Neutral Citation Number: [2024] EWHC 1781 (Admin)

Case No: AC-2023-LON-003491

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 July 2024

Before :

LORD JUSTICE WILLIAM DAVIS
and
MR JUSTICE JOHNSON

- -

Between :

The King **on the application of** **BAKHTIAR ABBASI**	**Claimant**
- and -	
THE CROWN COURT AT SOUTHWARK	**Defendant**
-and-	
(1) ASIM SIDDIQUI **(2) RAED SIDDIQUI**	**Interested Parties**

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- -

Rupert Bowers KC (instructed by **Berkeley Square Solicitors**) for the **Claimant**
David Perry KC and **Catherine Brown** (instructed by **Edmonds Marshall McMahon**) for the **Interested parties**

Hearing date: 9 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WILLIAM DAVIS

Lord Justice William Davis and Mr Justice Johnson:

This is the judgment of the court.

Introduction

1. The claimant was convicted on 16 May 2023 in the Crown Court at Southwark of fraud and associated offences. The convictions followed a private prosecution by the interested parties. Because the interested parties made a request pursuant to section 6 of the Proceeds of Crime Act 2002, the Crown Court commenced confiscation proceedings.

2. In the course of the confiscation proceedings the interested parties applied for and were granted witnesses summonses against eight banks at which the claimant and companies associated with him held accounts. Each summons required the bank to produce in evidence bank records relating to named account holders.

3. The claimant applies for permission to apply for judicial review of the decisions of the Crown Court to issue the witness summonses. He argues that the Crown Court had no jurisdiction to make those decisions.

4. On 9 February 2024 Mr Justice Sweeting ordered the application for permission to be considered in a "rolled-up" hearing with the substantive claim to be determined forthwith in the event of permission being granted. At the hearing we heard full argument on the substance of the claim. As is conventional the Crown Court was not represented. The claimant was represented by Rupert Bowers KC. The interested parties were represented by David Perry KC and Catherine Brown. We are grateful to all counsel for their written and oral submissions.

5. At the conclusion of the hearing we announced our decision, namely that the claim for judicial review was not arguable and that we refused permission to apply for judicial review. We said that we would give our full reasons in writing. These are those reasons.

The proceedings

6. This application was not the first occasion on which the relationship between the claimant and the interested parties has been the subject of litigation before this Court. In 2019 the interested parties obtained the grant of a summons from Westminster Magistrates' Court in relation to the offences of which the claimant in due course was convicted. The claimant then applied to set aside the summons. On 24 January 2020 the magistrates' court set aside the summons and stayed the proceedings. The interested parties applied for judicial review of that decision. On 17 June 2021 this Court granted the application. The decision of the magistrates' court was found to be wrong. The case was remitted to the magistrates' court with a direction to proceed in accordance with the judgment handed down: see *R (Siddiqi) v Westminster Magistrates' Court* [2021] EWHC 1648; [2021] 2 Cr App R 25. At [6] to [8] of the judgment the alleged fraudulent activity of the claimant was set out in summary form. The offences of which the jury were satisfied were considered in greater detail by the Court of Appeal Criminal Division when the claimant appealed against his sentence:

R v Abbasi [2024] EWCA Crim 457 at [4] to [12]. It is not necessary for our purposes to set out matters in any greater detail.

7. Following his conviction the interested parties on 17 May 2023 served a sentencing note. This indicated that orders in respect of confiscation and compensation were sought. The Crown Court was asked to postpone the making of any compensation order until the confiscation proceedings had been determined. On 18 May 2023 the claimant was sentenced to a total sentence of 12 years' imprisonment. At the same hearing the trial judge set a timetable for the confiscation proceedings with the application for compensation to be adjourned to the conclusion of those proceedings. The first step in the timetable was for the claimant to comply by 29 June 2023 with an order made pursuant to section 18 of the Proceeds of Crime Act 2002. This required the claimant to provide information in a witness statement including a signed statement of truth. The information included particulars of all bank accounts held in the claimant's name or in relation to which he was an authorised signatory.

8. On 29 June 2023 the claimant served a witness statement. He provided information for the period of six years prior to the date of the statement. The interested parties objected on the basis that the statement did not provide the information required. The order had stipulated that the relevant period was six years prior to the date on which the claimant had been charged i.e. February 2019. On 12 July 2023 the interested parties served applications for witness summonses against various banks. The applications were made pursuant to section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965. Each application was directed at the manager of the relevant bank and sought production of documents. The description of the documents in each application was the same. Particular account numbers were identified where they were known. By way of example the terms of the application in relation to Bank of Scotland were:

> "THIS IS AN APPLICATION FOR AN ORDER THAT A MANAGER OF BANK OF SCOTLAND PLC, MUST PRODUCE IN EVIDENCE BANK STATEMENTS, ACCOUNT OPENING DOCUMENTS, TRANSFER DOCUMENTS AND FULL RECORDS OF CLIENT CONTACT THAT RELATE TO ACCOUNT HOLDERS:
>
> BAKHTIAR ABBASI (DATE OF BIRTH 14/08/1975)
>
> GERRARDS MOTORS LTD (COMPANY NO. 07671498)
>
> GERRARD MOTORS LTD (COMPANY NO. 09877795)
>
> NEW EXCELSIOR DRY CLEANERS LTD (COMPANY NO 07315109)
>
> SILVER SPOON (UK) LTD (COMPANY NO 10460711)
>
> NEW SILVER SPOON LTD (COMPANY NO 08171144)
>
> NEW GLOBAL INVESTMENTS UK LTD (COMPANY NO 08999046)

> TO INCLUDE BUT NOT LIMITED TO THE FOLLOWING ACCOUNTS:
>
> 1. HALIFAX ACCOUNT NO. 11576063 SORT CODE 111480 (Bakhtiar Abbasi)
>
> 2. HALIFAX ACCOUNT NO. 01233367 SORT CODE 111480 (Children's Saver)
>
> TOGETHER WITH ANY OTHER ACCOUNTS HELD BY THE SAME ACCOUNT HOLDERS (TO INCLUDE ANY ACCOUNTS NOW CLOSED) FROM 6 FEBRUARY 2013 UP TO AND INCLUDING THE DATE OF SERVICE OF THE ORDER."

In every application the circumstances of the offending were set out. The application indicated that the proposed witness had not been served with the application. It was stated that there had been no delay in making the application.

9. The applications were considered on 24 July 2023 by the trial judge. He issued witness summonses in the terms sought by the interested parties. To a substantial extent there was prompt compliance with the summonses. On 10 August 2023 the interested parties served a statement of information in accordance with section 16(3) of the Proceeds of Crime Act 2002. The statement of information set out matters which had been gleaned from the bank records obtained as a result of the witness summonses. Appendix 5 to the statement of information consisted of bank statements, most of which had been obtained by that route.

10. On 12 August 2023 the claimant's solicitors wrote to the solicitors acting for the interested parties. They asked inter alia how the bank statements had been obtained and the legal basis upon which they had been obtained. On 14 August 2023 the interested parties' solicitors replied. They stated that the bank statements had been provided by the relevant banks pursuant to witness summonses granted in relation to that material. On 5 September 2023 the claimant's solicitors issued an application for further directions. One issue to which the application was directed was disclosure of all applications for witness summonses (save for the applications made prior to the trial), of the summonses as issued and of any note of the hearing before the judge and/or his reasons for issuing the summonses. On 11 September 2023 the solicitors for the interested parties responded to the application for further directions. In relation to disclosure they said that the request for disclosure had no legal basis. They submitted that, if the claimant wished to set aside the witness summons, he should make an application to the court. On 12 September 2023 the claimant's solicitors asked the court to list their application for further directions. It was hoped that the application would be listed on 29 September 2023. In the event that date was inconvenient for all parties.

11. On 17 October 2023 the interested parties' solicitors sent to the claimant's solicitors copies of the applications they had made for witness summonses in respect of banking material. They said that the applications had been considered on the papers. The following day the claimant's solicitors asked for copies of the witness summonses as issued by the court. Copies were provided on that day. On 16 November 2023 the claimant's solicitors asked for the sealed orders made by the court, the copies of the

summonses provided a month before being unsealed with no details of the judge. Again, the interested parties' solicitors replied on the same day. They said that the copies were the versions as sent to them by the court. On 20 November 2023 the claimant filed the claim for judicial review.

The claimant's grounds

12. The claimant's primary case is that the Crown Court had no jurisdiction to issue the witness summonses. Section 2(1) of the 1965 Act requires the Crown Court to be satisfied that the person to whom the summons is to be directed is likely to be able to produce a document "for the purpose of any criminal proceedings before the Crown Court". The purpose of section 2 is not the same as an application for a production order under the Proceeds of Crime Act 2002 or the Police and Criminal Evidence Act 1984. Those orders are only available to 'appropriate officers' (the 2002 Act) or 'constables' (the 1984 Act). Private prosecutors such as the interested parties cannot apply for such orders. It is said that, in respect of confiscation proceedings, there are policy reasons why private prosecutors cannot apply for a production order. A private individual will not be subject to the requirement to act compatibly with Convention rights imposed by section 6 of the Human Rights Act 1998. Draconian orders cannot be obtained by a private individual. By way of an example a private individual cannot obtain a search warrant. In *R (Virgin Media Limited) v Zinga* [2014] EWCA Crim 52 [2015] 1 Cr App R 2 the Court of Appeal held that a private prosecutor can bring confiscation proceedings. However, at [32] the court went on to say this:

> "It is, in our view, clear that POCA makes a distinction between those who can investigate and those who can prosecute. The fact that a prosecutor cannot investigate does not impair the ability to participate fully in confiscation proceedings, provided that an appropriate officer, as defined in POCA, assists that prosecutor by exercising the various investigatory powers."

If section 2(1) of the 1965 had been a route open to a private prosecutor to exercise investigatory powers, the court would have said so.

13. The purpose of section 2 is to allow evidence to be placed before a court for a particular purpose. "Criminal proceedings" as referred to in the 1965 Act relate only to the determination of the criminal charges sent to the Crown Court. The claimant relies on what Lord Bingham of Cornhill said in *R v H* [2003] UKHL 1 [2003] 1 WLR 411 at [19] in support of that proposition. His submission is that confiscation proceedings are incidental to the determination of a criminal charge. The same applies to the sentencing process. Were section 2 to be a proper means by which to obtain material following conviction, there would have been no purpose in the enactment of the provisions of the 2002 Act relating to production orders.

14. The claimant points to procedural failures in the process of application for the summonses. It is said that the interested parties failed to comply with the relevant Criminal Procedure Rules. The Rules provide a particular regime where the application relates to confidential material as was the case here. The interested parties did not comply with that regime. Moreover, the summonses as issued were substantively defective. They did not name the Crown Court. They did not require the witness in each case to attend at a specific time and place. With one exception the

summonses were not directed at a named individual. The summonses bore a contempt warning which would have been impossible to enforce. The summonses as issued were not summonses at all. All of these matters show that the Crown Court acted without jurisdiction.

15. The claimant's secondary arguments relate to the timing of the application for the witness summonses and to the parties on whom the application should have been served. As to timing, the claimant's argument is that the 1965 Act requires an application to be made as soon as reasonably practicable after service of the papers following sending for trial. It is said that usually a confiscation investigation proceeds alongside the substantive criminal proceedings. That did not happen here. The application for the witness summonses was not made as soon as reasonably practicable. In relation to service, the proposition is that the Crown Court should have directed service of the applications for the summonses on the claimant so that he could respond. There was no reason why that could not or should not have been done.

The response of the interested parties

16. The submission of the interested parties is that there are three procedural bars to the application for permission to apply for judicial review. First, the claim is out of time. The decision to issue the witness summonses was taken on 24 July 2023. The claimant was aware by 14 August 2023 that witness summonses had been issued. In the application of 5 September 2023 the claimant's solicitors had asserted that they considered that there were grounds to set aside the summonses. If it were to be said that the claimant required copies of the summonses in order to apply for permission to apply for judicial review, the claimant had the copies on 18 October 2023. The application for permission was dated 20 November 2023, namely nearly five weeks later. In all of those circumstances, the delay in making the claim was significant and sufficient in itself to require this Court to refuse permission.

17. Second, the claim concerns a matter relating to trial on indictment. As such it falls outside the supervisory jurisdiction of this Court. The only way in which a decision of the Crown Court in respect of a matter relating to trial on indictment can be subject to judicial review is where the Crown Court has acted outside its jurisdiction. The jurisdictional error must be of such gravity as to take the case out of the jurisdiction of the Crown Court. In this instance, there was no jurisdictional error. When the 1965 Act refers to "criminal proceedings", that does not have some limited meaning restricting the power to issue a witness summons to the trial process up to the point of conviction but no further. If there were procedural errors, they could not found an argument that the Crown Court had acted in excess of its jurisdiction.

18. Third, judicial review is a remedy of last resort. Where there is an alternative remedy available, judicial review will not be appropriate. In this instance, the claimant could and should have applied to the Crown Court to set aside the summonses. Provision is made for such an application in the Criminal Procedure Rules. The claimant's solicitors had recognised the possibility of the same in the application of 5 September 2023.

Discussion

Matter relating to trial on indictment

19. Section 29(3) of the Senior Courts Act 1981 provides:

> "In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make mandatory, prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court."

We are satisfied that this claim concerns a matter relating to trial on indictment. As such the jurisdiction of this Court prima facie is excluded. In *R v Smalley* [1985] AC 622 the House of Lords was concerned with the forfeiture of a surety by the Crown Court in relation to a defendant who had failed to surrender to bail. The conclusion was that such forfeiture did not fall within the exclusionary provision. Estreating a recognisance was not something which could affect the conduct of a trial in any way. It was tangential to the trial process. Providing the party who had provided the surety with the remedy of judicial review would not involve any interference with the progress of the criminal proceedings. Were judicial review not to be available, that party would have had no avenue to challenge the forfeiture even if it was legally flawed.

20. At 642E Lord Bridge explained the extent of the exclusionary rule:

> "….section 29(3) is apt to exclude….judicial review in relation to the verdict given or sentence passed at the conclusion of a trial on indictment, both of which are subject to appeal as provided by the Criminal Appeal Act 1968."

Lord Bridge did not refer to confiscation proceedings. That is unsurprising. Such proceedings were not known to English law in 1985. They were first introduced by the Drug Trafficking Offences Act 1986. It is well settled that confiscation proceedings form part of the sentencing process: *R v Zinga* [2014] 1 WLR 2228. The defendant who is made the subject of a confiscation order has a right of appeal to the Court of Appeal Criminal Division. A decision made in the course of confiscation proceedings may be the subject of an appeal if it affected the propriety of the confiscation order. To allow judicial review of such a decision would be liable to interfere with the conduct of the confiscation proceedings.

21. In *Re Sampson* [1987] 1 WLR 194 the House of Lords had to consider whether an order by the Crown Court that an acquitted defendant was to pay £250 towards the cost of his defence fell within the exclusionary rule. That order was not one in respect of which there was any right of appeal. Nonetheless, it was determined that the Crown Court had exercised its jurisdiction in a matter relating to trial on indictment. Lord Bridge explained the reasoning at 196F:

> "….certain orders made at the conclusion of a trial on indictment are excluded from judicial review as 'relating to trial on indictment' not because they affect the conduct of the trial, but rather because they are

> themselves an integral part of the trial process. This is obviously true of the verdict and sentence. It is equally true….of certain orders for the payment of costs…"

This reasoning applies to the issue of witness summonses in the course of confiscation proceedings. Such issue is an integral part of the trial process in its wider sense i.e. including sentencing.

22. In his skeleton argument, Mr Bowers argued that the claim is not excluded by section 29(3) because the trial had concluded and the claimant had been sentenced. There was no right of appeal in relation to the witness summonses under challenge. This argument fails for two reasons. First, the confiscation proceedings continue. No confiscation order has been made. Those proceedings form part of the sentencing process. Decisions within those proceedings may be the subject of appeal insofar as they affect the validity of any confiscation order. An order made by reference to witness summonses improperly issued could be open to challenge. Second, as set out in *Sampson*, the order made by the trial judge in relation to the issue of witness summonses was an integral part of the trial process.

23. We were referred to *R (T.B.) v Stafford Crown Court* [2006] EWHC 1645 (Admin) [2006] 2 Cr App R 34. The claimant was the 15 year old principal witness in a case where the defendant was charged with serious sexual offences against her. She had been receiving psychiatric treatment in the months leading up to her trial. The defendant applied for a witness summons directed to the relevant NHS Trust to produce the young girl's medical records. The Trust objected to the issue of the summons in a PII hearing. The trial judge ordered disclosure of the records as being relevant to the witness's credibility. The trial proceeded. The defendant was convicted. However, judicial review of the decision to order disclosure was sought by the young witness. The application was for a declaration that she was entitled to service of the application for the witness summons and to a right to make representations as to what order for disclosure should be made. This Court made the declarations for which the witness had asked.

24. In relation to the effect of section 29(3), Lord Justice May explained the position at [14] of his judgment:

> "No party before the court suggests that the application is incompetent by virtue of s.29(3) of the Supreme Court Act 1981. This provides for the powers of the High Court to make mandatory, prohibiting and quashing orders in relation to the jurisdiction of the Crown Court, "other than its jurisdiction in matters relating to trial on indictment". Speaking generally, this limitation is designed to prevent trials on indictment being delayed by challenges in the nature of interlocutory appeals. If the Crown Court makes an error and the defendant is convicted, he can appeal after conviction to the Court of Appeal Criminal Division. The present claim will have no such effect. It is not brought by a party to the Crown Court proceedings. It is not seeking a mandatory, prohibiting or quashing order, but declarations as to the claimant's rights."

It follows that no argument was raised before this Court as to the nature of the exclusionary rule. *Smalley* was not cited. It seems to us that this decision should be restricted to its own unusual facts. The claim for judicial review was made by a witness rather than a party to the criminal proceedings. The remedy sought was purely declaratory. The judicial review proceedings could not have had any effect on the trial. The reasoning is not applicable to the facts of this case.

Crown Court acting outside its jurisdiction

25. The issue then is whether the claimant can avoid the exclusionary effect of section 29(3) because the Crown Court had no jurisdiction to issue the witness summonses. There is no doubt that, where the Crown Court purports to exercise a power but it lacks jurisdiction to exercise that power, this Court may judicially review the Crown Court's order even where the order is made in relation to trial on indictment. The exposition of the relevant principles in *R (TM Eye) v Southampton Crown Court* [2021] EWHC 2624 (Admin) [2022] 1 Cr App R 6 at [68] to [73] sets out the position with conspicuous clarity. We cannot improve on what the court said in that case which also involved a private prosecution. We summarise the principles as follows: if the judge in the Crown Court has no jurisdiction to make the order they purport to make, the decision may be amenable to judicial review; the jurisdictional error must be of substantial gravity; there is a distinction between an order made without jurisdiction and a mistaken exercise of jurisdiction; there will be cases where it is difficult to say which side of the line the decision falls.

26. In this instance the claimant's submission is that the Crown Court's power to issue a witness summons pursuant to section 2 of the 1965 Act ceases once a criminal charge has been determined. If that proposition is correct, the judge in this case clearly acted without jurisdiction. We are satisfied that the proposition is wrong.

27. Section 2(1)(a) of the 1965 Act is in these terms:

> "(1)This section applies where the Crown Court is satisfied that—
>
> (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and
>
> (b) it is in the interests of justice to issue a summons under this section to secure the attendance of that person to give evidence or to produce the document or thing."

It is argued that consideration of further provisions in section 2 of the 1965 Act demonstrates that "criminal proceedings" in this context means the determination of the criminal charge and no more. Reliance is placed on section 2(4):

> "Where a person has been sent for trial for any offence to which the proceedings concerned relate, an application must be made as soon as is reasonably practicable after service on that person, in pursuance of regulations made under paragraph 1 of Schedule 3 to the Crime and Disorder Act 1998, of the documents relevant to that offence."

This subsection is said to show that the application is intended to be used within the trial itself since it refers to the requirement for making the application for a summons "as soon as reasonably practicable" after the service of papers following sending.

28. The claimant also says that subsections 2(9) and 2(10) demonstrate the limit of the power to issue a witness summons pursuant to the 1965 Act. They are as follows:

> "(9) Provision contained in Criminal Procedure Rules by virtue of subsection (8)(c) above may in particular require an affidavit to—
>
> (a) set out any charge on which the proceedings concerned are based;
>
> (b) specify any stipulated evidence, document or thing in such a way as to enable the directed person to identify it;
>
> (c) specify grounds for believing that the directed person is likely to be able to give any stipulated evidence or produce any stipulated document or thing;
>
> (d) specify grounds for believing that any stipulated evidence is likely to be material evidence;
>
> (e) specify grounds for believing that any stipulated document or thing is likely to be material evidence.
>
> (10) In subsection (9) above—
>
> (a) references to any stipulated evidence, document or thing are to any evidence, document or thing whose giving or production is proposed to be required by the witness summons;
>
> (b) references to the directed person are to the person to whom the witness summons is proposed to be directed."

The argument is that these provisions make it clear that the evidence identified in the witness summons must relate to the determination of the charge on which the proceedings concerned are based.

29. We find nothing in the wording of section 2 which supports the notion that "criminal proceedings" has the restricted meaning placed on it by the claimant. Section 2(1)(a) refers to "any criminal proceedings before the Crown Court". That is not restrictive. Rather, it connotes the widest possible meaning of the term. The requirement in section 2(4) is simply that the application for a witness summons must be made as soon as reasonably practicable. What is reasonably practicable will depend entirely on the context. It is not uncommon in substantial criminal trials for the need for a witness summons to become apparent at a late stage of the trial. The application then will be made and the summons granted even if there is no temporal connection between the application and the service of papers after sending. We note the terms of CPR 17.3(1): "A party who wants the court to issue a witness summons, warrant or

order must apply as soon as practicable after becoming aware of the grounds for doing so." The rule does not tie the period of reasonable practicability to the service of the papers. It simply requires the application to be made once there are grounds for making it. Mr Bowers in oral argument said that the investigatory process undertaken with confiscation proceedings in mind can and frequently does begin at an early stage whether as the trial is in progress or before the trial begins. We have no doubt that this is correct. Equally, confiscation proceedings cannot begin until after conviction. In many cases that will be the point at which the gathering of evidence will commence. On the facts of this case, it was not reasonably practicable for the interested parties to apply for the witness summonses until they did. Inter alia, it was only when the information provided pursuant to section 18 of the Proceeds of Crime Act 2002 proved to be inadequate that the interested parties reasonably could be aware of the need to apply for witness summonses.

30. We are satisfied that the proposition that there are policy reasons for preventing a private individual from using section 2 is ill-conceived. The fact that a private individual is not subject to the Human Rights Act 1998 is irrelevant. It is the Crown Court which issues a witness summons. Self-evidently the Crown Court must not act in a way incompatible with any person's Convention rights. The respondent to the claimant's application is the Crown Court. The claimant has not relied on any Convention rights in his application. The argument that the interested parties bent the process in the 1965 Act to a purpose for which it was not intended is baseless. The terms of section 2(1) of the Act are clear. If the Crown Court is satisfied that what is sought is likely to be material evidence in any criminal proceedings, a witness summons will be issued "if it is in the interests justice" to do so. Thus, the Crown Court has to reach an evaluative judgment in relation to the evidence sought and thereafter to stand back and consider the interests of justice. There is nothing in section 2(1) which shows that it was not intended to be used by a party to the proceedings in the course of the sentencing process.

31. We conclude that the claimant can gain no support for his argument by reference to *Zinga* at [32]. In *Zinga* the issue of section 2 of the 1965 Act never arose. The private prosecutor in that case, Virgin Media Limited, at an early stage had entered into an agreement with the Metropolitan Police whereby the police obtained search warrants, arrested the defendant and provided an officer to act as the appropriate officer for the purposes of the Proceeds of Crime Act 2002. There was no reason for the court to turn its mind to the potential use of section 2 of the 1965 Act. The interested parties were not using investigatory powers when they applied for witness summonses. They were seeking to obtain evidence likely to be material in relation to the claimant's criminal conduct and/or his available assets i.e. the relevant issues in the confiscation proceedings. Nothing said by the court in *Zinga* undermines this analysis.

32. Contrary to the submission made on behalf of the claimant, the reference in section 2(9)(a) to "any charge on which the proceedings concerned are based" does not mean that the application can only be made whilst the charge is still in the process of being determined. Section 2(9) simply indicates the factors with which an affidavit may be required to deal if the Criminal Procedure Rules make such provision. CPR 17.3(2) and 17.3(3) are the relevant provisions:

> "(2) A party applying for a witness summons or order must—

(a) identify the proposed witness;

(b) explain—

(i) what evidence the proposed witness can give or produce,

(ii) why it is likely to be material evidence, and

(iii) why it would be in the interests of justice to issue a summons, order or warrant as appropriate.

(3) A party applying for an order to be allowed to inspect and copy an entry in bank records must—

(a) identify the entry;

(b) explain the purpose for which the entry is required; and

(c) propose—

(i) the terms of the order, and

(ii) the period within which the order should take effect, if 3 days from the date of service of the order would not be appropriate."

The rule does not require the application to set out any charge on which the proceedings concerned are based. Even if it did, confiscation proceedings will always be based on a charge or charges. They cannot be commenced in the absence of a conviction on a charge or charges. The applications in this case set out in clear terms the course of the proceedings up to the point at which they were made and the purpose for which the summonses were being sought.

33. Significant reliance is placed by the claimant on *R v H*. That was a case where the accused had been found unfit to stand trial. The accused then was the subject of a hearing pursuant to section 4A of the Criminal Procedure (Insanity) Act 1964 to determine whether he had done the acts alleged in the indictment in respect of which he was not fit to stand trial. The issue considered by the House of Lords was whether this process involved the determination of a criminal charge for the purposes of Article 6 of the European Convention on Human Rights. This was of significance since it was common ground that, if it did, the procedure was not compliant with Article 6. It was determined that the process did not involve the determination of a criminal charge. That was the context of the passage in the speech of Lord Bingham of Cornhill on which the claimant relies:

> "The House was referred to no case in which the European Court has held a proceeding to be criminal even though an adverse outcome for the defendant cannot result in any penalty. It is, indeed, difficult if not impossible to conceive of a criminal proceeding which cannot in any circumstances culminate in the imposition of any penalty, since it is the purpose of the criminal law to proscribe, and by punishing to deter,

> conduct regarded as sufficiently damaging to the interests of society to merit the imposition of penal sanctions."

This passage provides no support for the claimant's argument. *R v H* was concerned with a process far removed from confiscation proceedings in the context of Convention rights. The claimant's submission is that *R v H* is relevant because confiscation proceedings cannot result in a penalty. We do not agree. Any confiscation order will be underpinned by a period of imprisonment in default of payment. Where the order is substantial, the term will be measured in years. Moreover, where the court makes a compensation order, this is regarded as a priority order within the Proceeds of Crime Act 2002. Section 13 of the Act provides for compensation to be paid out of any sums recovered under the confiscation order. A compensation order is part of the sentence of the court. Where such an order is made, it is a penalty.

34. We turn to the subsidiary arguments relating to jurisdiction. The applications were made on the form prescribed for applications made under CPR17.3 and 17.4. It is said that the form prescribed for an application under CPR 17.5 ought to have been used. CPR 17.5(1) provides:

> "17.5.—(1) This rule applies to an application under rule 17.3 for a witness summons requiring the proposed witness—
>
> (a) to produce in evidence a document or thing; or
>
> (b) to give evidence about information apparently held in confidence,
>
> that relates to another person."

35. The form prescribed is readily available on the GOV.UK website. We have been able to compare it with the form used by the interested parties. Insofar as it requires information not specified in the general form, that information was given by the interested parties in any event. Mr Bowers suggested that the form would give a prompt in relation to the discretionary power in rule 17.5 to direct service of the application on the person to whom the evidence relates. As a matter of fact it does not. If there was a procedural error by the interested parties in using the wrong form, it did not affect the jurisdiction of the court to issue the summonses. In fact, we are not persuaded that the wrong form was used. The application was for production of bank records. This fell within CPR 17.3(3). CPR 17.5(5) excludes from that rule an application relating to an entry in bank records. Mr Bowers suggested that the application went beyond entries in bank records when it referred to "full records of client contact". We do not accept that suggestion. The court did not go beyond its jurisdiction.

36. With one exception, the applications were not directed at a named individual. We do not consider that this was of any consequence. The application is required to identify the witness, not to name them. Where the summons is to be directed at an institution, it is sufficient to identify the function and position of the witness within the institution. The summonses did not specify a date or place of attendance of the witness. This did not affect the validity of the summonses. It is commonplace for a summons directed at an institution or corporate body and requiring the production of

documents not to provide for the physical attendance of the witness. The usual outcome of such a summons is the production of the documents without further ado. It is apparent that this was the outcome in this instance.

37. For all those reasons, the Crown Court had jurisdiction to issue the summonses under challenge. In taking that step it was dealing with a matter relating to trial on indictment. That is sufficient to dispose of the claim.

Other issues

38. It is common ground that the claim was made out of time. The relevant decision was made on 24 July 2023. The claim was not filed until 20 November 2023. The claimant's argument is that he did not have disclosure of the relevant documents until a week before the expiry of the 3 month time limit. There has been no explanation from the interested parties as to why they delayed disclosure for about two months after having been asked for copies of the applications and the witness summonses. The interested parties' submission is that the claimant knew by the middle of August 2023 that witness summonses had been issued. The decision to be challenged was made by the Crown Court yet the claimant took no steps to obtain copies of the documents from the court.

39. Taken in isolation the question of extending time is finely balanced. Were it necessary to do so, we would reach a final view on the issue. It is not necessary given the lack of merit in the underlying claim. In the circumstances there is no purpose in extending time.

40. The interested parties argue that there is a further bar to the claim, namely that the claimant had an alternative remedy. CPR 17.7(1)(c) permits a person in the claimant's position to apply to the court for withdrawal of the summons. This can be on the basis that the evidence is not likely to be material evidence or because the person's rights outweigh the reasons for the issue of the summons. The interested parties point out that, in the application for directions served by the claimant on 5 September 2023, it was said in terms that his solicitors considered that there were grounds to set aside the summonses.

41. Mr Bowers argued that this was not a true alternative remedy. At issue were the claimant's proprietary rights. They could not be protected by a withdrawal of the summonses. The Crown Court could not make an order for the delivery up of the material and destruction of any copies.

42. The reality of the situation here was that the summonses had led to the provision of electronic bank records to the interested parties. Some of the records were annexed to the section 16 statement served in the confiscation proceedings. The content of other records were referred to in considerable detail in the body of the statement. The material was used in the calculation of the benefit from criminal conduct. Were the Crown Court on an application to withdraw the summonses to have concluded that they were obtained unlawfully, the court would have had to consider the extent to which the confiscation proceedings could be conducted with the use of unlawfully obtained material. That would be the point of any application under CPR 17.7(1). In real terms that is the point of the claim for judicial review. The claim seeks an order prohibiting the use of any material obtained via the witness summonses.

43. We consider that the claim probably would be defeated by the alternative remedy bar. Since we have determined that we have no jurisdiction to review the orders made by the Crown Court, it is unnecessary to reach a final view on the issue.

Conclusion

44. The Crown Court did not act unlawfully or outside its jurisdiction when it issued witness summonses pursuant to the 1965 Act following applications by the interested parties. Therefore, there is no arguable claim for judicial review of the decision of the Crown Court. That is why we refused permission to apply for judicial review.

45. We heard full argument as to whether, by reference to section 29(3) of the Senior Courts Act 1981, the decision challenged was a matter relating to trial on indictment and whether the decision of the Crown Court to issue witness summonses was in excess of its jurisdiction. Our refusal of permission to apply for judicial review was in the context of a "rolled-up" hearing. In those circumstances we give permission for this judgment to be cited as authority on the issues in respect of which we heard full argument.