Neutral Citation Number: [2019] EWHC 126 (Admin)

Case No: CO/3139/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2020

Before :

THE HONOURABLE MR JUSTICE LANE

- -

Between :

Fuseon Limited	**Claimant**
- and –	
Senior Courts Costs Office	**First Defendant**
The Lord Chancellor	**Second Defendant**

- -
- -

Mr Rupert Cohen (instructed by **Edmonds, Marshall, McMahon Limited**) for the **Claimant**
Mr Riccardo Calzavara (instructed by **Government Legal Department**) for the **First Defendant**
Mr Richard Boyle (instructed by **Government Legal Department)** for the **Second Defendant**

Hearing date: 18 December 2019

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Approved Judgment

Mr Justice Lane: :

A. INTRODUCTION

1. The claimant carries on the business of letting agents. It is a small enterprise, based in Horwich, near Bolton, Lancashire. Mr Laycock is its director. Between January 2009 and May 2015, a co-director of Mr Laycock was Timothy Shinners. As a result of Mr Shinners' fraudulent activities, the claimant accrued liabilities in excess of £100,000. When these activities came to light, Mr Laycock informed the Greater Manchester Police. They declined to investigate, citing the effects of "austerity", which required them to prioritise the investigation of other forms of criminal activity.

2. In November and December 2015, Mr Laycock researched firms in the local area, which provided private prosecution services. Being unable to find such a firm, in January 2016 he instructed Edmonds, Marshall McMahon Limited ("EMM"), a firm based in London, which advertised itself as providing private prosecution services. EMM instructed a forensic accountant (fraud having been disguised in the accounts through the creation of invoices in respect of fictional transactions). EMM also instructed Counsel. On 26 August 2016, an information was laid at Preston Magistrates' Court. The final indictment contained six counts; two of false representations; two of making articles for use in fraud; and one each of theft and fraudulent trading.

3. The trial of Mr Shinners took place over eleven days at Preston Crown Court, before HHJ Knowles QC and a jury. On 9 June 2017, Mr Shinners was convicted on four counts. He was sentenced to three years' imprisonment (various terms being imposed concurrently). On 7 July 2017, HHJ Knowles QC ordered "that a payment be made to the prosecution out of central funds in respect of prosecution costs, including the cost of the investigation, and that the sum to be paid shall be determined". The Crown Court had been specifically told that the claimant's costs were £427,909.66 (including VAT).

4. On 24 November 2017, the determining officer allowed the claimant the sum of £150,000, plus VAT in respect of the prosecution costs. The claimant requested a re-determination and, on 23 February 2018, the determining officer re-determined costs in the sum of £200,000, plus VAT. The officer's written reasons for that re-determined sum were provided on 5 April 2018.

5. The claimant appealed against that decision to a Costs Judge (Master Rowley), who gave judgment on 30 April 2019. He dismissed the claimant's appeal.

6. On 28 May 2019, the claimant requested the Master to certify points of principle of general importance, so as to enable the claimant to appeal to the High Court. On 7 June 2019, the Master declined to issue a certificate.

7. The present proceedings are brought pursuant to the inherent jurisdiction of the High Court to control the exercise of the authority of that Court, which has been delegated to the Taxing Master: R v Taxing Officer *ex parte* Bee-Line Roadways International Limited (unreported, 5 February 1982). The nature of this jurisdiction was described by the Court of Appeal in R v Supreme Court Taxing Office *ex parte* John Singh and Co [1997] 1 Costs LR 49. Henry LJ held:-

> "Counsel for the taxing master conceded that such a jurisdiction existed but submitted that it should be restricted to cases where there had been a real injustice.
>
> I agree with both that concession and, in general terms, with the limitation on it. In his refusal to certify, the taxing master was exercising a "strong" discretion entrusted under the statutory scheme to him. The cases where the supervisory court could reverse a failure to certify would, in the circumstances, be very rare indeed …"

8. The claimant contends that the Master's decision contains errors of law. The Master is said to have wrongly upheld the delegated officer's decision that (a) EMM's London charging rates and travel expenses were not the appropriate yardstick; and (b) in applying the so-called Singh reduction, the claimant's recoverable costs should be reduced by reference to the costs of the Crown Prosecution Service, had it conducted the prosecution of Mr Shinners.

9. The claimant submits these errors are significant, not just because the claimant (in effect, Mr Laycock) is thereby out of pocket to the extent of more than £180,000, which has required Mr Laycock to take out a business loan. The errors have a more general significance because, if allowed to stand, they undermine the intention of the legislature (and the Lord Chancellor) to protect the position of those who bring private prosecutions; particularly where, as here, the police have refused to become involved, owing to a lack of resources.

10. The second defendant contends that there is no error in the Master's decision and that, even if there were, the Master was entitled to refuse to certify the case and there is no "real injustice" that requires remedy by the High Court, in the exercise of its inherent jurisdiction.

B. THE LEGISLATIVE FRAMEWORK

11. Part II of the Prosecution of Offences Act 1985 concerns defence, prosecution and third party costs in criminal cases. Sections 16, 16A and 17 concern the award of costs out of central funds.

12. In certain defined circumstances, a defendant may be awarded a defendant's costs order. Section 16(6) provides as follows:-

> "(6) A defendant's costs order shall, subject to the following provisions of this section, be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.
>
> (6A) Where the court considers that there are circumstances that make it inappropriate for the accused to recover the full amount mentioned in subsection (6), a defendant's costs order must be for the payment out of central funds of such lesser amount as the court considers just and reasonable."

Section 17 deals with prosecution costs:-

> "**17. Prosecution costs.**
>
> (1) Subject to [subsections (2) and (2A)] below, the court may -
>
> (a) in any proceedings in respect of an indictable offence; and

(b) in any proceedings before a Divisional Court of the Queen's Bench Division or the [Supreme Court] in respect of a summary offence;

order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.

(2) No order under this section may be made in favour of -

(a) a public authority; or

(b) a person acting -

(i) on behalf of a public authority; or

(ii) in his capacity as an official appointed by such an authority.

(2A) Where the court considers that there are circumstances that make it inappropriate for the prosecution to recover the full amount mentioned in subsection (1), an order under this section must be for the payment out of central funds of such lesser amount as the court considers just and reasonable.

(2B) When making an order under this section, the court must fix the amount to be paid out of central funds in the order if it considers it appropriate to do so and -

(a) the prosecutor agrees the amount, or

(b) subsection (2A) applies.

(2C) Where the court does not fix the amount to be paid out of central funds in the order -

(a) it must describe in the order any reduction required under subsection (2A), and

(b) the amount must be fixed by means of a determination made by or on behalf of the court in accordance with procedures specified in regulations made by the Lord Chancellor.

…"

13. Section 18 concerns the award of costs against an accused. In certain defined circumstances a court may make such order as to the costs to be paid by the accused to the prosecutor or other named person, as the case may be, as the court considers just and reasonable.

14. The Costs in Criminal Cases (General) Regulations 1986 (SI 1986/1335) deal, at Part III with the payment of costs out of central funds. So far as relevant, regulation 7 provides as follows:-

"7.- (1) The appropriate authority shall consider the claim, any further particulars, information or documents submitted by the applicant under regulation 6(5), and shall allow such costs in respect of—

(a) such work as appears to it to have been actually and reasonably done; and

(b) such disbursements as appear to it to have been actually and reasonably incurred.

(2) In calculating costs under paragraph (1) the appropriate authority shall take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved.

(3) Any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant.

(4) The costs awarded shall not exceed the costs actually incurred.

…"

15. Regulation 9 concerns the re-determination of costs by an appropriate authority. An applicant who is dissatisfied with the costs determined under the Regulations by an appropriate authority (other than before a Magistrates' Court) may apply to the appropriate authority to re-determine them. The regulation makes provision for the procedure to be followed on a re-determination, which can lead to the increase or decrease in the level previously determined, or involve a confirmation of that level. If so requested, the appropriate authority must give reasons for its decision.

16. Regulation 10 concerns appeals to a Costs Judge from the appropriate authority. After dealing with matters of procedure, the regulation provides:-

"12. The Costs Judge shall have the same powers as the appropriate authority under these Regulations and, in the exercise of such powers, may alter the redetermination of the appropriate authority in respect of any sum allowed, whether by increase or decrease, as he thinks fit."

17. Regulation 11 concerns appeals to the High Court:-

(1) An applicant who is dissatisfied with the decision of a costs judge on an appeal under regulation 10 may apply to a costs judge to certify a point of principle of general importance.

…

(3) Where a Costs Judge certifies a point of principle of general importance, the applicant may appeal to the High Court against the decision of a Costs judge on an appeal under regulation 10, and the Lord Chancellor shall be a respondent to the appeal.

…

(7) An appeal under paragraphs (3) … shall be brought to the Queen's Bench Division, follow the procedure set out in Part 52 of the Civil Procedure Rules 1998 and shall be heard and determined by a single judge whose decision shall be final.

…"

C. CASELAW

(1) The importance of private prosecutions

18. In R (Gujra) v Crown Prosecution Service [2012] UKSC 52, the Supreme Court held (by a majority) that the Director of Public Prosecutions had lawfully amended his policy in relation to the strength of the evidence in support of the prosecution, in determining whether to take over a prosecution and discontinue it. Giving the lead judgment, Lord Wilson had this to say:-

> "26. The value to our modern society of the right to bring a private prosecution is the subject of lively debate.
>
> 27. The *Gouriet* case [1978] AC 435 concerned the ability of a private citizen to secure an injunction restraining a threatened refusal by post office workers to handle mail to South Africa in breach of the criminal law. Members of the appellate committee of the House of Lords considered, in passing, his right to bring a private prosecution in the hypothetical event that the workers had proceeded to commit such an offence. Lord Wilberforce said, at p 477:
>
> > "This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority."
>
> Lord Diplock observed, at p 498, that the need for private prosecutions to be undertaken had largely disappeared but that the right to undertake them still existed and was "a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law". Can one confidently say that the later advent of the CPS has banished all the concerns articulated in the *Gouriet* case, particularly in relation to "inertia", or (to adopt what may be the fairer word used by the witnesses to the Royal Commission: see para 19 above) "inaction", on the part of the public authority?
>
> 28. In *Jones v Whalley* [2007] 1 AC 63 the police administered a formal caution to the perpetrator of an assault and explained to him that, as a result, he would not be brought before a criminal court in respect of it. Thereupon his victim instituted a private prosecution against him in respect of it. The House of Lords held that the magistrates had been correct to stay the proceedings as an abuse of their process. General observations were made about the value of the right of private prosecution. Lord Bingham said, at para 9:
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> > "There are ... respected commentators who are of opinion that with the establishment of an independent, professional prosecuting service, with consent required to prosecute in some more serious classes of case, with the prosecution of some cases reserved to the Director, and with power in the Director to take over and discontinue private prosecutions, the surviving right is one of little, or even no, value...
> >
> > [Counsel for the victim] is entitled to insist that the right of private prosecution continues to exist in England and Wales, and may have a continuing role. But it is hard to regard it as an important constitutional safeguard when, as I understand, private prosecutions are all but unknown in Scotland."
>
> Lord Bingham added, at para 16, that the surviving right of private prosecution was of questionable value and could be exercised in a way damaging to the public

> interest. By contrast, Lord Mance suggested, at para 39, that the rarity of a private prosecution in Scotland did not undermine the traditional English view that the right to institute it was an important safeguard; and, at para 43, that, as Lord Wilberforce and Lord Diplock had suggested in the *Gouriet* case, it was a safeguard against the wrongful refusal or failure by prosecuting authorities to institute proceedings.
>
> 29. With respect, I consider that there is much to be said in favour of the views thus expressed by Lord Mance. In any event, however, the fact is, that, by section 6 of the 1985 Act, Parliament chose, albeit in qualified terms, to reaffirm the right of private prosecution; and the conduct of the CPS must conform to its reaffirmation. …"

19. R (The Law Society of England and Wales) v The Lord Chancellor [2010] EWHC 1406 (Admin) is a Divisional Court judgment in a judicial review brought by the Law Society to challenge the lawfulness of a scheme made by the Lord Chancellor for the award of costs out of central funds to defendants who had faced, and successfully resisted, criminal proceedings. The effect of the new scheme was to allow successful defendants to recover their costs only at legal aid rates. The Divisional Court upheld the challenge on the single ground that the new scheme was made for improper purposes:-

> "48. In my judgment, they are not lawful. The section 20 power has to be exercised "to carry into effect" the principles enunciated in Part II of the Act, and that includes the principles set out in section 16(6). Mr Eadie does not suggest otherwise. He accepts that the regulations cannot undermine or subvert the principles of compensation set out in that subsection. That provision requires that the compensation must be "reasonably sufficient". It should be such amount as is reasonably incurred for work properly undertaken. In my view, one can only sensibly ask whether the cost has been reasonably incurred by having regard to the prevailing market. The individual defendant seeking legal representation is a consumer in that market. The amount he or she will have to pay to secure the services of a lawyer will be determined by that market."

20. The Divisional Court, however, rejected the Law Society's ground of challenge based on the similarities (which we have already seen) between sections 16 and 17 of the Prosecution of Offences Act 1985:-

> "63. The third ground compares the position of defendants and prosecutors. The submission in essence is that since sections 16 and 17 of the 1985 Act provide for costs orders to be paid from central funds in similar terms, so Parliament must have intended that a similar approach would be adopted by the Lord Chancellor in setting any rates and scales. To alter the rules in a manner prejudicial to defendants but to leave private prosecutors unaffected is unjust and irrational.
>
> 64. Mr Eadie denies that there is any legislative intent that can be inferred from the 1985 Act which would require the two cases to be treated identically. For example, a very important difference is that the cost of private prosecutors cannot be recovered from central funds where summary cases are successfully prosecuted in the magistrates' court.
>
> 65. Furthermore, Parliament has not chosen to empower the Lord Chancellor simply to introduce one set of rates and scales to apply identically to both sets of costs orders. He also points out that Ms Albon in her witness statement has identified a number of reasons why the Secretary of State has chosen not to cap private prosecutors' costs in the same way as defendants' costs. The Lord Chancellor took the view that it might

> deter private prosecutions if the claimants were to be so limited and that would be against the public interest. Some private prosecutors conduct prosecutions on a fairly regular basis. This will include a number of charities, such as the RSPCA. They will need to recover expenditure close to actual levels, otherwise they would be out of pocket, and that in turn would deter them from bringing such prosecutions. By contrast, defendants are not typically involved in a range of cases in this way. A further distinction is that private prosecutors have no access to an alternative funding mechanism, such as insurance or legal aid.
>
> 66. Finally, there are pressures which will cause private prosecutors to keep costs down, specifically because they cannot recover the majority of their costs even if successful. It is the Lord Chancellor's opinion, which is challenged by the Law Society, that the pressure is not felt to the same extent on individual defendants since they are generally involved in a one off event.
>
> 67. In my judgment, there is nothing which requires the Lord Chancellor to treat both situations the same, and these reasons provide a rational basis for drawing the distinction that he does. The assumption that must be made in assessing this ground as an independent basis for quashing the New Scheme is that the Lord Chancellor can fix such rates as he considers to be reasonable; and he has a wide area of discretion as to the factors that can weigh with him when making that assessment. He has chosen to discriminate here because he thinks it desirable to promote private prosecutions in the public interest. There is not the same public benefit to be derived from recompensing successful defendants in the same way.
>
> 68. In my view, this is capable of providing a justification for the difference in treatment. It is not for the court to determine how much weight should be given to these considerations. Had the scheme been otherwise lawful, I would not have struck it down on these grounds." (Elias LJ)

(2) The High Court's inherent jurisdiction: "real injustice"

21. I have already mentioned the case of Singh as an articulation of the requirement that there must be a "real injustice" in order for the Court to exercise its inherent jurisdiction to quash a decision of a Costs Judge who has refused to certify a point under the regulations, so as to give rise to a claim to the Court. In Singh the Court analysed in detail the decision of the Taxing Master. The Court observed that the Taxing Master "must exercise his own judgment while giving proper weight to any advantages the determining officer may have had in relation to the consideration of the case over him". It found that the Taxing Master had put the applicant under no time pressure, in making his submissions. There was no support for the suggestion that the Taxing Master merely looked "at the legality of what the determining officer was [doing]". The Court, accordingly, concluded that it could "detect no error of approach by the Taxing Master in this case". The Taxing Master "did what the regulations required".

22. In Bee-Line Roadways (see above), there had been a misunderstanding between the Master and those representing the Plaintiffs which had resulted in the Master failing to consider the merits of the case that those representatives wished to put to him. Woolf J came –

> "to the conclusion that this is one of those rare cases where it would be right to intervene. The solicitors acting for the Defendants have raised no objection to the Court intervening. Indeed, one of the solicitors has indicated that he would have been happier if the Master had proceeded to consider the merits … It seems to me that on the material before me there would be real injustice caused if the Plaintiffs were not entitled to put the evidence which they had before the Master …".

23. In his judgment, Woolf J made reference to Brown v Youde [1967] 3 All ER 1070. In that case, Chapman J held that it would be "contrary to justice" to allow a Certificate of Taxation to stand as an absolute bar to a review of that taxation, where the District Registrar had taxed the first Plaintiff's bill of costs, and, on the same date, without informing the parties of his intention to do so, had signed the Certificate of Taxation.

24. In R (Brewer) v Supreme Court Costs Office [2007] 1 Costs LR 20 the Divisional Court was asked to exercise its inherent jurisdiction to overturn a decision of a Costs Judge who had declined to certify a point of principle of general importance under regulation 11. The point in issue concerned the costs incurred by a successful Defendant in a criminal trial in respect of work undertaken by an American attorney who had been involved in the preparation of Mr Brewer's case, both before and after the grant of legal aid that had led to him receiving the services of London solicitors.

25. The determining officer had refused to award Mr Brewer any costs in respect of the American attorney but the Costs Judge decided that "a small sum should be allowed" covering, essentially, pre-prosecution work undertaken by her.

26. Giving the judgment of the Court, Maurice Kay LJ, having referred to the judgment in Singh said:-

> "19. In short, therefore, the jurisdiction is one to be exercised sparingly, only to be used to cure "a real injustice".
>
> 20. Mr Buley suggest that the approach of this court should replicate the jurisprudence in respect of second appeals under the Civil Procedure Rules … Whilst I acknowledge that there is some similarity between the present jurisdiction and that exercised in those circumstances, this jurisdiction has no statutory basis and I would prefer to place no gloss on the "real injustice" test and the "very rare indeed" limitation."

27. At paragraph 23, Maurice Kay LJ described the tasks of a determining officer or a Costs Judge faced with an application of the kind in question. The first was to ascertain whether the expenditure was "properly incurred … in the proceedings" (section 16(6)) and whether it was work that had been "reasonably done" (regulation 7(1A)). Furthermore, regulation 7(2) required account to be taken of all the relevant circumstances "including the nature, importance, complexity or difficulty of the work and the time involved".

28. At paragraph 24, Maurice Kay LJ held:-

> "It seems to me that once the Costs Judge had accepted that the claimant should receive some reimbursement in respect of the cost of engaging Ms Travis [the American attorney], it became necessary to carry out a detailed investigation so as to ascertain what she had done and whether particular aspects of her endeavours had been reasonably done in all the circumstances of the case. As I understand it, the Costs Judge was invited to review a large amount of documentation but declined to do so."

29. Maurice Kay LJ held that the Costs Judge had erred in limiting his consideration to "pre-prosecution" costs, despite the fact that leading Counsel for Mr Brewer had not suggested that the "great help" provided by Ms Travis was limited to the period before Mr Brewer had been charged. Secondly, and independently, by taking the solicitors' bills as the starting point, the Costs Judge "may have taken too narrow a view of Ms Travis's involvement" (paragraph 24).

30. Maurice Kay LJ concluded as follows:-

> "25. I have come to the conclusion that, having admitted the claim in principle, the Costs Judge did not then carry out the task in the way that was required by the Act and the Regulations. To this extent, I consider that there is a "real injustice" in awarding a figure - described by the Costs Judge as "a small sum" - which is not based upon the task which ought to have been undertaken. I express no view whatsoever on what a proper reassessment may yield. …
>
> 26. The problem that has arisen in this case has arisen because the claims separately submitted by [the solicitors] and by the claimant himself were allowed to remain separate. This should not have happened. …
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> 27. It follows from what I have said that, in my judgment, there was a "real injustice" in proceeding to assess the sum reflecting the input of Ms Travis without undertaking a detailed assessment of the work she had done."

31. The Divisional Court remitted the matter to a Costs Judge (Master Campbell). Master Campbell's decision, however, also led to proceedings in the High Court, which was again asked by Mr Brewer to exercise its inherent jurisdiction to quash the Master's decision. In Brewer v the Supreme Costs Office [2009] 3 Costs LR 462 (hereafter "Brewer [2009]"), Holroyde J described what had happened:-

> "23. Most unfortunately, there had been a misunderstanding or error as to whether a further hearing should take place before Master Campbell made his decision. The date for such an oral hearing had been identified when directions were given on 8 December 2006, but that date came and went without any hearing having taken place. It appears that regrettably the date had not been confirmed to Mr Brewer or to his solicitors, with the result that they were waiting to hear from the court as to a new date, whilst Master Campbell proceeded in the belief that Mr Brewer and his advisers knew of the hearing date but did not wish to add oral submissions to their written submissions. This unhappy situation became apparent, of course, when Master Campbell's written decision was received by Mr Brewer and his solicitors.
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> …
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> 29. On 30 October 2008 the SCCO acknowledged service of this claim and indicated that it would not be resisted. The SCCO accepts that because of the administrative error to which I have referred, Mr Brewer had suffered a breach of natural justice such as to justify the exercise by this court of its inherent jurisdiction.
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> …
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> 40. In those circumstances I accept that this is a proper case to exercise the inherent jurisdiction of this court so as to quash the relevant parts of Master Campbell's decision and remit Mr Brewer's claim in relation to the fees and expenses paid to Ms Travis to be considered afresh by a different costs judge. …"

(3) The reasonableness of the claimant's actions

32. In R v Dudley Magistrates' Court ex parte Power City Stores Limited and Another (New Law Journal, March 16 1990) the Divisional Court held that, where a Magistrates' Court makes a defendant's costs order, the test for deciding whether leading counsel's fee should be allowed

(when assessing, pursuant to section 16(7) of the 1985 Act, what amount it would be reasonable for the defendant to be paid out of central funds), is whether the defendant has acted reasonably in employing leading counsel. The test was not whether the case could have been conducted adequately by a senior solicitor or junior counsel. Having determined that matter, the court should then go on to determine whether leading counsel's fee was reasonable.

33. Woolf LJ recorded that counsel for the applicant submitted that the Magistrates' clerk -

> "was asking himself the wrong question. What he was asking himself was this: Could a junior counsel or a senior solicitor reasonably have conducted the case on behalf of the applicants? The answer he came to was that a senior solicitor or junior counsel could have properly conducted the matter on behalf of the applicants. However, Mr Inman submits that what he should have asked himself was whether the applicants acted reasonably in employing leading counsel, which is an entirely different question. The answer to that question would be very different on the facts of this case from the answer to the question which the clerk obviously asked himself. You can have many situations – and Mr Inman accepts that this is one such situation – where junior counsel or a senior solicitor could adequately deal with the case. But it was nonetheless reasonable for a defendant to employ leading counsel.
>
> If it was reasonable for him to employ leading counsel, then in the language of s.16 the expenses were properly incurred. It seems to me the criticism which is made by Mr Inman of the justices' clerk is justified. If the justices' clerk had asked himself the right question he would undoubtedly have come to a different conclusion from that which he did. By asking himself the wrong [questions] he came to the wrong decision as to whether or not any fees were allowable for leading counsel.
>
> On that basis, therefore, in my view, the decision of the justices' clerk has to be quashed in this case. …"

34. Wraith v Sheffield Forgemasters Ltd and Truscott v Truscott [1996] 1 WLR 617 were conjoined costs appeals. W, who was injured in an industrial accident in Sheffield, relied on his trade union to handle his claim for compensation. The trade union instructed London solicitors who specialised in personal injury claims. Proceedings were transferred by consent from London to Sheffield. W's solicitors, having been successful on his behalf, claimed an hourly charging rate applicable to central London. Potter J, sitting with assessors, refused the defendant's employers' application for a review, holding that the costs had been reasonably incurred.

35. T, who lived in Tunbridge Wells, instructed solicitors in East Grinstead in connection with county court proceedings by his former wife. Having become dissatisfied with his local solicitors, T instructed a small firm of solicitors in central London, who obtained an order in T's favour. The Costs Judge held that it was not reasonable for T to have instructed the London solicitors if their rates were higher than those charged locally and ordered a reconsideration on the basis of rates appropriate to a firm of solicitors in Sussex or Tunbridge Wells.

36. The Court of Appeal allowed both appeals. In the case of Wraith, Kennedy LJ held:-

> "When giving judgment in *Wraith v Sheffield Forgemasters Ltd* [1996] 1 W.L.R. 617, 624-625 Potter J said:
>
> > "In relation to the first question 'Were the costs reasonably incurred?' it is in principle open to the paying party, on a taxation of costs on the standard basis,

> to contend that the successful party's costs have not been 'reasonably incurred' to the extent that they had been augmented by employment of a solicitor who, by reason of his calibre, normal area of practice, status or location, amounts to an unsuitable or 'luxury' choice, made on grounds other than grounds which would be taken into account by an ordinary reasonable litigant concerned to obtain skilful competent and efficient representation in the type of litigation concerned … However, in deciding whether such an objection is sustainable in practice, the focus is primarily upon the reasonable interests of the plaintiff in the litigation so that, in relation to broad categories of costs, such as those generated by the decision of a plaintiff to employ a particular status or type of solicitor or counsel, or one located in a particular area, one looks to see whether, having regard to the extent and importance of the litigation to a reasonably minded plaintiff, a reasonable choice or decision has been made. If satisfied that the choice or decision was reasonable, it is the second question 'what is a reasonable amount to be allowed?' which imports consideration of the appropriate rate or fee for a solicitor or counsel of the status and type retained. If not satisfied the choice or decision was reasonable, then the question of 'reasonable amount' will fall to be assessed on the notional basis of the costs reasonably to be allowed in respect of a solicitor or counsel of the status or type which should have been retained. In either case, solicitors' hourly rates will be assessed, not on the basis of the solicitor's actual charging rates, but (in a case where the decision to retain was reasonable) on the basis of the broad costs of litigation in the area of the solicitor retained or (in a case where the choice made was not reasonable) of the type or class of solicitor who ought to have been retained."

> That in my judgement is right. I do however take issue with the way in which the principle was applied to the facts of the case. I accept that it was reasonable for Mr Wraith to consult his trade union, but the trade union knew or ought to have known what sort of legal fees it would have to expend to obtain competent services for Mr Wraith, who lived in Sheffield and had sustained a serious accident there. Once Mr Wraith consulted his union that knowledge must be imputed to him. As Potter J accepted, at p. 625, "no doubt there were firms of solicitors in Sheffield or Leeds well qualified to do the work" and in reality the only reason why the work went to London solicitors was that the union had adopted the practice of sending all their work to those solicitors. That connection seems to me to be of limited relevance on taxation in an individual case. It means of course that, like competent solicitors in Sheffield or Leeds, the solicitors actually instructed were well qualified to do the work, and that the union, as advisers to Mr Wraith, knew the solicitors to be competent and trusted them to exercise the necessary expertise, but that is all."

37. In the case of Truscott, Kennedy LJ, applying the dicta in Dudley Magistrates' Court, held that the judge fell into error "by applying one simple and in my judgment inappropriate test, namely a comparison between the rates charged by ATC and the rates charged by firms in the locality of the court and the locality in which Mr Truscott lived". What the judge should have done, in the judgment of the Court of Appeal, was to have considered the reasonableness of Mr Truscott's decision to instruct ATC having regard to the importance of the matter to him; the legal and factual complexities "insofar as he might reasonably be expected to understand them"; the location of his home, his place of work and the location of the court in which the relevant proceedings have been commenced; Mr Truscott's possibly well-founded dissatisfaction with the solicitors he had originally instructed "which may well have resulted in a natural desire to instruct solicitors further afield"; the fact that he had sought advice as to whom to consult, and had been recommended to consult ATC; the location of ATC including their accessibility to him and their readiness to attend at the relevant court; and what if anything Mr Truscott "might reasonably be expected to know the fees likely to be charged by ATC as

compared with the fees of other solicitors whom he might reasonably be expected to have considered". Kennedy LJ held that:-

> "If the judge had taken account of the matters which I have listed it seems to me to be obvious that he would have reached a different conclusion, namely that it was reasonable for Mr Truscott to instruct ATC. This is not a question of discretion, it is a question of the proper approach to be adopted to the matter under consideration."

38. In Kai Surrey and Barnet & Chase Farm Hospitals NHS Trust; AH and Lewisham Healthcare NHS Trust; and Yesil and Doncaster and Bassetlaw Hospitals NHS Foundation Trust [2018] EWCA Civ 451, the Court of Appeal referred to Wraith/Truscott and the statement of principle made at first instance by Potter J:-

> "16. That case illustrates the sensitivity of the test to the facts of the case. In one of the two cases under appeal (*Truscott v Truscott*) it was held to have been reasonable for the claimant to have instructed London solicitors instead of local solicitors; while in the other (*Wraith v Sheffield Forgemasters Ltd*) it was held to have been unreasonable for the claimant to have instructed London solicitors rather than local solicitors. The way in which this test was applied in *Truscott* is particularly instructive. At first instance the judge had simply compared the charging rates of the London solicitors, ATC, with the charging rates of a local firm. This court held that was too narrow an approach. It examined the reasons (of which there were seven) why Mr Truscott had chosen the solicitors that he did. One of those reasons was entirely personal to him: namely his dissatisfaction with his previous (local) solicitors. Another, which has relevance to the issues in our cases, was the fact that he had taken advice about whom to consult, and had been recommended to consult ATC. Thus the court examined the litigant's particular reasons for making the choice that he did. Equally important, the court excluded from consideration any particular experience that ATC had in relation to professional negligence:
>
> > "… because that was not why Mr Truscott consulted them."
>
> 17. It is plain, in my judgment, that in examining whether costs were reasonably incurred the court is entitled to (and, in practical terms, will often have to) examine the reasons why the litigant incurred the costs that he did.
>
> 18. Potter J's statement of principle was again approved by this court in *Solutia UK Ltd v Griffiths* [2001] EWCA Civ 736, [2002] PIQR P16 in which, having referred to *Wraith*, Latham LJ said at [16]:
>
> > "… whereas it is clear that the test must involve an objective element when determining the reasonableness or otherwise of instructing the particular legal advisers in question, nonetheless that must always be a question which is answered within the context of the particular circumstances of the particular litigants with whom the court is concerned."
>
> 19. That was another case in which the court took into account the particular reasons why the claimants had instructed London solicitors. As Latham LJ put it at [22]:
>
> > "It seems to me that the costs judge was clearly wrong in failing to take account of those special features of the case which were material to the decision to instruct Leigh Day & Co…."

> 20. Thus the court took into account the factors that were material to the decision. The choice of "material" as the appropriate adjective also has a bearing on the issues we have to decide."

39. R (Virgin Media Ltd) v Zinga [2014] 5 Costs LR 879 involved an order made under section 17 of the 1985 Act that a private prosecutor (Virgin) should be awarded costs out of central funds, following a successful prosecution of Mr Zinga and others. Lord Thomas of Cwmgiedd, LCJ giving judgment of the Court of Appeal, referred to a relevant Practice Direction and to Ministry of Justice Guidance:-

> "11. Provision is also made in respect of costs by the Practice Direction (Costs in Criminal Proceedings) [2013] EWCA Crim 1632. Paragraph 2.6 makes specific provision in respect of private prosecutors' costs. Paragraph 2.6.1 provides as follows:
>
> > "An order should be made save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause."
>
> 12. The Ministry of Justice has issued the following Guidance in respect of determining costs:
>
> > "In determining … costs of a private prosecutor … National Taxing Team determining officers will be guided as to the reasonableness of hourly rates claimed, by the composite rates set out in the Senior Court Costs Office Guide to the Summary Assessment of Costs. These guidance rates can be found on the Senior Courts Office website.
> >
> > These rates usually apply to the location of solicitors' office and not to where the matter is tried. However, where a solicitor not local to the court of trial has been instructed, the determining officer may apply a test of reasonableness as to which rate may be considered as relevant. Where the rate claimed is in excess of the guidance rate indicated in the Senior Court Costs Office guide, further explanation should be provided in the narrative of the claim."

40. The Court followed the approach in Dudley Magistrates' Court and R (Law Society v Lord Chancellor. The Lord Chief Justice, at paragraph 22, described the steps to be taken:-

> i) In determining the first question, namely whether a person, whether it be a corporate body or private individual, has acted reasonably and properly in instructing the solicitors and advocates instructed, the court will consider what steps were taken to ensure that the terms on which the solicitors and advocates were engaged were reasonable. It was submitted on behalf of the Interveners that they do not pursue private prosecutions lightly, but only where state prosecuting authorities are unwilling to prosecute or where the nature of the case makes it inappropriate; as this is the position of highly responsible industry bodies, a court may also have regard to the steps taken to involve State prosecuting authorities.
>
> ii) In any significant prosecution the private prosecutor would be expected properly and reasonably to examine the competition in the relevant market, test it and seek tenders or quotations before selecting the solicitor and advocate instructed.
>
> iii) We must emphasise that it will rarely, if ever, be reasonable in any such case, given the changes in the legal market to which we have referred, to instruct the solicitors and advocates without taking such steps. Although for the reasons we give at

paragraphs 23 and 24 below that issue does not arise in this matter, it will be highly material on all future applications.

iv) In determining whether the costs which are charged are proper and reasonable in a criminal case, the court will also have regard to the relevant market and the much greater flexibility in the way in which work is done.

v) The court will also have regard to the Guidance given by the Ministry of Justice".

(4) The "Singh" reduction

41. The case of Singh is important for our purposes for two reasons. Besides what it has to say about the nature of the High Court's inherent jurisdiction, the judgments of the Court of Appeal approved the following approach of the determining officer:-

> "Before moving to my specific reasons it may assist if I outline my approach to the assessment of the solicitors' claim in this case. The claim for preparation was percentaged in a total of 414 items, each one indicating the date, activity undertaken, grade of fee earner and time taken. Nearly all of these were supported by an attendance note, some attaching a copy of the document prepared at the attendance. This is, of course, the correct way to present the claim, and the bill and supporting papers were clearly prepared in a neat and orderly way. However, upon examination of the bill and papers, I formed the view that the time spent was excessive, a view which I based on my experience of assessment of other solicitors' claim in large cases as well as what appeared to be consistently high claims for most of the activities undertaken and given the work produced.
>
> This said, for several categories of work, I did not feel able to point to any particular attendance as being rather unreasonable in length or unreasonably held, and I accepted that something was gained from nearly all the attendances. However, as well as examining each individual item, I felt it reasonable for me to step back and look at the totality of the time claimed in relation to each type of activity and consider if, taken as a whole, the time claimed for that activity was reasonable.
>
> To assist my task I therefore classified the activities undertaken into a total of 15 categories as listed in annex 1 to these reasons. This lays out a category number, class of activity, the total claimed and the total allowed after redetermination. A note then indicates if my allowance for the activity based on a global figure of all the items classed in the relevant activity or whether I have made separate and specific allowances on the claim, my 'total allowed' figure on the chart being simply the allowance for each item totalled up."

42. Henry LJ held:-

> "The second point taken is this: whether the determining officer and taxing master could take an overall view and reduce the hours for each individual class of work over the board in the way that they did. The task to be performed in this taxation is preserving the balance between reasonable remuneration of the legal profession for work done on legal aid and protecting the fund against making an open-ended commitment to pay for more hours work than the task reasonably required. The judge dealt with it in this way at page 16:
>
> > "… the notice of appeal … essentially challenged the Determining Officer's right to stand back from the individual items in the bill and determine that the aggregate produced from those individual items, although not capable of being impugned as separate items, nonetheless produced a result which established that the time claimed was unreasonable. It seems to me that that must be one

> of the necessary functions of the Determining Officer, once he has carried out what might be called the audit exercise in relation to the individual items on the bill. The Determining Officer in the first instance, and the Taxing Master on appeal, should exercise great care to ensure that the sum payable on a determination such as the one in question is kept within reasonable bounds, whilst accepting that particular clients may pose particular problems. It is perhaps well to remember the comment of Russell LJ in *Re Eastwood (deceased)* [1974] 3 All ER 603 at page 608 [Costs LR (*Core Vol*) 50 at 53] where he said that the field of taxation albeit in that case an inner partes taxation, was on where:
>
> > 'Justice is any event rough justice, in the sense of being compounded of much sensible approximation.'
> >
> > I can see nothing to recommend an approach to taxation in this field which merely requires some justification of each item of the claim, followed by an aggregation, without a sensible assessment of the consequence of aggregation in the light of the overall complexities of the case, and above all the experience of the Determining Officer and Taxing Master."
>
> I agree with that passage entirely. How else can the unreasonable claim be controlled? That is, the judge found, a point of principle but it is not a point of principle as to which there is any dispute."

43. In summary, what has come to be known as the "*Singh* reduction" arises from "the necessity of standing back from the total hours claimed on each class of work done to assess whether globally it was reasonable".

44. In Zinga, the Lord Chief Justice ended his judgment with some "observations for the future" regarding the prosecution of economic crime. The observations were made in the context that it was:

> "In the public interest that the CPS is properly resourced to conduct such difficult and complex proceedings" and that the consequence of it not being so resourced "is detrimental to the public purse. The costs of a private prosecution, whether successful or unsuccessful, are recoverable from the taxpayer; the use of private prosecutors will almost inevitably cost the State much more than the use of a State prosecutor such as the CPS" (paragraph 43)."

45. Were the CPS to be properly resourced, the Lord Chief Justice considered that it was "likely to be able through its Specialist Fraud Division to conduct such complex and difficult prosecutions properly and at a much more reasonable cost to the public purse" (paragraph 44). Lord Thomas gave two reasons for this. First, "the rates for private solicitors are much greater than those charged in the public sector". Second, "where specialist knowledge of the law was required, the rates charged in the private market for counsel are likely to be significantly higher than those paid by the CPS which can exercise bulk purchasing power".

46. The Lord Chief Justice ended his observations by saying that "It cannot be right that resources are deployed by the State in such a way that an opportunity is provided for prosecutions to be

brought by private interests at a cost to the State that is likely to be far greater than if the prosecution were undertaken by the State" (paragraph 45).

47. In D Limited v A and Others [2017] EWCA Crim 1604, D Limited, having been successful before the Court of Appeal in having a stay lifted on a private prosecution proceeding it had commenced against the various defendants, applied to the Court for costs in its favour, either against those defendants under section 18(2A) of the 1985 Act or out of central funds, under section 17 of that Act, or both. Davis LJ, giving judgment, began by saying that the Court was of the opinion that "this is not an appropriate case for payment of any part of the applicant's costs out of Central Funds". It was, however, right that the applicant should be awarded appeal costs against the defendants. So far as quantum was concerned, Davis LJ said that despite the fact that the appeal had been "a heavy, two day appeal accompanied by a great (unnecessarily great) quantity of documentation … the sum claimed, of over £415,000, is eye-watering. Certainly costs of this appeal are not to be treated as though this was a commercial court case and with costs being sought on an indemnity basis". He continued as follows:-

> "We accept that in a private prosecution it is not a necessary requirement that for costs to be recovered they must correspond precisely with what may be claimed and allowed in the case of a public prosecution. But at the same time it is wrong to allow a very significant disparity between the two. That, in truth, is a reflection of considerations of proportionality. … Overall we do not consider – quite apart from the objections raised as to various individual items – that the claimed sum of £415,115 can be a just and reasonable sum to award. In truth, it would be wholly disproportionate and oppressive, given not only the various defendants' means but also having regard (to the extent that they are not legally aided) to their ability to defend themselves hereafter. Those factors of themselves require a very considerable reduction.
>
> …
>
> Viewing the position overall, and having regard to considerations of proportionality, this court considers that the just and reasonable sum to be paid is £110,000 (net of VAT). The exercise of its powers under s.18(2A), and all other enabling under the Rules, so to order accordingly."

D. THE DECISION OF THE DESIGNATED OFFICER

48. The designated officer's redetermination decision of 5 April 2018 stated that the officer had decided not to make any change regarding his earlier disallowance of hourly rates of central London solicitors and travel time and costs allowed. He had, however, had regard to the claimant's submissions relating to Zinga "and the inevitable difference in the costs of legal work done by the CPS or other public prosecutor, and the costs rates available to private prosecutors".

49. Accordingly, the designated officer varied the amount of the *Singh* reduction so that the overall amount of costs allowed was now £200,000 plus VAT at £40,000. The officer said:-

> "I fully accept that Laycock considered this an especially important case. All litigants tend to believe that their own case is special. However, having dealt with Crown Court costs for some thirty-two years, including multi-million pound complex frauds in cases which took many months to try, my view is that the instant case in terms of complexity of the fraud, the amount at issue, and the length of trial, was in fact a fairly ordinary Crown Court case and not a particularly complex or sophisticated fraud. The nature of the case is for example not dissimilar to frauds perpetrated by supermarket till operatives and supervisors, and I have known cases of that kind where twice to three times the amount of money contended by solicitors in this case, was in issue".

50. So far as concerned the claimant's decision to instruct EMM, the designated officer said:-

> "I do not accept the contention that because such expertise in private prosecution was only available in London, the Applicant had no choice but to instruct a central London firm. I have no doubt that there are firms based in Merseyside, Manchester or other Lancastrian towns which could reasonably have dealt with the private prosecution of this ordinary case".

51. The officer referred to the Court of Appeal judgment in Wraith/Truscott and the test of Potter J, approved by the Court. The officer considered that the claimant would need to satisfy one of a number of conditions, in order to justify instruction "of distant and expensive solicitors". One such condition was that "there is an insufficient number of local firms of solicitors sufficiently experienced to undertake the case in question". He continued:-

> "In my view the major metropolitan centres of Manchester and Liverpool (not considering the other major urban centres of the north-west) are capable of providing a pool of large and experienced firms which would negate any problems relating to [the stated condition] many significant regional firms of solicitors now offer a private prosecution service [examples given]".

52. The designated officer reiterated that:-

> "… It was an ordinary Crown Court case. I have determined a number of substantial private prosecution cases over the past few years. Some of those were complex intellectual property cases relating to musical copyrights or broadcasting rights. Virtually all of those were dealt with, and more than adequately, by firms, both in London or substantial regional centres, which did not claim an exclusive speciality in private prosecutions."

53. Turning to the "*Singh* reduction" the designated officer said:-

> "I made a rough assessment as to what it would have cost the CPS to prosecute this case (i.e. not including the police costs of investigation). Assuming say £75 hours prep and 11 days of trial before counsel (75 x £80 plus 11 x 310) and say 750 hours by a legal operative (say staff costs of £45/hour) and £30,000 for expert fees. That is approximately £75,000, adding a VAT element for comparison, the total is approximately £90,000.
>
> From this point of view, I consider the amount allowed after the audit phase, £207,000 still disproportionate to the nature of the case, and I there made a "***Singh***" adjustment allowing £100,000 plus £50,000 for the investigative work. This produced a total of £150,000 plus VAT which I considered to be reasonable. The determined figure including that would therefore be reduced from £282,381.95 to £180,000.
>
> My view is that it is a legitimate exercise to make a basic comparison with a level of costs that would be incurred by the Public Prosecutor. I accept that it is not a simple comparison, and that there are particularities to be considered in the private prosecutions (see para 61 of solicitors' comments as to the judge's comments in the ***Zinga*** case). However, my view is

that there should not be a gross disproportion between the level of costs incurred by a private prosecutor and the state prosecutor. Although the police apparently declined to act, the private prosecutor is not obliged to pursue the case, is at costs recovery risk in so doing, and (as is conceded) there is a private interest involved.

In considering whether or not this claim for costs is reasonable, I must consider whether or not the application firm would risk £¼ million of its money to pursue a prosecution the outcome of which on the one hand would see the conviction and likely imprisonment of the defendant, but on the other would not result in the restitution of any of the monies which the defendant had misappropriated. …

It seems unlikely to me that the Applicant would reasonable lay down £¼ million of its own money to this end …

In the recent case of ***D Limited v A & Others*** the judgement of Davis LJ included the following passages at paragraphs 16 and 18:-

> "We accept that in a private prosecution it is not a necessary requirement that for costs to be recovered they must correspond precisely with what may be claimed and allowed in the case of a public prosecution. But at the same time it is wrong to allow a very significant disparity between the two. That, in truth, is a reflection of considerations of proportionality.
>
> It is of course accepted that the applicant will have viewed this appeal with immense seriousness … but it does not follow at all that what might be reasonable, in terms of time spent and personnel engaged, as between solicitor and own client thereby becomes reasonable as to payment with regard to the opposing (paying) parties."
>
> …

I did consider that there did remain such a very significant discrepancy and on redetermination I did apply a ***Sing***h reduction although in consideration of ***Zinga***, a lesser reduction than on the original determination such that an increase of £50,000 plus VAT was allowed."

E. THE DECISION OF THE COSTS JUDGE (MASTER ROWLEY) OF 30 APRIL 2019

54. The Costs Judge had before him a witness statement of Mr Laycock. He described being "utterly aggrieved and angry by" the fraud perpetrated by Mr Shinners. He reported the matter to the police and did so again once a further fraud by Mr Shinners became apparent. Mr Laycock was interviewed at home by two police officers "who appeared surprised that it had not been taken up by the police". After being told the police would not investigate, Mr Laycock took the matter up with his local MP, who advised him to raise a formal complaint, which he did. It was then that Mr Laycock was told by the police that they did not have the resources to prosecute every crime.

55. Mr Laycock had never brought a private prosecution before; nor had he been involved in any large commercial litigation. As a result he "had little or no knowledge about where to turn to or what I could do about the fraud that had been perpetrated against me". The statement continues as follows:-

> "11. I began to read online about the possibility of bringing a private prosecution against Mr Shinners for his fraud.

> 12. I spoke to my solicitors who are quite a large company. They had acted for me in various matters, however they were not able to assist and could not recommend anyone in the area that might be able to assist me.
>
> 13. I did some further research and came across the law firm, Edmonds Marshall McMahon who specialised in bringing private prosecutions. I do not recall seeing on Google any other firms that advertised themselves as providing private prosecution services for frauds, although I looked numerous times and therefore was not able to contact other firms that were more local than Edmonds Marshall McMahon."

56. The Master also had before him the witness statement of Ashley Fairbrother of EMM dated 22 August 2018. The statement of Mr Fairbrother specifically addressed the view of the designated officer that the major metropolitan centres of Manchester and Liverpool were capable of providing a pool of large and experienced firms and that many significant local firms of solicitors now offered a private prosecution service.

57. Mr Fairbrother stated that when he joined EMM in 2013 the firm was the first in the United Kingdom to specialise in private prosecutions. Although a market "has slowly began to develop in this area in recent years", it was still new enough not yet to feature in legal directories "such as the Legal 500 or Chambers Directory". A *Google* search for the term "private prosecution" as at January 2016 showed that there were no organic search results for firms offering private prosecution services within the first 10 pages of results, other than EMM. By contrast, a search carried out for that term in April 2018 on *Google* now discloses a number of different service providers within the organic search results. Nevertheless many of these firms "have very limited experience, if any, in actually carrying private prosecutions".

58. Mr Fairbrother said that Mr Laycock "has no experience in ever conducting a private prosecution". By contrast, the determining officer was "uniquely placed to identify firms that carry out private prosecutions, given he is a vastly experienced determining officer". In any event, having regard to the named firms in the designated officer's decision which "now offer" private prosecution services, Mr Fairbrother submitted an analysis which concluded that they were (1) not sufficient in numbers; (2) not local to Preston; or (3) not sufficiently experienced to have carried out the private prosecution of the claimant's matter. A historic search of the internet, using a "Wayback Machine", which could capture the state of the internet at a particular time, revealed that one of the firms, specifically relied upon by the designated officer in his decision as offering private prosecution services, appears to have placed such information on the internet in February 2016, after Mr Laycock had instructed EMM. The firm in question, moreover, appeared to be owned by a struck-off solicitor. Another of the named firms did not advertise itself as carrying out private prosecution services; but only defending them. Another named firm's website suggested it had only recently begun advertising private prosecutions. A larger firm, also mentioned by the designated officer, began advertising a private prosecution service only in May 2016. A further firm had only one person listed currently as having experience in conducting private prosecutions. Although it was unclear when this individual began offering private prosecution services, a partner of EMM had been approached by him in mid-2016 to advise on a difficult aspect of a private prosecution, which suggested that that might have been his first such venture into that area.

59. A firm based in Liverpool, however, mentioned by the designated officer, appeared from the internet archive to have offered private prosecution services as far back as 2013. They were not, however, local to Preston Crown Court. Moreover, the private prosecution web page for this firm states that "companies cannot claim the costs of the prosecution from the State but these costs should be a taxable expense". Mr Fairbrother's statement points out that this is, of

course, wholly incorrect and suggested that the firm did not have sufficient experience in acting for companies who had been the victims of fraud.

60. The final firm mentioned by the designated officer was one which appeared from the *Google* results to have run a campaign to promote private prosecution services but they did not feature on the "organic search results for private prosecutions", which suggested to Mr Fairbrother they had not built up sufficient traffic or authority, which in turn indicated they were not sufficiently experienced in this field in January 2016. It was notable that they "do not return within the paid-for result in any current searches for the term "private prosecution"". An internet search demonstrated that they began to advertise their services in this area from 2015. They were therefore only advertising such services for less than a year prior to the claimant instructing EMM on 6 January 2016. The firm had offices in Mansfield and in London and a *Google* map search indicated that it would take longer to reach Preston from Mansfield than it would from London.

61. Having set out the history of the matter, the Master said:-

> "11. There is therefore a difference between the sum claimed and the sum allowed of £187,909.66. This appeal concerns the imposition of a Singh discount; certain brief fees; and numerous aspects of the solicitors' charges. In particular the use of London solicitors and the consequent effect of London rates being charged and travelling between London and Preston, including accommodation, being required. It is this last aspect which is the most significant in terms of the reduction made by the determining officer and consequently it is the place where I shall start this decision".

62. Having set out the relevant provisions of regulation 7, the Master continued:-

> "14. The ultimate intention of those regulations is to compensate the prosecutor for fees and expenses properly incurred by him in the proceedings as is required by s17 of the 1985 Act. The nub of this issue is that the determining officer considers that the company should be compensated on the basis that it instructed local solicitors to act on its behalf. The company contends that its choice of London solicitors i.e. EMM was a reasonable one and as such the compensation should be based on London rates.
>
> 15. … As a result, the decision I need to make is simply whether or not the determining officer was correct to consider that the use of central London solicitors was not justified."

63. Beginning at paragraph 30, the Master addressed the witness statements of Mr Laycock and Mr Fairbrother:-

> "30. The solicitors have gone to the trouble of producing a witness statement from Mr Laycock about the initial instruction of EMM and I have used the contents of that statement to produce paragraphs 3 to 5 above. Additionally, the solicitors have made enquiries of the availability and experience of the firms referred to by the determining officer to carry out a private prosecution. That evidence is distilled in a witness statement of Ashley Fairbrother, a solicitor at EMM, together with an exhibit relating to searches carried out by Mr Fairbrother.
>
> 31. EMM seek permission to rely upon Mr Fairbrother's evidence albeit that it was not provided to the determining officer. Since the determining officer did not mention the particular firms which formed the basis of Mr Fairbrother's witness statement

until producing his written reasons, it is inevitable that solicitors were unable to provide information previously and I have no hesitation in allowing the witness statement to be considered.

32. As I understand it, the searches involved rely on a sole-called "Wayback machine" which seeks to provide website information at particular points in time. There appeared to be some limitations on the information produced by such searches but I suspect that Mr Fairbrother's evidence is at least generally correct in terms of the availability of private prosecution departments at the firms mentioned by the determining officer. The core of Mr Fairbrother's evidence is set out in a table to paragraph 25 of his witness statement. It concludes that of the seven firms named by the determining officer, only two had advertised their ability to carry out private prosecutions …"

64. The Master noted that one of these firms was not local to Preston, having offices in Nottingham and London. (Although the table in Mr Fairbrother's statement refers to Nottingham, as I have already noted, the body of the witness statement refers to Mansfield.) The second firm was one which had provided incorrect information on its website, concerning the ability of a company to obtain reimbursement of fees incurred for a private prosecution. The Master noted that criticism. He continued as follows:-

"33. Based upon his search of the websites, Mr Fairbrother concludes:-

> "The analysis above suggests that there was not a "pool of large and experienced firms" that could have been instructed in this matter. Arguably, none of the firms relied upon by the determining officer could have been instructed in this matter, and at the very best, only one or two could have been. These firms are neither local, nor do they constitute a sufficiently large pool of experienced firms that the appellant could have chosen from to instruct."

34. Mr Fairbrother states that the market in private prosecution services is so small that it does not feature in the legal directories and that another costs judge has remarked that there are only a small number of firms going who are comparable to EMM. He also says there were no Google search results within the first ten pages upon searching private prosecution in January 2016 and finally makes the point that, although the determining officer may have knowledge of the market of private prosecutions, even the firms he had been able to locate were not reasonable to instruct. Mr Laycock, as an average consumer of such services, would not have known even of those firms.

35. Mr Strickland suggested that there was little between the tests put forward by the various cases. I agree with that comment, but I do not agree with Mr Strickland that the choice made by Mr Laycock was reasonable whichever test is applied.

…

38. The difficulty I have with the appellant's submissions in this case is that the phrase "Sufficiently experienced" used in the TONG guidance is interpreted by them to mean that the other solicitors must have carried out private prosecutions before. I have no doubt that, in some cases, that would be a necessary pre-condition. …

39. But in this case, there is no great complication, notwithstanding the description of it as being a "sophisticated and heinous" crime. The fraud perpetrated by Mr Shinners was not skilful and there does not appear to have been any lack of evidence to convict him on the great majority of accounts. Whilst Mr Laycock has clearly taken his case to be of great moment such that he had spent a considerable amount of money in pursuing Mr Shinners,

whilst knowing that there was little prospect of getting anything back, that does not make it sufficiently complicated for experienced private prosecutors to be required.

40. In my judgement, an experienced criminal practitioner would be quite capable of carrying out this private prosecution on behalf of the company. There are, in fact, numerous former public prosecutors who became partners or employees of defendant practices who would have no difficulty in bringing this prosecution. But even those without prosecution experience would, in my view, be quite capable of bringing this particular prosecution, if necessary with the benefit of experienced counsel.

41. This conclusion means that the evidence provided by Mr Fairbrother does not really assist. Some of the firms referred to by the determining officer have well-known criminal defence departments and that was the case well before these proceedings began. The fact that they may, or may not, have had a formal private prosecution department set out on their website does not alter that fact. There are also many other firms which contain suitably experienced criminal practitioners.

42. For these reasons it seems to me that the determining officer was quite correct to base his assessment on the hourly rates allowed for a firm local to Preston. He is allowed national band one rates which would encompass the large metropolitan centres."

65. The Master then turned to the "*Singh* discount", as he described it. The Master agreed with the designated officer that there was no reason in principle why the *Singh* discount should not apply to the ascertainment of the costs to be paid out of central funds in respect of a successful private prosecution. The Master noted that the claimant did not pursue an argument to the contrary, before him.

66. At paragraph 54, the Master agreed with the claimant that the determining officer could not deploy the argument, in support of the Singh discount, that a privately paying individual would not risk £250,000 of his own money to pursue a prosecution when not expecting to recover anything from the defendant. As the Master pointed out, that was exactly what Mr Laycock had done.

67. The Master, however, nevertheless concluded that the determining officer had reached the correct result, as regards the *Singh* discount:-

"62. … the big difference in the sum allowed on determination actually relates to the hourly rate allowed by the determining officer of £45 per hour for staff costs rather than the hourly rates allowed by the Guideline Hourly Rates to be allowed. I understand that the determining officer is intending to calculate the figure based upon an internal allowance by the CPS but I cannot see how a private prosecutor is ever going to be able to compare their costs to that sort of hourly rate where it is accepted that guideline rates are the starting point for a private prosecutor to claim.

63. The effect of using that hourly rate is inevitably to depress the figure that would seem to be reasonable. The same point can be made in relation to counsel where a daily rate of £310 per hour is unlikely to be achieved by anybody other than the CPS.

64. It seems to me that the determining officer recognised that deficiency in his original determination and sought to correct it in the redetermination when increasing the sum allowed by £50,000 plus VAT … He specifically refers to the reason for increasing the sum allowed as being a consideration of the appellant's arguments arising from the case of R (Virgin Media) v Zinga … as to the rates available to

private prosecutors. In view of this revision, it seems to me that a good deal of the force is taken out of the appellant's argument regarding the hourly rate used.

65. The appellant has described the determining officer's calculations as being "arbitrary". But it seems to me that this is in fact a very difficult exercise and the criticism of the determining officer is meant to calculate a reduced figure if he or she considers that a Singh reduction should apply to an aggregate figure that is too high, other than to consider "all the circumstances".

66. In the civil sphere, Lord Justice Jackson's review of civil costs extolled the virtue of stepping back in the manner set out in Singh in order to consider whether costs allowed as reasonable in the aggregate were also proportionate. … Nevertheless, the reported cases, which have been relatively few, demonstrate that courts have not always found this task to be an easy one. Most of the factors are not ones which involve figures and so it is a question of weighing the factors and coming to a sum based upon a consideration of those factors. A party dissatisfied with such a calculation may always challenge it as being arbitrary in the absence of any mathematical formulation.

67. In these circumstances, it seems to me that the determining officer's approach cannot be impugned. As I have already set out, he considered the nature of the case before looking at the costs that he allowed on a line by line audit and then considered whether it amounted to a sum that was reasonably sufficient to compensate the prosecutor as required by section 17 of the Prosecution of Offences Act 1985.

68. Each case is obviously factually different and if the determining officer had simply indicated that in his experience the costs were too high, and on that basis, allowed a different sum as being reasonable compensation, the appellant would undoubtedly be able to criticise it as being arbitrary. The determining officer has therefore sought a comparator in respect of the individual facts of this case and that seems to me to be a perfectly proper approach to take. As I have set out, he has in fact allowed almost all of the hours actually claimed by the appellant. He has then allowed an hourly rate which may well be perfectly appropriate for administrative costs within the CPS. It is certainly a figure that does not look entirely out of place with other legally aided rates such as those allowed in respect of confiscation proceedings. However, having accepted that such rates produced too large a gap between the comparative sums, the determining officer has revised his figures by an appreciable margin.

69. I take the same view as the determining officer that the aggregate sum of reasonable costs does not produce a figure which seems to be reasonable overall when compared with the nature of the case. Therefore, a Singh discount should apply and I consider that the determining officer's approach cannot be faulted. The figure that he has come out with through the redetermination process is well within the range of sums he might have allowed in order to comply with the requirements of s17."

F. MR LACOCK'S WITNESS STATEMENT OF 6 AUGUST 2019

68. Following receipt of the Master's decision, Mr Laycock filed and served a witness statement dated 6 August 2019. He did so on the basis that the Master had upheld the allowance of national band one rates on a "new and different" basis; namely that an "experienced criminal practitioner would be quite capable of carrying out this private prosecution on behalf of the company", even though that practitioner might "not have had a formal private prosecution

department set out on their website". Mr Laycock said that this was the first opportunity he had had to address the matter in more detail. The new witness statement describes how Mr Laycock contacted his existing solicitors, which had a multi-branch criminal defence element, but was told they were not in a position to conduct a private prosecution. Mr Laycock asked them whether they knew anybody in the local area who had such experience. He was told that they did not.

69. Through his solicitors, Mr Laycock made contact with counsel's chambers, with experience in private prosecutions. They told him, however, that he would need the assistance of solicitors. A firm was suggested which appeared to Mr Laycock to be "a one fee earner London-based law firm specialising in intellectual property and crime".

70. Mr Laycock was not satisfied with that advice and made enquiries with at least two other Manchester criminal defence solicitors, as well as his insurer. These enquiries were unsuccessful. He then conducted his search of private prosecution specialists on the internet and found EMM. Still being concerned about the prospect of instructing lawyers that were geographically far removed from him, Mr Laycock again contacted the barristers' chambers but was, again, given the same advice and suggestion as he had previously received. He also was in communication with a firm situated on the south coast of England. Mr Laycock was not satisfied that either of the firms in question had sufficient experience; whereas the solicitor acting for Mr Shinners was known to Mr Laycock as being "very competent and aggressive". He again searched the internet, without success, before instructing EMM. Mr Laycock described this as "not the luxury option. It was in fact a Hobson's choice. We desperately wanted a local solicitor for practical reasons, however, I have was unable to find any firm outside London that was willing to take on the instruction". The claimant had to borrow "almost every penny to fund the prosecution, loans to this day which are still outstanding" and which continued to cause "significant personal difficulties".

71. For the second defendant, Mr Boyle objected to reliance being placed upon the August 2019 witness statement of Mr Laycock. He accepted, however, as did Mr Cohen, that it was in essence an expansion of the evidence in the earlier witness statement, which had been before the Master. I consider that it is, in any event, in the interests of justice to admit the statement. The reason given by the Master for upholding the designated officer's decision as to regional, as opposed to London, rates is markedly different from that of the designated officer. Having accepted the evidence of Mr Fairbrother that, at the relevant time, there were no suitable firms, of which Mr Laycock could be aware, offering private prosecution services on their websites, the Master (at paragraphs 40 and 41) in effect concluded that Mr Laycock should have been aware that firms with criminal defence departments "would have no difficulty in bringing this prosecution". Just as the Master rightly accepted into evidence the statement of Mr Fairbrother, in order to deal with an aspect of the determining officer's reasoning that could not have been anticipated, I consider that it is appropriate to have regard to the August 2019 statement of Mr Laycock.

G. DISCUSSION

(a) The court's inherent jurisdiction: "real injustice"

72. Mr Boyle rightly conceded that, in order to determine whether it would be a "real injustice" to refuse to disturb the Master's substantive decision and his decision on certification, it is necessary for this court to consider the submissions on whether the Master has made an error of law. That is how the issue has been addressed in the authorities. It is difficult to see how, in reality, the position could be otherwise.

73. Before embarking on that exercise, however, it is necessary to establish the parameters of this court's ability to grant the claimant relief, in the exercise of its inherent jurisdiction. Mr Boyle submitted that an analysis of the cases discloses that "real injustice" requires there to have been some form of serious procedural unfairness. Whilst it is true that such unfairness is to be found in Brown v Youde, Bee-Line Roadways and Brewer [2009], there is no articulation in those authorities that substantial procedural unfairness, such as refusing to hear a party, is a necessary pre-condition of a finding of "real injustice".

74. Furthermore, and in any event, Brewer [2007] is a case where real injustice was found in circumstances where no such procedural unfairness arose. In that case, as we have seen, the court intervened because the Costs Judge did not correctly undertake the task assigned to him by section 16 of the 1985 Act and regulation 7. The Costs Judge did not have regard to the evidence that indicated that the American attorney had provided important assistance after, as well as before, the criminal legal aid solicitors came on the scene.

75. That said, I agree with Mr Boyle that not every legal error can give rise to a "real injustice". If it could, the expectation in Singh and Brewer [2007] that it will be "very rare indeed" for the test to be satisfied, would count for nothing. It is, in my view, unlikely, to say the least, that an error of law will give rise to "real injustice" unless it is also shown that maintaining the defective decision will cause very serious prejudice. In deciding whether such prejudice exists, regard must be had to the nature of the financial loss to the person concerned, by reference to that person's financial means. In the present case, for example, the effect on Mr Laycock and his small company, if the Master's decision were to stand, would plainly be far more significant than it would be if the claimant were a large, profitable multi-national company.

76. I consider, however, that the issue of substantial prejudice is not necessarily confined to the effect on the party seeking to overturn the decision. In the present case, Mr Cohen submits that, if left undisturbed, the Master's decision runs contrary to the important constitutional part played by private prosecutions, as recognised by the legislature and the higher courts.

(b) The Master's decision on London/regional rates

77. The constitutional position of private prosecutions is the important backdrop, against which one needs to consider both the criticisms levelled at the Master's decision as to rates and his conclusions on the *Singh* reduction or discount. I have already noted the wording of section 17 of the 1985 Act, concerning prosecution costs. Section 17(1) makes it plain that the purpose of making a payment out of central funds is to "compensate the prosecutor for any expenses properly incurred by him in the proceedings". Furthermore, the Crown Court, etc is specifically enjoined by section 17(2A) to consider when ordering payment out of central funds, whether it is appropriate for the prosecution to recover the full amount, or such lesser amount as the court considers just and reasonable. The court may either fix a reduced sum, at the time of making the order, or "describe in the order any reduction required under sub-section

(2A)" in which event the amount must be fixed in accordance with the procedure set out in the Regulations (section 17(2C)).

78. It is, therefore, of some (albeit limited) significance that the trial judge, though aware of the total sum being sought by the claimant, did not see fit to describe any reduction which would then be determined by the designated officer.

79. Be that as it may, the compensatory nature of section 17 needs to be recognised in the context of the importance afforded to private prosecutions. That importance explains why, despite the similarities between sections 16 and 17 of the 1985 Act, the Lord Chancellor was held in R (Law Society of England and Wales) to be entitled to decide not to cap private prosecutors' costs in the same way as defendants' costs. Paragraph 65 of Elias LJ's judgment, although describing private prosecutors (such as the RSPCA) who act in that capacity on a fairly regular basis, falls to be read as having a more general application; particularly where he highlighted the fact that, unless private prosecutors can "recover expenditure close to actual levels … they would be out of pocket, and that in turn would deter them from bringing such prosecutions".

80. Although the first sentence of paragraph 66 of the judgment suggests that "private prosecutors … cannot recover the majority of their costs even if successful", it is unclear what Elias LJ had in mind in so saying. In any event, that sentence cannot, in my view, be read as diminishing the clear thrust of paragraph 65; or of paragraph 67, where Elias LJ recognised the lawfulness of the Lord Chancellor's decision "to discriminate here because he thinks it desirable to promote private prosecutions in the public interest".

81. Gujra contains, in the judgment of Lord Wilson, a recognition at the highest level that the right of instituting a private prosecution is "an important safeguard" in constitutional terms.

82. Both on this issue and in relation to the *Singh* discount, I am conscious that I am being asked to disturb the position of the judge who is an expert in the area of costs and whose jurisdiction entails a wide discretion. I have, nevertheless, come to the conclusion that at paragraphs 39 to 42, the Master has in substance committed the error enjoined against in Dudley Magistrates' Court. The question the Master asked himself was whether there were, in the local area, firms containing such persons as former public prosecutors, who would have had "no difficulty in bringing this prosecution". That question is precisely analogous to the incorrect question posed by the Magistrates' clerk in Dudley Magistrates' Court; namely, whether "a senior solicitor or junior counsel could have properly conducted the matter on behalf of the applicants". In the present case, the Master should, I find, have asked whether Mr Laycock "acted reasonably" in instructing EMM, just as the question in Dudley Magistrates' Court that should have been asked was whether the applicants had "acted reasonably in employing leading counsel, which is an entirely different question".

83. The result of asking himself the wrong question was that the Master, at paragraph 41, rejected, for the purposes of his own decision, the evidence of Mr Fairbrother. In so doing, he committed the legal error of not having regard to relevant evidence.

84. Even on the basis of Mr Laycock's 2018 witness statement, read with the evidence of Mr Fairbrother, the answer to the question that should have been posed was, I find, plain. Mr Laycock had done everything that could reasonably be expected of a person in his position. He had made enquiries of his solicitors. He researched the matter online and did not find firms offering private prosecution services for fraud, who were more local than EMM.

85. Mr Laycock's 2019 witness statement contains a more detailed description of his search for a suitable solicitor, in response to the Master's attempt to justify the designated officer's decision on rates on the basis that firms offering criminal defence services can mount private prosecutions. There is, however, nothing whatsoever to suggest that Mr Laycock knew or ought to have known about that possibility. In any event, it must be doubtful whether the Master's assumption is soundly based. The duties on prosecutors are, in significant respects, different from and more onerous than those placed on defence teams. It is, accordingly, unsurprising that Mr Laycock's 2019 witness statement records that defence solicitors he contacted were unwilling or unable to assist him.

86. Mr Boyle sought to place reliance on the judgment in Wraith/Sheffield Forgemasters and to categorise Mr Laycock's decision to instruct EMM as a "luxury" choice, as opposed to something an ordinary reasonable litigant would make, contrary to the guidance given by Potter J in that case. Mr Boyle also laid emphasis on the finding that, although it was reasonable for Mr Wraith to consult his trade union, the trade union "knew or ought to have known what sort of legal fees it would have to expend to obtain competent services for Mr Wraith, who lived in Sheffield and had sustained a serious accident there".

87. That imputation of knowledge from the trade union to Mr Wraith does not, however, assist the present defendants. The trade union occupied a special position, vis-à-vis Mr Wraith, in that he relied on it to handle his claim for compensation. The principle of imputed knowledge cannot be stretched so far as to fix Mr Laycock with the knowledge of some hypothetical solicitor or other legal professional. In any event, such a person would need to possess a degree of knowledge that was certainly not present in Mr Laycock's existing solicitors and which I doubt anyone would, at the time, have possessed.

88. In my view, the part of the judgment in Wraith/Truscott which is of more relevance in the present case is the passage in which the Court of Appeal, applying Dudley Magistrates' Court, set out the list of matters which should have been regarded as relevant in considering the reasonableness of Mr Truscott's decision to instruct ATC Solicitors. Importantly, one of the factors identified by the court was that Mr Truscott "had sought advice as to whom to consult, and had been recommended to consult ATC".

89. The judgment is also important for pointing out that the question of whether it was reasonable for Mr Truscott to instruct ATC "is not a question of discretion, it is a question of the proper approach to be adopted to the matter under consideration". That is precisely the position here.

90. In conclusion, the Master's decision on London/regional rates contains an error of law as to the approach to be adopted under the Regulations. As such, it is an error of the same kind as that identified in Brewer [2009].

(c) The Singh discount

91. So far as the *Singh* discount is concerned, the claimant does not contend that it has no part to play in any assessment of costs incurred by a private prosecutor who is seeking recovery from central funds. There was, however, some disagreement between Mr Cohen and Mr Boyle as to whether the Master's decision had been "arbitrary", in that there had been no attempt to apply the discount by reference to particular classes or categories of costs incurred. I agree with Mr

Cohen that there is a lack of clarity in the Master's decision on this issue even if one assumes, as Mr Boyle submitted, that the Master was, in effect, not departing from the categorisation exercise that had been employed by the determining officer. I do not consider that *Singh* was concerned with classes or categories merely because the Regulations then in force demanded that attention be focussed on these issues. The importance placed on them bites deeper. I agree with Mr Cohen that, as a general matter, if the *Singh* discount is to be applied in a way that is comprehensible to those affected by it, the exercise needs to be undertaken. Support for this is to be found in the recent case of West v Stockport NHS Foundation Trust & Demouilpied v Stockport NHS Foundation Trust [2019] EWCA Civ 1220.

92. Much more important, however, is the underlying rationale why the determining officer and the Master applied the *Singh* discount in the present case. Each did so because they considered it was necessary to have regard to the costs that would have been expended by the Crown Prosecution Service (CPS), had the prosecution had been undertaken by it, rather than the claimant.

93. Mr Cohen submits that a comparison with CPS rates was, in the circumstances, wholly inappropriate and wrong. Again, he points to the judgment of Elias LJ in R (Law Society) and the importance of ensuring that private prosecutors can "recover expenditure close to actual levels, otherwise they would be out of pocket, and that in turn would deter them from bringing such prosecutions" (paragraph 65: see above). He also draws attention to paragraph 48 of Elias LJ's judgment where it was found that "one can only sensibly ask whether the cost has been reasonably incurred by having regard to the prevailing market". In the case of private prosecutions, the "prevailing market", Mr Cohen submits, is manifestly not one which comprises or includes the CPS.

94. In Zinga, Lord Thomas LCJ cited that particular finding of Elias LJ in R (Law Society). Paragraph 22 of Lord Thomas's judgment refers to "competition in the relevant market" which must be tested by the private prosecutor. Paragraph 25, by the same token, refers to "comparable market rates charged for similar work" as being relevant to the "reasonableness of the costs incurred".

95. As we have already seen, Lord Thomas ended his judgment in Zinga with observations for the future. In these observations, he expressed the hope that the CPS would in the future be sufficiently funded so as to be able to take over from private prosecutors the work at that time being undertaken by the latter in relation to specialist frauds. At paragraph 44, Lord Thomas gave reasons why the CPS, properly resourced, would be able to conduct "such complex and difficult prosecutions properly and at much more reasonable costs to the public purse". Those reasons included the fact that the CPS "can exercise bulk purchasing power".

96. In the present case, the Master upheld the designated officer on the issue of the *Singh* discount. He pointed out that the designated officer had, in fact, redetermined the sum to be awarded to the claimant at a higher level, having had regard to the judgment in Zinga. It is, however, apparent from paragraph 68 of the Master's decision that he saw no problem in the designated officer having "allowed an hourly rate which may well be perfectly appropriate for administrative costs within the CPS", that being a figure "that does not look entirely out of place with other legally aided rates … However, having accepted that such rates produced too large a gap between the comparative sums, the determining officer has revised his figures by an appreciable margin". The CPS accordingly remained central to the way in which the designated officer and the Master applied the *Singh* discount.

97. In order to defend the use of the CPS as a comparator, the defendants point to the Court of Appeal judgment in D Limited v A & Others. Mr Boyle rightly submits that this judgment is not binding on this court. The issue for me is whether the designated officer and the Master were nevertheless entitled, in the exercise of their discretion, to have regard to D Limited as permitting them to have regard to what it might have cost the CPS to undertake the prosecution of Mr Shinners.

98. Despite Mr Boyle's able submissions, I consider it plain that the judgment provides no legal justification for their decisions on this issue. The judgment of Davis LJ in D Limited did not involve the application of the *Singh* discount. There is no suggestion that the judgment of Lord Chief Justice in Zinga was drawn to the court's attention. Although there has been some discussion in academic circles about whether the *Singh* discount involves a "proportionality" assessment, it is common ground in the present case that the relevant legislative regime does not, in its own terms, require proportionality to feature.

99. The judgment in D Limited must, in any event, be read in context. The Court of Appeal had rejected the suggestion that the applicants' costs should be paid out of central funds. Accordingly, the issue was whether the defendants should pay the entire sum claimed to D Limited. In this regard, the court plainly considered it significant that, if they were required to do so, the defendants' ability to defend themselves in the forthcoming criminal prosecution would be jeopardised. That was part of the reason why Davis LJ regarded it as being "wholly disproportionate and oppressive" to award the claimed sum.

100. I consider that the Court of Appeal authorities of R (Law Society) and Zinga are incompatible with the designated officer's decision in the present case (upheld by the Master) to introduce the CPS as a comparator for the purposes of applying the *Singh* discount. In particular, the Lord Chief Justice's judgment in Zinga cannot in any sense be read as justifying use of the CPS in determining what is the relevant market for private prosecutions. On the contrary, as has been seen, the whole thrust of the judgment is to the opposite effect.

101. The point of Lord Thomas's observations was to highlight the fact that the then inability of the CPS to undertake prosecutions for particular kinds of fraud was unnecessarily costing the public purse, since it was having to compensate private prosecutors using private firms that were more expensive than the CPS would be, if it were to be in a position to do the work. In the present case, by the same token, the state was unable to bring a prosecution of Mr Shinners; not because the police and the CPS lacked in-house expertise to do so, but because of lack of resources at a time of "austerity". As the evidence shows, Mr Laycock tried his best to get the police to take the case. His decision to institute the private prosecution was a last resort.

102. In both Zinga and the present case, there is no suggestion that the private prosecution was trivial. Although the designated officer and the Master were of the view that the mechanics of the prosecution of Mr Shinners were straightforward, it was, on any view a serious matter. The trial lasted 11 days and Mr Shinners received an immediate sentence of three years' imprisonment. There was, in sort, a substantial public interest in seeing him brought to justice.

103. The fact that the designated officer employed Zinga to bring about some amelioration in the claimant's position is, accordingly, nothing to the point. On the facts of this case, the relevant market could not be said to involve any comparison with the CPS.

104. I also agree with Mr Cohen that the way in which the CPS was used as a comparator by the designated officer and the Master inevitably involved the application of hindsight, which is not permitted in an exercise of this kind. Both the designated officer and the Master looked at how

the CPS would have handled the prosecution, by reference to the now completed Crown Court proceedings.

105. As I have already noted, the claimant rightly does not contend that the *Singh* reduction can play no part in the assessment of costs of private prosecutors. I also do not consider it can be said, as a matter of law, that it will always necessarily be wrong to look at CPS costs, when determining the amount of costs to be awarded to a private prosecutor. If an individual resolves to embark on a private prosecution with no regard to whether the state is willing and able to prosecute, a comparison with the CPS might be legitimate. That, however, was not the position in the present case.

H. CONCLUSIONS

106. For the reasons I have given, the Master's decision contains legal errors, which resulted in him failing to undertake the task set by the legislature, as explained in the relevant caselaw. I reiterate that I do not come to this conclusion lightly. Nevertheless, in attempting to uphold the painstaking (albeit erroneous) decision of the designated officer, the Master fell into error.

107. It is evident that the effect of the legal errors is to cause very substantial prejudice to the claimant. The financial effect upon Mr Laycock and his company has been extremely profound. Furthermore, not to disturb the decisions in this case would risk the perpetuation of an erroneous approach to the award of costs in private prosecutions, which in turn risks damaging the position of private prosecutions in the constitutional framework. In particular, private prosecutions would be in danger of becoming the preserve of those with deep pockets.

108. In the light of my findings, it is evident that there would be a real injustice if the decisions remain undisturbed. I therefore quash the substantive decision of the Master and his decision not to certify a point of principle of general importance. I remit the matter to the first defendant for reconsideration, in the light of this judgment.

109. I invite submissions from the parties as to the terms of the order.