Neutral Citation Number: [2019] EWHC 1731 (Admin)

Case No: CO/4927/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2019

Before :

LORD JUSTICE MALES
MR JUSTICE EDIS

- -

Between :

THE QUEEN (ON THE APPLICATION OF AYODEJI HOLLOWAY)	**Claimant**
-and -	
HARROW CROWN COURT	**Defendant**
-and -	
(1) ADAMNEET SINGH BHUI **(2) JIMNEET SINGH BHUI** **(3) GURPINDER SINGH BHUI**	**Interested Parties**

- -
- -

Helen Malcolm QC (instructed by **Brett Wilson LLP**) for the **Claimant**
William Martin (instructed by **Guillaumes LLP**) for the **Interested Parties**
The **Defendant** took no part in the proceedings

Hearing date: 2 July 2019

- -

Approved Judgment

Lord Justice Males:

Introduction

1. This is a claim for judicial review in which the claimant, Ayodeji Holloway, challenges an order made in the Crown Court which required him to pay the costs incurred by the Interested Parties in a private criminal prosecution for blackmail brought against them by the claimant.

2. The order was made by Deputy Circuit Judge Fraser Morrison, sitting at Harrow Crown Court, pursuant to regulation 3 of the Costs in Criminal Cases (General) Regulations 1986 (*SI 1986/1335*). Those regulations enable a court to order a party to criminal proceedings to pay the costs of another party to the proceedings if satisfied that the costs were incurred as a result of an unnecessary or improper act or omission.

3. The blackmail and conspiracy to blackmail alleged against the Interested Parties was the making of an unwarranted demand for £76,325.39 in cash as a condition of proceeding with a sale of their property to the claimant, failing which the claimant and his family would be required to vacate the property, in which they were already living, and monies already paid by the claimant towards the purchase price would be retained until the property had been sold to another buyer.

4. The prosecution was taken over by the Crown Prosecution Service at an early stage and was discontinued. The Interested Parties contended that it should never have been brought at all and, moreover, that the claimant had failed to disclose important documents undermining the prosecution case. The judge found that the evidence never provided a realistic prospect of conviction as the Interested Parties had merely driven a hard bargain at a time when no binding contract had been concluded, parties being free to walk away from negotiations at any time up to exchange of contracts. As a result he concluded that the commencement and continuation of the prosecution constituted an improper act for the purpose of the Regulations and ordered the claimant to pay the Interested Parties' costs of the proceedings.

5. The claimant contends that this decision was wrong in law and that the judge failed to deal with the real gravamen of the prosecution case.

Legal framework

6. Section 19(1) of the Prosecution of Offences Act 1985 authorised the Lord Chancellor to make regulations as follows:

> "The Lord Chancellor may by regulations make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order as to the payment of those costs."

7. Those regulations were made by regulation 3 of the Costs in Criminal Cases (General) Regulations 1986.

8. The procedure to be followed when such an order is sought, or where the court is considering making such an order on its own initiative, is set out in rule 45.8 of the Criminal Procedure Rules. This provides, among other things, for a written application specifying the relevant act or omission and the reasons why the act or omission meets the criteria for making an order. That procedure was followed in this case.

9. The Criminal Costs Practice Direction (2015) as amended recommends, at para 4.1.1, a three stage approach:

> "The court may find it helpful to adopt a three stage approach. (a) Has there been an unnecessary or improper act or omission? (b) As a result have any costs been incurred by another party? (c) If the answers to (a) and (b) are 'yes', should the court exercise its discretion to order the party responsible to meet the whole or any part of the relevant costs, and if so what specific sum is involved?"

10. This serves to draw attention to the fact that, even if costs have been incurred as a result of an improper act or omission, the making of an order remains a matter of discretion.

11. There is no right of appeal against the making of such an order, which can only be challenged by an application for judicial review: *R v P* [2011] EWCA Crim 1130 at [12].

"Improper"

12. The meaning of "improper" in the context of section 19 and Regulation 3 has been a matter of some controversy in the case law, but was not in dispute before us. It was considered by this court in *DPP v Denning* [1991] 2 QB 533. Nolan LJ said at p.541:

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

13. *Denning* and later cases were reviewed by Hickinbottom J in *Serious Fraud Office v Evans* [2015] EWHC 263 (QB), [2015] 1 WLR 3595. He summarised the position at [148] as follows:

> "148. It would be helpful to summarise the propositions I have derived from the statutory provisions, the authorities and principle, so far as section 19 applications for costs against public prosecutors are concerned.
>
> i) When any court is considering a potential costs order against any party to criminal proceedings, it must clearly identify the statutory power(s) upon which it is proposing to act; and thus the relevant threshold and discretionary criteria that will be applicable.
>
> ii) In respect of an application under section 19 of the 1985 act, a threshold criterion is that there must be "an unnecessary or improper

act or omission" on the part of the paying party, i.e. an act or omission which would not have occurred if the party concerned had conducted his case properly or which could otherwise have been properly avoided.

iii) In assessing whether this test is met, the court must take a broad view as to whether, in all the circumstances, the acts of the relevant party were unnecessary or improper.

iv) Recourse to cases concerning wasted costs applications under section 19A or its civil equivalent, such as *Ridehalgh*, will not be helpful. Similarly, in wasted costs applications under section 19A, recourse to cases under section 19 will not be helpful.

v) The section 19 procedure is essentially summary; and so a detailed investigation into (e.g.) the decision-making process of the prosecution will generally be inappropriate.

vi) Each case will be fact-dependent; cases in which a section 19 application against a public prosecutor will be appropriate will be very rare, and generally restricted to those exceptional cases where the prosecution has acted in bad faith or made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him. The court will be slow to find that such an error has occurred. Generally, a decision to prosecute or similar prosecutorial decision will only be an improper act by the prosecution for these purposes if, in all the circumstances, no reasonable prosecutor could have come to that decision."

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

15. A further summary, also accepted by this court in *Haigh*, was provided by Coulson J in *R v Cornish and Maidstone & Tunbridge Wells NHS Trust* [2016] EWHC 779 (QB) at [16]:

> "16. … I consider that the principles to be applied in respect of an application under s.19 and Regulation 3 are as follows:
>
> (a) Simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of s.19 (*R v P*, *Evans*).
>
> (b) Improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly (*Denning*).
>
> (c) The test is one of impropriety, not merely unreasonableness (*Counsell*). The conduct of the prosecution must be starkly improper such that no great investigation into the facts or decision-making process is necessary to establish it (*Evans*).

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

16. This was the basis on which this court proceeded in *Haigh*. It was common ground before us that we should do so too.

17. In applying these principles, it is important to guard against hindsight, as pointed out in *Bentley Thomas v Wingfield* [2013] EWHC 356 (Admin) at [18]. We all have a tendency to suppose that what did happen was always going to happen, but all lawyers will have experienced cases which appeared at the outset to have good prospects of success, but which in the event proved to be utterly hopeless. References in the cases to situations where the prosecution never had any prospect of success should be understood to mean that it was always clear on any reasonable view of the case, avoiding the perils of hindsight, that the prosecution could not succeed.

Private prosecutions

18. Most of the cases have been concerned with allegations of improper acts or omissions by the Crown Prosecution Service or other public prosecution authorities, while Hickinbottom J's summary of principles in *Evans* was expressly limited to such cases. The position of private prosecutors was addressed in *Haigh* at [35] to [37]:

> "35. Both *Evans* and *Cornish* concerned <u>public</u> prosecutors. What of private prosecutions? First, as reiterated in *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52; [2013] 1 AC 484, by Lord Neuberger of Abbotsbury PSC (at [68]):
>
> > 'There is no doubt that the right to bring private prosecutions is still firmly part of English law, and that the right can fairly be seen as a valuable protection against an oversight (or worse) on the part of the public prosecution authorities, as Lord Wilson JSC acknowledges at paras. 28 and 29, and Lord Mance JSC says at para. 115.'
>
> On this footing, the law should guard against inadvertently discouraging the bringing of private prosecutions because of a fear of adverse costs consequences.
>
> 36. Secondly, however, those bringing and conducting a private prosecution must conform to the highest standards, as "Ministers of Justice". In *R v Zinga* [2014]

EWCA Crim 52; [2014] 1 WLR 2228, Lord Thomas of Cwmgiedd CJ said (at [61]):

> '…. Advocates and solicitors who have conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice (as described by Farquharson J) in preference to the interests of the client who has instructed them to bring the prosecution. As Judge David QC, a most eminent criminal judge, rightly stated in *R v George Maxwell (Developments) Ltd* [1980] 2 All ER 99, in respect of a private prosecution:
>
> > 'Traditionally Crown counsel owes a duty to the public and to the court to ensure that the proceeding is fair and in the overall public interest. The duty transcends the duty owed to the person or body that has instituted the proceedings and which prosecutes the indictment'.'
>
> See too, the observations of Buxton LJ (giving the judgment of the Court) in *R v Belmarsh Magistrates' Court, ex parte Watts* [1992] 2 Cr App R 188, at p.200, as to private prosecutors being subject to the same obligations, as a minister of justice, as are the public prosecuting authorities.
>
> 37. Thirdly, because private interests are, to some degree, almost invariably inherent in the bringing and conduct of private prosecutions, there is more scope for scrutiny of private prosecutors than public prosecutors. As Sir Richard Buxton observed, in *The Private Prosecutor as a Minister of Justice,* [2009] Crim LR 427, at p.427:
>
> > 'A private prosecutor will almost by definition have a personal interest in the outcome of a case.'
>
> As an important constitutional principle, public prosecutors enjoy a wide and independent prosecutorial discretion, including, under the Code for Crown Prosecutors, a focus on the public interest. They are not immune from scrutiny (see, for instance, the Victims Right to Review ("VRR") Scheme) but the Court will be astute to avoid the jurisdiction under s.19 of the Act being misused by becoming an appeal from a prosecutorial decision: see, *R v P (supra)*, at [15]. While the private prosecutor too must enjoy a wide measure of discretion and s.19 must not be abused so as to have a chilling effect, realistically there will likely be more room for questioning the initiation and conduct of a private prosecution. This is, perhaps, especially so where individuals, in effect, seek to prosecute or turn the tables on their accusers: *R (Dizaei) v Westminster Magistrates'* Court [2012] EWHC 4039 Admin, esp. at [33], [34] and [36] - where the contrast with the independence and detachment of a public prosecutor is particularly noteworthy. That said, when scrutinising private prosecutors, the principles set out in *Evans* and *Cornish* (both *supra*) will be applicable, *mutatis mutandis*. A private prosecutor will not be liable for costs merely because the prosecution fails or is withdrawn, still less because it is a private prosecution."

19. Two points relevant to the position of private prosecutors deserve emphasis. First, in their role as "ministers of justice" prosecutors have a duty to undertake an independent and objective analysis of the evidence before commencing proceedings to determine whether there is a realistic prospect of a conviction. This requires an assessment not only of what evidence exists, but also of whether it is reliable and credible, and whether there is other evidence which might affect the position. As the Code for Crown Prosecutors states:

> "When deciding whether there is enough evidence to charge, Crown Prosecutors must consider whether evidence can be used in court and is reliable and credible, and there is no other material that might affect the sufficiency of evidence. Crown Prosecutors must be satisfied there is enough evidence to provide a 'realistic prospect of conviction' against each defendant."

20. It was common ground before us that a private prosecutor is under the same duty, or at any rate is more likely to be treated as having committed an improper act or omission if he fails to carry out such an analysis. That leads on to the second point, which was not common ground. Because a private prosecutor will often have a private interest in the proceedings, he may lack the objectivity required to undertake such an analysis. Indeed, the objective private prosecutor will recognise the danger of his own lack of objectivity. It will often be prudent, therefore, to bring a proposed prosecution to the attention of the police or prosecution authorities and to take legal advice. While this is not a legal precondition to bringing a private prosecution, and a failure to do so is not in itself "improper", it may give rise to an inference that a private prosecutor was determined to go ahead regardless of the prospects of success or, more mundanely, may simply indicate that no proper analysis of evidential sufficiency has been carried out. *Haigh* at [39] shows that a failure to bring the matter to the attention of the relevant authorities may be a factor in demonstrating that the commencement of a private prosecution falls short of the standards required of a minister of justice.

Background

21. The first two Interested Parties, Adamneet Singh Bhui and Jimneet Singh Bhui, were the registered owners of a 1930s built semi-detached property at 1 Oakhampton Road, London NW7 1NG. The third Interested Party, Gurpinder Singh Bhui, is their father and appears to have had a beneficial interest in the property. Until the events with which we are concerned, the claimant and the Interested Parties were friends.

22. The claimant, Mr Holloway, is a solicitor authorised to exercise higher rights of audience, although he does not practise in the area of criminal law.

23. He has lived at the property since 1 March 2014. He was joined there by his wife after their marriage in June 2016. It is common ground that the plan was for Mr Holloway to buy the property from the Interested Parties and that he made payments totalling £90,153 which were regarded by the parties as payments made towards an eventual purchase.

24. It is Mr Holloway's case, and was part of the prosecution case in the criminal proceedings, that before taking up residence, he entered into "a contract" with the Interested Parties to purchase the property on a date to be later specified within the next three years, at an agreed price of £400,000. Mr Holloway has referred to this as

an option to purchase, although the document which he has produced is not signed by the Interested Parties. As I understand it, the Interested Parties challenge its authenticity. It is fair to say that its terms are not easily reconcilable with a text message sent by Mr Holloway on 8 October 2014 in which he said that the parties' deal had been that he had a period of six months from 1 March 2014 in which to complete the purchase and asked for an extension of a further six months. His text began by acknowledging that there should be a deadline after which, if completion had not taken place, the Interested Parties would be free to sell the property (in which case, obviously, he would have to vacate it) and return the deposit payments made by him:

> "Adam, I'm fine with a completion deadline after which you can sell the house and return the deposit."

25. At all events, Mr Holloway continued to live in the property. His case was that he notified the Interested Parties of his readiness to exercise his option in September 2016, but the Interested Parties were no longer prepared to sell for £400,000 because in the meanwhile the property had increased in value. Mr Holloway's case is that at a meeting on 5 November 2016, the Interested Parties required him to pay the sum of £480,000, which was now the value of the property, and that he reluctantly agreed. However, there was no written agreement to this effect. It was therefore not a binding contract, but was the basis on which solicitors would be and were instructed to complete the conveyancing transaction. The sum of £480,000 was also the amount for which Mr Holloway had obtained mortgage finance.

26. However, Mr Holloway's complaint is that the Interested Parties were not prepared to exchange contracts or to complete the transaction unless he paid them £70,000 in cash in addition to the price of £480,000 which would be recorded in the contractual documentation. He says that this was demanded in a series of telephone and text messages beginning in April 2017 in which the Interested Parties made clear that Mr Holloway and his wife and new baby would have to vacate the property if this additional amount was not paid, and said also that they would not return the deposit monies paid by him until the property had been sold to another buyer. These messages culminated in two texts sent in late May and early June 2017.

27. In the first of these, sent on 23 May 2017, the Interested Parties said:

> "Papers signed but we've instructed our solicitor not to go ahead yet. Please get cash ready and let me know when we can collect. Completion once cash is collected."

28. The second of these texts, sent on 2 June 2017, said:

> "We will come on Wednesday evening. Interest until Tuesday will be added so I will give you the new figure shortly. Please note highest denomination should be £20. Anything higher will be a headache for us to use. It is not like London here!"

29. Apparently the Interested Parties lived in Wolverhampton.

30. In the event, Mr Holloway did not pay this money. Instead, on 13 June 2017, he sent a long letter headed "Strictly Without Prejudice – Potential Claim", in which he accused the Interested Parties of "mafia like tactics". He said that the oral agreement to sell the property for £480,000 was legally binding, that the demand for £70,000 plus interest in addition was extortion, and that it constituted a variety of criminal offences including blackmail (as well as some offences, such as demanding money with menaces contrary to section 29 of the Larceny Act 1916, which had been abolished). It also gave rise to civil claims for damages which Mr Holloway quantified in the sum of £380,000.

31. It appears that this letter persuaded the Interested Parties to allow the transaction to go ahead for the price of £480,000, without payment of the additional sum which had been demanded. At all events, that is what occurred.

The criminal proceedings

32. On 6 November 2017 Mr Holloway and his wife laid informations seeking the issue of summonses at Willesden Magistrates' Court alleging blackmail and conspiracy to blackmail against the Interested Parties. The offence of blackmail contrary to section 21 of the Theft Act 1968 is committed by a person "if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief that he has reasonable grounds for making the demand and that the use of the menaces is a proper means of reinforcing the demand".

33. The blackmail allegation in each case was that the accused:

> "on several occasions by telephone calls and text in May and June 2017 made an unlawful demand of £76,325.39 in cash on Ayodeji Holloway and Hannatu Kokwain for an unlawful payment to allow the legal conveyancing transaction of 1 Oakhampton Road, NW7 1NG to Ayodeji Holloway and Hannatu Kokwain or he would unlawfully cause them to lose their home in which they had settled into as their marital home with their newborn baby."

34. The allegation of conspiracy to blackmail was in similar terms.

35. Attached to the informations were the contract for the sale of the property at a price of £480,000 dated 16 June 2017, a valuation of the property showing that value, the unsigned option agreement from 2014, a July 2016 letter from the Interested Parties confirming payment of £90,153.03 towards the purchase, the text messages from April to June 2017 demanding payment of the £70,000 plus interest, and Mr Holloway's letter of 13 June 2017 alleging mafia-like tactics and extortion. Attached also were texts exchanged in November 2016 in which the Interested Parties were saying that the property value was now £600,000. However, Mr Holloway did not attach the December 2016 emails referred to below. He did attach, but without explanation, an email from Mr Jimmy Bhui dated 23 February 2017 which included a reference to £70,000 which would remain outstanding to the Interested Parties after completion of the purchase.

36. The request for summonses to be issued was considered by the District Judge at the Magistrates' Court, who indicated that he considered this to be "primarily a civil

dispute". However, he said that he would consider the issue further upon receipt of answers from Mr Holloway to various questions. Mr Holloway's lengthy response insisted, among other things, that the evidence of demands was substantiated by clear and unambiguous text messages together with credible witness evidence from himself and his wife. He said that:

> "It cannot be reasonably argued that the defendants believed they had reasonable grounds for making a demand for £76,325.39 cash payment outside the conveyancing transaction in order to allow the conveyancing transaction proceed [*sic.*]. This is made even more evident by their condition, contained in the clear unambiguous texts sent by the defendants to us, that the payment be made in small cash denominations."

37. The District Judge also gave the Interested Parties an opportunity to make representations, which they did on 4 January 2018. They protested that they had completed the transaction under duress as a result of Mr Holloway's letter of 13 June 2017, at a loss of £70,000, as a recent valuation of the property had shown it to be worth £550,000. They said that the demand for £70,000 was lawful and the Interested Parties were entitled to require possession of the property if Mr Holloway and his wife could not proceed with the purchase. The Interested Parties indicated that, if summonses were issued, they would invite the Director of Public Prosecutions to take over the case and discontinue it.

38. On 24 January 2018 the District Judge decided to issue the summonses against the Interested Parties. On 20 February 2018 the case was sent for trial to Harrow Crown Court. A Plea and Trial Preparation Hearing was fixed for 28 March 2018. However, the day before this hearing was due to take place, the Interested Parties requested that the Director of Public Prosecutions take over the conduct of the case and discontinue it in accordance with section 6(2) of the Prosecution of Offences Act 1985. At a hearing on 29 May 2018 the Crown Prosecution Service did intervene in the private prosecution and offered no evidence against the Interested Parties, who were duly acquitted.

Review of the CPS decision

39. Although it was impossible to reverse the acquittal of the Interested Parties, Mr Holloway exercised his right under the Victim's Right to Review scheme for a review of the CPS decision. In a letter dated 15 June 2018 the CPS explained that it had concluded that there was insufficient evidence to provide a realistic prospect of conviction on a charge of blackmail or conspiracy to blackmail.

40. Referring to the ingredients of the offence of blackmail, the CPS said that there was evidence of a demand with a view to gain and that this was backed by a "menace", namely the threat of pulling out of the sale of the property, but concluded that the evidential test could not be met to show that the demand was "unwarranted".

41. This was because of an email which Mr Holloway had not disclosed in the proceedings which appeared to suggest that the agreed sale price was indeed £550,000, not £480,000, and that the sum of £70,000 plus interest had been agreed to cover a shortfall between this agreed sale price and Mr Holloway's mortgage offer of

£480,000. It was an email dated 5 December 2016 from Mr Holloway which read as follows:

> "We confirm that the sale price based on our mortgage offer is £480,000, and that the deduction of the £50,000 from the market value of £600,000 from your estate agent, makes the total price to be paid £550,000.
> We confirm that deposit monies of £90,148.23 has been paid to Jimmy Bhui over the course of 2 years and the £70,000 will be paid over the course of a maximum of 3 years, if not sooner. The repayment will be based on an APR of 6% with instalment being paid every 6 months.
> We confirm that the completion will be achieved through the normal conveyance procedures between our respective solicitors.
> We therefore look forward the letter from your solicitors justifying the deposit monies of £90,148.23 which you have received from us.
> Thank you for appreciating this process falls within winter period and the impending delivery of our baby.
> Kind Regards"

42. This email was sent in response to an email of the same date from the Interested Parties which read as follows:

> "We write further to our meeting on 1st December with you, Mr Deji Holloway and Mrs Hannah Holloway. In the said meeting we established that the agreed sale price of 1 Oakhampton Road, Mill Hill, London NW7 1NG is £550,000 based on the current market value of the property. However the sale price based on your mortgage offer is £480,000, for which we have already receipted deposit monies of £90,148.23 over the course of 2 years. Based on the above figures there is a shortfall of £70,000, which you, Mr Deji and Mrs Hannah Holloway, have agreed to pay back to Jimmy Bhui and Adam Bhui, over the course of a maximum of 3 years, if not sooner.
> This will be looked upon as a loan between the parties, based on an APR of 6%. You have insisted on the instalment being paid every 6 months, to which Adam and Jimmy Bhui have agreed, given your current financial circumstances.
> In order for the above to materialise into a contract agreement and become binding on both parties Mr Deji Holloway and Mrs Hannah Holloway must complete the conveyance of the said property within 6 weeks of this correspondence.
> If this term of the agreement is not abided with, Jimmy and Adam Bhui will be permitted to place the said property on the market for sale to the public.
> Furthermore if you agree to the above said kindly furnish us with your approval email in return of the same to which we will effectively issue an official letter justifying the position of the deposit monies that we have receipted from you in the sum of £90,148.23.
> We look forward to hearing from you accordingly.
> Many thanks,"

43. I will refer to this exchange as "the December 2016 emails".

The application for costs

44. There was then an application by the Interested Parties for an order for payment of their costs of defending the criminal proceedings in the sum of £23,470.73. The application was put on two bases. The first was that the relevant act or omission was "an act of the private prosecutor in bringing this prosecution without the skill and calibre to adequately do so as well as without adequate evidence to establish the offences complained of to such an extent that an ulterior motive was present other than to administer justice". The second was that there was "an omission being failure on the private prosecutor to adequately provide disclosure and fulfil their duty of candour".

45. The December 2016 emails were central to both ways in which the case was put. It was the Interested Parties' case that any proper analysis of the prospects for a successful prosecution would have had to consider the impact of these emails and, having done so, would inevitably conclude that the prosecution could not succeed. Moreover, it was said that Mr Holloway's failure to disclose these emails in the criminal proceedings was itself an improper act.

46. For his part Mr Holloway focused on the particular demands made in May and June 2017 including the fact that the demand was for cash in small denominations which was not to form part of the purchase price in the formal conveyance and that it was accompanied by the threat not to return the deposit payments which he had made until after the property had been sold, which would leave him in a precarious position, homeless and out of his money for an uncertain period.

47. The application came before His Honour Fraser Morrison sitting as a Deputy Circuit Judge in Harrow Crown Court at a hearing on 4 July 2018. In a written ruling provided on 7 September 2018 the judge held that the commencement and continuation of the prosecution was an improper act which had caused the Interested Parties to incur costs. He did so on the basis that a price of £480,000 had been agreed but that this was not legally binding until contracts were exchanged, so that the Interested Parties were entitled to seek a higher purchase price and to walk away if this was not agreed. He described this as "robust bargaining" which "may be repugnant to some, especially those on the receiving end, but is perfectly legal". Accordingly the demand for cash outside the agreed price was not unwarranted and the "threat" that Mr Holloway and his family would have to leave the property if the demand was not met was not a "menace", but rather was the obvious consequence of failing to exchange contracts. He agreed, therefore, with the CPS decision that there was insufficient evidence to provide a realistic chance of conviction.

48. Thus the judge did not find that the prosecution had been brought by Mr Holloway with an ulterior motive, but he did find that it was hopeless from the start. In view of this conclusion he decided that he did not need to determine whether payment of costs should be ordered because of a failure to make proper disclosure.

49. The judge invited submissions as to the quantum of the Interested Parties' costs but, because of this application for judicial review, the determination of quantum has not yet taken place. Strictly speaking, therefore, there is as yet no order in place as an order under Regulation 3 must "specify the amount of costs to be paid", but neither party has taken a point on this as they wish to know whether in principle such an order can be made in this case.

The parties' submissions

50. On this application for judicial review of the Deputy Circuit Judge's decision Ms Helen Malcolm QC for Mr Holloway submits, in outline, that:

    (1) There were factual disputes between the parties as to (a) the existence of an option agreement to purchase the property, (b) the nature and cause of negotiations as to price that took place before exchange of contracts, and (c) the nature and extent of threats made to Mr Holloway and his wife. These would have been a proper subject for evidence and cross-examination at a trial of the criminal proceedings. Whether the proceedings would have succeeded or failed, it was not improper to have brought them. However, the Deputy Circuit Judge had in effect substituted his view for that of the jury without having heard the evidence tested.

    (2) There was clear evidence of a demand for £70,000 plus interest in cash, in denominations of no more than £20, outside the formal conveyance. The nature and circumstances of that demand could arguably have supported a finding that it was unwarranted as well as unlawful.

    (3) There was equally clear evidence that Mr Holloway was threatened with having to vacate his home if this additional sum was not paid; there was also evidence that he was told that the deposit of some £90,000 which he had paid would be withheld until the Interested Parties had secured another purchaser, which was also capable of amounting to "menaces".

    (4) Mr Holloway had taken advice from counsel after the issue of the summons, but before the matter was taken over by the CPS, and had received positive advice; there was no reason to think that the advice would have been different if it had been obtained prior to commencing the proceedings. It could not be improper to rely on counsel's advice in continuing the proceedings.

    (5) The December 2016 emails, which Mr Holloway had not disclosed, dealt with a possible loan over three years and not a demand for payment in cash prior to and as a condition of exchange of contracts. Even if they would have become disclosable in the light of any defence statements, the time for disclosure had not arrived and the fact that they had not been disclosed did not amount to an improper act or omission.

51. In response Mr William Martin for the Interested Parties submits that there was never a realistic chance of conviction for the reasons given by the CPS and the judge. Moreover, the email exchange obviously ought to have been disclosed and Mr Holloway's failure to disclose it showed that he had not conducted the case properly.

Analysis

52. Unfortunately, it has to be said that the judge did not really engage with either party's real case. While he was right to say, as a general proposition, that until contracts are exchanged, there is no binding agreement for the sale of a house, and that either party is free to walk away, that did not address Mr Holloway's point that a demand for an additional payment of £70,000 in cash, in small notes, coupled with a threat to retain over £90,000 of Mr Holloway's money until the property was sold, which payment

was not to feature in the formal conveyance prepared by the parties' solicitors, was an unwarranted demand. This was not, on Mr Holloway's case, the typical situation of a seller asking for a higher price in the course of a conveyancing transaction before contracts had been exchanged. I would accept that a demand for cash in circumstances such as these could constitute an unwarranted demand. Indeed it might well be evidence of something untoward on the part of those making the demand. That would depend on consideration of all the circumstances. However, to describe the demand here as no more than "seeking an increased price" in "robust negotiations", as the judge did, misses the point. The judge did not even mention the aspects of the demand on which Mr Holloway relied, saying only that "Before exchange of contracts the owners sought a higher purchase price".

53. On the other hand, the judge did not address the Interested Parties' case either. He made no finding either way as to whether Mr Holloway had brought the prosecution with an ulterior motive, effectively in bad faith, as the Interested Parties alleged. He did not mention the December 2016 emails or consider how they affected the prosecution case, although he did say that he agreed with the CPS decision that there was insufficient evidence to provide a realistic chance of conviction. Nor did he mention the October 2014 text which cast doubt on the option agreement relied on by Mr Holloway. He decided not to adjudicate on the disclosure complaint. He said twice (adding that "It is worth repeating …") that Mr Holloway had neither reported the alleged blackmail to the police nor sought legal advice before bringing the prosecution, which should have been obvious steps, but did not say what conclusions he drew from this.

54. I have concluded, therefore, that the judge's reasoning cannot stand. That leaves the question of how this court should now proceed. One possibility would be to set aside the judge's ruling and to remit the matter to the Crown Court to consider the matter afresh. However, that would put the parties to substantial further expense. On the other hand, it is not for us, as a court exercising a judicial review jurisdiction, to exercise a discretion which has been conferred by Parliament on the Crown Court. That said, the procedure when costs are sought under section 19 and Regulation 3 is intended to be summary in nature and we have all the material which was before the Crown Court and have heard full argument. If we were to conclude that the requirements for making an order are (or alternatively are not) satisfied and that there is only one way in which the Crown Court could properly exercise its discretion, there would be no purpose in remitting the matter to the Crown Court. I propose, therefore, to consider the issues on this basis.

55. I deal first with the question whether this was a case where it was always clear on any reasonable view of the case, taking care to avoid hindsight, that the prosecution could not succeed. In my judgment it was, for the reasons given by the CPS when reviewing the decision to take over the prosecution and offer no evidence. The December 2016 emails present a picture flatly contradictory to the prosecution case and the evidence of Mr Holloway. To my mind these emails make it abundantly clear that the price agreed between the parties in December 2016 for the sale of the property was £550,000 but, because the mortgage finance which Mr Holloway was able to obtain was limited to £480,000, it was agreed between them that the balance of £70,000 plus interest would be treated as a loan to be repaid over a maximum of three years. This, however, was expressly subject to completion within six weeks, which did not occur.

It is, therefore, not surprising that, when Mr Holloway was unable to complete within six weeks, the Interested Parties insisted that the £70,000 be paid upfront. On this basis the demand for the £70,000 did not represent an unwarranted increase in price, but merely a difference in the timing of the payment, in view of Mr Holloway's delay in completing the transaction.

56. To have any prospect of a conviction, the prosecution would have had somehow to explain away the December 2016 emails. Mr Holloway would have had to persuade a jury that his email was written under some kind of duress, when the parties' true agreement was limited to a sale price of £480,000. However, there was no trace of any such suggestion in the contemporary messages. The final paragraph of Mr Holloway's email, expressing gratitude to the Interested Parties, was inconsistent with any such suggestion.

57. Nor was there any such suggestion in a witness statement dated 30 April 2018 which Mr Holloway had signed in the course of the criminal proceedings. The statement included the usual rubric that it was true to the best of Mr Holloway's knowledge and belief and he made it knowing that, if it was tendered in evidence, he would be liable to prosecution if he had wilfully stated in it anything which he knew to be false or did not believe to be true. The statement simply asserted that events prior to 10 April 2017 were not relevant to the criminal proceedings:

> "The meeting of 1st of December 2016 and events leading up to it does not form part of the criminal conduct complained of in this case, the demand complained of started after the conveyancing transaction for a valid legal purchase at £480,000 had started and reached the final stage. It started from April 2017 to June 2017 for a demand for £76,325.69 in cash before completion with a threat not to complete unless paid. Jimneet Singh Bhui, Adamneet Singh Bhui, and Gurpinder Singh Bhui's conduct relating to circumstances prior to 10th of April 2017 does not form part of our criminal complaint for blackmail."

58. While this statement was not in existence when the prosecution was begun, there is no reason to doubt that it represented Mr Holloway's position at that stage.

59. In order to explain away the December 2016 emails, Mr Holloway would have had to contradict what was said here. He would have had to say that the blackmailing demand for £70,000 began, not in April 2017, but in December 2016, and that (far from being irrelevant) the events of December 2016 were inextricably connected with the case of blackmail which was advanced against the Interested Parties.

60. Moreover, Mr Holloway would have had to explain why, although he had presented to the District Judge, when requesting the issue of a summons, the 2014 option agreement and the text messages from November 2016 in which the Interested Parties were saying that the property value was now £600,000, he had made no reference to the December 2016 emails. That in itself contradicted his claim that events before April 2017 were irrelevant, as he himself was relying on events going back to 2014 and the agreement allegedly reached in November 2016 as forming part of the background. The omission of the December 2016 emails exposed him at the very least to charges of selectivity and of suppressing unhelpful material. The result was that an incomplete and misleading picture had been presented to the District Judge.

61. As explained above, a private prosecutor, just like a CPS prosecutor, has a duty to undertake an independent and objective analysis of the evidence before commencing proceedings to determine whether there is a realistic prospect of a conviction. This case cried out for such an analysis, but none was undertaken. If it had been, it would have had to grapple with the significance of the December 2016 emails, both in themselves and as affecting the jury's likely view of the reliability and credibility of Mr Holloway. In my judgment the only possible conclusion would have been that there was no realistic possibility of a conviction.

62. In this context Mr Holloway's failure to refer the matter to the police or to take legal advice before commencing the prosecution is significant. It is clear that this was deliberate, as one of the questions asked by the District Judge was whether the police had been informed, to which Mr Holloway replied that he had decided not to do so, but to bring a private prosecution "as there was ample and irrefutable evidence available". The result is that Mr Holloway, who was clearly not objective but was (judging from the tone of his correspondence) emotionally affected by these events, commenced the prosecution and insisted on doing so despite the doubts expressed by the District Judge and the representations of the Interested Parties, without (as he must have known) any proper assessment of whether there was a realistic prospect of a conviction.

63. In my judgment this was undoubtedly "a clear and stark error". The decision to prosecute was a decision to which no reasonable prosecutor who had carried out anything approaching a proper assessment of the evidence could have come. The commencement and continuation of the prosecution was an improper act within the meaning of section 19 of the 1985 Act. Undoubtedly it caused the Interested Parties to incur the costs of defending those proceedings.

64. I reach this conclusion without needing to find that in pursuing the criminal proceedings and in failing to mention the December 2016 emails Mr Holloway was acting in bad faith. The judge did not make such a finding and I do not consider that it would be right for this court to do so. It is, however, sufficient that there was never any proper assessment of the prospects of conviction and that, objectively considered, this was a case which never had any prospect of success.

65. I prefer to found my decision on this conclusion rather than on a failure of disclosure. The December 2016 emails were undoubtedly disclosable as material which, in the terms of section 3(1) of the Criminal Procedure and Investigations Act 1996, "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". I can see no sensible argument to the contrary. However, it appears that the proceedings may have been terminated before the time for prosecution disclosure to be given, in which case there was not strictly a failure to give disclosure, and it does appear, however surprisingly, that counsel then instructed by Mr Holloway advised that the emails need not be disclosed, at any rate prior to consideration of any defence statements.

66. I have concluded, therefore, that there was an improper act by Mr Holloway as a result of which the Interested Parties incurred costs. That leaves the question of discretion. Although this is a matter for the Crown Court, and not every such improper act should lead to an order for costs, the circumstances of the present case are such, in my judgment, that the only proper exercise of discretion would be for an

order to be made. That is so for two reasons. First, even allowing for the fact that the test is whether there is a clear and stark error, this is in my judgment a very clear case. Second, the Interested Parties warned at the outset that, if a summons were to be issued, they would not only invite the Director of Public Prosecutions to take over the case and discontinue it, but would seek an order for their costs against Mr Holloway under section 19 of the 1985 Act. He chose nevertheless to go ahead with the prosecution, and did so with his eyes open as to the consequences.

Disposal

67. Although the judge's reasoning cannot be supported, he was right to conclude that there was an improper act by the prosecution as a result of which costs had been incurred by the Interested Parties. That was, moreover, the only possible conclusion which could be reached in the circumstances of this case. Further, the only way in which the Crown Court's discretion could properly have been exercised was by making an order for Mr Holloway to pay the Interested Parties' costs of the criminal proceedings.

68. On this basis I would therefore dismiss the claim for judicial review and remit the matter to the Crown Court to determine the amount of the Interested Parties' costs.

Mr Justice Edis:

69. I agree.