the handling and investigation of alleged criminal offences created by Section 34 of the Localism Act 2011 and specifically related to Disclosable Pecuniary Interests (DPIs). However, there may be other wider or more substantial criminal activity identified in any complaint as referred to in paragraphs 16 17 and 18 of this Protocol which the Police may need to investigate and as a

result the principles of this Protocol will also be mirrored in any such investigation regarding wider or more substantial criminal activity.

11. If the complaint has been made directly to the Police, the Police will request that the Monitoring Officer assures them that the following applies prior to further Police involvement:

(a) The alleged conduct took place after the commencement of section 34 of the Localism Act 2011.
(b) The Subject Member was a member of the Council at the time of the alleged conduct.
(c) The Subject Member was acting in an official capacity as a councillor at the time of the alleged conduct.
(d) The Subject Member was not acting as a member of another authority at the time of the alleged conduct.(e) If the facts are capable of establishment as a matter of evidence, the alleged conduct could be capable of a breach of the Code of Conduct.

(f) That the complaint is not about dissatisfaction with the Council's decisions, policies and priorities. In the event that the Police receives the assurances set out above then a criminal investigation will be commenced by the Police in line with this protocol and established police procedures. The Subject Member will be put on notice when invited by the Investigating Office to interview under PACE.

In the case that the alleged conduct was committed before the commencement of the Localism Act 2011 or is an expression of dissatisfaction with the Council's decisions or the matter is in relation to a different authority then the complainant should be informed and the matter referred either to the Council's Monitoring Officer or to the other authority.

13. Prior to acceptance of the criminal investigation by the Police, the Police will make contact with the

Council's Monitoring Officer in order to obtain confirmation that there is legal jurisdiction before the allegation is recorded as a crime and for a Police Investigating Officer to be appointed.

Circumstances may indicate wider or more substantial criminal activity

16. The circumstances of the complaint may also be indicative of a wider, more substantive criminal act.
17. The circumstances of the allegation may constitute a substantial crime of:-
(a) Bribery as defined by the Bribery Act 2010;
(b) Misconduct in public office at common law;
(c) Fraud by abuse of position of trust contrary to the Fraud Act 2006;or (c)(d) Other Serious Crime.

18. Referral of a complaint as a Serious Crime should only be made where there are substantial grounds for doing so. The essence of the Localism Act is to ensure greater transparency and public accountability and these principles should be mirrored in any Police Investigation.

22. However, where an investigating officer identifies a more serious notifiable offence a crime report will be created, for example, fraud offences.

Suspect Interviews

25. These should be conducted with a view to the circumstances of the investigation and fully comply with current codes of practice.
26. The Investigating Officer should bear in mind that a lot of investigative work can be avoided by an early account from the suspect of these alleged offences and in early liaison with the Council's Monitoring Officer, that the relevant circumstance that gave rise to the complaint, are actually correctly reported.
27. The Police will liaise regularly with the Monitoring Office in confidence to discuss progress of any investigation whether this relates to an alleged DPI offence or other wider or substantial criminal activity arising from a code of conduct complaint and seek to resolve any conflicts.
30. If the matter does not proceed to prosecution, the Monitoring Officer and complainant will be notified accordingly. The Monitoring Officer may, on the basis of the Investigating Officer's report, consider what, if any action, to take under the Council's Code of Conduct and arrangements.
31. It must be borne in mind by supervisors that the disposal of a DPI complaint may attract adverse publicity and potentially call into question the reputation of the Police Force, were a more substantive crime to be overlooked.
32. Closure of the investigation should be reviewed by an officer of at least the rank of Inspector.

Could you assure me that all aspects of this Guildford Borough Council Policy have complied with by you, and itemise any requirements you believe have not be met and how and when you will meet them?

I look forward to hearing from you as soon as possible as the matter is likely to be referred to the Guildford Magistrate's District Judge in the near future.

I am also writing to the Surrey Police Sergeant Potts along the same lines.

Yours truly

Mark Rostron

Item 095 - Appendix 5 - Police Protocol.pdf

145K

8.36 16th November 2019 Appellants reply to Managing Director Guildford Borough Council

Letter to Guildford Borough Council

For the attention of Mr James Whiteman

Managing Director

Dear Sir

I am disappointed that although notification of intention to prosecute several GBC Officers were sent to their Council email address, I have not received a reply from any of them. You have taken it upon yourself to do so although you are not a party to the prosecutions, so I think your activity is ultra vires your powers.

You state that:

> *In your emails you state an intention to bring private prosecutions for fraud against the individuals named in the emails and include a table containing a general commentary on putative offences, which fails to describe or particularise those offences in an intelligible form.*

To the extent that GBC could possibly be a party to the prosecutions, I am disappointed that as you seem not to understand them, you did not ask for clarification.

> *…if the court accepts the informations from you, the Council can consider what (if any) action it should take in response to your submissions. Unless and until that time, the Council declines the opportunity to engage with you.*

I am also surprised that you have not referred the matters to the Monitoring Officer as it appears you are required to do by the Council's policy, I have referred the matter myself, see attached for both.

You also wrongly characterise my emails:

> *noting that your current emails seem to be repetitive, aggressive, personalised in tone, and to comprise unsubstantiated allegations, and refer to core issues which have been the subject of exhaustive resolution, I have decided to reinstate those measures.*

The emails were none of the above and your mischaracterisation of them in your letter and in previous letters is wrong and appears to be designed to silence me.

> *In respect of legal proceedings, Guildford Borough Council does not accept notice of proceedings by email or fax*

As the Courts, Barristers and Solicitors accept legal service by email, I do not accept your condition to only accept service by post. That condition is unreasonable, unnecessary and seems designed to make communicating with the Council more difficult.

Yours truly

Mark Rostron

markgrostron@gmail.com

9 Cases referred to

9.1 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] UKHL 10 (24 June 1993)

9.1.1 Magistrates discretionary power to stop prosecution. - Power to ensure fair trial. Doubts about power of Court to refuse to try or commit case. Information dismissed on grounds of oppression and abuse of process.

the certified question be answered by a Declaration that "the High Court, in the exercise of its supervisory jurisdiction, has power to enquire into the circumstances by which a person has been brought within the jurisdiction and, if satisfied that it was in disregard of extradition procedures, it may stay the prosecution and order the release of the accused": And it is further Ordered, That the Cause be, and the same is hereby, remitted back to the Queen's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

LORD GRIFFITHS

As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164, Sir Roger Ormrod said, at pp. 168-169:

"The power to stop a prosecution arises **only** when it is an abuse of a process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the
preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable . . .

"The ultimate objective of this discretionary power is to ensure
that there should be a fair trial according to law, which
involves fairness to both the defendant and the prosecution."

Your Lordships have not previously had to consider whether justices,
and in particular committing justices, have the power to refuse to try or
commit a case upon the grounds that it would be an abuse of process to do so.
Although doubts were expressed by Viscount Dilhorne as to the existence of

such a power in *Reg. v. Humphrys* [1917] A.C. 1, 26, there is a formidable body of authority that recognises this power in the justices.

In *Mills v. Cooper* [1967] 2 Q.B. 459, Lord Parker C.J. hearing an appeal from justices who had dismissed an information on the grounds that the proceedings were oppressive and an abuse of the process of the court said, at p. 467E:

"So far as the ground upon which they did dismiss the information was concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court."

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Diplock L. J. expressed his agreement with this view, at p. 470F. In *Reg. v. Canterbury and St. Augustine Justices, Ex parte Klisiak* [1982] Q.B. 398, 411F, Lord Lane C.J. was prepared to assume such a jurisdiction. In *Reg. v. West London Stipendiary Magistrate, Ex parte Anderson* (1984) 80 Cr.App.R. 143, Robert Goff L.J., reviewing the position at that date said, at p. 149:

"There was at one time some doubt whether magistrates had jurisdiction to decline to allow a criminal prosecution to proceed on the ground that it amounted to an abuse of the process of the court: see *D.P.P. v. Humphrys* (1976) 63 Cr.App.R. 95, 144; [1977] A.C. 1, 19, *per* Viscount Dilhorne. However, a line of authority which has developed since that case has clearly established that magistrates do indeed have such a jurisdiction: see in particular *Brentford Justices, Ex parte Wong* (1981) 73 Cr.App.R. 67; [1981] Q.B. 445; *Watford Justices, Ex parte Outrim* (1982) [1983] R.T.R. 26; *Grays Justices, Ex parte Graham* (1982) 75 Cr.App.R. 229; [1982] 3 All E.R. 653. The power has, however, been described by the Lord Chief Justice as being 'very strictly confined': see *Oxford City Justices, Ex parte Smith* (1982) 75 Cr.App.R. 200, 204."

The power has recently and most comprehensively been considered and affirmed by the Divisional Court by *Reg. v. Telford Justices, Ex parte Badhan* [1991] 2 Q.B. 78, 81.

Provided it is appreciated by magistrates that this is a power to be most sparingly exercised, of which they have received more than sufficient judicial warning (Please see, for example, Lord Lane C.J. in *Reg. v. Oxford City Justices, Ex parte Smith* (1982) 75 Cr.App.R. 200 and Ackner L.J. *in Reg. v. Horsham Justices, Ex parte Reeves (Note)* (1980) 75 Cr.App.R. 236.) it appears to me to be a beneficial development and I am unpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court who are daily in much closer touch with the work in the magistrates court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or

exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures.

LORD OLIVER OF AYLMERTON

It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried

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fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression "a criminal court"), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason.

Making, as I do, every assumption in favour of the appellant as regards the veracity of the evidence which he has adduced and the implications sought to be drawn from it, I discern no such cogent reason in the instant case. I do not consider that, either as a matter of established law or as a matter of principle, a criminal court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him.

So far as the first question is concerned, I know of no authority for the existence of any such general supervisory jurisdiction in a criminal court. It is not, of course, in dispute that the court has power to prevent the abuse of its own process and that must, I would accept, include power to investigate the bona fides of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively - for instance, if the accused's co-operation in the investigation of a crime has been secured by an executive undertaking that no prosecution will take place. Thus, I would not tor a moment wish to suggest any doubt as to the correctness of a decision such as that in the recent case of *Reg. v. Croydon Justices, Ex parte Dean* (unreported), 19 February 1993. where the Court quashed committal

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proceedings instituted after an undertaking given to the accused by police officers that he would not be prosecuted. In such a case doubt is cast both upon the bona fides of the prosecution and on the fairness of the process to

an accused who has been invited to prejudice his own position on the faith of the undertaking. Where, however, there is no suggestion that the charge is other than bona fide or that there is any unfairness in the trial process, the duty of the criminal court is simply to try the case and I can see no ground upon which it can claim a discretion, or upon which it ought properly to be invited, to discontinue the proceedings and discharge an accused who is properly charged simply because of some alleged anterior excess or unlawful act on the part of the executive officers concerned with his apprehension and detention.

In *Reg. v. Sang* [1980] AC 402, 454, Lord Scarman observed:

"Judges are not responsible for the bringing or abandonment of prosecutions; nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury."

Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try.

LORD LOWRY

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.....I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct.

For a comparison of public and private interests in the criminal arena I refer to an observation of Lord Reading C.J. in a different context in *Rex v. Lee Kun* [1916] 1 K.B. 337, 341:

". . . the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at

pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State."

In his judgment my noble and learned friend, then Griffiths L.J., said at p. 112A:

"This court considers that it was wrong to invite a single lay justice to consider a matter such as this. Whether or not there has been an abuse of process of the sort raised in these proceedings is a matter far more fitting to be inquired into by the Queen's Bench Divisional Court than by a single justice. If a point such as this is to be taken in future it should be taken in the form in which it was in *Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75* Cr.App.R. 24; that is, there should be an objection to the justice hearing the committal and the matter should be pursued before the Divisional Court by way of an application for judicial review seeking an order of prohibition.

9.2 R v Horseferry Road Magistrates Court, ex p. Bennett (No. 1) [1993] Court of Appeal

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Short of allowing the proceedings to reach the Crown Court, the merit of having the case considered by the High Court in preference to the examining magistrate or magistrates is clear. In any event, notwithstanding dicta to the contrary, I would, on the authority of *Grassby v. The Queen*
(1989) 168 C.L.R. 1, a decision of the High Court of Australia, and of cases there cited (to which I shall presently refer), not be easily persuaded that examining magistrates have jurisdiction to stay committal proceedings for abuse of process. (I say nothing about the power of magistrates when sitting to try a case as a court of summary jurisdiction, as in *Mills v. Cooper* [1967] 2 Q.B. 459.)

As I see it, the magistrates here, understandably but erroneously relying on *Ex parte Driver,* acted prematurely and therefore without jurisdiction when they proceeded to hear and determine the committal proceedings without first allowing the appellant to make to the Divisional Court an application which (subject to *Ex parte Driven* was on its face at least worthy of consideration. Having, however innocently, neglected an essential preliminary step (namely the adjournment decreed by *Ex parte Healy*), the magistrates incurred the liability to have their order of committal quashed. For an example of proceedings in which a condition precedent to jurisdiction was omitted I refer to *In re McC. (a minor)* [1985] A.C. 528.

Since the resolution of the point is not essential to your Lordships' decision of the appeal, I shall be brief in my discussion of whether the examining magistrates can stay committal proceedings as an abuse of process.

In *Grassby v. The Queen* supra the accused was charged with criminal defamation and the examining magistrate stayed the committal proceedings on the ground of abuse of process. The Crown appealed to the Court of Criminal Appeal of New South Wales, which set aside the stay. The accused sought special leave to appeal from that decision. The High Court granted special leave but dismissed the appeal (which involved another point, namely the refusal of a member of the Court of Criminal Appeal to disqualify himself.)

Dawson J. delivered the leading judgment, holding that a committing magistrate has no power to stay the proceedings as an abuse of process. All the other members of the court, presided over by Mason, C.J., agreed except Deane J. who considered that, if the magistrate concluded (in the words of the Act) that "a jury would not be likely to convict" because the trial court was likely to stay the proceedings for abuse of process, he should then discharge the accused. The judge, however, agreed in the result on the facts and his dissent was based only on his interpretation of section 41(6) of the Justices Act.

Dawson J. said at p. 10 that the magistrate's power to stay for abuse of process "has been denied upon the highest authority in the United Kingdom." He referred to *Connelly v. D.P.P.* [1964] A.C. 1254 and continued:

"See also *Mills v. Cooper* [1967] 2 Q.B. 459, *per* Lord Parker C.J. Whether such comments were correct in relation to inferior courts exercising ordinary judicial functions has been doubted (Please see *Reg. v. Humphrys* [1977] A.C. 1 *per* Viscount Dilhorne, *per* Lord Salmon; to the contrary *Reg. v. West London Stipendiary Magistrate; Ex parte Anderson* (1984) 80 Cr.App.R. 143, but it is clear that they do not extend to a magistrate hearing committal proceedings.

In *Atkinson v. Government of the United States of America* [1971] A.C.197,231 Lord Reid (with whom Lords MacDermott and Guest agreed) said:

'The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires.

"The appellant argues that this was established, if it had been in doubt, by the decision of this House in *Connelly v. Director of Public Prosecutions . . .*

'Whatever may be the proper interpretation of the speeches in *Connelly's* case . . . with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. And that proposition has no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial.'"

In *Ex parte Sinclair* [1991] 2A.C. 64, another extradition case, Lord Ackner in his illuminating speech pointed out at p. 78E that Lord Reid's view of the magistrate's power to refuse to commit for trial by reason of abuse of process was obiter. Nonetheless a view expressed by such a high authority commends respect, and Lord Reid was making his point as an integral link in his argument, to show that in extradition proceedings a magistrate has no such power.

Dawson J. observed that it has been consistently held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of a judicial or ministerial function. Citing seven Australian cases, he continued at p. 11:

The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1 & 2 Philip & Mary c. 13; 2 & 3 Philip & Mary c. 10), **they were required to act upon information** and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial.

"With the establishment of an organised police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in *The Indictable Offences Act* 1848 (U.K.) (11 & 12 Vict, c.42), 'Sir John Jervis's Act', which provided for witnesses appearing before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his counsel."

After an interesting and valuable historical review the judge said, at pp. 15-16:

"The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. A fortiori that must be the case when its functions are of an administrative character. In *Reg. v. Forbes; Ex parte Bevan,* Menzies J. pointed out that:

'"Inherent jurisdiction" is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as "inherent jurisdiction", which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have 'inherent jurisdiction'.'"

Then, having emphasised the distinction between inherent jurisdiction and jurisdiction by implication, Dawson J. observed at p. 17:

"The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in s. 41 of the *Justices Act.* But the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial."

Having referred to section 41 of the Justices Act, the learned judge then said at p. 18:

"There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform."

It would, of course, be convenient (as well as correct, in my view) if the examining magistrates could not stay for abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates had erred in their exercise of discretion. Moreover, their decision would not bind the court of trial, if the Attorney General were to prefer a voluntary bill.

9.3 Watts, R (on the application of) v Belmarsh Magistrates' Court [1999] EWHC Admin 112

9.3.1 The jurisdiction of the magistrate

21. We go straight to the speech of Lord Griffiths in Bennett. His Lordship referred to the observation of Lord Parker CJ in Mills v Cooper [1967] 2 QB 459 at p467 that magistrates, like any court, had a right in their discretion to decline to hear proceedings on the ground that they were oppressive and an abuse of the process of the court, and continued, [1994] AC at p 63Hff:

22. Provided that it is appreciated by magistrates that this is a power to be most sparing exercised, of which they have received more than sufficient judicial warning (Please see, for example, Lord Lane C.J. in Reg v. Oxford City Justices ex parte Smith (1982) 75 C. App.R. 200 and Ackner L.J. in Reg. v. Horsham Justices, ex parte Reeves (Note) (1980) 75 C. App. R. 236) it appears to me to be a beneficial development and I am unpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court who are daily in much closer touch with the work in the magistrates' court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. **However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures.** Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in Reg. v. Guildford Magistrates' Court, ex parte Healy [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.

23. It will be recalled that the "abuse" complained of in Bennett was of a very particular nature, (allegedly) involving not specifically unfairness within the proceedings, but rather misconduct and indeed law-breaking by public authorities in bringing the defendant within the jurisdiction at all. As Lord Griffiths indeed said, it was something very different from abuse affecting what his Lordship called domestic criminal trial procedures.

24. On the basis of these observations, and with other authority in mind, the law as to jurisdiction over allegations of abuse in magistrates court cases is in our view as follows:

> 1. The Divisional Court and the magistrates court in principle have concurrent jurisdiction.

2. The Divisional Court is able to consider abuse of all types, including cases of the type characterised by Lord Griffiths as domestic: see for instance R v Croydon JJs ex parte Dean [1993] QB 769, which has never been suggested to have been wrongly decided as a matter of jurisdiction.

3. Within the general jurisdiction referred to in paragraph 1 above there is a limited category of cases, involving infractions of the rule of law outside the narrow confines of the actual trial or court process, where the magistrates do not have jurisdiction, or alternatively as a matter of law should not exercise such jurisdiction as they may have. So much is clear from Lord Griffith's speech in Bennett, though the exact reach of this category remains to be determined. Such cases should, as in Bennett, be addressed by the wider supervisory jurisdiction of the Divisional Court. That category is however a narrow one. It excludes every complaint that is directed at the fairness or propriety of the trial process itself.

4. It will however always be open to magistrates in cases that do not fall within the narrow Bennett category to decline jurisdiction, and require the matter to be pursued in the Divisional Court, whether because of the complexity or novelty of the point, or because of the length of investigation that is required. Any such decision by a magistrate, being one taken within the limits of his judgement, will be unlikely to be overturned in this court.

5. The wide category of cases over which magistrates have jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly: see for instance per Lord Oliver of Aylmerton in Bennett at p70E. Lord Oliver dissented in Bennett on the issue of whether the Divisional Court, or any other court, had any general supervisory jurisdiction of the order envisaged by the majority; but his observations about the general jurisdiction of the magistrates court are, with respect, a valuable synopsis of that jurisdiction, that accurately expresses the assumptions made by the other of their Lordships.

6. The domestic trial procedures to which Lord Griffiths referred in Bennett must include cases that fall foul of the Hunter rule.

25. We are fortified in these conclusions by the fact that it is well settled that a magistrate, when considering whether to issue a summons, has jurisdiction to refuse to issue a summons if to issue a summons would be vexatious and improper even if there were evidence of the offence:

R v Bros (1902) 85 LT 581 at p582, per Lord Alverstone CJ, cited with approval by Lord Widgery CJ in R v Metropolitan Magistrate ex p Klahn [1979] 1 WLR 933 at p936A. It would seem to be clearly vexatious to seek to issue a summons that involved a breach of the Hunter rule. If the magistrate has jurisdiction to refuse to issue such a summons, he must surely have jurisdiction to stay proceedings on such a summons at a later stage.

26. We have not overlooked that, as Mr Lawson very properly reminded us, it would appear that in the unreported case of R v Barnet JJs ex p R (10 November 1994) this court accepted, on the basis of Bennett, that the magistrates did not have jurisdiction to consider allegations of abuse based on "bad faith", as exemplified by the Hunter rule. That was however only a matter of assumption, in a case where the point does not appear to have been the subject of argument, and certainly not of the close attention that it has received before us; any holding to that effect would in any event have had to be obiter; and, we have to say, at least in respect

of bad faith generally stated, such a conclusion was contrary to the general assumptions made in Bennett. We are not in my view constrained in any way by Barnet JJs.

27. We are therefore of opinion that the magistrate was wrong to consider that he did not have jurisdiction to entertain a complaint of abuse on Hunter grounds. Had he merely decided not to exercise an accepted jurisdiction (category 4 above) his decision would be unlikely to be open to challenge in this court. However, he held as a matter of law that he could not entertain the complaint: and that, being an error of law, is open to correction by this court.

The Hunter rule

28. It therefore follows that if the magistrate was right in thinking that the present case infringed the Hunter rule he should have acceded to the application to stay the proceedings for abuse of process. The problem about the magistrate's conclusion is, however, that, although he appears to have held that the effect of the proceedings under the summonses would be to mount a collateral attack on Mr Tivnan's convictions, it is difficult or impossible to see that that would in fact be so. In order to demonstrate that point, we must first remind ourselves of what is meant in this context by "collateral attack".

29. Lord Diplock in Hunter found the principle to be stated in the judgment of AL Smith LJ in Stephenson v Garnett [1898] 1 QB 677 at pp 680-681:

> *the court ought to be slow to strike out a statement of claim or defence, or to dismiss the action as frivolous or vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court*

30. The second proceedings must, therefore, seek an answer to the question or legal issue that has already been determined in the first proceedings. But the nub of the complaint about the summonses in our case is that Mr Tivnan by them says that he has been wrongly accused of trafficking in cocaine. For Mr Tivnan to establish by the proceedings under the summonses that he was not a cocaine dealer would in itself say nothing about his activities with regard to cannabis; and therefore the successful conclusion of the second proceedings would not contradict the result of the first proceedings.

31. Mr Lawson in effect accepted that that was so. He however argued that the Hunter rule was not so narrowly limited. It extended also to cases where the intent of the second set of proceedings was to attack an earlier decision, even if the decision in the second set of proceedings would not in fact have the effect of contradicting the first decision. He relied in the first instance on the formulation of Lord Diplock in Hunter, [1982] AC at p 541B:

32. The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction

33. In our case it was conceded by leading counsel on behalf of Mr Tivnan before the magistrate that Mr Tivnan's objective in bringing the summonses was to "clear his name". The magistrate was for that and other reasons fully justified in finding, as he did, that the

prime aim of these instant proceedings is a collateral attack upon Mr Tivnan's original conviction for drug smuggling

34. We cannot however agree that that is enough to engage the Hunter rule. In our view that ground of abuse of process is based on the effect of the second set of proceedings, rather than on the intention with which those proceedings are brought. Mr Lawson very properly accepted that the observation of Lord Diplock quoted above was not conclusive on this point. He therefore took us to other authority in which the content of the Hunter rule has been discussed. That authority does not assist him. In Walpole v Partridge & Wilson [1994] QB 106 the plaintiff, who had been convicted before the magistrates, sued the solicitors who had acted for him in connexion with a proposed appeal to the Crown Court for failure to lodge such an appeal. The solicitors applied to strike out the action, citing Hunter. The Court of Appeal rejected that objection because, per Ralph Gibson LJ at p 118E, to permit a claim to be pursued for causing a plaintiff to lose the power to exercise a right of appeal is not to permit relitigation of the same issue

35. It would therefore seem to follow that the second proceedings must be in fact and effect, and not merely in intention, a challenge to the finding in the first proceedings.

36. That also appears to have been the view of the Court of Appeal in a subsequent case where a plaintiff convicted of a criminal offence again sought to sue his solicitors for negligence in the conduct of the criminal trial. In Smith v Linskills [1996] 1 WLR 763 the plaintiff said that his object in bringing the proceedings was not to re-open the original conviction, but to recover damages. The Court of Appeal however held, per Bingham MR at p768, that

> *37. It is, however, plain that the thrust of his case in these proceedings is that if his criminal defence had been handled with proper care he would not, and should not, have been convicted. Thus the soundness or otherwise of his criminal conviction is an issue at the heart of these proceedings. Were he to recover substantial damages, it could only be on the basis that he should not have been convicted....It is certainly true that in his speech in Hunter's case, at p 541E, Lord Diplock attached considerable significance to the ulterior purpose which lay behind the proceedings brought by the intending plaintiff in that case. We have no doubt at all but that the existence of such an ulterior motive provides a strong and additional ground for holding proceedings to be an abuse. The question is whether such an ulterior motive is a necessary ingredient of abuse.*

38. The Court of Appeal held that it was not. In so doing the court cited extensively from the judgment of Ralph Gibson LJ in Walpole's case, and in particular his Lordship's observation at p120H that

39. If it is clearly shown that the plaintiff's claim is a collateral attack upon a final judgment within the principle stated and applied in Hunter's case, then the simple purity of his purpose in seeking financial damages alone would not save his action

Smith v Linskills addressed the converse case from that in Walpole v Partridge & Wilson , since it concerned proceedings that undoubtedly would, if they had been successfully concluded, have contradicted the judgment in earlier proceedings. There is no doubt, however, that in both authorities the Court of Appeal regarded that factor as a necessary, and not merely as a sufficient, condition for the application of the Hunter rule.

40. Even if that were not already clear, it is put beyond doubt by the explanation given by the Court of Appeal in Smith v Linskills of the considerations underlying the Hunter rule, [1996] 1 WLR at p773A ff:

41. The main considerations of public policy which underlie the existing rule are, as we understand, threefold: (1) The affront to any coherent system of justice which must necessarily arise if there subsist two final but inconsistent decisions of courts of competent jurisdiction. ... (2) The virtual impossibility of fairly retrying at a later date the issue which was before the court on the earlier occasion...(3) The importance of finality in litigation.

42. All of these considerations, and in particular the first of them, assume that the second proceedings do in fact involve the danger of a decision inconsistent with the decision in the first proceedings: rather than, as in our case, an intention to make a "collateral attack" in a more general sense on those first proceedings. That conclusion is wholly consistent with, indeed is dictated by, the rationale of the Hunter rule drawn by Lord Diplock from the judgment of AL Smith LJ in Stephenson v Garnett .

43. The magistrate was, therefore, wrong in concluding that the summonses fell foul of the Hunter rule in its true formulation.

The jurisdiction of this court

44. It is not therefore possible for this court to reverse the magistrate's decision, even though he was wrong as to the ambit of his jurisdiction. We have therefore to go on and consider whether in this case we should exercise the supervisory jurisdiction of this court, to decide whether, as it is put in paragraph 5 of the ground set out in Mrs Watts' form 86A, citing Lord Lowry in Bennett [1994] 1 AC 42 at p74G, it should offend the Court's sense of justice and propriety to be asked to try the accused in the circumstances of [this] particular case

45. We have no doubt that the summonses fall under that condemnation. The principal reason for so concluding is that, by admission made by leading counsel on behalf of Mr Tivnan and recorded above, they have been issued with an ulterior motive, to clear his name rather than to bring the alleged criminals to justice. Although such a motive does not, as we have demonstrated, of itself engage the operation of the Hunter rule, it does, potentially, give rise more general issues of abuse of process. We are far from saying that a desire to clear the prosecutor's name would always be open to objection. To cite the example suggested during argument by Collins J, if a man thought that he had been convicted on the basis of perjured evidence by Mr A, it would be open to him to prosecute Mr A for perjury committed in an unconnected case, in order to seek to demonstrate Mr A's general unreliability. That,

however, is not this case. Mr Tivnan thinks that these proceedings will directly undermine his earlier conviction, and has that as his motive. But if Mr Tivnan wished to do something about his earlier conviction, he had his right to appeal, and to carry that appeal through to the end of its process. That is what he consciously decided not to do. It is wholly inappropriate now, some three or more years later, to try to use collateral criminal proceedings for the same purpose. That that is Mr Tivnan's purpose is demonstrated not only by the admission made on his behalf, but also by the use in his criminal proceedings of the allegation of earlier malice, quoted above; and by letters that he wrote to HM Customs immediately after the issue of the summonses demanding, in his capacity as prosecutor, a very wide range of documents, and facilities for interrogation, that had very little to do with the criminal acts of which he accused Mrs Watts, and very much to do with the events leading up to his own conviction.

46. The summonses are further abusive because Mr Tivnan has delayed in issuing them for some four and a half years after he knew of the matters complained of. As we have said, it was properly conceded on behalf of Mrs Watts that that delay did not affect the possibility of there being a fair trial of the summonses. It is however an abuse to commence civil proceedings in respect of an alleged libel, fail to prosecute those proceedings with anything remotely like due diligence, and then issue criminal proceedings that in respect of one summons in fact and in respect of the other summons in effect ventilate the same complaint as the civil proceedings. That is a further and separate reason why these proceedings should not be permitted to continue.

Conclusion

47. We accordingly have no doubt that the summonses are an abuse of the criminal process. At a time where it appears that the bringing of private prosecutions is to be facilitated (Please see Law Commission Report No 255, Consents to Prosecution (1998), we do well to remind ourselves that a private prosecutor such as Mr Tivnan is still a prosecutor, and subject to the same obligations as a minister of justice as are the public prosecuting authorities. We think that if the public prosecutor **had brought proceedings in anything like comparable circumstances to those in which the summonses were issued it would have been thought self-evident that they should be stayed. For the reasons set out above, that should be the fate also of these summonses.

48. We would therefore order, in the exercise of the supervisory jurisdiction of this court, that the summonses be stayed as an abuse of the criminal process. SL, R. v [2006]

9.4 GRASSBY v. THE QUEEN (1989) 168 CLR 1 12 October 1989

9.4.1 Powers of magistrate--Committal proceedings—Finding of prima facie case

HIGH COURT OF AUSTRALIA

Mason C.J., Brennan, Deane, Dawson and Toohey JJ.

GRASSBY v. THE QUEEN

(1989) 168 CLR 1

12 October 1989

Criminal Law (N.S.W.)—Courts and Judges

Criminal Law (N.S.W.)—Committal proceedings—Finding of prima facie case—Powers of magistrate—Whether power to stay proceedings as abuse of process—Justices Act 1902 (N.S.W.), s. 41(6). Courts and Judges—Bias—Appeal by Crown from order staying committal proceedings—Comment by member of appeal court in previous case that prosecution of accused "obviously an appropriate use of the criminal law"—Refusal to disqualify—Reasonable apprehension of bias.

Decisions

MASON C.J. I agree with the orders proposed by Dawson J. for the reasons which he gives.

BRENNAN J. I agree with Dawson J. that the magistrate, having made the findings which he did, was bound by s.41(6)(b) of the Justices Act 1902 (NSW) to commit the applicant for trial. I agree with the reasons which his Honour gives for that conclusion and, in particular, with his Honour's analysis of the function of committal proceedings in the administration of the criminal law in New South Wales. From the conclusion that s.41(6)(b) determined the magistrate's duty, it follows that consideration of the question whether a prosecution of the accused on indictment would amount to an abuse of process was no part of the magistrate's function. It is therefore unnecessary to repeat, for the purposes of this case, the view which I expressed in Jago v. The District Court of New South Wales (unreported, delivered 12 October 1989) as to the meaning of abuse of process in the prosecution of criminal offences.

2. I agree also in his Honour's observations with respect to the need for Hunt J. to have disqualified himself from sitting as a member of the Court of Criminal Appeal.

3. I would grant special leave to appeal and dismiss the appeal.

DEANE J. Subject to one qualification, I am in general agreement with the judgment of Dawson J. The qualification relates not to a matter of general principle but to the effect of

the statutory provisions directly involved in this case. My view on that narrow question of construction leads, however, to a different conclusion about the outcome of the appeal from that reached by Dawson J.

2. The particular statutory provisions are those of s.41(6) of the Justices Act 1902 (NSW) ("the Act"). That sub-section identifies the primary function of a magistrate in New South Wales at the conclusion of the hearing of evidence on committal proceedings in relation to an indictable offence. It provides:
"When all the evidence for the prosecution and any evidence for the defence have been taken, the Justice or Justices shall, after considering all the evidence before the Justice or Justices -- (a) if of the opinion that, having regard to all the evidence before the Justice or Justices, a jury would not be likely to convict the defendant of an indictable offence -- forthwith order the defendant to be discharged as to the information then under inquiry; or (b) if not of that opinion--commit the defendant for trial."

3. The question which s.41(6) requires a magistrate to address relates to the likely outcome of a trial if a committal order were to be made. It is whether, having regard to "all the evidence" before the magistrate, he or she is "of the opinion that ... a jury would not be likely to convict the defendant of an indictable offence". The resolution of that question will necessarily involve, in many cases, an assessment of the likely rulings which would be made by a trial judge (if a committal order were made) about whether particular evidence is admissible or should be received. If, for example, a magistrate were of the view that the only incriminating evidence would clearly be excluded by the trial judge in the exercise of a judicial discretion, he or she would, in my view, necessarily be of the opinion that, having regard to all the evidence before him or her, a jury would not be likely to convict the defendant of an indictable offence. In that regard, it seems to me that the requirement that the magistrate have regard to "all the evidence before the Justice or Justices" does not require the magistrate to disregard the question whether some or all of that evidence would be either ruled inadmissible or excluded on discretionary grounds upon a trial (cf. Seymour v. Attorney-General (Cth) (1984) 1 FCR 416, at p 441 and on appeal (1984) 4 FCR 498, at pp 503-504; Clayton v. Ralphs and Manos (1987) 45 SASR 347, at pp 358, 409). To the contrary, a magistrate cannot intelligibly address the question whether a jury would not be likely to convict without deciding, to the best of his or her ability and on the material before him or her, what the evidence before the jury would be.

4. In its judgment in the present case, the New South Wales Court of Criminal Appeal rightly accepted that there are circumstances in which criminal proceedings instituted in the Supreme Court could constitute an abuse of process notwithstanding that there was evidence upon which a jury could find the accused guilty. Prolonged delay on the part of the Crown in instituting proceedings could give rise to such circumstances. An extreme and purely hypothetical case should suffice to illustrate the point. If, for example, it was established that the prosecution had deliberately delayed bringing proceedings until defence evidence was no longer available, the reason for and the consequences of the delay might produce a situation in which any subsequent trial would necessarily be unfair and an abuse of process. In the rare case where a trial would necessarily be unfair and an abuse of process, the Supreme Court possesses inherent jurisdiction permanently to stay further proceedings in the matter (Please see Jago v. The District Court of New South Wales, unreported, 12 October 1989).

5. If, in the course of committal proceedings, a serious question emerges about whether a

prosecution of the accused in the Supreme Court would be stayed by that court as an abuse of its process, the magistrate hearing the committal proceedings is, in my view, neither obliged nor entitled to disregard that question in determining whether a committal order should be made. If the magistrate is of the view that, having regard to all the evidence, a prosecution in the Supreme Court would be permanently stayed as an abuse of the process of that court, he or she would, in my view, necessarily be of the opinion that a jury would not be likely to convict the defendant of an indictable offence if a committal order were made. That seems to me to be the effect of a literal construction of the words of s.41(6). As a matter of policy, I see no convincing reason for departing from that literal construction. To the contrary, it seems to me to be undesirable that a magistrate should be required to make an order that an accused be committed for a trial which would constitute an abuse of process if it were held. Nor can I see any convincing reason why an accused should be subjected to the anxiety and jeopardy involved in being committed for trial in such circumstances. If the view be taken by the prosecuting authorities that a magistrate is clearly in error in concluding that the circumstances are such that proceedings in the Supreme Court would be permanently stayed, it will remain open to the Attorney-General or the Director of Public Prosecutions to test the matter in the Supreme Court by filing an indictment or, arguably, by proceedings for declaratory relief (Please see, Spautz v. Williams (1983) 2 NSWLR 506, at p 517).

6. The material before the Court indicates that the question whether, if a committal order were made, proceedings in the Supreme Court would constitute an abuse of the process of that court was clearly raised before the learned magistrate in the present case. That being so, he was, in my view, required to advert to the question whether proceedings in the Supreme Court would be permanently stayed in forming an opinion about whether a jury would not be likely to convict the applicant of an indictable offence. His Worship did not, however, advert to that question in the process of considering whether he was of the opinion that a jury would not be likely to convict the applicant if an order were made that he be committed for trial. Instead, having indicated that he was not of that opinion, he purported himself to make an order permanently staying the committal proceedings. For the reasons given by Dawson J., that order was not one which he was entitled to make.

7. In the result, the Court of Criminal Appeal was correct in concluding that the order permanently staying the committal proceedings should not be allowed to stand. On the other hand, the applicant was, in my view, entitled to have the question whether proceedings in the Supreme Court would be permanently stayed as an abuse of the process of that court considered by the learned magistrate in forming an opinion about whether a jury would not be likely to convict him if a committal order were made. Ordinarily, the appropriate course in these circumstances would be to make orders which would have the effect that the matter was remitted to the learned magistrate to enable him to consider that question in that context. However, in the special circumstances of this case where there has already been long delay and where carefully reasoned views on that question have been expressed by the members of a Court of Criminal Appeal whose constitution has been made the object of a successful attack in this Court, it appears to me that the preferable course is to remit the matter to a freshly constituted Court of Criminal Appeal so that that court can consider whether it would be open to the learned magistrate to conclude that proceedings in the Supreme Court should be stayed as an abuse of process and that, for that reason, it was not likely that a jury would convict the applicant. Accordingly, I would grant special leave to appeal, allow the appeal and make orders having that effect.

DAWSON J. This application for special leave to appeal raises the question whether a magistrate has power to order a stay of committal proceedings as an abuse of process of court. Such an order was made in committal proceedings in which the applicant was a defendant, but the order was set aside by the Court of Criminal Appeal. The applicant now seeks special leave to appeal against the decision of the Court of Criminal Appeal.

2. In 1977 Mr Donald Bruce Mackay disappeared. He had been actively involved in a campaign against drug trafficking in the Griffith area of New South Wales. After his disappearance, a Royal Commission was appointed to enquire into drug trafficking. In 1979 the Royal Commission found that Mr Mackay had been murdered by an organization, comprised largely of people of Calabrian descent, involved in the cultivation of marijuana in the Griffith district.

3. Following the finding of the Royal Commission, a document was published containing allegations that Mr Mackay had been murdered, not by persons connected with the drug trade, but by his wife, his son and their solicitor or by someone on their behalf. The authorship of that document has not been established.

4. In 1987 the applicant, together with a number of others, was charged with conspiracy to pervert the course of justice and criminal defamation. Both charges related to the publication of the document in question but the charge of criminal defamation was based upon its publication on 29 July 1980 to a member of the Legislative Assembly of New South Wales, Mr Michael Maher. The prosecution alleged that the applicant on that date asked Mr Maher to read the document in Parliament and told him to keep on reading it despite any points of order which might be taken.

5. The committal proceedings in relation to both charges were heard in April and May of 1988. Applications based upon delay were twice made for a stay of the proceedings and were twice dismissed by the magistrate hearing the proceedings. Having heard the evidence, the magistrate discharged the defendants upon the charge of conspiracy. He also discharged the defendants other than the applicant upon the charge of criminal defamation. Upon that charge the magistrate found a prima facie case against the applicant and was not of the opinion, having regard to all the evidence before him, that a reasonable jury properly instructed would not be likely to convict the applicant. His failure to form such an opinion was relevant by reason of s.41(6) of the Justices Act 1902 (NSW). Section 41, which lays down the duties of justices hearing committal proceedings for an indictable offence, provides in sub-s.6 as follows:
"When all the evidence for the prosecution and any evidence for the defence have been taken, the Justice or Justices shall, after considering all the evidence before the Justice or Justices - (a) if of the opinion that, having regard to all the evidence before the Justice or Justices, a jury would not be likely to convict the defendant of an indictable offence - forthwith order the defendant to be discharged as to the information then under inquiry; or

(b) if not of that opinion - commit the defendant for trial."

Notwithstanding this the magistrate did not commit the applicant for trial upon the charge of criminal defamation, but acceded to a renewed application, which he invited, for a stay of proceedings on that charge and ordered a permanent stay.

6. The matter came before the Court of Criminal Appeal by way of appeal against the stay order pursuant to s.5F of the Criminal Appeal Act 1912 (NSW). That court expressed the view that, whilst the magistrate had no power to stay a trial, he did have power, even at the stage which the committal proceedings had reached, to stay those proceedings if they amounted to an abuse of the process of those committal proceedings. The Court of Criminal Appeal found, however, that the proceedings in the magistrate's court did not amount to an abuse of that court's process and set aside the order made by the magistrate. It directed the magistrate to conclude the hearing upon the charge of criminal defamation against the applicant in accordance with s.41(6) of the Justices Act.

7. It was submitted on behalf of the applicant that the Court of Criminal Appeal was wrong in its view that the magistrate, in determining whether to impose a stay, was limited to considerations affecting the process of the committal proceedings themselves and was precluded from taking into account the fairness of any trial for which the applicant might be committed. It was, however, conceded that the stay which was ordered could operate only upon the committal proceedings and could not operate to prevent the trial of the applicant upon indictment. The assumption underlying this submission is that there was power, whatever its extent, inherent in the magistrate to bring the committal proceedings to a halt, even after the calling of evidence had been concluded, in order to prevent injustice or oppression constituting an abuse of process.

8. Such a power has been denied upon the highest authority in the United Kingdom. In Connelly v. Director of Public Prosecutions (1964) AC 1254 views were expressed, notably by Lord Devlin (at p 1354) and Lord Pearce (at pp 1361-1362), that every court has a right to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court. See also Mills v. Cooper (1967) 2 QB 459, per Lord Parker C.J. at p 467. Whether such comments were correct in relation to inferior courts exercising ordinary judicial functions has been doubted (Please see Reg. v. Humphrys (1977) AC 1, per Viscount Dilhorne at p 26, per Lord Salmon at pp 45-46; to the contrary Reg. v. West London Stipendiary Magistrate; Ex parte Anderson (1984) 80 Cr App R 143, at p 149), but it is clear that they do not extend to a magistrate hearing committal proceedings. In Atkinson v. U.S.A. Government (1971) AC 197 Lord Reid (with whom Lords MacDermott and Guest agreed) said, at pp 231-232:
"The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires. The appellant argues that this was established, if it had been in doubt, by the decision of this House in Connelly v. Director of Public Prosecutions. ... Whatever may be the proper interpretation of the speeches in Connelly's case ... with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. And that proposition has no support in practice or in principle. **In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial**."

9. In Miller v. Ryan (1980) 1 NSWLR 93, at p 107, Rath J. read these passages as referring only to the case where the magistrate has heard all the evidence and not as denying generally the power of a magistrate to stay committal proceedings as an abuse of process.

Rath J. went on to hold (at p 109) that a magistrate otherwise does have power to stay committal proceedings upon the ground that they are oppressive and vexatious. The present case is, of course, one in which the magistrate had heard all the evidence before he purported to stay proceedings, but I am unable to read Lord Reid's remarks as confined to that situation. Nor is there any logical reason for doing so. If committal proceedings are an abuse of process justifying a stay, they do not cease to be so merely because the evidence is closed and there is no reason why a power otherwise existing to order a stay should cease at that point. The question is more fundamental than that and the answer lies in the nature of committal proceedings and of the function of the magistrate in hearing them.

10. **It has consistently been held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of an executive or ministerial function**. See Ammann v. Wegener (1972) 129 CLR 415, at pp 435-436; Lamb v. Moss (1983) 76 FLR 296, at p 321; 49 ALR 533, at p 559; Reg. v. Nicholl (1862) 1 QSCR 42; In re The Mercantile Bank; Ex parte Millidge (1893) 19 VLR 527, at p 539; Huddart, Parker &Co. Proprietary Ltd. v. Moorehead (1909) 8 CLR 330, at pp 356-357; Ex parte Cousens; Re Blacket (1946) 47 SR (NSW) 145; Ex parte Coffey; Re Evans (1971) 1 NSWLR 434. The explanation is largely to be found in history. **A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organized police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1 &2 Philip &Mary c.13; 2 &3 Philip &Mary c.10), they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial.**

11. With the establishment of an organized police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in The Indictable Offences Act 1848 (U.K.) (11 &12 Vict c.42), "Sir John Jervis' Act", which provided for witnesses appearing before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his counsel. Depositions of the evidence were to be taken down in writing and signed by the magistrate and the accused. The accused was no longer obliged to be examined. He was to be invited to make a statement and was to be cautioned with the now familiar words: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial". The Act went on to provide that "**if, in the opinion of such justice or justices such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise(s) a strong or probable presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant, commit him to the common gaol or house of correction ... or admit him to bail ...".**

12. The provisions of Sir John Jervis' Act established committal proceedings in essentially the same form as they are today and were adopted in New South Wales in 1850: Justices of the Peace (Adopting) Act 1850 (NSW) (14 Vict No.43); see now Justices Act 1902 (NSW),

s.41. **It is to be noted that even under Sir John Jervis' Act the function of the justices was not to determine whether the accused should stand trial - that was still a matter for a grand jury - but to decide whether the accused should be committed to gaol to await trial, admitted to bail or discharged.** Cf. The Interpretation Act of 1897 (NSW), s.28. But in determining whether an accused should be committed to gaol to await trial - committed for trial - it was necessary to determine whether a sufficient case had been made against him, thus duplicating in a practical sense the inquiry to be made by a grand jury in determining whether to indict the accused by returning a true bill. More and more the grand jury became a formality until it was finally abolished in the United Kingdom in 1933. By that time it had ceased to serve any real function.

13. The abolition of the grand jury was effected by the Administration of Justice (Miscellaneous Provisions) Act 1933 (U.K.). It laid down another procedure for the indictment of offenders which gave a significance to committal proceedings which they do not have in this country. Under the provisions of that Act, as amended, a bill may only be preferred, save in limited circumstances, if the person charged has been committed for trial and, where he has been so committed, the proper officer of the Crown Court is required to sign a bill preferred for his signature. Upon signature the bill becomes an indictment and is proceeded upon accordingly. Where committal proceedings have resulted in the discharge of the person charged, no indictment can be brought except through fresh committal proceedings or by leave of a judge of the High Court. Thus committal proceedings in the United Kingdom have become an integral part of the process leading to trial and form a substitute for the grand jury process.

14. The procedure for indictment differed in New South Wales and other Australian colonies. Whilst the grand jury is mentioned in various enactments, it seems that it may never have been used in New South Wales. See, however, Reg. v. McKaye (1885) 6 NSWR 123, at p 127. At all events it is clear that grand juries have not been used there since 1850 when the provisions of Sir John Jervis' Act were adopted. In 1823 the New South Wales Act (Imp.) (4 Geo.IV c.96) provided that those crimes which would nowadays be indictable offences should be prosecuted "by information in the name of His Majesty's Attorney General, or other officer duly appointed for such purpose by the governor": s.4. A similar provision was subsequently made by s.5 of The Australian Courts Act 1828 (Imp.) (9 Geo.IV c.83) but it was expressed to be an interim measure pending the constitution of grand juries. See also s.17 and the Crimes Act 1900 (NSW), s.572 in relation to District Courts. Grand juries were never constituted, but the term "information" continued until s.3 of the Criminal Law Amendment Act of 1883 (NSW) made way for the use of the term "indictment". See now Crimes Act, s.4(1) and Criminal Procedure Act 1986 (NSW), s.4.

15. Section 5 of The Australian Courts Act and s.572 of the Crimes Act have been repealed by ss.4 and 3 and Sched.1 of the Miscellaneous Acts (Public Prosecutions) Amendment Act 1986 (NSW). Indictable offences are now punishable by information - to be called an indictment - on behalf of the Crown in the name of the Attorney-General or the Director of Public Prosecutions: Criminal Procedure Act, s.4(1); Director of Public Prosecutions Act 1986 (NSW), s.7. A Crown Prosecutor, acting in the name and on behalf of the Director of Public Prosecutions, may also find a bill of indictment: Crown Prosecutors Act 1986 (NSW), s.5(1)(b). Thus in New South Wales indictment on behalf of the Crown in the name of the Attorney-General or the Director of Public Prosecutions takes the place of the grand jury's bill and the indictment founded upon it. The Attorney-General or Director of Public

Prosecutions is not bound by the decision of a magistrate to commit or not to commit a person for trial. An indictment may be filed whether or not the accused has been committed for trial upon the charge contained in the indictment, indeed, even if the accused has been discharged in committal proceedings: Criminal Procedure Act, s.4(2). See Reg. v. Cummings (1846) 1 Legge 289; Reg. v. Walton (1851) 1 Legge 706; R. v. Baxter (1904) 5 SR (NSW) 134.

16. In New South Wales the indictment also takes the place of the ex officio criminal information which it was the established privilege of the Attorney-General to file in the Queen's Bench Division of the High Court at will or at the relation of a private person or common informer. See Holdsworth, A History of English Law, 3rd ed. (1944), vol.9, at pp 236 et seq. Section 12 of the Administration of Justice (Miscellaneous Provisions) Act 1938 (U.K.) abolished criminal informations, although "informations filed ex officio by His Majesty's Attorney-General" were preserved. As a matter of practice ex officio informations have ceased to be used at all in the United Kingdom. See Edwards, The Law Officers of the Crown, (1964), p 266. Notwithstanding the element of historical inaccuracy, any indictment filed in New South Wales in the absence of committal for trial, whether or not there have been committal proceedings, is commonly referred to as an ex officio indictment. See Barton v. The Queen (1980) 147 CLR 75; Kidston, "The Office of Crown Prosecutor", (1958) 32 Australian Law Journal 148.

17. In fact the old, unpopular ex officio information, now largely abolished in the United Kingdom, was reflected in s.6 of The Australian Courts Act rather than in the authorization given by s.5 to the Attorney- General to assume the functions of a grand jury. Section 6 was peculiar to Australia and authorized any person, by leave of the Court, to exhibit a criminal information in the name of the Attorney-General for any crime or misdemeanour other than a capital offence. It was suggested in Reg. v. McKaye (at pp 127-128) that the reason for this extraordinary power lay in the "small number of inhabitants (of New South Wales) many of whom were convicts. In fact, it was very little better than a gaol, and it might be that in those days it was thought right that the Court as well as the Attorney-General should have power to direct informations to be filed in all cases, not being capital."

18. Committal for trial does not in New South Wales determine, as it now effectively does in the United Kingdom, whether a person charged with an offence shall be indicted. He will, of course, ordinarily stand trial if committed, although not necessarily so, and a person discharged may nevertheless be indicted. The powers of a magistrate in committal proceedings are thus, strictly speaking, still confined to determining whether the person charged shall be discharged, committed to prison to await trial or admitted to bail and do not involve the exercise of a judicial function.

19. The importance of the committal in the criminal process should not, however, be underrated. It enables the person charged to hear the evidence against him and to cross-examine the prosecution witnesses. It enables him to put forward his defence if he wishes to do so. It serves to marshal the evidence in deposition form. And, notwithstanding that it is not binding, the decision of a magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued. Indeed, the significance of the magistrate's decision is clearly reflected in the requirement now contained in s.41(6) of the Justices Act that the magistrate should

discharge a defendant if he is of the opinion that, having regard to all the evidence, a jury would not be likely to convict. Furthermore, the value of committal proceedings to a person charged may be such as to warrant a trial being stayed or postponed where an ex officio indictment has been presented without committal proceedings, in order to prevent an abuse of process of the trial court and to ensure a fair trial: Barton v. The Queen.

20. The committal proceedings in question in this case were heard by a magistrate sitting as a Local Court. See Local Courts Act 1982 (NSW), ss.7 and 8. As Gibbs J. pointed out in Ammann v. Wegener, at p 436, it does not follow that because a magistrate is not exercising judicial functions he cannot be said to sit as a court. It is common enough for courts which are not subject to constitutional restraints to exercise administrative functions. Moreover, whilst not required to make a judicial decision, the magistrate was no doubt bound to act judicially in arriving at a result, that is to say, he was bound to act justly and fairly. There is controversy whether the existence of that duty, coupled with the nature of the function performed by the magistrate, is sufficient to subject him to prohibition and the question must still be regarded as undecided. In Sankey v. Whitlam (1978) 142 CLR 1, at p 83, Mason J. thought that such a result did follow, but the other members of the Court went no further than to affirm the availability of declaratory relief in a proper case.

21. **The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions.** A fortiori that must be the case when its functions are of an administrative character. In Reg. v. Forbes; Ex parte Bevan (1972) 127 CLR 1, at p 7, Menzies J. pointed out that:
"'Inherent jurisdiction' is the power
which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorizing provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction', which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have 'inherent jurisdiction'." Inherent jurisdiction is an elusive concept and the proposition that it arises from the nature of a court has been described as metaphysical. See (1947) 57 Yale Law Journal 83, at p 85, cited by Jacob, "The Inherent Jurisdiction of the Court", (1970) 23 Current Legal Problems 23, at p 27. But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, **a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution**. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it

everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental.

22. The point may be illustrated by reference to the power to punish summarily for contempt not committed in the face of the court. Such a power is inherent in a superior court but forms no part of the powers of an inferior court: see Reg. v. Lefroy (1873) LR 8 QB 134. A superior court, however, not only has power to punish contempt against itself committed out of court, but in the exercise of its inherent jurisdiction it may prevent and punish summarily as a contempt any interference with the due course of justice in an inferior court. In John Fairfax &Sons Pty. Ltd. v. McRae (1955) 93 CLR 351 this Court pointed out that the jurisdiction over contempts committed against inferior courts was inherited by the superior court as "custos morum of all the subjects of the realm" (at p 365) and was but an aspect of "the traditional general supervisory function of the King's Bench, the function of seeing that justice was administered and not impeded in lower tribunals" (at p 363). The immediate basis for the exercise of such a function is to be found in the absence of any inherent jurisdiction in inferior courts similarly to protect themselves: see R. v. Davies (1906) 1 KB 32, at pp 47-48. A magistrate's court in New South Wales now has, of course, a statutory power to punish for contempt: Justices Act, s.152.

23. It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be "derived by implication from statutory provisions conferring particular jurisdiction". There is in my view no reason why, where appropriate, they may not extend to ordering a stay of proceedings: cf. R. v. Hush; Ex parte Devanny (1932) 48 CLR 487, at p 515.

24. The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in s.41 of the Justices Act. But **the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial.** If the defendant is committed for trial and subsequently indicted, the charge contained in the indictment will take the place of the charge upon the information.

25. Section 41 of the Justices Act commences with sub-s.(1) which provides that: "Whenever a person charged with an offence upon an information ... appears or is brought before a Justice or Justices ... the Justice or Justices shall, if the person so charged has been provided with a written copy of the charges against him, take the evidence for the prosecution in (the) manner hereinbefore provided." The section goes on in sub-s.(2) to provide that after all evidence for the prosecution has been taken, the magistrate shall, after considering it, discharge the defendant as to the information if he is not of the opinion that the evidence is

capable of satisfying a jury beyond reasonable doubt that the defendant has committed an indictable offence and otherwise proceed. The section concludes the procedure with sub-s.(6) which requires the magistrate, after considering the evidence for the prosecution and any evidence for the defence, to order the defendant to be discharged as to the information if he is of the opinion that a jury would not be likely to convict the defendant of an indictable offence and otherwise to commit him for trial.

26. **There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided.** Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but **the ultimate determination whether he does in fact stand trial does not rest with the magistrate**. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform. Having regard to the exceptional nature of the occasions upon which the prosecution of an offence will amount to an abuse of the process of the court trying that offence, oppression arising from, and confined to, the committal process itself is difficult to conceive. Indeed, having regard to the inability of a magistrate to stay the trial, it is not possible for him to know conclusively whether the person charged may, having regard to the interests of justice, safely be deprived of the advantage of committal proceedings. No doubt it is possible to conceive of committal proceedings being allowed to be conducted in an oppressive manner. But that is something within the control of the magistrate. Indeed, under sub-s.(9) of s.41, which has not yet come into force, a magistrate will have added power for this purpose. Sub-section (9) reads: "The Justice or Justices may at any stage during the examination or cross- examination of any witness giving evidence for the prosecution or the defence terminate the examination or cross-examination on any particular matter if satisfied that any further examination or cross-examination on the matter will not assist the Justice or Justices in forming any opinion referred to in subsection (2) or (6)." Be that as it may, **the fact remains that in committal proceedings a magistrate is performing an administrative or ministerial function which is governed by statute and the terms of the statute afford no basis for the implication of any power to dispose of those proceedings by the imposition of a permanent stay**.

27. What I have said would be sufficient to dispose of the appeal, but it is necessary in the circumstances to go on and deal with a further ground which was raised before us. When this matter came on for hearing in the Court of Criminal Appeal comprising Lee C.J. at C.L., Yeldham and Hunt JJ., counsel for the applicant suggested that Hunt J. should disqualify himself from sitting. The suggestion was prompted by a comment made by his Honour in his judgment in Waterhouse v. Gilmore (1988) 12 NSWLR 270, at p 288, which, it was submitted, could give rise to a reasonable apprehension of bias. The comment was as follows:
"A prosecution has also been brought by the appropriate public authorities against Mr A Grassby, the former politician, in relation to his publication of grossly defamatory statements concerning the widow of Mr Donald McKay (the Griffith drug campaigner), following Mr Grassby's successful (but hardly meritorious) claim that her right to recover damages from him was barred by the Limitation Act 1969. That prosecution is obviously an appropriate use of the criminal law, as the fact of the publication by Mr Grassby and the

extraordinary circumstances surrounding it were not discovered until a statutory inquiry was held after the limitation period had expired." Hunt J., with the concurrence of the other two members of the Court, declined to disqualify himself from sitting, saying of the comment which he had previously made:

> *"It was no more than an illustration of one set of facts where I thought that the public interest, rather than merely private interests, would justify the use of the criminal defamation law. As it subsequently turned out, that set of facts was incomplete, because the fact of this publication had indeed been discovered prior to the expiration of the civil limitation period, even if its significance may not have been realized at the time. That may be quite a different situation, but that is not something which I need explore at this stage. I simply have no view one way or the other. No question of a stay of the prosecution of Mr Grassby by reason of prejudice caused by the Crown's delay was under consideration by me in Waterhouse v. Gilmore. That is perfectly clear from my judgment in that case."*

28. Whilst I have found it possible without regard to any question of lack of impartiality to reach the conclusion that there ought to be no interference with the orders made by the Court of Criminal Appeal, that Court in a joint judgment adverted to the possibility that, if the applicant were committed for trial, an application might be made to the trial court, based upon delay, for a stay of proceedings. The Court of Criminal Appeal then proceeded to express its views upon the merits of such an application in order to assist the judge who might hear it. If there were reasonable grounds for the apprehension of bias on the part of Hunt J., it would plainly be inappropriate for any judge hearing the later application to be guided by the views expressed by the Court of Criminal Appeal upon the question of a stay.

29. The test which is to be applied when bias is raised has been clearly laid down. It is whether in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him: see Livesey v. New South Wales Bar Association (1983) 151 CLR 288; Reg. v. Watson; Ex parte Armstrong (1976) 136 CLR 248. If so, then the judge ought not to proceed to hear the matter. Of course, as Gibbs C.J. pointed out in Reg. v. Simpson; Ex parte Morrison (1984) 154 CLR 101, at p 104, the mere expression of the apprehension of bias does not establish that it is reasonably held; that is a matter which must be determined objectively.

30. In this case, it is true that the comment in question was made in the context of another case, Waterhouse v. Gilmore, which involved issues different from those before the Court

of Criminal Appeal in the present case. The comment was made by his Honour in a context in which he was attempting to draw a distinction between prosecutions for criminal defamation serving only private interests and those which, because they had a public aspect, justified the use of the criminal law. But in seeking to draw that distinction and in using the present case as an example, his Honour necessarily spoke of the prosecution of the applicant in terms of approbation at a time when the evidence against the applicant had not even been heard in committal proceedings. He did so without reference to any presumption of innocence. The comment was made, not merely in the course of argument where it may have been regarded as the momentary choice of a convenient example, but in a considered judgment. Moreover, the reference to the prosecution against "Mr A Grassby, the former politician" as being "obviously an appropriate use of the criminal law" involves an element of pre-judgment in emphatic, if not coloured, terms which must surely have justified apprehension on the part of the applicant that the attitude of his Honour towards his prosecution might not be impartial or unprejudiced. Indeed, the fact that the comment appeared in a judgment in an entirely different case, in which presumably there was no consideration of the evidence against the applicant or of any argument that may have been available to him, is so unusual as to lend added significance to the comment. Nor does the factual error which may be contained in it lessen its impact. In the minds of those unfamiliar with the capacity of the judicial mind to accept correction, if there were an error it would merely serve as an additional suggestion that the remarks were of a gratuitous nature.

31. Whilst a court may readily accept that no prejudice was intended by his Honour in expressing the views which he did and that in hearing the appeal before him his Honour was quite capable of putting those views to one side, the conclusion is, I think, unavoidable that the applicant or a member of the public might entertain a reasonable apprehension of bias. The matter having been raised, the due administration of justice required Hunt J. to have disqualified himself. It follows that, should the applicant be committed for trial and should any application subsequently be made to the trial court to stay the proceedings, the views expressed by the Court of Criminal Appeal upon the matter should be disregarded in the determination of that application.

32. I would grant special leave and dismiss the appeal.

TOOHEY J. I agree with the conclusion of Dawson J. and with his Honour's reasons for reaching the conclusion that, in the circumstances, the magistrate was bound by s.41(6)(b) of the Justices Act 1902 (NSW) to commit the applicant for trial.

2. I agree also with what Dawson J. has said regarding the disqualification of Hunt J. as a member of the Court of Criminal Appeal.

3. It follows that there should be a grant of special leave to the applicant but that the appeal should be dismissed.

Orders

Application for special leave to appeal granted.

Appeal dismissed.

9.5 Sunworld Ltd v Hammersmith & Fulham --[1999] EWHC QB 271 (23 November 1999); [2000] 1 WLR

9.5.1 Refusal to state a case no reasons

Relevant principles where it is sought to claim judicial review against the refusal by either a magistrates' court or the Crown Court to state a case for the opinion of the Divisional Court.

At page 2106, Simon Brown LJ set out the relevant principles in the following way, where it is sought to claim judicial review against the refusal by either a magistrates' court or the Crown Court to state a case for the opinion of the Divisional Court:

"Although it is impossible to lay down principles which will apply in every case, and this court should retain flexibility to deal with unusual situations as they arise, I would suggest the following approach.

(1) Where a court, be it a magistrates' court or the Crown Court, refuses to state a case, then the party aggrieved should without delay apply for permission to bring judicial review either

(a) to mandamus it to state a case and/or

(b) to quash the order sought to appealed.

(2) If the court below has already

(a) given a reasoned judgment containing all the necessary findings of fact and/or

(b) explained its refusal to state a case in terms which clearly raised the true point of law in issue, then the correct course would be for the single judge, assuming he thinks the point properly arguable, to grant permission for judicial review which directly challenges the order complained of, thereby avoiding the need for a case to be stated at all.

(3) If the court below has stated a case but in respect of some questions only, as here, the better course may be to apply for the case stated to be amended unless again, as here, there already exists sufficient material to enable the Divisional Court to deal with all the properly arguable issues in the case.

Seroka, R (on the application of) v Redhill Magistrates Court [2012] EWHC 3827 (Admin) (31 October 2012) This claim for judicial review challenged the refusal by the magistrates' court to state a case for the opinion of the court. In accordance with normal practice, the defendant had not taken any active part in these proceedings although it sought to assist the court by providing relevant correspondence. The Crown Prosecution Service played an active part in the proceedings as an interested party and opposed the claim for judicial review. Before the court turned to the specific facts of the case it reminded itself of the appropriate approach which the court should take in cases of this kind. That approach was helpfully set out by Simon Brown LJ as he then was, sitting in the Divisional Court with Turner J, in Sunworld Limited and Hammersmith and Fulham London Borough Council [2001] 1 WLR 2102.

The company faced a prosecution under the 1968 Act, in respect of a brochure. On conviction, the company asked the Crown Court to state a case for the Divisional Court. The Recorder refused as to two points, saying that they were decisions of fact not law. The company sought

judicial review for mandamus to require the case to be stated. Held: The court heard an appeal which should have been brought by way of judicial review. The court gave the necessary directions, and proceeded to treat the hearing as such an application. Simon Brown LJ suggested the appropriate practice:

(1) Where a court, be it a Magistrates' Court or a Crown Court, refuses to state a case, then the party aggrieved should without delay apply for permission to bring judicial review, either (a) to mandamus it to state a case and/or (b) to quash the order sought to be appealed.

(2) If the court below has already (a) given a reasoned judgment containing all the necessary findings of fact and/or (b) explained its refusal to state a case in terms which clearly raise the true point of law in issue, then the correct course would be for the single judge, assuming he thinks the point properly arguable, to grant permission for judicial review which directly challenges the order complained of, thereby avoiding the need for a case to be stated at all.

(3) If the court below has stated a case but in respect of some questions only, as here, the better course may be to apply for the case stated to be amended unless again, as here, there already exists sufficient material to enable the Divisional Court to deal with all the properly arguable issues in the case.

(4) This court for its part will adopt whatever course involves the fewest additional steps and the least expense, delay and duplication of proceedings. Whether, as in Ex Parte Levy, it will be possible to proceed at once to a substantive determination of the issues must inevitably depend in part upon whether all interested parties are represented and prepared, and in part upon the availability of court time."

Trade Descriptions Act 1968 14(1)(b)(ii)

McCombie, R (on the application of) v Liverpool City Magistrates' Court [2009] EWHC 2881 (Admin) (02 November 2009) This was an application for judicial review of a decision of the District Judge, sitting at the Liverpool Magistrates Court, to refuse to state a case in relation to a criminal trial that he had conducted whereby he found the present claimant (then the defendant) guilty of road traffic offences, driving without due care and attention, failing to stop and failing to report an accident. The question was whether relief should be granted on the judicial review of the District Judge's decision. Held: this was a case which a properly self-directing District Judge could not have concluded that the application in respect of conviction was frivolous. Decision quashed and in the circumstances there was an outstanding obligation to state a case.

Forest Heath District Council, R (on the application of) v North West Suffolk (Mildenhall) Magistrates' Court [1997 EWCA Civ 1575 (30th April, 1997) a decision of the Court of Appeal Civil Division presided over by Lord Bingham of Cornhill LCJ, as he then was. He said as follows:

"I think it very unfortunate that the expression 'frivolous' ever entered the lexicon of procedural jargon. To the man or woman in the street 'frivolous' is suggestive of light-heartedness or a propensity to humour and these are not qualities associated with most appellants or prospective appellants. What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic. That is not a conclusion to which justices to whom an application to state a case is made will often or lightly come. It is not a conclusion to which they can properly come simply because they consider their decision to be right or immune from challenge. Still less is it a conclusion to which they can properly come out of a desire to obstruct a challenge to

their decision or out of misplaced amour propre. But there are cases in which justices can properly form an opinion that an application as frivolous. Where they do, it will be very helpful to indicate, however briefly, why they form that opinion. A blunt and unexplained refusal, as in this case, may well leave an applicant entirely uncertain as to why the justices regard an application futile, misconceived, hopeless or academic. Such uncertainty is liable to lead to unnecessary litigation and expenditure on costs."

Hilton, R (On the Application of) v Canterbury Crown Court [2009] EWHC 2867 (Admin) (21 October 2009) This was an application for judicial review of a decision of the Crown Court to refuse to state a case for the consideration of the High Court, following the rejection by the Crown Court of the claimant's appeal against conviction and to compel them to do so. Held: It was unfortunate in the circumstances that a case was not stated by the judge, because it would have perhaps helped focus the mind of the court on precisely why they had convicted this defendant. This, plainly, was not in fact a frivolous appeal and it is unfortunate that no case was stated in the circumstances.

Nicholas v Chester Magistrates Court [2009] EWHC 1504 (Admin) (11 June 2009) The claimant, Warren embarked on judicial review proceedings in a claim form which sought to review the decision of District Judge refusing to state a case. In all the circumstances of this case, to give such an indication was perverse and was so unreasonable that in effect it was an unlawful indication.

9.6 Pegram, R (On the Application Of) v Bristol Crown Court & Ors [2019] EWHC 965 (Admin)

9.6.1 Refusal to state case-unacceptably blunt, brief, and wholly unreasoned response.

MR JUSTICE ANDREW BAKER:

5. The request to state a case for an appeal on one or more questions of law received in the first place an unacceptably brief, blunt, and wholly unreasoned response. The appeal had been presided over by Mr Recorder Atkinson QC, sitting with magistrates in the normal way. As reported to the claimant or those acting on his behalf, the learned Recorder decided as follows in response to the request to state a case: "*I have been able to review this matter; my decision is to refuse to state a case*".
6. In *R (Forest Heath District Council) v North West Suffolk (Mildenhall) Magistrates' Court* [1997] EWCA Civ 1575, Lord Bingham, LCJ, as he was then, referred to the entitlement of a lower court to decline to state a case for the purposes of appeal by way of case stated if the proposed appeal was, and therefore the request to state a case was, 'frivolous'. Lord Bingham continued:

"I think it very unfortunate that the expression, "frivolous" ever entered the lexicon of procedural jargon. To the man or woman in the street "frivolous" is suggestive of light-heartedness or a propensity to humour and these are not qualities associated with most appellants or prospective appellants. What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic. That is not a conclusion to which justices to whom an application to state a case is made will often or likely come. It is not a conclusion to which they can properly come simply because they consider their decision to be right or immune from challenge … But there are cases in which justices can properly form an opinion that an application is frivolous. Where they do, it will be helpful to indicate, however briefly, why they form that opinion. A blunt and unexplained refusal, as in this case, may well leave an applicant entirely uncertain as to why the justices regard an application futile, misconceived, hopeless or academic. Such uncertainty is liable to lead to unnecessary litigation and expenditure on costs."

In those circumstances, I am satisfied that although the refusal to state a case has gone beyond the entirely unreasoned or bare initial refusal, it remains a refusal that has not been properly considered in accordance with the applicable legal test. In those circumstances, on any view, in my judgment, the refusal to state a request must be, and it is, quashed. The question then is how much further this court should go by way of relief upon this judicial review.

10 Statutes referred to

10.1 Magistrates Courts Act 1980 s6 Discharge or committal for trial

6 Discharge or committal for trial.

F1 F2 [[(1) A magistrates' court inquiring into an offence as examining justices shall on consideration of the evidence—

(a) commit the accused for trial if it is of opinion that there is sufficient evidence to put him on trial by jury for any indictable offence;
(b) discharge him if it is not of that opinion and he is in custody for no other cause than the offence under inquiry;

but the preceding provisions of this subsection have effect subject to the provisions of this and any other Act relating to the summary trial of indictable offences.

(2) If a magistrates' court inquiring into an offence as examining justices is satisfied that all the evidence tendered by or on behalf of the prosecutor falls within section 5A(3) above, it may commit the accused for trial for the offence without consideration of the contents of any statements, depositions or other documents, and without consideration of any exhibits which are not documents, unless—
(a) the accused or one of the accused has no legal representative acting for him in the case, or
(b) a legal representative for the accused or one of the accused, as the case may be, has requested the court to consider a submission that there is insufficient evidence to put that accused on trial by jury for the offence;

and subsection (1) above shall not apply to a committal for trial under this subsection.**]**

(3) Subject to section 4 of the **M1**Bail Act 1976 and section 41 below, the court may commit a person for trial—in custody, that is to say, by committing him to custody there to be safely kept until delivered in due course of law, or
(a) on bail in accordance with the **M2**Bail Act 1976, that is to say, by directing him to appear before the Crown Court for trial;

and where his release on bail is conditional on his providing one or more surety or sureties and, in accordance with section 8(3) of the **M3**Bail Act 1976, the court fixes the amount in which the surety is to be bound with a view to his entering into his recognizance subsequently in accordance with subsections (4) and (5) or (6) of that section the court shall in the meantime commit the accused to custody in accordance with paragraph (a) of this subsection.

(4) Where the court has committed a person to custody in accordance with paragraph (a) of subsection (3) above, then, if that person is in custody for no other cause, the court may, at any time before his first appearance before the Crown Court, grant him bail in accordance with the **M4**Bail Act 1976 subject to a duty to appear before the Crown Court for trial.
(5) Where a magistrates' court acting as examining justices commits any person for trial or determines to discharge him, the **[F3**designated officer for**]** the court shall,

on the day on which the committal proceedings are concluded or the next day, cause to be displayed in a part of the court house to which the public have access a notice—

(a) in either case giving that person's name, address, and age (if known);

(b) in a case where the court so commits him, stating the charge or charges on which he is committed and the court to which he is committed;

(c) in a case where the court determines to discharge him, describing the offence charged and stating that it has so determined;

but this subsection shall have effect subject to **[**F4section 4 of the Sexual Offences (Amendment) Act 1976 (anonymity of complainant in rape etc. cases)**]**.

(6) A notice displayed in pursuance of subsection (5) above shall not contain the name or address of any person under **[**F5the age of 18 years**]** unless the justices in question have stated that in their opinion he would be mentioned in the notice apart from the preceding provisions of this subsection and should be mentioned in it for the purpose of avoiding injustice to him.**]**

10.2 Local Government and Housing Act 1989

(2) Subject to subsection (2B), it shall be the duty of a relevant authority's monitoring officer, if it at any time appears to him that any proposal, decision or omission by the authority, by any committee, or sub-committee of the authority, by any person holding any office or employment under the authority] or by any joint committee on which the authority are represented constitutes, has given rise to or is likely to or would give rise to—

(a) a contravention by the authority, by any committee, or sub-committee of the authority, by any person holding any office or employment under the authority] or by any such joint committee of any enactment or rule of law [F10or of any code of practice made or approved by or under any enactment]; or

(b) any such maladministration or injustice as is mentioned in Part III of the M1Local Government Act 1974 (Local Commissioners) or Part II of the M2Local Government (Scotland) Act 1975 (which makes corresponding provision for Scotland), to prepare a report to the authority with respect to that proposal, decision or omission

11 Crown Prosecution Service guidance

11.1 Abuse of Process Crown Prosecution Service

Updated: September 2018 Legal Guidance

General Principles

Discretion to stay proceedings

Examples of Reasons a Defendant Cannot Receive a Fair Trial

Delay

Failing to Obtain, Losing or Destroying Evidence

Adverse publicity

Non-disclosure by prosecutor

Examples of where it would be unfair to try the Defendant

Proceedings begun or continued in breach of promise not to prosecute

Cautions

Authority to set aside conditional cautioning decisions

Prosecutions following the imposition of Fixed Penalty Notices

Manipulation of procedures

Failure to follow Guidance or Policy

Prosecution Failures

Abuse of Executive Power

Entrapment

Relationship between autrefois pleas and abuse of process

ECHR Implications

Procedure and Review Process

Review

Crown Court (Criminal Procedure Rules (SI 2015 No. 1490) with October 2017 amendments and Criminal Practice Directions 3.20. Application to stay case for abuse of process)

Magistrates Court

Role of the Prosecutor

11.1.1General Principles

The basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue (Environment Agency v Stanford [1998] C.O.D. 373, DC)

However, the courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution in the magistrates' courts) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court.

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances: Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL. The essential focus of the doctrine is on preventing unfairness at trial, through which the defendant is prejudiced in the presentation of his or her case.

Courts that are asked to exercise their inherent power to stay should first consider whether other procedural measures such as the exclusion of specific evidence or directions to the jury might prevent 'trial unfairness' and allow the prosecution to continue.

Courts should not use their inherent power to stay proceedings merely to discipline the prosecution or because the court has formed the view that the prosecution was unwise. Case law makes it clear that the power to stay on the grounds of abuse is not designed to be a tool with which the courts can apply direct discipline to the police or the CPS - R v Crown Court at Norwich ex parte Belsham (1992) 94 Cr. App. R. 382, QBD.

The burden of establishing that the bringing or continuation of criminal proceedings amounts to an abuse of the court's process is on the defendant. The standard of proof is the balance of probabilities: R v Telford Justices ex parte Badhan [1991] 2 Q.B. 78; R v Great Yarmouth Magistrates ex parte Thomas [1992] Crim. L.R. 116.

As a general principle, if the argument refers to the first limb of abuse, it will normally be necessary for the defence to prove not only that an abuse has taken place but that the accused has been prejudiced in the presentation of his or her case as a result, so that a fair trial is no longer possible.

In respect of delay (Please see below), the Court of Appeal have held that once the issue of delay had been raised it was for the prosecution to satisfy the court that a fair trial was still possible - R v S Stephen Paul [2006] EWCA Crim 756.

11.1.2Discretion to stay proceedings

In Crawley [2014] EWCA Crim 1028, the Court of Appeal clearly set out the scope of the two potential limbs that a stay for abuse of process can be brought under:

1. Where the court concludes that the accused can no longer receive a fair hearing - This focuses on the trial process itself;

2. Where it would be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system – This is where the Court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself.

It was emphasised that there is a strong public interest in the prosecution of crime and therefore ordering a stay of proceedings is a remedy of last resort.

It was observed that: "cases in which it may be unfair to try the accused (the second category of case) will include, but are not confined to, those cases where there has been bad faith, unlawfulness or executive misconduct. In such a case, the court is concerned not to create the perception that it is condoning malpractice by law enforcement agencies or to convey the impression that it will adopt the approach that the end justifies the means: the touchstone is the integrity of the criminal justice system".

11.1.3Examples of Reasons a Defendant Cannot Receive a Fair Trial

11.1.4Delay

On an application for a stay on the ground of delay, a court should bear in mind the following principles:

a. Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;

b. Where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;

c. No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held; and

d. On the issue of possible serious prejudice, there is a power to regulate the admissibility of evidence. The trial process itself should ensure that all relevant factual issues arising from the delay will be placed before the jury for their consideration in accordance with appropriate directions.

If, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted: R. v. S. (S.P.) [2006] 2 Cr.App.R. 23, CA, restating the principles set out in Att.-Gen.'s Reference (No. 1 of 1990) [1992] Q.B. 630, 95 Cr.App.R. 296, CA.

The need for the accused to demonstrate that the delay has caused prejudice was emphasised in Brants v DPP (2011) 175 JP 246.

11.1.5Relationship between autrefois pleas and abuse of process

The basic purpose of the pleas of autrefois convict and autrefois acquit is to protect a defendant against repeated prosecutions for the same offence.

A defendant may not be punished twice for an offence arising out of the same or substantially the same set of facts and that to do so would offend the established principle that there should not be sequential trials for offences on an ascending scale of gravity Connelly v DPP [1964] A.C 1254.

Generally, he/she cannot be tried therefore for a crime in respect of which he has previously been acquitted or convicted or in respect of which he could on some previous indictment have been lawfully convicted. However, for the ordering of a re-trial for a number of limited serious offences, where new and compelling evidence comes to light, under Part 10 Criminal Justice Act 2003, please see 'Retrial of Serious Offences' elsewhere in legal guidance.

For the rule to apply, the offence charged in the second indictment must have been committed at the time of the first charge, e.g. a conviction or acquittal for assault will not bar a charge of murder if the assaulted person later dies. In all cases, the earlier adjudication must have been upon guilt or innocence resulting from valid process (and by a court of competent jurisdiction).

Since the decision of the House of Lords in DPP v Humphrys [1977] A.C. 1, the courts have recognised a close relationship between the pleas of autrefois acquit and autrefois convict (which operate as a bar to subsequent trial) and stays based on an abuse of process. Where a plea of autrefois acquit or autrefois convict has been entered but rejected by the court, the defendant may still seek to argue that to allow the prosecution to continue in the particular circumstances of the case would amount to an abuse of process.

In Beedie [1998] QB 356, the accused was charged with offences under health and safety legislation and, following his conviction, he was charged with manslaughter arising out of the same facts. The Court of Appeal ruled that it was an abuse of process to have sequential trials for offences on an ascending scale of gravity.

In J (JF) [2014] QB 561, it was held that in any case where the narrow application of the autrefois principle would result in unfairness or injustice to an accused to the extent of amounting to oppression, "the remedy lies in the power of the court to stay the proceedings".

11.1.6Review

When reviewing a file, prosecutors will need to anticipate whether or not there is likely to be an abuse of process. It would, however, be wholly exceptional to refuse to prosecute solely because of an alleged abuse. In order to do so, you must be satisfied that the abuse argument would inevitably succeed. Usually, a court will be able to ensure that there is some other method of remedying any prejudice to a defendant.

When an application for a stay should be heard and ruled upon is a matter for the trial judge. However, ordinarily this ought to be at the outset of the case, and before the evidence is heard, unless there is a specific reason to defer it because the issues can better be determined at a later stage: R. v. F. (S.) [2011] 2 Cr.App.R. 28, CA,

Crown Court (Criminal Procedure Rules (SI 2015 No. 1490) with October 2017 amendments and Criminal Practice Directions 3.20. Application to stay case for abuse of process)

- The accused must give written notice of the application to the prosecutor (and to any co-accused) and to the court as soon as practicable after becoming aware of the grounds for applying.

- The application must explain the grounds on which it is made; include or identify all supporting material; specify 'relevant events, dates and propositions of law'; and identify any witness the accused wants to call to give evidence in person

- A party who wishes to make representations in opposition to the application must serve written representations on the court and the other parties within 14 days of the service of the application.

- The advocate appearing for the applicant must serve a skeleton argument on the court and on the other parties at least five clear working days before the application is due to be heard, and the prosecution advocate must serve a responsive skeleton argument at least two clear working days before the hearing.

- The skeleton arguments must set out any propositions of law to be advanced, together with any authorities (identifying specific passages) that are relied on.

11.1.7 Magistrates Court

- No specific procedure is laid down for raising abuse of process in Magistrates' court, but it is essential that the court hears from both the prosecution and the defence.

- In DPP v Gowing (2014) 178 JP 181, it was emphasised that it is important that magistrates who are considering staying proceedings recognise "the exceptional nature of the jurisdiction to stay proceedings". Where there are failures on the part of prosecutors, the power to stay proceedings' should not be used to punish prosecutors where a fair trial remains possible.

- Prosecutors in the magistrates' courts should always ask the court to order skeleton arguments from both sides (defence first, prosecution response) so that the issues can be identified and the matter properly argued on the basis of agreed facts, principles, and law.

11.1.8 Role of the Prosecutor

All applications to stay prosecutions on the ground of abuse of process should be reported to the CCP or another senior lawyer specifically appointed for this purpose, so that a decision can be made whether to challenge the application.

The following steps should then be taken:

1. Prepare a skeleton argument in accordance with the Consolidated Criminal Practice Direction. A sample skeleton argument to be used by the Crown is provided at Annex 1. Provide a list of authorities. It is good practice to attach to the skeleton argument relevant case law and documentary evidence. Avoid citing too many cases; courts discourage such an approach, as each case is to be decided on the merits of its own facts.

2. Consider what evidence you may have to adduce, either orally or by way of documents, to establish particular facts. In particular, you may have to call evidence relating to the time of service of a summons from a police officer, or relating to the steps taken to execute warrants. You may have to call a CPS colleague as a witness or have CPS evidence agreed.

3. Consider what prejudice has been suffered by the defendant and whether the defendant has contributed to factors such as delay. For example, many offenders in delayed

child abuse cases have explicitly warned their victims "not to tell" (in R v Wilkinson (1996) 1 Cr. App .R. 81, the defendant's appeal was unsuccessful on the ground that the defendant was responsible for the delay because he made threats to the victims).

4. Consider what alternative remedies or solutions may be available to the court to deal with the alleged injustice, for example, (1) grant the accused bail, (2) expedite the trial, (3) impose reporting restrictions, (4) transfer venue, (5) exclude evidence, (6) use the summing-up to offset any prejudice the accused might suffer as a result of loss of evidence, delay and media attention.

5. Bear in mind that the power to stay an indictment is ongoing during a trial and reviewable throughout (R v Birmingham and Others (above)). The power to stay need not be used to stay the whole of an indictment; it can be used in relation to individual counts (R v Munro (1992) 97 Cr. App. R. 183).

12 Duty of Candour

PLP JUDICIAL REVIEW TRENDS AND FORECASTS 2017 THE

DUTY OF CANDOUR: WHERE ARE WE NOW?

Iain Steele, Blackstone Chambers

Defendant's duty of candour

1. **The duty:** A public authority defendant in judicial review proceedings has a duty *"to co-operate and to make candid disclosure by way of affidavit of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged"*: *Belize Alliance of Conservation NonGovernment Organisations v Department of the Environment* [2004] UKPC 6 at §86. Put another way, the public authority must assist the court with full and accurate explanations of all facts relevant to the issue the court must decide: *R (Quark Fishing Ltd) v SSFCA* [2002] EWCA Civ 1409 at §50.

2. **The underlying principle** is that a public authority's objective should not be to win the case at all costs, but to assist the court in its role of ensuring the lawfulness of the decision under challenge, with a view to upholding the rule of law and improving standards in public administration. It must therefore fairly and fully disclose all relevant information, including that which is harmful to its own case. See *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at 945:

> *"This development [i.e. the remedy of judicial review and the evolution of a specialist administrative or public law court] has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration. … The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why. … Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."*

3. **The duty's importance** "*is impossible to overstate*" and every failure on the part of the executive "*is inimical to the rule of law*": *R (Saha) v Secretary of State for the Home Department (Secretary of State's duty of candour)* [2017] UKUT 17 (IAC) at §§47-48.

4. **Trigger**: The duty "*endures from the beginning to the end of the proceedings*": *R (Bilal Mahmood) v SSHD* [2014] UKUT 439 at §23. But when do "the proceedings" begin?

5. **According to TSol's 2010 Guidance**[13] (§1.2), the duty applies as soon as the relevant body is aware that someone is likely to test a decision or action affecting them. It applies "*to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance, witness statements and counsel's written and oral submissions*". It is an ongoing duty and must therefore be kept under review as the case progresses: "*For example, if after service of evidence, further relevant information comes to light, that information must be disclosed to the other parties to the proceedings and put before the Court at the earliest possible opportunity*".

6. **CPR PD54A §12** By contrast, in April 2016 the Lord Chief Justice published a Discussion Paper[14] which proposed that "clarification" of the duty should be provided by amending CPR PD54A §12 to provide: "*12.2 A defendant should, in its detailed grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted.*" It was suggested that this wording reflects existing case law, although the point was left open in *I v SSHD* [2010] EWCA Civ 727 at §50. No change has yet been made to CPR PD54A.

7. **Documents / information**: The duty is not solely or specifically a duty to disclose documents. As the TSol Guidance notes, the duty is information-based and is not restricted to documents. A public authority must explain its decision-making process, not simply disclose documents created in that process. In particular, it may not suffice

[13] Treasury Solicitor's Department, "Guidance on discharging the duty of candour and disclosure in judicial review proceedings" (January 2010).

[14] "Defendant's duty of candour and disclosure in judicial review proceedings: A discussion paper" (28 April 2016). The paper was written by Cranston and Lewis JJ.

to provide "*a pile of undigested documents*", particularly in a document heavy claim, without an explanation of the full significance of a document: *R (Khan)*

v SSHD [2016] EWCA Civ 416 at §46. Further, the obligation to serve relevant material is not displaced or diminished by the fact that material may be publicly available online: *UB (Sri Lanka) v SSHD* [2017] EWCA Civ 85 at §21.

8. **Relationship with disclosure:** The existence of the duty of candour explains why there is no general duty of disclosure in judicial review proceedings. See CPR PD54A §12.1: "*Disclosure is not required unless the court orders otherwise*." This means that standard disclosure under CPR Part 31 does not ordinarily apply. The idea is that standard disclosure would generally be unnecessary because the defendant will in any event have discharged its duty of candour. See e.g. *R v SSHD, ex p Fayed* [1998] 1 WLR 763 at 775 per Lord Woolf MR. Standard disclosure is also viewed as unnecessary since the focus of judicial review is on the lawfulness of the decision under challenge, rather than on determining disputed issues of fact.

9. Disclosure of documents nevertheless has an important role in judicial review.

10. First, the voluntary provision of copies of documents may be a method of discharging the duty of candour: see for example *R (Sustainable Development Capital LLP) v SSBEIS* [2017] EWHC 771 (Admin) at §80.

11. Secondly, disclosure of documents (and not merely a précis in a witness statement) is required where it is necessary for fairly and justly disposing of an issue. This is generally more likely in HRA cases involving issues of proportionality: *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 at §§3, 32, 57; *R (Al-Sweady) v SSD* [2009] EWHC 2387 (Admin) at §§24-29.

12. Disclosure may also be needed where there is a "hard-edged" question of fact in dispute, in particular a "jurisdictional" or "precedent" fact such as whether a person is a child for the purposes of entitlement to services under the Children Act 1989. See *R (A) v Croydon LBC* [2009] UKSC 8, [2009] 1 WLR 2557 at §33 per Lady Hale: "*[It is argued that the] only remedy available is judicial review and this is not well suited to the determination of disputed questions of fact. This is true but it can be so adapted if the need arises… That the*

remedy is judicial review does not dictate the issue for the court to decide or the way in which it should do so."

13. Further, where a private law claim is brought as part of a judicial review (as permitted by CPR 54.3(2)), the ordinary CPR Part 7 procedures employed for resolving substantial disputes of fact will apply: *R (MH) v SSHD* [2009] EWHC 2506 (Admin) at §7 (a judicial review challenge to the lawfulness of immigration detention in which a claim for damages for false imprisonment was also pleaded).

14. It is in any event good practice for a public authority to exhibit a document on which it relies as significant to its decision, and a claimant seeking sight of a document whose effect has been summarised in witness evidence does not need to suggest some inaccuracy or incompleteness in the summary – "*[i]t is enough that the document itself is the best evidence of what it says*": *Tweed* (cited above) at §4.

15. In *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, Sedley LJ emphasised at §49 that the best evidence rule "*is not simply a handy tool in the litigator's kit [but] a means by which the court tries to ensure that it is working on authentic materials. What a witness perfectly honestly makes of a document is frequently not what the court makes of it. In the absence of any public interest in non-disclosure, a policy of non-production becomes untenable if the state is allowed to waive it at will by tendering its own précis instead.*"

16. <u>Scope of the duty</u>: A key issue concerns the extent to which the duty of candour requires a public authority to reveal features of the decision-making process which do not bear on the grounds of challenge currently advanced by the claimant, but which could potentially be relied on in support of additional grounds.

17. Some of the older case law suggested that the courts would not expect that once a claimant has been granted permission "*he is entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance some argument which has not previously occurred to him*": *Huddleston* (cited above) at p.947 per Parker LJ. Sir John Donaldson MR agreed at p.946: "*the grant of [permission] does not constitute a licence to fish for new and hitherto unperceived grounds of complaint*".

18. However, there is a clear tension between the undesirability of allowing a claimant to "fish" for new grounds of challenge – echoed by Lord Brown's comment in *Tweed* that even post-HRA "*the court should continue to guard against what appear to be merely 'fishing expeditions' for adventitious further grounds of challenge*" (§56) – and the simple fact that a claimant will often not know the facts that might support a new ground of challenge unless and until the defendant reveals those facts.

19. Perhaps for that reason, the TSol Guidance states that the duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge, citing *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052. *Hook* in fact addressed a related but distinct point, namely that if the material filed by the defendant does happen to reveal additional grounds, "*the court can inquire into them without being bound by the grounds stated in the original statement [of grounds]*" (p.1058).

20. *Hook* does not state in terms that there is a duty on the defendant in the first place to file material that reveals additional grounds. However, there is recent support at the highest level for the proposition that the duty of candour includes the need to give "*disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground*": *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35, [2016] 3 WLR 157 at §183 per Lord Kerr.

21. <u>Duty of non-participating defendant:</u> Even where a defendant decides not to take an active part in the proceedings, for example where it considers that an interested party is able to defend the claim, it nevertheless owes a duty to assist the court.

22. In *R (Midcounties Co-Operative Ltd) v Forest of Dean DC* [2015] EWHC 1251 (Admin), the defendant's grant of planning permission was challenged and it informed the court that while it would not defend the claim due to financial constraints, it did not concede it and supported the developer's opposition to it. Singh J held that the defendant at least needed to consider whether it had complied with its duty of candour by disclosing all relevant documents, whether the duty required it to file a witness statement to assist the court, whether it should file an acknowledgement of service and summary grounds even if only in outline form to explain the gist of

why it maintained that its decision was lawful, and whether a representative (not necessarily a lawyer) should be present in court at any hearing so the authority knew what was going on and could deal with any points that arose.

23. Consequences of breach: A variety of adverse consequences may arise where the duty of candour is breached by a defendant. The court can use its case management powers to remedy the deficiency in information provided by the defendant, for example by ordering it to provide disclosure of documents or further information about its case, or requiring its witnesses to attend for cross-examination. The court could stay proceedings pending such steps, and order indemnity costs: e.g. *R (AlSweady) v SSD* [2009] EWHC 1687 (Admin).

24. Lack of candour may allow the court to draw adverse inferences of fact. "*[T]he court might simply decide that the [claimant] has made out a prima facie case and that, the authority having produced no sufficient answer, relief should be granted*": *Huddleston* (cited above) at p.947. "*If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the [defendant] upon points which remain obscure*": *Quark* (cited above) at §50.

25. Where a defendant fails to file evidence to explain its decision-making process and the reasoning underlying the decision, "*[t]he basis for drawing adverse inferences of fact against the [Defendant] will be particularly strong*" given the stringent duty of candour: *R (Das) v SSHD* [2014] EWCA Civ 45, [2014] 1 WLR 3538 at §80.

12.1 Claimant's duty of candour

26. **The duty:** It is not only a public authority defendant that owes a duty of candour. A claimant is similarly obliged, throughout the course of a claim for judicial review, to make full and frank disclosure of (a) all relevant facts of which he is aware, including those which are or appear to be adverse to his case, and (b) all such facts as he would have known had appropriate inquiries been made: *Cocks v Thanet DC* [1983] 2 AC 286 at 294G; *R (Khan) v SSHD* [2016] EWCA Civ 416 at §§35-37, 71.

27. **Scope:** The duty may require a claimant: (1) to disclose relevant documents (*Khan*, cited above, §37); (2) to cite adverse authority *(R v SSHD, ex p Li Bin Shi* [1995] COD 135); (3) to identify alternative remedies *(R v Law Society, ex p Bratsky Lesopromyshlenny Complex* [1995] COD 216); (4) to inform the court of other ongoing cases in which the same issues of law have been raised *(R (ICI) v HMRC* [2016] EWHC 279 (Admin) at §21); (5) to point out any relationship between himself and other unsuccessful previous challengers, as well as any issue of delay *(R v Lloyd's of London, ex p Briggs* (1993) 5 Admin LR 698); and (6) to point out any relevant ouster clause *(R v Cornwall County Council, ex p Huntington* [1992] 3 All ER 566 at 576).

28. **Ongoing duty:** The duty is a continuing one. A claimant must reassess the viability and propriety of a challenge in light of the material filed by the defendant, and must keep the court informed about material changes in circumstances that may mean judicial review is no longer required or appropriate: *R (Tshikangu) v Newham LBC* [2001] EWHC 92 (Admin) at §23; *Khan* (cited above) at §48.

29. **Consequences of breach:** If there has been a failure to comply with the duty of candour, permission may be set aside: *Tshikangu* (cited above); *Huntington* (cited above). Alternatively, (1) an injunction may be discharged *(R (MS (A Child)) v SSHD* [2010] EWHC 2400 (Admin) at §1; (2) the court may decline to order costs *(R v Liverpool City Council ex p Filla* [1996] COD 24); (3) relief may be refused *(R v Leeds City Council, ex p Hendry* (1994) 158 LG Rev 621); and (4) wasted costs may be ordered *(R v SSHD, ex p Shahina Begum* [1995] COD 176).

Interested Party's duty of candour

30. The duty of candour applies to all parties to judicial review proceedings, not merely the claimant and the defendant. Thus, for example, in *Belize Alliance of Conservation Non-Government Organisations* (cited above), the interested party developer which was in effect the defendant's partner in the relevant public works project was under "*a duty to make candid disclosure to the court*" (§87).

Iain Steele, Blackstone Chambers, 6 October 2017

13 European Human Rights

Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb)

C. Applicability of Article 6 to proceedings other than main proceedings

53. Preliminary proceedings, like those concerned with the grant of an interim measure such as an injunction, were not normally considered to "determine" civil rights and obligations. However, in 2009, the Court departed from its previous case-law and took a new approach. In Micallef v. Malta ([GC], §§ 80-86), the Court established that the applicability of Article 6 to interim measures will depend on whether certain conditions are fulfilled. Firstly, the right at stake in both the main and Guide on Article 6 of the Convention – Right to a fair trial (civil limb) European Court of Human Rights 17/102 Last update: 30.04.2020 the injunction proceedings should be "civil" within the meaning of the Convention. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.

54. An interlocutory judgment can be equated to interim or provisional measures and proceedings, and the same criteria are thus relevant to determine whether Article 6 is applicable under its civil head (Mercieca and Others v. Malta, § 35).

55. Again with reference to the principles established in Micallef v. Malta [GC], Article 6 may apply to the stay of execution proceedings in accordance with the above-mentioned criteria (Central Mediterranean Development Corporation Limited v. Malta (no. 2), §§ 21-23).

56. Article 6 is applicable to interim proceedings which pursue the same purpose as the pending main proceedings, where the interim injunction is immediately enforceable and entails a ruling on the same right (RTBF v. Belgium, §§ 64-65).

57. Leave-to-appeal proceedings: according to Hansen v. Norway, § 55, the prevailing approach seems to be that Article 6 § 1 is applicable to such proceedings (citing Monnell and Morris v. the United Kingdom, § 54; Martinie v. France [GC], §§ 11 and 53-55; see also Pasquini v. San Marino, § 89). The manner in which Article 6 is to be applied depends upon the special features of the proceedings involved, regard being had to the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court in those proceedings (ibid.; see also Monnell and Morris v. the United Kingdom, § 56).

58. Consecutive criminal and civil proceedings: if a State's domestic law provides for proceedings consisting of two stages – the first where the court rules on whether there is entitlement to damages and the second where it fixes the amount – it is reasonable, for the purposes of Article 6 § 1, to regard the civil right as not having been "determined" until the precise amount has been decided: determining a right entails ruling not only on the right's existence, but also on its scope or the manner in which it may be exercised, which of course includes assessing the damages (Torri v. Italy, § 19).

59. Constitutional disputes may also come within the ambit of Article 6 if their outcome is decisive for civil rights or obligations (Süßmann v. Germany, § 41; Ruiz-Mateos v. Spain). This does not apply in the case of disputes relating to a presidential decree granting citizenship to an individual as an exceptional measure, or to the determination of whether the President has breached his constitutional oath (Paksas v. Lithuania [GC], §§ 65-66). It is of little consequence whether the proceedings before the constitutional court concern the

referral of a question for a preliminary ruling or a constitutional appeal against judicial decisions. Article 6 is also applicable, in principle, where the constitutional court examines an appeal directly challenging a law if the domestic legislation provides for such a remedy (Voggenreiter v. Germany, §§ 31-33 and 36 and case-law references cited). Furthermore, the criteria governing the application of Article 6 § 1 to an interim measure extend to the Constitutional Court (Kübler v. Germany, §§ 47-48).

60. Execution of court decisions: Article 6 § 1 applies to all stages of legal proceedings for the "determination of ... civil rights and obligations", not excluding stages subsequent to judgment on the merits. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (Hornsby v. Greece, § 40; Romańczyk v. France, § 53, concerning the execution of a judgment authorising the recovery of maintenance debts). Regardless of whether Article 6 is applicable to the initial proceedings, an enforcement title determining civil rights does not necessarily have to result from proceedings to which Article 6 is applicable (Buj v. Croatia, § 19). Guide on Article 6 of the Convention – Right to a fair trial (civil limb) European Court of Human Rights 18/102 Last update: 30.04.2020

61. Article 6 § 1 is also applicable to the execution of foreign judgments that are final (exequatur - see Avotiņš v. Latvia [GC], § 96 and case-law references cited). The exequatur of a foreign court's forfeiture order falls within the ambit of Article 6, under its civil head only (Saccoccia v. Austria (dec.)).

62. Applications to have proceedings reopened/extraordinary appeal proceedings: The case of Bochan v. Ukraine (no. 2) [GC] clarified the Court's case-law concerning the applicability of Article 6 to extraordinary appeals in civil judicial proceedings. The Convention does not in principle guarantee a right to have a terminated case reopened and Article 6 is not

applicable to proceedings concerning an application for the reopening of civil proceedings which have been terminated by a final decision (Sablon v. Belgium, § 86). This reasoning also applies to an application to reopen proceedings after the Court has found a violation of the Convention (Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2), § 24). Article 6 is therefore deemed inapplicable to them. This is because, in so far as the matter is covered by the principle of res judicata of a final judgment in national proceedings, it cannot in principle be maintained that a subsequent extraordinary application or appeal seeking revision of that judgment gives rise to an arguable claim as to the existence of a right recognised under national law or that the outcome of the proceedings involving a decision on whether or not to reconsider the same case is decisive for the "determination of ... civil rights and obligations" (Bochan v. Ukraine (no. 2) [GC], §§ 44-45).

63. However, should an extraordinary appeal automatically entail, or result in practice in, reconsidering the case afresh, Article 6 applies to the "reconsideration" proceedings in the ordinary way (ibid., § 46). Article 6 has also been found to be applicable in certain instances where the proceedings, although characterised as "extraordinary" or "exceptional" in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings, the national characterisation of the proceedings not being regarded as decisive for the issue of applicability (San Leonard Band Club v. Malta, §§ 41-48). In conclusion, the Court has found that while Article 6 § 1 is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of such proceedings in the legal system concerned may be such as to bring them within the ambit of Article 6 § 1 and of the safeguards of a fair trial that it affords to litigants. The Court must accordingly examine the nature, scope and specific features of the extraordinary appeal at issue (Bochan v. Ukraine (no. 2) [GC], § 50). In the case cited, those criteria were applied to an "exceptional appeal" in which the applicant, relying on a

judgment in which the European Court of Human Rights had found a violation of Article 6, had asked her country's Supreme Court to quash the national courts' decisions. While the Court found in that case that Article 6 § 1 was applicable to the type of proceedings in issue (§§ 51-58), that was not the case in Munteanu v. Romania (dec.), §§ 38-44.

64. Article 6 has also been declared applicable to a third-party appeal which had a direct impact on the applicants' civil rights and obligations (Kakamoukas and Others v. Greece [GC], § 32), and to costs proceedings conducted separately from the substantive "civil" proceedings (Robins v. the United Kingdom, § 29).

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