Neutral Citation Number: [2023] EWHC 1362 (Admin)

Case No: CO/3547/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 June 2023

Before :

LORD JUSTICE WILLIAM DAVIS
and
MR JUSTICE JEREMY BAKER

- -

Between :

The King on the application of Chapter 4 Corp Dba Supreme	**Claimant**
- and -	
The Crown Court at Southwark	**Defendant**
- and -	
The Lord Chancellor	**Interested Party**

- -
- -

Mr Nicholas Bacon KC and Mr Rupert Cohen (instructed by Howard Kennedy LLP) for the **Claimant**
Ms Florence Iveson and Ms Harriet Wakeman (instructed by GLD) for the **Defendant**

Hearing date: 16 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice William Davis and Mr Justice Jeremy Baker:

This is the judgment of the court.

Introduction

1. The Claimant company, to whom we shall refer throughout as Chapter 4, in January 2019 acting as a private prosecutor, brought criminal proceedings against Michele di Pierro and IBF Ltd, a company with which he was associated. In June 2019 Chapter 4 brought further criminal proceedings against Marcello di Pierro. Both sets of proceedings related to the sale in many countries worldwide of counterfeit goods purporting to have been made by Chapter 4. In June 2021 Michele and Marcello di Pierro and IBF Ltd were tried in the Crown Court at Southwark (Judge Beddoe and a jury). They were convicted of conspiracy to defraud and fraud.

2. Following the conviction Chapter 4 applied for the costs of the prosecution to be paid from central funds. At the sentencing hearing on 25 June 2021 the judge ordered that Chapter 4's costs should be paid from central funds. Subsequently, after an issue was raised by the Legal Aid Agency as the body responsible for the assessment of claims for prosecution costs, the judge on 19 July 2022 made a further order which was not in the same terms as the order made on 25 June 2021.

3. Chapter 4 with the permission of Mr Justice Swift now apply for judicial review of the decision made by the judge on 19 July 2022. They argue that the judge had no jurisdiction to make the further order. As is customary the Crown Court has played no part in these proceedings. The Lord Chancellor as interested party opposes Chapter 4's application, the Legal Aid Agency being an executive agency sponsored by the Ministry of Justice.

4. We have received written and oral submissions from Mr Nicholas Bacon KC and Mr Rupert Cohen on behalf of Chapter 4; and written submissions from Ms Melanie Cumberland and Ms Harriet Wakeman, and oral submissions from Ms Florence Iveson and Ms Harriet Wakeman on behalf of the Lord Chancellor. We are grateful to all of them for their assistance.

Factual background

5. Chapter 4 is a US company which sells high quality clothing and accessories. It trades in many countries across the world. It operates retail outlets at a limited number of sites in the US and Europe (including London). It sells its merchandise via its various websites. The company operates in the UK by way of a British company called 1994 INC Ltd. The identifying trademark of Chapter 4 is a red and white logo with the single word "Supreme". This is the logo which is used on the retail outlets as well as the websites.

6. Over a number of years Michele and Marcello di Pierro traded in counterfeit "Supreme" branded goods. They opened retail outlets in Spain and in China bearing the red and white logo identical in appearance to those affixed to the genuine outlets operated by Chapter 4. They set up websites which had every appearance of being genuine. They had offices and warehouses in San Marino and Bulgaria. Their operation was sophisticated and complex. They incorporated IBF Ltd in 2018 as part of their fraud.

7. Chapter 4 instituted civil proceedings in a number of jurisdictions. These proceedings failed to stop the fraudulent activity. Chapter 4 then determined to commence the criminal proceedings to which we already have referred. They instructed their London solicitors, Howard Kennedy LLP, who already had been involved in civil action against the di Pierros. Howard Kennedy instructed leading counsel. Consideration was given to referral of the alleged criminal activity to the police or the Crown Prosecution Service. Leading counsel advised that neither had the resources and/or the expertise to take on the conduct of the proposed prosecution. No approach was made to the police or the Crown Prosecution Service.

8. Applications were made to the magistrates' court to withdraw the summonses issued by the court in relation to Michele di Pierro and IBF Ltd and in respect of Marcello di Pierro. The applications in July and September 2019 were heard by different District Judges. Both were refused. Once the cases had been sent to the Crown Court, both di Pierros and IBF Ltd applied to dismiss the charges. On 10 March 2020 the applications were refused. A few weeks prior to the start of the trial Marcello di Pierro applied for a stay of the case against him for abuse of process. That application was refused. As we have set out above, the trial took place in June 2021. It occupied approximately three weeks of court time.

The hearing on 25 June 2021

9. The di Pierros and IBF Ltd were convicted on 24 June 2021. The sentencing hearing took place the next day, 25 June 2021. Prior to the hearing prosecution counsel, Jonathan Laidlaw KC and Lewis MacDonald, provided a written sentencing note to the judge. The concluding paragraphs of the note consisted of an application for payment of prosecution costs from central funds. The note set out the relevant parts of Section 17 of the Prosecution of Offences Act 1985, CPR 45.4 (as it then was, the rule subsequently having been amended) and paragraphs 1.3, 1.4, 2.6.1, 2.6.2 and 2.6.4 of Practice Direction (Costs in Criminal Proceedings) 2015. This material was followed by the following paragraphs:

> "45. This has been a substantial prosecution. Whilst the trial was able to proceed quickly, that was the product of the condensing of vast quantities of material. The various defendants brought two fully argued applications to withdraw the summonses, applications to dismiss, and an application to stay. In those circumstances it is accepted a summary assessment will not be appropriate.
>
> 46. The court is invited to make a section 17 order with an assessment to take place under Part III of the Costs in Criminal Cases (General) Regulations 1986(a)."

Nothing was said in the note as to the amount of the costs for which application was being made. Save that it was implicit that the costs would be substantial, there was no reference to quantum in the course of the sentencing hearing.

10. During the morning of 25 June 2021 there was discussion between the judge and Mr Laidlaw about various aspects of the proceedings. This included inquiry by the judge about the application for costs. The judge at different stages of the hearing raised the following issues:

(i) Why were proceedings not brought in Italy, both individual defendants being Italian citizens who carried on the fraud from their domicile in Italy? The response from Mr Laidlaw was that there was concern about the effectiveness of proceedings in other jurisdictions and that it was considered that this jurisdiction would be the most effective way of bringing the defendants to justice.

(ii) Was any criminal complaint referred to the police or the Crown Prosecution Service or the Serious Fraud Office? If not, why not? That prompted this exchange:

> "MR LAIDLAW: Well, I think recognising that the – those bodies firstly have different priorities and, secondly, would not be able to bring the resources to bear on the investigations which have been necessary of the sort that we have seen and, of course, we mustn't forget that Chapter 4 had already in place, through the civil proceedings, the work of Mintz and the like.
>
> JUDGE BEDDOE: Well, that could have all been passed on.
>
> MR LAIDLAW: Yes."

(iii) Given that the prosecution appeared to have been brought primarily to protect the commercial interests of Chapter 4 and Chapter 4 was a US company, where did that company pay its taxes? Mr Laidlaw explained that Chapter 4 paid UK taxes on revenue flowing from any sales activity in the UK whether at retail outlet in London or online. He was not able to provide any detail of the amounts of tax involved.

11. The judge at one point asked for assistance in relation to the way in which Section 17 should be applied. He was directed to what was then the relevant paragraph in *Archbold* (6.31) which set out the principles governing the exercise of the court's discretion to order prosecution costs from central funds. The judge read that paragraph. No submissions were made by Mr Laidlaw in relation to its contents.

12. The hearing continued with submissions from the defence in relation to mitigation. At the conclusion of the morning's hearing, the judge adjourned to give himself time to consider his sentence.

13. On the afternoon of 25 June 2021 the judge delivered his sentencing remarks. Having sentenced the defendants, he turned to the issue of prosecution costs. He said this:

> "I have…..been invited to make an order under Section 17 of the Prosecution of Offences Act 1985 in favour of the prosecutor. I have to say as I reflected on this yesterday, I was initially inclined not to make such an order. In coming to that preliminary conclusion, I was taking into account my conclusion that this prosecution was not brought so much to protect the rights of the consumer, but to protect the commercial interests of the prosecutor.
>
> I was influenced by the fact that the prosecutor is essentially a United States company and I was also taking into account that the United Kingdom had provided that prosecutor with a forum conveniens in which to prosecute this case at considerable expense already to the public because of course the prosecutor in a

criminal case whoever he or she is unlike a complainant or a claimant in a Civil Court does not have to pay for the operation of the Court itself.

However, added to that there was also the issue as has been confirmed to me today that I had understood that the prosecutor had elected not to seek the assistance of a United Kingdom Prosecuting Authority for the purposes of these proceedings.

However, I have resiled from that conclusion and I think I need to explain more clearly why. Chapter 4 Supreme has in fact United Kingdom expression in the Company 1994 Inc Ltd through which it runs its UK operations, its London store, and its web sales. It pays its taxes here on the income it receives from those activities here.

Moreover, I am quite satisfied that criminal proceedings were brought in this country quite appropriately and for good legal reasons. There is an undisputed jurisdictional basis for the prosecutor having done so.

IBF was registered here and was central to both the frauds covered in counts one and two and significant parts of the offending in counts one and two were committed in this country as well as committed overseas. I am quite satisfied that the proceedings that the prosecutor has brought have been conducted reasonably and properly.

In the end therefore I am content to honour the general rule that the Court should make an order under this section unless there are very compelling reasons not to do so.

I do think however that whoever has responsibility for taxing such application for costs in the overall interests of the public should have an eye on Crown Prosecution Service rates rather than anything else. I should add that given all that has happened during the course of this case and in particular all that happened after the proceedings in this criminal case were instituted and before the trial itself. It has throughout been perfectly fitting for this case to be prosecuted by Leading and Junior Counsel."

14. Following the hearing a court officer drew up a formal costs order. The terms of the order were expressed as follows:

> "The Court orders that a payment be made to the prosecution out of central funds in respect of prosecution costs, including the costs of the investigation, and that the sum to be paid shall be determined."

Events following the hearing on 25 June 2021

15. On 13 December 2021 the Legal Aid Agency Criminal Cases Unit received a claim of £5,977,494.13 from Chapter 4 in respect of their claim for prosecution costs. Chapter 4's solicitors' file included a copy of the transcript of the hearing on the afternoon of 25 June 2021. The determining officer noted the judge's reference to the need to "have an eye on Crown Prosecution Service rates rather than anything else". The determining

officer also had access to the court's Xhibit log where the court clerk had recorded "an assessment of prosecution costs will be made in line with the CPS rules".

16. On 29 March 2022 Michael Rimer, a senior lawyer with the Government Legal Department, wrote to the judge. Mr Rimer invited the judge to consider whether he had intended to specify that Chapter 4 should recover a lesser amount than that considered reasonably sufficient to compensate them for their expenses incurred in the proceedings. In the event that the judge did have that intention, Mr Rimer further invited the judge to amend the costs order.

17. Mr Rimer sent a copy of his letter to Chapter 4's solicitors. The solicitors wrote to the court. They disputed that the court had jurisdiction to amend the order. The judge ordered both parties to serve skeleton arguments following which there was to be a hearing. The hearing was listed on 21 April 2022. The judge had only limited time to consider the competing submissions at this hearing. He reached no final conclusion. He ordered a further hearing to allow sufficient time for him to determine the position. His preliminary view in April 2022 was that he was not prevented from re-visiting the order made in June 2021 i.e. he was not functus officio. However, he said expressly that he had not made a final decision even on that issue and that the parties should be ready to argue the point further at the adjourned hearing.

18. The adjourned hearing was listed on 19 July 2022. Mr Laidlaw's oral submissions were directed at two issues. First, he argued that the judge had no jurisdiction to amend the order. Had an issue been raised within 56 days of the order, it could have been considered pursuant to the slip rule. Once that time had passed, the judge was functus officio. Second, he submitted that the order the judge made – what he said in court on 25 June 2021 – did not involve any specific limitation on the costs recoverable. Mr Laidlaw's written submissions also dealt with the question of whether, in the overall circumstances of the case, the order should be amended assuming the judge had jurisdiction to do so. He did not develop the written submissions orally because the judge said that they only would become relevant should he be persuaded that the slip rule did not apply.

19. Mr Rimer on behalf of the Lord Chancellor submitted that the formal order drawn up by the court officer did not reflect what had been said in court. The judge's order was what he said in court. Since the formal order was wrong, it could and should be corrected. Mr Rimer argued that what was said in court meant that the costs recoverable were to be assessed by reference to Crown Prosecution Service rates. He said that what the judge said "could not be clearer".

20. In response Mr Laidlaw said that the application was for an order under Section 17(1) of the 1985 Act. For an order to be made restricting recovery of costs, it had to be expressed as an order under Section 17(2A) of the 1985 Act. There was no mention of Section 17(2A).

The judge's ruling on 19 July 2022

21. The judge began his ruling with a rehearsal of the exchanges with Mr Laidlaw on the morning of 25 June 2021. He then turned to what he had said in the course of his sentencing remarks in relation to prosecution costs and what he meant by it. The judge said as follows:

> "When I went on to say what I did, I intended to limit the ambit of that decision and that order, and I intended to indicate, and believe I did sufficiently indicate, in paragraph eight and there beyond, or reference H and there beyond I should say, I sufficiently indicated that what was recovered by the prosecutor should be capped by the application of CPS rates for the work undertaken, rather than by what I anticipated would be, as they considerably are, the enormous costs actually incurred by the prosecutor by carrying out its own investigations, by engaging a major London legal firm, and in turn distinguished counsel, to prosecute the case for them…..
>
> I consider it was obvious from my remarks that however skilfully and effectively …..the prosecution may have been undertaken in this case by Mr Laidlaw and his team, that I considered it could have been undertaken by others at far less cost and could have been undertaken quite adequately by the Crown Prosecution Service…..
>
> Although in giving my decision on the application I did not expressly refer to Section 17.2, and used language looser than was clearly desirable, I had no doubt in my own mind that I intended to cap the amount of costs recoverable by the prosecution to those that would have been allowed to the Crown Prosecution Service….
>
> The clerk of the day then drew up an order without reference to me, that does not reflect either what I have said in court, nor indeed his understanding as recorded on the log…. there is this reference to including the costs of the investigation which does not reflect for a moment anything that I had said….. If it were thought at the time that the remarks that I had made were ineffective or ambiguous in what they sought to encompass, I am surprised that it was not brought to my attention…..
>
> …… I am quite satisfied that both the intention and the effect of what I said on 25 June 2021 was to adopt a qualification to the extent of the costs recoverable by the prosecutor and to apply the law as set out in Section 17.2. And to put a cap on the amount of costs to be recovered on taxation by the prosecutor…."

22. The judge concluded by saying that he was not amending his earlier order. Rather, his earlier order had not been recorded correctly. He was simply engaged in correcting the error in the formal order. The order drawn up thereafter by a court officer read as follows:

> "The Court orders that a payment is to be made to the prosecution out of Central Funds in respect of prosecution costs and that the sum to be paid is to be determined by reference to CPS rates."

The Claim for Judicial Review

23. On behalf of Chapter 4 it was submitted that the order of 19 July 2022 must be quashed because the judge had no jurisdiction to make the order. The period for amending or varying the order pursuant to the slip rule had long expired. Beyond that, the judge's powers were restricted to correcting a mistake on the court record. The order of 19 July 2022 went far beyond simple correction. It changed the substance of the order which had been made in June 2021.

24. It was argued that, because the judge acted in excess of jurisdiction, judicial review of his order is available notwithstanding the fact that, prima facie, it concerned a matter relating to a trial on indictment.

25. The argument was that the order of 25 June 2021 was as stated in open court by the judge. This was an order pursuant to Section 17(1) of the 1985 Act. The remarks to the effect that the determining officer should have an eye to Crown Prosecution Service rates when taxing the bill submitted by Chapter 4 could not be read as restricting the amount of the payment pursuant to Section 17(2A).

26. On behalf of the Lord Chancellor it was submitted that the judge's order of 25 June 2021 was intended to impose a limit or cap on the costs recoverable by Chapter 4. That was clear because the judge said that the determining officer was to have an eye to Crown Prosecution Service rates "rather than anything else". The contents of the contemporaneous Xhibit court log supported this interpretation. In addition, nothing was said by prosecution counsel at the time that the order was made. Had the terms of the order been ambiguous, counsel would have raised their concerns.

27. On that basis the costs order drawn up on 25 June 2021 did not reflect the order pronounced in court by the judge. The judge had jurisdiction to correct the error which is what he did on 19 July 2022. Because there was no jurisdictional error on the part of the judge, judicial review of his decision must be barred, the order being a matter relating to a trial on indictment.

28. On behalf of the Lord Chancellor it was further argued that the application for costs was inadequate in its particularity. It did not comply with CPR 45.4. It was an application put forward on the basis that it would be approved "on the nod". Even if Chapter 4's case otherwise was made out, the deficiencies in the application meant that relief should be refused on the basis that judicial review is a discretionary remedy.

The legal framework

29. The power to order prosecution costs from central funds is to be found in Section 17 of the Prosecution of Offences Act 1985:

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

An order for costs under Section 17 will always be an order pursuant to section 17(1). The default position is that the payment will be for such amount as the court considers reasonably sufficient to compensate the prosecutor. On the assumption that an amount is not fixed when the order is made, that will be fixed by means of a determination by a determining officer. Section 17(2A) permits a reduction to be made from the sum considered reasonably sufficient to compensate the prosecutor. The order under Section 17(1) will be subject to that deduction. In cases where the amount is not fixed by the court in the order, the order must describe the reduction to be applied. That does not mean that a specific sum must be identified. Rather, the order must set out the percentage reduction or the means by which the reduction is to be calculated. Were there to be a lack of specificity, it would render problematic the determination by the determining officer.

30. The Criminal Procedure Rules set out the regime for applications for costs from central funds by prosecutors at CPR 45.4. That rule has been amended since the orders made in this case. The requirements now placed on prosecutors applying for costs are more stringent than they were in 2021. We shall refer to the relevant parts of the rule as it applied in 2021:

45.4.—(1) This rule applies where the court can order the payment of costs out of central funds…..

(3) The court may make an order—

(a) on application by the person who incurred the costs; or

(b) on its own initiative.

(4) Where a person wants the court to make an order that person must—

(a) apply as soon as practicable; and

(b) outline the type of costs and the amount claimed, if that person wants the court to direct an assessment; or

(c) specify the amount claimed, if that person wants the court to assess the amount itself.

(5) The general rule is that the court must make an order, but—

……(b) the court may decline to make a prosecutor's costs order if, for example, the prosecution was started or continued unreasonably.

(6) If the court makes an order—

(a) the court may direct an assessment under, as applicable—

(i) Part III of the Costs in Criminal Cases (General) Regulations 1986(1)….

(7) If the court directs an assessment, the order must specify any restriction on the amount to be paid that the court considers appropriate…..

In this instance Chapter 4 wanted the court to direct an assessment. Contrary to the rule as it then was, Chapter 4 did not outline the type of costs and, more significantly, the amount claimed.

31. The Criminal Practice Direction 2015 Division X as amended provides further guidance in relation to the making of an order for the payment of prosecution costs from central funds, in particular paragraphs 1.4.1 and 2.6.2. Paragraph 1.4.1 is of particular relevance:

> *If the court does not fix the amount of costs to be paid out of central funds, the costs will be determined in accordance with the General Regulations by the appropriate authority. The appropriate authority will calculate the amount payable in respect of legal costs at such rates and scales as are prescribed by the Lord Chancellor. Where the court makes a defendant's costs order, or an order in favour of a private prosecutor, but is of the opinion there are circumstances which make it inappropriate that the person in whose favour the order is made should recover the full amount of the costs, the court may assess the lesser amount that would in its opinion be just and reasonable, and specify that amount in the order. If the court is not in a position to specify the amount payable, the Judge may make remarks which the appropriate authority will take into account as a relevant circumstance when determining the costs payable.*

In this case the judge was not in a position to specify the amount payable. He was not told the amount claimed. The reference in the final sentence of 1.4.1 to "a relevant circumstance" must be read in conjunction with the relevant part of Section 17(2A), namely "…there are circumstances that make it inappropriate for the prosecution to recover the full amount…" This provision complements the long standing inherent jurisdiction of a trial judge to make comments about matters relevant to the taxation of costs.

32. An order of the court is what was said in open court. The basic principles were set out in *R v Kent* [1983] 3 All ER 1:

> *First of all, the order of the court is that pronounced by the judge in open court. Second, the responsibility of the court staff is to make a record which accurately reflects that pronouncement. Third, if the court staff are in doubt as to the pronouncement, the judge must be consulted where the staff are not clear what it was the judge said, or where they think that the judge's order may be faulty.*

Both parties agree that these principles apply. Where they part company is in relation to the meaning of what the judge said in open court on 25 June 2021.

33. There has been limited consideration of the power to award prosecution costs from central funds whether in this court or the Court of Appeal Criminal Division. In *R v Zinga* [2014] EWCA Crim 1823 the Court of Appeal had to consider an application by the prosecutor for the costs of an appeal against a confiscation order. Thus, the court was engaged in the same type of exercise as the judge in this case. At [22] the court considered the approach to be taken where particular solicitors and counsel were instructed:

> *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 [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;*
> *and*
> *v) the court will also have regard to the guidance given by the Ministry of Justice.*

This is not an issue to which any reference was made in the hearings before the judge. The passage in *Zinga* was reproduced in the section of Archbold to which the judge was referred during the hearing in June 2021.

34. In *TM Eye Ltd v Crown Court at Southampton* [2021] EWHC 2624 this court emphasised that a judge has a wide discretion to apply a reduction to the payment of costs from central funds. The reference in CPR 45.4 to unreasonable conduct by the prosecutor is only one example of a case where a reduction might be applied. In every case the judge must make a case-specific decision as to whether a reduction should be applied to an order for costs from central funds.

Discussion

35. The core issue for us to determine is what order the judge made on 25 June 2021. If the order capped or restricted the rate at which the prosecutor was to be remunerated by reference to Crown Prosecution Service rates, the formal order issued by the court following the hearing in June 2021 did not begin accurately to reflect the order made by the judge. In those circumstances, it would have been appropriate to correct the order and to give effect to what the judge pronounced in open court. On the other hand, if what the judge said in open court did not cap the rate of remuneration to those rates but simply gave some guidance to the determining officer, the judge could not amend the order some 13 months after the event. Amendment of an order could only be made under the slip rule provision in section 385 of the Sentencing Code 2020 i.e. within 56 days of the order being made. Any change to the order thereafter could only be by way of correction of an error.

36. In our view the judge on 25 June 2021 did not express himself in such a way as to "specify any restriction on the amount to be paid" as required by CPR 45.4(7). The

determining officer was enjoined to "…have an eye on Crown Prosecution Service rates rather than anything else…" We do not accept the proposition that this language served to limit or cap the costs recoverable. It was insufficiently specific to have that effect. The phrase "have an eye on" indicated that the determining officer was to take Crown Prosecution Service rates into account when assessing what was "reasonably sufficient" to compensate the prosecutor. It went no further than that.

37. On 19 July 2022 the judge more than once said that he intended to cap the costs recoverable by Chapter 4 to the costs that would have been allowed to the Crown Prosecution Service. With respect to the judge, what he intended must be divined from what he said at the time rather than what he later expressed as his intention.

38. In his decision in July 2022 the judge relied on the absence of any intervention from prosecution counsel at the hearing in June 2021 to demonstrate that what he said was unambiguous. Had it been otherwise, counsel would have intervened. The same point is made on behalf of the Lord Chancellor in these proceedings. We do not consider that the point has any weight. What the judge said was not ambiguous. It was guidance to the determining officer. It was not a reduction pursuant to Section 17(2A). There was no reason for prosecution counsel to intervene.

39. In the light of those conclusions, we are satisfied that the judge had no jurisdiction to make the order he did on 19 July 2022. In his order he capped or restricted the remuneration of the prosecutor to Crown Prosecution Service rates. That order was quite different in its terms to the order made on 25 June 2021. Contrary to what he said in the course of his ruling in July 2022, he was not correcting an error in the earlier order.

40. Since the order in July 2022 was made without jurisdiction, it is amenable to judicial review even though it related to a matter on indictment. This is not a matter of controversy between the parties. The effect of a jurisdictional error in the context of an application for costs from central funds was considered in *TM Eye v Southampton Crown Court* at [68] to [73]. It is unnecessary for us to traverse the same ground. The jurisdictional error here was of sufficient gravity to take the case out of the jurisdiction of the Crown Court.

41. We accept the argument put on behalf of the Lord Chancellor that there was a failure to comply with the requirements in CPR 45.4(4)(b). We are concerned only with the failure to "outline the type of costs and the amount claimed". We do not condone the fact that Chapter 4 gave no indication to the judge of the sums involved. It was something which deprived him of important information in the exercise of his discretion. However, in all of circumstances of the case, we are not persuaded that this failure means that we should refuse to grant judicial review as a matter of our discretion. It may have other consequences in terms of consequential orders.

42. As we have observed, the version of CPR 45.4 now in force is significantly more stringent in relation to the obligations of a prosecutor applying for costs from central funds. The relevant parts of the rule now read:

> *…..on an application for a prosecutor's costs order—*
> *(i) apply in writing and serve it on the court officer (or, in the Court of Appeal, the Registrar), and*

(ii) in the application specify the amount claimed to the date of the application and provide the information listed in paragraph (5).

(5) The information required by paragraph (4)(b) is—

(a) a summary of the items of work to date done by a solicitor;

(b) a statement of the dates on which items of work were done, the time taken and the sums claimed;

(c) details of any disbursements claimed, the circumstances in which they were incurred and the amounts claimed in respect of them; and

(d) such further particulars, information and documents as the court may require.

Whether a failure to comply with the rule as it now stands would lead to particular consequences is not a matter on which we can or should offer a final view. However, the amended rule is designed to provide a judge or magistrate with much more information before a decision is made on any application for prosecution costs from central funds. Given that the decision involves an exercise of discretion, failure to comply with the terms of CPR 45.4 will be relevant to that exercise.

The costs of the claim for judicial review

43. Prior to the hearing Chapter 4 served a schedule of costs relating to these proceedings. The total sum claimed was £187,246.66. The nature and extent of the costs schedule was such that this could not be a case for summary assessment of the costs. At the conclusion of the hearing we said that judgment on the merits of the claim would be reserved. We ordered that, after circulation of the draft judgment in respect of the substantive claim, the parties were to provide written submissions on the question of costs in the event that the parties did not agree an order. We indicated that the issue of costs then would be dealt with in our final judgment. We have received written submissions on costs from Ms Iveson on behalf of the Lord Chancellor and Mr Bacon and Mr Cohen on behalf of Chapter 4.

44. On behalf of Chapter 4 it was argued that the claim for judicial review succeeded. Thus, there was no basis for any reduction in the costs to be recovered prior to a detailed assessment, still less for no order at all for costs. Chapter 4 had "a strong preference" for an order for costs under the civil jurisdiction pursuant to Section 51 of the Senior Courts Act 1981. Chapter 4 expressly abjured any application for the costs of the proceedings before the judge in April and July 2022. It was argued that we would have jurisdiction to make an order in relation to those costs pursuant to Section 17 of the 1985 Act. However, in the light of what we said at paragraph 41 of this judgment, Chapter 4 did not seek such an order. It was argued that not recovering the costs of the proceedings in 2022 in the Crown Court constituted a sufficient penalty for any procedural failings in the course of the proceedings in the court below.

45. The Lord Chancellor submitted that, notwithstanding the success of the claim for judicial review, there should be no order for costs. Due to the procedural and other failings of Chapter 4 in making the application for costs in the Crown Court, there were good reasons for refusing Chapter 4's application for costs in the proceedings for judicial review. That proposition applied whether costs fell to be considered pursuant to Section 51 of the 1981 Act or under the regime of the 1985 Act. It was argued on behalf of the Lord Chancellor that this court had no jurisdiction to make any order in relation to the proceedings in April and July 2022 in the Crown Court irrespective of

any concession by Chapter 4. Thus, Chapter 4 suffered no disadvantage when the concession was made. The inability to recover the costs in the Crown Court was the result of the operation of statute. Chapter 4's concession was nugatory.

46. We have already set out the provisions of Section 17 of the 1985 Act insofar as relevant to the exercise of the judge's discretion in the Crown Court. Subsection 17(1)(b) of the Act gives this court jurisdiction "*in any proceedings….in respect of a summary offence".* Self-evidently this sub-section has no application to these proceedings. Whilst recognising that we did not hear oral argument on this issue, on the facts of this case we doubt whether Section 17(1)(a) is applicable. These were not proceedings "in respect of an indictable offence". We were able to consider the application for judicial review on the basis that the Crown Court had acted outside its jurisdiction: the High Court has jurisdiction to review a decision which is made "other than in the exercise of" the Crown Court's jurisdiction in matters relating to trial on indictment: Regina (TM Eye Ltd) v Crown Court at Southampton [2022] 1 W.L.R. 1114 at 70. In those circumstances, the appropriate costs regime is contained in Section 51(1) of the 1985 Act which gives us a discretion to order *"the costs of and incidental to all proceedings in…..the High Court".* We agree with the submission of the Lord Chancellor that any costs incurred in the Crown Court could not be said to be "incidental to" the claim for judicial review. We do not need to develop our reasoning since Chapter 4 have not sought recovery of those costs. Suffice it to say that we consider that, although the facts in *Darroch v Football Association Premier League Ltd* [2017] 4 WLR 6 were different to those in this case, the observations at [27] to [29] are of general application.

47. The correct approach to the exercise of the court's discretion pursuant to Section 51 of the 1981 Act is set out in CPR 44.2. The relevant parts of the rule are as follows:

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order…..

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties…..

5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings….

Thus, the starting point always will be that the unsuccessful party will pay the costs of the successful party but there may a departure from that approach if the circumstances of the case justify it. The discretion open to the court is wide.

48. We consider that the following circumstances are relevant to the exercise of our discretion:

- The written application for costs from central funds made in June 2021 was silent as to the type of costs and the amount claimed. Nothing was said in oral

submissions which clarified the matter. This breach of the Criminal Procedure Rules trammelled the judge's exercise of his discretion under Section 17 of the 1985 Act.

- Although the judge was referred to a passage in Archbold which cited *Zinga*, nothing was said in the written application or in any oral submissions to show that the steps set out at [22] of the judgment were taken. This omission further trammelled the exercise of the judge's discretion.

- The order drawn up by the Crown Court in June 2021 made no reference to the judge's observations directed at the determining officer. Further, it stated that the costs were to include the costs of investigation when that was not a matter to which any reference had been made by those representing Chapter 4. The order was issued to Chapter 4's solicitors. The solicitors did not notify the court of the apparent inconsistency between the order and what had been said by the judge in court. At this point the Lord Chancellor was unaware of the order and of what had been said in court. Thus, it was only Chapter 4 who could have put the court on notice of the position.

- Chapter 4 did not submit its bill of costs until December 2021. This was the first point at which the Lord Chancellor had notice of the order and of what was said in June 2021 by the judge. Those representing the interests of the Lord Chancellor acted reasonably promptly in asking the court to consider further the issue of costs.

- When the judge made the order in July 2022, this was the first point at which he had been fully informed of the nature and extent of the claim being made by Chapter 4.

49. We consider that those circumstances taken together contributed very significantly to the outcome of the hearing in July 2022 i.e. the order which we have found was made without jurisdiction. Had the judge been properly informed of the position in June 2021 as required by the rules, we are satisfied that he would have imposed the cap which he purported to impose in July 2022. We reach that conclusion in the light of his observations at the time of making the invalid order. He then knew of the scale of Chapter 4's claim. It is quite clear that he did not consider the claim to be reasonable. In the event, Chapter 4 will not be subject to a cap. That is to their advantage. The way in which that advantage has arisen reflects the conduct of Chapter 4 before these proceedings.

50. A further consideration is the failure of Chapter 4 to take any steps when the order of June 2021 was received. We have concluded that the words used by the judge on 25 June 2021 did not have the effect that he intended. However, had he been given a further opportunity to reflect on the claim at a slip rule hearing within 56 days of the making of the order, we consider that it is likely that he would have amended the order – as he then would have been entitled to do. The absence of that opportunity was due to the failure of Chapter 4's solicitors to draw the court's attention to the position.

51. We acknowledge that Chapter 4 succeeded in their submission that the order of 19 July 2022 was made when the judge had no jurisdiction to make it. However, the situation arose because of their culpable failings as we have outlined. In this court the Lord

Chancellor did not act unreasonably. Although we concluded that the failure to comply with CPR 45.4(4)(b) did not justify a refusal to grant judicial review, the Lord Chancellor was right to rely on that failure. The failure was and is equally relevant to the exercise of our costs discretion.

52. In the exercise of our discretion we consider that it is appropriate to depart from the general rule in CPR 44.2(2). Notwithstanding the fact that we have determined that the judge's order in July 2022 was made without jurisdiction, we conclude for the reasons set out above that there should no order for costs in these proceedings.

Conclusion

53. The claim for judicial review succeeds. The judge's decision of 19 July 2022 and the consequent order will be quashed. Therefore, the order pronounced by the judge in open court on 25 June 2021 will be extant. That order was for payment out of central funds of such amount as is reasonably sufficient to compensate Chapter 4 for any expenses properly incurred by them in the proceedings, the judge having indicated that he made his order pursuant to section 17 of the 1985 Act. Since no amount was (or could be) fixed, it was implicit in the order that the amount would be fixed by means of a determination. That was made explicit by the judge when he referred to "whoever has responsibility for taxing such application for costs…" The determining officer will take into account the comments of the judge when assessing what amount will be reasonably sufficient to compensate Chapter 4. Beyond that, the approach to be taken by the determining officer is not for us. The determining officer will reach a reasoned conclusion. Should Chapter 4 disagree with that conclusion, there would be a defined appeal route.