[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]

England and Wales Court of Appeal (Criminal Division) Decisions

You are here: BAILII >> Databases >> England and Wales Court of Appeal (Criminal Division) Decisions >> BDI & Ors, R. v [2025] EWCA Crim 1289 (10 October 2025)
URL: *https://www.bailii.org/ew/cases/EWCA/Crim/2025/1289.html*
Cite as: [2025] EWCA Crim 1289

[New search] [Printable PDF version] [Help]

WARNING: reporting restrictions apply to the contents transcribed in this document, as explained in paragraphs 2 and 3 of the judgment. The effect of the restrictions is that the judgment may be published in this anonymised form, but nothing may be published which names the private prosecutors or any of the respondents, or which would otherwise lead members of the public to identify them. The restrictions will continue until the conclusion of the proceedings in the Crown Court, or further order.

Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Neutral Citation Number: [2025] EWCA Crim 1289

IN THE COURT OF APPEAL, CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
10/10/2025

B e f o r e :

LORD JUSTICE HOLROYDE
MRS JUSTICE MAY
and
MR JUSTICE BRIGHT

Between:

THE KING **Appellant**

- and -

(1) BDI

(2) AMU
(3) BFP
(4) ADX
(5) BCX **Respondent**

Counsel (instructed by) for the appellant
Counsel (instructed by) for the Lord Chancellor as Interested Party

Hearing dates: 10 June 2025

HTML VERSION OF APPROVED JUDGMENT

Crown Copyright ©

This judgment was handed down remotely at 10.30am on Friday 10 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Holroyde:

1. Private prosecutors appealed, pursuant to s58 of the Criminal Justice Act 2003, against a ruling by a judge of the Crown Court that the prosecution of the respondents, on charges of conspiracy to defraud and money laundering offences, should be stayed as an abuse of the process. We allowed the appeal and ordered that the proceedings in the Crown Court may be resumed. The private prosecutors applied for an order pursuant to section 17 of the Prosecution of Offences Act 1985 ("s17"; "the POA 1985") that their costs of resisting the application in the Crown Court, and of their appeal to this court, be paid out of central funds. We permitted the Lord Chancellor to intervene in that application, and we received most helpful written and oral submissions on behalf of the private prosecutors and the Lord Chancellor. This is the reserved judgment of the court in relation to the application for costs.

2. At the conclusion of the substantive hearing, we ordered that the reporting restrictions which had been in place pursuant to section 71 of the 2003 Act should remain in force; and further ordered, pursuant to section 4(2) of the Contempt of Court Ac 1981, that no report of the proceedings may be published until the conclusion of the resumed proceedings in the Crown Court. Those proceedings are still continuing, and it has accordingly not been possible thus far to publish the court's judgment on the substantive appeal.

3. The present application raises issues of general importance in relation to the payment from central funds of the costs of a private prosecution. It is desirable that the guidance which we feel able to give in this judgment should be available to judges and legal representatives in other cases. We are able to give our judgment without referring in any detail to the facts of the case or to other features which may identify it. We direct that the reporting restrictions pursuant to s71 of the 2003 Act be disapplied, and our order pursuant to s4(2) of the 1981 Act be varied, to the extent necessary to permit this judgment in its present anonymised form to be published. We emphasise that, in accordance with the order made at the substantive hearing, nothing else may be published which

names any of the respondents or which could otherwise lead members of the public to identify them. These restrictions will continue until the proceedings in the Crown Court have been concluded.

The background to the private prosecution:

4. The private prosecutors, who are not residents of the United Kingdom, allege that they have suffered financial loss as a result of dishonest activity by the respondents which crosses national borders. They initially instructed an attorney, and later a consulting and investigations company, in their own country to make enquiries about the persons involved in the events which had resulted in the loss. As the investigation proceeded, the private prosecutors decided they needed legal representatives in this country. Having no knowledge of the English criminal legal system, they took advice from the investigators and identified two firms who would be able to act in both civil and criminal proceedings. The evidence of the private prosecutors is that they believed there was "likely little difference in cost when using leaders in their field". They selected and instructed a firm of solicitors with offices both in this country and in other countries ("the solicitors").

The commencement of the prosecution:

5. In 2021, the private prosecutors, acting through the solicitors, applied for and were granted summonses against four of the respondents. A summons was later issued against a fifth respondent, who was then joined to the indictment as a further defendant. All the respondents deny the allegations against them.

6. About six weeks after the hearing in a magistrates' court at which the summonses were issued, the solicitors wrote for the first time to the Crown Prosecution Service ("CPS"). They said that the District Judge (Magistrates' Courts) who issued the summonses had asked them to inform the CPS, in case the Director of Public Prosecutions wished to exercise his power under s6(2) of the POA 1985 to take over the proceedings. The solicitors said that the District Judge had not expressed any concern about the continued private prosecution, but thought it right that the CPS "were at least aware due to the international element of the alleged offending". The solicitors then said:

> "The Private Prosecutors are not asking for the case to be taken over but are providing notice to you of these proceedings as directed by the Court."

7. Enclosed with the letter were a copy of a draft prosecution case summary and a copy of the proposed draft indictment which had been filed with the court. The solicitors informed the CPS of the date of the next hearing in the magistrates' court, at which it was anticipated that the case would be transferred to the Crown Court. They added that they had obtained restraint orders against three of the respondents and that steps were to be taken to restrain assets in another country. The solicitors' letter concluded with an expression of willingness to provide any further information the CPS might require.

8. The CPS did not reply to that letter. The private prosecution of the respondents continued.

Further proceedings in the Crown Court:

9. A trial date in 2023 was fixed, but the fixture later had to be broken. In the event, the date fixed for trial was in 2024, more than two years after the prosecution had been commenced. There were a significant number of hearings during that period. These included several hearings which culminated in one of the respondents being committed to prison for breaches of a restraint order.

The request for the CPS to take over, and discontinue, the prosecution:

10. In 2022, one of the respondents made a request to the CPS to take over the prosecution and discontinue it. The private prosecutors were requested to, and did, provide the CPS with all the served evidence and unused material. More than a year after the request was made, a senior CPS specialist prosecutor ("the senior prosecutor") replied. The request was refused. The senior prosecutor expressed the view that both the evidential sufficiency stage and the public interest stage of the Full Code test were met in relation to each of the respondents, and that there were no factors making it in the interests of justice for the CPS to take over the case and close it down. He further stated that there was no need for the CPS to take over the case and continue it: he was satisfied that it was a serious case which had been properly investigated and was being properly prosecuted by the private prosecutors, who were assisted by experienced and very capable solicitors and counsel.

The abuse application:

11. At a hearing some months before the scheduled trial date, the judge heard argument on a number of issues, including an application by all the respondents to stay the proceedings as an abuse of the jurisdiction.

12. As we have stated, the judge granted that application. The private prosecutors appealed successfully against the judge's decision. By then, however, the scheduled trial date had been lost. The resumed proceedings have therefore not yet reached a trial.

The application for costs:

13. At the conclusion of the substantive appeal hearing, the private prosecutors indicated that they wished to claim their costs from central funds. They were directed to, and did, make their costs application in writing to the Registrar of Criminal Appeals ("the Registrar"). They have provided summaries and schedules of the work done by the solicitors and by counsel in relation to the abuse application in the Crown Court and the appeal to this court. They claim a total sum of £187,970. They ask the court either to order costs summarily assessed in that sum, or to order that the amount of the costs be assessed.

14. Before summarising the competing submissions of the private prosecutors and the Lord Chancellor, we set out the legal framework.

Relevant statutory provisions:

15. Part 1 of the POA 1985 contains provisions relating to the constitution and functions of the CPS (referred to in the Act as "the Service"). The CPS is headed by the Director of Public Prosecutions (referred to in the Act as "the Director"). The functions of the Director include, by s3(2)(b), a duty:

> "to institute and have the conduct of criminal proceedings in any case where it appears to him that –
>
> (i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or
>
> (ii) it is otherwise appropriate for proceedings to be instituted by him."

16. By s6 of the POA 1985:

"**6 Prosecutions instituted and conducted otherwise than by the Service**

(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.

(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage."

17. Part II of the POA 1985 contains provisions relating to defence, prosecution and third party costs in criminal cases. So far as is material for present purposes, s17 provides:

"**17 Prosecution costs.**

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

(a) in any proceedings in respect of an indictable offence … order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.

…

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

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

(a) the prosecutor agrees the amount, or

(b) subsection (2A) applies.

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

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

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

…

(5) Where the conduct of proceedings to which subsection (1) above applies is taken over by the Crown Prosecution Service, that subsection shall have effect as if it referred to the prosecutor who had the conduct of the proceedings before the intervention of the Service and to expenses incurred by him up to the time of intervention."

18. We note in passing that s16 of the POA 1985 relates to an award of costs from central funds to a defendant ("a defendant's costs order"). Subsections (6A) and (6B) contain provisions which,

mutatis mutandis, are in the same terms as subsections (2A) and (2B) of s17.

19. Section 18 gives the court a power to order that a convicted accused, or unsuccessful appellant, should pay to the prosecutor such costs as the court considers just and reasonable.

20. Section 20(1) gives the Lord Chancellor a general power to make regulations for carrying Part II into effect. Subsection (1A) provides that the Lord Chancellor may by regulations:

> "(a) make provision as to the amounts that may be ordered to be paid out of central funds in pursuance of a costs order, whether by specifying rates or scales or by making other provision as to the calculation of the amounts,
>
> (b) make provision as to the circumstances in which and conditions under which such amounts may be paid or ordered to be paid,
>
> (c) make provision requiring amounts to be paid out of central funds by a costs order to be calculated having regard to regulations under paragraphs (a) and (b),
>
> (d) make provision requiring amounts required to be paid out of central funds by a relevant costs order to be calculated in accordance with such regulations (whether or not that results in the fixing of an amount that the court considers reasonably sufficient or necessary to compensate the person), and
>
> (e) make provision as to the review of determinations of amounts required to be paid out of central funds by costs orders."

21. Pursuant to those statutory powers, the Lord Chancellor has made the Costs in Criminal Cases (General) Regulations 1986 ("the Costs General Regulations"). Part III contains provisions relating to costs out of central funds. They include the following:

> "**5 The appropriate authority**
>
> (1) Costs shall be determined by the appropriate authority in accordance with these Regulations.
>
> (2) Subject to paragraph (3), the appropriate authority shall be –
>
> (a) the registrar of criminal appeals in the case of proceedings in the Court of Appeal
> …
>
> (3) The appropriate authority may appoint or authorise the appointment of determining officers to act on its behalf under these Regulations in accordance with directions given by it or on its behalf.
>
> **6 Claims for costs**
>
> …
>
> (2) Subject to paragraph (3), a claim for costs shall be submitted to the appropriate authority in such form and manner as it may direct and shall be accompanied by any receipts or other documents in support of any disbursements claimed.

(3) A claim shall –

(a) summarise the items of work done by a solicitor,

(b) state, where appropriate, the dates on which items of work were done, the time taken and the sums claimed, and

(c) specify any disbursements claimed, including counsel's fees, the circumstances in which they were incurred and the amounts claimed in respect of them.

(4) Where there are any special circumstances which should be drawn to the attention of the appropriate authority, the applicant shall specify them.

(5) The applicant shall supply such further particulars, information and documents as the appropriate authority may require.

7 Determination of costs

(1) The appropriate authority shall consider the claim, any further particulars, information or documents submitted by the applicant under regulation 6 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,

as it considers reasonably sufficient to compensate the applicant for any expenses properly incurred by him in the proceedings.

(2) In determining 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) When determining costs for the purposes of this regulation, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and 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."

22. Rule 45.4 of the Criminal Procedure Rules applies where the court can order the payment of costs out of central funds. It gives practical effect to the provisions of the POA 1985 and the Costs General Regulations. The rule includes the following paragraphs:

"(6) The general rule is that the court must make an order, but –

…

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

(c) the court may decline to make an order if the applicant fails to provide enough information for the court to decide whether to make an order at all and, if so, whether it should be for the full amount recoverable or for a lesser sum.

> (7) If the court makes an order –
>
> (a) the general rule is that it must be for such amount as the court considers reasonably sufficient to compensate the applicant for any expenses properly incurred in the proceedings;
>
> (b) where the court considers there to be circumstances making it inappropriate for the applicant to recover that amount then the order may be for such lesser amount as the court considers just and reasonable;
>
> (c) the court may fix the amount to be paid in a case in which either –
>
> (i) the recipient agrees the amount, or
>
> (ii) the court decides to allow a lesser sum than the full amount otherwise recoverable; and
>
> (d) if the court does not fix the amount itself it must direct an assessment under, as applicable –
>
> (i) Part III of the Costs in Criminal Cases (General) Regulations 1986 …
>
> (10) If the court directs an assessment, the order must specify any restriction on the amount to be paid that the court considers appropriate."

23. The Practice Direction (Costs in Criminal Proceedings) 2015 [2015] EWCA Crim 1568, as amended ("the Costs Practice Direction"), has effect where this court considers an award of costs in criminal proceedings. Paragraph 1.3.1 states that where the court orders that the costs of a private prosecutor should be paid from central funds, the order will be for such amount as the court considers "sufficient reasonably to compensate the party for expenses incurred by him in the proceedings"; unless the court considers that there are circumstances that make it inappropriate to allow the full amount, in which event the court will allow "such lesser sum as it considers just and reasonable".

24. Paragraph 1.4.1 states that where the court makes an order in favour of a private prosecutor, but is of the opinion that there are circumstances which make it inappropriate that the prosecutor should recover the full amount of the costs:

> "… the court may assess the lesser amount that would in its opinion be just and reasonable, and specify that amount in the order. If the court is not in a position to specify the amount payable, the judge may make remarks which the appropriate authority will take into account as a relevant circumstance when determining the costs payable."

25. Paragraph 2.6.1 states that in a case in which the costs of a private prosecutor may be awarded out of central funds:

> "An order should be made save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause."

Relevant case law:

26. We were referred to, and have considered, a substantial bundle of authorities. We extract from the case law the following points.

27. In *Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1964] 3 All ER 833 ("*Simpsons Motor Sales*"), the losing party in an action in the Chancery Division was ordered to pay the costs of the successful party. An issue arose as to the proper amount to be paid in respect of counsel's fee. Pennycuick J held, at p838C:

> "… one must envisage an hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief … There is, in the nature of things, no precise standard of measurement."

28. In *R v Dudley Magistrates' Court, ex parte Power City Stores Ltd* (1990) 154 JP 654 ("*Dudley Magistrates*") a magistrates' court had dismissed the charges against the accused and made a defendant's costs order. In assessing the amount to be paid under that order, the justices' clerk disallowed a claim for the fee of leading counsel, on the ground that the matters alleged against the accused could more than adequately have been dealt with by a senior solicitor or junior counsel. On an application for judicial review, a Divisional Court quashed that determination. Provisions corresponding, *mutatis mutandis*, to those in s17(1) and (2A) of the POA 1985 were then contained in s16(6) and (7). Woolf LJ (as he then was) stated a test which has subsequently been followed by courts ordering the payment of costs out of central funds:

> "It appears to me that subs (6) and subs (7) presuppose that, in properly assessing the amount of costs that are to be allowed in respect of a defendant's costs order, the appropriate taxing authority will carry out a two-stage exercise, first of all, consider what amount will be reasonably sufficient to compensate the defendant for any expenses properly incurred by him in the proceedings. In order to fulfil the requirements of stage 1 he has to ask himself first of all, whether the expenses are ones which were properly incurred by the defendant. …
>
> Having come to the conclusion that the expenses are properly incurred the court's next task is to consider the amount which is reasonably sufficient to compensate the defendant for those costs. That is a question of quantum. If there are no untoward circumstances that is the end of the task of the taxing authority under the provisions of s16. However, there can be a situation where subs (7) comes into play. That is a situation where the court is of the opinion that there are circumstances which make it inappropriate that the person, in whose favour the order is made, should recover the full amount mentioned in subs (6). Subsection (7) is dealing with a situation where there is something which causes the court to consider that what would normally be the result of taxation should not apply to this particular case."

29. On the specific issue as to the fee of leading counsel, the court held that the appropriate question, which the justices' clerk should have asked himself, was whether the defendant had acted reasonably in instructing the counsel they did, and not whether more junior counsel or a solicitor could adequately have dealt with the case. Having asked himself the wrong question, the clerk had not considered the second stage of the test at all. The effect of the court's order was that the justices' clerk would be required to accept that it had been reasonable to instruct leading counsel, and to assess what fees were properly recoverable in respect of leading counsel's fees.

30. In *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 132 the taxation of costs in a civil action raised an issue as to whether the successful party could properly claim for their solicitors' work at the rates applicable to London (where the solicitors were based) rather than Sheffield (where the cause of action arose and the proceedings were heard). At p96F the Court of Appeal upheld the approach stated by Potter J at first instance: the court should first consider whether costs were reasonably incurred and, if they were, should then consider what was a reasonable amount. In respect of the first question, costs might not have been reasonably incurred if they had been increased by engaging a solicitor who was "an unsuitable or 'luxury' choice"; but the focus was primarily upon the reasonable interests of the party in whose favour costs were awarded, and whether that party's choice of solicitor was reasonable having regard to the extent and importance of the litigation to a reasonably minded party. In respect of the second question:

> "… solicitors' hourly rates will be assessed, not on the basis of the solicitor's actual charging rates, but (in a case where the decision to retain was reasonable) on the basis of the broad costs of litigation in the area of the solicitor retained or (in a case where the choice made was not reasonable) of the type or class of solicitor who ought to have been retained."

31. In *Barry v Birmingham Magistrates' Court* [2009] EWHC 2571 (Admin) a Divisional Court confirmed that a person who wanted to bring a private prosecution was not invariably required to make a complaint to the police before applying to a justice of the peace for a summons. The failure to do so might, however, be a relevant circumstance to be taken into account by the justice in deciding whether to issue a summons.

32. In *R (on the application of the Law Society) v Lord Chancellor* [2010] EWHC 1406 (Admin) ("*Law Society*") a Divisional Court granted an application for judicial review of the Lord Chancellor's making of a new reg 7 of the General Regulations, the effect of which was to limit a successful defendant to the recovery of costs under a defendant's costs order at legal aid rates. The new regulation was held to be *ultra vires* the power conferred by s20 of the POA 1985, which could not be used to undermine or subvert the principle of compensation set out in s16(6). Elias LJ, with whom Keith J agreed, held at [48] that the amount a defendant would have to pay to secure the services of a lawyer would be determined by the prevailing market; at [49], that it was common ground that lawyers could not usually be hired privately at legal aid rates; and at [51], that the Lord Chancellor could not stipulate what sums he deemed to be a reasonable reward for the services of a lawyer.

33. At [52], Elias LJ stated that the obligation under s16(6) was to provide a sum of money which was reasonably sufficient to compensate the successful defendant. The relevant measure, he said, was the principle of compensation, "albeit one which is constrained by considerations of what is reasonable and proper expenditure". He accepted, at [53], a submission that, in context, compensation meant recompensing the defendant for the expenditure that had been incurred, within those constraints.

34. In *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52, [2014] 1 WLR 2228 this court was concerned with an appeal against a compensation order made following a successful private prosecution. Lord Thomas CJ, giving the judgment of the court, noted at [57] that retrenchments in the funding of the CPS and the Serious Fraud Office made it seem inevitable that the number of private prosecutions would increase, particularly in areas relating to the criminal misuse of intellectual property. He observed that in the overwhelming majority of such cases, a prosecution would serve the public interest in addressing such criminal conduct. At [58], the Lord Chief Justice continued:

> "However, it must be noted that the expense to the public purse may be greater given the way in which section 17 of the Prosecution of Offences Act 1985 operates and the fact that the use of criminal proceedings circumvents the fees charged in the civil courts for the recovery of damages by way of compensation. Consideration of the interrelationship of a reduction in the provision of funds to public prosecutors, the prospect of an increase in the sums paid to successful private prosecutors under section 17 and the avoidance of fees in the civil courts is entirely a matter for the executive branch of the state and in particular the Ministry of Justice."

35. The successful private prosecutors in that case applied for their costs of the appeal to be paid out of central funds. We shall refer to the decision of the court (differently constituted) on that application (*R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823, [2014] 5 Costs LR 8) as "*Zinga*". The court considered s17 of the POA 1985, reg 7 of the Costs General Regulations, and paragraph 2.6.1 of the Costs Practice Direction. It also considered Guidance published by the Ministry of Justice to the effect that determining officers assessing the costs of a private prosecutor would be guided by the rates set out in the Senior Courts Costs Office Guide to the Summary Assessment of Costs in civil cases.

36. At [19] Lord Thomas CJ confirmed that in considering costs recoverable under a defendant's costs order there were two questions, as stated in *Dudley Magistrates*:

> "(i) Whether it was proper and reasonable to instruct the solicitors and/or advocates actually instructed. It did not matter whether the work could have been done adequately by someone by someone less experienced, provided it was proper and reasonable to instruct those instructed.
>
> (ii) If it was proper and reasonable, then the costs were recoverable, provided the costs were reasonable."

37. At [20], it was held that there was no good reason not to adopt the same approach to the identical language in s17 of the same Act.

38. However, at [21] the Lord Chief Justice noted that the way in which the legal profession is retained, and the way in which it renders its charges, have changed significantly since the decision in *Dudley Magistrates*. He observed that it is now commonplace for commercial clients to seek quotations or tenders and to negotiate the basis on which fees are charged. At [22] the court held that in relation to the test in *Dudley Magistrates*:

> "(i) In determining the first question, namely whether a person, whether it be a corporate body or private individual, has acted reasonably and properly in instructing the solicitors and advocates instructed, the court will consider what steps were taken to ensure that the terms on which the solicitors and advocates were engaged were reasonable. It was submitted on behalf of the Interveners that they do not pursue private prosecutions lightly but only where state prosecuting authorities are unwilling to prosecute or where the nature of the case makes it inappropriate; as this is the position of highly responsible industry bodies, a court may also have regard to the steps taken to involve State prosecuting authorities.
>
> (ii) In any significant prosecution the private prosecutor would be expected properly and reasonably to examine the competition in the relevant market, test it and seek tenders or quotations before selecting the solicitor and advocate instructed.

> (iii) We must emphasise that it will rarely, if ever, be reasonable in any such case, given the changes in the legal market to which we have referred, to instruct the solicitors and advocates without taking such steps. Although for the reasons we give at paras 23 and 24 below that issue does not arise in this matter, it will be highly material on all future applications.
>
> (iv) In determining whether the costs which are charged are proper and reasonable in a criminal case, the court will also have regard to the relevant market and the much greater flexibility in the way in which work is done.
>
> (v) The court will also have regard to the Guidance given by the Ministry of Justice."

39. At the conclusion of the judgment, at [38] ff, the court made some Observations for the Future. It referred to what had been said at [58] in the judgment on the appeal against the compensation order (see paragraph 34 above). It accepted that in certain areas of criminal prosecutions, some specialist knowledge of an area of law is necessary, but referred to the expertise and experience of the Specialist Fraud Division of the CPS.

40. At [43] the court stated that it is in the public interest that the CPS is properly resourced to conduct such difficult and complex proceedings:

> "The consequences of the CPS not being so resourced is detrimental to the public purse. The costs of a private prosecution, whether successful or unsuccessful, are recoverable from the taxpayer; the use of private prosecutors will almost inevitably cost the State much more than the use of a State prosecutor, such as the CPS."

41. The court concluded the judgment at [45] by stating:

> "The experience of this court is that there is unlikely to be any difference of quality between a prosecution brought by the State and a private prosecution. In the present state of public finances and the funds available for the proper administration of justice, it cannot be right that resources are deployed by the State in such a way that an opportunity is provided for prosecutions to be brought by private interests at a cost to the State which is likely to be far greater than if the prosecution were undertaken by the State. No doubt the savings to public expenditure can be used for the benefit of the proper administration of justice."

42. In *Evans v The Serious Fraud Office* [2015] EWHC 1525 (QB), [2015] 3 Costs LR 557 ("*Evans*"), defendants against whom a charge of conspiracy to defraud had been dismissed were awarded costs from central funds in circumstances where the prosecution was found to have been responsible for an "unnecessary act or omission" (s19 of the POA 1985). At [25(i)], Hickinbottom J (as he then was) accepted that it is not appropriate to use publicly funded comparators when assessing privately funded costs. In relation to counsel's fees, he applied the test stated in *Simpsons Motor Sales* (see paragraph 27 above), and held that the rates charged by counsel exceeded the reasonable fees of the hypothetical counsel, and were therefore not reasonable. In relation to the solicitors' charges, he took the guideline hourly rates for summary assessment as his starting point.

43. In *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404 (Comm), Leggatt J (as he then was) ruled on applications for payment on account of costs in proceedings in the Commercial Court. At [13] he said:

> "In a case such as this where very large amounts of money are at stake, it may be

> entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party."

44. In *Fuseon Ltd v Senior Courts Costs Office* [2019] EWHC 126 (Admin), [2020] Costs LR 251 ("*Fuseon*"), a businessman who had suffered loss as a result of fraud reported the matter to the police. The police declined to investigate, citing the effects of "austerity", which required them to prioritise investigations into other types of crime. The businessman brought a successful private prosecution. He was awarded costs from central funds in an amount substantially less than he had claimed.

45. On appeal against that award, Lane J at [43] referred to the approach endorsed by the Court of Appeal in *R v Supreme Court Taxing Office ex parte John Singh and Co* [1997] 1 Costs LR 49 , of not only examining each item of costs claimed, but also "standing back from the total hours claimed for each class of work done to assess whether globally it was reasonable" ("the *Singh* reduction"). At [100], Lane J expressed the view that the decision in *Zinga* is inconsistent with using the CPS as a comparator for the purpose of applying a *Singh* reduction. At [105], he summarised the correct approach as follows:

> "As I have already noted, the claimant rightly does not contend that the *Singh* reduction can play no part in the assessment of costs of private prosecutors. I also do not consider it can be said, as a matter of law, that it will necessarily be wrong to look at CPS costs, when determining the amount of costs to be awarded to a private prosecutor. If an individual resolves to embark on a private prosecution with no regard to whether the state is willing and able to prosecute, a comparison with the CPS might be legitimate. That, however, was not the position in the present case."

46. In *R (TM Eye Ltd) v Crown Court at Southampton* [2021] EWHC 2624 (Admin), [2022] 1 WLR 1114 ("*TM Eye*"), the trial judge had refused to award private prosecutors any costs from central funds. The private prosecutors' claim for judicial review of that refusal was dismissed. A Divisional Court held, at [51] – [53], that where an application is made for an order under s17:

> "51. … the court must consider first whether to exercise its discretion under section 17(1) in favour of making an order for payment out of central funds. By Crim PR r45.4(5), there is a general rule in favour of an award being made; and often it will be clear that such an award is appropriate. But s17(1) is permissive, and the court is entitled in an appropriate case to decline to make any award.
>
> 52. If the court exercises its discretion in favour of making an award under section 17(1) … it must be an order for the payment in full of such sum as is considered reasonably sufficient to compensate the prosecutor for expenses properly incurred in the proceedings.

> 53. Section 17(2A), however, enables the court in an appropriate case to award the private prosecutor less than the full amount of that reasonably sufficient sum. We reject [counsel's] submission that the court can only do so in cases of misconduct. Parliament has imposed no such restriction: section 17(2A) refers more widely to the court's considering that there are 'circumstances that make it inappropriate for the prosecution to recover the full amount'. Rule 45.4(5)(b) and paragraph 2.6.1 of the Practice Direction (Costs in Criminal Proceedings) provide examples of circumstances which may be regarded as making full recovery inappropriate; but those examples are plainly not exhaustive. The court must make a case-specific decision as to whether it is appropriate to award costs from central funds at all and, if so, whether to limit that award in any way."

47. It should be noted that the reference in that quotation to Crim PR r45.4(5)(b) is to the terms of that rule which were in force in 2021: the rule has subsequently been amended.

48. In *R (Chapter 4 Corp Dba Supreme) v The Crown Court at Southwark* [2023] EWHC 1362 (Admin), [2023] Costs LR 897 ("*Chapter 4*"), at [29], it was held by a Divisional Court that where a court orders a reduction under s17(2A), and does not itself fix the amount in its order:

> "… the order must describe the reduction to be applied. That does not mean that a specific sum must be identified. Rather, the order must set out the percentage reduction or the means by which the reduction is to be calculated."

49. At [31], the court described s17(2A) as a provision which:

> "… complements the long standing inherent jurisdiction of a trial judge to make comments about matters relevant to the taxation of costs."

50. In *R (Allseas Group SA) v Sultana* [2023] EWHC 2731 (SCCO) ("*Allseas*") the circumstances were that private prosecutors had suffered loss as a result of fraudulent activity by a number of persons. They brought civil proceedings against some of those persons. They then learned that the CPS had decided to charge some persons, but not Mr Sultana. Having failed to persuade the CPS to a different decision, they embarked upon a private prosecution and instructed the solicitors who were already acting for them in the civil proceedings and other proceedings relating to the fraudulent activity. After a lengthy trial, the jury were unable to reach a verdict and were discharged. The private prosecutors then applied to the CPS to take over the conduct of the prosecution, which the CPS declined to do. The private prosecutors conducted a retrial, at which Mr Sultana was convicted.

51. The trial judge made an order pursuant to s17. The costs payable from central funds pursuant to that order were initially assessed by a determining officer. The private prosecutors appealed against her ruling. The Costs Judge who heard the appeal gave a detailed ruling on his determination or assessment ("the words being interchangeable for present purposes") of the costs.

52. The judge held, at [78], that neither he, nor the determining officer who had initially assessed the costs, had any power to make an order under s17(2A) limiting the costs to be awarded. The jurisdiction to make such an order could only be exercised by the court which made the order under s17.

53. The judge noted, at [102], that in the circumstances of that case, the Lord Chancellor had accepted that the private prosecutors' choice of the solicitors who would act for them in the criminal

proceedings was objectively a reasonable choice. The choice had been made without any tendering exercise being carried out. At [116], the judge held that as the choice of solicitors was a reasonable one, it followed that the decision not to undertake a tendering process was also a reasonable one: given that the solicitors were the reasonable choice, "a tendering process would have been an empty gesture".

54. In relation to counsel's fees, the Lord Chancellor submitted that in the absence of any tendering process, the assessment of what would amount to reasonably sufficient compensation should be made by reference to CPS rates. The judge at [162] rejected that submission. Relying on *Evans* and *Fuseon*, he held that, even assuming there had been no adequate tendering process, it was not appropriate to use publicly funded comparators when assessing privately funded costs. The judge went on, however, to adopt the 'hypothetical counsel' test in *Simpsons*: at [164] he stated that, based on his own experience of assessing costs, he did not find it credible that counsel competent to take on the case would have done so for fees "at anything like the level suggested by the Lord Chancellor".

55. At [165] ff, the judge said that left a question of principle to be addressed:

> "165. … In the absence of any or any adequate tendering process on selecting of prosecuting counsel, precisely how is the element of doubt (which must, by reference to regulation 7(3) of the 1986 Regulations, be resolved against the Appellant) to be resolved?
>
> 166. I would observe that a tendering exercise is not simply a matter of identifying and choosing the cheapest available option. The cheapest option may not be the best one. It was incumbent upon the Appellant only to make a reasonable choice in all the circumstances. The point of the tendering process is that it helps to establish that that was done. To assume that the Appellant should have chosen the least expensive option, and to award costs accordingly, would be to repeat the error identified by Woolf LJ in *R v Dudley Magistrates' Court*.
>
> 167. *Zinga*, at paragraph 19, makes it clear that if the choice of legal representative is reasonable, then that legal representative's costs will be recoverable, in so far as reasonable. Where the choice of legal representative is not reasonable, or there is doubt as to whether the choice of legal representative is reasonable, then in my view the correct approach must (bearing in mind *Wraith* and the other authorities to which I have referred) be to identify the level of cost that would have been attendant upon a reasonable choice, and to assess reasonable costs accordingly, by reference to the work actually done."

56. Adopting that approach, the judge concluded, at [169] that any element of doubt created by an inadequate tendering process could, so far as hourly rates were concerned, be resolved by having due regard to the guidance given in *Evans*.

57. After that lengthy review of many of the cases cited to us, we return to the submissions. It is common ground that all the charges which have been brought against the respondents allege indictable offences, and that s17 is accordingly engaged.

The submissions to this court:

58. The respondents, the defendants in the continuing criminal proceedings, have made no submissions

and taken no part in this application for costs.

59. For the Lord Chancellor, it is submitted that this court should reduce the amount of the costs claimed, because of what are said to be serious deficiencies in the application for costs; and/or that this court should make an order pursuant to s17(2A) limiting the costs to those which would have been charged to the state if the CPS had conducted the prosecution; or alternatively, should direct that the costs of the solicitors' work should be based on the guideline rates applicable to National Band 1, and that the costs of counsel should be those which represent a competitive rate in the market for an appeal of this kind.

60. The submissions on behalf of the Lord Chancellor emphasise what was said in *Zinga* at [22] (see paragraph 38 above), which – it is said – impose requirements that an applicant must set out what steps were taken to ensure that the terms on which legal representatives were engaged were reasonable, and what steps were taken to involve state prosecuting authorities. It is submitted that the importance of the first of those requirements is illustrated by *Law Society*, and the importance of the second is illustrated by *Fuseon*, *TM Eye* and *Chapter 4*. It is further submitted that a failure to make a properly-formulated application may have serious consequences, because after 56 days from the date when the order under s17(1) is made, the trial court can no longer make any correction under the slip rule, and there is only limited scope for the Lord Chancellor to apply for judicial review of the order.

61. In the present case, it is submitted, the private prosecutors failed to state in their application that they had taken no steps to involve the police and the CPS before commencing the prosecution, and failed to set out what steps they had taken to test the market before instructing the solicitors and counsel. Complaint is made that the private prosecutors did not mention in their application the fact that they and the Lord Chancellor are currently engaged in assessment proceedings in respect of costs incurred in applying for restraint orders.

62. The Lord Chancellor submits that if, as happened here, a substantial prosecution is commenced without seeking to involve the police, and/or without asking the CPS to prosecute before issuing the summonses, then the private prosecutors' costs awarded pursuant to a s17 order should be capped at CPS rates. It is further submitted that the private prosecutors, on their own account of their actions, carried out no structured tendering process before instructing either the solicitors or counsel.

63. The core submission on behalf of the Lord Chancellor is that the public purse should not have to pay increased costs when the private prosecutors took no steps to involve the state prosecuting authorities. In accordance with the test stated by Leggatt J ("the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances": see paragraph 43 above), it is submitted, the amount "reasonably sufficient" to compensate the private prosecutors should be the costs which would have been incurred by the CPS.

64. The Lord Chancellor does not accept that the private prosecutors' selection of the solicitors was reasonable; but even if it was, it is submitted, the solicitors were not chosen by market tender. It is submitted that part of the decision of the Costs Judge in *Allseas*, namely that quoted in the last sentence of paragraph 53 above, was made in error, because the costs of a private prosecutor must be limited to that which is reasonably sufficient by reference to the market.

65. We note that the Lord Chancellor has indicated a willingness to bear his own costs of intervening in this application for costs.

66. In response, the private prosecutors deny that their application for costs was defective, and submit that there is no basis for the court to make an order under s17(2A) – a type of order which, it is submitted, should not be made lightly. They observe that any costs which were unreasonably incurred, or were unreasonable in amount, would in any event be disallowed on the assessment of costs pursuant to an order under s17(1). They accept that *Zinga* at [22] identifies factors which will be relevant to that assessment; but they deny that that paragraph sets down hard and fast rules, any breach of which would result in a reduction in the award of costs which would otherwise be reasonable.

67. The private prosecutors submit that it was perfectly reasonable for them to commence this prosecution without having first referred to the police or the CPS. They point to a comment by the CPS senior prosecutor, in his letter referred to in paragraph 10 above, that the way in which the case had been handled to that date demonstrated that the international reach of the solicitors "can have benefits to a prosecution which a public prosecutor would find it harder to match". The private prosecutors emphasise that they instructed the solicitors to act in the investigation of the suspected fraud at least nine months before this prosecution was commenced, and that during that period the solicitors had investigated matters both in the UK and elsewhere, and had made two applications for "*Norwich Pharmacal*" orders against UK banks. They submit that later instruction of a different firm would inevitably have resulted in duplication of work, delay and increased cost.

68. The private prosecutors accept that the market for legal services is obviously relevant to the question of what costs it is reasonable to incur; but so too, they submit, is the reasonableness of their decision to instruct the solicitors. They submit that it was reasonable for them to pursue the prosecution privately and to instruct legal representatives for that purpose: they contend that this is not a case in which the CPS was willing and able to prosecute, but was given no opportunity to do so. Relying in particular on *Fuseon*, they submit that CPS rates can therefore have no relevance as a comparator. They emphasise that there is no requirement in law for a private prosecutor to report a matter to the state authorities, and submit in any event that it is far from clear that the CPS would have wanted to take over this complex prosecution even if they had been notified before it began. They rely on the senior prosecutor's 2023 letter (see paragraph 10 above) as an indication of the likely response of the CPS if invited in March 2021 to take on this prosecution.

69. As to the rates at which the solicitors' work should be paid, the private prosecutors accept that a failure to test the market may make it more difficult for a private prosecutor to satisfy a determining officer that the costs incurred were reasonable. They contend, however, that *Zinga* at [22] does not require that a s17(2A) order should be made, simply because no sufficient tendering exercise was carried out, even though it was objectively reasonable to instruct particular solicitors at a particular cost. To make a s17(2A) order in such circumstances would amount, it is submitted, to an unfair penalising of the private prosecutors. On the facts here, it is submitted, the conducting of a tendering process before commencing the prosecution would have wasted time (in circumstances where it was important to act quickly, in particular to obtain restraint orders), and would likely have resulted in increased costs if different solicitors had been instructed who would have had to read into the case.

70. The private prosecutors submit that it was reasonable for them, resident abroad, to select solicitors based in London, and to accept the recommendation of their investigators (who would have to have a good working relationship with whichever solicitors were instructed). They point in this regard to *Wraith* at p141D, where the fact that a plaintiff had sought advice, and acted in accordance with that advice, was recognised as a relevant factor in considering the reasonableness of his decision to appoint those representatives. In the present case, they submit that, even if others based outside London may have been capable of conducting the proceedings, that does not affect the

reasonableness of the decision to instruct the solicitors. It is therefore submitted that the appropriate comparator is the Guideline Hourly Rates for solicitors based in Central London.

71. As to counsel's fees, the private prosecutors submit that the appropriate test is that stated in *Simpsons*. They suggest that the hourly rates charged by counsel are less than those which were allowed in *Evans*, uprated for inflation. They submit that the appropriate rate can properly be determined on assessment under s17(1), and that there is no justification for a reduction pursuant to s17(2A).

72. As to the suggested deficiencies in their application, the private prosecutors submit there is a sharp contrast between their detailed application (which fully complied with the requirements of Crim PR r45.4) and the inadequate applications made in *TM Eye* and *Chapter 4*.

73. Both the private prosecutors and the Lord Chancellor are content that this court should make an order pursuant to s17(2C) for the determination of the amount of the costs to be awarded from central funds. They differ, however, as to who should carry out that determination. The private prosecutors submit that it should be the Costs Judge who is already seized of the assessment of costs in relation to the contempt proceedings arising from breaches of the restraint order. The Lord Chancellor submits that it should be a determining officer, in accordance with reg 5 of the Costs General Regulations.

74. We are grateful to counsel and those instructing them for their submissions. Having reflected on them, our conclusions are as follows.

Analysis:

75. We begin by setting out principles of general application in cases in which a private prosecution is undertaken by an individual or entity other than the police or a state prosecuting authority (a term which, for present purposes, includes those entities which have statutory power to conduct prosecutions).

76. When Parliament established the CPS, it preserved (in all but some reserved cases) the right of other persons to bring a private prosecution: see s6 of the POA 1985 (quoted at paragraph 16 above). A person who wishes to bring a private prosecution is under no legal duty first to report the matter to the police and/or the CPS (or any other state prosecuting authority), and under no legal duty to invite the CPS to conduct the prosecution, either before it has been commenced or whilst it is proceeding. The CPS, save in the reserved cases, has a power to take over the conduct of the proceedings at any stage, but is under no duty to do so.

77. Parliament also provided, by s17 of the POA 1985, for criminal courts to have a discretionary power to order that an amount reasonably sufficient to compensate for the expenses properly incurred by a private prosecutor be paid out of central funds. That power may be exercised, in an appropriate case, whether or not the private prosecution results in any conviction. Furthermore, as this case illustrates, no statutory provision prevents the court from ordering the payment out of central funds of expenses incurred in relation to a discrete application or appeal, even though the case has not reached trial and it would not be possible for an award under s18 to be made against the accused at that stage of the proceedings.

78. The general rule is that an order under s17(1) in favour of the private prosecutor must be made, unless there is some good reason not to do so: see Crim PR r45.4(6) and paragraph 6.2.1 of the Costs Practice Direction (see paragraphs 22 and 25 above). We should make clear that, because no

award of costs against the respondents could be sought at this stage of the present case, we do not here address the question of whether a failure to apply for an order for costs against a convicted defendant would of itself be a good reason not to make an order under s17(1).

79. The consequence of these provisions is that every private prosecution carries with it the potential for a claim for the costs of the prosecutor – in some cases, very substantial costs – to be made against the public purse. And, for the reasons explained by the Lord Chief Justice in *Zinga* (in the passages which we have cited at paragraphs 39-41 above), the cost to the state is likely to be far greater than it would be if the prosecution were undertaken by the state. We respectfully agree with, and adopt, those observations. The public funding of the criminal justice system is inevitably subject to a limit. It follows that, if an order under s17 of the POA 1985 results in a cost to the state which is greater than would have been incurred if the state authorities had undertaken the prosecution, the public funds available for other criminal cases are likely to be reduced. If the appropriate state authority was able and willing to undertake a particular prosecution, or would have been if it had been given a reasonable opportunity to do so, an obvious question arises as to whether the cost to the public purse should be increased by a private prosecutor choosing to pursue his own course. The asking of that question does not limit the right of an individual to undertake a private prosecution: it relates simply to the extent to which he can recover his costs from central funds.

80. We therefore emphasise the importance of what was said at paragraph 22 of *Zinga* about the need for a court, when considering in relation to a significant prosecution whether to make any, and if so what, order under s17(1) of the POA 1985, to have regard to the steps taken by a private prosecutor to involve the state prosecuting authorities and to test the market for appropriate legal representation. True it is, as counsel for the private prosecutors submits in this case, that the Lord Chief Justice was not there laying down inflexible rules, any breach of which would necessarily result in the refusal of an order under s17(1). But in our view, any private prosecutor who fails to take appropriate steps, or fails sufficiently to inform the court about them in his application for an order under s17, puts himself at risk that the application will be refused, or that any award will be reduced by an order under s17(2A) to the level of costs which would have been incurred if the state authorities had prosecuted the case.

81. The reasons why that is so include the following.

82. First, as is clear from *TM Eye* at [51]-[53] (quoted at paragraph 46 above), the court must first consider whether in the exercise of its discretion to make any order under s17(1) of the POA 1985 at all. If it does make such an order, it must be for the payment in full of such sum as the court considers reasonably sufficient to compensate the private prosecutor for the expenses he has properly incurred in the proceedings (for convenience, "the reasonably sufficient sum"). The wording of s17(1) plainly contemplates that the reasonably sufficient sum may be less than the sum claimed. But in addition, in an appropriate case, s17(2A) enables the court to award less than the full amount of the reasonably sufficient sum. There may be good reason to make such a reduction even though a private prosecutor has not been guilty of misconduct.

83. In deciding whether there is good reason for an order under s17(2A), it will always be important, and in some cases decisively so, for the court to know whether the state prosecuting authorities were given a reasonable opportunity to make an informed decision as to whether they could undertake the prosecution and, if so, whether they wished to do so. If the state authorities have decided that they lack the resources or expertise to undertake a particular prosecution, or prefer not to do so, the private prosecution may be the only way in which the public interest in the prosecution of those against whom there is evidence of serious crime can be served. But the extent to which a private prosecutor may recover compensation for his expenses from the public purse may be

reduced if he has chosen to pursue the case without reference to the state authorities.

84. Secondly, if an order is made under s17(1), the reasonably sufficient sum will be assessed by the appropriate authority: often a determining officer rather than the court which makes the order, though the court may make observations about matters which it considers should be considered by the determining officer. We agree with counsel for the private prosecutors that that process of assessment by an experienced officer will enable the court to exclude from the award any compensation for expenses which were unnecessarily incurred, or were unreasonable in amount. Any doubts as to the reasonableness of a particular item of expenditure will be resolved against the applicant private prosecutor: see reg 7(3) of the Costs General Regulations, quoted in paragraph 21 above. But that process of assessment comes after the court has decided whether to order, pursuant to s17(2A), that the reasonably sufficient sum (whatever it may be assessed to be) must for good reason be reduced in a specified way or to a specified extent. The court which is invited to make an order under s17(1) must therefore have the information it needs to decide whether, in the circumstances of a particular case, a reduction should be ordered under s17(2A).

85. Thirdly, in deciding whether to make any comments for consideration by the determining officer assessing costs pursuant to an order under s17(1), or to order a reduction pursuant to s17(2A), the court will wish to consider whether a private prosecutor has acted reasonably in instructing particular legal representatives. In our view, the reasonableness of the choice of legal representatives does involve consideration of their charges by comparison with others working in the same market. At paragraph 53 above, we have referred to the decision of the Costs Judge in *Allseas* that as the choice of solicitors was a reasonable one, it followed that the decision not to undertake a tendering process was also a reasonable one. It seems to us that that decision must have been based on the particular circumstances of that case, including the concession which was made. If it was not, then, with all respect to the experience of the costs judge, we cannot agree with him.

86. Fourthly, the case law shows that a private prosecutor may act reasonably by choosing to instruct, for the purpose of the prosecution, legal representatives who are already acting for him in the investigation which has led to the decision to prosecute, or in associated civil or regulatory proceedings. But the strength of that argument in favour of the private prosecutor will be diminished, and may be lost altogether, if he has chosen not to give the state authorities a reasonable opportunity to decide whether to commence, or to take over, the prosecution.

87. Fifthly, the principle stated by Leggatt J which we have quoted at paragraph 43 above, though expressed in the context of an award of costs between parties in civil litigation, is relevant to an application under s17. The decision to instruct particular legal representatives may be a reasonable one from the private prosecutor's point of view; but the court must make an objective decision, and it will be assisted by knowing what was done to test the market.

88. What is reasonably required of the private prosecutor, by way of providing evidence of testing the market, will depend on the circumstances of the particular case. We note that in some of the cases cited to us, the view was taken that only a very limited number of solicitors and counsel would be competent to conduct the private prosecution, and that charging rates would differ little within that small group. We accept that, in some highly specialised areas of the law, that may be so. In our view, however, clear evidence will be needed before a court would decide that the choice was limited in that way, and that the public purse must accordingly bear a substantial cost. We observe, for example, that in fraud cases there are a significant number of expert counsel with experience of prosecuting; there are a significant number of large solicitors' firms whose expertise in defending such cases could be deployed on the prosecution side; and such expertise can be found both in London and in other cities.

89. Lastly, we accept that if a private prosecutor has acted reasonably in undertaking the prosecution, either because there were particular circumstances which made it reasonable for him not to give the CPS an opportunity to prosecute, or because such an opportunity was given but the CPS chose not to take it, then it will be necessary for the reasonableness of the expenses incurred to be assessed by reference to the market rate for legal representatives privately instructed, rather than solely by reference to CPS rates. We would, however, make two points. First, CPS rates may properly be considered if a private prosecutor acted without regard to whether the state was willing and able to prosecute (cf *Fuseon*, referred to at paragraph 45 above). Secondly, even it was reasonable for the private prosecutor to undertake the prosecution, it may still be relevant to consider what expenses would have been incurred if the case had been conducted by the appropriate state prosecuting authority: not least if the case was of a kind (such as fraud) often prosecuted by the CPS (or the Serious Fraud Office – "SFO"), in which it might be said that there clearly were competent counsel available who would conduct such a case at CPS (or SFO) rates. A determining officer, when assessing what expenses would have been incurred by the appropriate state prosecuting authority, is able to seek assistance from Ministry of Justice officials as to what those expenses would have been.

90. We note that in an unreported Crown Court case to which we were referred, *R v Agada* (8 September 2023), which the trial judge stated to be a simple case of fraud and theft, in which no contact had been made with the police or the CPS, the court made an order under s17(1) of the POA 1985 but reduced the award by ordering pursuant to s17(2A) that the determining officer cap or restrict costs by reference to CPS rates.

91. Having set out those general considerations, we return to the facts and circumstances of the present case. In doing so, we shall focus on the present application, which relates only to the costs of the abuse application and the appeal against the judge's ruling. However, since the private prosecutors have chosen to make that application at this stage, it will be necessary to consider some features of the prosecution as a whole.

92. Counsel for the Lord Chancellor rightly drew our attention to a detailed chronology, from which it is clear that the financial transaction which began the sequence of relevant events was a deposit made, on the instructions of two of the respondents, into a bank account in this country. About four months later, the private prosecutors instructed the investigators to begin enquiring into those respondents; and about three months after that, they instructed the solicitors to bring proceedings to trace what had become of the monies deposited into the UK bank account. As we have previously noted, it was about nine months later that the solicitors began the criminal proceedings.

93. Thus from the very outset, it was known that a relevant deposit had been made into a bank account in this country, and it must therefore have been obvious that it was at least possible that there had been conduct which could be reported to the police. By the time the summonses were issued, the decision had obviously been taken that criminal proceedings in this country were appropriate, whether or not there also were or might be civil or criminal proceedings in other jurisdictions. It was known that the criminal proceedings in this country were likely to be of some complexity and to involve substantial cost. Yet, so far as the evidence before us shows, nothing was done, before the private prosecution was commenced, to inform the police or to invite the CPS to consider the evidence relied on as proving fraud.

94. Six weeks then passed before the solicitors wrote to the CPS (see paragraph 6 above). As their letter makes clear, it was written only because the District Judge had said it should be; and it said in terms that the private prosecutors did not wish the CPS to take over conduct of the proceedings. It is regrettable that the CPS did not reply; but in our view, the private prosecutors could reasonably be

expected to have sent a chasing letter, particularly when they felt that urgent action was needed. We are unable to regard the one letter which was sent – written weeks after the criminal proceedings had been commenced (and months after the investigation had revealed matters which could have been reported to the police), and expressed in terms which discouraged the CPS from taking over the case – as providing a reasonable opportunity for the CPS to make an informed decision whether to undertake the prosecution. The private prosecutors were entitled to take the approach they did; but, for the reasons we have explained, they thereby put themselves at risk in relation to recovering their costs from the public purse.

95. The private prosecutors rely on the fact that the request by one of the respondents, made more than a year after the prosecution had been commenced, was rejected by the CPS (see paragraph 11 above). It is submitted that the terms in which the CPS responded show that the CPS would not have undertaken he prosecution even if invited to do so before the summonses had been issued. We reject the submission. The decision taken by the CPS, in responding to a request by a defendant to take over and end the prosecution, cannot be regarded as a guide to what the response would have been if the private prosecutors had given the police and the CPS an appropriate opportunity before the proceedings began.

96. We accept that the case is a complex one, made more complex by the need to consider events and transactions in other countries. We also accept that it has been well conducted by the private prosecutors and their legal representatives, and nothing we say in this judgment should be taken as suggesting any criticism of the work of those representatives. The private prosecutors were entirely justified in resisting the application to stay the prosecution as an abuse of the process, and in appealing against the adverse ruling by the judge. But it does not follow that the CPS, if given an appropriate opportunity at an appropriate stage, could not or would not have undertaken the prosecution. Complex though the case is, what we have seen of it does not suggest that it poses unique difficulties.

97. As to the selection of the legal representatives, it is clear from the evidence of the private prosecutors that they did not undertake any form of testing of the market before agreeing to pay the fees charged by the solicitors and by instructed counsel. We accept, of course, that the private prosecutors are citizens of another country, with little knowledge of the English criminal justice system; but they were able to identify two large and very reputable firms of solicitors as being able to undertake all the work which was likely to be needed, and they therefore had a ready source of advice as to what had been said in *Zinga* as long ago as 2014. It is clear that the private prosecutors made an assumption that charges would differ little as between highly-regarded practitioners. It is understandable that they proceeded on that assumption, and they were entitled to do so; but in our view, it was not a proper basis on which to invite the court to order the payment of very substantial sums from public funds.

98. We do not accept the submission of the Lord Chancellor that the private prosecutors' application, and its accompanying appendices, were seriously deficient. But the private prosecutors face, in our view, a more fundamental difficulty. They have failed to show that the police and the CPS, if given an appropriate opportunity at an appropriate stage, could not or would not have undertaken the investigation and prosecution of the crimes alleged against the respondents. They have failed to show, for the purposes of this application under s17, that they have acted reasonably in incurring expenses in excess of those which would have been incurred by the CPS (who have been treated throughout as the appropriate state prosecuting authority in the circumstances of this case). We are satisfied that there are, therefore, circumstances which make it inappropriate for the private prosecutors to recover the full amount of compensation which would otherwise be awarded pursuant to s17(1).

99. We do not consider it appropriate that we should fix the amount to be paid out of central funds. That must be done by means of a determination made by the appropriate authority. By reg 5(2)(a) of the Costs General Regulations, the appropriate authority is the Registrar, who will no doubt appoint a determining officer to act on her behalf.

Conclusion:

100. For the reasons we have given, we make an order pursuant to s17(1) of the POA 1985 that the private prosecutors be paid out of central funds a sum reasonably sufficient to compensate them for the expenses properly incurred by them in (i) resisting the respondents' application in the Crown Court to stay the prosecution as an abuse of the process; (ii) preparing and conducting the appeal to this court against the judge's order staying the prosecution; and (iii) responding to the Lord Chancellor's intervention and preparing and conducting this hearing. However, we make an order pursuant to s17(2A) of the POA 1985 that the reasonably sufficient sum so awarded be reduced so far as may be necessary so that it does not exceed the expenses which would have been incurred if the prosecution had been undertaken by the CPS. We direct pursuant to s17(2C) that the amount to be paid be fixed by means of a determination under Part III of the Costs General Regulations made by the Registrar, or by a determining officer appointed to act on her behalf.

BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
URL: *https://www.bailii.org/ew/cases/EWCA/Crim/2025/1289.html*