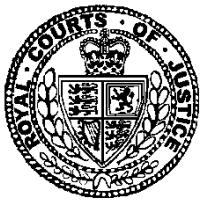

Neutral Citation Number: [2022] EWCA Crim 1254

Case Nos: 202102781 B1 / 202103296 B1

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE
CROWN COURT AT SOUTHWARK
HIS HONOUR JUDGE MILNE QC
T20197030

Royal Courts of Justice
The Strand, London
WC2A 2LL

28 July 2022

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE WALL
THE RECORDER OF LONDON
(His Honour Judge Lucraft QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

Between:

REGINA

Respondent

- and –

ELIE TAKTOUK

Appellant

Timothy Moloney QC and Peter Caldwell appeared on behalf of the **Appellant**
Daniel Bishop appeared on behalf of the **Respondent**

Approved Judgment

LORD JUSTICE STUART-SMITH:

1. On 2 August 2021 in the Crown Court at Southwark, before HHJ Milne QC, the applicant was convicted of the offences which we will detail in a moment.

2. On 23 September 2021, before the same court, he was sentenced in his absence as follows:

a. On Count 1 of the indictment which he had faced, which was an offence of fraud by abuse of position contrary to s.1 and s.4 of Fraud Act 2006, he was sentenced to seven years' imprisonment.

b. On Counts 2 to 7, 9 and 11, which were offences of fraud by false representation contrary to ss. 1 and 2 of the Fraud Act 2006, he was sentenced on each count to five years' imprisonment concurrent.

c. On Counts 8 and 10, which were offences of using a false instrument contrary to s.3 of the Forgery and Counterfeiting Act 1981, on each count he was sentenced to three years' imprisonment concurrent.

3. The total sentence was therefore seven years' imprisonment. Other relevant orders were made, including disqualification from acting as a company director for ten years pursuant to s.2 of the Company Directors Disqualification Act 1986. We shall say a little more about the offences in a while.

4. He now renews his application to appeal both against conviction and against sentence, permission having been refused on the papers by the single judge.

The Facts

5. The case arose out of a failed project for the purchase and redevelopment of a flat at 33 Ennismore Gardens in Knightsbridge. It was purchased for £7.75 million in February 2015. Part of the purchase price was to be funded by a mortgage. The balance was to be provided by those backing the project either in person or through SPVs: of that balance, 42 per cent was to be provided by the Noel family, 50 per cent by the applicant's father, Mr Youssef Taktouk, and 8 per cent by Mr Pierre-Adrien Colliac, who had introduced the project to the Noels. It was important to the Noels that, as the introducer, Mr Colliac should take some of the risk of the project to provide assurance of his integrity. Unbeknown to the Noels, Mr Colliac's contribution was funded by the applicant, which proved to be a source of dispute between the Noels and Mr Colliac when they discovered what had happened.

6. The applicant was meant to administer and run the project, for which he was to be paid five per cent of the profits on resale of the flat. In the event, there were no profits. The freeholder obtained an injunction in 2015 prohibiting the continuation of the works, because they had been undertaken without permission. The project defaulted on its mortgage payments. The final denouement was that the flat was sold at auction in 2017 for £5.5 million, as a result of which the Noels lost their entire investment. On making enquiries, the Noels formed the view, subsequently endorsed by the decision of the jury, that the applicant had been guilty of persistent fraud and deception and in his running of the project.

7. In briefest outline, evidence had emerged that he had made cash calls to the investors based on forged documents or given reasons that were not true and that he had

diverted investors' funds to his own private use, spending their monies on his personal rent, private school fees and a smart car. It was also alleged that he had misrepresented the mortgage arrangements to the investors. Having failed to get normal mortgage finance, he obtained expensive bridging finance without informing the investors, either in advance or when he had done so.

8. The defence case, while accepting that the applicant had mixed investors' money with his own private funds, was that he had access to substantial family wealth and discharged the project's obligations as and when necessary and without dishonesty. He alleged that Mr Adrian Noel had known what was going on and the true state of progress of the development works as a result of his involvement and that he was not misled by anything the applicant said or did. To the extent that they said otherwise, he said they were lying. He also said that he had relied upon Mr Colliac to keep the Noels informed. The central issue for the jury therefore was whether the applicant was dishonest.

9. It is only necessary to refer briefly to the facts underlying the applicant's alleged offences.

10. The allegation on Count 1 was that funds provided by the Noels to the applicant or his company for the purposes of the redevelopment were transferred to the applicant's personal account where they were used for his own personal expenditure. Under Count 2 the allegation was that the applicant had misled the Noels into believing that the purchase of the property would be financed through a mortgage obtained from the National Bank of Abu Dhabi and that 12 months' advanced interest had been paid to that bank. Instead, the applicant had taken high interest bridging finance with Omni Capital, which incurred some £61,000 of interest per month.

11. The allegation under Counts 3 to 7 was that funds were provided by the Noels to meet the costs of the redevelopment as a consequence of a series of fraudulent misrepresentations by way of cash calls made by the applicant. Some of the applicant's requests for cash were supported by forged or fictitious invoices.

12. Count 8 related to the applicant providing Byblos Bank with a false invoice from a supplier in support of a request for the sum of £2,484 to be paid from his father's bank account.

13. Count 10 related to a schedule of payments purportedly made on the project which was sent to Mr Alain Sierro, an agent of the Noels who had conducted an audit of the project. The false documents were provided to conceal the applicant's wrongdoing.

14. Under Count 9 it was alleged that when it became apparent that there were a number of issues with the redevelopment and its progress, discussions turned to potential share sales. During the course of those discussions concerning the value of the investment, the applicant made a series of false representations regarding refunds allegedly owing to EG Property (EG standing in this case for Ennismore Gardens) and non-refundable payments that had been made towards the redevelopment.

15. On Count 11 it was alleged that when the Noels began to seek information concerning the management of the redevelopment and how the funds they had paid had been utilised, they were provided with false information and documentation by or on behalf of the applicant. This included false invoices from the contractors and false bank documentation.

16. There are two grounds of appeal against conviction, in respect of which leave was refused by the single judge. The application is now renewed.

a. Ground 1 is that the judge erred in refusing to stay the proceedings as an abuse of process. The private prosecution had been commenced in order to exert pressure on the applicant's father to pay a financial demand in settlement of the dispute relating to the failed development. The motive was to cause the applicant's father to reach a settlement in order to spare the applicant from the risk of prosecution.

b. Ground 2 is that the judge erred in ruling that no questions could be asked and the applicant could not give evidence concerning:

1) the fact that the case was a private prosecution and

2) the facts surrounding a settlement agreement between the prosecutor companies and a former defendant in proceedings, Mr Colliac.

Conviction Ground 1

17. The prosecution before the court below was a private prosecution brought by the corporate vehicles for the Noels. Mr Moloney QC, who appears for the applicant before us and who appeared in the court below, submits that there is:

> "No doubt that the intention of the Noels ... was to first use the threat of prosecution and later, just as seriously, to use the prospect of proceedings being discontinued against [the applicant] as an inducement to reach a settlement with the prosecutor companies."

18. The high watermark of the evidence in support of this submission, as it was below, is the attendance note of a telephone call on 12 April 2017 between Mr Alain Sierro, who was then acting as a representative of the investors in and about the recouping of their lost outlay, and two solicitors from EMM, who would in due course act in the prosecution. The telephone call happened some 21 months before these proceedings were issued. It appears from the contents of the note that Mr Sierro was providing the solicitors with introductory information with a view to their acting going forward. In the course of the attendance note, Mr Sierro was recorded as saying:

> "... [The applicant] does not have any money. The father has the money. The objective is to force the father to buy him out to force him to save his son by putting enough pressure on him. The only thing he will understand is a criminal charge. We have discussed this for 12 months. We 99 per cent think that he stole the money. The only way the father will step in is if his son is in big trouble and is facing bankruptcy. That is the only way the father will step in."

19. A little later he is recorded as saying:

> "The critical thing is we want to have [the applicant] on his knees -- we want a criminal case against him/his father/his brother. We want to force the father to buy him out."

20. It should immediately be noted that the solicitors gave entirely proper advice about how to go about commencing a criminal investigation and what steps might follow. They made clear that:

> "We can't say that you have to pay us money otherwise we will prosecute you. That would be blackmail."

21. Mr Moloney relies upon four other documents in particular. We have read them all in their entirety. None of them comes close to what Mr Sierro is recorded as saying. It is not necessary to set them out extensively in this judgment: one example makes the point. In an attendance note of a settlement meeting held on 8 February 2018 between representatives of Mr Youssef Taktouk and representatives of the Noels, the representative of the Noels is recorded as having said:

> "Our clients do not want to use the 'criminal proceedings' to try and reach settlement. What they want more than anything is for [the applicant] and [Mr Colliac] to pay for what they have done."

22. Before the court below there was no significant difference between the parties about the applicable law. The court was referred to the leading authorities on limb two abuse of process, including *R v Grant* (Edward) [2005] 2 Crim App R 28; *R v Maxwell* [2010] UKSC 48; *Warren v Attorney General of Jersey (PC)* [2002] Crim App R 29, and *R v Crawley* [2014] EWCA Crim 1028, both for the statements of principle they contain and for their facts as illustrating the proper application of established principles. For present purposes, it is sufficient to say that we respectfully accept and adopt the summary set out by Sir John Dyson (the Master of the Rolls) in *Maxwell* at para.13 of the decision of the Court of Appeal, subsequently endorsed by the Supreme Court in *Grant.* The touchstone is whether the court concludes that in all the circumstances a trial will offend the court's sense of justice and proprietary. We are in no doubt that oppressive conduct by a prosecutor may offend the court's sentence of proprietary. The court below was also referred to the relevant leading authorities on the effect of motive in private prosecutions, including *R v Bow Street MSM, ex p South Coast Shipping Company Limited* [1993] QB 645: *R (Dacre) v City of Westminster Magistrates' Court* [2009] 1 WLR 2241 and *R(G) v S and S* [2017] EWCA Crim 2119.

23. The prosecution response to the application in the court below, as before us, was that the applicant was trying to place a weight upon the recorded statement of Mr Sierro that it would not and could not bear. He took no part in the decision-making process concerning the bringing of the private prosecution and even if what he had said had accurately reflected the Noels' thinking at the time, which was not to be taken for granted or assumed, the subsequent evidence showed that there was no impropriety in the motives or actions of the Noels in bringing the private prosecution on the basis of the evidence that they then had.

24. In a careful written judgment, the judge correctly identified the principles to be applied and the nature of the applicant's submissions. He set out extensively the materials upon which the applicant relied and referred to other materials which were included in the papers before us, but do not require separate mention here. The judge accepted that Mr Sierro's remarks could not be dismissed as irrelevant and he referred to other evidence that in his view could lend some support to the defence application. However, he balanced those materials against other materials which in his view tended in the opposite direction. He concluded that this was a case of mixed

motives and that the desire to achieve a settlement could not be taken in isolation. The core of his reasoning is at para.71 to 75 of his ruling where he said as follows:

> "71. In light of the above, to succeed in their argument the defence would therefore need to show that the motive for settlement was:
>
> **a)** a primary motive and one which is so unrelated to the proceedings that it tenders it a misuse or an abuse of the process (as per In Serif Systems - para.59 above);
>
> **b)** 'an oblique motive which is so dominant and so unrelated to the proceedings that it tenders them an abuse of process' (as per S&S at para 61 above);
>
> **c)** Even if and 'indirect or improper motive' it would have to be one that rendered the conduct 'truly oppressive' (as per Dacre - para.60 above), or
>
> **d)** That the 'proceedings [were] tainted by mala fides or spite or some other oblique motive (as per R. V. D - para.62 above).
>
> 72. I have considered each in turn. Given the nature of the close business relationship between the parties, the family ties and nature of the resolution of the business it is unrealistic to say that the primary motive was 'so unrelated to the proceedings' so as to render it a misuse, nor was it an 'oblique' one or 'so dominant' as to render the process an abuse. The desire for compensation for loss suffered and the wish to see justice done sit readily alongside one another, and the combination would be a commonplace in crimes involving property.
>
> 73. Even if one categorises the motive of achieving a settlement as indirect or improper, it would have to render the proceedings 'truly oppressive'. The latter wording in this case must, it seems to me, refer to oppression against the defendant - but in this case, there is none. There would be oppression to him if this were a prosecution commenced with no evidence - but there is evidence aplenty which calls for explanation. Indeed the only party who might complain of oppression would be [Youssef Taktouk] (who is not a witness in the case). Had the alleged improper motive achieved its alleged aim, [the applicant] would have benefited without cost to him by having the investigation or prosecution withdrawn, despite the evidence previously mentioned.
>
> 74. Finally in this regard I cannot see that the prosecution, based as it is upon strong prima facie evidence of dishonesty by [the applicant], can in any way be categorised as tainted by mala fides or spite.
>
> 75. Accordingly in my judgment the very high bar set for demonstrating second limb abuse of process is not met in this case

> and I therefore do not accede to the application to halt the case on that basis."

25. In the light of this finding, the applicant's submission on the present appeal amounts to a reiteration of his case below and the submission that the prosecutor companies in the present case:

> "placed little value in the prosecution of [the applicant] above the leverage that it afforded in seeking to extract money from [the applicant's father]. Their decision to prosecute was merely a means to achieve that end."

26. Refusing permission, the single judge said:

> "There is not error of principle in the judge's ruling or omission of any relevant piece of evidence. The ruling to dismiss the application was one that the judge was entitled to make."

27. We agree. We would go further. On the material that was available to the judge and before us, his conclusion was clearly right for the decisions he gave. Despite Mr Maloney's best efforts, ground 1 is in our judgment unarguable. At its best, this was a case of mixed motive falling far short of satisfying the principles that are firmly established and that the judge clearly had in mind. The application to renew ground 1 is therefore dismissed.

Ground 2

28. On day ten of the trial, by which time, subject to being recalled, Mr Adrien Noel had completed his evidence, Mr Moloney raised the issue that is now covered by ground 2. That is not a criticism of the timing, for which there were good reasons on which we need comment no further. As we have already indicated, the first question was whether Mr Moloney could refer to and rely upon the fact that the prosecution was a private prosecution as casting doubt on Mr Noel's credibility as a witness or the voracity of the allegations against the applicant. The judge held that he could not, because the fact of the prosecution being private was irrelevant to the truth or falsity of the allegations against the applicant.

29. Mr Moloney now submits that the good faith of the Noels in their conduct of the prosecution was central to his case, because it went to their credibility. The judge rejected that submission and he was right to do so. Time and again, he pressed Mr Moloney to identify any lies that flowed from Mr Noel's motive in wanting to achieve a settlement, assuming that it was a case of mixed motives. Time and again, as the transcript shows, Mr Moloney was unable to identify a link between any motivation on the part of Mr Noel, which the judge had ruled not to be abusive, and the evidence he may have given. The most that Mr Moloney could identify was that if the applicant had paid the money that the Noels wanted to recoup, the proceedings may have stopped there.

30. Refusing permission, the single judge said:

> "The abuse of process argument having failed the fact that this was a private prosecution without more is irrelevant."

We agree.

31. Turning to the second limb of ground 2, the judge held that there was no relevant connection between the fact that the Noels had settled with Mr Colliac but had not settled with the applicant. Refusing leave, the single judge said:

> "The position regarding the terms of a settlement against the former co-defendant were remote from the issues in contest at trial."

32. Once again, we agree. The issues raised by the proceedings against Mr Colliac were quite different and much more limited than the allegations made against the applicant. The submission that something might turn up if the applicant were allowed to investigate the reasons or motivation behind the settlement with Mr Colliac is at best an invitation to go fishing. It was rightly declined by the judge. We decline it too.

33. For these reasons, the renewed application to appeal against conviction must be dismissed.

34. Turning to sentence, we have identified the sentence passed by the judge already. In the course of carefully constructed sentencing remarks, the judge considered all the factors that he was required to consider in accordance with the relevant provisions of the fraud guideline.

35. Although there was some medical evidence before him, he correctly identified that there was none that excused the applicant's conduct or suggested that the applicant's responsibility was reduced by reason of mental health issues. The most informative evidence was to the effect that he is inadequate and submissive in aspects of his character, an assessment with which the judge agreed.

36. The applicant advances three potential grounds in support of his renewed application for permission to appeal against sentence. They are as follows. That the judge erred in his application of the sentencing guideline in that:

a. Evidence of the applicant's personality and mental health should have been considered by the judge when evaluating culpability. The applicant's level of culpability should have been at a lower point in the range.

b. There was no proper basis upon which the judge could have risen within the category range for the offence and, accordingly, no reasons to set off important features of the applicant's personal mitigation against that consideration.

c. The judge failed to take account of the applicant's personal mitigation.

37. We can deal with each submission shortly: none has any merit. The judge expressly took the applicant's personality and mental health into account when assessing culpability. He rightly has identified the multiple factors indicating higher culpability to be:

a. abuse of a position of trust and responsibility;

b. the offences were in some respects sophisticated and involved a degree of planning, and

c. the fraudulent activity was conducted over a sustained period. He had already identified, with good reason, that the most worrying feature of that conduct was the fact that the applicant misled investors about the development in order to obtain their cash advances, which he then paid into his personal accounts, moved about in those accounts, and then used substantially for his own personal expenditure. This finding precludes any suggestion, only faintly made by Mr Maloney in his written submissions and not renewed in his oral submissions, that the offending was no more than an attempt to keep the development show on the road.

38. The multiple features of higher culpability necessarily exercised an upward pressure when taken into account in assessing where within the range of sentences the judge should settle. Similarly, when considering harm, the judge rightly identified that harm A category 1 indicates a starting point based on a fraud of £1 million. Here the cumulative effect of the applicant's frauds was to deprive the Noels of some £2.5 million. There was also evidence, which the judge identified, of non-pecuniary harm to both Mr Noel and to a Mr Farrah. Those multiple features of harm would also properly exercise an upward pressure on the correct level of sentence to be imposed by the court.

39. The submission that there was no basis for going upwards from the starting point of seven years for a single offence is therefore unarguable, even having regard simply to Count 1. In fact, of course, Count 1 did not stand alone and the sentence on Count 1 had to reflect the criminality involved in the other counts for which concurrent sentences were imposed. It is equally unarguable that the judge paid no attention to the applicant's personal mitigation. On the contrary, despite the absence of any solid evidence suggesting that his mental health issues may have contributed to his offending, the judge gave him the benefit of any doubt and sentenced him on the basis that his mental health issues might be worse than the evidence suggested. On that basis alone, he reduced the overall sentence which would otherwise rightly have been significantly above the seven year starting point.

40. In our judgment, the sentence imposed by the judge was not manifestly excessive and shows no error of principle. It was comfortably within the range and it was open to the judge for the reasons he gave. The renewed application for permission to appeal against sentence is therefore dismissed.