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

[2020] EWHC 2918 (Admin)
No. CO/2192/2020

Royal Courts of Justice

Friday, 16 October 2020

Before:

MRS JUSTICE TIPPLES

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
OLEG VLADIMIROVICH DERIPASKA — Claimant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS — Defendant

- and -

(1) VLADIMIR CHERNUKHIN
(2) THE CROWN COURT AT SOUTHWARK — Interested Parties

MISS C. MONTGOMERY QC, MR J. LAIDLAW QC, and MR A. BUNYAN
MR T. JAMES-MATTHEWS (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Claimant.

MR W. BOYCE QC and MS K. ROBINSON (instructed by the CPS) appeared on behalf of the Defendant.

MR R. LISSACK QC and MS L SAGAN (instructed by Quinn Emanuel Urquhart & Sullivan, LLP) appeared on behalf of the First Interested Party.

THE SECOND INTERESTED PARTY was not present and not represented.

J U D G M E N T

MRS JUSTICE TIPPLES:

1 On 18 June 2020 Oleg Deripaska issued a claim form seeking judicial review of the decision of the Director of Public Prosecutions ("**DPP**"), dated 24 March 2020, to take over and discontinue the criminal prosecution of Vladimir Chernukhin, which was proceeding at the Southwark Crown Court with case number T20197113.

2 The Statement of Facts and Grounds was settled by two leading counsel, together with junior counsel, and is dated 15 June 2020. There are three grounds of challenge. Ground 1 is that the DPP's decision was irrational for the following reasons:

(i) no or inadequate weight was given by the relevant factors with reference to the CPS Code for Crown Prosecutors ("**the Code**"), and the relevant offence specific guidance;

(ii) inappropriate weight was given to other factors with reference to the same material; and

(iii) the decision erred in law by failing to identify either the true gravamen of the offence charged or the real 'victim' of Mr Chernukhin's criminal activity.

3 Ground 2 is that the DPP's decision was procedurally flawed. It is said that, in the absence of a request to intervene, no exceptional factors justifying intervention in accordance with the CPS legal guidance were identified.

4 Ground 3 was that the circumstances surrounding the referral and the subsequent chronology gave rise to an apprehension that the decision maker may have been improperly influenced. But that third ground, as I shall explain, has since been abandoned. The detailed document prepared by counsel then identifies at length the facts and reasons relied on in support of those grounds.

5 On 14 July 2020 the DPP, as the defendant to the claim, filed his Acknowledgement of Service and grounds for contesting the claim for judicial review, and attached written reasons in support of his response. That was also a very detailed document settled by Leading and Junior counsel. Three days earlier, on 11 July 2020, Vladimir Chernukhin (the first interested party) served his Acknowledgement of Service, together with the Summary Grounds of Resistance. Again, that document is detailed and was settled by Leading counsel.

6 The papers were then placed before Sir Ross Cranston, sitting as a High Court Judge, to determine whether to grant the claimant permission to apply for judicial review. Sir Ross Cranston refused the claimant permission and he then renewed his application at an oral hearing which took place yesterday afternoon before me. All parties were represented by Leading and Junior counsel, and served skeleton arguments which I was able to consider in advance of the hearing, together with the relevant authorities and a bundle of documents in relation to the application.

7 The hearing finished at 4.15 p.m. yesterday and, for that reason, I informed the parties that I would give my judgment at 2 p.m. today.

8 Before I turn to the arguments before me, I should first identify the reasons that Sir Ross Cranston refused the claimant permission on the papers. This is a determination which, I understand, was dated 9 September 2020, and he explains his reasons in the following terms.

> "The starting point is that the Supreme Court has strongly discouraged judicial review of this type of decision. *R (Gujra) v Crown Prosecution Service* [2013] 1 AC 484. The context of the private prosecution was bitterly fought private law proceedings in an arbitration and a Commercial Court action, *Deripaska v Chernukhin & Ors.* [2019] EWHC 173 (Comm), and [2019] EWHC 727 (Comm). There Teare J found serious misconduct on all sides but in particular condemned the claimant's dishonesty. In other words, the claimant's private prosecution had all the hallmark[s] of a party in the civil courts continuing the battle in the criminal courts. I cannot regard as arguable the claimant's case that the CPS decision to take over and discontinue this prosecution in the public interest was irrational. In reaching its decision the CPS took into account a range of factors. But it was up to it to give to each what weight it thought appropriate. In my view it does not assist for the claimant to recast the challenge (see the claimant's 21 July 2020 note) as the CPS acting unreasonably by not acting in accordance with settled policy. Reading through the analysis of these factors in the claimant's grounds I cannot conceive that a relevant/irrelevant considerations challenge would go anywhere as an alternative to the irrationality ground given the high threshold. The second ground seems to overlook the Resident Judge's report to the CPS on the case. On the material adduced I am very surprised that the improper influence ground was ever ventilated."

9 Having received the decision of Sir Ross Cranston on 15 September 2020, the claimant requested that the matter be reconsidered at a hearing in open court for the following reasons, and again I quote from the document prepared on behalf of the claimant.

> "1. The correct starting point is that decisions properly amenable to review should be considered on their particular merits rather than by reference to a perceived and generalised sense of judicial discouragement. In any event, *Gujra* is not authority for the proposition advanced.
>
> 2. The fact the case arose from civil proceedings between the claimant and Mr Chernukhin (undeniably 'bitterly fought' and in which both parties were found to have misconducted themselves) does not in itself provide a basis for concluding that the prosecution was in some way improper ('continuing the battle'). This analysis ignores the clear evidence of Mr Chernukhin having perverted the course of public justice (the CPS acknowledged in its review that a jury would be more likely than not to convict him

> of that offence) and of the claimant's reasonable interest in ensuring that such conduct be dealt with appropriately.
>
> 3. (Ground 1). Whilst it is accepted that the CPS are to be given a degree of latitude in the exercise of their discretion, the claimant maintains that the decision-maker in this case erred by incorrectly approaching the exercise of that discretion and that their conclusion on the public interest stage was therefore irrational. Specifically, no or wholly inadequate weight was given to relevant factors in the CPS Code and relevant guidance, disproportionate weight given to other factors in the same material and the decision was not taken in accordance with settled policy (as revealed for the first time by the disclosure of the original review note with the defendant's grounds – in the addendum note the claimant sought to highlight evident errors, not to 'recast the challenge')
>
> 4. Further, the decision erred in law by failing to identify either the true gravamen of the offence charged or the real 'victim' of Mr Chernukhin's criminal behaviour."
>
> 5. The decision was also procedurally lawed (Ground 2).
>
> 6. The claimant no longer pursued Ground 3."

That document was, again, settled by two Leading counsel together with Junior counsel.

10 In relation to the grounds for renewal there are two points I should make about what has been said about Ground 1. First, the reference in Ground 1 to the decision not being taken in accordance with settled policy is a reference to the document, or the guidance, entitled: "Public Justice Offences Incorporating the Charging Standard". Secondly, at the hearing before me, the claimant placed the most focus on Ground 1. The reasons in support of Ground 2 were not articulated separately in the skeleton argument served on behalf of the claimant and, during the course of the hearing, Miss Montgomery QC, on behalf of the claimant, accepted that Ground 2 was not a free-standing point, rather it leads to the same conclusion as Ground 1 and therefore the focus of the oral submissions before me were all directed at Ground 1.

11 Before I deal with the arguments in relation to Ground 1, I should say something briefly about the facts and chronology of this case. On 25 April 2019 a summons was issued against Mr Chernukhin and also Mr Kargin in the Westminster Magistrates Court, and a PTPH took place in Southwark Crown Court on 8 August 2019 by which time a draft indictment had been served containing one offence. However, Mr Chernukhin was not arraigned as he had indicated that he intended to apply to dismiss the proceedings or seek a stay on grounds of abuse of process. The draft indictment discloses one offence of doing acts tending or intended to pervert the course of justice contrary to common law. The particulars of that offence were expressed in the following terms:

> "Vladimir Chernukhin between 1st November 2015 and 18th January 2019, together with Vadim Kargin, with intent to pervert the course of public justice, did acts which had a tendency to pervert the course of public justice, namely falsely representing in arbitration and High Court proceedings that a declaration of trust had named Vladimir Chernukhin as the beneficial owner of one hundred bearer shares in Compass View Ltd at the date of its execution on 7th September 2004."

12 The claimant, in his Statement of Facts and Grounds explains as follows at para. 7:

> "The crux of the criminal allegation against Mr Chernukhin is that, assisted by and acting in concert with his former adviser Vadim Kargin ('Mr Kargin'), he set out to gain an unfair and illegal advantage in civil litigation between himself and Mr Deripaska. Mr Chernukhin arranged for the production of a false trust document (the Continental Administration Services Ltd Declaration of Trust, 'CAS DoT') that had been falsified by alteration and then deploying that false document, concealing the true position as to its original form and providing untruthful testimony in witness statements and orally in respect of it, before both an arbitral tribunal (the 'Tribunal') and the High Court."

13 The dispute between Mr Chernukhin and Mr Deripaska concerned a valuable site in central Moscow that was owned by a company which was indirectly the subject of a shareholder agreement to which Mr Deripaska and Mr Chernukhin were parties. They then fell out in circumstances which I do not need to go into, but Mr Chernukhin commenced arbitration proceedings against Mr Deripaska to recover the value of his shares, and the outcome of the arbitration was that Mr Deripaska was ordered to pay Mr Chernukhin US$ 95 million. Mr

Deripaska then sought to challenge and overturn the arbitration award by proceedings which were heard in the Commercial Court in London by Teare J. This gave rise to complicated and lengthy proceedings, the outcome of which was that Mr Deripaska's challenge failed, and the Judge found that there had been serious misconduct on all sides. There is more detail to the extensive background to the civil proceedings in the papers before me, but there is no need for me to say any more about them in this judgment.

14 On 13 December 2019, Her Honour Judge Debrorah Taylor, the Resident Judge at Southwark Crown Court, and the Honorary Recorder of Westminster, sent an email to Mr Max Hill QC, the DPP in the following terms:

> "Dear Director,
>
> > I am making a report to you and referring this case for consideration of whether you should take it over. It is brought by Oleg Deripaska against Vladimir Chernukhin who was successful in Civil Proceedings between them before Teare J in the Commercial Court.
> >
> > In short, Mr Deripaska prosecutes Mr Chernukhin for perverting the course of justice by alleged fabrication of documents and lying in those proceedings. There is some real urgency about it as there is a proposed Dismissal and Abuse hearing fixed for the end of January before Bryan J at this court.
> >
> > Please let me know to whom the Court office ought to address the papers. I have contacted you directly as it is a case of which I consider you should be aware."

15 The matter was then passed by the DPP to the Deputy Chief Crown Prosecutor (Miss Joanna Coleman), who replied explaining that the DPP had passed the email of 13 December 2019 to her. In a further email of the same day she explained that she had checked their legal guidance and asked that the Court office be asked to send a copy of the indictment, case summary and details of the parties' representatives to her. Later the same day, the Listing Delivery Manager at Southwark Crown Court sent those documents through to Miss Coleman.

16 On 24 March 2020, the CPS wrote to Mr Chernukhin's solicitor informing them that that day they had sent a notice to the Crown Court under s.23 of the Prosecution of Offences Act 1985, discontinuing the following charges against Mr Chernukhin: "Doing acts tending and intended to pervert the course of public justice contrary to common law". The letter then explained the effect of the notice and explained that the decision to discontinue these charges has been taken because a prosecution is not needed in the public interest. The letter then set out what was said to be the main reason for determining that this case failed the public interest stage of the Code for Crown Prosecutors.

17 Underlying this letter was a 21 page report prepared by Julie Snell, a Reviewing Lawyer, Specialist Prosecutor at the Specialist Fraud Division of the CPS, dated 23 March 2020 setting out the reasons why she considered that the CPS should intervene and discontinue the prosecution. Her report explained that, although the evidential stage of the full Code test set out in the Code for Crown Prosecutors dated October 2018 had been met, the public interest stage was not met. At para. 9.3 of her report she said this:

> "Mr Chernukhin, by falsifying the document, making witness statements asserting its veracity and in oral testimony purporting it to be true has committed the offence of perverting the course of justice. Accordingly, the evidential stage of the Code is met. There is sufficient evidence to provide a realistic prospect of conviction."

At section 10 of her review she then turned to the "Public Interest" and said this:

> "In accordance with 4.9 of the Code this stage must always be considered even where there is sufficient evidence to justify a prosecution. Both the private prosecutor and defence firms have made representations under this limb of the code, which I have read and considered. Paragraph 4.11 of the Code refers to a non-exhaustive list of questions in 4.14 when considering public interest. It is these factors along with other relevant guidance and policies issued by the CPS that should be taken into account when considering public interest . . ."

She then proceeds to consider the non-exhaustive list of questions under para. 4.14 of the Code. Her conclusion is set out at para. 11.1 of her review, which reads as follows:

> "For the reasons stated above, I believe that though the evidential stage of the code is met the public interest stage is not met. On the face of it this is a serious offence and appeared to be an attempt to subvert the administration of justice. When applying the CPS charging guidance it does not appear to be a scenario that would fall within the charging standard required for an offence of this nature. The culpability and involvement of the defendant is arguably the strongest factor, but ultimately the court ruled in his favour. It is of note at paragraph 33 of his judgement that Mr Justice Teare states:
>
> > '*Thus the depressing fact is that there was good reason to doubt the honesty of each of the principal actors in this c*ase'.
>
> Therefore, although the defendant's involvement in the commission of the offence was irrefutable, Mr Justice Teare considered the honesty of each party to be dubious. It is impossible not to take the High Court Judgment into consideration. The harm to the victim Mr Deripaska by the alleged act is, arguably, negligible. I have also considered the issue of proportionality. Although legal costs are borne by the parties, the expense to the public purse occurs by the use of Court time, the empanelment of a jury and a comprehensive independent review of the case. In any event on a rigorous application of the code, this case would fail on public interest grounds."

She then says at para. 12 that for reasons she has given she considers the CPS should intervene and discontinue the private prosecution.

18 At pp.21 and 22 there is an endorsement of the ratification statement of the decision made by Julie Snell, which is made by David Malone, the Deputy Chief Crown Prosecutor and Deputy Head of Specialist Fraud Division of the CPS, and that is dated 23 March 2020. Mr Deripaska's solicitors sent a letter before claim to the DPP on 20 April 2020, and the response from the CPS is dated 4 May 2020.

19 Having set out that chronology and factual background I will now return to the claimant's grounds for judicial review. In deciding whether or not it is appropriate to grant permission the relevant test is set out at para. 8.1.3 of the Administrative Court Judicial Review Guide 2020 which provides that:

> "The Court will refuse permission to apply for judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success . . ."

Ground 1 is that the prosecutor's decision was irrational. This means that the claimant needs to establish that the decision was one that was not open to a decision maker on the available material, or that the decision maker did not act in accordance with settled policy. In this regard, there are a number of important points of law which are well established.

20 First, the general approach of the courts is to disturb a decision of an independent prosecutor only in highly exceptional cases. See Lord Bingham in *R(Cornerhouse Research) v The Serious Fraud Office* [2019] AC 756 at para. 30, which was then cited with approval by Richards LJ in *R(Gujra) v Crown Prosecution Service* [2012] 4 WLR 254 at para. 41, which was then approved by the Supreme Court in the same case at [2013] 1 AC 484. In the words of Richards LJ in *R(Gujra)*: "This is an area where challenges by way of judicial review are, in my view, to be strongly discouraged."

21 Second, the general inhibition against disturbing the decisions of an independent prosecutor must be just as strong where the court is invited to review the rationality of the judgment concerning the prospect of a conviction as it is in relation to other aspects of the decision making process. (See Richards LJ in *Gujra* at para. 41, (p.268D-E), which was again approved by the Supreme Court in *Gujra*. The other aspects of the decision making include whether a decision is in the public interest and that is clear from the decision of the Divisional Court in *The Campaign Against Anti-Semitism v The DPP* [2019] EWHC 9 (Admin) para. 15(ii) per Hickinbottom LJ.

22 Third, in the recent case of *R(on the Application of) "Monica" v The Director of Public Prosecutions* [2019] QB 1019, a Divisional Court comprising the Lord Chief Justice, Lord

Burnett of Maldon and Jay J considered the circumstances in which a court will intervene in relation to a prosecutorial decision, and having identified that they are "very rare indeed", distilled a number of additional propositions from the authorities and the principles underlying them in these terms which are set out at para. 46 of the judgment:

> "(1) Particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse.
>
> (2) A significant margin of discretion is given to prosecutors.
>
> (3) Decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis.
>
> (4) It is not incumbent on decision makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgment."

23 Fourth, the weight attached to a particular factor in reaching a decision is something which remains quintessentially for the decision maker. The courts will not interfere with the weight ascribed by the decision maker to a particular factor provided all material considerations have been taken into account, unless he or she has acted irrationally in the *Wednesbury* sense: See *R(on the Application of Greenpeace Limited) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 55 (Admin) per Andrews J (as she then was) at para. 51.

24 The full Code test, as explained in the Code for Crown Prosecutors has two stages: the evidential stage first, which is then followed by the second stage, namely, the public interest stage. There is no dispute in this case that the evidential stage was satisfied. The dispute is whether the prosecutor's decision that the public interest stage was not satisfied is irrational. The Code sets out the public interest stage at paras. 4.9 to 4.14:

> "4.9 In every case where there is sufficient evidence to justify a prosecution or to offer an out-of-court disposal, prosecutors must go on to consider whether a prosecution is required in the public interest.

> 4.10. It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. In some cases the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution.
>
> 4.11. When deciding the public interest, prosecutors should consider each of the questions set out below in paragraphs 4.14 a) to g) so as to identify and determine the relevant public interest factors tending for and against prosecution. These factors, together with any public interest factors set out in relevant guidance or policy issued by the DPP, should enable prosecutors to form an overall assessment of the public interest.
>
> 4.12. The explanatory text below each question in paragraphs 4.14 a) to g) provides guidance to prosecutors when addressing each particular question and determining whether it identifies public interest factors for or against prosecution. The questions identified are not exhaustive, and not all the questions may be relevant in every case. The weight to be attached to each of the questions, and the factors identified, will also vary according to the facts and merits of each case.
>
> 4.13. It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed."

25 Paragraph 4.11 explains that "When deciding the public interest, prosecutors should consider each of the questions set out below in paragraphs 4.14 a) to g)" and 4.12 makes it clear that that is a non-exhaustive list of questions. They begin with considering how serious is the offence committed? What is the level of culpability of the suspect? What are the circumstances of and the harm caused to the victim? And so on.

26 The other guidance to which I have been referred is the Public Justice Offences, incorporating the Charging Standard. The first page of the guidance explains that the purpose of the Charging Standard is as follows:

> "The charging standard below, provides guidance concerning the charge which should be preferred if the criteria set out in the Code for Crown Prosecutors are met. The purpose of charging standards is to make sure that the most appropriate charge is selected, in the light of the facts, which can be proved, at the earliest possible opportunity. This will help the police and Crown Prosecutors in preparing the case. . . "

Below that, the guidance explains that the guidance set out in this Charging Standard does not, amongst other things, override the principles set out in the Code for Crown Prosecutors. Then, at p.4 of the guidance there is a section entitled: "Charging Practice for Public Justice Defences", which is at p.165 of the bundle before me. That explains as follows:

> "The following factors will be relevant to all public justice offences when assessing the relative seriousness of the conduct and which offence, when there is an option, should be charged . . ."

It then continues by saying: "Consider whether the conduct was spontaneous and unplanned or deliberate and elaborately planned . . ." and continues with five other points to consider.

27 The guidance then goes on to give examples of 'serious harm' and including conduct which "enables a potential defendant in a serious case to evade arrest or commit further offences" and provides other examples. So this particular aspect of the guidance is dealing with offences which should be charged, and then the guidance continues beyond that to consider the particular offences, starting off with "perverting the course of justice" at the bottom of p.4. On p.7: "Handling Arrangements", "Misrepresentations as to Identity" and so on. Then, also on p.4, in the section entitled "Charging Practice for Public Justice Offences", there is a paragraph which says this:

> "In some cases there may be public interest factors against a prosecution; however, prosecutions for public justice offences should

> usually go ahead and those factors should be put to the court for consideration when sentence is being passed."

28 Pausing there, in the recent case of *R(on the application of Ram) v Director of Public Prosecutions* [2016] EWHC 1426 (Admin) the Divisional Court held that, in relation to similar wording in the guidance for charging perverting the course of justice in cases involving false allegations of rape and/or domestic abuse, that the reference to a prosecution usually taking place did no more than re-state the two stage test required by the Code For Crown Prosecutors, that is to say both the evidential test, and the public interest test had to be satisfied. It seems to me the position is identical here. As I have said, the guidance then goes on to the individual offences, starting with "Perverting the Course of Justice", "Handling Arrangements", "Perjury" and so on.

29 Miss Montgomery QC, for the claimant, contends that, as a principle of public law where established policy and guidance has been promulgated, that policy and guidance should be followed, and if there is a failure to follow guidance the court should, or will interfere. Here, she says, the court should interfere because the prosecutor failed to follow the guidance entitled "Public Justice Offences" incorporating the Charging Standard and, as a result of this, her client has an arguable case that the prosecutor acted irrationally. Miss Montgomery points in particular to p.4 of the guidance in relation to public justice offences incorporating the Charging Standard, and says that the prosecutor failed to apply the "generic guidance" in relation to the charging for public justice offences and, as a result, went wrong in relation to the seriousness of the offence, and then failed to deal with the impact of culpability. She then relies on the word "usually" in support of her argument that prosecutions for public justice offences usually go ahead, and the factors identified on p.4 of the guidance should be put to the court for consideration when sentence is passed.

30 Miss Montgomery then points to other aspects of the prosecutor's review. She says that in relation to the public interest test the prosecutor is simply wrong in her analysis of harm, and in relation to costs it is very hard to see why the costs of a three week trial at Southwark Crown Court were not justified in the circumstances of the case and, in reaching her conclusion, the prosecutor has simply failed to understand the seriousness of the offence as this is a case which would have given rise to a custodial sentence, alternatively a substantial financial penalty.

31 Miss Montgomery made her submissions very attractively, both in writing and orally, however, I am not persuaded by them. Ground 1 does not disclose an arguable ground for judicial review having a realistic prospect of success.

32 First, the two stage test required to be applied by Crown prosecutors is set out in the Code. That Code was plainly applied by the prosecutor in this case.

33 Second, the CPS Guidance in Public Justice Offences at p.165 in the bundle, commencing with the words: "In some cases . . ." upon which Miss Montgomery placed much reliance does no more than restate the two-stage test in the Code, which the prosecutor plainly applied.

34 Third, there is no foundation for the complaint that the prosecutor failed to consider the seriousness of the offence, or whether the activity resulted in harm to the administration of justice. The offence, namely perverting the course of justice, had already been identified in the indictment, and p.4 of the guidance is directed at identifying which offence in the circumstances of any particular case should be charged. Here the offence was already identified in the draft indictment, and it was that offence (and not a range of other public justice offences such as forgery) that the prosecutor was required to consider, and which she did consider. Further, and in any event, it is plain that the prosecutor did consider both the issues of seriousness and harm in the context of public interest. That she did so is clear from

pp.14 to 18 of her review, and, as the Divisional Court has made clear in *Monica*, the review must be read in a broad common sense way.

35 Fourth, I do not consider there is anything in the point that the prosecutor failed to consider the harm to the administration of justice which resulted from the offence of perverting the course of justice. It is obvious from reading the report, as one must in the full common sense way, that she had such harm well in mind. Apart from anything else, it is clear from paras. 9.2 and 11.1 of her review.

36 Fifth, in the claimant's reasons for seeking a reconsideration of the decision of Sir Ross Cranston they accepted that the CPS, as the decision maker, are to be given a degree of latitude in the exercise of their discretion. However, they argued that the prosecutor's conclusion as to public interest was irrational because they incorrectly exercised their discretion. They pinned their colours to the mast on two points:

(1) that no, or wholly inadequate, weight was given to the other factors in the same material; and

(2) that the decision was not taken in accordance with the guidance in relation to public justice offences.

I have dealt with the second point above. On the first point there is no suggestion that the decision maker considered any material which ought not to have been considered in reaching her decision, or that there was any material she omitted to consider. This first point is, therefore, a complaint about weight. It is trite law that the weight to be attached to any particular factor used in making a decision is, as I have already explained, quintessentially for the decision maker, and the court will not interfere with the weight to be ascribed by the decision maker to any particular factor, provided all material considerations have been taken

into account, unless he or she has acted irrationally in the *Wednesbury* sense. This point goes nowhere as this is not a case where there is any basis for saying that the decision maker acted irrationally for the reasons that I have explained because the Code was applied and, on top of that, the prosecutor did take all material considerations into account, and points such as costs are all matters which go to weight and, as I have said, I do not think that is a point which goes anywhere.

37 In relation to Ground 2 which, in the end, was not pursued as a separate ground, was in my view hopeless. It is obvious that the terms of the Resident Judge's email to the DPP was a request for intervention within the means of the CPS guidance. Indeed, the email from the Resident Judge specifically invited the DPP to consider whether he should take it on – I contemplated the provision of papers for that purpose – and the subsequent email correspondence which I have referred to earlier in this judgment confirms that position and understanding.

38 Accordingly, for the reasons set out above, and also for the reasons given by Sir Ross Cranston, with which I agree, this application for permission to apply for judicial review is refused and the claim is dismissed.

L A T E R:

39 I now have to deal with the question of costs in relation to this claim.

40 The defendant seeks the costs of the Acknowledgement of Service, and also of attending the oral renewal permission application hearing which took place yesterday. The interested party, Mr Chernukhin, also seeks his costs on the same basis. In response to that the claimant says

that he accepts that, as the losing party, he must pay the defendant's costs down to and including the service of the Acknowledgement of Service, but beyond that the claimant does not accept he should pay any part of the defendant's costs thereafter or, indeed, any part of the interested party's costs at all.

41 The claimant refers, in particular, to the provisions of the Administrative Court Guide, which are set out at para. 23.4 at pp. 95 to 96 of the 2020 edition, and also to the underlying case law which is essentially contained in the well-known decision *R (on the application of (1) Mount Cook Land Ltd (2) Mount Eden Land Ltd) v Westminster City Council* reported in 2004, the key point being that the default position is that a party is not entitled to any costs beyond the service of the Acknowledgement of Service.

42 The claimant also points to the recent decision of the Court of Appeal in *Campaign to Protect Rural England (Kent Branch) v Secretary of State for Communities and Local Government [2020] 1 WLR* at 352 and, in particular, the judgment of Coulson LJ at paras. 20 and 24. The claimant's counsel, Mr James-Matthews, accepts this is a decision concerning planning cases. However, Coulson LJ made it clear there is no general rule which limits the number of parties who can recover their reasonable and proportionate costs of preparing an Acknowledgement of Service, and also the issues to be considered in terms of proportionality. Those cases were also drawn to my attention by Ms Sagan.

43 The general rule is that a defendant or other party who attends and successfully resist the grant of permission at a renewal hearing will not usually recover from the claimant the costs of the hearing, but will still be entitled to the costs of preparing the acknowledgment of service. Paragraph 76 of *Mount Cook* then sets out six separate points and at sub-para.(3) explains this:

> "A court, in considering an award against an unsuccessful claimant of the defendant's and/or any other interested party's costs at a permission hearing, should only depart from the general guidance in the Practice Direction if he considers there are exceptional circumstances for doing so."

Sub-paragraph (4) explains:

> "A court considering costs at the permission stage should be allowed a broad discretion as to whether, on the facts of the case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant."

Sub-paragraph (5) explains:

> "Exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list:
>
> a) the hopelessness of the claim:
>
> b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness;
>
> c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends – a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and
>
> d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim."

Sub-paragraph 6 explains

> "6) A relevant factor for a court, when considering the exercise of its discretion on the grounds of exceptional circumstances, may be the extent to which the unsuccessful claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs."

Paragraph 81 of the judgment then refers to the particular facts of the *Mount Cook* case:

> "As to the considerable resources of Mount Cook and its deployment of them in initiating and persevering with the claim, I should add that, in my view, there are different considerations when a court is asked to consider the grant of costs against an unsuccessful claimant at the

> permission stage from those as to discretionary refusal of relief at the end of a substantive hearing (see paragraph 47 above). At the refusal of permission stage the claimant has lost on the merits and, as in any other case where the award of costs lies in the discretion of the court, the conduct and motive of an unsuccessful party in having pursued unmeritorious litigation for some collateral aim is capable of being a relevant consideration to the exercise of that discretion. And, as a result of the refusal of permission, there is no underlying legal justification for the claim to intrude on the manner of its exercise."

44 The dispute before me in relation to how the costs should be ordered in this case has therefore focussed on whether this is a case which can be described as having exceptional circumstances. There are, in my view, a number of factors which are relevant to this consideration. First, it is clear on the case law that any challenge to a decision of the DPP in relation to matters concerning prosecution, or challenges when made by judicial review, are cases that should be "strongly discouraged" to use the words of David Richards LJ in the *Gujra* case in 2012, which was subsequently approved by the Supreme Court. That case and other cases have made it clear that it is a very rare case indeed in which the court will interfere with a decision of an independent prosecutor.

45 Second, in this case the claimant started off with three grounds of judicial review. Ground 3 was abandoned following the decision of Sir Ross Cranston (sitting as a High Court Judge) at the permission stage on the papers. Ground 2 was not pursued independently before me, but morphed into Ground 1. In my decision, given earlier this afternoon, I described Ground 2 as, in any event, "hopeless", and in relation to Ground 1 described one particular aspect of the argument before me, in relation to the challenge made to the weight of various factors given by the decision maker, as also being "hopeless".

46 Third, at the end of my judgment I mentioned that I also agreed with the reasons of Sir Ross Cranston, and at part of his reasoning he identified that Teare J, in the civil litigation, had "found serious misconduct on all sides but, in particular, condemned the claimant's

dishonesty." He said: "In other words, the claimant's private prosecution had all the hallmark of a party in the civil courts continuing the battle in the criminal courts." The dispute between Mr Deripaska and Mr Chernukhin has gone on, it seems, for very many years, and Ms Sagan, in her submissions, referred to it lasting for over a decade.

47 Fourthly, this is a case where it appears that money is no object, in terms of legal representation, to the claimant. It does not appear to be disputed that substantial resources are available. The underlying dispute, as Miss Montgomery explained to me yesterday in her submissions, was worth over £100 million, that underlying dispute giving rise to the matters which the form the subject matter of the indictment in this case. Perhaps more tellingly, in terms of pursuing the judicial review, this is a case where, as I mentioned in my judgment, four counsel were instructed on behalf of Mr Deripaska. The documents have all been settled by two Silks and two Juniors, and before me yesterday Mr Deripaska was represented by two Silks and a Junior.

48 Taking all those matters together, in my view, this is a case which does have all the hallmarks of an exceptional case, and it is a case where I am satisfied it is appropriate to depart from the general rule in relation to costs at the outcome of a permission hearing.

49 Taking first the defendant, I am quite satisfied it is appropriate to order that the claimant do pay the costs of both preparing and responding to the Acknowledgement of Service, and also to the costs of and associated with attending at the hearing before me yesterday and at the judgment this afternoon.

50 In relation to the interested party, I am certainly clearly of the view that the claimant should pay the costs of the interested party in relation to the service of the Acknowledgement of Service and Grounds in response.

51 I took time, briefly, before giving this judgment to gather my thoughts and, having done so, I am also satisfied that it is appropriate that the claimant do pay the interested party's costs of attending at the hearing before me. It is very easy for the claimant to say that there was no need for Mr Chernukhin's representatives to attend and it is simply duplication on the part of the DPP. I disagree with that. I think, in fact, the submissions made by Mr Chernukhin together with those made by the DPP were of assistance to the court and, in those circumstances, it seems to me it is entirely appropriate that those costs should be borne by Mr Deripaska. As to the amount of those costs that is a separate issue which will need to be determined by way of assessment.

52 So, I order the claimant to pay the costs of the defendant and the interested party of the case.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Hon. Mrs Justice Tipples DBE.

30 October 2020