Neutral Citation Number:

No: 201704969/A3 NEUTRAL CITATION NUMBER: **[2018] EWCA Crim 1345**

IN THE COURT OF APPEAL
CRIMINAL DIVISION
AND

No: CO/45/2018 NEUTRAL CITATION NUMBER: **[2018] EWHC 1450 (Admin)**

IN THE HIGH COURT OF JUSTICE

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 17 May 2018

B e f o r e:

LORD JUSTICE TREACY
MR JUSTICE STUART-SMITH
HER HONOUR JUDGE MUNRO QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

BETWEEN

R(ENVIRONMENT AGENCY) **Respondent**

- v –

TAPECROWN LIMITED **Applicant**

AND THEN

B e f o r e:

LORD JUSTICE TREACY
MR JUSTICE STUART-SMITH

R E G I N A
(ON THE APPLICATION OF TAPECROWN LIMITED) **Claimant**

v

OXFORD CROWN COURT **Defendant**

&

ENVIRONMENT AGENCY **Interested Party**

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MR EDMUND WALTERS appeared on behalf of the **Applicant/Claimant**

MR CHRISTOPHER BADGER (instructed by the Environment Agency) appeared on behalf of the **Crown/Interested Party**

J U D G M E N T
(Approved)

LORD JUSTICE TREACY:

1. Our conclusion is that the Court of Appeal (Criminal Division) does not have jurisdiction. Accordingly, we shall have to move on to consideration of the claim concerning judicial review. For that purpose, we shall have to reconstitute ourselves as the Administrative Court and Her Honour Judge Munro QC will not be part of that constitution; we shall continue as a duo.

2. We will give our reasons at the conclusion of all the proceedings. I am not going to give a separate judgment at this stage.

(The court then reconstituted as the Administrative Court and heard submissions.)

LORD JUSTICE TREACY:

3. This is a judgment to which all members of both constitutions have contributed.

4. There arises in this case an issue as to whether jurisdiction lies with the Court of Appeal Criminal Division or with the Administrative Court. If the court were to conclude that the Court of Appeal Criminal Division did not have jurisdiction, then it would have to reconstitute itself as the Administrative Court in the absence of Her Honour Judge Munro QC and go on to make a decision as to the jurisdiction of that court, and then, if so advised, to deal with matters under that jurisdiction.

5. We will first set out the background. On 6th March 2015, at the Crown Court at Oxford, the applicant company, Tapecrown Limited, pleaded guilty to four counts of knowingly causing or permitting the operation of an unauthorised regulated facility and one count of operating a regulated facility at a site without a permit, in contravention of regulations 12 and 38 of the Environmental Planning (England and Wales) Regulations 2010.

6. On 25th September 2015, following the company's failure to comply with an agreement to

clear waste from the site, the applicant was made subject to a remediation order under regulation 44 of the 2010 regulations. That order contained a penal notice warning that a failure of compliance might lead to the company or any person who assisted it being held in contempt of court.

7. On 25th January 2016, the company was ordered to pay a total fine of £20,000, with costs of just over £30,000.

8. On 1st July 2016, this court, Lord Thomas CJ presiding, refused applications for leave to appeal against the remediation order and the trial judge's refusal to extend time for compliance with that order. That judgment can be found under the name of R v Rogers & Others [2016] EWCA Crim 801.

9. The company failed to comply with the remediation order and proceedings for contempt of court were then brought. On 30th March 2017, the applicant company and Messrs Ismail (a director) and Crossley-Cooke (a purported director) were all found to be in contempt of court. On 28th April 2017, the applicant was sentenced for the contempt to a fine and costs order totalling £49,000.

10. On the same day, the judge made an order under the Civil Procedure Rules pursuant to CPR 70.2A. This order appointed a waste management company, Grundons, to remove all non-hazardous waste identified in the order from the applicant's site. The costs of removal were to be paid by Tapecrown. Paragraph 8 of the order provided that Tapecrown was at liberty to return to court to challenge the reasonableness of any costs incurred and charged. Any such challenge had to be notified to all parties, Grundons and the court within seven days of the invoice being received.

11. Grundons carried out the removal of waste and, on 6th July 2017, sent an invoice by email to Tapecrown, dated 30th June 2017, claiming over £79,000 for their services. The

document described itself as a "Pro Forma Invoice". It contained the words: "A formal tax invoice/receipt will be provided for your records when payment has been received for this pro forma invoice".

12. On 11th July 2017 Tapecrown informed Grundons that it could not open the pro forma invoice. As a result, the invoice was re-sent on 11th July 2017 and received on the same date in readable format.

13. On 21st July 2017, Tapecrown applied to challenge the reasonableness of costs charged by Grundons pursuant to paragraph 8 of the order, made pursuant to CPR 70.2A. By now, the original judge had retired and a new judge, His Honour Judge Ross, had taken over the case. On three occasions he granted extensions of time for Tapecrown to file evidence supporting its application. However, on 30th August 2017, he refused a further application for an extension of time for serving evidence.

14. On 31st August 2017, he declined to reduce the sums payable by Tapecrown, on the basis that Tapecrown had failed to give notice within seven days as required by paragraph 8 of the order of 28th April. However, on 1st September he gave a further ruling, after representations by Tapecrown, ordering them to provide further information.

15. On 3rd October 2017, having received further submissions from Tapecrown and the prosecutor (the Environment Agency), the judge ruled: (i) that he had a discretion to extend the time limit for Tapecrown to challenge the reasonableness of costs incurred and charged under paragraph 8 of the CPR 70.2A order; and (ii) declining to exercise that discretion in favour of Tapecrown.

16. Tapecrown initially sought to appeal to the Court of Appeal Criminal Division ('CACD') against the ruling of 3rd October. It now submits that that court has jurisdiction to hear an appeal by reason of section 13 of the Administration of Justice Act 1960. That is

contested by the Environment Agency, which argues that the CACD does not have jurisdiction to hear the appeal.

17. As a result of the issue over jurisdiction, by application filed on 3rd January 2018, Tapecrown applied for judicial review of the 3rd October ruling as an alternative should the CACD find that it had no jurisdiction to hear Tapecrown's appeal.

18. Section 13 provides:

> "13. Appeal in cases of contempt of court.
>
> (1) Subject to the provisions of this section, an appeal shall lie under this section from *any order or decision of a court in the exercise of jurisdiction to punish for contempt of court* (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings." (our italics)

Subsection (2)(bb) provides that an appeal shall lie to the Court of Appeal when it is from an order or decision of the Crown Court. The effect of section 53(2)(b) of the Senior Courts Act 1981 is that such appeals should be heard by the Criminal Division of the Court of Appeal.

19. Tapecrown contends that the CACD has jurisdiction because a wide ambit should be given to the wording of section 13(1), particularly in the light of the phrase "any order or decision". It was submitted that the CACD is not confined to hearing appeals against orders of punishment in contempt proceedings, but can hear appeals against any order or decision in contempt proceedings, whether before or after findings of contempt or orders of punishment have been made in such proceedings, and whether or not findings of contempt or orders of punishment are ever in fact made in such proceedings.

20. It is accepted that, although the orders made on 28th April and 3rd October 2017 in

relation to CPR 70.2A were not findings of contempt or orders of punishment in themselves, they were orders made when the Crown Court was exercising its jurisdiction to punish for contempt, and thus fell within section 13(1) of the 1960 Act.

21. Reliance was placed on the decision of this court in R v Seramuga [2005] 2 Cr App R 12, particularly at [12] in support of a wide construction. There, the court held that the phrase we have italicised in section 13(1) was sufficiently wide to relate to orders or decisions made in the course of proceedings which may result in a conviction of, and/or sentence for, contempt and was not limited to appeals against conviction or sentence. Accordingly, in that case, it was held that the CACD had jurisdiction to entertain an appeal under section 13 against a refusal of bail made in the course of contempt proceedings.

22. It will be seen at once that Seramuga does not extend in a manner which covers the facts of this case. The judge here had made a finding of contempt on 30th March 2017 and had sentenced the contemnors to fines and costs and/or a suspended sentence on 28th April 2017. He dealt separately with the consequences of the contempt, namely the failure of Tapecrown to remove waste from the site as required, by putting in place an order under CPR 70.2A designed to bring about a clearing of waste from the site by a third party (Grundons) who would then be reimbursed for their services by Tapecrown.

23. It seems to us that the order under CPR 70.2A did not constitute an order of the court in the exercise of its jurisdiction to punish for contempt of court. The court had already exercised that jurisdiction and was making an order consequent on the failure of Tapecrown to comply with the remediation order made in September 2015.

24. This analysis is supported by the terms of CPR 70.2A itself:

> **70.2A Court may order act to be done at expense of disobedient party**
>
> (1) In this rule 'disobedient party' means a party who has not complied with a

mandatory order, an injunction or a judgment or order for the specific performance of a contract.

(2) Subject to paragraph (4), if a *mandatory order, an injunction or a judgment or order for the specific performance of a contract is not complied with, the court may direct that the act required to be done may, so far as practicable, be done by another person, being—*

(a) the party by whom the order or judgment was obtained; or
(b) *some other person appointed by the court*.

(3) Where paragraph (2) applies—

(a) *the costs to another person of doing the act will be borne by the disobedient party*
(b) *upon the act being done the expenses incurred may be ascertained in such manner as the court directs;* and
(c) *execution may issue against the disobedient party* for the amount so ascertained and for costs.

(4) Paragraph (2) is *without prejudice to*—

(a) the court's powers under section 39 of the Senior Courts Act 19811; and
(b) *the court's powers to punish the disobedient party for contempt*. (our italics)

25. The italicised words, and in particular those at paragraph 4, emphasise that what the court is doing is securing compliance with the previously made remediation order and that this is a process independent of the court's power to punish for contempt of court. The foundation for the CPR 70.2A order is not the contempt proceedings but the remediation order, made long before there was any question of contempt of court.

26. This analysis is also supported by reference to section 45(4) of the Senior Courts Act 1981, which contains the Crown Court's power to make a CPR 70.2A order. It provides:

(4) ... the Crown Court shall, in relation to ... any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority as the High Court.

27. Thus it is clear that the power is not dependent on a finding of contempt of court. It may

arise independently from enforcement of an order such as a remediation order. Whilst the contempt of court arose from the fact of non-compliance with the remediation order, the CPR 70.2A order formed no part of the punishment for contempt of court, and the decision of 3rd October 2017 was one step further removed since it was based on a question arising under paragraph 8 of that order, as opposed to anything arising by way of punishment in the contempt of court proceedings. We therefore conclude that section 13 does not confer jurisdiction.

28. The applicant has relied solely on section 13 of the 1960 Act as a basis for giving jurisdiction to the CACD. We have, however, gone on to consider whether the decision of 3rd October 2017 is an appeal against sentence under Part 1 of the Criminal Appeal Act 1968. The parties are agreed that it is not. Section 50 of the Act provides that "sentence" includes any order made by a court when dealing with an offender. It then provides a non-exhaustive list of examples. It is clear that the definition of 'sentence' goes beyond a penalty imposed and that it will cover many orders ancillary to a sentence, including costs, compensation, hospital orders and recommendations for deportation.

29. The order of 3rd October arose as a result of non-compliance with the remediation order which was made several months before sentence was passed in relation to the offences on the indictment. The power to make a remediation order arises under regulation 44 of the 2010 regulations where a person has been convicted of an offence. As already stated, an appeal brought to this court in relation to the remediation order itself has been rejected. The appeal before us relates to a matter concerning the implementation of the order under CPR 70.2A arising from non-compliance with the remediation order. Although a link can be made back to the conviction of the applicant on the indictment, we consider that the proceedings on 3rd October are far too remote to be considered as part of any sentence

from which an appeal may lie.

30. For these reasons, we hold that the CACD does not have jurisdiction to entertain any appeal. The consequence is that we have to reconstitute ourselves as the Administrative Court in order to consider the alternative way in which the applicant's case is put by reference to a claim for judicial review of the decision of 3rd October. In so doing, Her Honour Judge Munro QC ceases to be a member of the constitution.

31. The first issue raised is whether the Administrative Court has jurisdiction to hear the judicial review claim. Since section 45(1) of the Senior Courts Act provides that the Crown Court shall be a superior court of record, the High Court would not ordinarily entertain challenges by way of judicial review since the Crown Court is of equal status. There is, however, an exception provided by section 29(3) of the 1981 Act, which 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. (our italics)

32. The issue then is whether the matter raised before us is one which relates to trial on indictment. Mr Badger for the Environment Agency contended that it was. He referred to regulation 44(2) of the 2010 regulations, which provides that a remediation order may be made "in addition to or instead of a punishment imposed". Accordingly, he argued that a remediation order is a criminal sentence and thus an integral part of the trial process. He then argued that an order made under CPR 70.2A, whilst not a sentence itself, was so closely linked to the criminal sentencing process that it was also a matter relating to trial on indictment, even if it was not a sentence within the meaning of section 50 of the Criminal Appeal Act 1968.

33. Thus, by extension of reasoning, the decision of the judge on 3rd October declining to exercise a discretion to extend time for the applicant to challenge the reasonableness of the costs in Grundon's invoice was also a matter relating to trial on indictment. Accordingly, the Administrative Court had no jurisdiction. That analysis was disputed by Mr Walters for the applicant, who contended that the High Court has jurisdiction.

34. We have considered In Re Smalley [1985] AC 622 and in particular the speech of Lord Bridge at pages 642-644 with which each of their Lordships concurred. No attempt was made to define the words italicised in section 29(3) above, but their Lordships held that the test to be applied was whether the decision of the Crown Court was one affecting the conduct of a trial on indictment given in the course of the trial or by way of pre-trial directions. It would also include matters by way of sentence passed at the end of a trial on indictment. Lord Bridge expressly dissented from propositions that any decision as to a matter arising out of or incidental to a trial, whether it related to approximate trial or a remote one, fell inevitably into the immunity from review by the High Court. He said there was nothing in the language or policy of the legislation to support such a sweeping statement. He envisaged the matter being determined on a case-by-case basis.

35. In R v Manchester Crown Court ex parte DPP (1994) 98 Cr App R 461, Lord Browne-Wilkinson suggested that a helpful pointer was posed by the answer to the question: "Is the decision sought to be reviewed one arising in the issue between the Crown and the defendant formulated by the indictment (including the costs of such an issue)?"

36. There is now a significant body of decisions dealing with individual situations, but there is none which is on all fours with the present case. We consider that the mere fact that there is some linkage to the holding of a trial on indictment is not of itself sufficient to bring the matter within the relevant phrase. Closer attention needs to be given to the nature of the

decision challenged.

37. Applying Lord Browne-Wilkinson's test, the decision in this case does not arise from an issue between the Crown and the defendant formulated by the indictment. Although it derived from the sentencing process, the relationship involved was not sufficiently close. The matter before the court on 3rd October 2017 derived from an order made under the Civil Procedure Rules, resulting from the failure to comply with the remediation order. The form of order was a means whereby a third party was empowered to carry out remediatory activity which the applicant had not performed. The issue before the court related to the mechanism for payment of the third party's costs in the event of a dispute as to their amount. We do not consider that this is an issue that can properly be described as relating to one between the Crown and the defendant at a trial on indictment in the sense considered in the authorities to which reference has been made. Rather, it is an issue between a third party and an erstwhile defendant as to payment for services performed. We therefore conclude that section 29(3) does not exclude the jurisdiction of the High Court. We now go on to consider issues raised in the claim for judicial review.

38. We begin with the issue of delay. Tapecrown's claim form in the judicial review proceedings was filed on 3rd January 2018 - the last day of the three-month period for bringing a judicial review challenge to the order of 3rd October 2017. The Environment Agency submits that permission should be refused pursuant to section 31(6) of the 1981 Act because there has been undue delay and the granting of relief sought by Tapecrown would be detrimental to good administration.

39. The relevant chronology shows that, when Tapecrown first submitted its notice of appeal to the CACD, the Registrar wrote on 24th November 2017 raising a number of points, including the question of jurisdiction to entertain an appeal from an order made under CPR

70.2A. On 6th December 2017, Tapecrown counsel's replied. He requested that, having regard to the approaching three-month time limit for judicial review, the Court of Appeal should consider the question of jurisdiction as soon as possible. The Registrar replied two days later, indicating that the matter would not be heard before January 2018 at the earliest and stating that it was a matter for Tapecrown to decide whether they should lodge protective judicial review proceedings. Counsel replied the same day saying that he was going to revert to his clients. In the event, he drafted judicial review grounds, which were dated 2nd January 2018, and proceedings were filed the following day.

40. In the light of this chronology, we reject the submission that there has been undue delay. Although it can be said that filing the judicial review proceedings at the outer end of the three-month time limit was a consequence of Tapecrown's error in relation to the application of section 13 of the Administration of Justice Act 1960, we consider that the delay, on the particular facts of this case, is understandable and not reprehensible.

41. We therefore turn to the next issue, which is the question of alternative remedy. The general principle is well established:

> "The court has a discretion whether to give permission to proceed with the claim for judicial review and consider the substance of the claim ... However ... where there is an alternative remedy available to the claimant, the court will not ordinarily allow him to proceed by way of judicial review, save in exceptional circumstances, usually because it is satisfied that the alternative remedy is for some reason clearly unsatisfactory."

See R (Willford) v Financial Services Authority [2013] EWCA Civ 674 at [20] per Moore-Bick LJ. It is, however, clear that the categories of circumstances in which, or reasons because of which, a claimant will be permitted to proceed are neither fixed nor closed.

42. In the present case, the Environment Agency submits that Tapecrown has an alternative

remedy because it can wait until Grundons sues for its charges and then take any point it wishes in order to resist Grundon's claim. In our judgment there are a number of points which, either singly or cumulatively, lead to the conclusion that this is not a satisfactory alternative remedy.

43. First, we are not satisfied that the Environment Agency's submission is technically correct either in principle or in scope. CPR 70.2A makes provision for the court to establish a self-contained process leading to the recovery of civil liabilities that may arise pursuant to an order made under the rule. Thus, 70.2A provides for the expenses incurred in the doing of the mandated act to be "ascertained in such manner as the court directs" and provides that "execution may issue against the disobedient party for the amount so ascertained and for costs". These terms are sufficient to enable the court making an order under CPR 70.2A to establish a mechanism for ascertaining the sums that the disobedient party will have to pay, which does not involve resort to the court at all.

44. In the present case, the court has ordered that: (a) Grundons are to determine the amount of costs incurred by reference to the breakdown of costs attached to the order; (b) the materials to be removed are those identified in the order; and (c) all costs the subject of the order are to be paid to Grundons within 30 days of a final invoice. This mechanism has the additional safeguards for Tapecrown that it is entitled to challenge the reasonableness of any costs incurred by a challenge that is to be notified to the parties, Grundons and the court (meaning the Oxford Crown Court) within the specified time.

45, On its face, therefore, the CPR 70.2A order sets up a self-contained and self-sufficient process for determining the proper level of costs to be paid. That mechanism is backed up by the power to levy execution for the amount so ascertained.

46. We therefore consider it to be at least well arguable that the alternative remedy for which

the Environment Agency contends does not exist. We express our view on this point provisionally and with caution because Grundons, although named as an interested party, are not before the court today and their position (if any) on this issue is not known. Even if the Environment Agency's alternative remedy exists in theory, we do not consider that it is a "satisfactory" alternative remedy within the terms of the general principle that we have identified.

47. In Willford, the claimant wanted to bring judicial review proceedings against the FSA to challenge their issue of a Decision Notice that was adverse to his interests. The statutory structure that regulated the power of the FSA to issue such notices also included the right of an individual to challenge the notice by an application to the tribunal. Although the remedies that could be obtained by the respective routes of judicial review and an appeal to the tribunal were not identical, the fact that the opportunity to refer the disputed Decision Notice to the tribunal was "an integral part of the statutory scheme" led the Court of Appeal to conclude that:

> "It would be surprising ... if Parliament had intended that disputes relating to the procedure adopted by the FSA should be reviewed by the courts, save in the most exceptional circumstances" [37] per Moore-Bick LJ.

48. The present case is far removed from the integrated statutory structure regulating decisions of the FSA. To the contrary, CPR 70.2A makes no express provision for reference to the County Court as a forum for ascertaining the amounts to be paid by the disobedient party and actively encourages the court imposing the order to create its own structure for ascertaining those amounts.

49. The Environment Agency also relied upon Grosvenor Chemical Limited v HSE [2013] EWHC 999 (Admin). However, that case involved different provisions which: (a) did not establish a mechanism for ascertaining what fee was payable; (b) required the fee not to

"exceed the sum of the costs reasonably incurred; and therefore (c) (as the judge found) said nothing that could be said to exclude the possibility of a challenge to the amount of the fee in the context of separate proceedings in the ordinary civil courts: see [3] to [4].

50. For the reasons already given, the present case should be distinguished under points (a) and (c). Reference to the court as the alternative remedy in Grosvenor had the additional advantage that the court would be independent, whereas the outcome of judicial review proceedings would be to cause the dispute to be remitted back to a disputes panel, which could be regarded as less independent because two of the three members would be from the HSE. By contrast, in the present case, if the present order is quashed, the case will have to go back to the Crown Court for reconsideration. For these reasons, we would not refuse permission because of the existence of a satisfactory alternative remedy.

51. We now move on to consider the merits. Despite considerable care being taken on 28th April 2017 in the construction and drafting of the order, it is not entirely unambiguous. In particular, it is notable that paragraph 8 of the order requires any challenge to the reasonableness of any costs incurred and charged to be notified to all parties, Grundons and the court within seven days of "the invoice" being received; but paragraph 9 of the order requires the costs that are the subject of the order to be paid to Grundons within 30 days of a "final invoice" being provided to Tapecrown (subject to the possibility of challenge and extending the time for payment). Tapecrown submits that "the invoice" in paragraph 8 should be read as referring to the same "final" invoice as referred to in paragraph 9.

52. We agree, for three reasons. First, such an interpretation ensures consistency between paragraphs 8 and 9, with time for challenging the costs or for paying them running from the same day. Second, if an invoice is not a final invoice or is liable to be superseded by

another one, there seems to be no sense in requiring Tapecrown to challenge an interim invoice that is liable to change or be superseded. Third, given the lack of clarity in the drafting, we would adopt the interpretation that is more favourable to the obligor: that is, Tapecrown.

53. Tapecrown received the "pro forma" invoice on 11th July 2017. The previous attempt to send it to them was not received because they could not open the attachment. Tapecrown submits that the document they received on 11th July was not the final invoice within the meaning of paragraphs 8 and 9 of the order. In our judgment, the strongest point in support of this submission is the fact that Grundons provided a further and different invoice on 21st July. However, the reasons for this were technological rather than substantive. On 6th July, when Grundons first sent their pro forma invoice, their covering email said:

> "Please find attached our invoice for the various aspects of the collection/disposal of waste from your site. Also attached is the breakdown of costs for the collections. We are struggling with some of our IT systems at the moment, but have managed to get a pro forma invoice raised for you."

54. There was nothing in the terms or format of the pro forma invoice to suggest that it was not a call for payment. It clearly was: as it said that "a formal tax invoice/receipt will be provided for your records when payment has been received for this pro forma invoice", and - to state the obvious - it described itself as an invoice. Although, when it came, the invoice sent on 21st July 2017 was in a different format, it still required payment of the same amount, calculated in the same way. In our judgment, all that was being done on 21st July was sending the same invoice in Grundon's normal format as a matter of record rather than of substance.

55. We therefore reject the submission that the relevant invoice for the purposes of

paragraphs 8 and 9 of the CPR 70.2A order was the 21st July version. In our judgment Tapecrown received the relevant invoice on 11th July 2017. Since it is common ground that Tapecrown's challenge was issued on 21st July, it was issued outside the seven days allowed by paragraph 8 of the order, and His Honour Judge Ross was correct to conclude that Tapecrown needed an extension of time, albeit of only three days.

56. The judge gave four reasons for his decision not to extend time:

(i) He concluded (correctly, as we have found) that the pro forma invoice "raised on 30 June 2017" was a demand for payment. He did so for reasons that were wrong - mistakenly transposing some of the wording from the document sent by Grundons on 21st July 2017 into the pro forma invoice. The evidence before the judge made clear that the pro forma, although dated 30th June 2017, was not sent until 6th July 2017, and there was nothing to contradict Tapecrown's evidence that they could not open the pro forma as originally sent. There is, however, no reference to this in the ruling.

(ii) The judge said he could see no reason why an invoice would have taken more than a working week (from 30th June to 11th July) to reach Tapecrown. Once again, this is not clear that the judge appreciated that the invoice was not sent until 6th July, nor is it clear whether he accepted or rejected the evidence of Tapecrown which was supported by documents that a readable version of the pro forma was not received until 11th July 2017.

(iii) He said that it appeared that work was complete by 30th June 2017. That was disputed by Tapecrown, but appears to us to be irrelevant to the question as to whether time for challenging the subsequent invoice should be extended.

(iv) He asserted that Tapecrown did not challenge the quantities of material that had been removed between 30th June and 11th July 2017. This ignored the fact that Tapecrown had already complained about the quantities removed on 29th June 2017. It might have

been a relevant consideration if the judge was operating on the basis that the invoice had been received on 30th June, which it was not. Otherwise we are unable to see the relevance of this point to the question of extending the seven days allowed from receipt of the invoice on 11th July to the raising of Tapecrown's challenge.

57. It will be apparent from the summary we have provided above that the points upon which the judge relied contained errors of fact and matters which were irrelevant. Of equal importance, the judge's ruling did not identify the considerations that would have been material to the exercise of his discretion. These were: the length of the extension required (three days); the likely effect of refusing the extension on Tapecrown (severe, because it would prevent the operation of the mechanism established by the order for determining Tapecrown's proper liability); the effect of an extension upon either the Environment Agency or Grundons (negligible or nil); the fact that Tapecrown had made clear their opposition to the quantities being removed (on 29th June 2017); the scale of charges (on 14th July); and the principles that would conventionally be applied, either under the Criminal or the Civil Procedure Rules, when considering a request for an extension of time for compliance with an existing order of the court.

58. The Environment Agency submitted that, even if we were to identify deficiencies in the ruling of 3rd October 2017 - and it did not seriously contest that there were some - we should not quash the order for two main reasons.

59. First, it is submitted that such an order would leave an earlier order of the court made on 31st August 2017 unaffected. We disagree. In our judgment the order made on 31st August was, at best, an interim order that was (or should have been) superseded by the order of 3rd October 2017. The judge suggested in the course of that ruling that there were two issues for him to decide, the first being the extension of time and the second

being the substantive question of whether Tapecrown's challenge should be litigated. In the end, he decided the first issue but not the second.

60. Second, the Environment Agency submits that any challenge is bound to fail because it is directed to issues that have already been determined by the CPR 70.2A order and may not be reopened.

61. We can see considerable force in the submission that the original CPR 70.2A order has determined: (a) that Grundons were to take the material to the specified address in Cheltenham; and (b) that the cost was to be calculated by reference to the breakdown of costs attached to the order; so that (c) it is not open to Tapecrown now to contend that costs incurred in accordance with (a) and (b) were unreasonable.

62. Mr Badger for the Environment Agency further submitted that it was not open to Tapecrown to challenge the quantities of material on which Grundon's claim is based because paragraph 2 of the CPR 70.2A order provided that:

> "The amount of waste due to be removed under this Order shall be deemed to be that weighed and received at the Bishops Cleeve landfill site."

This, submits Mr Badger, means that any material weighed and received at the Bishops Cleeve landfill site is deemed to be waste that was due to be removed under the order.

63. We do not consider that this is either the only or necessarily the correct interpretation of paragraph 2. It may equally be submitted that the meaning and effect of paragraph 2 is that *if* waste due to be removed under the order is removed, its amount shall be deemed to be that weighed and received at the Bishops Cleeve landfill site. On this interpretation, what waste is due to be removed under the order would fall to be determined by reference to the terms of the order as a whole and in particular by reference to paragraphs 1 and 7.

64. For present purposes, we are not in a position either to assume or to rule that such

an argument is not open to Tapecrown. We note that, when the order was made, the competing projections of quantities were 120 and 180 tonnes respectively. Grundons have charged for over 400 tonnes; and the circumstances in which such quantities came to be taken to Cheltenham are evidently in dispute. The financial consequences of this dispute are clearly significant, both for Tapecrown and Grundons, and (possibly) for the Environment Agency. We consider that these are potential issues of interpretation and (if appropriate) of fact for the court below to decide if and when the question of an extension of time is or has been reconsidered. We should not be taken as giving any direction or decision about their resolution one way or the other.

65. For these reasons, we grant leave and quash the decision of the court below made on 3rd October 2017. We remit the matter to the Oxford Crown Court for reconsideration.

66. MR WALTERS: My Lord, in relation to the costs of this application, I have put in a schedule of Tapecrown's costs, which consist entirely of brief fees paid to me. Obviously in relation to your Lordships' ruling on the issue of jurisdiction in the Court of Appeal, some of the costs in that schedule relate (1) to drafting the application.

(The court adjourned for a short time after hearing argument as to costs.)

67. LORD JUSTICE TREACY: We have considered the opposing submissions made as to costs. Having considered those, we will be making an order in favour of Tapecrown and against the Environment Agency. We consider that, overall, Tapecrown was successful, although we recognise there was a failure in relation to the jurisdictional point concerning the Court of Appeal Criminal Division, and that not only that should some measure of disallowance be made for the costs claimed by Tapecrown in that respect, but it will also have resulted in the incurring of costs by the Environment Agency, so we take that into

account. Approaching the matter in the round and taking account of all matters raised with us, we make an order in favour of Tapecrown in the sum of £7,000.

68. MR WALTERS: I am grateful, my Lord. There is one point. In relation to the quashing the order and remitting it, if I understand your Lordship's comment correctly, it will be remitted for reconsideration of the point?

MR JUSTICE STUART-SMITH: Yes.

LORD JUSTICE TREACY: Yes. Namely, whether an extension of time should be granted and any consequences which flow from that.

MR WALTERS: Yes. Can I ask, my Lord, that it be remitted to a different judge from His Honour Judge Ross to avoid complications arising from all those rulings?

LORD JUSTICE TREACY: I do not think that is a matter for us to rule on; it would be a matter for the resident judge and the listing officer at Oxford Crown Court to determine. It may be that, if the resident judge deems it appropriate, he should consult a presiding judge of the South Eastern Circuit.

MR WALTERS: I am grateful, my Lord.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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