Neutral Citation Number: [2025] EWHC 17 (Admin)

Case No: AC-2024-CDF-000121

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
CARDIFF DISTRICT REGISTRY SITTING IN BRISTOL

Bristol Civil Justice Centre
2 Redcliff Street, Redcliffe
Bristol, BS1 6GR

Date: 09/01/2025

Before :

MR JUSTICE KERR

- -

Between :

OLIVER LEWIS	**Appellant**
- and -	
(1) SARAH LOUISE FRANCIS	**Respondents**
(2) STEPHANE BORIE	

- -
- -

Robert McCracken KC (instructed by direct access) for the **Appellant)**
Sarah Salmon (instructed by **Hanratty & Co**) for the **Respondents**

Hearing date: 29 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 9 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE KERR

Mr Justice Kerr :

Introduction: the appeal

1. In this appeal by case stated, the appellant appeals against orders made on 16 January 2024 by District Judge (Magistrates' Court) Gwyn Jones (**the judge**) under section 19(1) of the Prosecution of Offences Act 1985 that the appellant must pay the respondents' costs of unsuccessful statutory nuisance proceedings brought by the appellant against the respondents and heard in November 2023.

2. The order made by the judge in the North East Wales Magistrates' Court on 16 January 2024 was that the appellant shall by 13 February 2024 pay to each of the respondents the sum of £5,071.60 costs, making a total of £10,123.20. On being asked to state a case, the judge did so. The case stated was dated 1 April 2024, but did not reach the appellant until June 2024.

3. This appears to have been due to an administrative oversight. As a result, either time for appealing did not start to run until receipt of the case stated, or if the appeal is brought late, an extension of time is needed and the appellant has applied for one. It is agreed that the extension should, if it is needed, be granted. The appeal is therefore not out of time.

4. The questions asked of the High Court in the case stated are the following:

> "a. Was the Court correct in law to determine that it had the power to order costs against the applicant where the finding of an unnecessary act was on the basis that the evidence presented was too weak to satisfy the criminal standard of proof?
>
> b. Was the Court correct to determine that the amount of costs sought against the applicant was reasonable and properly incurred?
>
> c. Was the Court correct to make the Order for costs against the applicant in favour of the respondents?"

5. An appeal by case stated may be brought, under section 111(1) of the Magistrates' Court Act 1980, by a person who is "aggrieved" by an order made in a magistrates' court. Such a person may "question the proceeding on the ground that it is wrong or is in excess of jurisdiction".

6. In an appeal by case stated such as this, unusually, both Part 35 of the Criminal Procedure Rules (**Crim PR**) and Part 52 of the Civil Procedure Rules (**CPR**) apply; see rule 35.1(1) (and note) of the Crim PR; and in the CPR, see rule 52.1(3)(a), rule 52.2, read with Practice Direction 52D, paragraph 1.1; and Section I of Practice Direction 52E.

7. I must allow the appeal (by CPR rule 52.21(3)) if I consider that the decision of the court below was wrong, or that it was unjust because of a serious procedural or other irregularity. If I allow the appeal, the powers of this court are those found in CPR rule 52.20(1) and (2): I have all the powers of the lower court, subject to any statutory provision to the contrary. I can affirm, set aside or vary the order made below, remit the matter back or order a fresh hearing of the issue.

The facts

8. The facts must be taken from the case stated (*Wheeldon v. CPS* [2018] EWHC 249 (Admin) per Males LJ, as he then was, at [5]; per Holroyde LJ at [1]). The numbers below refer to the numbered paragraphs in the case stated. The appellant and the respondents shared an access yard adjacent to 3 Castle Terrace, Montgomery, Powys. The respondents had a brown Labrador and a smaller white dog. The appellant objected to the way in which the two dogs behaved in the yard. He believed their behaviour was a statutory nuisance.

9. The appellant's case was that they were "uncontrolled, unrestrained and often unsupervised in the shared access yard" (3). The dogs "should not pose a perceived risk and be unsupervised" (9). They "should not be allowed to roam freely in the yard" (10). His case was that the respondents allowed them to roam freely because they "did not want random persons to enter the yard" (12). The respondents' purpose was to "disincentivise the use of this area" (13).

10. There was a notice in the yard "warning that there were freely roaming dogs" (13). He maintained that the dogs were "quick on their feet", had guard dog characteristics, barked and charged at users; his nephews and nieces were put in fear. His aged mother "was not able to cross the yard" (14-16). It was not normal for persons of ethnic heritage to be faced with free roaming dogs (17). The dogs were "not kept under immediate control and … not monitored" (18).

11. The appellant instructed solicitors to write to the respondents. He followed "appropriate steps" before issuing proceedings. He sent the respondents informal texts, two solicitors' letters, a final letter proposing mediation and a standard pre-action notice under section 82 of the Environmental Protection Act 1990 (**the EPA 1990**) (5). He did not ask the local authority to seek an abatement notice. His offer of mediation was not accepted (24).

12. The appellant then brought a claim for statutory nuisance under section 82 of the EPA 1990. He asserted that he had a right of way as an express easement and that the respondents "used the yard over and above the grant in the terms of the deed" (25). He "contended that shared access was impossible as there is access by other vehicles and was implied" [sic: (7)].

13. The application was heard at Welshpool Magistrates' Court on 8 November 2023 (1). The appellant was not represented; the respondents were, by a solicitor. The appellant gave evidence and was cross-examined, including about closed circuit television (**CCTV**) and, probably, an expert report being put to him (21, 27, 28). The judge knew of the respondents' expert report (28). The appellant called two witnesses who were cross-examined and said to be "influenced by their longstanding relations with the [appellant]" (29).

14. At the close of the appellant's case, the judge allowed a submission of no case to answer and dismissed the application (30, 31). He adjourned an application for costs by the respondents, directing that a schedule of costs be served on the appellant. He fixed the hearing of the costs application for 28 November 2023, at Wrexham Magistrates' Court, sitting remotely (32, 33). The schedule of costs was then served on the appellant (36).

15. The hearing on 28 November 2023 had to be adjourned due to the poor quality of the video link (34, 35). The costs application was heard remotely, at Wrexham Magistrates' Court, on 16 January 2024. There was an updated costs schedule. The court heard representations from both sides (36). He granted the application for costs for reasons he set out in the case stated, to which I will return in a moment.

16. The judge made two orders in the same terms on 16 January 2024, one in favour of each respondent. The written orders stated in each case that "the prosecutor pay costs due to an unnecessary or improper act or omission under section 19(1) Prosecution of Offences Act 1986". The appellant was ordered to pay to each respondent £5,071.60 by 13 February 2024, making a total of £10,123.20.

The case stated

17. In the case stated, the judge recited the facts and assertions set out above. He referred to the appellant's cross-examination, noting that the respondents' veterinary expert, Ms Emma Stoker, on observing "the same video footage" suggested that "the dogs were not defending their territory"; while the appellant "maintained that the evidence is not an accurate recollection of events …" (28).

18. The judge noted that the submission of no case was "upon the basis that the evidence was so weak and undermined, that no reasonable tribunal properly directing itself could determine that a statutory nuisance was made out to the criminal standard of proof" (30); a submission the judge accepted (31). As for costs, he heard the application on 16 January 2024 and reasoned as follows.

19. First, he relied on having accepted the submission of no case. He found that "the proceedings had been unnecessary". He had "previously determined that the applicant's evidence seeking an abatement of a statutory nuisance to be [sic] so weak and undermined that it was insufficient to prove a nuisance to the criminal standard of proof" (40).

20. I set out paragraphs 41-48 in full:

> "41. The applicant failed in his basic duty to consider objectively the evidence that he was relying upon in court. The evidence that he presented was so subjective that it did not meet the basic evidential requirements to enable to the court to consider that a statutory nuisance was made out.
>
> 42. To establish a nuisance, a material interference with the ordinary physical comfort of human existence must be demonstrated. The evidence in this case did not meet that evidential standard.
>
> 43. The applicant showed that he was an irritated neighbour.
>
> 44. The evidence of the applicant and that called in support by his two witnesses as to the behaviour of the dogs was not such as to enable me to hold that there was a nuisance.
>
> 45. The applicant's quest to seek an order from the court has resulted in the respondents instructing solicitors to deal with matters on their behalf with a view to resolution and to receive objective advice as to how to progress to deal with defending the proceedings.
>
> 46. The respondents prepared the court bundle to assist the court.

47. The respondents ensured that expert witnesses dealing with the demeanour of the dogs were available to testify which was necessary in view of the contentions of the applicant.

48. The applicant whilst polite and courteous was nonetheless unable to see or accept that his case was too weak to succeed."

21. Having referred to the request to state a case, the judge commented that he was not referred to any relevant case law (50). At paragraphs 51-58, he set out his reasons for awarding costs, again set out in full below, as follows:

"51. I WAS OF THE OPINION THAT:

52. The proceedings were unnecessary. The applicant failed in his basis duty [sic] to reflect and consider the quality of his evidence to determine objectively whether it would stand up to scrutiny.

53. The applicant's failure to objectively assess the evidence made the proceedings unnecessary.

54. The court was entitled to consider the provisions of The Criminal Procedure Rules (as amended October 2022, April 2023 & October 2023) Part 45.2, which dealt with the general rules and in particular Rule 45.8, which enables the court to order a party to pay another's party's costs incurred as a result of ***an unnecessary or improper act***.

55. The applicant in bringing proceedings which was supported by evidence, which was too weak to succeed, failed in the basic duty to objectively review the quality of the evidence to be relied upon. Conducting litigation without a basic regard to the evidential veracity of the evidence ignores duties to the court and the other parties impacted by such decisions and accordingly, the applicant has done an unnecessary act.

56. I was satisfied that the unnecessary act meets the criteria for the making of an order for cost against the applicant, to sufficiently compensate the respondents for the legal costs they incurred, as well as the expert reports obtained to support their case.

57. I was satisfied that my assessment of the relevant costs reflected the following factors-:

1 Conduct of all the parties.

2 The complexity of the matter or the difficulty or novelty of questions raised.

3 The skill, effort, specialised knowledge, and responsibility involved.

4 The time spent on the case.

5 The place where and the circumstances in which the work or any part of it was done.

6 Any direction or observations by the court that made the Order.5

8. I was satisfied that Orders for costs in favour of the respondents in the sum of £5071.60 each was reasonable and properly incurred."

The law

22. Part III of the EPA 1990 relates to statutory nuisances and clean air. Statutory nuisances in England and Wales include "any animal kept in such a place or manner as to be prejudicial to health or a nuisance" (section 79(1)(f)). Where a complaint of statutory nuisance is made by a person living in the area of a local authority, the authority has a duty to "take such steps as are reasonably practicable to investigate the complaint" (section 79(1)).

23. In Part III, the "person responsible" for a statutory nuisance is "the person to whose act, default or sufferance the nuisance is attributable" (section 79(7)). Section 80 gives the local authority powers to serve an abatement notice on the person responsible for a statutory nuisance. Subject to certain defences, it is an offence not to comply with such a notice.

24. A person may bring a complaint before a magistrates' court "on the ground that he is aggrieved by the existence of a statutory nuisance" (section 82(1)). Before doing so, section 82(6) and (7) require (in a case such as this, involving animals) 21 days' written notice to the proposed defendant. Complaints of statutory nuisance by members of the public are sometimes called "citizen proceedings".

25. On such a complaint, a magistrates' court may make an abatement or prohibition order in respect of the nuisance and may impose a fine on the defendant (section 82(2)). It is an offence not to comply with such an order, without reasonable excuse (section 82(8)). Since the defendant may be fined, the complaint is treated as criminal and the criminal standard of proof applies; unlike when a local authority seeks an abatement notice and the civil standard applies.

26. It was common ground that in section 79(1)(f), in the phrase "any animal kept in such a place or manner as to be prejudicial to health or a nuisance", the reference is to a nuisance at common law. Conventionally, common law nuisance is measured by the reasonableness of a person's user of land; but in *Lawrence v. Fen Tigers Ltd* [2014] AC 822, at [179] Lord Carnwath JSC endorsed Tony Weir's qualification of the reasonableness test:

> "Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with. (Weir, *An Introduction to Tort Law*, 2nd ed (2006), p 160.)"

27. In *Budd v. Colchester BC* [1997] Env LR 128 a defendant appealed by case stated against an abatement notice obtained by a local authority, arguing that the notice was too vague; it required the defendant to abate a statutory nuisance arising from dogs barking but did not say what steps had to be taken. The Divisional Court upheld the abatement notice. At p.135, Schiemann LJ held that the local authority was entitled to say: "[c]ease this nuisance", adding that:

> "in nuisance cases there is always an element of judgment in a continuum between a mildly irritating activity to something which is intolerable and positively criminal if it affects a large enough number of people."

28. He rejected any suggestion that the number of decibels from the barking dogs had to be specified. That would be "introducing an undue degree of technicality". The need to avoid a technical approach was also emphasised in *Pearshouse v. Birmingham City Council* [1999] Env LR 536. A complaint by a member of the public was dismissed by magistrates because the pre-action notice under section 82 lacked the required clarity and precision; it should have contained the information found in an abatement notice.

29. On appeal by case stated, the Divisional Court allowed the appeal. The pre-action notice only had to give as much detail as was reasonable. Lord Bingham CJ (agreeing with Collins J who gave the main judgment), commented at p.551:

> "Section 82 is intended to provide a simple procedure for a private citizen to obtain redress when he or she suffers a statutory nuisance of any one of the various kinds itemised in section 79(1), which may relate to the state of the premises or the emission of smoke or the emission of fumes or gases, or dust, steam, smell or other effluvia arising on premises, or the accumulation or deposit, or the keeping of an animal, or noise, or anything else declared by statute to be a statutory nuisance. It would frustrate the clear intention of Parliament if the procedure provided by section 82 were to become bogged down in unnecessary technicality or undue literalism. It is important that the system should be operable by people who may be neither very sophisticated nor very articulate, and who may not in some cases, unlike this appellant, have the benefit of specialised and high quality advice."

30. In *Hall v. Kingston upon Hull City Council* [1992] 2 All ER 609, three appeals by cases stated were heard together by a Divisional Court comprising Rose LJ and Mitchell J who gave the judgment of the court. The appellant council tenants had served pre-action notices under section 82(6) and (7) of the EPA. Their complaints of statutory nuisance had been dismissed by magistrates on the ground that the pre-action notices had not been properly served.

31. The Divisional Court allowed the appeals. After citing from Lord Bingham's judgment in *Pearshouse* (including the passage quoted above), Mitchell J said at p.618d-f:

> "The rationale of the s 82 procedure is there clearly stated. It is a simple procedure for a private citizen to obtain redress when he or she suffers a s 79(1) statutory nuisance. Thus the system should be operable by people who may be neither very sophisticated nor very articulate and who may not in some cases have the benefit of legal advice. The notice should be such as will reasonably alert the recipient to matters complained of so that the recipient may take timely and effective steps to put right such matters as he accepts need to be put right. Thus the hallmarks of the statutory remedy can be summarised in two words: 'simple' and 'speedy'."

32. The court rejected technical arguments about service that were making it difficult for local authority tenants to use the section 82(6) notice procedure forewarning of a statutory nuisance claim. At p.624d-g, Mitchell J said:

> "This aspect of the 1990 Act is intended to provide ordinary people, numbered amongst whom are those who are disadvantaged (whether by reason of their health or their financial circumstances or otherwise), with a speedy and effective remedy for circumstances which will often have an adverse effect (or a potentially adverse effect) upon their health and/or the health of their children. Parliament's intention, in the absence of compelling statutory language, should not in our view be frustrated by introducing into this straightforward and

> swift statutory remedy any technical obstacle of which the ordinary citizen will almost certainly be unaware."

33. Against that background, I come next to the relevant costs provisions. If an information is not proceeded with or is dismissed, the magistrates' court may make an order in favour of the accused for a payment to be made out of central funds in respect of the defendant's costs: section 16(1)(a) and (c) of the Prosecution of Offences Act 1985 (**the POA 1985**).

34. The payment must be "of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings" (POA 1985, section 16(6)). Section 16(6A) provides (it might be said, unnecessarily) for the court to order payment of less than the full amount incurred if "circumstances … make it inappropriate for the accused to recover the full amount … ."

35. Section 19(1) of the POA 1985, headed "Provision for orders as to costs in other circumstances", provides:

> "(1) The Lord Chancellor may by regulations make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order as to the payment of those costs."

36. The Costs in Criminal Cases (General Regulations) 1986 (**the CCCGR**) regulation 3, provides as follows:

> "**Unnecessary or improper acts and omissions**
>
> 3.—(1) Subject to the provisions of this regulation, where at any time during criminal proceedings—
>
> (a) a magistrates' court,
>
> (b) the Crown Court, or
>
> (c) the Court of Appeal
>
> is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, the court may, after hearing the parties, order that all or part of the costs so incurred by that party shall be paid to him by the other party."

37. Regulation 3 of the CCCGR is supplemented by Part 45 of the Crim PR, which makes detailed provision on practice, procedure and assessment of costs. It includes provision at rule 45.2 for matters to be taken into account when dealing with costs issues and assessing costs; and rule 45.8 on costs "resulting from unnecessary or improper act, etc".

38. Regulation 3 of the CCCGR is also supplemented by the Criminal Costs Practice Direction (2015). It recommends at para 4.1.1, a three stage approach:

> "The court may find it helpful to adopt a three stage approach. (a) Has there been an unnecessary or improper act or omission? (b) As a result have any costs been incurred by another party? (c) If the answers to (a) and (b) are 'yes', should the court exercise its discretion to order the party responsible to meet the whole or any part of the relevant costs, and if so what specific sum is involved?"

39. The scope of "an unnecessary or improper act or omission" has been considered in numerous cases, among them those discussed in *Blackstone's Criminal Practice* 2025, at D33.35-D33.37. Six such cases were cited to me. The first in time is *DPP v. Denning* [1991] 2 QB 532, an appeal by case stated to the Divisional Court (Nolan LJ and Roch J).

40. The court dismissed the prosecutor's appeal against a costs order in favour of lorry operators charged with using or permitting use of overloaded vehicles. The prosecutor discontinued the case after the defendants had pleaded guilty, while expressing doubts about the weighbridge used to determine the relevant axle weights. Their guilty pleas were not accepted and it was found that the weighbridge had been used in a wrong manner that could not prove the offence.

41. At p.540G-H, Nolan LJ held that the justices had been entitled to regard as important the failure of the prosecution to review the file when it was passed to them; had they done so, "the discrepancy between the reference to the second axle in the information and the lack of any corresponding reference in the supporting evidence of the weights would have been immediately apparent, and would or should have prompted further inquiries … ."

42. The defendants had incurred costs as a result of the late discontinuance. It was (per Nolan LJ at p.541C-D):

> "impossible to maintain that there were no grounds upon which the justices could reasonably conclude that there had been an improper omission on the part of the prosecution … . [T]he word 'improper' in this context does not necessarily connote some grave impropriety. Used, as it is, in conjunction with the word 'necessary', it is in my judgment intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly".

43. In *R. v. P* [2011] EWCA Crim 1130, the Court of Appeal (Hughes LJ (VP), Treacy J (as they then were) and Edwards-Stuart J) allowed a prosecution appeal against a costs order in favour of defendant on his acquittal in a Crown Court trial on a charge of rape, to which his defence was consent. The court also sat as a Divisional Court to quash the order. Crown counsel had advised that a conviction was unlikely. The judge allowed a submission of no case to answer.

44. Hughes LJ strongly criticised the lack of reasoning in the judgment below on costs and said at [15] that the issue was not whether the decision to prosecute was right or wrong; though "[t]here may be very rare cases where the decision is wholly unreasonable". He added:

> "… in most cases such as the present, there will be room for a legitimate difference of opinion. It is important that the making of that decision should not be overshadowed by the fear that if a prosecution is continued and fails there may be an order for the payment of costs. An acquitted defendant will normally receive his costs from central funds unless

> there is a good reason why he should not. We do not say that there will never be a case where a decision to prosecute is so unreasonable that a costs order is appropriate, but we are satisfied that this case was not arguably such. Here, the complainant's evidence *might* have been assessed as likely to be accepted. There was, we note, some material which perhaps suggested possible partiality. There were, it was said, some possible injuries to the complainant. We want to make it clear that we simply do not know whether the decision to prosecute was right or wrong. It is clear that it was made in good faith. Supposing, however, that it was a wrong judgment on a difficult issue, that is not enough to justify an order for costs … ."

45. The decision of Hickinbottom J (as he then was, sitting in both the Crown Court and the High Court) in *R. v. Evans (No. 2); Serious Fraud Office v. Evans (No. 2)* [2015] 1 WLR 3595 followed an unfortunate debacle: a long and expensive fraud prosecution collapsed, ultimately because the facts alleged against the defendants were not criminal, despite the SFO's efforts to say they were.

46. The lengthy criminal process generated a majestic judgment after hearing argument from six silks. The length, detail and erudition of that judgment I do not begin to emulate here. Without going into the detailed facts, the nub of the problem emerges from paragraph 75:

> "… I reconvened the court on 10 February 2014 to consider whether a conspiracy to defraud can comprise an agreement to achieve a lawful result by lawful means. The SFO, through Mr Parroy, contended it could. In the dismissal ruling, I held that, as a matter of law, it could not."

47. The defendants' costs subsequently claimed under section 19 of the POA 1985 ran into millions. Hickinbottom J rejected the proposition that the wasted costs jurisdiction cases could be read across to applications under section 19. He held that he was bound by the Divisional Court's decision in *DPP v. Denning*. After detailed consideration of the case law and evidence, he stated his conclusions at [144]-[148], culminating in "Summary of the principles" at [148].

48. The assessment of whether a party has conducted his case properly is fact specific, he not surprisingly said. The court should take a broad view of whether there was an unnecessary or improper act or omission which would not have occurred if he had conducted it properly. The section 19 procedure is essentially summary; a detailed investigation into, for example, the decision making process, will "generally be inappropriate".

49. A section 19 application succeeding against a public prosecutor will be, he said:

> "very rare, and generally restricted to those exceptional cases where the prosecution has acted in bad faith or made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him. The court will be slow to find that such an error has occurred. Generally, a decision to prosecute or similar prosecutorial decision will only be an improper act by the prosecution for these purposes if, in all the circumstances, no reasonable prosecutor could have come to that decision."

50. Those observations were cited in each of the remaining four cases cited to me. Hickinbottom J, after considering the *Denning* case, the Court of Appeal's decision in *R. v. P* (cited above) and many other cases, decided that the high section 19 threshold was met, not when the decision to charge was made, but once the defence had explained

why the conduct alleged was not criminal, in a dismissal application which no reasonable prosecutor would have resisted.

51. The next case is *R. v. Cornish* [2016] EWHC 779 (QB). Following the death of a patient, a doctor was charged with gross negligence manslaughter and an NHS Trust with corporate manslaughter. At the close of the prosecution case at Inner London Crown Court, Coulson J (as he then was) upheld a submission of no case to answer. The Trust (but not the doctor) applied for defence costs under section 19 of the POA 1985.

52. After considering the authorities I have already discussed (and some others), Coulson J (apparently sitting in the High Court, though the ruling should be seen as a Crown Court decision by the trial judge) set out the applicable principles where an application is made under section 19 of the POA 1985 and regulation 3 of the CCCGR, which merit quoting in full:

> "(a) Simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of s.19 (***R v P***, ***Evans***).
>
> (b) Improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly (***Denning***).
>
> (c) The test is one of impropriety, not merely unreasonableness (***Counsell***). The conduct of the prosecution must be starkly improper such that no great investigation into the facts or decision-making process is necessary to establish it (***Evans***).
>
> (d) Where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper, but even then, that does not necessarily follow because "no one has a monopoly of legal wisdom, and many legal points are properly arguable" (***Evans***).
>
> (e) It is important that s.19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions (***R v P***, ***Evans***).
>
> (f) In consequence of the foregoing principles, the granting of a s.19 application will be "very rare" and will be "restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him" (***Evans***)."

53. Coulson J concluded that he could not say the decision to prosecute the Trust, or to continue the prosecution against it, was improper. The decision was "based on expert evidence … put forward with some force and clarity". The expert had fared badly in cross-examination and the Crown's case was "always going to be in trouble" if he failed cogently to answer the questions put to him, for there was no other evidence to sustain a conviction ([60]-[61]).

54. A judicial review claim in *R (Haigh) v. City of Westminster Magistrates' Court* [2017] 1 Costs LR 175 was heard by a Divisional Court comprising Gross LJ and Nicol J. The facts were unusual, extreme even. The claimant had been imprisoned in Dubai for fraud. While in custody in Dubai, he brought a private prosecution in England alleging

that various interested parties had conspired to defraud him and had criminally trafficked him.

55. The private prosecution was part of a complex strategy involving other, civil proceedings in England and Dubai and a freezing order against the claimant in Dubai, which he was seeking to vary. The claimant then did not actively pursue the prosecution; the district judge (magistrates' court) at first adjourned the matter and then, without objection from the claimant, dismissed the application for issue of summonses in the private prosecution.

56. The district judge allowed the application for costs against the claimant, assessed in an amount totalling £230,000 in respect of the costs of all the parties proceeded against. The district judge said it was "wholly improper to launch these proceedings". In the judicial review, Gross LJ gave the main judgment, with which Nicol J agreed. After citing *Evans* and *Cornish*, among other cases, Gross LJ noted that they concerned public rather than private prosecutors.

57. Gross LJ noted at [35] the remarks of Lord Neuberger PSC in *R (Gujra) v. Crown Prosecution Service* [2013] 1 AC 484, at [68], that private prosecutions are part of English law and should not be discouraged by fear of adverse costs consequences. On the other hand, he noted at [36], those bringing and conducting private prosecutions "must conform to the highest standards, as 'Ministers of Justice' …".

58. He continued the discussion in the following paragraph, concerned that section 19 of the POA 1985 should not have a "chilling effect" ([37]); yet, "there will likely be more room for questioning the initiation and conduct of a private prosecution" (*ibid.*) because the prosecutor would inevitably have a private interest in the outcome. On the facts, the district judge had been entitled to make the order, though the Divisional Court reduced the assessed costs to £190,000.

59. Finally, I was taken to another judicial review decided by a Divisional Court, *R (Holloway) v. Harrow Crown Court* [2019] EWHC 1731 (Admin). Males LJ gave the leading judgment, with which Edis J (as he then was) agreed. It was another private prosecution case with bizarre facts. The claimant had brought a private prosecution alleging blackmail and conspiracy to blackmail against parties on the basis that they had made an unwarranted demand for £73,325.39 as a condition of proceeding with the sale of their property to the claimant.

60. The prosecution was taken over by the Crown Prosecution Service and discontinued. The defendants in the private prosecution (interested parties in the judicial review) sought costs under section 19 of the POA 1985 and regulation 3 of the CCCGR. They asserted that the prosecution ought never to have been brought; and that, in addition, the claimant had failed to disclose important documents undermining the prosecution case.

61. The judge in the Crown Court upheld both these contentions and granted the costs application. The judicial review was of that decision. Referring to the now familiar authorities, Males LJ noted that Gross LJ in *Haigh* at [33] had preferred a slightly amended approach to that of Hickinbottom J in *Evans*, in that Gross LJ preferred to ask whether there had been an act or omission "which would not have occurred if the party

concerned had conducted his case properly or which *should* [rather than *could*] otherwise have been properly avoided".

62. At [17], Males LJ cautioned against the use of hindsight: every lawyer knows of cases thought to be good at the outset, which turn out to be utterly hopeless. Cases which never had any prospect of success had to be those where "it was always clear on any reasonable view of the case, avoiding the perils of hindsight, that the prosecution could not succeed". He then echoed the remarks of Gross LJ about the possible differences between public and private prosecutions.

63. About the latter, he made two further points, at [19]-[20]: first, a private prosecutor must, like a public one, analyse the evidence before commencing proceedings, to determine whether there was a realistic prospect of a conviction; and second, a private prosecutor may need to alert the police and public authorities and take legal advice to undertake the evidential assessment, because he may lack the objectivity to carry out the analysis properly himself.

64. Males LJ strongly criticised the absence of adequate reasoning and engagement with submissions in the judgment under review. However, he held that the judge had been not only entitled but bound to make the decision he did (a conclusion which avoided further proceedings); because the claimant could not at trial have explained away certain emails, undisclosed by him and inconsistent with blackmail unless written under duress or something like it.

65. The claimant had failed to assess the evidence objectively, including the damaging effect of those emails, before starting the proceedings. It was also significant that he had consciously chosen not to go to the police beforehand; nor had he taken legal advice, though he lacked objectivity in forming his belief that there was "ample and irrefutable evidence" to prove guilt [61]-[66]. That was a clear and stark error, Males LJ held. The claim was therefore dismissed.

66. I drew attention to one other case, *Clerk v. Gas Safe Register* [2024] EWHC 2099 (Admin). It is the only case, so far as I am aware, where an appeal against a costs order under section 19 of the POA has been brought following an unsuccessful statutory nuisance claim brought under the EPA 1990. The (unrepresented) appellant complained to the magistrates that the respondent had failed to secure abatement of fumes from a neighbour's boiler flue.

67. Omitting unnecessary detail, the magistrates' court refused to issue the summons because the claimant had proceeded against the wrong defendant. The defendant, the respondent to the appeal, was not arguably a "person responsible" for any statutory nuisance. Its enforcement powers did not enable it to secure abatement of the nuisance; it was not the source of the nuisance and could not even enter the relevant premises without the occupier's consent.

68. On appeal by case stated, in the judgment of the court given by Whipple LJ and myself, after citing the usual authorities (i.e. some of those discussed above) we accepted at [60] that the district judge below had been:

> "entitled to conclude that the Appellant's conduct in laying an information naming the Respondent as the defendant was unnecessary and improper for the reasons he gave and to

> make a costs order against her. The Appellant had refused to engage with or heed the explanations given by the Respondent that the Respondent was not the right defendant; DJ (MC) Bone was entitled to conclude that this was an exceptional case where costs should be awarded."

The issues, reasoning and conclusions

69. The appellant submits, through Mr Robert McCracken KC, that the judge's decision is flawed in three ways. First, he treated section 19(1) of the POA 1985 as empowering the court to make an order that a prosecutor pay costs on the basis of the weakness of his case. Second, he treated the making of a wrong judgment about whether a situation amounted to a statutory nuisance in law as satisfying the conditions in s.19(1) POA 1985. Third, there was no evidential basis for holding that the conditions set out in s.19(1) POA 1985 were satisfied.

70. These are the three grounds of appeal. In submissions, Mr McCracken observed that no reasons were given at the time for accepting the submission of no case to answer; and that no reasons were given at the time for granting the respondents' application for costs; in particular, there was no discussion of the normal rule (under section 16 of the POA and under the CCCGR and Criminal Costs Practice Direction) that an acquitted defendant is granted defence costs from central funds; and there was no consideration of the relevant case law.

71. Mr McCracken submits that the cases decided after *DPP v. Denning*, especially *R. v. Cornish*, have raised the bar for obtaining defence costs against a prosecutor. The judge here ordered that costs be paid because he found the appellant had made a wrong judgment when deciding to prosecute his claim, not because he had made a "stark error". Nor could a reasonable district judge have found that the decision to prosecute was a stark error that no reasonable prosecutor would have made, Mr McCracken submitted.

72. The appellant behaved properly in every way, Mr McCracken submitted. He did nothing wrong; he merely lost his case and nothing more. He consulted solicitors at the pre-action stage. He followed the required pre-action steps. He sought legal help although the remedy is intended to be a speedy and simple one that can be invoked by unsophisticated citizens who do not necessarily have access to legal support. And he was courteous and polite in the proceedings.

73. The judge failed to appreciate, Mr McCracken argued, that on an objective assessment of evidence about the behaviour of dogs, a judgment about what is objectively a nuisance - i.e. what level of barking and aggressive behaviour a person can reasonably be expected to put up with - is one on which reasonable people may differ. Mr McCracken further complained that the difficulty of poorly performing witnesses whose evidence was "undermined" in court, suggests an impermissible use of hindsight by the judge, contrary to authority.

74. For the respondents, Ms Sarah Salmon defended the judge's decision on costs. She gave a factual account in written argument which went well beyond what is found in the case stated. She recounted the pre-action history in some detail. She gave names to the two dogs. I must confine my consideration of the facts to what is in the case

stated. The pre-action history must therefore be taken from the case stated and the dogs must remain anonymous.

75. Ms Salmon submitted that the case was a private prosecution, not a public one, as was the position in the *Haigh* and *Holloway* cases. The duty on the prosecutor is more exacting in such a case; he must act as a "minister of justice" and must make an objective assessment of the evidence, if necessary with legal help because his personal interest in the case may make an objective assessment of the evidence difficult without such help.

76. She submitted that the judge correctly referred to and applied the "unnecessary or improper act" test in rule 45.8 of the Crim PR. While he did not refer to section 16 of the POA 1985 and the practice of awarding acquitted defendants costs from central funds, it cannot be supposed that he was ignorant of that rule and practice. It makes sense, she submitted, for the state to pay defence costs where the state prosecutes unsuccessfully; where, as here, the state is not the prosecutor, the considerations are not the same.

77. Ms Salmon attached significance to the appellant's decision not to engage with the local authority, a point mentioned in the case stated. As the judge observed, the appellant said the authority's resources were stretched and he did not want to waste them. Ms Salmon said his failure to contact the local authority pointed to the dogs not being a serious danger to anyone and that this supports the judge's reasoning that the appellant failed to evaluate the evidence properly.

78. Ms Salmon submitted that the respondents had been put to the trouble and expense of instructing solicitors and the judge was entitled to conclude, having seen for himself how weak the evidence was, that no reasonable prosecutor would have brought the claim. The judge was entitled to find that the appellant should have realised the claim was doomed to fail and his conclusion that the proceedings were "unnecessary" is not impeachable on appeal.

79. I come to my reasoning and conclusions. First, it is clear from the case stated that the judge's decision on costs was based on his finding that there was an "unnecessary act"; and that the unnecessary act was bringing the proceedings when the appellant should have known, and would have known, had he properly and objectively analysed the evidence, that the claim for statutory nuisance was so weak that it was bound to fail.

80. I accept Mr McCracken's submission that there was no suggestion of an "improper" act. Impropriety was not the basis of the judge's decision. He did not say bringing the proceedings was improper; he said bringing them was unnecessary. That said, authorities such as *Denning*, *Evans* and *Cornish* do not differentiate sharply between the adjectives "unnecessary" and "improper"; the courts have emphasised that the legislature has used them together in the phrase "unnecessary or improper act or omission".

81. I therefore do not attach much weight to the absence of any mention of impropriety or to the finding that the appellant was polite and courteous at court. That should be expected of any litigant out of respect for the court, including a litigant in person appearing against a represented party. The judge's criticism of the appellant's conduct, if valid, had to relate back to the pre-action phase. If he were properly condemned in

costs on account of his pre-action conduct, his good conduct at court could not rescue him.

82. Nor is it important that the judge did not refer to an "omission". He considered, implicitly, that there was a material omission, namely failure to analyse the evidence properly and objectively before proceeding. He might have said, and may have thought, that the omission was wrong or "improper" and that this made the proceedings "unnecessary". I accept Ms Salmon's submission that he was aware of the language of the test; he set it out in the case stated (at 54).

83. Next, it is clear from the case stated (27, 28) that there was a difference of view between the appellant and the respondents' expert, Ms Emma Stoker, about whether the dogs were behaving in a manner that reasonable people should put up with, or not. The expert thought not; she had evidently said in her report that having viewed film of the dogs, she did not think they were defending their territory. I am satisfied from the account of her report – perhaps put to the appellant in cross-examination – that the expert's view weighed with the judge.

84. That helped to undermine the appellant's evidence in cross-examination and to undermine his contention that the behaviour of the dogs went beyond what a reasonable person should have to put up with. I should add that there is no suggestion the appellant got the law of nuisance wrong and believed that it would suffice for him *subjectively* to believe that the dogs' behaviour went beyond what *he* as an individual should have to put up with.

85. Next, the case stated says the appellant called two witnesses who were cross-examined and said to be "influenced by their longstanding relations with the [appellant]" (29). It seems clear that the judge accepted this submission, though he did not say so directly. It is obvious that the two witnesses' evidence either was not accepted as true and correct or, to the extent that it was, did not succeed in persuading him that the behaviour of the dogs amounted to a nuisance.

86. Such was the evidential setting in which the submission of no case to answer was made. The judge accepted it "upon the basis that the evidence was so weak and undermined, that no reasonable tribunal properly directing itself could determine that a statutory nuisance was made out to the criminal standard of proof" (30 and 31). The judge repeated the phrase "weak and undermined" at (40) in the context of costs, when referring back to his substantive decision.

87. I accept the submission of Mr McCracken that use of the phrase "weak and undermined" and use of the word "veracity" (at 55) smacks of hindsight and contradicts the suggestion that the judge found it would have been obvious to any reasonable person objectively analysing the evidence, even before the proceedings were started, that the case was always going to be hopeless. On a fair reading of the case stated, I do not think that was his proposition.

88. I think the judge's proposition was that the appellant should pay costs because he had brought a claim which no reasonable court could uphold on the basis of the evidence called in support of it. It is true that he criticised the appellant's failure to analyse the evidence and failure to draw the conclusion that the claim must be hopeless. But he did not go further and say that, still less explain why, the decision to prosecute was not only

wrong but was one which no reasonable objective person could have made on the basis of the evidence available to him at the pre-action phrase. Indeed, he did not say what that evidence was.

89. He found the appellant's evidence "so subjective that it did not meet the basic evidential requirements to enable to the court to consider that a statutory nuisance was made out". He set out that objective evidential standard and found that "[t]he evidence in this case did not meet that evidential standard". The appellant was an "irritated neighbour" (41-43). An irritated neighbour may have a cause of action but, the judge was clearly saying, did not in this case.

90. The judge referred to the criminal standard of proof applying. That may be important if there are factual disputes. Unhelpfully, the judge did not say in the case stated whether there were any actual factual disputes or not; nor, if there were any, what his findings were. The criminal standard of proof makes little odds if the issue is one of evaluation of the degree of threat and aggression in the dogs' behaviour, based on undisputed facts such as those caught on CCTV.

91. I do not think the appellant should be criticised for not having sought legal advice on whether the dogs' behaviour amounted to a nuisance or not. He well knew how the dogs behaved; his pre-action solicitors did not. I suppose he could have filmed the dogs and asked his solicitors to opine on the legal issue based on the footage. But the procedure is meant to be simple and speedy and authorities such as *Budd*, *Pearsman* and *Hall* recognise that the process should not be technical and applicants may be inarticulate and unrepresented.

92. I am also concerned, on several counts, about the judge's reliance on the respondents' expert evidence in support of his reasoning. He referred (at 47) to expert witnesses in the plural, though only Ms Stoker is known to me. Her report was not, I infer, formally in evidence because the respondents' case did not proceed due to the success of their submission of no case. Certainly, she was not cross-examined on her report.

93. The judge said (at 47), that "expert witnesses dealing with the demeanour of the dogs" was "necessary in view of the contentions of the [appellant]". That is not correct. A veterinary expert is barely better placed than a lawyer or the court to determine what canine behaviour a reasonable person can be expected to put up with. It was not relevant whether the dogs were defending their territory or subjectively thought they were defending their territory.

94. I accept that an expert such as Ms Stoker could opine on what level of threat and aggression is commonly encountered in the behaviour of dogs such as the respondents'. That would just about be admissible, in a dog-loving society such as ours, on the issue of how much threat and aggression a reasonable person could be expected to put up with; but Mr McCracken is right to say that it would be evidence of very limited value. It is not a defence to a nuisance claim to show by expert evidence that behaviour amounting to the nuisance is prevalent.

95. But if Ms Stoker's report was really so damning that it would have deterred any reasonable pre-action prosecutor from proceeding, the judge did not say when it became available to the appellant. It is not necessary to conduct a detailed investigation into the procedural history to establish that simple fact. The temporal part of the court's

reasoning was important in cases such as *Denning*, *Evans* (and after this case, *Clerk*). There is no temporal dimension to the judge's analysis here, probably because the judge did not know about those cases.

96. For my part, I accept that cases such as *Lawrence* and *Budd* show that the outcome of a nuisance case based on the behaviour of dogs is difficult to predict and that opinions about the likelihood of a conviction might reasonably differ where it is clear that the dogs' behaviour is causing distress and annoyance, there is a warning sign about the dogs and there is evidence – even if later not accepted – of people being deterred by the dogs from visiting the location.

97. There is quite a strong analogy here with the facts of *R. v. P* and *R. v. Cornish*, to neither of which the judge was referred. In the former, witnesses' testimony was not accepted but it might have been. The decision to prosecute could have gone either way; it was borderline but not perverse and unreasonable. In the latter, the Crown's case rested on an expert witness who performed poorly under cross-examination. Again, the decision to prosecute was not unreasonable.

98. I do not think the respondents are assisted by the proposition that a detailed investigation into the procedural history is "generally … inappropriate" (*Evans*, per Hickinbottom J at [148]). That was said in the very different context of a case of immense complexity where the expense incurred was staggering. Here, the history was simple and the judge needed to know what the appellant knew about the evidence and when. He should have stated what material was available to the appellant when his offer of mediation was refused.

99. I do not accept that invocation of the citizen remedy under section 82 of the EPA 1990 can be equated with the conduct of a private prosecutor in a context involving sophisticated commercial transactions and accusations of far more serious indictable criminal offences, as in *Haigh* and *Holloway*. The private "prosecution" here is of a specified statutory kind which parliament has deliberately chosen to put into the hands of a person aggrieved, who by definition has a personal interest in the outcome or he would not be aggrieved.

100. I also note that in the private prosecution cases, it was assumed that the prosecutor would have access to legal assistance at the pre-trial stage. Indeed, it has been suggested in learned discourse that private prosecutions should only be undertaken by professional advocates with rights of audience. This appellant did have legal help but it is not said he received advice on the merits of his nuisance claim. That is not to be expected where the statutory remedy is deliberately put in the hands of those who may not be sophisticated or articulate.

101. I reject the significance of the analogy Ms Salmon sought to draw between the appellant refraining from troubling the local authority in this case and Mr Holloway deciding not to go to the police with his complaint of blackmail in the *Holloway* case. The context is again different. Here, the statutory scheme in the EPA 1990 enacts two separate remedies: a local authority's power to seek an abatement order and an aggrieved person's right to bring a claim.

102. The provisions are carefully weighted so that in the second case, certain mandatory pre-action steps must be taken, to give the proposed defendant a chance to avoid litigation

by abating the nuisance; and to avoid, if possible, litigious conflict between neighbours and others in close proximity. But there is nothing in the statutory provisions requiring the local authority to be requested to act before the alleged victim can proceed himself.

103. If the alleged victim is advised, on pain of costs risk, to go to the local authority first, the alleged victim is likely to follow that advice, which I think would have a chilling effect on exercise of the citizen remedy under section 82. If the local authority refuses to act, the alleged victim proceeds under section 82 and the defendant is then acquitted, the defendant could then claim costs, saying that the prosecutor failed to take note of the local authority's unwillingness to act.

104. I accept that the judge must have been aware of section 16 of the POA 1985 and did not need to mention it, though it would have better if he had. I do not accept that the practice of awarding the costs of an acquitted defendant from central funds should necessarily operate differently in a case under section 82 of the EPA 1990 than in an ordinary criminal prosecution where the prosecutor is a public body. It is a question of fact in each case and the relevance of the private prosecutor's personal interest in the outcome will vary from case to case.

105. I do not think the judge was sufficiently alive to the risk that his decision would tend to have a chilling effect on exercise of the section 82 remedy. He did not mention the issue, though it has featured prominently in cases such as *Pearshouse* and *Haigh*. I am in no doubt that if this appeal were to fail, there would be a chilling effect on exercise of that remedy, which parliament has chosen to entrust to the citizenry at large.

106. For those reasons, I am persuaded that the judge's decision is wrong and cannot stand. He disagreed with the decision to prosecute. He found that the evidence was so weak that no reasonable tribunal could convict on the basis of it. There is no challenge to that decision. But he did not find, and it was not open to him to find on the material that is in the case stated, that no reasonable prosecutor could have decided to bring the claim on the basis of the evidence available to the appellant at the point of issuing the proceedings.

107. I answer the questions in the case stated as follows. The first is: was the court correct in law to determine that it had the power to order costs against the appellant where the finding of an unnecessary act was on the basis that the evidence presented was too weak to satisfy the criminal standard of proof? My answer is that the court's exercise of the power to order costs was flawed and wrong for the reasons I have given; the test is not whether the evidence was too weak but whether the decision to prosecute was wholly unreasonable.

108. The second question is whether the court was correct to determine that the amount of costs sought against the applicant was reasonable and that the costs were properly incurred. My answer is that the costs were reasonable in amount and reasonably incurred, apart from the cost of Ms Stoker's report, to which I will return in a moment. There was no challenge to the reasonableness of the quantum of the costs incurred.

109. The third question is whether the court was correct to make the order for costs against the appellant in favour of the respondents. The answer is no for the reasons given above. Again, the test is not whether the evidence was too weak to sustain a conviction

by a reasonable tribunal, but whether the decision to prosecute was wholly unreasonable on the basis of the material available to the prosecutor at the relevant time.

Disposal

110. For those reasons, I will set aside the judge's costs order. It is "wrong in law" within the meaning of section 111(1) of the Magistrates' Court Act 1980 and "wrong" within the meaning of CPR rule 52.21(3). Under CPR rule 52.20(1) and (2), I have all the powers of the lower court, subject to any statutory provision to the contrary. I can affirm, set aside or vary the order made below, remit the matter back or order a fresh hearing of the issue.

111. Neither party in their skeletons addressed the issue of remedy, should the appeal be allowed. I gave them the opportunity to do so orally. I will direct that the respondents' costs of the proceedings below shall be paid out of central funds, save for the costs of their expert evidence, which shall not be recoverable. I have explained why expert evidence is of very limited value in a case such as this. I do not think it would be right for the state to have to bear the cost of it.

112. If the amount deductible in respect of the respondents' expert evidence is not agreed, I will make a determination of the amount, as part of the process of finalising the court's order on the appeal. The issue of the costs of the appeal is not necessarily straightforward. On that and any other consequential issues, I will consider brief further written submissions. Counsel are invited to prepare a draft order in the usual way.