Neutral Citation Number: [2024] EWHC 1207 (Admin)

Case No: AC-2022-LDS-000276

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Tuesday, 21st May 2024

Before:
FORDHAM J

- -

Between:

THE KING **(on the application of ANTHONY McGILL)**	**Claimant**
- and -	
NEWCASTLE MAGISTRATES' COURT	**Defendant**
- and -	
(1) HAIZHE HUANG	**Interested**
(1) CROWN PROSECUTION SERVICE	**Parties**

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The **Claimant** in person
Paul Jarvis (instructed by CPS) for the **Second Interested Party**
The **Defendant** and **First Interested Party** did not appear and were not represented

- -

Hearing date: 11.4.24
Draft judgment: 9.5.24

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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FORDHAM J

FORDHAM J:

I. INTRODUCTION

1. This case is about an exercise of the power of a magistrates' court to decline to issue a summons. On 12 September 2022, the Claimant (Mr McGill) emailed Ms Emily King an application for a summons. Ms King is the Acting Legal Team Manager (Crime) at Newcastle Magistrates' Court. As a court lawyer, she is empowered by r.2.8(5)(a) of the Criminal Procedure Rules ("CrimPR") to make decisions about issuing summonses. Mr McGill had attached a completed application form (9.9.22) and accompanying witness statement (9.9.22). Following email correspondence (27.9.22 and 10.10.22), on 11 October 2022 Ms King sent a decision letter communicating her reasoned decision to refuse the application. That refusal is the target decision in this judicial review claim. The question for me to decide is whether that impugned refusal was a lawful refusal to issue the summons for which Mr McGill had applied.

2. On 3 October 2022 – a week before the impugned decision – amendments to the CrimPR had come into effect. There was a new provision addressing the discretionary power to decline to issue a summons. The new provision is CrimPR r.7.2(14): see §7 below. The impugned decision then gave "two grounds" for the refusal to issue the summons, referring to new r.7.2(14)(a) and (f). Mr Jarvis for the CPS recognises that r.7.2(14)(a) is at the heart of this case. He tells me that he is aware of no previous case-law on whose language is based, and that this is the first case to address it.

3. There are four documents produced by Ms King which are before the Court. (1) The two-page reasoned decision letter (11.10.22). (2) A three-page letter of response (28.10.22). (3) A 3-page submission (6.1.23) filed prior to permission for judicial review. (4) A 6-page revised submission (26.7.23) filed following the grant of permission for judicial review. I have considered these, together with the helpful written and oral materials from Mr McGill and Mr Jarvis, both of whom assisted me at the hearing with balanced, focused submissions.

II. THE LAW

Statutory Provisions

4. Section 1(1) of the Magistrates' Courts Act 1980 provides that "upon information being laid … that any person has, or is suspected of having, committed an offence" a "justice … may … issue a summons directed to that person requiring him to appear before a magistrates' court for the area to answer the information…" Section 6 of the Prosecution of Offences Act 1985 preserves the right of private prosecution. Section 23 of the 1985 Act empowers the CPS to take over and discontinue proceedings. It is lawful, in exercising that power of discontinuance, for the CPS to apply the evidential stage of the Full Code Test: see R (Gujra) v CPS [2012] UKSC 52. Section 23(9) of the 1985 Act provides that: "The discontinuance of any proceedings by virtue of this section shall not prevent the institution of fresh proceedings in respect of the same offence".

The CrimPR

5. CrimPR r.7.2 makes provision about an application for a summons. Making an "application" for a summons is the same thing as laying an "information" for s.1(1) of the 1980 Act. An application can be written, or oral but accompanied by a written statement (r.7.2(1)). A single document may contain multiple applications or charges (r.7.2(9)). An allegation in an application must describe the offence and particulars of conduct (r.7.3(1), r.7.2(3)(a)) "more than one incident of the commission of the offence" may be "included in the allegation if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission" (r.7.3(2)). CrimPR r.7.1(1)(d) and r.7.3(3) allow for "an additional allegation" to be added in "an existing prosecution". All applications for a summons are required (r.7.2(3)(b)) to "demonstrate – (i) that the application is made in time, if legislation imposes a time limit, and (ii) that the applicant has the necessary consent, if legislation requires it".

6. Where the prosecutor is a private prosecutor (see r.7.2(5)), the application for a summons must also (r.7.2(6)(a)-(c)):

> ***(6)(a) concisely outline the grounds for asserting that the defendant has committed the alleged offence or offences; (b) disclose – (i) details of any previous such application by the same applicant in respect of any allegation now made, and (ii) details of any current or previous proceedings brought by another prosecutor in respect of any allegation now made; and (c) include a statement that to the best of the applicant's knowledge, information and belief – (i) the allegations contained in the application are substantially true, (ii) the evidence on which the applicant relies will be available at the trial, (iii) the details given by the applicant under paragraph (6)(b) are true, and (iv) the application discloses all the information that is material to what the court must decide.***

Under r.7.2(7), where the statement required by r.7.2(6)(c) is made orally it must be on oath or affirmation, unless the court otherwise directs; and the court must arrange for a record of the making of the statement.

7. CrimPR r.7.2(14) contains six paragraphs, (a) to (f). Here is what it says:

> ***(14) The court may decline to issue a summons or warrant if, for example – (a) a court has previously determined an application by the same prosecutor which alleged the same or substantially the same offence against the same defendant on the same or substantially the same asserted facts; (b) the prosecutor fails to disclose all the information that is material to what the court must decide; (c) the prosecutor has – (i) reached a binding agreement with the defendant not to prosecute, or (ii) made representations that no prosecution would be brought, on which the defendant has acted to the defendant's detriment; (d) the prosecutor asserts facts incapable of proof in a criminal court as a matter of law; (e) the prosecution would constitute an assertion that the decision of another court or authority was wrong where that decision has been, or could have been, or could be, questioned in other proceedings or by other lawful means; or (f) the prosecutor's dominant motive would render the prosecution an abuse of the process of the court.***

I am going to refer to these six paragraphs using the labels [14a] to [14f]. Some of them are describing events which precede the making of the application: [14a] (past application), [14c] (past promises) and [14e] (past decision).

8. Under CrimPR r.1.3(a) the magistrates' court, when exercising the s.1(1) power and when interpreting r.7.2(14), "must further" this "overriding objective" (r.1.1):

> ***… that criminal cases be dealt with justly, [which] includes – (a) acquitting the innocent and convicting the guilty; (b) treating all participants with politeness and respect; (c) dealing with***

> ***the prosecution and the defence fairly; (d) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights; (e) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case; (f) dealing with the case efficiently and expeditiously; (g) ensuring that appropriate information is available to the court when bail and sentence are considered; and (h) dealing with the case in ways that take into account – (i) the gravity of the offence alleged, (ii) the complexity of what is in issue, (iii) the severity of the consequences for the defendant and others affected, and (iv) the needs of other cases.***

Case-Law

9. It is common ground in this case that r.7.2(14) and its six paragraphs [14a] to [14f] need to be understood and applied in the context of the previous case-law on s.1(1) of the 1980 Act. Three cases were placed before me: R (Charlson) v Guildford Magistrates Court [2006] EWHC 2318 (Admin) [2006] 1 WLR 3494; R (Kay) v Leeds Magistrates Courts [2018] EWHC 1233 (Admin) [2018] 4 WLR 91 and R (Smith-Allison) v Westminster Magistrates Court [2021] EWHC 2361 (Admin). The makers of the new r.7.2(14) were picking up on some of the features of the case-law. For example, Kay featured [14b] material non-disclosure (see §§37-40) and the case also involved what were said to be a [14ci] binding agreement not to prosecute (see §3(1), 8(8)); a [14cii] assurance (see §11iii). In the same way, r.7.2(12)(c) – which refers to issuing a summons with or without representations from the defendant – reflects a point which arose in Kay (see §22(6)). Similarly, in part, the threshold requirements recognised in the case-law (§10(2) below) are reflected in r.7.2(3) and r.7.2(14) at [14d]. The idea from the case-law about a dominant motive which renders prosecution an abuse of process (§10(5) below) is clearly reflected in r.7.2(14) at [14f].

Established Principles

10. These are some established principles from the case-law. (1) Considering an application for the issue of a summons involves a duty to exercise a judicial discretion (Kay §21). (2) These are "threshold requirements" (Smith-Allison §47): (a) that the allegation is an offence known to the law; (b) that the essential ingredients of the offence are prima facie present; (c) that the offence alleged is not time-barred; that the court has jurisdiction; and that the informant has the necessary authority to prosecute (Kay §22(1); Smith-Allison §43). (3) Where the threshold requirements are met, generally the magistrates' court ought to issue the summons "unless there are compelling reasons not to do so" (Kay §22(2)). The most obvious compelling reasons are that the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay); or is an abuse of process; or is "otherwise improper" (Kay §22(2) and (3)). The language of "otherwise improper" reflects the fact that applications which are "vexatious" or involve "abuse of process" are themselves aspects of propriety. (4) The essential question is "whether it is a proper case" to issue the summons (Kay §22(3)). (5) As to the presence of an improper ulterior purpose, there may legitimately be "mixed motives" (Smith-Allison §§48-50), but these are distinguished from "an oblique motive which is so dominant and unrelated to the proceedings that it renders them an abuse of process" (Smith-Allison §50). (6) The decision-maker should consider "the whole of the relevant circumstances" to enable them to satisfy themselves that it is a "proper" case to issue the summons (Kay §22(3)).

11. From these established principles, three points warrant special emphasis. First, the overarching question whether it is a "proper case" to issue the summons. Secondly, the

basic duty to consider the whole of the relevant circumstances. Thirdly, the relevant reminder that a summons should be granted absent "compelling reasons not to do so".

CrimPR r.7.2(14): Avoiding the Trap

12. The seven paragraphs [14a] to [14f] in CrimPR r.7.2(14) are not to be read as a series of prescribed 'tick-boxes', to identify when a summons should be declined. That is a trap. The purpose of r.7.2(14) is less rigid than this. The rule presents a non-exhaustive set of "examples" – which may overlap – of situations where, in all the circumstances, it "may" be appropriate to decline to issue the summons. The rule uses the language of "for example" and the language of "may decline". If a set of circumstances do not fit within one of the examples, it may still be appropriate in all the circumstances to refuse to issue the summons. If a set of circumstances does fit within the one of the examples, it may still be appropriate in all the circumstances to issue the summons.

13. The rule is not a comprehensive statement of principles. It did not overturn the case-law on the exercise of the statutory power. The rule needs to be read in light of that case-law. For example, the threshold requirements (§10(2) above) continue to apply, but they are not fully spelled out in the rule. Most of all, the three points which I have emphasised (§11 above): the overarching question whether it is a "proper case" to issue the summons; the basic duty to consider the whole of the relevant circumstances; and the relevant reminder that a summons should be granted absent "compelling reasons not to do so". It is proper to think of r.7.2(14) as if it said:

> ***(14) If the court is satisfied that in all the circumstances there are compelling reasons why it is not a proper case to issue a summons, the court may decline to do so, for example because (a) …***

Some of the examples – see [14b], [14c], [14d] and [14f] – may be expected, in and of themselves, answer the question. That is because they are, by nature and without more, recognised situations of impropriety. But the rule still says "may" and not "shall". The situation in example [14e] may mean, but need not necessarily mean, that it is not a proper case to issue a summons. The same is true of example [14a], as I will now illustrate.

Understanding Example [14a]

14. There can be different circumstances in which "a court has previously determined an application by the same prosecutor which alleged the same or substantially the same offence against the same defendant on the same or substantially the same asserted facts". Here is a first example. Suppose a private prosecutor applies for a summons but, in the application, misdescribes the criminal law and identifies an offence which is not known to the law. Suppose the summons is refused, but a second application is made which identifies the right offence, and everything else is in order. Here is a second example. Suppose a summons is issued for a private prosecution. Suppose the CPS takes it over and discontinues it for insufficiency of evidence. Now suppose the private prosecutor discovers compelling new evidence. Parliament has expressly provided in s.23(9) of the 1985 Act (§4 above) that a further prosecution may be bought. These examples illustrate that a summons could properly be issued, even though [14a] applies.

15. Conversely, it may be that the circumstances are close to satisfying [14a], but do not fall within it, yet still it would not be proper to issue a summons. Take this example. Suppose a summons has been issued to a private prosecutor, but the CPS take over the prosecution and discontinue the proceedings. Suppose nothing has changed. Now there is an identical application for a straight re-run, but the applicant is the sister of the person who made the first application. That would not fall within [14a], because it is a different prosecutor. But it links to r.7.2(6)(b)(ii) – which requires a private prosecutor applicant for a summons to "disclose … details of any current or previous proceedings brought by another prosecutor in respect of any allegation now made". And it may readily be decided that it would not be a proper case to issue a summons.

16. Here are key points about Example [14a] in r.7.2(14). (1) Example [14a] is describing a situation where the summons may be refused, even if the threshold requirements (§10(2) above) are satisfied. (2) Interpreted in context, the reference in example [14a] to "a court" having previously determined "an application" is not a reference to any "application", but to the species within r.7 itself. That includes an "application for the issue of a summons" (r.7.2(3)) which a "court may determine" (r.7.2(12)). (3) The description of having, in a previous application for a summons, "alleged the same or substantially the same offence against the same defendant on the same or substantially the same asserted facts" is language to be given its ordinary and natural interpretation. The word "substantially" allows focus on practical substance and reality rather than form or relabelling. The words "the same" allows focus on close correspondence: the rule does not say "the same or substantially similar". (4) The application of the language of [14a] is not a hard-edged question of law, but a question of evaluative judgment, to which a reasonableness standard of review would apply.

17. These are some features of r.7 which can properly illuminate the application of [14a]. First, there are r.7.1(1)(d) and 7.3(3). These describe a prosecutor who "alleges an offence" against a defendant, where that defendant is already attending court in response to "another allegation". Secondly, there is r.7.2(6)(b)(i). This describes a duty on a private prosecutor applicant to "disclose … details of any previous such application by the same applicant in respect of any allegation now made". This duty, and the idea of the "allegation now made", fits an alleged offence and asserted facts being "the same or substantially the same". Thirdly, there is r.7.3(2). This provides that an "allegation" may include "more than one incident of the commission of the offence … if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission." The idea of the same "course of conduct having regard to the time, place or purpose of commission" could properly illuminate the application of the alleged offence and asserted facts being "the same or substantially the same". Depending on the circumstances, they could also illuminate the question whether it is not a proper case to issue a summons, whether or not the precise wording of [14a] apply.

Why is Example [14a] in r.7.2(14)?

18. It is helpful to think about why [14a] has been included as one of the listed examples of a situation where it may not be a proper case to issue a summons. One strand must be about the legitimate interests of the defendant, which is why [14a] is about "the same defendant". Another strand is about forum-hopping, where a prosecutor has made an application to another magistrates' court and is now trying their luck here, which is why [14a] says "a court" and not "the court". A further strand is about presenting a

magistrates' court with a straight re-run, which is why [14a] includes "the same offence" and "the same asserted facts". Another strand is about reclassification, where there is a re-run but the alleged crime is reclassified as a different offence, which is why [14a] includes "substantially" the "same offence". A further strand is about a insubstantial or superficial change as to asserted facts, which is why [14a] includes "substantially" the "same asserted facts".

19. Within all of this, there is I think a discernible purpose about a prosecutor who has 'sat back' or 'held back'. A prosecutor has previously made an application raising an allegation. There may have been another way of classifying the offence. There may have been another aspect of the defendant's alleged conduct. The offence is "substantially the same". The "asserted facts" are "substantially the same". Aspects could and should have been included in an earlier application, or in an earlier ensuing prosecution, but they were not included. The prosecutor has – in these circumstances – simply 'sat back' or 'held back'. Now, after whatever outcome has arisen from the previous application or prosecution, the prosecutor is making this further application with "the same or substantially the same" offence and with "the same or substantially the same" asserted facts. After 'sitting back' or 'holding back', it may not now be proper – second time around – to issue a summons.

Example [14a]: An Encapsulation

20. For reasons which I have explained, in a case falling within [14a], the question really comes to this:

> *Whether, in all the circumstances, there are compelling reasons why this is not a proper case to issue the summons by reason of the fact that a court has previously determined an application by the same prosecutor which alleged the same or substantially the same offence against the same defendant on the same or substantially the same asserted facts.*

Example [14e]: An Encapsulation

21. I have mentioned (§13 above) that the same analysis is also applicable to example [14e]. Here, then, is an equivalent encapsulation. In a case falling within [14e], the question really comes to this:

> *Whether, in all the circumstances, there are compelling reasons why this is not a proper case to issue the summons by reason of the fact that the prosecution would constitute an assertion that the decision of another court or authority was wrong where that decision has been, or could have been, or could be, questioned in other proceedings or by other lawful means.*

Case-Specific Propriety

22. The main theme in what I have said so far really converges into one simple point. In applying the non-exhaustive examples [14a] to [14f], the decision-maker is looking at the circumstances of the individual case – whether those circumstances fit within the language of a given example or not – to see whether they provide the compelling reasons why this is "not a proper case" to issue the summons. What matters here is not the label, or the formulation, but the idea. For convenience, I will give it a label. I will

call it "Case-Specific Propriety". In deciding whether to issue a summons, the decision-maker is on a quest for Case-Specific Propriety. That is what the case-law is discussing (§§9-10 above). That quest is what r.7.2(14) is plainly intended to guide.

III. THE HISTORY OF THE CASE

23. The impugned decision (11.10.22) said the refusal to issue the summons was "in view of the history of the case" and was "based on the chronology of events". It referred to three past events: (i) the July 2021 institution of proceedings; (ii) the CPS taking over and discontinuing those proceedings; and (iii) the CPS decision on a Victim Review maintaining that discontinuance decision as correct. I need to explain what happened. But the best place to start is the civil proceedings.

The Civil Proceedings

24. There were civil proceedings in the High Court in Newcastle which culminated in the judgment of HHJ Kramer, sitting as a High Court Judge, on 21 January 2021: see Anthony McGill v Haizhe Huang [2021] EWHC 938 (Ch) (the "2021 Judgment"). The claimant was Mr McGill. The remaining defendant (2021 Judgment §1) was Mr Huang, the (non-participating) First Interested Party in these judicial review proceedings.

25. The civil proceedings arose out of a partnership in which Mr McGill and Mr Huang were both participants. The relevant business was the sale of advertising on LED display boards at English Premier League football grounds. The advertising rights were sold on to a Chinese company called Tomorrow Sunshine, as agent for a Chinese telecoms manufacturer called Vivo. Deals were across three relevant seasons: 2015/16 (Vivo 1), 2016/17 (Vivo 2) and 2017/18 (Vivo). Those who featured in the case included Xiaofei Lin ("Mr Lin" in this judgment; "Xiaofei" in the 2021 Judgment); Wenzhou Xiai Sports Development Co Ltd ("the Company" in this judgment; "Wenzhou Xiai" in the 2021 Judgment) and Lily Zhan. The Company had been set up to receive income from the advertising deals in respect of Vivo 2.

26. In the course of the civil proceedings bank statements and supporting transfer forms relating to the Company's bank account ("the Bank Documents") were produced. It came to light that these had been forged. Mr McGill said Mr Huang was a participant in the forging of the Bank Documents. Judge Kramer addressed that question. He concluded (2021 Judgment §50):

> ***On the evidence I have recited, it is more likely than not that Mr Huang was a participant in the forging of the bank statements and supporting transfer forms.***

27. This is what Mr McGill says about the Bank Documents and the civil proceedings. First, that the Bank Documents were disclosed by Mr Huang in the civil proceedings in December 2016. Their contents recorded monies from a single Vivo 2 deal worth £1.4m, concealing monies from two further Vivo 2 deals worth a further £2.2m. Secondly, that Mr Huang originally claimed that the Bank Documents were genuine and relied on them. Thirdly, that Mr Huang ultimately had to accept that they were forgeries, but he maintained that he had no knowledge of or involvement in the forgery of the documents. Judge Kramer rejected that story.

28. Returning to the 2021 Judgment, Mr Huang had given evidence in the civil proceedings about his and Mr Lin's relationship to the Company. Judge Kramer addressed that aspect of the case. He said this (§§44-45):

> ***44. Putting to one side the inconsistencies in Mr Huang's account concerning the formation of [the Company], on his evidence it was set up to deal with the proceeds of Vivo 2 which amounted to over £1 million. It is implausible that he would be completely incurious as to who was to be in control of that company or would have left someone he claims to have known for only 2 months to form the company and decide as to the structure of ownership. The fact that Mr Huang told me that [Mr Lin] was not a big businessman but just an employee China Television who has a family connection to Tomorrow Sunshine renders it even more improbable that he allowed him, without oversight, to set up [the Company] in order to receive the Vivo 2 monies.***
>
> ***45. I do not accept Mr Huang's account as to his connection to [the Company]. It is far more likely that whoever owns the shares, it was set up as his business, probably in association with [Mr Lin] as it was politic to take him in given his connections. The fact that [Mr Lin] stayed in the business after Vivo 2 and took part in transacting Vivo 3 supports this view.***

29. Judge Kramer went on to refer to the Company as "Mr Huang's business" (§46). He described the "wholly unconvincing account from Mr Huang as to the setting up of, and his part in, the company whose bank statements have been forged and of his relationship with Xiaofei" (§49). Judge Kramer added that Mr Huang's "evidence concerning the formation and control of Wenzhou Xiai … places a considerable dent in his credibility" (§50).

The Shareholding Agreement

30. A document which is at the heart of this claim for judicial review is called, in the English translation, a "Shareholding Entrust Agreement". I will call it the "Shareholding Agreement". This is what Mr McGill says about how the Shareholding Agreement featured in the civil proceedings. First, that it was a document disclosed by Mr Huang in the civil proceedings on 9 August 2019. On its face, it records that the shareholders in the Company were as actual investor (and 100% shareholder) Mr Lin, and as nominal (0%) shareholder Zhan Bili. Secondly, that Mr Huang relied on the Shareholding Agreement, to show that the 100% shareholder in the Company was Mr Lin. This was an important part of Mr Huang's assertion that he had no connection at all with the ownership of the Company. Thirdly, that Mr McGill was unable to gainsay that position and in consequence abandoned a claim relating to Vivo 2 monies.

The Prosecution

31. In the light of Judge Kramer's judgment, Mr McGill took steps with a view to Mr Huang being prosecuted for forgery. An email from Mr McGill dated 20 January 2021 to the CPS referred to Judge Kramer's serious finding of forgery in the recent civil judgment, and asked to be put in touch with the person who would make a decision as to whether or not to prosecute once they had read the file. A follow-up email from Mr McGill dated 17 March 2021 referred to a lack of contact from the CPS; to Mr McGill's stated preference that the CPS prosecute; and to the fact that – having had no reply from the CPS – Mr McGill was now preparing to commence a private prosecution. That is what he did.

32. By an email dated 12 May 2021, Mr McGill sent first applications to the Magistrates' Court at South Tyneside, for summonses and warrants of arrest against Mr Huang and his wife. Mr McGill provided a 32-page witness statement (12.5.21). The allegations described were forgery, theft, contempt of court, perjury, bribery and criminal damage. On 18 June 2021 Ms King refused the first applications as Mr McGill did not have the required consents from the Director of Public Prosecutions or the Attorney General. Mr McGill subsequently provided a further 5-page witness statement (20.7.21) and, on request, the full judgment of Judge Kramer (29.7.21).

33. Mr McGill then sent an amended application for summonses (4.8.21). By an email (16.8.21), Ms King told Mr McGill:

> ***I am content to issue a summons for each defendant for the alleged forgery offences. There will need to be an argument about whether 'bank transfer' falls within the definition of 'false instrument' under ss.1 and 8 Forgery and Counterfeiting Act 1981. This can be dealt with at the first hearing. A prosecutor from the Crown Prosecution Service will also be present at the first hearing and the judge may invite them to take over the prosecution of the case from you. I direct that you must prepare a bundle for the judge at the first hearing, to include all the correspondence between you and the court, including any previously refused applications.***

On 25 August 2021 Ms King issued the two summonses for the alleged forgery offences.

34. Pausing there, the new rule 7.2(14) was not in force. But the facts illustrate how a previous refusal does not necessarily mean it is not proper to issue a summons. After all, forgery was in the first application (12.5.21) which was refused (18.6.21), but it was proper to grant the second application (4.8.21) and issue the summons second time around (25.8.21).

35. The two summonses issued on 25.8.21 gave the date of the information as 4.8.21 and a first hearing date in the magistrates' court as 10.9.21. The informant was Mr McGill. The particulars of the offences were as follows:

> ***06/12/2016 at United Kingdom made a false instrument, namely bank transfers and bank statements, with the intention that you or another should use the same to induce unknown to accept it as genuine and by reason of so accepting it to do or not to do some act to his own or another person's prejudice. Contrary to Sections 1 and 6 of the Forgery and Counterfeiting Act 1981.***

The significance of the date 6.12.16 is that the Bank Documents had been produced in the civil proceedings by Mr Huang in December 2016.

<u>The Shareholding Agreement Forgery Allegation</u>

36. On 9 September 2021 Mr McGill provided a further 4-page witness statement for the first hearing in the magistrates court the next day. This new statement recorded his understanding that to "amend an indictment, by adding or amending counts", he required an express order of the court to comply with section 5 of the Indictments Act 1915. The statement explained that Mr McGill was asking the court's permission to "add or amend counts before arraignment". He referred to CrimPR r.8.2 (the prosecutor's duty to serve "initial details of the prosecution case" no later than the beginning of the day of the first hearing). The statement (9.9.21) said this:

> ***Mr Huang produced and submitted into court a 'Shareholders Entrust Agreement' on 9 August 2019… Mr Huang… claimed the business set up was nothing to do with him, and was in fact set up by a Mr Lin, who Mr Huang had known for only 2 months and had never met. To justify this, Mr Huang then disclosed what he calls a 'Shareholding Entrust Agreement' to show Mr Lin was the 100% of the [C]ompany … Very recent information from qq.com which is the equivalent of Companies House, shows the agreement is false.***

37. The witness statement then set out this new count:

> ***On 9 August 2019 in the United Kingdom made a copy of a false instrument which is and which he knows or believes to be, a false instrument, with the intention that he or another shall use it to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice. Contrary to Section 2 of the Forgery and Counterfeiting Act 1981.***

The significance of the date 9.8.19 is that the Shareholding Agreement was said to have been produced in the civil proceedings by Mr Huang on that date. This was nearly 3 years after the date in the summonses (6.12.16) regarding the Bank Documents.

38. The 4-page witness statement was emailed to the magistrates' court and to Mr Huang's solicitors, just after midday on 9.9.21. The email asked that the witness statement be added to the trial bundle. That was a reference to the bundle which Ms King had directed Mr McGill to prepare, in her email of 16.8.21.

Liaising with the CPS

39. The first hearing took place in the magistrates' court on 10 September 2021. Ms King's email of 16.8.21 had described the presence of a CPS prosecutor and the prospect of the judge inviting the CPS to take over the prosecution. The case was adjourned to 22.10.21 and there is email traffic recording that Mr McGill was in touch with the CPS on 17.9.21, 21.9.21 and 12.10.21. In his emails, Mr McGill was explaining to the CPS that he had the completed file ready, together with additional evidence. The hearing was adjourned again to 21.1.22.

40. In an email of 20.1.22, the CPS asked Mr McGill to provide the CPS with a missing document and English translations, together with a "Case Summary" detailing an outline of the allegations and a summary of the evidence in support. The case was adjourned to 8.4.22. Mr McGill complied with this request. He provided further information in the form of a 23-page Case Summary document dated 18.2.22. The Case Summary described the Shareholding Agreement as having been produced by Mr Huang in the civil proceedings and as recorded that Mr Lin was a registered shareholder of 100% of the shares in the Company. The Case Summary explained, by reference to an email on 3.9.21 from Lily Zhan, that new evidence had come to light which showed that the shares in the Company were held 50% by Zhan Bili (a friend of Mr Huang's father) and 50% by Huang Haiyan (Mr Huang's sister).

Discontinuance

41. On 31.3.22 the CPS issued a notice of discontinuance, informing the court and Mr McGill that the CPS did not intend that the proceedings against Mr Huang and his wife be continued on the charge of forgery. The reason for the decision was given as "there is not enough evidence to provide a realistic prospect of conviction". No reasons were given which indicated what matters the CPS had, or had not, considered. Mr McGill's

uncontradicted account is that he thought the Shareholding Agreement alleged forgery had been considered by the CPS. This is supported by the Case Summary (18.2.22) and original witness statement (9.9.21), both of which had included it.

The Victim Review Decision

42. Mr McGill requested a formal review of the discontinuance decision, under the Victims' Right to Review (VRR) Scheme. The CPS originally decided that Mr McGill did not meet the test of "victim". He judicially reviewed that decision, and prevailed. The proceedings culminated in a consent order (6.6.22) by which it was now agreed that Mr McGill did meet the victim test. Mr McGill's, uncontradicted, account is that he thought that the Shareholding Agreement alleged forgery would be reconsidered by the CPS.

43. The outcome of the victim review was adverse. For reasons set out in a decision letter of 7.9.22, a specialist prosecutor in the appeals and review unit of the CPS (Gemma Carsey) determined that the March 2022 decision to discontinue the private prosecution was not wrong. The focus of the reasoned decision letter was squarely on the forgery allegation relating to the Bank Documents and Ms Carsey explained that the Full Code Test of realistic prospect of conviction was not satisfied. The decision letter did not address the forgery allegation relating to the Shareholder Agreement. Ms Carsey said this:

> ***I have seen your witness statements in the [private prosecution], one of which alleges many more wide-ranging offences against [Mr Huang] than is included in the summons for him. For the avoidance of doubt, this VRR review is of the decision of the CPS to discontinue the [private prosecution] and the summonses issued for that.***

This was a reference to the forgery allegation relating to the Shareholder Agreement as the only offence which had been included in the summons, which was the sole focus of the reasoned decision letter.

Applying for the New Summons

44. Having received that Victim Review Decision (7.9.22), Mr McGill promptly made his application (dated 9.9.22) to the magistrates' court for a further summons to be issued in respect of Mr Huang. The application identified the alleged offence as forgery of the Shareholding Agreement. The application was accompanied by a witness statement (9.9.22) in which "the alleged offence" was described as follows:

> ***On 9 August 2019 during a civil trial, in his 4th supplemental disclosure, it is alleged Mr Huang knowingly disclosed a false 'Shareholding Entrust Agreement' with the intention that he or another would use this false instrument to induce myself and the courts to accept it as genuine and by reason of so accepting it to do or not to do some act to his own or another person's prejudice. The offence alleged is that Mr Huang knowingly submitted a false Shareholding Entrust Agreement to hide the fact that £2.2m worth of football advertising business into an account set up for the benefit of the partnership was not under his control and to avoid civil action.***

45. In response to the question "have you applied before for the issue of a summons or warrant in respect of any of the allegations you are making?" Mr McGill wrote: "No". He added this:

> ***I have previously applied and a summons issued for a separate forgery (re bank documents) at South Tyneside Magistrates Court on 25 August 2021. The CPS took over and said I was not a victim, so no VRR. A judicial review said I was. The VRR concluded there is insufficient evidence of forged Bank Documents.***

46. There was further email correspondence dated 27.9.22 and 10.10.22. By the impugned reasoned decision letter (11.10.22), Ms King declined to issue the new summons (§49 below). After a letter before claim (21.10.22) to which Ms King responded with a letter of response (28.10.22), Mr McGill commenced these judicial review proceedings (19.12.22), in response to which Ms King filed an Acknowledgment of Service with the initial submission (6.1.23) and the revised submission (26.7.23).

Judicial Review of the Victim Review Decision

47. In parallel to this, after a letter before claim (20.10.22), Mr McGill commenced judicial review proceedings (CO/4579/2022) to challenge the VRR Decision (7.9.22). His grounds were that the VRR Decision "only considered the summonses issued for the forged bank documents, not any additional counts, specifically that relating to the forged Shareholders Entrust Agreement". In its summary grounds of resistance (23.1.23) the CPS: (a) accepted that Mr McGill had sought to add the Shareholders Agreement forgery allegation (2.9.21) to the first prosecution; (b) accepted that (after the hearing on 21.1.22) Mr McGill had provided a Case Summary which outlined the allegations against Mr Huang regarding the false Shareholders Agreement; (c) stated that "these matters were not added to the charge sheet at any stage" and that the forged Shareholding Agreement allegation was "not the subject of any charge in the private prosecution", which "only encompassed the alleged forged bank transfers"; (d) accepted that the VRR process did not consider the evidence regarding the alleged false and forged Shareholders Agreement, and reviewed the evidence "regarding the alleged forgery of bank transfers and bank statements"; (e) stated that the decision-maker "can only make [their] determination in respect of charges that are on the charge sheet", so that "Ms Carsey could not consider whether any other criminality which may or may not be disclosed in the papers was made out"; and (f) advanced no argument that it was highly likely that the outcome would not have been substantially different, had the Shareholding Agreement forgery allegation and relevant evidence been considered. The CPS's resistance succeeded. Permission for judicial review was refused by Hill J on 14.6.23. Two days later (16.6.23), the same Judge granted permission for judicial review in the present claim.

Key Features of the History of the Case

48. From this sequence of events, the following key features can be seen. (1) The Bank Documents alleged forgery was said by Mr McGill to have been committed by Mr Huang on 6.12.16, to conceal money received by the Company. (2) The Shareholding Agreement alleged forgery was said by Mr McGill to have been committed by Mr Huang on 9.8.19, to conceal Mr Huang's relationship with the Company. (3) Mr McGill, who had said (9.9.21) that the new Shareholding Agreement alleged forgery was supported by "very recent information", had asked for this new allegation to be included within the first prosecution, when preparing the prosecution materials as directed. (4) Mr McGill, when then asked by the CPS for a Case Summary document (20.1.22), had provided this and, within it, identified the Shareholding Agreement alleged forgery (18.2.22). (5) The CPS discontinuance (31.3.22) gave no indication that

the Shareholding Agreement alleged forgery had not been considered. (6) Mr McGill clearly wanted the Shareholding Agreement alleged forgery to be included within the Victim Review Decision, was not told that this was not included, and challenged the CPS's non-consideration of this matter, as soon as it came to light. (7) The Victim Review Decision (7.9.22) was clear and express in carefully identifying the Shareholding Agreement alleged forgery as distinct, and not covered by the discontinuance or the decision to maintain it.

IV. ANALYSIS

The Decision Letter (11.10.22)

49. The reasoned Decision Letter (11.10.22) said this:

> ***I have now had the opportunity to review your application and supporting information in full. In view of the history of the case, I have decided to refuse the request for a summons. My reasons for this decision are set out below. (1) You instituted proceedings against the same defendant for substantially the same matters in July 2021 and a first hearing took place in September 2021 at Newcastle Magistrates' Court. The proceedings were taken over by the Crown Prosecution Service at first hearing, and subsequently discontinued. (2) You asked for, and were refused, a victim's right of review of this decision by the CPS, on the basis that you were not a victim. You then began judicial review proceedings against this decision, which were terminated by consent after the CPS further reviewed their own decision and agreed that you were a victim in the proceedings. (3) The correspondence you have supplied shows that, although it is now agreed that you are a victim for the purposes of the CPS review scheme, the CPS maintain their original decision to discontinue proceedings was correct. This was because, in the prosecution's view, there were no grounds to revive proceedings as the evidence in the case did not meet the Full Code Test for a prosecution. This decision has prompted you to reapply for a summons. (4) Based on the chronology of events outlined above, I refuse your application on two grounds. It is refused firstly under Criminal Procedure Rule 7.14(a) on the basis that the court has previously determined an application by you which alleged the same or substantially the same offence against the same defendant on the same or substantially the same asserted facts; and secondly under Criminal Procedure Rule 7.14(f), which is that your dominant motive, which in this case is to circumvent the CPS decision to discontinue proceedings, would render the prosecution an abuse of the process of the court.***

50. I have reached the conclusion that the impugned decision was incompatible with applicable public law standards. I will explain why. But the key to the whole case is the idea which I have called Case-Specific Propriety (§22 above).

The Circumvention Point

51. It is unmistakeable that the decision letter involves a circumvention narrative. It characterises Mr McGill as: (a) starting a private prosecution for "substantially the same matters"; then (b) unsuccessfully challenging the discontinuance of that prosecution; and then (c) being prompted by the adverse Victim Review decision maintaining that discontinuance, to circumvent that discontinuance by seeking the new summons. There is a clear legal virtue in this circumvention narrative, but in the present case I am satisfied that there is also a clear legal vice.

52. The virtue is that the circumvention narrative would provide a reason which is to do with Case-Specific Propriety. In terms of example [14a], the decision would be answering the question which I sought to encapsulate: in all the circumstances, there are compelling reasons why this is not a proper case to issue the summons by reason of the fact that a court has previously determined an application by the same prosecutor

which alleged the same or substantially the same offence against the same defendant on the same or substantially the same asserted facts. The same clear legal virtue is seen in terms of example [14f] which the decision letter also references. The narrative is very clear. Mr McGill's dominant motive is to circumvent the CPS decision to discontinue proceedings, which would render the prosecution an abuse of process. If the circumvention narrative is reasonably open, based on "the history of the case", it would clearly be legally sustainable to refuse to issue the summons because it would not be a "proper case" for a further summons in all the circumstances.

53. But the vice is this. The circumvention narrative leaves out of account highly relevant features of the "history of the case". Most obviously, the "correspondence you have supplied", by which the CPS "maintain their original decision", was a Victim Review Decision Letter stating – expressly and carefully – that the Shareholding Agreement forgery allegation had not been part of the original prosecution, had not been part of the discontinuance decision, and was no part of the CPS decision maintaining the discontinuance decision. That CPS's express reasoning, in the letter referenced in the decision letter, treated the Shareholding Agreement forgery allegation as distinct. This is nowhere recognised in the Decision Letter (11.10.22). It is as though Mr McGill was rerunning his Bank Documents forgery allegation – perhaps by pointing to a further bank statement or transfer – having had it considered, discontinued and the discontinuance maintained. But he was not. On the face of it, a key piece of the circumstances has been missed or misappreciated, which went to the heart of Case-Specific Propriety.

54. There is strong later corroboration for the conclusion that something went wrong in appreciating relevant circumstances. The letter of response (28.10.22) said, in terms, that Mr McGill was "pursuing your application in the wrong forum" and that "any judicial review proceedings should be directed towards the CPS concerning their decision to discontinue the original prosecution". This was then explained further in the initial submission accompanying the summary grounds of resistance (6.1.23). It said this (emphasis added):

> ***The claimant provided information to the CPS about the allegedly fraudulent shareholders agreement during the course of the original 2021 Magistrates' Court proceedings, and also during the request for a review of the CPS decision to discontinue. Had this provided the CPS with sufficient evidence to proceed with a prosecution, no doubt they would have done so.***

This strongly reinforces the conclusion that a key feature of the circumstances was misappreciated. The circumvention narrative involved the idea that the Shareholding Agreement forgery allegation was within the scope of what the CPS had been thinking about when discontinuing the prosecution and in upholding that discontinuance. That made this a straight rerun, a second bite at the cherry. This also explains why the letter of response referenced example [14e]. That was because, in substance, Mr McGill was mounting a collateral challenge trying to reverse the CPS's discontinuance decision – and the Victim Review decision – by starting a new private prosecution. It also explains why there was emphasis on Mr McGill making his application for the new summons so soon after the Victim Review Decision. That is a characterisation of him getting an adverse CPS decision on the Shareholding Agreement forgery allegation and then immediately starting again. Instead, he got no CPS decision on the Shareholding Agreement forgery allegation, was told it had never featured, and acted to get it started.

55. As Mr McGill powerfully pointed out in his submissions in these proceedings, he had shared the same belief as lay behind this reasoning. He "chose to wait" – as it is put in Mr Jarvis's skeleton argument – because he thought the Shareholding Agreement forgery allegation was within the scope of consideration by the CPS, the unreasoned discontinuance decision, and then the reconsideration through the Victim Review. That was what he wanted. That was what he asked for. But that was wrong, as the Victim Review Decision Letter had expressly and carefully spelled out. He even tried to challenge the CPS for not considering the Shareholding Agreement forgery allegation. That went nowhere. It had never been in scope. It was materially distinct. It had never been considered by a Court; never considered by the CPS when discontinuing; and never considered when making the Victim Review Decision.

56. In my judgment, the failure – in making the impugned decision – to appreciate that the CPS had not considered the Shareholding Agreement forgery allegation was a public law material failure to have regard to an obviously relevant consideration. In public law terms, it vitiates the decision. The reasons given for declining to issue the summons, by reference to [14a] or alternatively [14f], and later [14e], are all linked to a circumvention narrative which is flawed because a key feature of the history has not been appreciated. On this basis, I grant the application for judicial review and quash the decision refusing to issue the summons.

Superficial-Alteration

57. I have described the fact that the letter of response (28.10.22) and submission (6.1.23) introduced further elaboration relating to the decision. A number of themes emerge. In the letter of response, is a Superficial-Alteration narrative. Having referred to the CPS discontinuance of the prosecution, it is there said that the Shareholding Agreement forgery allegation was a "new allegation … superficially altered to refer to an instrument of a different type and a different date, but the facts underpinning the allegation are substantially the same as the original proceedings"; and that a new summons "with a superficial amendment" would lead to a cycle of prosecutions and discontinuances "for the same alleged wrongdoing". A "superficial" alteration or amendment has the hallmarks of sitting back or holding back, then relabelling a pre-existing allegation. It would be Case-Specific Propriety. Again, it would be like Mr McGill rerunning his Bank Documents forgery allegation – perhaps by pointing to a further bank statement or transfer – having had it considered, discontinued and the discontinuance maintained. This is linked to an idea that he must have been aware throughout of the Shareholding Agreement forgery allegation.

58. But, again, highly material features of the "history of the case" are being left out of account. First, Mr McGill did not make an alteration after the CPS discontinuance. He tried to make the alteration before the case was considered by the CPS. He did so on the eve of the first hearing. He did so in the Case Summary for the CPS, prior to discontinuance. He was trying to get it considered; not holding it back. Secondly, he had said from the time of the witness statement (9.9.21) that he was asking for it to be added in because of "very recent" information. It would not have made sense to hold it back. And if he was, for some reason, holding it back, he would have continued to do that. He was able to produce email traffic (2.9.21) to which he was referring as the "very recent" information. Thirdly, the Shareholding Agreement forgery allegation was not characterised as a "superficial" by the CPS in its decision-making. The CPS was careful to treat the Shareholding Agreement forgery allegation as distinct. The CPS did

not say or suggest that it was substantially the same allegation as in the charge sheet. If it was indistinct or superficial it would have been included. If it was indistinct or superficial, the CPS could later have made the point that the outcome would have been no different, had the new superficial allegation been considered.

The Same Bundle

59. In the revised submission (26.7.23) the point is made that the Shareholding Agreement forgery allegation was considered to be "substantially the same" as those in the original proceedings "in part because much of the evidence supplied in support of the application was from the same unpaginated and unindexed bundle that had been submitted in the original proceedings". This loses sight of the Case-Specific Propriety. It falls into the trap (§12 above). Unless there was a circumvention, or a superficial alteration, where does it go that the evidence was in the same bundle prepared in the original proceedings? The key feature of the circumstances that is missing here is that Mr McGill had made his witness statement (9.9.21) and had asked for it to be added to the bundle. He had included the Shareholding Agreement forgery allegation in his Case Summary required by the CPS. It was there. He asked for it to be considered. He wanted it to be considered. It was not considered.

Non-Disclosure

60. The revised submission (26.7.23) suggests yet another example [14b], again as Case-Specific Propriety. It is said that Mr McGill "did not disclose in the application that he had instituted a second application for permission to bring judicial review proceedings against the CPS on 6 December 2022". I have failed to understand how this can be a material non-disclosure in an application made on 9.9.22. In any event, Mr McGill's attempt to get the CPS to look again was an attempt to do what the submission (6.1.23) said he ought to have been doing. It is another feature of a case about trying to get the Shareholding Agreement forgery allegation considered by the CPS. There was also a point in the revised submission (26.7.23) about suggested "selective disclosure", but this is new and unexplained, and I have been unable to see a material non-disclosure for the Case-Specific Propriety by reference to example [14b].

V. CONCLUSION

61. For the reasons I have given, the impugned decision (11.10.22) does not withstand scrutiny. True, this was another forgery allegation by the same private prosecutor against the same defendant relating to the same civil proceedings. The alleged offences were years apart, and one was said to be about concealing what a company received; the other about concealing links to the ownership of that company. The decision called for evaluative judgment, applying the non-exhaustive examples in r.7.2(14) as a guide, but never losing sight of the Case-Specific Propriety (§22 above) which is necessarily at the heart of a lawful decision. Mr McGill was and is, in my judgment, entitled to a lawful decision as to the issue of a new summons and lawful consideration by the CPS if a new private prosecution is being taken over with a view to possible discontinuance. The claim for judicial review succeeds.

62. Having considered email communications from the parties, after circulation of the judgment as a confidential draft, here is the Order I am making. (1) The Claimant's claim for judicial review of the decision of the Defendant (11.10.22) not to issue a

summons is allowed. (2) That decision is quashed and the Claimant's application for a summons is remitted to the Defendant for a fresh decision to be taken in light of this Judgment. (3) As to the Claimant's application for costs (16.5.24): (i) The Claimant shall by 4pm on 11.6.24 file and serve (on the CPS and the Defendant) written submissions – together with any authorities – setting out what application for costs he is making, in what amounts and on what basis, whether (a) from central funds and/or (b) against the CPS and/or (c) the Defendant; and whether he is seeking an order for set-off in respect of costs awarded to the CPS on 14.6.23 in CO/4579/2022. (ii) The Defendant (if costs are being sought against it) and the CPS (if costs and/or a set-off are being sought from it or if costs are being sought from central funds) shall by 4pm 25.6.24 file and serve any written submissions or observations in response, together with any authorities. (iii) The Claimant shall by 4pm 9.7.24 file and serve any reply. (iv) The question of costs, including any appropriate further steps or directions, will be considered thereafter by Fordham J.