Neutral Citation Number: [2024] EWHC 2913 (KB)

Case No: KB-2023-004631

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 November 2024

**Before** :

**MRS JUSTICE YIP DBE**

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**Between :**

**IPE Marble Arch Limited**

**Prosecution**

**- and -**

**Anthony Moran** **Defendant**

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IPE Marble Arch Limited were not represented at the costs hearing
Ivan Krolick (instructed by Bishop and Light Solicitors) for Mr Moran

Hearing dates: 24 October 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 15 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Mrs Justice Yip DBE:**

## Introduction

1. In a judgment handed down on 7 June 2024 ([2024] EWHC 1375), I dismissed an application brought by IPE Marble Arch Limited for leave to prefer a voluntary bill of indictment against Mr Anthony Moran. Mr Moran seeks an order that his costs should be paid by IPE Marble Arch on an indemnity basis. The company disputes that I have jurisdiction to make any order for costs. The principal issue that arises is whether the High Court may make an order for costs relating to voluntary bill proceedings pursuant to the regime set out in the Civil Procedure Rules (CPR) and/or in the exercise of its inherent power.

2. For consistency, I shall continue to refer to IPE Marble Arch as "the prosecution" and Mr Moran as "the defendant".

## Representations and hearing

3. Having invited them to agree an order to reflect my substantive judgment, the parties identified that costs could not be agreed as a matter of principle. The prosecution proposed the exchange of skeleton arguments and listing for a further hearing. I received skeleton arguments from both parties. At the hearing, the defendant was represented again by Mr Krolick, who made oral submissions supplementing his written representations. The prosecution was not represented. Shortly before the hearing, the solicitors acting for the prosecution gave notice that they had ceased to act. Miss Nisha Maher, Head of HR and Operations, attended to observe the hearing on behalf of the company and confirmed that it adopted, and wished to rely on, the written submissions contained in the skeleton argument prepared by its former solicitors.

## The parties' respective positions in summary

4. The defendant's primary position is that the High Court should order the prosecution to pay his costs of resisting the unsuccessful application pursuant to section 51 of the Senior Courts Act 1981. It is argued that this provision applies to all proceedings in the High Court and that the usual rule that "costs follow the event" should apply. The defendant contends that the application was one that the prosecution knew or ought to have known was doomed to fail on its facts and on the law and that the court should accordingly assess costs on the indemnity basis.

5. In the alternative, the defendant contends that the High Court has an inherent power to make costs orders in voluntary bill cases, albeit no source of such an inherent power was identified and Mr Krolick's oral submissions focused on the power under section 51 of the 1981 Act.

6. The prosecution's position is that the application was a criminal matter and that applications for costs in criminal cases are to be determined according to the statutory criminal costs regime, contained in Part II of the Prosecution of Offences Act 1985. It is not in dispute that the criminal regime affords no power to make the costs order which is sought. Indeed, the High Court (other than a Divisional Court) has no power to make any orders for costs under the criminal regime. On that basis, the prosecution say that the application for costs must be refused.

## Section 51 of the Senior Courts Act 1981

7. Section 51 of the 1981 Act provides (so far as material):

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –
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> (a) the civil division of the Court of Appeal;
>
> (b) the High Court;
>
> (ba) the Family Court; and
>
> (c) the county court, shall be in the discretion of the court.
>
> …
>
> (3) The court shall have full power to determine by whom and to what extent costs are to be paid.
>
> …
>
> (5)Nothing in subsection (1) shall alter the practice in any criminal cause, or in bankruptcy."

## The Civil Procedure Rules

8. The Civil Procedure Rules are expressed to apply to all proceedings in the County Court, the High Court and the Civil Division of the Court of Appeal, save for certain specified exceptions (see CPR 2.1). The CPR contain no reference at all to applications for leave to prefer a bill of indictment.

9. CPR Part 44 contains general rules about costs and provides a regime under which the court can determine how to exercise the broad discretion as to costs provided by section 51(1) and (3) of the 1981 Act.

## The High Court's voluntary bill jurisdiction

10. The power to prefer a bill of indictment with the consent of a judge of the High Court exists at common law and is preserved by section 2(2)(b) of the Administration of Justice Act 1933 (see *R v Golsdstone* [2008] EWHC 976 (QB) at [38]). It is well-established that the preferment of a voluntary bill is an exceptional procedure and that consent should only be granted where good reason to depart from the normal procedure is clearly shown.

## Procedure for voluntary bill applications: Criminal Procedure Rules

11. The procedure governing applications for permission to prefer an indictment is now found in the Criminal Procedure Rules (CrimPR) Part 10. Paragraph 10.9 provides the procedure for making an application to the High Court. Paragraph 10.5 provides the

procedure to be adopted in the event that permission is granted. The relevant rules contain no reference to costs.

## The defendant's reliance on *Evans v SFO*

12. In *Evans & others v The Serious Fraud Office* [2015] EWHC 263 (QB), Hickinbottom J considered applications for costs following the dismissal of a charge of conspiracy to defraud in the Crown Court and the subsequent refusal by the High Court to grant leave to prefer a voluntary bill of indictment. The SFO conceded that it should pay the applicants' costs of its unsuccessful application for a voluntary bill. Hickinbottom J said [83]:

> "The only issue between the parties in relation to those costs is whether their assessment should be on the indemnity basis (as the Applicants contend) or the standard basis (as the SFO contends.)"

He decided that the conduct of the SFO was such that it should be marked with costs on the indemnity basis.

13. In the course of his judgment, Hickinbottom J said [185]:

> "Subject to exceptions not relevant to this case, the costs of an application in the High Court are governed by the CPR, even when arising from a criminal case (CPR rule 2.1(1))."

He then said [186]:

> "The relevant principles are uncontroversial. The general rule is that costs follow the event (CPR rule 44.2(2)(a)); and, in the case of the VB application, the SFO accept that there are no circumstances that would warrant any different order."

14. Mr Krolick contends that *Evans* is binding authority for the proposition that the costs of a voluntary bill application may be awarded under section 51 of the 1981 Act and should be determined by reference to CPR Part 44.

15. The prosecution disputes this, contending that Hickinbottom J's statements at [185-186] were obiter, and not correct. The prosecution submit that, properly analysed, section 51(5) of the 1981 Act disapplies the civil costs regime in respect of criminal matters.

16. In *Finzi v Jamaican Redevelopment Foundation Inc and others* [2023] UKPC 29, Lord Leggett JSC said this [60]:

> "It is important not to lose sight of the basic tenets of common law reasoning that every judgment must be read in context, by reference to what was in issue in the case, and that it is only the ratio of the decision which establishes a precedent and not obiter dicta."

Lord Leggett reiterated [62-63] the need to read judgments in light of the arguments advanced and the questions decided. It is still relevant to examine the reasoning behind obiter remarks, but it is a mistake to treat what was said as authority on a point which the court was not addressing.

17. In stating that the costs of the High Court proceedings were subject to the civil costs rules, Hickinbottom J drew a distinction with the costs of the dismissal application in the Crown Court, which he said fell within the criminal costs scheme. In doing so, he accepted that the SFO's concession that the High Court costs were to be approached by reference to the Civil Procedure Rules was correct. His judgment must though be approached on the basis of what was in issue before him. It was not argued, as it is now, that as a matter of principle costs should not be awarded. Hickinbottom J was not asked to decide whether he had power to award costs under section 51 or pursuant to any inherent jurisdiction. It is apparent that no authorities were cited.

18. In those circumstances, *Evans* cannot be regarded as authority for the propositions advanced on behalf of the defendant. Although I have regard to the obiter remarks of Hickinbottom J, I do so in the context in which they were made, namely where the points I am now asked to decide were conceded without any argument to the contrary. I must therefore decide the arguments in this case as a matter of principle rather than by treating *Evans* as having previously decided them.

**The interaction of the civil and criminal costs regimes in the High Court**

19. Mr Krolick's primary submission was that the High Court's jurisdiction to order costs is not limited by whether the proceedings are civil or criminal in nature. He contended that both section 51 and CPR 2.1 refer to <u>all</u> proceedings in the High Court. He argued that the costs provisions in Part II of the Prosecution of Offences Act 1985 are enabling, allowing other courts to make orders relating to costs in criminal proceedings. However, they do not apply to the High Court and do not restrict this court's power to make costs orders under other provisions. In relation to section 51(5), Mr Krolick submitted that there is no established practice limiting or restricting the High Court's power to make orders for costs in criminal causes. Since the High Court cannot make any order for costs under the 1985 Act, a "vacuum" would exist if section 51(5) is treated as disapplying the usual High Court costs regime. He argued that Mr Moran had been required to respond to an unconventional procedure and it would be unjust to leave him without any access to costs.

20. The courts have previously considered the interaction of the civil and criminal costs regimes in the High Court in the context of appeals by way of case stated and judicial review proceedings.

**The *Murphy* jurisdiction**

21. In *Murphy v Media Protection Services Limited* [2012] EWHC 529 (Admin), the Divisional Court applied the civil costs regime to make orders for costs incurred in complex criminal proceedings. The orders extended not only to costs incurred in the Divisional Court proceedings (an appeal by way of case stated) but also to the costs of the underlying proceedings in the magistrates' court and the Crown Court.

22. Giving the judgment of the court, Stanley Burnton LJ said [15]:

> "Clearly, save in exceptional cases, prosecutions and appeals in criminal cases should be and will be subject to the criminal costs regime. However, the present case is unusual. The prosecution was brought by the respondent in order to protect a very substantial profit stream … It was treated by both parties as a test case, involving substantial legal resources … Both hearings were conducted in a manner indistinguishable from a hearing in the Chancery Division or before the Civil Division of the Court of Appeal in which substantial sums are in issue. This was very far from being a typical appeal against conviction for a summary offence …"

These factors and the circumstances of the case as a whole justified the application of the civil costs regime.

23. The decision in *Murphy* was underpinned by a concession that the High Court had the power to order costs 'here and below' pursuant to section 51 of the 1981 Act. In *Darroch & Darroch v Football Association Premier League Limited* [2016] EWCA Civ 1220 ("*Darroch CA*"), the Court of Appeal concluded that such concession was wrong. Costs incurred in the court below could not fall within section 51 and accordingly the Divisional Court had no power to make a civil costs order in respect of the costs incurred in the underlying proceedings in the Crown Court or Magistrates' Court.

24. The Divisional Court (*Darroch v Media Protection Services Limited, Football Association Premier League Limited* [2014] EWHC 4148 (Admin)) had followed *Murphy*, albeit with some reservations, but found that the circumstances of that case were not sufficiently exceptional to justify making a civil costs order as had occurred in *Murphy*. The Court of Appeal concluded it had no jurisdiction to hear the appeal since it was an appeal against a judgment in a criminal cause or matter. However, having heard argument and on the basis that the subject of the appeal was of practical importance, the judgments contained analysis of the merits, acknowledging that what was said was necessarily obiter. Having found that there was no power to make the costs order sought in relation to the proceedings in the court below, Burnett LJ said [33]:

> "Even if I am wrong in my earlier conclusion that section 51 of the 1981 Act is not concerned with the costs of proceedings from which an appeal is brought to the High Court, the terms of section 51(1) and (5) provide a further negation of the power which the appellants asked the Divisional Court to exercise in this case. That is because the statutory provisions contained in the 1985 Act govern the circumstances in which an award of costs can be made in criminal proceedings against a non-party …
>
> [34] The judicial review proceedings, whilst technically civil proceedings, are nonetheless a criminal cause or matter …"

25. Further caselaw since *Darroch CA* suggests that *Murphy* continues to apply to the costs of criminal proceedings in the High Court, allowing civil costs to be awarded only in a very narrow category of exceptional cases.

26. In *R (Bahbahani) v Ealing Magistrates Court* [2019] EWHC (Admin) 1385, the Divisional Court dealt with an application for costs against an interested party in judicial review proceedings. The Divisional Court said that it was rightly common ground that the proceedings were proceedings in a criminal cause or matter; that the Divisional Court had power pursuant to section 16 of the Prosecution of Offences Act 1985 to make a defendant's costs order in the claimant's favour; and that the existence of the power to make a defendant's costs order under the 1985 Act did not displace the power of the court to make an order for costs inter partes pursuant to section 51 of the 1981 Act.

27. The court rejected an argument that the "whole basis of *Murphy* was wrongly decided", concluding (at [99]) that the judgments in *Darroch CA* did not include any explicit or implied disapproval of the principle that the criminal costs regime should be applied (within its proper limits) unless there are exceptional circumstances making it appropriate for the High Court to make an award under the civil costs scheme. Therefore, in a claim for judicial review in a criminal cause or matter, the criminal costs scheme should apply unless there are exceptional reasons to take a different course.

28. Other recent decisions have taken the same approach. In *R (AB) v Uxbridge Youth Court* [2023] EWHC 2951, Linden J described the *Murphy* principle as well-established before saying [34]:

> "… in my view the Court in *Murphy* was saying no more than this: Parliament has enacted a framework for the determination of costs in civil cases and it has enacted a framework for the determination of costs in criminal cases. Each identifies the orders which may be made and the statutory conditions which require to be satisfied if they are to be made. Parliament intended that costs would only be awarded in a criminal cause or matter where such an award is in accordance with the statutory provisions applicable to such causes or matters. The proceedings do not lose their criminal character when they are subject of an appeal or a claim for judicial review in the High Court, and nor do they for the purposes of the determination of costs of such proceedings. So it would only be in exceptional circumstances that a court would use its powers under section 51(1) of the Senior Courts Act to make an award of costs in a criminal case which would not be available under the provisions applicable to criminal cases."

29. Linden J also observed that, as *Darroch* illustrates, the category of case in which there may be a departure from the criminal costs regime in a criminal cause or matter applying the *Murphy* exception is very narrow indeed.

30. In *Morjaria v Westminster Magistrates Court* [2024] EWHC 178 (Admin), the Divisional Court dealt with an application by interested parties for a costs order following the dismissal of a claim for judicial review of a decision of Westminster

Magistrates' Court to set aside summonses issued against them. The material before the Magistrates' Court revealed that the claimants' motive in issuing the criminal summonses was to exert pressure on the interested parties to settle civil proceedings.

31. The Divisional Court said that the application for judicial review was a criminal cause and thus the applicable costs regime was the criminal costs regime, which did not permit the High Court to make any order for costs in favour of the interested parties. The Court rejected the interested parties' argument that the case was exceptional such as to come within the *Murphy* category because it was a private prosecution, the dominant purpose of which was to serve the prosecutor's private interests. That was not sufficient to bring it within the very narrow exception identified in *Murphy*.

32. Mr Krolick did not maintain any argument that this case could be brought within the *Murphy* category of exceptional cases. He conceded that, if that was the test to be applied, it was apparent from the cases since *Murphy* that this case would not be regarded as sufficiently exceptional. The fact that the intended prosecution may have been motivated by private interest and that the application was made following the fully reasoned dismissal by the Crown Court without any new evidence or change in circumstances was not enough. In that regard, there is no basis to distinguish the underlying facts from *Morjaria*, in which the conduct of the claimants had been subject to criticism. Rather, Mr Krolick's contention was that voluntary bill applications were a separate category where the civil regime should apply, as was the case in *Evans v SFO*.

**The nature of the voluntary bill proceedings**

33. Mr Krolick accepted that the voluntary bill application related to a criminal matter but, in developing his oral submissions, he argued that the proceedings were not a criminal cause. Following the hearing, he provided further written representations on this point with reference to *Re McGuinness* [2020] UKSC 6.

34. In *McGuiness*, the Supreme Court considered the meaning of "a criminal cause or matter" in the context of section 41(1) of the Judicature (Northern Ireland) Act 1978, which deals with the appropriate avenue for an appeal from the High Court in Northern Ireland. The court noted that the phrase was used in a different statutory context in section 6 of the Justice and Security Act 2013 (dealing with the special closed procedure for secret intelligence material) which was the subject of the Supreme Court's decision in *R (Belhaj) v Director of Public Prosecutions (No 1)* UKSC 33; [2019] AC 593. Lord Sales identified [24] the need for caution in identifying the extent to which the judgments in *Belhaj* provided guidance in the context of rights of appeal.

35. Referring to *Amand v Home Secretary* [1943] AC 147, Lord Sales said [45]:

> "It is not sufficient for the underlying proceeding to relate to subject-matter which might be described as "criminal in a broad sense; the proceeding itself has to be criminal in nature."

And at [48]:

> "… for a proceeding to qualify as a "criminal cause or matter" a person has to be placed at jeopardy of criminal trial and

> punishment as the direct outcome of that proceeding, such that it was possible to identify "the defendant" and "the prosecutor" in respect of it."

36. An order which is directly consequential upon the outcome of the criminal process, such as an order for costs in a criminal case, will also be categorised as a "criminal cause or matter" (*R (Hargreaves) v Steel* (1867) 2 QBD 37).

37. In *Darroch CA*, Burnett LJ said that there was no doubt that an appeal against conviction by way of case stated was a criminal cause or matter. The fact that such an appeal was converted into judicial review proceedings did not deprive the proceedings of their "colour" for the purpose of rights of appeal. Although judicial review proceedings are by their nature civil, there are many circumstances in which decisions in criminal cases are challenged by judicial review but are treated as criminal causes or matters for the purposes of rights of appeal. Burnett LJ expressly rejected an argument that a costs order should not be viewed as a criminal cause or matter, saying [18]:

> "The determination of an application for costs by either party at the end of an appeal by way of case stated or a claim for judicial review is an inherent part of the exercise of the jurisdiction. There would be a startling consequence if the appellants' submissions were correct. Many appeals by way of case stated or claims for judicial review which are criminal causes or matters result not only in an order determining the substance of the matter but also an order in relation to costs. There could not sensibly be different appeal routes for those two aspects of the same order of the High Court."

38. It is right to say that *Amand* and *McGuinness* were considering the phrase "criminal cause or matter" in its statutory context. In *McGuinness* at [70] Lord Sales noted the significance of the words "or matter" within the provisions dealing with rights of appeal. The effect was to widen the meaning of the phrase to create a category defined by reference to the criminal nature of the underlying proceedings in respect of which the decision under review in the High Court was taken "without drawing subtle and ultimately unsustainable distinctions depending on the precise nature of the procedure by which a matter concerning the process for bringing and determining criminal charges might be brought before the High Court".

39. Mr Krolick argues that the expression "criminal cause or matter" does not have any statutory relevance to any costs issues. As noted above, section 51(5) of the 1981 Act refers to any "criminal cause". Mr Krolick contended that, although the purpose of the application for leave to prefer a voluntary bill of indictment was to lead to criminal proceedings, it was not itself a "criminal cause".

40. As originally enacted, the provision that is now section 51(5) was found in section 51(2) of the Act but the form of wording differed:

> "Nothing in sub-section (1) shall alter the practice in any criminal cause or matter, or in bankruptcy." (emphasis added)

The changed wording was introduced by section 4 of the Courts and Legal Services Act 1990 which came into effect on 1 October 1991. It is not clear why the words "or matter" no longer appeared.

41. Section 151 of the 1981 Act defines a "cause" as "any action or any criminal proceedings" and a "matter" as "any proceedings in court not in a cause". An "action" means "any civil proceedings commenced by writ or in any other manner prescribed by rules of court."

42. Since "any criminal proceedings" come within the definition of a "cause", the effect is that section 51(1) is not to be taken as altering the practice in relation to criminal proceedings. The question then is whether voluntary bill applications to the High Court are to be treated as "criminal proceedings".

43. Although Mr Krolick sought to argue that the voluntary bill procedure does not itself directly put a respondent in jeopardy, this is exactly what it does. Had I granted the application, an indictment would have been laid before the Crown Court and Mr Moran could have expected to stand trial. That it was possible to identify "the defendant" and "the prosecutor" is plain from my substantive judgment. The voluntary bill application therefore plainly fell within the *Amand* definition of a criminal cause or matter. The application was made following the procedure prescribed in the Criminal Procedure Rules. I conclude that the proceeding itself was criminal in nature and comes within the definition of a criminal cause for the purpose of section 51(5).

**Costs consequences of finding that this was a criminal cause**

44. Mr Krolick's submission that there is no established practice limiting or restricting the High Court's power to make orders for costs in criminal causes is not supported by the authorities to which I have referred above. The authorities confirm that, save in exceptional cases, costs in criminal proceedings will be considered within the statutory framework for criminal cases.

45. Further, Mr Krolick's reliance on the absence of any power for the High Court to make a criminal costs order, meaning that if the High Court does not use its civil costs powers, a defendant in Mr Moran's position will be left without access to costs does not assist. This argument has been considered and rejected in other cases.

46. In *AB v Uxbridge,* Linden J said [42]:

> "The prior question is whether there are exceptional circumstances such that the civil costs regime should be applied to a criminal cause or matter. If the conclusion is that there are not, the criminal regime applies and costs should be awarded if it is in accordance with that regime to do so. If, as in the present case, the provisions of the criminal costs regime on which the applicant would have wished to rely does not provide for the award of costs against a party in the High Court it would be contrary to the intention of Parliament to treat this as an exceptional circumstance which justified awarding costs under section 51(1) Senior Courts Act 1981 given the terms of section 51(5) and given that section 19(1) reflects the intention of

> Parliament that costs should not be awarded against a party to a criminal cause in the High Court."

47. A similar point was made by the Divisional Court in *Morjaria*, the judgment concluding with the following observation [13]:

> "It may be said that there is a lacuna in the criminal regime in relation to costs in a criminal cause heard in the High Court. It is not for us to fill that lacuna by an unjustified extension of a very narrow jurisdiction."

**Are voluntary bill proceedings an exceptional category of criminal proceedings for the purpose of costs?**

48. Mr Krolick argued that the voluntary bill procedure was itself exceptional and called for a different approach to that adopted in relation to the more conventional routes by which the High Court considered criminal matters, namely appeals by case stated and judicial review proceedings.

49. Mr Krolick contended that the voluntary bill procedure was a very old procedure and one that was entirely judge made. He said it had developed outside criminal procedures. However, he was unable to explain how that distinguished this process from judicial review. Judicial review proceedings are acknowledged to be civil proceedings for which the relevant procedural rules are to be found in the Civil Procedure Rules. Nevertheless, if the proceedings concern a criminal cause, costs applications are generally to be determined by reference to the criminal costs regime.

50. I cannot see any principled basis to draw a distinction between voluntary bill proceedings and other ways in which proceedings relating to criminal causes may be brought before the High Court. The arguments advanced on Mr Moran's behalf about the procedure being an old one and being judge-made and about the unfairness of being left without access to costs apply also to other types of proceedings where the courts have found that the civil costs regime does not apply.

51. In particular, allowing the application for costs in this case would create an unjustified distinction with the position in *Morjaria*. The factual circumstances in that case were similar in that the case concerned a private prosecution where the charges were dismissed in a lower court. The District Judge gave a fully reasoned judgment, as the Crown Court judge did in this case. In each case, the prosecution sought to reinstate the charges by bringing an application in the High Court in which the reasoning of the judge below was challenged. The different procedural routes adopted reflected the fact that the charges were dismissed in the Magistrates' Court in *Morjaria* whereas in this case Mr Moran was sent to the Crown Court for trial and it was there that the charges were dismissed and the indictment accordingly quashed. The decision in *Morjaria* could be challenged by way of judicial review whereas in this case, the only available procedure was the voluntary bill process. In substance, what the prosecution sought to do in each case was the same.

52. I am also unable to accept that *Evans v SFO* establishes a different 'practice' within the meaning of section 51(5) of the 1981 Act in relation to voluntary bill proceedings. I have explained why *Evans v SFO* is not a precedent to be followed. The fact that an

order was made on the basis of a concession cannot be treated as an established practice allowing for a distinction to be drawn between High Court proceedings brought through this process compared to other processes. In general terms, criminal proceedings, however they originate, are subject to the criminal costs regime. There are no exceptional circumstances to depart from that principle here.

53. Unfortunately for Mr Moran, he cannot recover his costs under the criminal regime. Any extension of the availability of criminal costs would engage public policy considerations and is a matter for Parliament.

## Conclusion

54. I conclude that this matter was a criminal cause. Absent any exceptional circumstances falling with the very narrow category established by *Murphy* and subsequent decisions, costs in relation to criminal proceedings are recoverable only to the extent permissible by the statutory criminal costs regime. These proceedings do not fall within the *Murphy* exception. There is no power to make the order sought under the criminal regime. No other residual inherent power has been identified. It follows that I am constrained to refuse the application for costs.

55. My conclusion makes it unnecessary to decide the order I would have made had I decided that it was open to me to make a costs order exercising my discretion under section 51(1) and (3) of the 1981 Act. However, for completeness I will say that had I decided that the civil costs regime did apply, I would have followed the general principle that the unsuccessful party should pay the successful party's costs and ordered that the prosecution should pay the defendant's costs of the High Court proceedings. I would have ordered that such costs be assessed on the standard basis rather than the indemnity basis.

56. Unlike the position in *Evans*, I would not have found that the conduct of IPE Marble Arch was such as ought to be marked with indemnity costs. I note that in relation to this case, when I first considered the application on the papers, I took the view that it was arguable that the ruling in the court below contained a relevant error of law. I noted that the Crown Court judge had expressly said in his ruling that he had less time to consider the application than he would have wished. Although after careful analysis, I agreed with the judge's ruling and dismissed the application for the reasons I gave, I did not view the conduct of IPE Marble Arch in making the application in the same way as Hickinbottom J viewed the conduct of the SFO in *Evans*. As he acknowledged, there is a "very high hurdle" for indemnity costs and I would have found that this case fell short of reaching that hurdle. I would therefore have assessed costs on the standard basis, doing so as a paper exercise.

57. As it is, Mr Moran's application for costs must be dismissed.