Neutral Citation Number: [2021] EWHC 755 (QB)

Case No: QA-2020-000191 & QA-2020-000192

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2021

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE NICOL
and
MRS JUSTICE O'FARRELL

- -

Between :

(1) Football Association Premier League **(2) Sports Information Services Ltd**	**Appellants**
- and -	
Lord Chancellor	**Respondent**

- -
- -

Nicholas Bacon QC and Dominic Donoghue (instructed by **DLA Piper UK LLP and Hickman Rose**) for the **Appellants**
Richard Clarke (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 17th March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

LORD JUSTICE DINGEMANS, NICOL AND O'FARRELL JJ

Nicol J:

1. This is an appeal from Costs Judge (or, as he is also known, Master) Rowley.

2. The Appellants are the Football Association Premier League ('FAPL') and Sports Information Services Ltd ('SIS'). From time to time both organisations bring private prosecutions. In particular, FAPL prosecuted O'Leary, Dodds and Haggerty for conspiracy to defraud contrary to Fraud Act 2006 s.11(1). The Defendants either pleaded guilty or were convicted. SIS prosecuted William Marston who had broken into encrypted horse and greyhound racing channels. He was convicted or pleaded guilty to an offence under Copyright Designs and Patents Act 1988 s.297A(1)(a).

3. In each case an order was made that the prosecutor should receive its costs out of central funds pursuant to Prosecution of Offences Act 1985 s.17.

4. Where such an order is made instead of the court quantifying the costs to which the prosecutor is entitled out of central funds, there can be an assessment by a Determining Officer. That procedure was followed in each of the cases with which we are concerned.

5. The Determining Officer in the FAPL case was Ms Helen Thompson. The Determining Officer in the SIS case was Mr Peter Fitzgerald-Morris. Neither Ms Thompson nor Mr Fitzgerald-Morris allowed the Appellants to recover any of the costs or expenses which were incurred prior to the commencement of the criminal proceedings, that is any of the costs prior to the issue of a summons or before an information had been laid.

6. From decisions of Determining Officers there is a right of appeal to a Costs Judge. FAPL and SIS exercised this right. The appeals were heard together by Master Rowley on 6th February 2020. He reserved his decision which he handed down on 6th August 2020.

7. In brief, Master Rowley agreed with the Determining Officers that costs or expenses incurred before the commencement of the criminal proceedings could not be recovered out of central funds.

8. Master Rowley acknowledged that his decision involved a point of law of general importance. He certified this as,

> 'What is the correct approach for the Court to apply in determining the level and extent of recovery of expenses where they are incurred before the commencement of proceedings?'

9. Such a certificate is a necessary pre-condition to the Appellants being able to appeal to the High Court from the Costs Judge's decision (see Costs in Criminal Cases (General) Regulations 1986 ('CCCGR 1986') regulation 11(3). The decision of the High Court is final (see regulation 11(7)).

10. The sums in issue can be substantial. In the FAPL case, for instance, some £87,050.33 was disallowed on the basis that these were costs or expenses incurred before the commencement of the criminal proceedings. In the SIS proceedings some £78,846.30

was disallowed as costs or expenses incurred before the commencement of the prosecution. The Costs Judge accepted the evidence of Kieron Sharp, Director-General of the Federation Against Copyright Theft ('FACT') that, if investigative costs were not recoverable, then essentially private prosecutions could not be brought.

11. The appeal first came before me sitting as a single judge. I drew attention to the fact that the decision of the High Court was final: there could be no appeal to the Court of Appeal or the Supreme Court. I asked if the parties were content for me to continue to hear the appeal or whether they wished to apply for the appeal to be adjourned to be re-listed in front of a Divisional Court. The parties agreed that that they wished the matter to be adjourned, which I agreed was appropriate. The matter has subsequently come before a Divisional Court composed of Dingemans LJ, Nicol and O'Farrell JJ.

12. In advance of the adjourned hearing, the Court had asked the parties for their submissions as to whether a Divisional Court, as opposed to a single judge of the High Court could consider the appeal. This inquiry was prompted by the terms of regulation 11(7) which says,

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

13. The parties responded with commendable speed in a joint note of the same date (16th March 2021) in which they submitted that the appeal could be heard by a Divisional Court. Some of what follows below draws on that joint note.

14. Part 52 of the CPR is concerned with appeals. It particularly affects the Court of Appeal, but it is not limited to that Court and also applies to the High Court when that court is exercising an appellate function.

15. CPR r.52.20 is entitled 'Appeal Court's powers'. Rule 52.20 (4) and following says,

> '(4) The appeal court may exercise its powers in relation to the whole or any part of an order of the lower court.
>
> (Part 3 contains general rules about the court's case management powers.)'

16. There is a Practice Direction – Practice Direction 52B - specifically for appeals to the County Court and the High Court, but it contains nothing material to the present issue.

17. By s.19(3)(a) of the Senior Courts Act 1981,

> 'Any jurisdiction of the High Court shall be exercised only by a single judge of that court, except in so far as it is—
>
> (a) by or by virtue of rules of court or any other statutory provision required to be exercised by a divisional court'

18. By s. 66(1) of the Senior Courts Act 1981,

> '(1) Divisional courts may be held for the transaction of any business in the High Court which is, by or by virtue of rules of court or any other statutory provision, required to be heard by a divisional court.'

19. In 2017 the CPR were amended by the Civil Procedure (Amendment No.2) Rules 2017 SI 2017 No. 889. Rule 3 made amendments to Part 3 of the CPR. As amended and so far as material, it reads,

> '3.1 (1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or any other enactment or any powers it may otherwise have.
>
> (2) Except where these rules otherwise provide, the court may –
>
> …
>
> (bb) require that any proceedings in the High Court be heard by a Divisional Court of the High Court. …
>
> (3A) Where the court has made a direction in accordance with paragraph (2)(bb) the proceedings shall be heard by a Divisional Court of the High Court and not by a single judge.'

20. In my view, the parties are correct that the Divisional Court has jurisdiction to hear this appeal for the following reasons:

i) While it is the case that regulation 11(7) says that the appeal to the High Court should be heard by 'a single judge' it also makes specific reference to the Civil Procedure Rules Part 52 and Part 52 itself cross refers to Part 3 of the CPR.

ii) There are many occasions when a court may need to have recourse to the case management powers in CPR Part 3. To take just one example, if there had been delay in lodging the notice of appeal for some good reason and an application for an extension was not made until after the deadline had passed, the appellant ought to be able to seek relief from sanctions under CPR r.3.9. It is inconceivable that Parliament should have intended there to be no such case management power.

iii) As set out in paragraph 11 above, when this matter first came before me, exercising my case management powers and at the request of the parties, I adjourned the case to be heard by a Divisional Court.

iv) Because of rule 3.1(3A), a single judge would now be prohibited from hearing the appeal: only a divisional court can hear the appeal. Of course I may have erroneously decided that the appeal should be adjourned to a divisional court, but if I so erred, it would be for the Court of Appeal to correct me and no such appeal was advanced. Unless and until my order was set aside on appeal, it remained valid and effective (see for instance *Strachan v Gleaner Co. Ltd.* [2005] UKPC 33, [2005] 1 WLR 3204 citing, at [29], *In Re Padstow Total Loss and Collision Assurance Association* (1880) 20 Ch.D. 137 at 142 and 145).

21. Accordingly, I consider that, as a Divisional Court, we could continue to hear the substantive appeal.

The statutory background

22. As I have said, the power to order costs out of central funds is contained in Prosecution of Offences Act 1985 s.17 ('POA 1985'). However, the argument in this appeal travelled over other powers in relation to costs and it is convenient to set these parts of the Prosecution of Offences Act 1985 out at the same time.

'16. **Defence costs**....

(6) A defendant's costs order shall, subject to the following provisions of this section, be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.

(6A) Where the court considers that there are circumstances that make it inappropriate for the accused to recover the full amount mentioned in subsection (6), a defendant's costs order must be for the payment out of central funds of such lesser amount as the court considers just and reasonable.

17. **Prosecution costs**.

(1) Subject to subsections (2) and (2A) below, the court may –

(a) in any proceedings in respect of an indictable offence; and

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

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

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

(a) a public authority; or

(b) a person acting –

(i) on behalf of a public authority; or

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

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

central funds of such lesser amount as the court considers just and reasonable.

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

- (a) the prosecutor agrees the amount, or

(b) subsection (2A) applies.

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

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

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

18. **Award of costs against accused**.

(1) Where—

(a) any person is convicted of an offence before a magistrates' court;

(b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or

(c) any person is convicted of an offence before the Crown Court;

the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.'

23. Regulations have been made by the Lord Chancellor under the 1985 Act. They include the CCCGR 1986. Regulation 7 says,

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

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

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

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

> (3) Any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant.
>
> (4) The costs awarded shall not exceed the costs actually incurred.
>
> (5) … the appropriate authority shall allow such legal costs as it considers reasonably sufficient to compensate the applicant for any expenses properly incurred by him in the proceedings.'

24. The jurisdiction of the civil courts to award costs derives from Senior Courts Act 1981 s. 51 which says, 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 –
>
> (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 the costs are to be paid.
>
> ….
>
> (5) Nothing in this section shall alter the practice in any criminal court or in bankruptcy.'

25. Section 52 of Senior Courts Act 1981 makes clear that, while there may be Rules of the Crown Court, they may not authorise the payment of costs out of central funds – see 52(3).

Master Rowley's decision

26. Master Rowley recognised that the same phrase 'in the proceedings' was used in both s.17(1) (prosecution costs out of central funds) and s.16(6) (defence costs out of central funds). He appears to have accepted that the same meaning should be given to the same phrase in both contexts (and see to this effect *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823). Judge Rowley saw the judgment of Auld LJ in *R (Hale) v North Sefton JJs* [2002] EWHC 257 (Admin) ('Hale') as allowing a degree of elasticity in the interpretation of the phrase before proceedings had begun in that case a decision of the magistrates to disallow the costs of a defendant's interview with a

solicitor after the defendant had been arrested and was on police bail but before he had been charged was quashed on judicial review. Master Rowley said that this elasticity was 'fairly limited' in the context of a prosecutor's costs incurred before an information was laid and would not stretch to the beginning of an investigation into a possible prosecution. The court in Hale had, however, upheld the refusal to allow the costs of a consultation with the solicitor after the defendant had been acquitted. Master Rowley summarised this as meaning that there was no equivalent elasticity after the conclusion of the criminal proceedings.

27. Master Rowley did not consider that the provision regarding costs in civil proceedings (i.e. Senior Courts Act 1981 s.51) was of any assistance. That was because the civil courts had power to determine the costs 'of and incidental to the proceedings'. As Sir Robert Megarry V-C had said in *In Re Gibson's Settlement Trusts* [1981] Ch 179 the emphasised words significantly added to the Court's power. For this reason, Master Rowley disagreed with the comment of Master Gordon-Saker in *R v Dodd and Ward* [2009] 2 Costs LR 368 and *R (Blenkhorn) v Camilleri* SCCO ref AGS/57/19 that the difference in wording was a 'distinction without a difference.'

28. Master Rowley also thought that the power to make an order that the defendant pay the prosecution's costs (Prosecution of Offences Act 1985 s.18) was also immaterial since the critical issue there was whether such an order would be 'just and reasonable'. It was therefore immaterial that under s.18 the costs of the investigation which led to the proceedings could be recovered by the prosecutor (see *Neville v Gardner Merchant Ltd* (1983) 5 Cr. App. R. (S) 349 and *Re Associated Octel Ltd* [1997] 1 Cr. App. R (S) 435).

29. Master Rowley also considered that the House of Lords case of S*teele Ford and Newton* [1994] 1 AC 22 was relevant. This had held that there was no inherent power to order costs to be paid out of central funds. As Master Rowley said at [65] of his judgment,

> '"in the proceedings" cannot include all investigation and other pre-charge work which may eventually bear fruit in a conviction. To take that construction of the phrase would be to provide the publicly funded safety-net which was deprecated by Lord Bridge [in *Steele Ford and Newton*]. As such the Determining Officer should be slow to construe the phrase as involving work done before (or after) the court process is on foot, albeit that there will inevitably be some circumstances where that may be appropriate as demonstrated by the s.16 cases.'

The grounds of appeal

30. Mr Bacon QC, on behalf of the Appellants, submits that Master Rowley reached the wrong conclusion. He argues:

i) On its true construction s.17(1) does allow a private prosecutor who is awarded costs out of central funds to recover costs even if they have been incurred prior to the formal commencement of the prosecution: they can still be costs 'in the proceedings' if that work is made use of in the proceedings.

ii) Master Rowley said in [65] of his decision that some pre-commencement work could be reimbursed out of central funds (as indeed the Lord Chancellor had conceded), but he gave no reasons as to why the particular items of work claimed by the Appellants, could not be included.

iii) Master Rowley was wrong not to accept the Appellants' argument that the National Taxing Director had exceeded her authority in issuing the direction of July 2016 to the National Taxing Team Determining Officers. By the Prosecution of Offences Act 1985 s.20(1A) it was the Lord Chancellor and not the National Taxing Director who had the power to make regulations as to the amounts to be paid out of central funds.

iv) The National Taxing Directorate had historically allowed the Appellants and other private prosecutors to recover out of central funds the costs of investigation and other pre-proceedings expenses. The Appellants therefore had a legitimate expectation that this practice would continue.

31. Mr Bacon submitted that the Appellants' case was fortified by the decision of the Court of Appeal in *Murli Mirchandani v Lord Chancellor* [2020] EWCA Civ 1260 which had been decided on 2nd October 2020 and so subsequent to Master Rowley's decision.

32. Mr Clarke, on behalf of the Lord Chancellor, opposed the appeal. He submitted that Master Rowley was right for the reasons which he gave. In addition, he relied on the Notes to Clause 16(1) (which became s.17(1) of the Prosecution of Offences Act 1985. These said,

> 'The private prosecutor will be able to recover any expenses properly incurred in the proceedings. This will include all legal expenses and any out of pocket expenses (such as travelling expenses) but not any loss of earnings. The private prosecutor will also not be able to recover any investigation expenses, for example the charges made by an inquiry agent entrusted to make inquiries before the commencement of proceedings.'

Discussion

33. The critical phrase is thus 'in the proceedings' in s.17(1). Section 21(1) of the Prosecution of Offences Act 1985 provides a definition of the term 'proceedings' but I agree with the parties that this definition adds nothing material to the issue before us.

34. I think that there is force in Mr Bacon's submission that Master Rowley was wrong to treat the commencement of the prosecution as a bright line, before which no costs incurred by the private prosecutor could be reimbursed out of central funds.

35. As Master Rowley noted, the phrase 'in the proceedings' is used both in s.17(1) and s.16(6). In those circumstances, Parliament must have intended the phrase to have the same meaning in both contexts. Yet it is clear that there is no bright line cut-off for the costs of a defendant which may be reimbursed out of central funds and even if the costs were incurred before the commencement of the prosecution, as *Hale* shows.

36. The Lord Chancellor and Master Rowley acknowledged this, yet, beyond saying that *all* investigation costs and other pre-commencement costs could not be recovered out of central funds, neither offered reasons as to why the costs incurred by the Appellants were irrecoverable.

37. As Mr Clarke submitted, it may be easier to see how pre-commencement costs by a defendant were incurred when a prosecution was imminent, but that is not a principled basis for distinguishing between pre-commencement costs which are properly regarded as having been incurred 'in the proceedings' as both ss.16(6) and 17(1) require.

38. *Mirchandani* concerned a private prosecution by Mr Mirchandani of Mr Somaia. Mr Somaia was convicted at the Central Criminal Court before HHJ Hone QC and a jury. Mr Somaia was sentenced to 8 years imprisonment. Mr Mirchandani sought a confiscation order under the Criminal Justice Act 1988 (the offences in question having been committed before the commencement of the current legislation, the Proceeds of Crime Act 2002) which Judge Hone granted on 12th January 2016 in the sum of £20,434,691. Mr Mirchandani did not pay the confiscation. In due course, a receiver over Mr Mirchandani's property was granted by Spencer J. By that time an issue had arisen as to whether certain transactions by the defendant to his wife, Alka Gheewala, were 'tainted gifts'. That issue came before Jefford J. who, on 17th October 2017, decided that they were not tainted gifts. On 7th November 2017 Jefford J. ordered Mr Mirchandani to pay Ms Gheewala's costs. Mr Mirchandani applied for his costs to be paid out of central funds. On 25th May 2018 Jefford J. acceded to that application and ordered that Mr Mirchandani's costs as determined by a Determining Officer should be paid out of central funds (those costs were to include the costs that Mr Mirchandani had been ordered to pay to Ms Gheewala). By that stage, the Lord Chancellor had not had an opportunity to make submissions. He applied to Jefford J. for permission to intervene and to make submissions as to why she lacked jurisdiction to make the orders for costs out of central funds. Jefford J. allowed the Lord Chancellor to make his application and, in her judgment of 15th May 2019, set aside her earlier decision, accepting that she had no jurisdiction to order Mr Michandani's costs out of central fund. (see *R v Somaia* [2019 EWHC 1227 (QB), [2019] 2 Cr App R 24). Jefford J. herself granted permission to appeal to the Court of Appeal.

39. It will be seen that Jefford J. was *not* hearing an appeal from a Costs Judge which was why CCCGR regulation 11(7) was not an obstacle to the Court of Appeal exercising jurisdiction.

40. The Court of Appeal allowed the appeal on both issues. The leading judgment was given by Davis LJ, with which the President of the Queen's Bench Division agreed, as did the Master of the Rolls, 'after much soul-searching'.

41. Davis LJ identified the two issues which confronted the Court of Appeal as,

    i) On the true interpretation of s.17 (of the 1985 Act) may a private prosecutor receive out of central funds costs incurred by him in the enforcement of a confiscation order made in criminal proceedings.

ii) On the true interpretation of s.17 may a private prosecutor receive out of central funds costs which the private prosecutor has been ordered to pay to a third party.

42. Mr Bacon referred us in particular to the following aspects of the decision:

i) The endorsement of the value of private prosecutions – see [79], the possibility of which was expressly preserved by Parliament in Prosecution of Offences Act 1985 s.6. (as to which see also *R (Virgin Media) v Munaf Zinga ('Zinga')* [2014] EWCA Crim 1823).

ii) The view that the costs of the enforcement of a confiscation order could be reimbursed out of central funds called into question the part of the decision in *Hale* that costs incurred subsequent to a prosecution could not be recovered from central funds.

iii) The hollowness of the argument that private prosecutors could have recourse to orders that defendants pay the costs of prosecutions themselves (see [80]).

iv) What the Court of Appeal had to say about the relationship between s.16 and s.17 of the Prosecution of Offences Act 1985 at [81],

> 'There has never been an exact equivalence between s.16 (whether in its original or amended form) and s.17 (whether in its original or amended form). The circumstances in which a defendant can recover costs out of central funds have, generally speaking in criminal cases always tended to be more circumscribed than those applicable to a prosecutor. The policy and pragmatic considerations for this differentiation are not difficult to discern. As pointed out by a constitution of this court in the *Zinga* litigation, and after referring to a decision of the Divisional Court in *R (Law Society) v Lord Chancellor* [2010] EWHC 1406 (Admin), [2011] 1 WLR 232, there are policy reasons why provisions governing payment to a private prosecutor may be more favourable than those applying to a defendant: namely a desire not to deter private prosecutions: see *R (Virgin Media) v Zinga* [2014] EWCA Crim 1823, [2014] Costs LR at [20]. Indeed that differentiation has become more pronounced by virtue of the amendments made to s.16 and s.17 by the 2012 Act [I understand this to be a reference to s.16(6A) and s.17(2A) which were added to the Prosecution of Offences Act 1985 by the Legal Aid and Sentencing and Punishment of Offenders Act 2012. This authorised the court if it considered that there were circumstances which made it inappropriate for the defendant or the private prosecutor to recover the full amount of the costs in accordance with s.16(6) or s.17(1) to recover instead such lesser amount as the court considered appropriate.]

v) *Steele Ford and Newton* was not an obstacle to this conclusion. It dealt with a situation where there was no reference at all in Senior Courts Act 1981 s.51 to payment of costs out of central funds. The situation in *Mirchandari* was very different since s.17 of the 1985 Act explicitly authorised payment of costs out of central funds (see [90]).

43. I agree with Mr Bacon that *Mirchandani* at [81] stands for the proposition that, for pragmatic and policy reasons, the circumstances in which prosecution costs were recoverable out of central funds was intended to be more generous than the circumstances in which a defendant's costs could be recouped from central funds. Yet the decision of Master Rowley has the opposite effect.

44. Both *Mirchandani* and *Zinga* also emphasised the public interest in private prosecutions, particularly in the fields of fraud and intellectual property rights. While there are limits on the extent to which a purposive interpretation can trump clear language to the contrary, in my view, there is no such clear language in this case. As I have already noted, Master Rowley accepted the evidence from F.A.C.T. that, unless investigative costs could be recovered out of central funds, private prosecutions would not be viable. I agree with Mr Bacon that there is something of a parallel with *Mirchandani.* In that case, the Court of Appeal said that, absent the enforcement of a confiscation order, confiscation proceedings would be 'toothless'. So, too, Mr Bacon said, if investigative costs could not be recovered out of central funds, private prosecutions would not get off the ground.

45. I also agree with Mr Bacon that *Steele Ford and Newton* is of limited assistance in the present context. Section 17 of the 1985 Act gives express authorisation for the payment of costs out of central funds. The situation is therefore very different from the position in that case where the solicitors were driven to rely on inherent jurisdiction or an implied power to order costs out of central funds. I do accept that the courts must be vigilant as to the expenditure of public funds and, to this extent, must be cautious as to the extent to which costs may be reimbursed, but Mr Bacon was right to remind us that, even if we interpret the phrase 'in the proceedings' in a manner which permits the private prosecutor to recover some of the pre-commencement costs, there is still a restraining factor: the costs must anyway be no more than are reasonable and, by s.17(2A) if there are circumstances which mean that the prosecutor should not be able to recover the full amount of his costs, the court may instead order that he recover such amount as is just and reasonable.

46. I was not persuaded by Mr Clarke's analysis of the legislation which preceded the Prosecution of Offences Act 1985. As Mr Bacon submitted, that Act introduced a wholly new regime (including the establishment of the Crown Prosecution Service). In my view, the previous legislation does not assist us in deciding the meaning of the 1985 Act.

47. As for the Lord Chancellor's reliance on the Notes to Clause 16 (now s.17 of the 1985 Act), Mr Bacon referred us to *R (Public and Commercial Services Union)v Minister for the Civil Service* [2010] EWHC 1027 (Admin), [2011] 3 All ER 54 in which Sales J. said at [55] that Notes on Clauses were not a proper aid to the interpretation of an Act of Parliament, whether or not they were circulated to the legislature. In the present case, there was no evidence that the Notes were circulated either to peers or to MPs and Mr Clarke did not suggest that the comments in the Notes were articulated by a responsible minister in the course of debates so that they were an admissible aid to construction in accordance with *Pepper v Hart* [1992] UKHL 3, [1993]AC 593.

48. I do agree with Master Rowley that the provision regarding costs in civil proceedings is different since it refers to costs of 'and incidental' to the proceedings. I consider that this means that the civil cases are of no assistance in interpreting s.17 and I,

therefore, respectfully differ from Master Gordon-Saker who thought the contrary in *R (Blinkhorn) v Camilleri* 28.08.19 SCCO Ref AGS5719 at [42]. Similarly, the power to order costs against a party (Prosecution of Offences Act 1985 s.18) has a different jurisdictional requirement. It may be that the outcome is the same under both s.17 and s.18, but the route to that conclusion will have been different.

49. As for the direction of the National Taxing Director of July 2016, Mr Clarke accepted that this added little to the Respondent's argument. Either the direction accurately reflected the law, in which case it provided no additional weight, or it did not, in which case Mr Clarke acknowledged that it could not, by itself, justify Master Rowley's conclusion.

50. In my view, the ground of appeal regarding legitimate expectation likewise adds nothing to the Appellants' case. If the interpretation of the law is as they propose, it is unnecessary to rely on legitimate expectation. If the law is not to be interpreted as the Appellants propose then any expectation which they might have had was not 'legitimate' (see for instance *Corporation of the Hall of Arts and Sciences v Albert Court Residents Association* [2011] EWCA Civ 430 at [35]. As Mr Clarke submitted, the doctrine of legitimate expectation cannot justify what is, for the basis of this argument, an unlawful expenditure of public funds. However, as will be apparent, in my view, the Appellants do not need to have recourse to the principle of legitimate expectation.

51. As I have said, I do not agree that the commencement of the prosecution represents a bright line, before which no items of expenditure may be recovered from central funds. It seems to me that, even if incurred before the issue of a summons or the laying of an information, steps may properly be regarded as having been taken 'in the proceedings' for the purposes of s.17(1) (or, for that matter, for the purposes of s.16(6)). Purely by way of example, costs may have been incurred in drafting the summons or charge, in assembling witness statements to be used in the prosecution or in assembling materials which the prosecutor would be required to produce by way of disclosure.

52. It follows that I also agree with Master Whalan who, in *R (TM Eye Ltd) v Pama and Co Ltd and others* 26th February 2021 SCCO reference 239/19 and 240/19, declined to follow Master Rowley's decision in the present case.

53. If my Lord and my Lady agree with what I have said, I would propose that the case is remitted to the Costs Judge to decide which of the pre-commencement costs and expenses come within s.17. The Costs Judge by CCCGR regulation 10(12) will have all the powers of a Determining Officer. I would also remit to the Costs Judge the power to decide whether, in accordance with s.17(2A) of the 1985 Act there are circumstances making it inappropriate for the prosecutor to recover the full amount of the costs as in s.17(1) and, if so, to determine what lesser sum is just and reasonable.

Mrs Justice O'Farrell:

54. I agree.

Lord Justice Dingemans:

55. I agree with the judgment of Nicol J. that the appeal should be allowed and the case remitted to the costs judge. I wanted, however, to say something about whether the Divisional Court had jurisdiction to hear this appeal.

56. As appears from regulation 11(7) of the Costs in Criminal Cases (General) Regulations 1986, set out in paragraph 12 of the judgment of Nicol J., provision is made for the appeal to "be heard and determined by a single judge whose decision is final". This provision in the Regulations exists to ensure, so far as possible, that costs proceedings do not themselves become expensive satellite proceedings following the original criminal proceedings. In circumstances where we have not heard contested argument about the point I do not express a view about whether the reference to Part 52 of the Civil Procedure Rules in regulation 11(7), which itself refers to case management powers in Part 3 of the Civil Procedure Rules, gives jurisdiction to permit the single judge to refer the matter to the Divisional Court and, if there is such jurisdiction, whether the case management discretion should be exercised in accordance with the scheme of the Regulations so that the appeal should be heard only by a single judge.

57. I do agree with Nicol J. that in circumstances where he made an order directing that the appeal should be heard by a Divisional Court, and that order has not been appealed, then this Divisional Court has jurisdiction to hear and determine the appeal. This is for the reasons set out in *Strachan v Gleaner Co Ltd* [2005] UKPC 33; [2005] 1 WLR 3204 at paragraph 29. This is because Nicol J.'s order directing that the hearing be before a Divisional Court is valid and effective unless or until it is set aside on appeal.