Neutral Citation Number: [2022] EWHC 2963 (Admin)

Case No: CO/3449/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT
SITTING IN LEEDS

Tuesday 22nd November 2022

Before:

LORD JUSTICE STUART-SMITH
and
MR JUSTICE FORDHAM

- -

Between:

Appellant

DIRECTOR OF PUBLIC PROSECUTIONS
- and -

(1) EDWARD COOK **Respondents**
(2) SCOTT SNOWDEN

- -

- -

John McGuinness KC (instructed by CPS) for the **Appellant**
Jason Pitter KC (instructed by JMW Solicitors LLP) for the **First Respondent**
Nick Worsley (instructed by Scott Taylor Law Ltd) for the **Second Respondent**

- -

Hearing date: 19.10.22

- -

Approved Judgment

MR JUSTICE FORDHAM:

Introduction

1. This is an appeal by the Prosecution by way of case stated against a decision of District Judge Mallon ("the District Judge"), sitting at Leeds District Magistrates Court on 17 December 2020. By the decision the District Judge dismissed the prosecution of the two Respondents, for offences under section 127 of the Communications Act 2003 ("the 2003 Act"). In broad terms, section 127(1) and (2) make it an offence to use a public electronic communications network for grossly offensive, indecent, obscene or menacing content, or for false messaging or persistent use purposively causing annoyance, inconvenience or needless anxiety. The District Judge dismissed the prosecution on the basis that the proceedings were brought out of time, applying section 127(5) of the 2003 Act, which provides:

> ***(5) An information or complaint relating to an offence under this section may be tried by a magistrates' court … if it is laid or made— (a) before the end of the period of 3 years beginning with the day on which the offence was committed, and (b) before the end of the period of 6 months beginning with the day on which evidence comes to the knowledge of the prosecutor which the prosecutor considers sufficient to justify proceedings.***

2. At the heart of the case is a prosecutor's certificate ("the Certificate") issued by Elizabeth Frain, the reviewing CPS lawyer. Parliament provided for such certificates by section 127(7) of the 2003 Act, which provides:

> ***(7) A certificate of a prosecutor as to the date on which evidence described in subsection (5)(b) … came to his or her knowledge is conclusive evidence of that fact.***

In the case law, to which I will shortly come, the "date on which evidence described in subsection (5)(b)" comes to "the prosecutor's knowledge" is described as the "relevant date". In this case, the Certificate recorded as the relevant date 27 November 2019. This meant that, unless the Certificate could be impugned, so that the Magistrates Court could go behind it and address the relevant date for itself, the prosecution of the Respondents had been within time.

3. Section 127(5) of the 2003 Act is one of those provisions which stands as an exception to the general rule contained in section 127(1) of the Magistrates' Courts Act 1980. That general rule is that a magistrates' court "shall not try an information" unless laid "within 6 months from the time when the offence was committed". But that is "except as otherwise expressly provided by any enactment". Sections 127(5) and (7) of the 2003 Act use a language and structure which are familiar in other statutory schemes. As Holgate J observed in R (Russnak-Johnston) v Reading Magistrates' Court [2021] EWHC 112 (Admin) [2021] 1 WLR 2444 at §66, the "principles established by the case law on provisions of [this] nature were helpfully distilled" in two cases. They are the judgment of Hickinbottom LJ for the Divisional Court in R v Woodward [2017] EWHC 1008 (Admin) (2017) 181 JP 405 and the judgment of Males LJ for the Divisional Court in R (Chesterfield Poultry Ltd) v Sheffield Magistrates' Court [2019] EWHC 2953 (Admin) [2020] 1 WLR 499. Those judgments extensively cite and analyse the previous case law. They were the only cases referred to by the District Judge and the only cases cited to us in this appeal. Like the present case, Woodward was an appeal by the Prosecution by case stated, against a decision – notwithstanding a certificate – to dismiss a prosecution on grounds of it being brought out of time. The appeal succeeded.

In Chesterfield on the other hand the challenge was by way of judicial review by the Defence in the criminal proceedings, brought against a decision declining to dismiss the prosecution as being brought out of time. The claim failed. In each case – as in this case – the question was whether the magistrates' court had been "wrong in law".

Three permissible grounds

4. The cases treat as settled law that a certificate can be impugned – so that the criminal court can look behind it and treat it as being other than "conclusive evidence" of the relevant date – on three grounds only.

   i) The first is that the certificate was "not in the proper form". That is because a certificate "must comply strictly with the statutory requirements". This means it "must be signed by or on behalf of the appropriate prosecutor" and "must state what it is required to state". A "certificate which fails to do so is a nullity". See Chesterfield at §25.

   ii) The second is that the certificate contains an "error on its face". One phrase which was used in the case law is that the certificate is "plainly wrong". But "plainly" means "inaccurate on its face" and so a better word is "patently". See eg. Chesterfield at §48.

   iii) The third is where the certificate "can be shown to be fraudulent". See Chesterfield at §57.

5. These three permissible grounds were rolled up into the following summary in Chesterfield, among a number of conclusions described as rooted "firmly" in "policy, language and authority" (see Chesterfield §58) at §62:

> ***[I]n the absence of fraud, a certificate in proper form which contains no error on its face is conclusive evidence of that date …***

A certificate which is unimpeachable on these three grounds is "conclusive evidence of the relevant date from which the six-month period begins to run": Chesterfield §61.

An impermissible enquiry

6. The principle which requires a certificate – which is in the proper form and non-fraudulent – to have an "error on its face" before it is impugned has a necessary corollary. It involves the identification of a permissible, and an impermissible, enquiry. The permissible enquiry is encapsulated by "on its face". The enquiry, permissibly to arrive at the conclusion that a certificate bears a vitiating "error", is limited to looking to the "face" of the certificate. Looking beyond the "face", to find the error by reference to "evidence" which is "extraneous", is the impermissible enquiry. This is seen in the fuller passage from Chesterfield at §62:

> ***[I]n the absence of fraud, a certificate in proper form which contains no error on its face is conclusive evidence of that date and is not open to challenge by reference to extraneous evidence showing that it is wrong or even plainly wrong. To hold otherwise would depart from a clear and consistent line of authority which rests on sound principles…***

7. Applying the relevant principles to the facts of the case, and identifying "extraneous evidence" as "inadmissible", Males LJ concluded as follows in Chesterfield at §63:

> ***… [T]he prosecutor's certificate in this case contains no error on its face and is therefore conclusive evidence that the relevant date was 8th November 2017. The proceedings were therefore in time. Evidence to the contrary suggesting that the relevant knowledge was acquired on some earlier date (the claimant says March 2017) is inadmissible. Equally, although there was some suggestion that the actual date on which the evidence justifying proceedings came to Ms Sanghera's knowledge may have been in early January 2018 rather than 8th November 2017, that too is inadmissible.***

The District Judge's approach

8. In analysing whether the prosecution was within time or out of time, the District Judge gave a detailed 52-paragraph written judgment on 17 December 2020 (the "Judgment"). She then incorporated the Judgment in its entirety – adding one amplificatory paragraph and one final clarificatory paragraph – into the Stated Case which she issued on 23 March 2021.

9. The District Judge began the Judgment by summarising, as follows, the essential argument advanced by the Prosecution, which she did not accept (Stated Case at [6]):

> ***[T]he prosecution rely on the judgment of Lord Justice Males [in Chesterfield Poultry at §§25-26, 61-62] that: "there is in my judgment no greater scope for a defendant to invoke policy considerations to challenge a certificate which is valid on its face…there are powerful policy considerations in favour of upholding the conclusive nature of such a certificate…A certificate in proper form is conclusive evidence of the relevant date from which the 6 month period begins to run…in the absence of fraud, extraneous evidence is not admissible to challenge a certificate which is valid on its face." The prosecution submit therefore that the court cannot go behind the certificate which confirms the relevant date to be 27th November 2019, meaning that the proceedings were commenced within the 6 month time limit.***

She then summarised, as follows, the essential argument advanced by the Respondents, which she went on to accept (Stated Case at [7]):

> ***[T]he defence rely on the factual matrix in the agreed chronology which suggests that the evidence came to the knowledge of the prosecutor at a much earlier stage meaning that the certificate is plainly wrong and that the court should therefore hear evidence and reach a determination on the issue.***

10. A number of key sources stood as reference points for the District Judge's analysis. I will identify them here by way of a chronological list. (1) The MG3 ("a police request for charging advice") dated 8 November 2018. (2) The "evidence in the case… first received by the prosecution on 21/03/19", at which point "some evidence was missing and request was made for further information". (3) The "police misconduct file… received" on 10 May 2019. (4) A mobile phone "attribution statement" received on 27 November 2019. (5) The Certificate. (6) A "chronology" provided by Ms Frain in the criminal proceedings, setting out "her involvement and knowledge of the evidence in the case", which was then embodied in the First Respondent's skeleton argument for the hearing before the District Judge on 17 December 2020, constituting an "Agreed Chronology". (7) The oral evidence of Ms Frain who was called as a witness at the hearing on 17 December 2020, was cross-examined by Counsel for the First Respondent and then by Counsel for the Second Respondent, then re-examined by Counsel for the Prosecution.

11. There were, in essence, four stages in the District Judge's decision-making approach, leading her to the ultimate conclusion. Stage (1). The District Judge started by considering the Certificate, in the light of the contents of the Agreed Chronology. The outcome of that stage was the Judge's conclusion that it was appropriate to hear oral evidence from Ms Frain. This first stage was described by the District Judge – in her summary of the defence argument which I have set out above (from Stated Case at [7]) – as the defence reliance on the "factual matrix in the agreed chronology" as suggestive of the Certificate as being "plainly wrong" about the date at which "the evidence came to the knowledge of the prosecutor", on which she should "hear evidence and reach a determination on the issue". The District Judge agreed, recording (at [7]) that:

> ***I decided that to do so would only be appropriate in an exceptional case but that this is such a case, given the wealth of detail about for instance the evidence available for the earlier misconduct hearing and that it was necessary for the court to receive evidence in order to make a determination as to whether the certificate is "plainly wrong".***

In her clarificatory additional paragraph in the Stated Case (at [54]), the District Judge said this:

> ***Due to the fact that the prosecution had been preceded by a full police investigation in which all of the relevant evidence had been gathered, I was able to form the view that the certificate was arguably wrong in its reference to 27/11/19, based on the prosecution's own chronology; I said as much in open court and went on to hear evidence from the CPS lawyer; I did not include that in my written judgment, but it was the basis upon which I proceeded to hear evidence in order to ascertain whether proceedings had been commenced within the statutory time limits.***

As will be seen below, in Question (1) for this Court, the District Judge refers to:

> ***… determining that the prosecutor's certificate, issued pursuant to section 127(7) of the Communications Act 2003 was plainly wrong by reference to the agreed chronology …***

12. Stage (2). Next, the District Judge allowed the introduction of the oral evidence of Ms Frain. This was evidence which the District Judge set out at length in the Judgment. Her description of it occupies 31 paragraphs of the Judgment and, by incorporation, the Stated Case. Features of that evidence included: Ms Frain's description of the conclusions which she had reached and the date on which she had reached them; the various reviews of the file which had taken place in the date on which they had taken place; the evidence which had been received by the CPS as at March 2019 as at May 2019; the reasons why an attribution statement analysing evidence elicited from mobile phones was considered necessary; the attribution statement received on 27 November 2019; together with other matters.

13. Stage (3). Next, the District Judge arrived at her "findings of fact". Those findings were set out in the Stated Case as follows (including the amplificatory additional paragraph at [49]):

> ***[41] Miss Frain had no knowledge of the MG3 of 08/11/18 until 21/10/20. It is therefore irrelevant for the purpose of this decision.***
>
> ***[42] Evidence in the case was first received by the prosecution on 21/03/19. Some evidence was missing and request was made for further information.***
>
> ***[43] On 10/05/19 the police misconduct file was received. This comprised the same evidence as this prosecution relies on, save for the attribution statement of Alyson Young, 27/11/19.***

> ***[44] It is conceded by Miss Frain (paragraph [29] above) that the evidence in that statement was already available, albeit not in one place.***
>
> ***[45] Without the formal statement of Alyson Young, there was ample evidence available regarding attribution of Scott Snowden's mobile phone including the circumstances of its seizure, his having given the police the PIN, the email confirming the number and the contents of the download and spreadsheets.***
>
> ***[46] The prosecution could, if need be, have commenced proceedings prior to a formal attribution statement being obtained. It was simply a case of "dotting the i's and crossing the t's". It was a desirable rather than essential piece of evidence.***
>
> ***[47] It is inconceivable that the absence of such a statement would have led to a decision that there was insufficient evidence to justify a prosecution.***
>
> ***[48] Miss Frain conceded that the attribution evidence concerning Edward Cook's phone was available in March 2019.***
>
> ***[49] Miss Frain conceded that she had knowledge of the evidence against Edward Cook between March and May 2019.***
>
> ***[50] There was a substantial volume of evidence to be carefully considered, with multiple potential charges and several potential defendants. However, the fact that either way and indictable only offences were under consideration does not obviate the 6 month time limit for the commencement of a prosecution.***

14. Stage (4). Finally, the District Judge arrived at her ultimate conclusion. This was that the Certificate was "plainly wrong" and the prosecution of the Respondents was "out of time". As she put it, in formulating Question (3) for this Court (to which I will return):

> ***I found … [t]he day on which all the relevant evidence came to the knowledge of the prosecutor, which was objectively sufficient to justify a prosecution, was more than 6 months before the day on which the informations were laid against the defendants.***

The underpinning of her ultimate conclusion was this (Stated Case at [51]):

> ***From March 2019 onwards, the prosecutor was able to review the file so as to have knowledge of all the relevant evidence. Certainly from May 2019, the evidence was all available. Even allowing for the number of potential charges and defendants and resulting complexity, there was ample time for a decision to have been made within the statutory limits, months before 27/11/19.***

Chesterfield §60

15. In her analysis the District Judge placed strong reliance on a particular passage from the "conclusions" section in the judgment of Males LJ in Chesterfield at §60, which the District Judge set out (Stated Case at [8]):

> ***The decision whether the evidence was sufficient to justify proceedings…required an exercise of judgment…both as to whether the evidence amounted to a prima facie case and whether proceedings were in the public interest. However, the statutory question was when evidence which in her opinion satisfied those criteria came to her knowledge, and not (if different) when she formed the opinion that proceedings were justified. The date on which the relevant evidence came to her knowledge is not, however, to be equated with the date on which the relevant evidence was placed on her desk or delivered to her inbox. Rather it is the date on or by which it has been considered so that knowledge of the content has been imparted. In most cases, no doubt, and there is no reason to suppose that this case is different, that imparting***

> ***of knowledge and the forming of opinion will happen together. The responsible individual will review the file and make a decision about prosecution. Hypothetically, however, if he or she were to review the file so as to have knowledge of all the relevant evidence, but only made a decision about prosecution at a later date, it seems to me that the date when the file was reviewed would be the date when the evidence came to the prosecutor's knowledge. To that extent, therefore, I respectfully disagree with Hickinbottom LJ's statement in Woodward at §23(iii) that the relevant date is the date on which the prosecutor decides that it is in the public interest to prosecute.***

16. In expressing her ultimate conclusion, the District Judge picked up on that passage. She prefaced the passage which I have quoted and described as underpinning her ultimate conclusion (at [51]) with the following observation identifying what she saw as a symmetry with Chesterfield at §60:

> ***This is exactly the scenario foreseen by Males LJ [at §60], in which 'the responsible individual… were to review the file so as to have knowledge of all the relevant evidence, but only made a decision about prosecution at a later date … the date when the file was reviewed would be the date when the evidence came to the prosecutor's knowledge'. From March 2019 onwards, the prosecutor was able to review the file so as to have knowledge of all the relevant evidence. Certainly from May 2019, the evidence was all available. Even allowing for the number of potential charges and defendants and resulting complexity, there was ample time for a decision to have been made within the statutory limits, months before 27/11/19.***

The Questions

17. In the Stated Case the District Judge has posed these Questions for this Court:

> ***(1) Did I err in law in determining that the prosecutor's certificate, issued pursuant to section 127(7) of the Communications Act 2003 was plainly wrong by reference to the agreed chronology?***
>
> ***(2) If not, did I err in proceeding to hear extraneous evidence on the matter?***
>
> ***(3) Did I err in law in determining, by reference to section 127(5)(b) of the 2003 Act, that the certificate was plainly wrong because I found:***
>
> > ***(a) The day on which all the relevant evidence came to the knowledge of the prosecutor, which was objectively sufficient to justify a prosecution, was more than 6 months before the day on which the informations were laid against the defendants; and/or***
> >
> > ***(b) There was ample time for the prosecutor to have made the determination required more than 6 months before the day on which the informations were laid against the defendants?***

The Prosecution's Appeal

18. The Prosecution's position on this appeal is encapsulated in its Grounds of Appeal, which are as follows:

> ***[1] There was no issue raised in the proceedings that the certificate issued by the prosecutor was either: (a) fraudulent; or (b) plainly wrong "on its face".***
>
> ***[2] Accordingly, any extraneous evidence (including the oral evidence of the prosecutor who signed the certificate and the documents to which she was referred) was inadmissible for the purpose of challenging the validity of the certificate.***

> ***[3] The District Judge's finding that, "it was necessary …to receive evidence in order to make a determination as to whether the certificate [was] 'plainly wrong'" [§7 of the Stated Case] was an error of law, and contrary to binding appellate authority. This is the decision challenged by way of questions (1) and (2) in the Stated Case.***
>
> ***[4] In §51 of the Stated Case, the District Judge held that the certificate was "plainly wrong" because: (a) she was of the opinion that all relevant evidence sufficient for the prosecutor to make the determination required by section 127(5)(b) of the 2003 Act was "available" to her so as "to have knowledge" of it by no later than May 2019; and/or (b) there was "ample time" for the "decision" required by the statutory provision to have been made before 27 November 2019 and thus more than six months before the informations were laid.***
>
> ***[5] It is submitted that the District Judge erred in law in holding that the certificate was plainly wrong on the ground that the judge substituted the primarily subjective issue of when the prosecutor who signed the certificate came to the knowledge that there was evidence she considered sufficient to justify proceedings, by applying an objective test of when (in the District Judge's opinion) the prosecutor ought to have come to the knowledge that there was evidence she considered sufficient to justify proceedings. This is the decision challenged by way of question (3) in the Stated Case.***

The Respondents' Analysis of the Central Issue

19. The central issue on this appeal is whether the District Judge went wrong in law, as the Prosecution submits, because she allowed the Respondents to impugn the Certificate on an impermissible ground and by reference to an impermissible enquiry. Not so, say Mr Pitter KC for the First Respondent, and Mr Worsley for the Second Respondent. They defend the District Judge's approach and analysis, in essence as I saw it, on the following basis.

20. Mr Pitter KC submitted as follows. It is correct, on the basis of Woodward and Chesterfield, that the Certificate could be impugned only on the basis of "error" if there were an "error on the face of the Certificate", and not an "error" identifiable by reference to "evidence" which is "extraneous". However, this is an exceptional case. Whether by way of a legally correct understanding of "error on the face of the certificate", or if necessary by way of a narrow and principled new category of "error", this case falls within an exceptional category of case in which the District Judge was correct, and at least entitled, to depart from the Certificate as not being "conclusive". A number of features combine to make this case exceptional and produce that outcome. They come to this: (1) the fundamental nature of the error; (2) the degree of clarity of the conclusion reached; (3) the nature and status of the key source relied on to identify the error. A possible encapsulation of this combination of features would be as follows: this is an exceptional case, where an 'error of approach' was 'clearly' demonstratable from a 'uncontroversial documented fact'. Recognising these key features does not, or should not, be regarded as an impermissible ground or enquiry. The key stage was stage (1). The key source for the District Judge's clear conclusion was the Agreed Chronology. It constituted "recognised fact". It was not, or not simply, "evidence" or "extraneous" evidence. Because the contents of the Agreed Chronology were uncontentious, the assessment of the facts did not offend the policy and purpose of insisting on an error "on the face" of the Certificate, namely to avoid a 'satellite enquiry' into disputed facts and contentious evidence. The facts did not require "assessment". They did not require "forensic analysis". True, the District Judge allowed Ms Frain's oral evidence to be adduced. But she did so, as an act of fairness towards the Prosecution, to give a chance of attempted rebuttal of a conclusion supported by the Agreed Chronology. The nature of the error was fundamental. It was an "error of

approach". This was why the District Judge emphasised the important passage from Chesterfield at §60. In issuing the Certificate, Ms Frain had misunderstood and misapplied the statutory provisions.

21. Mr Pitter KC made the following further key points. First, that §60 of Chesterfield is a key part of Males LJ's careful analysis. The District Judge rightly treated it as informing the question whether the Certificate contained an "error on its face". The passage at Chesterfield §60 "crucially" sets out what it is that a certificate has to represent. It would be artificial to treat it as irrelevant to the grounds and enquiry by which a certificate can be impugned. Secondly, the Respondent's analysis is supported by other passages: Chesterfield §21, where Males LJ said that "considering what the fact is of which a valid certificate is conclusive evidence" is something which serves to "inform discussion of the issue of the status of the certificate"; Chesterfield §28 which emphasises that the relevant date involves the relevant "fact"; Chesterfield §29 which identifies "the 'fact' which has to be certified"; and Chesterfield §57 which describes "a valid certificate", "determinative … unless inaccurate on its face", as one which must be "saying the right thing". Thirdly, it would be a clear injustice if the Prosecution could continue to rely as "conclusive" on a certificate, involving an error of approach, clearly demonstrated, from uncontroversial documented fact. Fourthly, that this injustice should be confronted directly as constituting an error in the Certificate. That direct route is preferable to the possible alternative. The alternative would mean challenging the Prosecution's decision to maintain the Certificate, as constituting a species of "abuse of process". Mr Pitter KC told us that an "abuse of process" analysis was raised, in the alternative, before the District Judge.

22. Mr Worsley adopted all of these submissions and added some key points of his own. First, he had a locational point. The position – by reference to whatever route or source or enquiry – is that the "error" can be located in what is said "on the face of the Certificate". Secondly, he described as inevitable the need for an "extraneous" source. An "error" which is "on the face" of a certificate will always need to be identifiable by using some source which shows it to be an "error". It has to be possible to look somewhere. Third, he emphasised the reasoning in Woodward at §28. In that passage, the Divisional Court identified as "an error" which was "clear from the certificate" the fact that the certificate "did not accurately reflect the wording of [the statute]". That was because the certificate appeared "to focus on the date upon which the evidence … had been collected … by the FSA". The point was that the FSA was the investigatory body, not the "prosecutor". Reference was made at §28 to the fact that the actual "prosecutor" "did not even receive the file until three months later". That example, says Mr Worsley, illustrates reference being made to facts and matters beyond those set out in the certificate, whose contents the Court had earlier set out (Woodward at §11).

23. There was one point of divergence between Mr Pitter KC and Mr Worsley. Mr Pitter KC emphasised, if necessary, that the attribution statement (27 November 2019) related to the Second Respondent's mobile phone. He says, in those circumstances, that the relevant date in the case of the First Respondent must have been earlier than 27 November 2019. That is on the basis that the attribution statement "added nothing" in the case of the First Respondent.

Discussion

24. I am unable to accept the Respondent's submissions. In my judgment, as soon as the Certificate was being impugned by reference to "the factual matrix in the Agreed Chronology", for the purposes of showing that the Certificate was "wrong" or "plainly wrong", the District Judge was allowing an impermissible ground and an impermissible enquiry. Any "error" was not "on the face" of the Certificate. Since neither of the other two permissible grounds was applicable, the Certificate could not be impugned. That was the end of it.

25. There is a difficulty with the District Judge's strong emphasis on Chesterfield §60. The Respondents say she was right to rely on that passage and to apply it in finding, by reference to the Agreed Chronology, that there was an error in the Certificate. I cannot agree. It is important to appreciate that distinct questions can arise in relation to statutory provisions like section 127(5) and (7) of the 2003 Act. Section 127(5) identifies the certifiable relevant day as "the day on which evidence comes to the knowledge of the prosecutor which the prosecutor considers sufficient to justify proceedings". There are questions about who is "the prosecutor"; about what it means to say that "evidence comes to the knowledge of" the prosecutor; about what it means to say evidence "sufficient to justify proceedings"; and about what it means to say the prosecutor "considers" the evidence which has come to their knowledge to be "sufficient". These are all relevant questions so far as concerns section 127(5)(b), correctly interpreted and lawfully applied by a certifying prosecutor. They are analysed in detail in the authorities, and in Chesterfield in particular. But these are distinct from the question of what permissible "grounds" – and what permissible enquiry – allow a certificate to be impugned.

26. In the section of Chesterfield headed "the authorities" (at §30-57) Males LJ identified these as being "issues" addressed in the previous authorities (§30):

> ***(1) Whose knowledge counts as the knowledge of the prosecutor (the prosecutor issue)?***
>
> ***(2) What has to happen to cause the six-month period to begin to run (the relevant date issue)?***
>
> ***(3) On what grounds can a certificate be challenged (the grounds issue)?***
>
> ***(4) What is the correct procedure for challenging a certificate (the procedural issue)?***
>
> ***(5) What is the relationship between such a challenge and an application to stay for abuse of process (the abuse issue)?***

27. It is the next section of the judgment (Chesterfield §§58-63) which is headed "Conclusions". It begins with this (§§58-59):

> ***58. In my judgment policy, language and authority lead firmly to the following conclusions which are decisive of this case.***
>
> ***59. First, although the prosecutor is the CPS, the relevant individual with responsibility for deciding whether to commence proceedings was Ms Sanghera. It is therefore her knowledge which counts for the purpose of section 41 of the Regulations. Mr Hockman's submission that time began to run from the date when the file was received by the CPS is untenable in view of the authorities which address the prosecutor issue.***

The passage at §59 is clearly addressing what at §30(1) Males LJ had called "the prosecutor issue". In the same way, the passage at §60, which I have set out and on which the District Judge strongly relied, is clearly addressing what at §30(2) was "the

relevant date issue". The prism through which an "error" becomes permissible for impugning a certificate is provided by the answer to what at §30(3) Males LJ had called "the grounds issue". That answer is at Chesterfield §62, which I have set out. Resort to other passages in Chesterfield cannot assist. The relevant permissible ground is error "on the face of the certificate". It cannot assist to identify the legally correct approach to the "relevant date", and then point to extraneous evidence to be able to say that the certifying prosecutor's approach was "wrong", or even "plainly wrong".

28. Mr McGuinness KC submits that:

> ***The [District Judge] fell into error because she applied §60 of Chesterfield Poultry out of context. In that paragraph, Males LJ was focusing on precisely what date the prosecutor's certificate was required to address – and he was there considering three possible dates. The [District Judge] wrongly read §60 as a justification for the exercise she had undertaken of requiring extraneous evidence: the chronology, oral evidence from Ms Frain and production of (or detailed reference to) documents from the CPS file on which she was cross-examined.***

For the reasons I have given, I agree.

29. In impugning a certificate, it is not enough to try – or be able – to point to extraneous evidential material which is said to show that "the fact" which has been certified "is not correct". The degree of certainty of the conclusion does not assist. As the cases explain, "plainly wrong" does not suffice. What is needed is that the certificate is wrong – or plainly wrong – "on its face". That is not a reference to the location where the "error" can ultimately be found stated. It is also a reference to the enquiry which permissibly leads to the conclusion that there is a vitiating error. This is why the nature and scope of the permissible enquiry is of such importance. It is deliberately a "very limited" exception to a prohibition on an enquiry into facts. That position is encapsulated as follows (Chesterfield at §23):

> ***A conclusive evidence provision prevents the court, subject to very limited exceptions, from enquiring whether the fact certified is or is not correct.***

30. Nor is it right to regard the "very limited" permissible enquiry as being an engine of injustice. In the first place, this is primary legislation in which Parliament is deliberately entrusting a function to a certifying prosecutor, applying a subjective test. The clear function and purpose of the certificate is to stand, not as "evidence" of the relevant date, but as "conclusive" evidence. Secondly, this is designed to promote certainty, so that – leaving aside fraud (which 'unravels all') – everyone can look at the certificate and know where they stand (including whether it is in the proper form and whether it has an error on its face). Thirdly, this is designed to avoid any external factual enquiry, and to avoid lines being drawn about questions of degree in satellite disputes. The idea of exceptionality, based on an error of approach which is clearly demonstrated, from uncontroversial documented fact, itself illustrates lines being drawn about questions of degree in satellite disputes about external factual enquiry. The principled certainty is lost. The policy and purpose of "error on the face of the certificate" are therefore undermined. As it was put in Chesterfield at §26:

> ***[T]here are powerful policy considerations in favour of upholding the conclusive nature of such a certificate. To do so promotes certainty which is in the interests of all parties avoids the court having to second guess prosecutorial judgments which are properly the province of the CPS, and avoids satellite litigation about whether proceedings have been commenced in time which causes additional expense while determination of the real issue, whether an***

> ***offence has been committed, is delayed well beyond the time within which it ought to be determined.***

As it was put in Chesterfield at §62:

> ***62. … To hold otherwise would … lead to endless arguments as to whether the date stated on a certificate was "plainly wrong" or just "wrong" and what was meant to be added by the word "plainly"…***

In Chesterfield at §34 Males LJ described as a case which "explains the policy justification for giving effect to a certificate which is valid on its face", R v Haringey Magistrates Court, Ex p Amvrosiou (unreported) 13 June 1996. In that case, "the certificate … was not inaccurate on its face", so that "evidence which was said to show that the certificate was wrong was immaterial" (Chesterfield §33). Males LJ extracted (at Chesterfield §32) passages from Amvrosiou including this one:

> ***The clear purpose of [the statutory provision] is to achieve certainty, both for the prosecutor and for the defendant, and to prevent what would otherwise be an exercise in discovery of the prosecuting process as to when a particular information came to hand and as to when decisions as to its sufficiency could or should have been made. Clearly any such possibility in the context of this sort of provision would be an intolerable burden to the prosecution and a clog on the wheels of justice at summary level.***

Fourthly, the context involves an identifiable permissible start date for a prosecution in the magistrates' court, during which a defendant will be convicted only on evidence to the criminal standard after a trial involving all relevant fair trial guarantees. This was the point made in Chesterfield (at §24):

> ***The time limit in the Regulations does not involve the same considerations as apply when fundamental human rights are in play. The consequence of certifying that proceedings are in time is not particularly startling. It is merely that the defendant faces summary proceedings in the magistrates' court to which the common law and article 6 guarantee of a fair trial applies.***

31. I would agree with Mr Worsley – to a point – that it can be permissible to look at some "source" beyond the Certificate, in order to decide whether there is an "error on the face of the certificate". One can take a certificate and examine it against the contents of the statutory provisions themselves, to see if what is recorded on the face of the certificate involves a recognisable error. The statute is external to the Certificate. But it does not involve an impermissible enquiry into inadmissible extraneous evidence. For the same reason, I would also agree – to a point – with Mr Pitter KC that the analysis in Chesterfield at §60 is capable of informing the assessment of whether the Certificate has an "error on its face". One can take a certificate and examine it against the contents of the judgment in Chesterfield, including §60, to see whether there is an "error" on its "face". If the Certificate were to say something on its "face" which shows that the certifying prosecutor has asked the wrong question – where it is Chesterfield §60 which identifies the right question – that is an "error on the face of the certificate". But it involves the permissible ground and the permissible enquiry.

32. Mr Pitter KC and Mr Worsley accept that the Certificate was "in the proper form". They did not, and do not, submit that there was "fraud". The Agreed Chronology was "evidence", notwithstanding that it was uncontroversial. It was akin to "agreed facts", which is itself "evidence" (see eg. Crown Court Compendium Part I pages 4-3, 12-6). In Woodward itself the Court referred to the "evidence of the case history" (§32) which

included a "chronology" as well as a "screen print of the case history" (§15). That "evidence" was "extraneous", which means "extraneous to a … certificate" (Woodward §31). Resort even to the Agreed Chronology meant the error was not identifiable "on the face of the certificate". The Court in Woodward concluded that the March 2016 certificate (§11) "did not accurately reflect the wording of [the statutory provision]" and which described the "date by when the evidence had been collected by the FSA" (the non-prosecutorial body with the "investigatory role": §26). The Court said that the error which it had identified was "clear from the face of the certificate" (§28). As was later explained in Woodward (§29) the judge had erred in relation to July 2016 certificates (§14), because the judge "ought to have considered the July 2016 certificates on their face, and asked himself whether there was anything patently wrong with them". I do not accept that Woodward can be read as involving an enquiry by reference to extraneous evidential material; nor that such an approach can survive Chesterfield.

33. In the present case, the only references made by the District Judge to error on the "face" of the Certificate were in the description of the Prosecution's argument (Stated Case at [6]), which the District Judge rejected. Nowhere else did the District Judge use that expression. Nowhere did she conclude that the Certificate was erroneous on its "face", or give reasons why. Nowhere did she say that the Agreed Chronology was being treated as anything other than "evidence", which was "extraneous" to the Certificate. No error on the "face" of the Certificate has been identified. The true thrust of the argument was that the relevant date which was certified was incorrect – or unreasonable – when viewed against the evidence, starting with the Agreed Chronology. But that is not a permissible ground and is an impermissible enquiry.

34. The Prosecution's argument – which the District Judge had summarised (at [6]) – was legally correct. The District Judge was wrong in law not to accept it. There was no challenge to the Certificate as not having been "in the proper form" and complying strictly with the statutory requirements. There was no challenge based on fraud. But nor was there any challenge based on error on the "face" of the Certificate. The District Judge's Stage (1) was itself an impermissible enquiry into whether the Certificate could be said to be "wrong" (or "plainly wrong") by reference to "extraneous evidence".

35. It follows – since the District Judge ought to have considered only what was said on the "face" of the Certificate (from which she identified no "error") – and ought not to have reached her adverse conclusions even by reference to the Agreed Chronology, that Grounds [1] to [3] of the Grounds of Appeal are each made out and that the answer to Questions (1)-(2) is "yes".

Other points

36. That is sufficient to decide this case, but there are other points with which I should deal. First, part of the Respondents' argument characterises the District Judge's Stage (1) as critical, with Stage (2) as an act of fairness towards the Prosecution, to give a chance of attempted rebuttal. I do not accept that characterisation. The District Judge does not say that this is what she did. At one point (Stated Case at [54]) the District Judge describes her Stage (1) as leading to the "view" that the Certificate was "arguably" wrong. The oral evidence was undoubtedly "extraneous evidence". The District Judge also said (at [7]) that it was "necessary" to receive evidence "to make a determination".

In the event, since even the Agreed Chronology was extraneous evidence, this point goes nowhere.

37. Secondly, there is the divergence point: Mr Pitter KC's argument that the attribution statement of Ms Young (27.11.19) related only to the Second Respondent's mobile phone, so that sufficient evidence, in respect of the First Respondent, must have been received no later than 10 May 2019. This contention itself depends on "extraneous" evidence, and how it is characterised. It does not arise on the "face" of the Certificate. It does not involve identifying an error on the "face" of the certificate itself. It cannot assist.

38. Thirdly, there is the distinct point raised in Appellant's Grounds of Appeal at [4] and [5]. The argument is this. Even if it had been open to the District Judge to consider whether the Certificate was plainly wrong, by reference to extraneous evidence, she nevertheless still erred in law. That is because she substituted an "objective test" of the date at which in the District Judge's opinion Ms Frain ought to have come to the knowledge that there was evidence she considered sufficient to justify proceedings. This was itself an error of law, given the "primarily subjective issue" as framed in section 127(5)(b). In my judgment, there is force in that submission. The District Judge herself in Question (3) describes herself as finding there to have been relevant evidence "objectively sufficient to justify the prosecution", as well as her finding that there had been "ample time" to make the required determination. The force is that Parliament defined the relevant date by using the subjective phrase "which the prosecutor considers sufficient". That means, even in a case in which no certificate is issued and the Court has to apply section 127(5)(b) to decide whether a prosecution is out of time, it would still be necessary to address the "relevant date" by recognising that latitude for prosecutorial judgment for which Parliament had made provision. It is unnecessary to say more. None of this arises in the present case. It presupposes an inappropriate enquiry. The legally appropriate enquiry, before a Certificate could be treated as other than conclusive evidence of the relevant date, was restricted in a way described in the authorities. The subjective/ objective criticism does not therefore arise.

39. Fourthly, reference was made to the alternative of an abuse of process argument. Mr Pitter KC explained why his arguments focused on direct challenge to the Certificate as involving a relevant "error", and not indirect challenge through seeking to characterising the maintenance of the Certificate as an abuse of process. I think that focus was correct. The limits of "error on the face of the certificate" cannot be circumvented by challenging the decision to maintain an 'erroneous' certificate and characterising it as an abuse of process. As has been seen, this was what at Chesterfield §30(5) Males LJ had called "the abuse issue". His answer included this (at §70):

> ***As the cases make clear, whether a certificate is "plainly wrong" must be determined, in the absence of fraud, by reference to the face of the certificate and without regard to extraneous evidence. Absent fraud, a certificate which is valid on its face is conclusive evidence of the relevant date. If it were possible to circumvent this principle by dressing up a challenge to the certificate as an abuse of process argument, the purpose of the time bar provisions would be frustrated.***

Conclusion

40. For the reasons given, I would allow this appeal. I would answer "yes" to all Questions and would find that the District Judge materially erred in law. I would quash her

determination dismissing the proceedings and remit the matter to the magistrates' court, with a direction that the magistrates' court refuses the application to dismiss the proceedings.

LORD JUSTICE STUART-SMITH:

41. I agree.