Neutral Citation Number: [2021] EWCA Crim 1195

Case No: 201803264 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
His Honour Judge Beddoe

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

LORD JUSTICE MALES
MR JUSTICE GOOSE
HER HONOUR JUDGE DHIR QC

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Between:

REGINA	**Respondent**
- and -	
SALLY ANN JONES	**Appellant**

- -
- -

Tom Kark QC and **Rachna Gokani** (instructed by **Birds Solicitors**) for the **Appellant**
Richard Whittam QC and **Henry Hughes** (instructed by **Edmonds Marshall McMahon**) for the **Respondent**

Hearing date: 21st July 2021

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Approved Judgment

Lord Justice Males:

1. On 9th July 2018 in the Crown Court at Southwark the appellant, Sally Ann Jones, was convicted of one count of conspiracy to defraud. Her fellow conspirators, Paul Asplin and David Kearns, were also convicted on this count. Asplin was also convicted of false accounting.

2. On 13th July 2018 Asplin was sentenced by the trial judge, HHJ Beddoe, to seven years' imprisonment and was disqualified from acting as a director for 12 years pursuant to section 2 of the Company Directors Disqualification Act 1986. Kearns was sentenced to four years and three months' imprisonment. Jones was sentenced to three years and nine months' imprisonment and was disqualified from acting as a director for eight years.

3. On 21st July 2021 we heard an appeal against conviction by Sally Jones, brought with the permission of the full court. There are two grounds of appeal:

   (1) The judge was wrong to reject the defence submission that the proceedings should be stayed; the prosecution was in breach of an undertaking given to Sally Jones in 2013 not to prosecute her.

   (2) Material obtained by the prosecution pursuant to a *Norwich Pharmacal* order (*Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133) issued by the High Court should not have been admitted against Jones in circumstances where she was not clearly identified to the issuing judge as a potential suspect; there was no discussion about her privilege against self-incrimination; and no express permission to use the documents against her was sought or obtained pursuant to CPR 31.22.

4. At the conclusion of submissions we announced that the appeal would be dismissed for reasons to be given later. These are our reasons.

The facts

5. The case concerned a fraud on an insurance company called DAS Legal Expenses Insurance Company Limited ("DAS"). DAS insures the cost of litigation brought by insured clients against third parties, including claims for damages for personal injuries. It is a subsidiary of DAS UK Holdings Limited which in turn is a subsidiary of a major European insurance group with headquarters in Germany.

6. Asplin was employed by DAS throughout the indictment period 2000 to 2014 as the managing director and then the CEO. Kearns was employed until 31st December 2004 in a senior role as Head of Claims and General Manager. Sally Jones had worked for DAS as Head of Marketing but she left in October 1999 when she began a relationship with Asplin. They married in 2001 but divorced in May 2005.

7. It was the prosecution case, accepted by the jury, that the defendants used their status to exploit the way in which DAS did business and to allow them to make a secret profit without DAS being aware of their actions. The fraud involved a company called Medreport, established by Asplin and Kearns in 2000. In carrying out its business as a legal expenses insurer DAS required medical reports. The conspirators set up

Medreport to provide such reports. They kept their interest in Medreport hidden from DAS. Asplin and Kearns worked at DAS while in effect owning Medreport. In their capacity as employees of DAS they arranged that Medreport contracted with DAS for the provision of medical reports. Over 90% of DAS's requirement was directed to Medreport in this way. The prosecution case was that the conspirators earned significant secret profits from Medreport over a period of approximately 14 years. They took careful steps to keep their involvement, control and profit from Medreport secret from DAS. They devised systems of routeing funds which concealed the payment of dividends to them and they profited without DAS knowing that Medreport was in substance their business. Sally Jones became a manager of Medreport and later an owner and director, continuing to run the company after Asplin transferred his interest in it to her.

8. Initially, Jones acted to route the secret benefit that Asplin obtained to him, and to conceal the fact of his ownership. Over time, her interest in Medreport grew and that of Asplin and Kearns diminished. In due course, she came in effect to control the company. Throughout the conspiracy, she was the principal point of contact with DAS and dealt with members of its staff on a regular basis. She warned and cautioned her co-conspirators from attending Medreport in order to prevent any word of a link between them and DAS getting back to DAS and its parent companies.

9. Contracts were entered into by DAS with Medreport. Under a first contract Medreport was entitled to use funding from DAS to cover expenses and fees. There was no profit share provision for DAS. Over time, independent staff at DAS began to insist on terms that were more advantageous to DAS. However, Asplin exerted his influence to ensure that the contractual terms were favourable to Medreport. DAS remained in ignorance of the fact that both Asplin and Kearns were on both sides of the fence. Throughout this period, Medreport was substantially dependent upon DAS for its income. Without the DAS work, it would have had no business.

10. Gradually suspicion arose as to the uncommercial nature of the relationship between the companies and that some form of secret interest existed in favour of DAS directors. An article appearing in a national newspaper in 2006 referred to Asplin's use of the company to benefit his former wives (including Sally Jones). DAS commissioned inquiries and investigations, but the true position that Medreport was improperly profiting from its DAS business was successfully concealed by the conspirators.

11. Kearns sold his interest in Medreport in 2007. Asplin sold his interest in 2008. Sally Jones continued to run Medreport. Contracts were renewed with Medreport after the ending of the interests of Asplin and Kearns.

12. In 2011 certain non-UK executives from within the DAS Group insisted upon a tendering process being carried out for the allocation of expert reports. Medreport failed in this process, but the contract with Medreport was, nonetheless, renewed. In 2012 the board of DAS decided to terminate the relationship. Medreport, led by Sally Jones, sued DAS. Ignorant of the conspiracy, DAS settled the case and paid a sum by way of compromise exceeding £800,000. Documents proving the secret ownership were finally acquired by DAS in 2015 as a result of DAS applying for and obtaining a *Norwich Pharmacal* order.

13. When the police declined to prosecute, DAS commenced a private prosecution.

14. Sally Jones did not give evidence but her case at trial was that she was an honest woman who wished to make Medreport a success and had no reason to engage in fraud. She did her best to ensure that Medreport functioned properly, and she did not seek or conspire to abuse the relationship with DAS.

15. The jury convicted her.

16. When sentencing Sally Jones, the judge accepted that the scheme was not of her imagination or making. However, she was involved from the outset and she was vital in its realisation. Without her experience of many years' employment at DAS, it was inconceivable that Medreport could have been set up or run. She was also a conduit pipe through which confidential information passed between DAS and Medreport. She had played a leading role.

17. Other applications for permission to appeal by Jones and the other conspirators have been refused. The only remaining grounds of appeal are those to which we referred at the outset.

The Settlement Agreement

18. Ground 1 is that the judge wrongly declined to stay the trial because of the terms of a Settlement Agreement dating from July 2013, under which it is said that DAS agreed it would not prosecute the directors of Medreport, one of whom was Sally Jones, whether in civil or criminal proceedings.

19. The Settlement Agreement is dated 26th July 2013. It was concluded between two DAS companies, Medreport and the two directors of Medreport. Its context, as the recitals make clear, was the settlement of actual and potential civil litigation in which each side had claims:

> "(A) Between 2001 and 2008 DAS and Medreport entered into various contracts (the **"Historic Agreements"**). Under the Historic Agreements, DAS agreed to request (in so far as it was able) that panel solicitors utilise Medreport for the provision of medico-legal services and Medreport agreed to pay DAS various commissions. One of those panel solicitors was DAS Law.
>
> (B) In 2011 DAS and Medreport negotiated over a further contract to govern their relationship from 1 January 2012 onwards. For the purposes of this Agreement, DAS and Medreport agree that a contractual relationship did exist between them from 1 January 2012 onwards (**"the 2012 Agreement"**).
>
> (C) A dispute has arisen between DAS and Medreport over Medreport's alleged wrongful withholding of payments due to DAS and DAS' alleged repudiatory breach and/or wrongful termination of the 2012 Agreement.
>
> (D) A further dispute exists between DAS and Medreport over Medreport's alleged entitlement to recover payment of insurance premiums made on behalf of clients.

> (E) A further dispute has also arisen between Medreport and DAS Law over the payment of invoices submitted by Medreport to DAS Law for medico-legal services delivered to DAS Law's clients.
>
> (F) DAS, DAS Law and Medreport have agreed to enter into this Agreement in order to settle their disputes.
>
> (G) The Medreport Directors have agreed to be Parties to this Agreement for the purposes of being bound by certain undertakings contained therein."

20. As the final recital indicates, the purpose of Sally Jones and her fellow Medreport director being parties to the agreement was so that they would be bound by certain undertakings. Those were set out in clause 5 in which, among other things, Medreport agreed to procure that its directors would sign a letter confirming the retraction of various allegations. Those included "any allegations to the effect that any Party or any of its directors, officers or employees has acted improperly, dishonestly or in any way wrongfully in connection with the relationship between Medreport and DAS and/or DAS Law". Thus, far from being intended to expose any wrongdoing, the purpose of the undertakings was to protect DAS's reputation by ensuring that what were believed to be false allegations of wrongdoing were not repeated.

21. The clause on which Sally Jones relies for the purpose of this appeal is clause 2.3. To put this in context, we must set out the whole of clause 2:

> "2 Settlement
>
> 2.1 DAS hereby waives the DAS Claims against Medreport and/or the Medreport Directors. Medreport hereby waives the Medreport Claims against DAS and/or DAS Law, save as set out below in relation to the Medreport DAS Law Claim.
>
> 2.2 The Agreement is in full and final settlement between DAS and Medreport of the DAS Claims and the Medreport Claims, and of any other claims, counterclaims, appeals, rights and/or obligations, past, present or future whatsoever arising out of or in any way connected with the facts and/or subject matter of the DAS claims and/or the Medreport Claims.
>
> 2.3 Save for the purposes of enforcing any of the terms of this Agreement, DAS and Medreport agree not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any other Party, any action, suit or other proceeding concerning the DAS Claims or the Medreport Claims, in this jurisdiction or any other.
>
> 2.4 For the avoidance of doubt:
>
> (a) Medreport shall continue to have delegated authority under the Historic Agreements and the 2012 Agreement to

recover disbursements, agency fees and DAS commission from appointed solicitors, including DAS Law (or in the event of an Invoice issued to DAS, DAS), but shall be entitled to retain all sums recovered.

(b) This Agreement shall not release or in any way affect the liability of DAS or any other Third Party to pay or reimburse Medreport in respect of fees for medico-legal services provided or commissioned by or through Medreport (including disbursements, agency fees and DAS commission), whether or not any such Third Party's liability is insured or indemnified or forward funded by DAS, save as expressly set out herein. Such fees include all those invoiced on the Invoices.

(c) DAS shall not assert a claim against any Third Party in respect of any fees for medico-legal services provided or commissioned by or through Medreport by a Third Party (including disbursements, agency fees and DAS commission), or interfere with any claim by Medreport against any Third Party for any such sums.

(d) The parties agree that, save as set out at clause 3.1 below, and save that Medreport shall be entitled to receive from the relevant Third Party all sums received on their behalf by any Third Party and held for their benefit as at the date of the Agreement, the Agreement is in full and final settlement of all sums relating to cases which are Concluded cases on or before the Effective Date, and, save as permitted by clause 3.1 or this clause, Medreport shall not assert a claim against DAS Law or any Third Party in respect of any shortfalls/non recovered sums in respect of medico legal services provided in respect of such Concluded cases.

(e) DAS or DAS Law, as appropriate, shall pay the invoices on Schedule 4 in accordance with clause 3.1 below."

22. The "DAS Claims" referred to in this clause were defined as follows:

"DAS Claims" means:

a) the claim by DAS for repayment of forward funding advanced to Medreport in connection with the Historic Agreements and not repaid by as at the Effective Date;

b) a claim by DAS for commission payable by Medreport for cases referred to it under the Historic Agreement and/or the 2012 Agreement, including commission that will only become payable after the Effective Date;

c) all other claims by DAS under or relating to the Historic Agreements and/or the 2021 Agreement;

> d) all other claims by DAS and/or DAS Law against Medreport; and
>
> e) any and all claims by DAS and/or DAS Law against one or both of the Medreport Directors."

The *Norwich Pharmacal* application

23. Some two years later, on 7th July 2015, DAS issued an application against Sally Jones and Medreport for a *Norwich Pharmacal* order to obtain documents which would reveal the beneficial ownership of shares in Medreport. The application was made on the basis that the defendants were mixed up in and/or had facilitated wrongdoing, namely fraudulent conduct and breach of fiduciary and contractual duties by Asplin and Kearns. It was supported by a witness statement by Kate McMahon, DAS's solicitor. It is necessary to set out, at greater length than we would have wished, parts of the witness statement which bear on ground two:

> "6. The essential nature of the Alleged Fraud is that former officers or employees of DAS UK and DAS Legal held a secret and undeclared beneficial ownership of Medreport. As I have already noted, Medreport was until very recently a counterparty to contractual arrangements with DAS Legal which resulted in substantial amounts of business being provided to it. It is believed that these contractual arrangements were very beneficial to Medreport, and therefore its ultimate shareholders.
>
> 7. The Alleged Fraud is believed to have been committed by two individuals.
>
> 8. The first individual is a former director of DAS UK and Chief Executive of DAS Legal, Mr Paul John Asplin. He held those offices from 27th November 1997 to 8th March 2015. The First Respondent ('Sally Ann Jones') is one of Mr Asplin's former wives.
>
> 9. The second individual, David Kearns, was DAS Legal's Head of Claims from 1st January 2000 to 1st September 2002, and thereafter its General Manager until 31st December 2004. As those titles would suggest, there [*sic*.] were very senior positions which gave Mr Kearns considerable autonomy and decision making power.
>
> …
>
> **The legal and beneficial ownership of Medreport**
>
> 17. To the best of the Applicants' knowledge … the registered shareholders of Medreport at all material times were:
>
> a. Mr Robert John 'Tom' Dalley, from 2000 to 2003 (though for some of that period his wife, Mrs Sally Dalley had a 1% shareholding);

b. From 2003 until mid 2008, Wessex Medico Legal Limited ('Wessex'). Wessex was itself owned by Mr Kenneth Brian Walker; and

c. At some time in mid 2008, the shares in Wessex were acquired by Sally Ann Jones, and Mr Simon Peter Munro. They continued to own those shares, though Wessex has changed its name to Medreport Holdings Limited. As I have already noted, Sally Ann Jones is Mr Asplin's fourth wife and is also known as Sally Cresswell and Sally Asplin. She too was employed by DAS Legal, leaving there in 1999 and commencing engagement with Medreport in around 2000, first as an employee, and later as an owner and director of Wessex.

…

Confidential letter from Peters & Peters to Paul Asplin

33. During the dispute that arose around the termination of the final contract between the DAS entities and Medreport, Peters & Peters (lawyers for Medreport in the dispute) wrote a private letter to Mr Asplin. I know this to be the case because Peters & Peters also wrote to Osborne Clarke (lawyer for the Applicants in that dispute) on 28 September 2012 stating

'*On a separate but related matter and as a professional courtesy, you should be aware that we have today written to Mr Paul Asplin, your clients' CEO, in relation to an issue that could touch upon the dispute between the Medreport Companies and your clients. It is entirely a matter for Mr Asplin if he wishes to share the letter with you but it is possible that it could give rise to matters of conflict; we do not know whether Mr Asplin will wish to instruct you or not in relation to the issue raised in our letter*.'

34. On 6 October 2021, Rainer Huber, Chairman of the Applicant's parent ERGO International AG, wrote an email to Leslie Perrin, the Applicant's Senior Independent Director, recording a conversation he had just had with Mr Asplin:

'*Paul [Asplin] told me that he has taken legal advice in this respect. Both Paul and his lawyer do not think we will read the content of this letter in an English newspaper. However, we have no control over it. Paul added that Sally [Jones, the First Respondent] would harm herself.*

Talking about the letter itself Paul called it a 'classical blackmail letter.' When I asked [Asplin] whether I should know sth [sic.] about the content [of the Peters & Peters letter] and if there is some truth in the allegations he

responded 'Of course there is a story behind' but according to Paul it is overdone (as usual in those blackmail cases).'

He once again said that the likelihood of the letter being published is close to zero.'

35. On the basis of what was said to be in the Peter & Peters letter to Asplin ('the Peters & Peters letter'), it seems very likely that it makes express reference to Mr Asplin's beneficial interest in Medreport. That is the only plausible explanation for Peters & Peters' reference to 'conflict'. **Further, the only reasonable explanation for Mr Asplin's statement that Sally Ann Jones would, if matters were discussed, 'harm herself' must be because she was holding shares in Medreport on trust for Mr Asplin and was thereby party to or facilitated a corrupt beneficial arrangement with Mr Asplin**. [Our emphasis].

…

Necessity for Norwich Pharmacal relief

47. The Applicants require the documents that it seeks to establish the true beneficial ownership of Medreport and of CW Law. Absent those documents, the Applicants would be unfairly prejudiced. They have been told by third parties that Messrs Asplin and Kearns have engaged in serious breach of duty, but the allegations against them are particularly serious and not to be lightly made.

48. If the Applicants were to launch civil proceedings or a criminal prosecution in the absence of the disclosure sought, they would be advancing a claim that would be inferential at best – albeit a claim that would be built, in my respectful submission, on powerful inferences. However, I do not think that the Applicants should be required to pursue serious allegations on an inferential basis, when a relatively small compass of documents could be disclosed now which would put the matter beyond doubt, and demonstrate whether there was substance to the Alleged Fraud. In the circumstances, the disclosure is plainly necessary and desirable.

49. Furthermore, if the Applicants were to obtain the disclosure which they now seek, they could take an informed view about the best course of redress that is open to them as the victim of the Alleged Fraud: whether by way of civil action; or by way of private prosecution; or by way of public prosecution. Although this is a matter for legal submissions, I understand that the *Norwich Pharmacal* relief extends to the provision of disclosure of documents for all of these purposes.

> 50. Finally, the Respondents are very far from mere witnesses to the alleged wrongdoing. If the Applicants' allegations are correct, Sally Ann Jones has acted as a nominee shareholder, holding shares on trust for Messrs Asplin and/or Kearns. Sally Ann Jones may or may not have personal knowledge as to whether those beneficial interests were properly declared by Messrs Asplin or Kearns to the Applicants. However, regardless of her state of mind, the truth of the matter is that she is not a 'mere bystander': she has (either wittingly or unwittingly) become mixed up in and involved in the Alleged Fraud.
>
> …
>
> 68. If the Applicants are correct and Messrs Asplin and Kearns have concealed their beneficial ownership of Medreport and CW Law, they are both in serious breach of duty, and the Applicants would be entitled to both civil and criminal redress. There is a powerful public interest in ordering disclosure, as well as the Applicants' private interest in vindication of their rights.
>
> 69. By contrast, the prejudice that the order would occasion to the Respondents is very limited. The Respondents have been invited to disclose a very small number of documents, limited (essentially) to the Peters & Peters letter and any documents in the Respondents' possession which would demonstrate that either Messrs Asplin or Kearns were ultimately beneficially interested in Medreport and/or CW Law. Contrary to what Peters & Peters have sought to suggest, this is unlikely to be a burdensome request: in the normal course of events, neither Medreport nor Sally Ann Jones could be expected to have a large number of documents in their control which demonstrate that Messrs Asplin or Kearns have a beneficial interest in Medreport and/or CW Law. The class of documents is quite narrow, and will not infringe any confidentiality concerns of any other beneficial owners (apart from Messrs Asplin and Kearns). Neither the Respondents nor Messrs Asplin and Kearns can have any expectation of privacy in respect of those documents, in circumstances where Messrs Asplin and Kearns were meant to disclose the existence of such arrangements in any event, in conformity with the fiduciary duties that they owed to my clients.
>
> 70. Finally, the Applicant has already expressed its willingness to pay for the Respondents' reasonable costs of compliance, and continues to do so – other than the costs of issuing this application, in circumstances where the Respondents could and should have acceded to my clients' requests on a voluntary basis."

24. A skeleton argument in support of the application reiterated that Sally Jones and Medreport appeared to have facilitated and/or become mixed up in wrongdoing. It too

made clear that DAS intended to seek redress against Asplin and Kearns and was carefully considering the claims that might be open to it, including both civil and criminal claims which might involve a private prosecution. It stated in terms that it had yet to decide the precise form of redress that it intended to seek and that the documents which it hoped to obtain as a result of the application "will necessarily have a powerful impact upon the nature of the redress that might be available". It reiterated that Sally Jones was an "involved" third-party who had "facilitated the Alleged Fraud". Referring to her involvement, the skeleton argument stated as follows (our emphasis):

> "50 … (v) As set out above, **there is no doubt that the Respondents have facilitated the wrongdoing**. In Ms Jones' case she apparently acted as a trustee for matters Asplin and/or Kearns; and in Medreport's case it was the corporate vehicle through which the Alleged Fraud worked, and by which the secret profits were extracted from DAS and distributed to the wrongdoers. **Both Medreport and Jones are in the thick of the wrongdoing.**
>
> (vi) Furthermore, DAS believes that there **are good grounds for thinking that the Respondents' involvement was not simply innocent**. The legal owners of its shares were at the material times directors of Medreport, one of which was in later years Ms Jones. The directors were holding shares on trust for Messrs Asplin and Kearns. **They must have known (or at the very least suspected that the purpose behind the creation of the Ownership Documents was deliberate concealment. They must have understood why that concealment was necessary**. Their knowledge is attributable to Medreport."

25. Medreport and Sally Jones were advised by experienced solicitors and were represented on the hearing of the application by counsel (not those now representing her). Their position was that they did not object to an order for the production of some tightly defined documents, but that it would be burdensome to look more widely, while some documents were subject to obligations of confidence.

26. On 13th July 2015 HHJ Moloney QC, sitting as a judge of the High Court, made the order, limiting it to those which the defendants had agreed to produce. It included the following undertaking:

> "UPON the Applicants undertaking to the Court that without the permission of the Court they will not use any of the documents disclosed pursuant to this Order for any purposes other than the obtaining of lawful redress for the wrongdoing identified in the witness statement of Kate McMahon dated 6 July 2015 in support of the Application."

27. The documents ordered were produced in July 2015. In September 2015 DAS commenced civil proceedings against Asplin, Kearns and Medreport, but not against Sally Jones, who was joined as a defendant to the claim in March 2016. Those proceedings have since been stayed.

The criminal proceedings

28. The criminal proceedings were commenced by the issue of a summons on 8th June 2016. On 19th December 2016 the defendants issued an application to stay the criminal proceedings for abuse of process. The grounds did not include any complaint corresponding to what are now grounds one and two of this appeal, but were concerned with the conduct and motivation of DAS and its solicitors, in particular Kate McMahon, in bringing a private prosecution. On 3rd April 2017 HHJ Korner CMG QC acceded to that application, but her decision was reversed by this court (Lord Justice Davis, Mr Justice Phillips and HHJ Dickinson QC: [2017] EWCA Crim 1172). This court accepted that there were valid criticisms to be made of Ms McMahon's conduct (we agree), but held that these would not affect the fairness of the trial.

29. Having rejected the various complaints made, the court continued:

> "97. This court has already referred to the *Norwich Pharmacal* Order of 13 July 2015 obtained against Medreport and the third defendant. At the appeal hearing, the court raised concerns that documents obtained as a result of that Order had then been used to include the third defendant herself in the private prosecution: in circumstances where the third defendant seems not to have been clearly identified to HHJ Moloney QC as a potential suspect and in circumstances where there appears to have been no discussion about issues of privilege against self incrimination. Further, an undertaking to the court in quite broad terms as to the limitations on use of documents so obtained was contained in the Order; and no express permission to use the documents against the third defendant, pursuant to CPR 31.22, was made.
>
> 98. However this point was not, as Mr Boyce [then appearing for Sally Jones] candidly acknowledged, taken below (Mr Boyce's attention understandably enough being directed towards the other issues) and was not, when raised by this court, over much debated before us. In those circumstances, apart from drawing attention to the point, we say no more about it for present purposes. Whether the point will, at all events so far as the third defendant is concerned, feature hereafter is not a matter for us."

30. We cite this passage because, perhaps understandably, it featured in the submissions made by Mr Tom Kark QC for Sally Jones and because it appears to have been the origin of (at any rate) ground two on the present appeal. However, we would note two points. First, the point was not "over much debated" at the 2017 hearing. What was said, therefore, hardly amounts even to a provisional view. Second, it does not appear to have occurred either to Sally Jones herself or to the experienced counsel then acting for her that the circumstances in which the *Norwich Pharmacal* order was obtained had resulted in any unfairness which might give rise to an abuse of process argument. Rather, the point was raised by the court. Once raised by the court, however, the point was seized upon.

31. On 13th March 2018 HHJ Beddoe, to whom the case had now been allocated, rejected an application by Sally Jones that the proceedings should be stayed as an abuse of process. The first ground, corresponding to ground one before us, was that the Settlement Agreement provided, or at least suggested, that Jones would have immunity from prosecution for criminal offences arising from her connection with Medreport. The judge observed that, contrary to her counsel's submission, there was no evidence that she had ever believed this to be the effect of the Settlement Agreement. He said that it was remarkable, if this was her belief, that this point had not been taken before. He concluded, however, that the Settlement Agreement contained no such promise of immunity. Its context was civil proceedings; there was no evidence that anyone had criminal proceedings in mind at that stage; and the agreement could not reasonably be construed as amounting to an agreement not to prosecute.

32. The second ground, corresponding to ground two before us, was that Sally Jones would not have submitted to the *Norwich Pharmacal* order, and HHJ Moloney QC would never have made it, if it had been known that she might become a defendant to criminal proceedings; and that use of the documents produced pursuant to the order as evidence against Jones was contrary to the terms of the undertaking which had been given. The judge held that there was no evidence of any assurance being given to Sally Jones that she would not become a focus of attention if evidence were obtained to justify this; that she had presumably received legal advice as to her position; that she would have had no basis on which to resist disclosure; and that use of the documents in the criminal proceedings was permitted by the terms of the undertaking which DAS had given. There was, therefore, no good reason to stay the proceedings as an abuse of process. Rather, admissibility of the *Norwich Pharmacal* documents would be a matter for the trial.

33. The trial then took place before HHJ Beddoe at Southwark Crown Court between 9th April 2018 and 9th July 2018. On 16th April 2018 the judge rejected an application to exclude the *Norwich Pharmacal* documents pursuant to section 78 of the Police and Criminal Evidence Act 1984. He held that there was nothing to suggest that Sally Jones had been led to believe that she would not be subject to criminal proceedings, either at the time of the Settlement Agreement or at the time of the *Norwich Pharmacal* application; that there was no unfairness in the way that the documents had been obtained; and that the documents were admissible not only against Asplin and Kearns who had been the primary focus of the application to obtain documents, but also against Jones.

Ground One – the Settlement Agreement

34. We deal first with ground one.

Submissions

35. On behalf of Sally Jones, Mr Tom Kark QC submitted, in outline, as follows:

    (1) Clause 2.3 was a promise by DAS which extended not only to civil but also to criminal proceedings. The term "prosecute" should be given its ordinary meaning. Although it is capable of referring to civil proceedings, it applies most commonly to criminal proceedings. Here, it extended to both.

(2) The definition of "DAS Claims" in the Settlement Agreement included "any and all claims by DAS and/or DAS Law against one or both of the Medreport Directors", which included Sally Jones.

(3) Where a prosecutor, in possession of the relevant facts, agrees to compromise proceedings and offers immunity from prosecution as part of a wider agreement with a suspect, that agreement will be binding on that prosecutor other than in the most exceptional of circumstances.

(4) The Settlement Agreement was made against the background of an allegation that Asplin had made secret profits from his connections to Medreport. It was designed to put these allegations to rest.

(5) Accordingly the bringing of the prosecution against Sally Jones was a breach of the Agreement.

(6) Having signed the Settlement Agreement, Sally Jones must have been confident that she would not be prosecuted; she acted on that belief to her detriment by acceding to the *Norwich Pharmacal* application.

36. We did not call upon Mr Richard Whittam QC for the prosecution to deal with ground one in oral submissions, but we have the benefit of his detailed written argument. He submitted, again in outline, as follows:

(1) The Settlement Agreement was itself vitiated by the fraud of Sally Jones and Medreport as it was entered into with full knowledge on their part of their fraudulent conduct, of which DAS remained ignorant.

(2) The Agreement was drafted in terms which clearly relate to civil proceedings, specifically the claims which were then the subject of litigation, defined as "the DAS Claims". It did not amount to a promise not to pursue criminal proceedings.

(3) There was no evidence from Sally Jones that she ever understood the Agreement as extending to criminal proceedings or that she had acted on any such belief, whether by acceding to the *Norwich Pharmacal* application or at all.

Decision

37. It is common ground that it may be an abuse of process to prosecute a defendant for conduct in respect of which he has been given an assurance that no prosecution will be brought. Whether this is so will depend on all the circumstances of the case, the question being whether they are such as to render the proposed prosecution an affront to justice. The relevant case law was reviewed by this court in *R v Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659. Giving the judgment of the court, Lord Phillips CJ said:

> "50. As the judge held, circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances, other than to say that they must be such as to render the proposed prosecution an affront to justice. The judge expressed reservations as to the extent to which one can apply

the common law principle of 'legitimate expectation' in this field, and we share those reservations. That principle usually applies to the expectation generated in respect of the exercise of an administrative discretion by or on behalf of the person whose duty it is to exercise that discretion. The duty to prosecute offenders cannot be treated as an administrative discretion, for it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest.

51. Such circumstances can arise if police, who are carrying out a criminal investigation, give an unequivocal assurance that a suspect will not be prosecuted and the suspect, in reliance upon that undertaking, acts to his detriment. Thus in *R v Croydon Justices, ex parte Dean* (1994) 98 Cr. App. R. 76, a 17 year old youth, who had assisted in destroying evidence after a murder had taken place, was invited by the police to provide evidence for the prosecution and assured that, if he did so, he would not himself be prosecuted. He thereupon provided evidence against those who had committed the murder and admitted the part that he had played. In these circumstances, which Staughton LJ presiding in this court described as 'quite exceptional', it was held to be an abuse of process subsequently to prosecute him.

52. In *R v Townsend, Dearsley and Bretscher* [1997] 2 Cr App R 540 the Vice-President, Rose LJ, giving the judgment of this court approved the propositions: where a defendant has been induced to believe that he will not be prosecuted this is capable of founding a stay for abuse; where he then co-operates with the prosecution in a manner which results in manifest prejudice to him, it will become inherently unfair to proceed against him. He added that a breach of a promise not to prosecute does not inevitably give rise to abuse but may do so if it has led to a change of circumstances (pp 549, 551). These propositions echo the observation of Lord Lowry in *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] AC 42 at p. 74:-

> ‘It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted.’

53. *R v Bloomfield* [1997] 1 Cr App R 135 was a case where it was held to be an abuse of process to proceed with a prosecution in the face of an unequivocal statement by counsel for the Crown to the Court that the prosecution would tender no evidence. In that case there was no change of circumstances which might have justified departing from that statement.

> 54. These authorities suggest that that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."

38. When a question arises whether a defendant to whom an assurance of immunity from prosecution has been given has acted on that assurance to his or her detriment, that fact will need to be proved by evidence. Sometimes the facts will speak for themselves, as in the cases cited where the defendant cooperated with the police or prosecution authorities by providing information which also implicated himself. In such cases the court will be entitled to infer that he did so as a result of the assurance given. In other cases the facts may be more equivocal or, considered objectively, may suggest that any assurance had no effect on the conduct of the defendant. In such cases detrimental reliance will not be obvious and may only be capable of being proved if the defendant gives persuasive evidence.

39. In the present case it is not obvious that Sally Jones ever believed that the Settlement Agreement included a promise by DAS not to bring criminal proceedings against her or that she acted on any such belief, whether by acceding to the *Norwich Pharmacal* application or at all, and she chose not to give evidence that she did. On the contrary, there is every reason to believe that she had no such belief and that the argument now deployed is essentially a legal construct. Hence the late stage at which this point emerged when, if there had been any substance in it, it would have been the first point to be taken. The fact that it was not taken until a late stage, after a galaxy of abuse of process arguments had already been deployed unsuccessfully, speaks volumes.

40. Even if Sally Jones had such a belief, however, she would have been mistaken. On any view the Settlement Agreement cannot be regarded as an unequivocal statement that no criminal proceedings would be brought against her. We would, however, go further and conclude that on its true construction clause 2.3 of the Agreement is concerned only with civil proceedings.

41. For convenience, we set out the clause again:

> "Save for the purposes of enforcing any of the terms of this Agreement, DAS and Medreport agree not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any other Party, any action, suit or other proceeding concerning the DAS Claims or the Medreport Claims, in this jurisdiction or any other."

42. Plainly the word "prosecute" is capable of referring to civil proceedings and need not extend to criminal proceedings. Where the object of the verb is a person, that refers most naturally to a criminal prosecution, but where (as here) the object is an "action, suit or other proceeding", that is not necessarily so. The term is used here in contrast to commencement of proceedings. Proceedings have first to be commenced and, once

commenced, have then to be prosecuted. In itself, the word "prosecute" is neutral and whether it extended to criminal proceedings must depend upon the context. The context of clause 2.3 was the civil claims being brought by each party against the other and there is no reason to suppose that either party contemplated criminal proceedings at this stage. The "DAS Claims" were actual or potential civil claims. A prosecution, even a private prosecution, cannot naturally be regarded as a "claim by" the prosecutor, but is a proceeding brought in the public interest. The language and context taken together therefore indicate strongly that the clause was not intended to extend to criminal proceedings.

43. Moreover, in circumstances where the law is clear that any promise of immunity from criminal prosecution must be unequivocal, and the drafter can reasonably be expected to have known that, any doubt should be resolved in favour of holding that a statement which is less than unequivocal does not amount to such a promise. Here the parties were legally advised and the Settlement Agreement was drafted by solicitors. The agreement can fairly be construed on the basis that, if it had been intended to include a promise of immunity from criminal prosecution, the drafter would have understood that this needed to be spelled-out unequivocally. It was not.

44. Finally, to construe "action, suit or other proceeding" as extending to criminal proceedings would produce strange and unlikely results. It would mean that, in the event of criminal proceedings brought by the prosecution authorities against Sally Jones, DAS would be unable to cooperate voluntarily with those authorities. It could not produce documents, even its own documents, without a production order. It could not provide witness statements without a summons. It is not plausible that clause 2.3 should be read in this way.

45. For these reasons we conclude that there is no substance in ground one.

Ground Two – the *Norwich Pharmacal* order

46. We deal next with ground two. It is necessary here to keep in mind that this is not an appeal against the grant of the *Norwich Pharmacal* order by HHJ Moloney QC or against HHJ Beddoe's ruling dismissing the abuse of process application. Rather, the appeal is against HHJ Beddoe's ruling refusing to exclude the documents obtained as a result of the *Norwich Pharmacal* order pursuant to section 78 of the Police and Criminal Evidence Act.

Submissions

47. For Sally Jones, Mr Kark submitted, in outline, as follows:

(1) It is apparent from DAS's own documents that at the time of making the application it contemplated at least the possibility of proceedings against Jones.

(2) The application for a *Norwich Pharmacal* order identified Asplin and Kearns as the "perpetrators" of the alleged fraud and the prospective defendants to any proceedings; it did not suggest that Sally Jones was a potential defendant in any proceedings, whether civil or criminal, which might follow from production of the documents. On the contrary, while it referred to Jones having "facilitated and/or become mixed up in the wrongdoing" (a precondition to any *Norwich Pharmacal*

order), it stated in terms that any prejudice to Jones from the making of the order would be "very limited".

(3) If Sally Jones had been identified as a potential defendant to criminal proceedings, she would have been able to resist production of the documents by claiming privilege against self-incrimination and/or HHJ Moloney QC would not have made the order.

(4) The terms of the undertaking given by DAS did not permit the use of the documents in criminal proceedings against Jones, but no application was made to the High Court to vary the undertaking.

(5) In these circumstances it was unfair for the documents to have been used against Jones at the criminal trial and the judge was wrong to have permitted this.

48. Mr Whittam for the prosecution submitted, again in outline, as follows:

(1) There was nothing in the application for the *Norwich Pharmacal* order to suggest that Sally Jones would not be a defendant in criminal proceedings if there was evidence against her (including any evidence in the documents to be produced pursuant to the order) to justify such proceedings.

(2) Sally Jones was advised by experienced criminal solicitors in responding to the application; any experienced criminal solicitor would inevitably have considered and advised her about the possibility that the documents to be produced (if they showed what DAS expected them to show) might incriminate her.

(3) It must, therefore, have been a deliberate decision by Jones not to claim privilege against self-incrimination. Whatever the reason, it is for the person claiming privilege to raise it, not for the applicant for the documents, at any rate in a case where the defendant is legally represented.

(4) In fact a claim for privilege would not have succeeded, either because the documents were pre-existing documents or because Jones would have been required to comply with any order for their production pursuant to section 13 of the Fraud Act 2006.

(5) There is no evidence whatever from Jones to suggest that her agreement to produce the documents was because she was lulled into believing that there would be no criminal proceedings against her by the terms of the application.

(6) The documents produced were provided to DAS by the solicitors acting for both Medreport and Jones, without any indication that they had been produced by Jones as distinct from Medreport. That being so, it had not been demonstrated that the documents had been produced by Jones in response to the order at all.

(7) The *Norwich Pharmacal* order permitted the use of the documents for the purpose of obtaining lawful redress for the wrongdoing identified in the witness statement of Ms McMahon; that included their use in the criminal proceedings against Jones.

(8) In these circumstances there was no unfairness in the use of the documents against Jones.

Decision

49. Broadly speaking we accept the submissions of Mr Whittam which we have summarised above. The passages from the witness statement of Ms McMahon and the skeleton argument in support of the *Norwich Pharmacal* application which we have set out leave no room for doubt that (although it was not a necessary part of the application) DAS considered that there were strong grounds to suspect that Sally Jones was not merely "mixed up" innocently in the wrongdoing of Asplin and Kearns, but was herself a participant in that wrongdoing. In particular, the passages which we have emphasised could hardly have said this more clearly.

50. The application likewise made clear that DAS intended to use the documents produced, if they demonstrated Asplin's and Kearns' beneficial ownership of Medreport, to obtain redress for the wrongdoing, which could extend to criminal proceedings including a private prosecution. There was nothing to say that Sally Jones would not be a defendant to such proceedings if the evidence obtained justified that course. In particular, the statement that compliance with an order would cause no prejudice to Jones must be seen in context. That context was entirely concerned with the fact that because tightly defined specific documents were sought, compliance with any order would be straightforward and not unduly onerous and that, in any event, DAS was prepared to pay for any costs incurred in seeking out the documents. To suggest that it amounted to a statement that Jones would not be a defendant in any future proceedings would take the statement completely out of context.

51. In those circumstances we accept the submission that Jones' solicitors must have considered the question of self-incrimination. Moreover, whatever she told her solicitors, Jones knew that the documents would incriminate her, as they did, because she had been part of the fraud all along. In other circumstances, for example if Jones had been unrepresented or if the application had been made *ex parte*, fairness might have required that the applicant for a *Norwich Pharmacal* order should draw the possibility of a claim for privilege against self-incrimination to the attention of the judge dealing with the application or that any order issued should contain a proviso referring to that privilege. But where, as here, the application was made *inter partes* with experienced criminal solicitors acting and the possibility (at least) of criminal proceedings against the party producing documents was clearly raised, the fact that these things were not done does not in our judgment mean that the use of those documents in the criminal proceedings rendered those proceedings unfair.

52. The fact is that no claim to privilege against self-incrimination was made. In the absence of any evidence to the contrary, the judge was entitled to infer that this was a considered and deliberate decision. It does not matter whether this was because it was thought that any such claim would not have succeeded or because the view was taken that the documents were likely to come out sooner or later anyway or because Sally Jones was reluctant at that stage to claim privilege.

53. In the result, there was no evidence that Jones ever believed that there would be no criminal proceedings against her or that she had been misled by the terms of the *Norwich Pharmacal* application and, as we have already indicated in relation to ground one, the circumstances in which this point came to be taken strongly suggest that she had no such beliefs.

54. We need not decide, therefore, whether a claim for privilege, if made, would have succeeded. Equally, it is unnecessary to decide whether the documents should be regarded as having been produced by Jones as distinct from Medreport.

55. We would make clear, however, that in our view the *Norwich Pharmacal* order permitted the use of the documents produced in any criminal proceedings against Sally Jones. Such proceedings fall within the purposes for which the documents were expressly permitted to be used, namely for the purpose of obtaining lawful redress for the wrongdoing identified in the witness statement of Ms McMahon. An application for permission to use them in the criminal proceedings against Jones was therefore unnecessary.

56. Accordingly the judge was entitled, and in our view was correct, to rule against Sally Jones on the section 78 application to exclude the documents. We have no doubt that the trial was fair and that her conviction is safe.

Conclusion

57. It was for these reasons, which are in essence those of the judge, that we dismissed the appeal. We commend the judge's handling of this complex and difficult case.