Neutral Citation Number: [2020] EWHC 1529 (Admin)

Case No: CO/2528/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2020

Before:

LORD JUSTICE HOLROYDE
MRS JUSTICE THORNTON DBE

- -

Between:

THE QUEEN on the application of MARIOS PETER KOMBOU	**Claimant**
- and -	
THE CROWN COURT AT WOOD GREEN	**Defendant**

LONDON BOROUGH OF ENFIELD
(Interested Party)

- -
- -

Andrew Campbell-Tiech QC (instructed by **Trethowans LLP**) for the **Claimant**
The Defendant did not appear and was not represented
Julian Christopher QC (instructed by **London Borough of Enfield**) for the **Interested Party**

Hearing dates: 12th May, 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 on the 12th June 2020.

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LORD JUSTICE HOLROYDE

Lord Justice Holroyde and Mrs Justice Thornton DBE:

1. The claimant ("Mr Kombou") was charged by the Interested Party, the London Borough of Enfield ("Enfield"), with an offence of failing to comply with an enforcement notice, contrary to section 179(2) of the Town and Country Planning Act 1990. On 13 October 2017 he pleaded guilty to that offence before a magistrates' court. Pursuant to section 70 of the Proceeds of Crime Act 2002 ("POCA"), he was committed for sentence to the Crown Court at Wood Green, with a view to a confiscation order being considered. He applied to the Crown Court to vacate his guilty plea. On 13 May 2019 HH Judge Greenberg QC ("the judge") refused that application. She gave her reasons both orally and in writing on 28 May 2019. Mr Kombou now applies, by limited permission of Yip J, for judicial review of the judge's decision. The defendant, the Crown Court, has entered an appearance but has taken no further part in the proceedings. The application for judicial review is resisted by Enfield. This is the judgment of the court.

2. It is appropriate to identify at the outset a feature of confiscation proceedings which lies at the heart of Mr Kombou's case. When a confiscation order is made pursuant to POCA, the sum ordered to be paid is collected from the offender by the Home Office. What happens to the money so recovered has since 2006 been governed by the Home Office's Asset Recovery Incentivisation Scheme: "ARIS". The objective of ARIS, as described in a Home Office publication, was

> "to provide operational partners with incentives to pursue asset recovery as a contribution to the overall aims of cutting crime and delivering justice."

The effect of the scheme, at the time material to this case, was that the Home Office would retain 50% of funds recovered under a compensation order, and the remaining 50% would be divided as follows: 18.75% to the investigator; 18.75% to the prosecutor; and 12.5% to Her Majesty's Courts and Tribunals Service. It follows that where, as in this case, the same body was both investigator and prosecutor, it would receive 37.5% of the sum recovered.

The facts:

3. We summarise the principal facts as succinctly as possible. It is however necessary to go into some detail, in view of the submissions made on Mr Kombou's behalf.

4. Mr Kombou has at all material times been the owner of a property in north London which was initially – and lawfully - divided into three units of accommodation. In 2008 Enfield, the relevant planning authority, became aware of conversion work at the property and issued a Planning Contravention Notice. In February 2009, Mr Kombou applied (through his agent) for a change of use to a house in multiple occupation ("HMO"). That application was refused. Later in 2009, however, Enfield granted an application for a Certificate of Lawful Development ("LDC") permitting Mr Kombou to use the property for up to six persons living as a single household.

5. The property was instead converted into eight self-contained rooms, each with its own bathroom and kitchen. That was a clear breach of planning control. The rooms were occupied by tenants of Mr Kombou, seven of whom were in receipt of housing benefit from Enfield. Enfield observed this unlawful use of the property when an inspection

was carried out on 8 November 2010. On 10 December 2010 Enfield served an enforcement notice which required Mr Kombou, by 11 April 2011, permanently to cease the use of the premises as eight separate units of accommodation and permanently to remove from the premises all doors and partitions serving to separate the premises into eight separate units, all but three kitchens, all but three electricity meters, all but three gas meters, all but three door bells and all resulting materials.

6. Mr Kombou, through his agent, gave notice of appeal against the enforcement notice but later withdrew that appeal. He applied in February 2011 for a certificate permitting him to use the property as eight self-contained units, but Enfield refused that application on 14 July 2011.

7. Mr Kombou did not comply with the enforcement notice. He continued for about four and a half years to let the property as eight separate units and to gain financially by doing so.

8. Mr John Shuttlewood, a Planning Enforcement Officer employed by Enfield, compiled a file in relation to the change of use of Mr Kombou's property from three units to eight. On 2 April 2015 he sent an email to Mr Wesley Stevens, a financial investigator employed by Enfield, in which he noted that the enforcement notice period had expired in April 2011 and said:

> "Approx £310k of benefit if you take into account all 8 units."

9. On 28 September 2015 Enfield gave Mr Kombou a final warning to comply with the enforcement notice. He was then given two weeks' notice that a site visit would be made.

10. On 29 September 2015 Mr Shuttlewood recommended that the case proceed to prosecution. He expressed the opinion that Mr Kombou had played the system by delaying enforcement action with the submission of multiple applications, and said:

> "The purchase of the 3 flats at the premises and the conversion into 8 units is purely to gain a substantial rental income (see POCA figures below), resulting in the defendant not living at the premises but creating 8 units of sub-standard accommodation in this borough."

Mr Shuttlewood went on to estimate the "POCA potential on rental income of 8 flats" in the sum of £307,200.

11. On 23 October 2015 Mr Stevens sent an email addressed amongst others to Mr Shuttlewood, Mr Andy Higham (Enfield's head of development management) and a member of Enfield's legal department. He attached a spreadsheet listing a number of current cases and showing which would be considered for prosecution and which would not. Mr Kombou's property was listed as "POCA – file to be reviewed. Awaiting service of summons".

12. Mr Shuttlewood carried out the site visit on 3 November 2015. He found that the building appeared to have been reconfigured into a six-occupant HMO. However, there were still eight gas meters, eight electricity meters (all with varying amounts of

credit on them) and eight door bells; and although there was a room marked "kitchen", its contents and appearance, and the appearance of the other rooms, suggested that it was not in fact a communal kitchen. Mr Shuttlewood's enquiries also showed that there were eight live council tax accounts in different names at the premises, and that payments of Housing Benefit/Council Tax Benefit were being under made seven live accounts. He therefore suspected that the reconfiguration of the premises may have been a temporary alteration carried out for the purpose of his visit, and the building could easily revert to its former illegal use. Alternatively, he suspected that a Council Tax/Housing Benefit fraud may be taking place.

13. On 22 March 2016 Mr Higham completed a form entitled "Officer Recommendations/Decision of Head of Service". He recommended prosecution of Mr Kombou. The form listed a number of "Criteria for consideration" in accordance with Enfield's prosecution policy. In relation to the "Seriousness of Offence" criterion, Mr Higham wrote:

> "The illegal conversion of properties even those previously occupied as HMO into self-contained residential accommodation is one of the Council's planning enforcement priorities especially where there are concerns over the quality of the accommodation.
>
> The conversion to 8 took place without first obtaining the necessary planning permission which had previously been obtained for the conversion to 3 units. A number of planning applications have been submitted in attempt to regularise the position. Those seeking pp for HMO have not resulted jn approval. An LDC seeking confirmation of the use as lawful but involving a different configuration have been agreed but the use remains contrary to these accepted positions. A second LDC for the current use was not accepted.
>
> No action to regularise the use of the property has been taken following the determination of these planning applications.
>
> An Enforcement Notice was served and although an appeal was lodged, this was withdrawn by the Appellant. The Enforcement Notice been complied with [sic].
>
> The situation is contrary to the Council's adopted planning policies in providing a poor standard of residential accommodation and an inappropriate form of development contrary to the objective of delivering high quality residential accommodation and development.
>
> It is considered sufficient time has elapsed for the breach to have been rectified."

14. In relation to the "Evidential Test" criterion, Mr Higham wrote:

> "Satisfied in principle – lawyer to do full evidential test."

15. In relation to the "Prosecution in the Public Interest" criterion, he wrote:

> "Yes. This is a serious offence. Illegal conversions are one of the council's planning enforcement priorities, and noncompliance with statutory notices is a gravity factor in the enforcement policy. Unlikely that the defendant will comply as has not to date despite given amble [sic] time and advice."

16. In relation to two further criteria, Mr Higham wrote:

> "(7) Co-operation of Defendant: Unco-operative. Not invited for a PACE interview.
>
> (8) Is Alternative Action Appropriate: No - simple caution and written warning is insufficient."

17. In the space provided for "Other Comments and Decision", Mr Higham wrote:

> "NEED TO CHECK IF POCA IS BEING CONSIDERED FOR THIS CASE."

18. On three occasions in June, July and September 2016 Mr Stevens applied to a court for a production order in relation to Mr Kombou.

19. On 22 July 2016 Mr Kombou's solicitor wrote to Mr Shuttlewood saying that the property had been reconfigured into three flats and now fully complied with the Enforcement Notice. She asked for an inspection to be arranged to confirm that compliance.

20. On 11 October 2016 Mr Stevens sent an email to Mr Hillier (who had succeeded Mr Shuttlewood as the officer dealing with Mr Kombou's case) and Mr Robert Oles (Mr Higham's deputy), saying in relation to Mr Kombou:

> "My analysis to date is that in the period he had not complied he made well over £300kin rental income.
>
> Whilst accepting that compliance is the name of the game, for a commercial landlord should we not be ensuring that they do not profit from 'playing the system', especially after ignoring the PEN for 5 years.
>
> If you can let me know ASAP if we aren't taking action as I have about 300 pages of bank accounts that I have just received for this case and I don't want to go to the lengths of analysing them if the case is a dead duck."

21. On 24 October 2016 Mr Richard Essex, in Enfield's legal department, emailed Mr Hillier and others saying:

> "I am going to lay the attached information today. Can you confirm that there has been no further visit after the date on the information, please."

Although this court has not been provided with a copy of Mr Essex's draft, it seems that it alleged an offence continuing until a date after 1 October 2015.

22. Mr Stevens replied within an hour, referring to Mr Hillier's site visit on 3 November 2015 and to his own research into Council Tax liabilities at the property. He said that the enforcement notice may have been complied with from 1 October 2015, and continued:

> "It may therefore be worth considering that the period of offending cease prior to John's visit on 1st October 2015. Obviously Rob [Oles] or Andy [Higham] would need to agree the most appropriate date."

23. On 4 November 2016 Mr Hillier prepared schedules of current planning enforcement prosecutions. In relation to Mr Kombou, he noted that the property was now in three flats and wrote:

> "Owner has complied with Notice. However – file to be returned to [Mr Higham] to confirm that despite very late compliance (and attempts to delay etc) it is in the public interest to continue with the prosecution. Confirm position with [Mr Oles/Mr Higham]."

Mr Hillier also noted comments by Mr Stevens referring to investigation of a potential offence relating to the use of fake documents submitted as part of Mr Kombou's LDC application in 2011.

24. On 8 November 2016 Mr Essex laid an information and Mr Kombou was summonsed for an offence of failing to comply with the enforcement notice between 11 April 2011 and 1 October 2015. That offence is triable either way, and Mr Kombou agreed to be tried in the magistrates' court. A magistrates' court has no power to make a confiscation order under section 6 of POCA. Section 70 of POCA, so far as material, provides:

> "(1) This section applies if –
>
> (a) a defendant is convicted of an offence by a magistrates' court, and
>
> (b) the prosecutor asks the court to commit the defendant to the Crown Court with a view to a confiscation order being considered under section 6.
>
> (2) In such a case the magistrates' court –
>
> (a) must commit the defendant to the Crown Court in respect of the offence …"

25. On 7 December 2016 Mr Hillier emailed Mr Stevens asking for "an idea of the POCA income that we may achieve for the relevant planning cases we are prosecuting". He referred to Mr Kombou's property as one of the cases in which "we don't have any indication". Mr Hillier must have received an answer, because on 12 December he sent to Mr Higham, Mr Essex and others a "POCA Team spreadsheet" which included Mr

Kombou's property in the list of "POCA cases". The relevant entry in a column headed "POCA Proceedings – estimated/claimed" read –

> "Benefit amount- £200,000, recoverable amount £200,000. Incentivisation: **£75,000**"

26. At the Crown Court hearing in May 2019, Mr Kombou accepted that he was guilty of the offence charged. He further admitted that he had not fully complied with the enforcement notice even by 1 October 2015: his evidence, which the judge noted was unsupported by any document or by any other evidence, was that he had finally complied with the notice in the summer of 2016. He did not, however, admit the charge at the outset. He initially pleaded not guilty and elected summary trial.

27. We turn to the procedural history. It is again necessary to go into some detail.

The procedural history:

28. Mr Kombou first appeared before a magistrates' court on 5 January 2017. His counsel, Mr Heller, suspected that the prosecution may have been motivated by an improper consideration of confiscation, and informed the court that an issue of abuse of process would arise. He sought disclosure from Enfield. The case was adjourned so that Mr Kombou's solicitor could make representations inviting Enfield to discontinue proceedings.

29. In January 2017 Mr Essex was succeeded by Ms Harvey as the lawyer with conduct of the case on behalf of Enfield. On 11 January 2017 Mr Stevens sent an email to Mr Higham and Mr Hillier listing cases (including Mr Kombou's) which would soon come before the magistrates' court. He said:

> "All of the above have been identified as suitable for confiscation so we need to ensure whoever is taking over from Richard Essex is fully briefed that they need to make the application for committal if the defendants enter pleas at the hearings (the application must be made prior to sentence otherwise confiscation cannot take place)."

30. On 23 January 2017 Mr Kombou's solicitor made written representations to Enfield's Legal Services department, to the effect that it was not in the public interest to pursue the prosecution. She said that Mr Kombou had completely complied with the enforcement notice and she assumed that issues of confiscation had influenced the decision to prosecute. She also accused Enfield of unconscionable conduct and long delay.

31. Ms Harvey replied on 3 May 2017. She said that Enfield would not discontinue the prosecution. She addressed each of the points which had been made on Mr Kombou's behalf. She said:

> "The normal position will be that it is in the public interest for those guilty of criminal offences to be prosecuted. This is the Council's starting point in relation to public interest. The breach of planning control in this case was significant. It persisted for

> an extended period of time without, in the Council's view, any adequate justification. The justification your client has attempted to give for his actions is precisely the kind of justification which could be readily repeated in relation to other landlords who might think they could maximise profits from lettings by acting in breach of planning control. It will not be unusual for a person to comply with an enforcement notice before a summons is issued. Indeed, it might be hoped that would typically be the worst case situation; and that most breaches of planning control might be regularised by the specified date for action in the enforcement notice itself. It does not lessen the importance of the breach in this case in light of its nature, duration and likely motivation for continuing the breach long after the enforcement notice required compliance. Accordingly, the Council's actions in pursuing this prosecution comply with its policy. In particular they are proportionate. We would point out that it was obviously open to your client, who must - we suggest - have known day on day he was committing a criminal offence, to have approached the planning department with a view to regularising the situation. This situation is all the more unjustified, given that your client had made a number of applications for planning permission prior to service of the relevant enforcement notice. After the service of the notice, he made no applications for planning permission for the use of the site which was actually taking place."

32. In relation to the suggested motive for the prosecution, Ms Harvey said:

> "The Council's decision to prosecute in this case was informed by all the factors set out above. It was not made by reference to the possibility of confiscation proceedings."

33. Mr Kombou applied to the magistrates' court to stay the proceedings as an abuse of the process of the court. In a skeleton argument dated 9 June 2017, Mr Heller submitted that this case fell within the second of the two categories of abuse which are recognised in case law: not that Mr Kombou could not have a fair trial, but that it would be unfair to try him, and that the administration of justice would be brought into disrepute if the prosecution was allowed to proceed. As grounds for that submission, he asserted (in summary) that Enfield had been guilty of misconduct or abuse of power, had been dilatory and unhelpful when Mr Kombou tried to resolve matters by discussion, had been guilty of delay in bringing the prosecution, had failed to follow its own enforcement policy and had improperly been motivated by a desire to seek a confiscation order. As to the last of those assertions, he submitted that the primary purpose of the enforcement notice was to achieve compliance with its requirements: as that had been achieved,

> "it is apparent that [Enfield] can only be motivated by confiscation."

34. On 19 June 2017 Enfield was ordered by a District Judge (Magistrates' Courts) to respond to Mr Heller's skeleton and to make relevant disclosure by 17 July. Enfield failed to do so, and a further order was made. On 18 September 2017 Enfield disclosed

just three documents: Mr Higham's Recommendations/Decision document of 22 March 2016 (see [13] above), Enfield's Operating Policy and another policy document. The following day, Enfield's counsel Mr Beglan served a skeleton argument in which he said that Mr Kombou's point about the motives for prosecution –

> "… is misconceived and cannot survive the clear statement of the actual reasons for prosecution as set out in the decision to prosecute."

35. Mr Kombou's application to stay the proceedings as an abuse of the process was listed to be heard on 12 and 13 October 2017. On 11 October Ms Harvey sent an email to Mr Kombou's solicitor dealing mainly with the documents needed for the hearing. She ended that email by saying –

> "I am instructed that a financial investigator was notified about this case in late 2014 as part of a wider discussion about all enforcement cases. An officer will be able to give evidence on this if needed."

36. At the hearing, no request was made on behalf of Mr Kombou for any officer to give such evidence or to provide further information. Much of the first day was taken up with submissions about the jurisdiction of the magistrates' court. The District Judge ruled that he had no jurisdiction to stay the prosecution on the basis for which Mr Kombou contended. On 13 October 2017, Mr Kombou – having consulted his legal representatives - changed his plea to guilty. Mr Beglan informed the court that Enfield intended to seek confiscation. Mr Kombou was accordingly committed to the Crown Court for sentence.

37. In the Crown Court, it was submitted by Mr Campbell-Tiech QC and Mr Heller that Enfield had failed properly to discharge its disclosure duty. The judge was provided by Enfield with three lever-arch files of material (a great deal of which she found to be duplication). Mr Beglan indicated that any document which the judge found to be disclosable would be disclosed, whether or not legal professional privilege might be claimed. The judge, having read all the material to see whether any of it may weaken the prosecution case or strengthen the defence case, found that a number of documents should be disclosed by Enfield. Enfield duly disclosed them.

38. Mr Kombou then applied to vacate the guilty plea which he had entered in the magistrates' court. It was submitted that the recent disclosure, although still incomplete, provided support for his abuse of process application, and that he would not have entered his guilty plea if the documents had been disclosed when they should have been. Mr Kombou waived his legal professional privilege in respect of his communications with his legal representatives relating to the manner and circumstances of his decision to plead guilty.

39. At a hearing on 11 March 2019 it was submitted on behalf of Mr Kombou that there was further material which should have been disclosed but had not been. The judge carried out a further disclosure exercise and ordered some further documents to be disclosed. Again, that was done. The judge thereafter reviewed for a third time the documents which had been provided to her, and concluded that nothing further fell to be disclosed.

40. In a further skeleton argument dated 20 March 2019 it was submitted on behalf of Mr Kombou that the confiscation proceedings should be stayed as an abuse of the process. The judge recognised that some evidence may be relevant to both applications. She decided to hear first the application to vacate the plea. If it failed, she would go on to consider abuse of process, hearing any further evidence which was relevant to that application.

The judge's decision:

41. The substantive hearing before the judge occupied three days. Mr Kombou, on whom the burden lay to show that the interests of justice required that he be allowed to change his plea, gave evidence. He said that he had decided to plead guilty on the basis of Mr Heller's advice that he could only avoid conviction if his abuse of process argument succeeded and that, following the District Judge's ruling, the prospect of that argument succeeding was not good. He also said he had been worried about mounting costs and, because he understood that Enfield had not yet decided whether to seek a confiscation order, he thought it was possible that the case might end without such an order. He accepted, however, that he had been advised by Mr Heller that it remained likely that he would face a substantial confiscation order.

42. An unusual feature of the hearing was that Mr Heller appeared as a witness, examined in chief by Mr Campbell-Tiech and cross-examined by Mr Beglan. His evidence was to the effect that the limited disclosure made in the magistrates' court proceedings had not provided a basis to argue that Enfield's decision to prosecute had been improperly influenced by the prospect of gain from confiscation proceedings. If he had had the documents which had subsequently been disclosed, he would not have advised Mr Kombou to plead guilty. He said that he had asked Mr Beglan whether Enfield would seek confiscation, but had received no answer. He confirmed that he had advised Mr Kombou that a confiscation order was likely.

43. Mr Beglan, for Enfield, called Mr Higham as a witness. He declined to call either Mr Shuttlewood or Mr Stevens (neither of whom was still in Enfield's employment) on the ground that they could give no evidence relevant to the application to vacate the plea. However, the judge herself called both those gentlemen to give evidence, so that they could be cross-examined by Mr Campbell-Tiech. Mr Beglan was also permitted to cross-examine them.

44. It was common ground between the parties that, although the guilty plea had been entered in the magistrates' court, the Crown Court on a committal for sentence had jurisdiction to permit a change of plea. The judge directed herself that she had a discretion as to whether to allow the plea to be vacated: it should be exercised sparingly where, as here, an unequivocal guilty plea had been entered, but she must consider the facts of the case, including the circumstances in which the plea was entered, and must exercise her discretion in Mr Kombou's favour if the interests of justice demanded it.

45. In her detailed ruling, the judge identified Mr Kombou's central argument that

> "if the disclosure recently received had been available at the magistrates' court, the defence would have had material which it is submitted could have demonstrated that the decision to prosecute had been driven by an improper motive, the prospect

> of gain from a confiscation order, and, as such, made the prosecution an abuse of process."

She noted the submissions on behalf of Mr Kombou that Enfield had either made a deliberate decision to withhold relevant information from disclosure, in order to conceal evidence supporting the claim of improper motive, or alternatively had failed to carry out any proper disclosure exercise before Mr Kombou entered his guilty plea; and that if the information had been disclosed as it should have been, Mr Kombou would not have entered that plea. She recorded that Mr Kombou had not sought to dispute that a number of features of his case were listed as "gravity factors" in Enfield's Operating Policy. She noted Mr Beglan's submissions that the decision to prosecute had been made lawfully and on the basis of correct criteria, and that the duty of disclosure had been carried out correctly and in good faith.

46. The judge referred to the decisions in *R v Early* [2002] EWCA Crim 1904, [2003] 1 Cr App R 19, *R v Togher* [2001] Cr App R 33 and *R v Younis* [2018] EWCA Crim 2484. She observed that in relation to prosecutorial impropriety,

> "A distinction is to be drawn between those cases where this has had an impact on the ingredients of the offence itself and where it has not."

47. She stated later in her judgment that in deciding whether to allow the application to vacate the guilty plea, she had to consider whether there had been a failure to disclose relevant material and, if so,

i) Whether such failure was consequent on prosecutorial impropriety/bad faith;

ii) Whether such failure concealed prosecutorial impropriety;

iii) Whether the abuse of process argument which was not pursued in the magistrates' court, but was raised again in this application, related to guilt or innocence of the offence;

iv) Whether the abuse of process argument had or may have merit; and

v) Whether the interests of justice demanded that the guilty plea be vacated.

48. The judge found that the decision that Mr Kombou should be prosecuted had been taken by Mr Higham:

> "Mr Higham's decision dated the 22nd March 2016 records that he was satisfied that the evidential test had been satisfied and his decision was passed to the legal department for them to do a full evidential test. It is apparent that the evidential test satisfied the lawyers, as the summons was issued. By the admission by the defendant and those representing him that all the elements of the offence were proved, it is apparent that the defence could not argue otherwise."

She was satisfied that Mr Kombou had failed to comply with the enforcement notice for several years; remained in breach of it at the time when Mr Higham made his

decision; and had chosen to plead guilty in a hope, but not an expectation, that there would not be confiscation proceedings.

49. The judge did not accept Enfield's argument that all the documents which should have been disclosed had in fact been disclosed before Mr Kombou entered his guilty plea, but she did not find that Enfield's decision as to disclosure was made in bad faith: it was just wrong.

50. As to the argument that the decision to prosecute had been motivated by Enfield's desire to gain financially from an order under POCA, the judge quoted from the decision in *R (Wokingham BC) v Scott* (which we consider at [65] below). She recorded Mr Higham's evidence that he was the "ultimate head" of the planning and enforcement department but that he played no part in the day-to-day work of the department and no part in its investigation work: his role only arose when he was supplied by Mr Shuttlewood with a body of material (including the report of 29 September 2015: see [10] above), upon which he was to make a decision whether Mr Kombou should be prosecuted. His evidence was that having made his decision, the matter was passed to the legal department to carry out a full evidential test and he had no further contact with that department before the summons was issued.

51. The judge considered the evidence that the issue of a possible POCA order had been discussed within Enfield before Mr Higham made the decision that Mr Kombou should be prosecuted. She referred to Ms Harvey's email of 11 October 2017 (see [35] above). She recorded that Mr Stevens in evidence had denied that he had any role in the decision to prosecute, and she found that there was no evidence to suggest otherwise.

52. The judge said that Mr Higham had given clear and unequivocal evidence that when making his decision, he had not taken into account the prospect of gain to Enfield from a POCA order. At [69-71] she said this:

> "69. Mr Higham was, as he freely acknowledged, aware of the potential of LBE gaining 37.5% of any POCA order made following a successful prosecution. Mr Higham's evidence was that there was a departmental appreciation of the possibility of LBE's gain from POCA orders. Given that the defendant's offending had continued over several years, nobody concerned in the planning department or with planning enforcement or a decision to prosecute and who applied his or her mind to this case (or any similar case) could fail to appreciate that the defendant's gain from his offending will have been substantial and, therefore, any POCA order had the potential to be substantial. It would be remarkable if it were otherwise.
>
> 70. Having considered the documents and Mr Higham's evidence I find that there is nothing to support any suggestion that Mr Higham must have or even may have participated in any discussion about possible confiscation proceedings before he made his decision that the defendant should be prosecuted. Mr Higham acknowledged that, as part of the package of information submitted to him for his decision on whether the defendant should be prosecuted, he would have seen in the report

> by Mr Shuttlewood dated the 29th September 2015 the reference to a potential POCA sum in excess of £300,000; however, he said that this played no part in his decision which was based on planning considerations only.
>
> 71. I found Mr Higham to be an honest and reliable witness. …."

53. The judge went on to summarise Mr Higham's assessment that the evidential test had been met and his view that it was in the public interest to prosecute. She also referred, in relation to the issue of public interest, to Ms Harvey's letter of 3 May 2017 (see [31] above). She noted that the decision by Mr Higham, that Mr Kombou should be prosecuted, had been made before the Court of Appeal's decisions in the *Wokingham* case and in *R v Knightland Foundation* (to which also we refer below, at [64]). She was however satisfied that the principle identified in those cases was a basic tenet of fairness of which Mr Higham was aware when he made his decision. There was, she said, nothing in the evidence or in the documents to lead her to conclude that Mr Higham may not have carried out his duty conscientiously.

54. At [75-78] the judge made the following finding:

> "75. I have considered the documents and evidence which do show there was awareness within the LBE planning department of a possible POCA order arising from a successful prosecution of the defendant and that this preceded the decision made by Mr Higham. There is no doubt that there was some discussion within the LBE planning department as well as with the financial investigator about the possibility of POCA order and what sum that might realise. In particular, it is apparent that some preliminary enquiries had been made by Mr Shuttlewood, the planning enforcement officer, in communications with Mr Stevens, the financial investigator. Nevertheless, having heard evidence from Mr Higham, I am left in no doubt that the decision Mr Higham made that the defendant should be prosecuted was not motivated by or influenced by a desire for gain from a POCA order.
>
> 76. Confirmation of this can be found in Mr Higham's decision made on the 22n March 2016. Having explained his reasons why the defendant should be prosecuted, the document concludes with the comment, "Need to check if POCA is being considered for this case. " It is apparent, therefore, that Mr Higham's decision made on the 22nd March 2016 was not based on the prospect of possible gain from a confiscation order. He was not making a decision that there should be confiscation proceedings and was not encouraging any such decision to be made. His concluding comment demonstrates that it was not a decision he was to make and demonstrates that he was merely enquiring as to whether it was being considered by others.
>
> 77. The decision by the prosecution to provide only limited disclosure prior to the defendant entering his guilty plea was

> made in good faith; however, the documents which I ordered to be disclosed required examination when considering the defence arguments in this application. I have considered the contents of the newly disclosed documents after having heard evidence from, Mr Higham, Mr Shuttlewood and Mr Stevens. My conclusion is that there is no merit in the argument that evidence or material within the documents disclosed since the defendant entered his guilty plea would support the abuse of process argument the defence is seeking to mount based on that material and evidence. It manifestly fails to show that Mr Higham's decision that the defendant should be prosecuted was or even may have been improperly made, driven by an improper motive for gain from a POCA order.
>
> 78. I am satisfied that Mr Higham's decision that the defendant should be prosecuted was independent, fair and objective. It was a proper exercise of his judgment uninfluenced by any consideration of a possible gain by LBE from a confiscation order made following POCA proceedings"

55. The judge went on to deal comparatively briefly with the other grounds on which a stay had been sought. She found no merit in the argument that Enfield's conduct offended the court's sense of justice and propriety so as to make it unfair to try Mr Kombou. She concluded that Mr Kombou had failed to demonstrate that the interests of justice required that he be allowed to vacate his guilty plea, and accordingly declined to exercise her discretion to allow him to do so.

56. At a subsequent hearing, on 6 September 2019, the judge imposed a fine of £13,500, ordered Mr Kombou to pay prosecution costs (later quantified at £30,449) and made a confiscation order in the sum of £333,400.99. We understand that an appeal against sentence is pending in the Court of Appeal, Criminal Division.

The grounds for judicial review:

57. The grounds for judicial review, as amended by direction of Yip J (but retaining their original numbering), are –

> Ground 2: The judge's finding that the decision to prosecute was independent, fair and objective was wrong in law and/or irrational.
>
> Ground 5: The judge's finding that [Enfield's] conduct of the proceedings could not amount to an abuse of process is wrong in law and otherwise irrational.

58. Yip J indicated that the original grounds 3 and 4 were encapsulated in grounds 2 and 5, and that the refusal of permission on ground 1 did not prevent Mr Kombou from arguing that the judge erred in law. Mr Campbell-Tiech was therefore permitted to advance wide-ranging submissions before this court.

59. The remedy sought is an order quashing the judge's decision of 13 May 2019 and an order remitting the case to the magistrates' court.

The legal framework, and relevant case law:

60. Given the issues in this case, we can summarise the legal framework very briefly.

61. The judge's self-direction as to her discretion to permit a change of plea, [44] above, was correct in law and has not been challenged in this court.

62. It is common ground that Enfield, in its role as prosecutor, is subject to the same duties as other prosecuting authorities, including the duties as to disclosure which arise under section 3 of the Criminal Proceedings and Investigation Act 1996, and is required to follow the Code for Crown Prosecutors. That Code emphasises that prosecutors must be independent and must not be affected by improper influence from any source. It states that a prosecution must only be commenced or continued when the case has passed both stages of the Full Code Test, which requires the prosecutor to consider first whether there is sufficient evidence to provide a realistic prospect of conviction and, if there is, whether a prosecution is required in the public interest.

63. In *R v The Knightland Foundation* [2018] EWCA Crim 1860 a local authority had prosecuted the respondents for failing to comply with a planning enforcement notice. The trial judge found that the local authority had acted improperly, in particular because improper influence had been brought to bear on the planning team by senior officials whose intention was that there should not be a proper assessment of the planning merits of an application by the respondents, and that nothing should hamper the prosecution or the POCA proceedings. The judge therefore stayed the prosecution as an abuse of the process. The Court of Appeal refused the local authority's application for leave to appeal against that ruling. Hallett LJ, giving the judgment of the court, said at [37]:

> "The authority, as a prosecuting authority, is subject to the same duties as other prosecuting authorities. It is obliged to act fairly, independently and objectively. The judge's findings of fact indicate that the authority did not do so."

64. In *R (Wokingham Borough Council) v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2 Wokingham had prosecuted the defendant for failing to comply with an enforcement notice. The trial judge, accepting a defence submission that Wokingham had prosecuted in order to claw back public money already expended on the case, stayed the prosecution as an abuse of the process. The Court of Appeal dismissed Wokingham's application for leave to appeal against that ruling. Hallett LJ, giving the judgment of the court, said at [63]:

> "The decision to prosecute is a serious step and one that must be taken with the utmost care. We understand the argument that the making of a POCA order on conviction may act as a deterrent to offending and has the effect of extracting ill-gotten gains from offenders. This was no doubt Parliament's intent in enacting the POCA. But where there is a potential conflict of interest, namely a financial interest in the outcome of the prosecution set against the objectivity required of a prosecutor, the prosecutor must be scrupulous in avoiding any perception of bias. The possibility of a POCA order being made in the prosecutor's favour should play no part in the determination of the evidential and public

> interest test within the Code for Crown Prosecutors. We hope that this message will be relayed to all those making charging recommendations and decisions as soon as possible."

65. In a well-known statement in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103], Lord Craig of Hopehead expressed the test of apparent bias in these terms:

> "the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

66. In *R v Togher*, it was held that an appeal against conviction could succeed even after a plea of guilty if the criminal proceedings constituted an abuse of the process, such that it would be inconsistent with the due administration of justice to allow the guilty plea to stand. In *R v Early* the court accepted that guilty pleas could be set aside, however strong the prosecution case might appear to be, where there had been a combination of inadequate disclosure by the prosecution and perjury by prosecution witnesses when giving evidence to the trial judge on a voire dire.

67. In *R v Younis* the evidence clearly showed a conspiracy to cause grievous bodily harm and the issue was whether the appellant had been party to that conspiracy. He pleaded guilty, and subsequently complained that non-disclosure by the prosecution had deprived him of a valid abuse of process argument. The court rejected that complaint and held that the guilty plea had not been procured by any material misrepresentation or non-disclosure. The court accepted that if the relevant disclosure had been made, counsel might have given different advice; but it was always open to the defendant to pursue his abuse application and he had foregone that application.

68. We turn to a summary of the submissions made to this court. We do not think it necessary to refer to every point which was made, but we have taken them all into account.

The submissions on behalf of Mr Kombou:

69. Mr Campbell-Tiech submits that Ms Harvey's email of 11 October 2017 did not simply fail to disclose information which should have been disclosed: it amounted to a positive assertion that Enfield had followed a proper disclosure procedure and that no relevant material existed. He makes a similar point about the responses of Enfield to the orders for disclosure made in the magistrates' court. He argues that as a result, the advice given to Mr Kombou about the strength of his case was predicated on a belief that Enfield had properly discharged its disclosure obligations when in fact it had not done so. He asserts that Mr Kombou pleaded guilty because of the assertions by Enfield that the suggestion of an improper motivation for the prosecution was misconceived. The judge wrongly failed to recognise or address this point.

70. Mr Campbell-Tiech goes on to submit that Enfield's officials were "hopelessly conflicted" because some or all of the salaries of Mr Stevens and Mr Essex were paid out of funds received by Enfield from ARIS – a fact which only emerged when Mr Stevens was cross-examined. He points to misstatements by Mr Stevens in his applications for production orders and argues that if those documents (which have only

been disclosed since the permission hearing) had been before the judge, they should have made a difference to her decision.

71. Mr Campbell-Tiech submits that the judge misunderstood the decisions in *R v Early*, *R v Togher* and *R v Younis*. She wrongly drew a distinction between cases in which prosecutorial impropriety had had an impact on the ingredients of the offence itself and cases in which it had not. In that way, he submits, the judge placed an improper fetter on the exercise of her discretion to permit a change of plea. She further fettered her discretion by holding, at [79] of her written reasons, that because Mr Kombou had no defence in law to the charge, there was no merit in the argument that he could not receive a fair trial. As a result of these errors, it is submitted, the judge took insufficient account of Enfield's failures in disclosure or of the conflicts of interest in "a case saturated by considerations of confiscation".

72. As to ground 2, Mr Campbell-Tiech submits that key officials were conflicted and therefore neither independent nor objective, and that Enfield's process lacked basic elements of procedural unfairness. He submits that the decision whether to prosecute should have been taken by an independent lawyer: Mr Higham is not a lawyer, was not independent, and was conflicted because he was head of a small department which was in part funded by ARIS, and because he had been copied in to correspondence relating to the POCA potential of Mr Kombou's case. The judge heard no evidence from anyone in the legal department of Enfield about the decision to prosecute. Further, the decision to prosecute should have been – but was not - reviewed when it became clear that there had already been full compliance with the enforcement notice before the information was laid: Mr Hillier had indicated on 4 November 2016 that the file should be reviewed by Mr Higham, but that was not done. The judge failed to consider these matters, and her finding that the decision to prosecute was independent, fair and objective therefore had no rational connection to the evidence.

73. As to ground 5, Mr Campbell-Tiech submits that the judge misdirected herself as to the limits of the abuse jurisdiction by ruling that prosecutorial misconduct could not amount to an abuse of the process when Mr Kombou was admittedly guilty of the offence charged. She consequently took no, or no sufficient, account of Enfield's serious misconduct. He repeats his submissions that there was a very serious failure by Enfield to disclose material which would have supported a submission leading to a stay of proceedings, but the judge wrongly brushed this aside. In a detailed review of the documents which we have summarised earlier in this judgment, he submits that Mr Stevens, with a clear conflict of interest, was embedded in a decision to prosecute, and that Mr Higham on 22 March 2016 was unaware of important facts. He makes allegations of serious impropriety, contending that Enfield "must have taken a deliberate decision not to reveal … material which would support [Mr Kombou's] abuse application", that the final paragraph of Ms Harvey's email of 3 May 2017 ([31] above) was "grossly misleading" and that Ms Harvey "must have known" when she wrote that email that Mr Stevens had applied for production orders.

74. Mr Campbell-Tiech does not submit that there are no circumstances in which it would have been right to prosecute Mr Kombou. His argument, in very brief summary of comprehensive submissions, is that an abundance of material shows that POCA "infiltrated nearly every aspect of the case"; the decision to prosecute was not Code-compliant; those involved were heavily conflicted; a review of the decision was obviously necessary but was not carried out; and when challenged by Mr Heller's initial

submissions, Enfield's conduct was "disgraceful". He submits that Mr Kombou pleaded guilty because he and his advisers were misled into believing there was no material to support his abuse of process application when "in truth there was an abundance of such material". The judge's finding that Enfield's conduct could not amount to an abuse of the process was wrong in law and irrational.

The submissions on behalf of Enfield:

75. Mr Christopher QC emphasises that the court is concerned with a judicial review of the judge's refusal to allow Mr Kombou to vacate his guilty plea, not with a review of the decision to prosecute. Many of the matters about which Mr Kombou complains are unrelated to the judge's decision as to vacating the plea. Four important aspects of the Mr Kombou's case were known before he pleaded guilty, and could have been explored if they really were important to his decision as to plea: the fact that Enfield had not served a schedule of unused material is regrettable, but was known at the time; Mr Higham's decision document of 22 March 2016 had been disclosed, and therefore the question of whether he was the appropriate person to make a decision to prosecute could have been explored; there could have been enquiry as to why the decision to prosecute had not been reviewed when it was accepted that Mr Kombou had complied with the enforcement notice; and although there were failures by Enfield in the disclosure of documents, Ms Harvey on the eve of the hearing in the magistrates' court had offered to make an official available, from whom further information could have been sought.

76. Mr Christopher submits that the judge did not misdirect herself or fetter her discretion: it is clear from her decision that she examined all the circumstances of the case, including the merits of the abuse of process argument, and did not limit herself to features directly relating to the ingredients of the offence. It was the judge herself who ensured that Messrs Stevens and Shuttlewood were called as witnesses so that they could be cross-examined.

77. As to ground 2, there is no challenge to the judge's finding that Mr Higham was an honest and reliable witness. The judge was plainly alive to the allegations of conflict of interest. Having heard the evidence, she was entitled to make her findings. She was right to regard the note at the end of the decision document, "need to check if POCA is being considered for this case" as providing powerful support for Mr Higham's evidence that his decision was not affected by POCA considerations. There was no evidence before the judge, and there is no evidence now, that the fact that the decision to prosecute was not subsequently changed was due to the prospect of financial gain. The fact of compliance must have been taken into account by Enfield, because the period covered by the charge was shortened before the information was laid.

78. As to ground 5, Mr Christopher accepts that the court's jurisdiction to find an abuse of process arising out of prosecutorial impropriety is not limited to cases in which the misconduct has an impact on the ingredients of the offence. He denies however that the judge fell into error in that respect. She rightly had regard to whether the undisclosed material could have had an impact on the ingredients of the offence, which was a relevant consideration though not decisive; but her judgment shows that she also took into account factors not related to guilt or innocence.

79. Mr Christopher submits that the judge, having found that there should have been more disclosure than there was, was entitled to find that Enfield had not acted in bad faith,

and that the late disclosure of further material did not alter the position. She was entitled to find that there had been nothing improper about the initial decision to prosecute or about the commencing of the prosecution at a time after Mr Kombou had belatedly complied with the enforcement notice. It was for Mr Kombou to make good his allegation of an abuse of process, and he was unable to do so. The judge was entitled, and correct, to refuse the application to vacate the guilty plea.

Discussion and conclusions:

80. Although the submissions on behalf of Mr Kombou were wide-ranging, it is important to remember that at the heart of this claim for judicial review is his submission that the judge acted unlawfully and irrationally in refusing his application to vacate his guilty plea. That unequivocal plea was entered by Mr Kombou after receiving legal advice and in the knowledge that he had breached planning control over a period of four and a half years and was at risk of a substantial confiscation order being made against him.

81. As the judge correctly directed herself, the discretion to permit a defendant to change an unequivocal guilty plea should be sparingly exercised. Moreover, the basis of the submission that Mr Kombou should be permitted to change his plea was, in essence, that Enfield had behaved with such serious impropriety, and his advisers had been so badly misled, that his prosecution would be an affront to justice and an abuse of the process of the court. The power to stay a prosecution on grounds of abuse of process is also one which is sparingly exercised. On any view, therefore, Mr Kombou – on whom the burden lay - was seeking to bring himself within a very narrow category of case.

82. The allegations of prosecutorial impropriety required the judge to consider the evidence as to the reasons for and motivation of the decision to prosecute Mr Kombou, and as to the deficiencies in Enfield's discharging of its disclosure duties. It was for her to decide which evidence she found to be truthful, accurate and reliable. She approached her task with evident care. She heard a substantial body of evidence: it is worth noting, for example, that the transcript of the cross-examination of Mr Higham covers some 45 pages. She also heard detailed submissions and clearly considered all the many points made on Mr Kombou's behalf.

83. With all respect to the industry of Mr Campbell-Tiech, it seems to us that the case advanced by Mr Kombou was built on flimsy foundations. Ensuring compliance with an enforcement notice is the primary aim of the legislation (see *Sanger v London Borough of Newham* [2014] EWHC 1922 (Admin), [2014] 2 Cr App R 27 at [39]), but it is not suggested that it is the only permissible consideration. If it were, there would be a perverse incentive for a property owner who was profiting from his deliberate breach of planning control to remain in breach for as long as possible, so as to maximise his profit before belatedly complying in order to put an end to any risk of prosecution and therefore to any risk of a confiscation order. There was here clear evidence of a prolonged and deliberate flouting of planning control, which Mr Kombou ultimately admitted, and Mr Higham's decision document of 22 March 2016 set out strong reasons why a prosecution was in the public interest. So too did Ms Harvey's email of 3 May 2017. In those circumstances, the premise of Mr Kombou's case – that there could be no reason for prosecuting him when he had complied with the notice, other than the pursuit by Enfield of a financial advantage – was from the outset contradicted by the evidence.

84. *R (Wokingham BC) v Scott* makes clear that a prosecuting authority, when deciding whether to commence a prosecution, must not be influenced by the prospect of a financial benefit accruing to it as a result of a confiscation order. ARIS is capable of giving rise to a serious conflict of interest on the part of a prosecuting authority, or to the appearance of such a conflict. Examples are provided by the facts and circumstances of that case, of *R v Knightland*, and of another of the cases cited to us, *R v Innospec Limited* (2010 WL 3580845). The very phrase "Incentivisation Scheme" is one with which lawyers may instinctively be uncomfortable, but it at least serves to highlight the need for the utmost care to be taken by a prosecuting authority to act in accordance with the principles stated in *R (Wokingham BC) v Scott*. The authority must be scrupulous to ensure that a decision to prosecute is not motivated, and does not appear to be motivated, by the prospect of financial gain.

85. It is not however the case that a decision to prosecute will inevitably be open to successful challenge if it might eventually lead to a confiscation order from which the prosecuting authority will benefit. It will often be necessary, before a decision to prosecute is taken, for someone within the authority to consider the possibility that confiscation proceedings might be brought: it may for example be necessary to consider an application for a restraint order pursuant to section 40(2) of POCA during the investigation, and it may be necessary to consider the allocation of limited resources as between a number of investigations. There is a crucial distinction between investigators legitimately considering the possibility of confiscation proceedings, and the decision-maker being improperly motivated to decide in favour of prosecution by the prospect of financial gain to the authority. We are confident that the court in *R (Wokingham BC) v Scott* had that distinction in mind when speaking, in the passage quoted at [65] above, of the possibility of a POCA order being made in the prosecutor's favour.

86. The judge accepted Mr Higham's evidence that he did not in fact consider confiscation proceedings at all. It is therefore not necessary for us to decide whether there is any aspect of confiscation which can properly be considered by the decision-maker. We would however observe that we see force in Enfield's submission that, when deciding whether a prosecution would be in the public interest, it may be legitimate to consider whether the breach of planning enforcement has resulted in a financial benefit of which the offender could be stripped by the court if he were prosecuted and convicted, but which he would otherwise be able to retain.

87. The judge heard the evidence of Mr Higham, whose decision as to prosecution is said to have been motivated by improper consideration of financial gain, and of Messrs Stevens and Shuttlewood, who were expressly or impliedly accused of improperly influencing Mr Higham's decision. It was the judge herself who ensured that the latter two gentlemen were made available for cross-examination by Mr Campbell-Tiech. Having heard that evidence, she concluded that Mr Higham was an honest and reliable witness and found as a fact that it was he who made the decision to prosecute (although his decision was then passed to the legal department for them to do a full evidential test) and that his decision was not motivated by or influenced by a desire for gain to Enfield from a POCA order. She therefore found that Mr Higham's decision that Mr Kombou should be prosecuted was independent, fair and objective.

88. We reject the submission that the judge could not rationally make those findings, or that she erred in law in making them. Mr Campbell-Tiech does not challenge her finding that Mr Higham was an honest and reliable witness. The internal

correspondence which we have summarised earlier in this judgment does not in our view provide any basis for saying that the judge could not accept Mr Higham's evidence. On the contrary, as she rightly said, his note at the end of the decision document provides powerful evidence that he did not then know whether there would be any confiscation proceedings. Moreover, many of the points made on Mr Kombou's behalf by reference to the internal correspondence relate to consideration of the possibility of POCA proceedings, not to the reasons for Mr Higham's decision, and do not undermine his evidence that he made his decision based on the planning merits of the case. It follows that the judge was entitled to make the findings she did at [77] of her ruling.

89. Whatever may be the merits of the argument that the decision to prosecute should have been taken by a lawyer, we do not see that that point could alter the judge's assessment of the evidence of the man who actually did make the decision. Nor do we see how the source of some or all of Mr Stevens' salary can assist Mr Kombou's argument when the judge found no evidence to cast doubt on Mr Stevens' denial that he had any role in the decision to prosecute. As the judge again rightly said, Mr Stevens' email of 1 October 2016 shows that as late as that date he did not know whether Mr Kombou was to be prosecuted.

90. When considering the suggested appearance of improper motivation of the decision to prosecute, it is important to remember that the yardstick is the view of an observer who is both fair-minded and informed. In the present context, that means that the observer is invested with the knowledge that ARIS is a system introduced by the government, not a private arrangement devised by the prosecuting authority for its own advantage; that legal consequences, in terms of the powers of the court, follow upon conviction; that those legal consequences may bring financial consequences for the offender; and that any financial benefit to the prosecuting authority accrues only after, and as a result of, the court's exercise of its powers. In the circumstances of this case, we see no basis on which it can be said that the judge, having made her findings as to Mr Higham's actual reasons, erred by not finding an appearance of an improper motive.

91. For those reasons, ground 2 fails.

92. The judge was correct to consider the merits of the abuse of process argument when deciding whether she should exercise her discretion to allow Mr Kombou to vacate his guilty plea. It is now common ground between the parties, and we agree, that the jurisdiction of the court to stay a prosecution as an abuse of process in circumstances of prosecutorial impropriety is not confined to cases in which the impropriety touches directly upon the ingredients of the offence charged.

93. With respect to the judge, the passages in her ruling referring to *R v Togher*, *R v Early* and *R v Younis* are not entirely clear, and it may be that she was doing no more than summarising the decisions on the facts of those cases rather than stating a point of law. But in any event, we accept Mr Christopher's submission that she did not in fact confine herself to a consideration of impropriety relating to the ingredients of the offence, and did not fetter herself: she clearly considered all the points which had been argued on Mr Kombou's behalf. As Yip J observed at the permission hearing, the judge clearly did not regard the question of whether the belatedly-disclosed material went to the ingredients of the offence as being decisive: had she taken that view, it would have been unnecessary for her to hear the evidence as she did. But not only did she hear the

evidence the parties called, she insisted that two further witnesses be available for cross-examination.

94. Despite Mr Campbell-Tiech's efforts, we are therefore unable to accept the submission that all of the judge's findings and conclusions can be ascribed to an error of law as to the ambit of abuse of process hearings.

95. Enfield undoubtedly failed to comply in a timely manner with its disclosure duty, and is rightly criticised in that regard. Nonetheless, those advising Mr Kombou had Mr Higham's decision document and had Ms Harvey's offer of 11 October 2017 that an officer would be available if required to give evidence about the information provided to a financial investigator. That offer was not taken up, but the fact that it was made contradicts the assertion that the failure of disclosure was a deliberate attempt to deny Mr Kombou access to material to which he was entitled. The judge was entitled to find that Enfield did not act in bad faith.

96. We do not share Mr Campbell-Tiech's view of the importance of the material which was belatedly disclosed in the course of the Crown Court proceedings. As we have indicated, we accept that it showed that a number of Enfield's officers were considering whether there would be confiscation proceedings and what benefit Mr Kombou might be ordered to repay, and we accept that Mr Higham was copied in to some of the correspondence. We do not however see that it provided any material support for the assertion that Mr Higham was or may have been improperly influenced in his decision as to prosecution by consideration of financial gain for Enfield. The judge was therefore entitled to conclude that earlier disclosure would not have assisted an application to stay the proceedings as an abuse of the process, and would not have supported the submission that continued prosecution would offend the court's sense of propriety and justice.

97. We are not persuaded that there was a culpable failure by Enfield to consider whether it was in the public interest to continue the prosecution when Mr Kombou had belatedly complied with the enforcement notice. We recognise that Mr Higham confirmed in his evidence that he had not seen the file after he submitted his decision of 22 March 2016. There is however a clear inference that there was further consideration of the decision, both because the period covered by the charge was shortened and because the schedule compiled by Mr Hillier on 4 November 2016 (on which Mr Campbell-Tiech relies) referred to an investigation into a possible further charge which, so far as we are aware, was never laid against Mr Kombou. As we have said, there was ample basis for the conclusion that prosecution was, and remained, in the public interest.

98. For those reasons, ground 5 also fails.

99. The claim for judicial review is accordingly refused.