Neutral Citation Number: [2020] EWCA Civ 1260

Case No: A2/2019/2119

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MRS JUSTICE JEFFORD)
[2019] EWHC 1277 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2020

Before :

THE MASTER OF THE ROLLS
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
LORD JUSTICE DAVIS

- -

Between :

MURLI MIRCHANDANI	**Appellant**
- and -	
THE LORD CHANCELLOR	**Respondent**

- -
- -

Dr Mark Friston (instructed by **Thomas Legal Costs**) for the **Appellant**
Mr Rupert Cohen (instructed by the **Legal Aid Agency)** for the **Respondent**

Hearing date: 14th July 2020

- -

Approved Judgment

LORD JUSTICE DAVIS:

Introduction

1. This appeal raises issues of interpretation of s. 17 of the Prosecution of Offences Act 1985 ("the 1985 Act"), as amended. The issues arise in the context of confiscation proceedings conducted under the provisions of the Criminal Justice Act 1988 ("the 1988 Act"), following the conviction for fraud of Ketan Somaia on 13 June 2014 on a private prosecution brought by Murli Mirchandani. There must be very few confiscation proceedings under the 1988 Act still extant.

2. In summary, the issues are these:

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

    (2) On the true interpretation of s. 17 of the 1985 Act, may a private prosecutor recover out of central funds costs which the prosecutor has been ordered to pay to a third party in the enforcement proceedings?

    The issues thus are jurisdictional. This court has not been concerned with the subsequent question as to how the jurisdiction is to be exercised, if there is such jurisdiction in either situation.

3. The appellant is the prosecutor, Mr Mirchandani. The respondent is the Lord Chancellor, who had intervened in the proceedings below and had successfully argued before Jefford J that the court had no jurisdiction to order that such costs be paid out of central funds.

4. The appeal was brought by leave granted by the judge herself. Before us the appellant was represented by Dr Mark Friston. The respondent was represented by Mr Rupert Cohen. I would acknowledge the very thorough and careful arguments which they presented to us. The defendant has not been represented on this appeal and has taken no part in it.

The Background

5. Mr Mirchandani, the prosecutor, and Mr Somaia, the defendant, were engaged in very substantial business transactions in 1999 and 2000. Subsequently, the prosecutor considered that he had been the victim of a sustained fraud on the part of the defendant, to the tune of several millions of pounds. The details are not important for present purposes.

6. In due course, in 2012 he commenced a private prosecution against the defendant. There were numerous counts of fraud on the indictment. Following a lengthy trial at the Central Criminal Court, the defendant was convicted by the jury on 13 June 2014 of nine offences of fraud. The trial judge, Judge Hone QC, sentenced him to 8 years imprisonment. An appeal against conviction was subsequently rejected by a constitution of the Criminal Division of this court.

7. The prosecutor then commenced confiscation proceedings under the 1988 Act (because of the dates of the frauds alleged, antedating 24 March 2003, the provisions of the Proceeds of Crime Act 2002, "the 2002 Act", did not, as throughout was common ground, apply). In the result, a confiscation order was made by Judge Hone QC on 12 January 2016 in the amount of £20,434,691. The total benefit had been assessed in that amount. As to available assets, certain assets were identified. As to the balance, the court made a finding of hidden assets and determined the recoverable amount to be not less than the value of the benefit from the relevant criminal conduct, that is £20,434,691. A confiscation order was made accordingly, with a term of 10 years imprisonment imposed in default of payment. In addition, the judge was invited to exercise his power under s. 130 of the Powers of Criminal Courts (Sentencing) Act 2000 and s. 72 (7) of the 1988 Act to make confiscation orders in favour of the prosecutor, Mr Mirchandani, and a Mr Shah. The judge did so, in the amount of £18,220,723 and £200,233 respectively. The balance of the confiscation order represented the remaining assets of the defendant, in circumstances where the criminal lifestyle provisions had been applied. The judge directed, under s.72 (7) of the 1988 Act, that any money realised under the confiscation order should first be paid to satisfy the compensation orders. A subsequent application for leave to appeal against the confiscation order was unsuccessful.

8. The defendant failed to make payment of the confiscation order.

9. In consequence, the prosecutor sought the appointment of an enforcement receiver over the assets of the defendant. On 12 October 2016 Spencer J, sitting in the Queen's Bench Division (Administrative Court), appointed Christine Bartlett of HS Alpha Limited receiver over the assets of the defendant, with wide-ranging powers.

10. By that time, one particular point of contention, among others, had been identified. Significant sums had been paid by the defendant into bank accounts in the name of his (by now former) wife, Alka Gheewala. The prosecutor was claiming that these were to be regarded as tainted gifts for the purposes of the 1988 Act. Directions were given by Spencer J for a hearing of that issue. By the time of that hearing, the only extant dispute related to seven transfers of money to Ms Gheewala between April and August 2010.

11. Although the Order of Spencer J appointing Ms Bartlett as receiver had conferred on her the power to bring proceedings against Ms Gheewala (and others) to recover the value of alleged tainted gifts, in the result it was the prosecutor who himself, through lawyers, pursued such proceedings. There was a four day hearing before Jefford J, sitting in the Queen's Bench Division, in May 2017. At that hearing, each of the prosecutor, the defendant and Ms Gheewala was represented by counsel.

12. By a reserved judgment handed down on 17 October 2017, the judge refused to declare the payments in question to be tainted gifts: [2017] EWHC 2554 (QB). After detailed consideration of the background and the evidence, the judge decided there had been no gifts as such: rather the money in question had beneficially remained the defendant's money and had been transferred into his wife's account for his own convenience, primarily out of money legitimately acquired by him as a consequence of a settlement of certain legal proceedings in Kenya.

13. Having so decided, Jefford J in due course on 7 November 2017 among other things directed the prosecutor to pay Ms Gheewala's costs (including certain reserved costs) on the standard basis, with a payment on account of just over £125,000. By this stage the prosecutor had applied for his costs to be paid out of central funds. As to that application the judge directed written submissions.

14. That application, following detailed written submissions from the parties, was determined by the judge on 25 May 2018. She concluded that the prosecutor was entitled to apply for his costs of the proceedings (including the costs ordered to be paid by him to Ms Gheewala) out of central funds; that she had jurisdiction so to order; and that she should so order. She directed such costs to be the subject of a determination made on behalf of the court by the National Taxing Team.

15. In due course, the Lord Chancellor was made aware of this Order, given that the use of central funds was involved. (By this stage, the prosecutor had prepared a bill of costs seeking as much as £751,279, including £453,801 for the prosecutor's own costs and £297,478 for Ms Gheewala's costs.) The Lord Chancellor raised objections on jurisdictional grounds to the Order of 25 May 2018, as to which he had had no previous opportunity to make representations. He sought to have that Order set aside. The Lord Chancellor was given leave to intervene accordingly. It was the outcome of that intervention that led to the Order of the judge, following a hearing at which the prosecutor and the Lord Chancellor were represented, which is the subject of this present appeal. For Jefford J, in a detailed and careful reserved judgment dated 15 May 2019, decided that her previous decision was wrong and that she should set aside her previous Order of 25 May 2018. The judge's decision was ultimately reflected in an amended Order sealed on 1 August 2019; and it is against that Order that this appeal is brought by the prosecutor.

The Legislative Scheme

16. It is convenient at this stage to set out aspects of the relevant legislative provisions, in order to explain how it is that the current dispute has arisen.

(a) The 1988 Act

17. As previously explained, the 1988 Act has since been superseded by the 2002 Act. Although there is a conceptual and structural similarity in a significant number of respects between the two Acts, there are also significant differences.

18. For present purposes, the relevant provisions are those set out in Part VI of the 1988 Act.

19. Section 71, in outline, requires the court to determine whether the offender has benefited from any relevant criminal conduct (as defined). The court is then to determine the amount to be recovered; but that amount is not to exceed the benefit or the amount which may be realised, whichever is the less.

20. Section 72 (7) provides that where – as in the present case – the court is proposing to make both a compensation order and a confiscation order, it shall, if it considers that there is an overall insufficiency of means, direct that the compensation order is first to be paid out of sums recovered under the confiscation order.

21. Section 74 (1) contains a wide definition of "realisable property", extending to any property held by the defendant and to any property held by a person to whom a tainted gift has been made. It may in this regard be noted that, in common with the 2002 Act but in contrast with some European jurisdictions, the 1988 Act operates on what might be styled an in personam, rather than an in rem, approach. Thus there is no requirement that the realisable property must itself derive from criminal conduct.

22. Section 75 among other things provides that for enforcement purposes the confiscation order is to have effect as if the amount were a fine imposed by the Crown Court. Sections 76 to 78 confer powers on the High Court to make Restraint Orders and Charging Orders, on an application by the prosecutor; and s. 80 confers the like power on the High Court, on an application by the prosecutor, to appoint a receiver in respect of realisable property, with various ancillary and consequential provisions (including provision for payment of renumeration and expenses as set out in s. 88). Section 83 relates to circumstances in which the High Court may issue a certificate of inadequacy: where such a certificate is issued, then, on application made, the Crown Court (or Magistrates' Court, as the case may be) is required to substitute for the recoverable amount such lesser amount as it thinks just, and with any consequential appropriate adjustment to the default term of imprisonment.

23. It is not necessary for present purposes to summarise all the provisions of Part VI. But it may be noted that by s. 102 (12) it is provided that "proceedings for an offence are concluded … (d) if a confiscation order is made against him in those proceedings, when the order is satisfied". In the present case, the confiscation order has not been satisfied and the proceedings for the offence thus still are not concluded.

(b) <u>The 1985 Act</u>

24. One principal – although by no means only – purpose of the 1985 Act was to provide for the establishment of the Crown Prosecution Service.

25. For present purposes, s. 6 of the 1985 Act is in point. That provides as follows:

> "(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."

It may be noted that s. 6 does not of itself create a right of private prosecution. Rather, it acknowledges an existing right of instituting or conducting criminal proceedings on the part of persons other than the Crown Prosecution Service.

26. Part II of the 1985 Act is headed "Costs in Criminal Cases".

27. Section 16 is headed "Defence Costs". The section itself has been subject to periodic amendment from time to time: in particular, for present purposes, by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act"). As so amended, it provides as follows:

> "(1) Where—
>
> (a) an information laid before a justice of the peace for any area, charging any person with an offence, is not proceeded with;
> (b) [a magistrates' court inquiring into an indictable offence as examining justices determines not to commit the accused for trial;]
> (c) a magistrates' court dealing summarily with an offence dismisses the information;
>
> that court or, in a case falling within paragraph (a) above, a magistrates' court for that area, may make an order in favour of the accused for a payment to be made out of central funds in respect of his costs (a "defendant's costs order ").
>
> (2) Where—
>
> (a) any person is not tried for an offence for which he has been indicted or [sent] for trial; or
> (aa) [a notice of transfer is given under [a relevant transfer provision] but a person in relation to whose case it is given is not tried on a charge to which it relates; or]]
> (b) any person is tried on indictment and acquitted on any count in the indictment;
>
> the Crown Court may make a defendant's costs order in favour of the accused.
>
> (3) Where a person convicted of an offence by a magistrates' court appeals to the Crown Court under section 108 of the Magistrates' Courts Act 1980 (right of appeal against conviction or sentence) and, in consequence of the decision on appeal—
>
> (a) his conviction is set aside; or
> (b) a less severe punishment is awarded;
>
> the Crown Court may make a defendant's costs order in favour of the accused.
>
> (4) Where the Court of Appeal—
>
> (a) allows an appeal under Part I of the Criminal Appeal Act 1968 against—
> (i) conviction;
> (ii) a verdict of not guilty by reason of insanity; or
> (iii) a finding under the Criminal Procedure (Insanity) Act 1964 that the appellant is under a disability, or that

he did the act or made the omission charged against him;]

(aa) directs under section 8(1B) of the Criminal Appeal Act 1968 the entry of a judgment and verdict of acquittal;]

(b) on an appeal under that Part against conviction—
(i) substitutes a verdict of guilty of another offence;
(ii) in a case where a special verdict has been found, orders a different conclusion on the effect of that verdict to be recorded; or
(iii) is of the opinion that the case falls within paragraph (a) or (b) of section 6(1) of that Act (cases where the court substitutes a finding of insanity or unfitness to plead);

(c) on an appeal under that Part against sentence, exercises its powers under section 11(3) of that Act (powers where the court considers that the appellant should be sentenced differently for an offence for which he was dealt with by the court below);

(d) allows, to any extent, an appeal under section 16A of that Act (appeal against order made in cases of insanity or unfitness to plead)

the court may make a defendant's costs order in favour of the accused.

(4A) The court may also make a defendant's costs order in favour of the accused on an appeal under section 9(11) of the Criminal Justice Act 1987 (appeals against orders or rulings at preparatory hearings) [or section 35(1) of the Criminal Procedure and Investigations Act 1996][or under Part 9 of the Criminal Justice Act 2003].

(5) Where—

(a)any proceedings in a criminal cause or matter are determined before a Divisional Court of the Queen's Bench Division;
(b)the [Supreme Court] determines an appeal, or application for leave to appeal, from such a Divisional Court in a criminal cause or matter;
(c)the Court of Appeal determines an application for leave to appeal to the [Supreme Court] under Part II of the Criminal Appeal Act 1968; or
(d)the [Supreme Court] determines an appeal, or application for leave to appeal, under Part II of that Act;

the court may make a defendant's costs order in favour of the accused.

(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.

(6B) Subsections (6) and (6A) have effect subject to—

(a)section 16A, and

(b)regulations under section 20(1A) (d).

(6C) When making a defendant's costs order, 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 accused agrees the amount, or

(b)subsection (6A) applies.

(6D) 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 (6A), 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.]

….

(10) Subsection (6) above shall have effect, in relation to any case falling within subsection (1)(a) or (2)(a) above, as if for the words "in the proceedings" there were substituted the words "in or about the defence".

(11) Where a person ordered to be retried is acquitted at his retrial, the costs which may be ordered to be paid out of central funds under this section shall include—

(a)any costs which, at the original trial, could have been ordered to be so paid under this section if he had been acquitted; and

(b) if no order was made under this section in respect of his expenses on appeal, any sums for the payment of which such an order could have been made.

(12) In subsection (2)(aa) "relevant transfer provision " means—

(a)section 4 of the Criminal Justice Act 1987, or

(b)section 53 of the Criminal Justice Act 1991.]"

28. Section 16A of the 1985 Act, as inserted by the 2012 Act, and since itself subsequently amended, provides as follows:

"16A Legal costs

(1) A defendant's costs order may not require the payment out of central funds of an amount that includes an amount in respect of the accused's legal costs, subject to the following provisions of this section.

(2) Subsection (1) does not apply where condition A, B [, C or D] is met.

(3) Condition A is that the accused is an individual and the order is made under—

(a)section 16(1),

(b)section 16(3), or

(c)section 16(4)(a)(ii) or (iii) or (d).

(4) Condition B is that the accused is an individual and the legal costs were incurred in proceedings in a court below which were—

(a)proceedings in a magistrates' court, or

(b)proceedings on an appeal to the Crown Court under section 108 of the Magistrates' Courts Act 1980 (right of appeal against conviction or sentence).

(5) Condition C is that the legal costs were incurred in proceedings in the Supreme Court.

(5A) Condition D is that– (a) the accused is an individual,

(b) the order is made under section 16(2),

(c) the legal costs were incurred in relevant Crown Court proceedings, and

(d) the Director of Legal Aid Casework has made a determination of financial ineligibility in relation to the accused and those proceedings
(and condition D continues to be met if the determination is withdrawn).

(6) The Lord Chancellor may by regulations make provision about exceptions from the prohibition in subsection (1), including—

(a)provision amending this section by adding, modifying or removing an exception, and
(b)provision for an exception to arise where a determination has been made by a person specified in the regulations.

(7) Regulations under subsection (6) may not remove or limit the exception provided by condition C.

(8) Where a court makes a defendant's costs order requiring the payment out of central funds of an amount that includes an amount in respect of legal costs, the order must include a statement to that effect.

(9) Where, in a defendant's costs order, a court fixes an amount to be paid out of central funds that includes an amount in respect of legal costs incurred in proceedings in a court other than the Supreme Court, the latter amount must not exceed an amount specified by regulations made by the Lord Chancellor.

(10) In this section—

"legal costs" means fees, charges, disbursements and other amounts payable in respect of advocacy services or litigation services including, in particular, expert witness costs;

"advocacy services" means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide;

"expert witness costs" means amounts payable in respect of the services of an expert witness, including amounts payable in connection with attendance by the witness at court or elsewhere;

"litigation services" means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to proceedings, or contemplated proceedings, to provide.]

(11) In subsection (5A)—

"determination of financial ineligibility", in relation to an individual and proceedings, means a determination under section 21 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 that the individual's financial resources are such that the individual is not eligible for representation under section 16 of that Act for the purposes of the proceedings;

"Director of Legal Aid Casework" means the civil servant designated under section 4(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

"relevant Crown Court proceedings" means any of the following—

a) proceedings in the Crown Court in respect of an offence for which the accused has been sent by a magistrates' court to the Crown Court for trial;

b) proceedings in the Crown Court relating to an offence in respect of which a bill of indictment has been preferred by virtue of section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933;

c) proceedings in the Crown Court following an order by the Court of Appeal or the Supreme Court for a retrial."

29. Section 17 is of central importance for present purposes. It is headed "Prosecution Costs". In its original form, it provided as follows:

"(1) Subject to subsection (2) 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 House of Lords 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.

(3) Where a court makes an order under this section but is of the opinion that there are circumstances which make it inappropriate that the prosecution should recover the full amount mentioned in subsection (1) above, the court shall—

(a)assess what amount would, in its opinion, be just and reasonable; and
(b)specify that amount in the order.

(4) Subject to subsection (3) above, the amount to be paid out of central funds in pursuance of an order under this section shall—
(a)be specified in the order, in any case where the court considers it appropriate for the amount to be so specified and the prosecutor agrees the amount; and
(b)in any other case, be determined in accordance with regulations made by the Lord Chancellor for the purposes of this section.

(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.

(6) In this section " public authority " means—
(a)a police force within the meaning of section 3 of this Act;
(b)the Crown Prosecution Service or any other government department;
(c)a local authority or other authority or body constituted for purposes of—
(i)the public service or of local government; or
(ii)carrying on under national ownership any industry or undertaking or part of an industry or undertaking; or
(d)any other authority or body whose members are appointed by Her Majesty or by any Minister of the Crown or government department or whose revenues consist wholly or mainly of money provided by Parliament."

As subsequently amended by the 2012 Act, it provides:

"(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.

….

(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.

(6) In this section "public authority" means—

(a)a police force within the meaning of section 3 of this Act;
(b)the Crown Prosecution Service or any other government department;

> (c)a local authority or other authority or body constituted for purposes of—
>
> (i)the public service or of local government; or
>
> (ii)carrying on under national ownership any industry or undertaking or part of an industry or undertaking; or
>
> (d)any other authority or body whose members are appointed by Her Majesty or by any Minister of the Crown or government department or whose revenues consist wholly or mainly of money provided by Parliament."

30. As contemplated by (among other provisions) s.16 and s.17 of the 1985 Act in their original form, and as empowered so to do under s. 20 of the 1985 Act, the Lord Chancellor made Regulations, with effect from 1 October 1986, in the form of the Costs in Criminal Cases (General) Regulations 1986 ("the 1986 Regulations").

31. By Regulation 4, "costs order" is defined to mean an order made under or by virtue of Part II of the Act for the payment of costs out of central funds; and "expenses" are defined to mean out of pocket expenses, travelling expenses and subsistence allowance.

32. Regulation 5 provides as follows:

> "(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,
>
> (b) the master of the Crown Office in the case of proceedings in a Divisional Court of the Queen's Bench Division,
>
> (c) an officer appointed by the Lord Chancellor in the case of proceedings in the Crown Court [or, subject to sub-paragraph (d), a magistrates' court],
>
> (d) [a justices' legal adviser (a person nominated by the Lord Chancellor who is authorised to exercise functions under section 28(1) of the Courts Act 2003)] in the case of proceedings in a magistrates' court [, where the costs consist solely of expenses claimed by the applicant].
>
> (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."

No mention there is made as to who the "appropriate authority" is in proceedings before a single judge of the High Court. Regulation 6 relates to claims for costs. Regulation 7 then provides in the relevant respects:

> "(1) The appropriate authority shall consider the claim and any further particulars, information or documents submitted by the applicant under regulation 6(5), and shall allow 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 and 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) Subject to paragraph (6), 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."

33. Part VI of the 1988 Act is, as was common ground before us, subject to the Civil Procedure Rules. Those Rules (subject to exceptions which do not apply here) apply to, among others, "all proceedings in the High Court": Civil Procedure Rules Pt 2 r. 2 (1). By Civil Procedure Rules Pt 50, the Rules apply to the proceedings to which the Schedules to the Rules apply: and Schedule 1 includes RSC Order 115 of the Rules of the Supreme Court, which by RSC O.115 rules 22 and 23 extend to proceedings under Part VI of the 1988 Act.

Submissions

34. The parties' respective submissions supply the context both for a review of some of the legal authorities cited to us which it is necessary to undertake and for an outline of the judgment below (the submissions to us in substance replicating the submissions to the judge). I do not attempt here to set out the detail or nuances of all the respective arguments. But the essence of them, I think, can be summarised as follows.

35. For the appellant, Dr Friston accepted that the enforcement proceedings under Part VI of the 1988 Act were civil proceedings and governed by civil procedural law. But that, he argued, was not determinative. What matters is what s. 17 of the 1985 Act actually provides. If it was intended that an order for costs out of central funds could

not be made in such proceedings but could only be made in proceedings designated as criminal proceedings then s. 17 could and would have so provided. But it does not. Instead it uses what he said is deliberately broad language: "any proceedings in respect of an indictable offence". He stressed, in particular, the words "any proceedings" and the words "in respect of" an indictable offence.

36. Here, he said, both the trial itself and the actual confiscation proceedings were on any view in respect of an indictable offence; indeed they both (as the respondent conceded) on any view were criminal proceedings: the confiscation proceedings themselves being criminal proceedings since they were part of the overall sentencing process. It must follow, he submitted, that the enforcement proceedings, designed to give effect to the confiscation order, thus likewise are "in respect of" an indictable offence. He said that that fact was reinforced by s. 102 of the 1988 Act which, for the purposes of a case such as this, is to the effect that proceedings for the offence are not concluded until the confiscation order is satisfied.

37. He went on to submit that not only is that the natural reading to be ascribed to s. 17, it also is reinforced by purposive considerations. For where, he asked, is the purpose or sense in making the costs of pursuing confiscation proceedings potentially recoverable out of central funds at the behest of a private prosecutor but not in making potentially recoverable the costs of enforcing a confiscation order which has been obtained? He further submitted that such an outcome would be a deterrent to instituting confiscation proceedings in the first place: which would not accord with the overall legislative scheme and intention or with the public interest.

38. Dr Friston further said that nothing in the 1986 Regulations precluded payment of costs out of central funds for enforcement proceedings such as these. He accepted that the 1986 Regulations did not themselves make provision for the appointment of an appropriate authority to determine costs in enforcement proceedings in the High Court. But he submitted that the statutory instrument "tail" should not be permitted to wag the statutory "dog". Besides, there was no real lacuna as, under the statute, the High Court can itself fix the amount payable.

39. For the respondent, Mr Cohen submitted that s. 17 – consistently with s. 6 and with the heading to Part II of the 1985 Act – applies, and applies only, to criminal proceedings, on the proper interpretation of the section. Here, whilst, as he accepted, the confiscation proceedings themselves were part of the sentencing process and were criminal proceedings, the enforcement proceedings were by statute assigned to the High Court and were civil proceedings: they were *not* criminal proceedings. He further submitted that such enforcement proceedings are not in respect of an indictable offence; rather, they are proceedings in respect of enforcing a confiscation order. He roundly said, in fact, that the indictable offence (of fraud) had no relevance to the nature of the enforcement proceedings other than for providing the basis for the confiscation order itself. Overall, and consistently with the decision of the House of Lords in the case of *Steele, Ford & Newton v Crown Prosecution Service,* also sub. nom. *Holden & Co v Crown Prosecution Service (No. 2)* [1994] IAC 22 (an authority to which I will come), as he submitted, there was no proper basis for construing s. 17 (1) (a) so as to permit an award of costs out of central funds in a case such as this. Moreover, it was, he stressed, throughout to be borne in mind that the public purse was involved here.

40. He went on to submit that that conclusion is reinforced by the lack of any provision in the 1986 Regulations for an appropriate officer to determine costs in enforcement proceedings in the High Court of this kind. On the other hand, RSC O.115 does apply as do the provisions of Civil Procedure Rules Part 44. That does not leave a private prosecutor, where he succeeds, without remedy if he is successful in enforcement proceedings: for costs can follow the event as between the parties, in accordance with the general approach in civil proceedings under Civil Procedure Rules Pt. 44. Yet further, he said, such an outcome achieves a desirable degree of equivalence with s. 16: for a successful defendant in enforcement proceedings cannot recover costs out of central funds under s. 16, which is consistent with it being intended that a successful private prosecutor should not be able to do so under s. 17, either.

41. As to the second issue (which only arises if the appellant succeeds on the first issue) the submissions were concise. Dr Friston submitted that the word "expenses", when read in context, was plainly wide enough to extend, in an appropriate case, to costs ordered to be paid by a prosecutor to a third party in enforcement proceedings. Mr Cohen, on the other hand, said that the word was only capable of extending to legal costs and disbursements incurred by the prosecutor pursuant to Regulation 7, as well as, where relevant, any travelling expenses or subsistence allowance (he also, in this regard, referred us to Regulation 24 and Regulation 18 of the 1986 Regulations). The word "expenses" thus, he said, did not extend to costs ordered to be paid to a third party by the prosecutor in enforcement proceedings.

Legal Authorities

42. It was common ground before us that there is no legal authority directly in point on the issues which have to be decided in this case.

43. The context here, of course, is that of a private prosecution. Private prosecutions have received something of a mixed press, as it were, over the years. For example, in *Jones v Whalley* [2006] UKHL 41, [2007] 1 AC 63 Lord Bingham alluded (at paragraph 9) to commentaries to the effect that the surviving right of private prosecution was of little or no value; and he himself indicated some doubts as to whether it constituted an important constitutional safeguard. Lord Mance in the same case, on the other hand, indicated the view that it was an important safeguard. The latter viewpoint was favoured by Lord Wilson in the subsequent case of *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52, [2013] 1 AC 484.

44. A number of organisations (such as, for example, the RSPCA or copyright protection associations) regularly undertake private prosecutions. Moreover, it is the declared policy of a number of large corporations in, for example, the leisure and travel and retail industries to undertake prosecutions where the police themselves are either disinclined to bring charges or content to accept a caution in, say, cases of an assault on an employee or of relatively minor dishonesty. There are increasingly, also, instances of complex fraud prosecutions nowadays being successfully undertaken by way of private prosecution where the police or Serious Fraud Office have lacked the inclination or resources (or both) to pursue a criminal investigation or have considered it appropriate to leave the matter to be litigated in the Civil Courts: see, for example, *Zinga* [2014] EWCA Crim 52, [2014] 1 WLR 2228 at paragraphs 15-16 and 57 of the judgment; *D Ltd v A and others* [2017] EWCA Crim 1172.

45. The fact remains that the right to institute private prosecutions has been preserved by s. 6 of the 1985 Act. Important safeguards exist in that, for example, the Director of Public Prosecutions has the right to take over a private prosecution and then discontinue; and in that the Crown Court itself, where the circumstances may, exceptionally, justify such a step, can stay such a prosecution as an abuse of process. Another important safeguard, in this respect, is that the prosecutor in a private prosecution, even though doubtless in part motivated by personal considerations, is required to act with the impartiality and objectivity appropriate to a public prosecutor: see the discussion in *Zinga* (cited above).

46. *Zinga* in fact affirms, following the decision of the House of Lords in *Rezvi* [2002] UKHL 1, [2003] 1 AC 1099, that confiscation proceedings are part of the sentencing process and thus, on any view, are part of the criminal proceedings. It is also authority for the proposition that, being part of criminal proceedings for the purposes of s. 6 of the 1985 Act and serving as they do the public interest, confiscation proceedings may be instituted by a private prosecutor; and the power to institute such proceedings thus is not confined to the Crown Prosecution Service or other state prosecutors. As I have said, these points were, rightly, conceded before us on behalf of the respondent.

47. The position nevertheless is that, while privately conducted confiscation proceedings are themselves criminal proceedings, enforcement proceedings of the present kind under the 1988 Act are civil proceedings, assigned to the High Court and subject to the Civil Procedure Rules. And that, says the respondent, makes all the difference.

48. The principal authority relied on for this purpose by the respondent is the decision of the House of Lords in *Steele, Ford and Newton* (cited above).

49. In that case, firms of solicitors had been made subject to wasted costs orders in the Crown Court as a result of their allegedly negligent or improper conduct of the defences of clients in criminal proceedings. They appealed against such orders, the appeals being to the Civil Division of the Court of Appeal and being civil appeals, as required by the legislation then in place. The appeals succeeded. The solicitors then sought to have their costs paid out of central funds. For this purpose, they did not seek to invoke any jurisdiction under the 1985 Act. Instead, they sought to argue that the power to order costs out of central funds was to be implied in s. 51 of the Supreme Court Act 1981 (now the Senior Courts Act 1981) or s. 50 of the Solicitors Act 1974. The argument succeeded in the Court of Appeal. But it failed in the House of Lords.

50. In his speech, with which the other judges of the House of Lords agreed, Lord Bridge rejected the proposition that such a power could be implied. At page 33 C-G, he said this:

> "The rule of general application which limits the court's power to read into legislation words which the draftsman has not used is, even in today's climate of purposive construction, still an important rule which cannot be disregarded. "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do:" *Thompson v. Goold & Co.* [1910] A.C. 409, 420, *per* Lord Mersey. "We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the

> four corners of the Act itself:" *Vickers, Sons & Maxim Ltd. v. Evans* [1910] A.C. 444, 445, *per* Lord Loreburn L.C.
>
> But still more important, in the present context, is the special constitutional convention which jealously safeguards the exclusive control exercised by Parliament over both the levying and the expenditure of the public revenue. It is trite law that nothing less than clear, express and unambiguous language is effective to levy a tax. Scarcely less stringent is the requirement of clear statutory authority for public expenditure. As it was put by Viscount Haldane in *Auckland Harbour Board v. The King* [1924] A.C. 318, 326:
>
> "it has been a principle of the British Constitution now for more than two centuries . . . that no money can be taken out of the Consolidated Fund into which the revenues of the state have been paid, excepting under a distinct authorisation from Parliament itself."”

51. He went on to review a number of differing statutes in this regard. That review extended to s. 16 and s. 17 of the 1985 Act. Following that review, he said this, at p37A-B:

> “Thus, throughout the history of the legislation in which jurisdiction has been expressly conferred to order payment of costs out of money provided by Parliament we find that the circumstances in which such an order may be made have been precisely and specifically defined, that, save in the provisions relating to licensing authorities, those circumstances can only arise in criminal proceedings and that, so far as the Court of Appeal is concerned, jurisdiction to make such orders has only been conferred on the Criminal Division of the court”

52. He went on to say, at page 40 C-F:

> “The strictly limited range of the legislation expressly authorising payment of costs out of central funds in criminal proceedings no more lends itself to extension by judicial implication than does the equally limited range of legislation authorising payment of costs out of the legal aid fund in civil proceedings.”

He concluded with these words, at page 41 C-D:

> “I would hold that jurisdiction to order payment of costs out of central funds cannot be held to have been conferred by implication on the courts by any of the statutory provision which I have examined. Indeed, I find it difficult to visualise any statutory context in which such a jurisdiction could be conferred by anything less than clear express terms. I would

> accordingly allow the appeals and set aside the orders made for payment of costs out of central funds."

53. In *United States Government v Montgomery* [2001] UKHL 3, [2001] 1 WLR 196, it was held that an order made under Part VI of the 1988 Act, although granted in consequence of criminal proceedings, was essentially civil in character. Accordingly such an order was not "in a criminal cause or matter" for the purposes of determining appellate jurisdiction by reference to s. 18 (1) of the Supreme Court Act 1981 (now Senior Courts Act 1981).

54. In the course of his speech, Lord Hoffmann said this at paragraph 19:

> "My Lords, it may be right, and possibly in most cases would be right, to regard orders made by way of enforcement of orders made or to be made in criminal proceedings as part and parcel of those proceedings. This was certainly the case in R *v Steel* 2 QBD 37. But I would not accept what I regard as the extreme proposition of [counsel] that the nature of the proceedings in which the original order was made will necessarily determine whether the machinery of enforcement through the courts is a criminal cause or matter. Modern legislation, of which Part VI of the 1988 Act is a good example, confers powers upon criminal courts to make orders which may affect rights of property, create civil debts or disqualify people from pursuing occupations or holding office. Such orders may affect the property or obligations not only of the person against whom they are made but of third parties as well. Thus the consequences of an order in criminal proceedings may be a claim or dispute which is essentially civil in character. There is no reason why the nature of the order which gave rise to the claim or dispute should necessarily determine the nature of the proceedings in which the claim is enforced or the dispute determined."

He went on to hold, after reviewing aspects of Part VI of the 1988 Act, at paragraph 22:

> "In my opinion, therefore, the jurisdiction conferred upon the High Court under Part VI is a civil jurisdiction, notwithstanding that that jurisdiction exists to enforce or determine disputes over the debts or proprietary rights created or consequent upon a confiscation order made by a criminal court."

55. We were next referred to the decision of the House of Lords in *In re Norris* [2001] UKHC 34, [2001] 1 WLR 1388. In that case, a Crown Court judge, in deciding the extent of a confiscation order in confiscation proceedings under the Drug Trafficking Offences Act 1986, received the evidence of the defendant's wife to the effect that the matrimonial home wholly, or mainly, beneficially was owned by her. The judge rejected her evidence and found that the house formed part of the defendant's realisable property, in respect of which he appointed a receiver. It was held by the

House of Lords that, in subsequent enforcement proceedings, Mrs Norris was not precluded from re-asserting her claim to the beneficial interest in the property. (That outcome, I add, has since been modified by s.10A of the 2002 Act.)

56. The context was thus different from the present case. But in the course of his speech Lord Hobhouse referred, at paragraph 23, to "the division of responsibility and function between the Crown Court exercising the criminal jurisdiction and the High Court exercising the civil jurisdiction." He went on to say in the course of paragraph 23:

> "The English system of criminal justice does not itself confer any civil jurisdiction upon the criminal courts and it takes a clear and express provision in a statute to achieve that result. The 1986 Act does not contain any such provision; indeed, as already explained, its clear intention is to preserve the distinction between the respective jurisdictions."

57. In *R (Lloyd) v Bow Street Magistrates Court* [2003] EWHC 2294 (Admin), [2004] 1 Cr. App. R. 11 the issue before the Divisional Court was whether delay in pursuing enforcement proceedings to commit a defendant to prison for want of full payment of a confiscation order amounted to a violation of the defendant's rights under Article 6.1 of the European Convention on Human Rights: which of course relates to the "determination of any criminal charge". In giving the judgment of the court, Dyson LJ said this at paragraph 18:

> "In our judgment, [counsel] is right to concede that Article 6.1 applies not only to the confiscation proceedings up to the making of a confiscation order, but also to any subsequent proceedings to enforce the order by the issue of a warrant of commitment to prison. As she accepts, such proceedings are part and parcel of the confiscation proceedings, which in turn are part and parcel of the original criminal proceedings. They are no more separate from the original criminal proceedings than is the application for a confiscation order itself. They are not fresh proceedings involving the determination of a criminal charge within the meaning of Article 6.1 , any more than are the proceedings by which the prosecutor seeks a confiscation order. Article 6.1 applies because, as [counsel] rightly accepts, the enforcement proceedings are part of the criminal proceedings. Were the position to be otherwise, we do not see how Article 6.1 could apply to the enforcement proceedings at all."

He went on to say this at paragraph 24:

> "In our judgment, a defendant enjoys the full benefit of all the rights conferred by Article 6.1 in all aspects of confiscation proceedings (including their enforcement by means of a summons for the issue of a warrant to commit in the magistrates court). We heard no argument as to the application of Article 6 to the civil methods of enforcement. What we say

> in this judgment is to be understood as applying only to the enforcement of a confiscation order by the issue of a warrant of commitment to prison."

58. Finally, for present purposes, we were referred to the decision of the Divisional Court in *Taylor v City of Westminster Magistrates Court* [2009] EWHC 1498 (Admin). The issue there was somewhat removed from that in the present case. It involved the extent to which a Magistrates Court could make a representation order to provide public funding for a court advocate in enforcement proceedings of a confiscation order made in 1996 under the Drug Trafficking Offences Act 1986. This in turn involved consideration of the Criminal Defence Service (General) (No. 2) Regulations 2001 and whether the confiscation enforcement proceedings in question were "proceedings before a Magistrates Court in the case of any indictable offence".

59. In his judgment, with which Pill LJ agreed, Cranston J stated at paragraph 25 that for the purposes of the Access to Justice Act 1999 and the 2001 Regulations the confiscation enforcement proceedings were criminal proceedings. However, distinguishing the case of *Lloyd*, he held that Regulation 12 of the 2001 Regulations had no application. The enforcement of the confiscation order in question was to be treated as though it were the enforcement of a fine, under the provisions of s. 6 of the Drug Trafficking Offences Act 1986. Thus the proceedings in the Magistrates Court, being regarded as by way of enforcement of a fine, were too far removed from falling within "the case of any indictable offence".

The 2002 Act

60. We raised with counsel the question of what the position would be in confiscation enforcement proceedings under the 2002 Act. We did so because, whilst the provisions of that Act are different from those of the 1988 Act, it is difficult to discern why the outcome, for the purposes of the availability of orders for costs out of central funds, should have been intended as a matter of policy to differ: the more so, indeed, when both s. 16 and s. 17 of the 1985 Act have been the subject of significant amendments by the 2012 Act, which of course post-dates the enactment of the 2002 Act by a number of years.

61. The position appears to be this.

62. The 2002 Act differs very significantly in this respect from the 1988 Act: in that confiscation enforcement proceedings of this type are now, in proceedings on indictment, expressly assigned to the Crown Court: see s. 50 (and likewise also with restraint orders and the appointment of management receivers). Thus it is for the Crown Court now to determine any issues of trusts or beneficial ownership and tainted gifts and so on that may arise in such a context. At all events, the strict dichotomy between criminal proceedings in the Crown Court and civil proceedings in the High Court as envisaged by Lord Hobhouse in *Norris* has to that extent been removed.

63. The 2002 Act does not itself make any reference to an award of costs out of central funds, any more than does the 1988 Act. The jurisdiction, such as it is, is to be found in the 1985 Act.

64. The Criminal Procedure Rules in general terms are designed to apply to (among others) "all criminal cases in Magistrates Courts and in the Crown Court": Rule 2 (1) (a). Section 91 of the 2002 Act further provides that such Rules may make provision corresponding to provision in the Civil Procedure Rules. Rule 33 of the Criminal Procedure Rules relates to Confiscation and Related Proceedings. Rule 33.47 applies where the Crown Court is deciding whether to make an order for costs in restraint proceedings or receivership proceedings. The "general rule" is stated to be that "the unsuccessful party may be ordered to pay the costs of the successful party": Rule 33.47 (3) (a). That Rule also sets out detailed provisions as to restraint orders and enforcement receivers: see Rule 33.51 and following and Rule 33.56 and following.

65. Rule 45 of the Criminal Procedure Rules relates to costs. This in terms extends among other things, to Part II of the 1985 Act: see Rule 45.1 (1) (a). Rule 45.4 deals specifically thereafter with costs out of central funds, the rule being stated to apply "where the court can order the payment of costs out of central funds": Rule 45.4.(1). By Rule 45.4 (5) the "general rule" is that the court must make an order. But, among other things, the court "may decline to make a prosecutor's costs order if, for example, the prosecution was started or continued unreasonably".

66. We were also referred to the amended Practice Direction (Costs in Criminal Proceedings) 2015. That, in paragraph 1.3, states that where "a court orders that the costs of a defendant, appellant or private prosecutor should be paid from Central Funds" the order is to be for such amount as the court considers sufficiently reasonable to compensate the party for expenses incurred by him in the proceedings. Part 7 deals with costs in restraint, confiscation and receivership proceedings under the 2002 Act. Such Practice Direction, both by its terms and by its status as a Practice Direction and by its date – 30 years after the 1985 Act – seems to me to provide very limited assistance on the issues of statutory interpretation arising on this appeal. And as for the Administrative Court Judicial Review Guide 2018, to which Dr Friston rather hopefully made brief allusion, I do not think that can really be relied upon at all for present purposes.

The Judgments Below

67. As I have said, the first judgment of the judge followed written submissions from the parties but at a time when the Lord Chancellor was not represented and did not participate. The jurisdictional points nevertheless were debated in those submissions. Jefford J noted that the private prosecutor's costs of the actual confiscation proceedings themselves in this case had previously been ordered to be paid out of central funds both in respect of the Crown Court and in respect of the defendant's unsuccessful application to the Court of Appeal for leave to appeal against the confiscation order. She then said: "The position should plainly be the same in respect of the proceedings under the Criminal Justice Act 1988". She amplified this by saying at paragraph 12:

> "Section 80 of the Criminal Justice Act 1988 provides a mechanism for enforcing a confiscation order in the High Court. Without such a mechanism for enforcement, the confiscation proceedings are themselves toothless and, in my view, by necessary extension such enforcement proceedings must therefore be regarded as brought "in respect of an

> indictable offence". The proceedings do not exist in a bubble or have some life of their own: they exist solely to enable assets to be seized or received that have been obtained by or represent the benefit of fraud."

68. Thereafter she turned to the issue of whether such expenses could extend to the costs ordered to be paid by the private prosecutor to Ms Gheewala. The judge held that it could not be said that such proceedings against Ms Gheewala had been unreasonable or instituted or continued without good cause. She went on to hold ("with some hesitation") that such costs were recoverable out of central funds as expenses within the ambit of s. 17 in the 1985 Act. She gave a number of reasons for so deciding in paragraph 23 of her judgment, including the following:

> "(i) Proceedings of this nature are brought in the public interest. A private prosecutor may do so entirely properly but ultimately be unsuccessful. The Criminal Justice Act 1988 expressly contemplates such proceedings involving a third party having the right to a hearing. If the prosecutor in proceedings against such a third party were then exposed to personal liability for that third party's costs, the prosecutor would be dissuaded from properly pursuing enforcement. That itself is not in the public interest.
>
> (ii) By the same token, if the prosecution had been brought, and the consequent proceedings been pursued by a public prosecutor, if any adverse costs order had been made, it would have been paid out of some manifestation of the public purse.
>
> (iii) The public purse is not exposed to some unconstrained liability as the circumstances in which a prosecutor may be liable on a civil basis for costs of a third party are limited.
>
> ….
>
> (v) Such expenses are properly incurred if they arise out of proceedings properly brought, even if unsuccessful.
>
> …."

69. In her second judgment, following the intervention of the Lord Chancellor and following a hearing, the judge took a different view. She carefully reviewed the legislative background and competing submissions. She considered the decision of the House of Lords in the *Steele, Ford & Newton* case. She said this at paragraph 25 of her judgment:

> "The conundrum, it seems to me, is this. On the one hand, even if the power to conduct "criminal proceedings" is not derived from section 6, section 17 is most obviously concerned with the

> costs of a private party who pursues such criminal proceedings and is, therefore, limited to costs of criminal proceedings. So far as defence costs are concerned, section 16 is clearly limited to various types of criminal proceedings and it could be expected that section 17 would have a similar scope. It would be surprising if the defendant's costs could only be recovered out of central funds in what are obviously criminal proceedings and not in proceedings in the High Court or on appeal from the High Court to the Court of Appeal Civil Division whilst the prosecutor's costs could be recovered in the High Court and on appeal. On the other hand, if that is right, the wording of section 17 need only have referred to criminal proceedings (or contained a similar list of proceedings to that in section 16) but instead a broader expression "in respect of an indictable offence" is employed. That expression is capable, for example, of referring to criminal proceedings before the Court of Appeal Criminal Division but there is also a persuasive reason why an even broader meaning ought to be ascribed to the words used. As submitted on behalf of the prosecutor, that is because there is a public interest in the enforcement of confiscation orders and under section 80 of the CJA the application for the appointment of a receiver may only be made by the "prosecutor".”

70. After considering further the arguments and also the contents of the 1986 Regulations, the 2015 Practice Direction and the Criminal Procedure Rules as well as various other authorities, including *Lloyd* and *Taylor*, she expressed her conclusion and reasons for her conclusion at paragraph 47 of her judgment in these terms:

> “I have come to the conclusion, with the benefit of full argument, that my previous decision was wrong and that the order made should be set aside. In summary:
>
> (i) It remains my view that the wording of section 17 of the POA 1985 is, in itself, broad enough to encompass civil proceedings in the High Court to enforce a confiscation order and not limited to “criminal proceedings”. There is good reason for that because the confiscation proceedings are toothless without an adequate enforcement mechanism; where the prosecution is brought by a public body, for the public good, the costs of the prosecutor would be paid out of public funds (irrespective of the outcome) and there is good reason to place the private prosecutor in the same position.
>
> (ii) However, the legislative background examined in *Steele Ford & Newton v CPS* and the decision in that case provide strong indications that the legislative intent was that section 17 should only apply to criminal proceedings and should not have such broader application.

> (iii) There is further support for that in the fact that it would be surprising if the prosecutor could recover costs out of central funds (under section 17) in circumstances where the defendant could not (under section 16).
>
> (iv) The Regulations made under the POA 1985 do not provide for the determination of costs in proceedings in the High Court.
>
> (v) The POA 1985 has itself been amended by LASPO 2012 (by the insertion of sub-sections (2A) to (2C)) in such a way that, if not fixed by the court, there is no mechanism to determine the amount to be paid out of central funds to the prosecutor in proceedings in the High Court."

71. Having so decided, she did not need to consider separately the issue of the costs ordered to be paid by the prosecutor to Ms Gheewala. However, she shortly indicated that she would in any event have set aside that part of her previous decision as well: primarily on the ground that the 1986 Regulations did not provide for any appropriate authority to determine the costs in such a situation and did not give any indication that costs so incurred with regard to a third party were intended to be recoverable as expenses.

Jurisdiction of this Court

72. In view of the nature of some of the arguments being put forward, this court raised with the parties in advance of the hearing the question of whether there was any jurisdictional bar to this court hearing this appeal, by reason of s. 18 (1) of the Senior Courts Act 1981. However, the decision of the Supreme Court in *R (Belhaj) v Director of Public Prosecutions (No. 1)* [2018] UKSC 33, [2019] AC 593 has, of course, since been the subject of clarification and explanation in *In re McGuinness* [2020] UKSC 6, [2020] 2 WLR 510. In the light of that decision, and also of the decision in *Montgomery* (cited above), and given the nature of the present dispute involving these issues of statutory interpretation on the intervention of the Lord Chancellor, I would accept the submissions of Dr Friston and Mr Cohen that this court does have jurisdiction to entertain this appeal.

Discussion and Disposal

73. Against that outline review of the position, I turn to my conclusion.

(a) The First Issue

74. In assessing the true meaning and effect of s. 17 (1) (a) of the 1985 Act, two points, discussed above, have, in my opinion, at the outset to be borne in mind:

(1) First, confiscation proceedings themselves are part of the sentencing process and are criminal proceedings: see *Rezvi*; *Zinga*.

(2) Second, enforcement proceedings under the 1988 Act are civil proceedings and are subject to civil procedural law: see *Montgomery*; *Norris*; *Olden v Crown Prosecution Service* [2010] EWCA Civ 961.

75. As to the words "in respect of", they are words of connection. As a matter of interpretation, the extent of the connection must depend on the particular context, whether it be statutory or contractual, in which those words find themselves. As so often, context is all.

76. Taking the words of s. 17 (1) (a) as they stand, and putting them also in the context of other provisions of the 1985 Act, the sub-section, read naturally and ordinarily, seems to me plainly, on the face of it, to apply to a situation such as the present. Here, the defendant had been convicted at trial in the Crown Court of fraud: an indictable offence. The trial proceedings unquestionably were "in respect of" an indictable offence. The ensuing confiscation proceedings, part of the overall sentencing process which culminated in the confiscation order, were themselves likewise unquestionably "in respect of" an indictable offence. It seems to me to be very odd and strained then to say that, nevertheless, enforcement proceedings which are designed to give effect to the confiscation order are somehow *not* "in respect of" an indictable offence. It is too restricted an approach, in my opinion, to say that such proceedings are, and only are, in respect of the confiscation proceedings. As the judge had herself put it in her first judgment, the enforcement proceedings do not exist in a bubble or have some life of their own.

77. It is true that Part II of the 1985 Act, as amended, is headed: Defence, Prosecution and Third Party Costs in Criminal Cases. But that heading is general and is only a limited guide to interpretation; it cannot of itself displace the natural meaning of s. 17 (1) (a).

78. Mr Cohen was insistent, however, that s. 17 (1) (a) was only to be taken as extending to criminal proceedings as such. Absent authority, I see no sufficient basis for so reading that sub-section. It is quite true that in s. 6 the preservation of the right to institute and conduct private prosecutions is in terms geared to "criminal proceedings". But that, if anything, tells against his argument. Section 17 (1) (a) could, for example, readily have been restricted expressly to criminal proceedings if that was what was intended. But it is not: on the contrary, it in terms relates to *any* (emphasis added) proceedings in respect of an indictable offence. Moreover, that is to be contrasted with s. 17 (1) (b). That sub-section, in the context of summary offences, is limited to the Divisional Court or the House of Lords. But s. 17 (1) (a), by way of contrast, is not limited by its terms to any particular court.

79. Yet further, such an interpretation – to my way of thinking, the natural interpretation – is surely very strongly supported by purposive considerations. The judge in her first judgment had clearly thought that such considerations ultimately were determinative of the point: see her powerful observations in paragraph 12 of her first judgment. In her second judgment, the one now under appeal, this point understandably continued to occupy her mind: see paragraph 47 (i) of that judgment. As she observed, confiscation orders are "toothless" in the absence of adequate enforcement proceedings. There can, as I see it, be no rhyme or reason in permitting a private prosecutor's costs of confiscation proceedings to be paid out of central funds but then prohibiting such an outcome for enforcement proceedings with regard to the confiscation order so obtained. Indeed, it can also be said that such an outcome would be contrary to the perceived public interest. Parliament has decided that, in appropriate cases, private prosecutions serve a public interest. Parliament has further decided that confiscation proceedings, designed to require a criminal to disgorge the proceeds of his criminality, also serve a public interest. Yet if a private prosecutor can

never get any costs of enforcement proceedings out of central funds that would operate as a very substantial deterrent to initiating confiscation proceedings in the first place. It is very difficult to think that that would accord with the presumed Parliamentary intention.

80. That point, in fact, has particular focus in the present case. It will be recalled that by the confiscation order made by Judge Hone QC in the Crown Court, the judge had directed that compensation to the victims of the fraud (Mr Shah, as well as the private prosecutor) should first be paid out of the sums recovered out of the confiscated amount. It is a further aspect of the public interest, under the legislative scheme, that where practicable victims should be compensated for the fraud (or other related criminality) inflicted on them. Indeed, such an order remains under the purview of the Crown Court throughout. But, as pointed out by the President of the Queen's Bench Division in argument, that further public interest would also stand to be undermined if the prosecutor is not able to recover costs of enforcement proceedings out of central funds. Given the practical realities of defendants in such cases claiming to be without assets and not co-operating in the (necessary) enforcement process, it is a hollow argument indeed to say that the remedy, where the enforcement proceedings are successful, is to be left solely to an order for recovery of costs from the defendant himself pursuant to Civil Procedure Rules Part 44.

81. In support of her conclusion, the judge considered it surprising that the prosecutor could recover costs out of central funds in circumstances where the defendant, under s. 16, could not: see paragraph 47 (iii) of her judgment. With respect, that is not a tenable point. There has never been an exact equivalence between s. 16 (whether in its original form or in its amended form) and s. 17 (whether in its original form or its 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 in the present situation are not difficult to discern. As pointed out by a constitution of this court in the subsequent costs decision in the *Zinga* litigation, and after reference to the decision of the Divisional Court in *R (Law Society) v Lord Chancellor* [2010] EWHC 1406 (Admin), [2011] 1 WLR 234, 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 Ltd) v Zinga* [2014] EWCA Crim 1823, [2014] 5 Costs L. R. 879 at paragraph 20 of the judgment. Indeed, that differentiation has become even more pronounced by virtue of the amendments made to s. 16 and s. 17 by the 2012 Act.

82. The judge was also concerned that the 1986 Regulations, made pursuant to the 1985 Act, did not provide any mechanism for the determination of costs out of central funds in proceedings before a single judge of the High Court: whereas in other respects such means of determination are available. I accept that it is legitimate to take into account the 1986 Regulations in considering the interpretation of the 1985 Act itself and I accept that this is a point, particularly having regard to s. 17 (2C) (b) of the 1985 Act, favouring the respondent's interpretation. But, as I see it, the 1986 Regulations cannot operate to distort the meaning of s. 17 (1) (a) if otherwise not ambiguous. Besides, it cannot be assumed that the 1985 Act, and 1986 Regulations made thereunder, were drafted with the confiscation provisions, let alone the

enforcement provisions, of the subsequent 1988 Act, or Drug Trafficking Offences Act 1986, specifically in mind. Moreover, the lack of provision for such determination does not leave a gaping lacuna in the legislative scheme, if read so as to extend to enforcement proceedings in the High Court. For the statutory provisions are to the effect that the court itself is empowered to fix the amount. Overall, in fact, as I see it, the real lacuna would be if the legislation did *not* permit recovery of costs of enforcement proceedings out of central funds.

83. As to the authorities, I do not consider that they require a conclusion that s. 17 (1) (a) of the 1985 Act is to be interpreted so as to apply solely to criminal proceedings: the proposition which is the bed-rock of the respondent's arguments.

84. Dr Friston relied on the case of *Lloyd*. However, that was decided by reference to Article 6.1 of the Convention and does not deal with the present situation. It is true that the concession of counsel in that case that subsequent proceedings to enforce the confiscation order by a warrant of committal formed "part and parcel of the original criminal proceedings" was accepted. Since the present case also involves enforcement of the confiscation order there is indeed, it can be said, a broad analogy. Nevertheless, Dyson LJ was careful to stress that the actual decision related to, and was confined to, enforcement by way of summons for the issue of a warrant to commit: and that there had been no argument on the civil methods of enforcement (paragraph 24 of the judgment).

85. I consider that not much help can be derived from the case of *Taylor*. Mr Cohen to some extent relied upon it, albeit the judge had in fact read that decision as providing, if anything, some limited support to the prosecutor's argument. It is true, as Dr Friston noted, that Cranston J had stated that "confiscation enforcement proceedings are criminal proceedings". But Cranston J expressly qualified that by saying that that was so for the purpose of the Access to Justice Act 1999 and related 2001 Regulations. Indeed, as Mr Cohen noted, by reference to those Regulations Cranston J regarded the enforcement proceedings as by way of enforcement of a fine in that particular case as "quite separate proceedings" which were not to be regarded as falling within the ambit of the words "in the case of any indictable offence", as used in the applicable legislative scheme in that case. Overall, in my view, the context of that case is too far removed from the present case to provide much assistance.

86. That leaves the decision of the House of Lords in the *Steele, Newton & Ford* case.

87. That case was not directly concerned with the issue arising in the present case. Rather, as I have said, it was concerned with the issue of whether the power to order the payment of costs out of central funds could be implied if not into s. 50 of the Solicitors Act 1974 then into s. 18 (1) of the Supreme Court Act 1981: statutory provisions which, on their face, have nothing to do with costs out of central funds at all.

88. Mr Cohen stressed that Lord Bridge had, in his review of various statutes, included consideration of s. 16 and s. 17 of the 1985 Act. He further stressed that Lord Bridge had also stated that, in general terms, the circumstances in which an order for costs out of central funds may be made had been precisely and specifically defined and that those circumstances could only arise in criminal proceedings (p.37 A-B). Those observations, submitted Mr Cohen, are directly in point in the present case.

89. That seems to have been a point which particularly swayed the judge in this case. But those remarks of Lord Bridge have to be read in context. It is evident that there was no discussion at all in *Steele, Ford & Newton* of the status of confiscation proceedings, let alone the status of enforcement proceedings. Rather, the House of Lords was concerned, primarily, with the true interpretation of s. 51 of the Supreme Court Act 1981 in the factual context of that case. That said, what the decision does establish for present purposes, in my view, is that if there is to be jurisdiction to make an order for costs out of central funds then it must be conferred by sufficiently clear and express terms.

90. In the present situation however (unlike *Steele, Ford & Newton*), s. 17 of the 1985 Act is *explicitly* geared to the payment of costs out of central funds: no question of implication, as such, arises. If, therefore, in any given case, there are "any proceedings in respect of an indictable offence" there is jurisdiction to make an order for costs out of central funds: if not, not.

91. Reflecting what I have previously said, I do consider that, here, the enforcement proceedings are "proceedings in respect of an indictable offence". I consider the words of the subsection to be clear and explicit. It is, in my opinion, not permissible or justifiable to write in a further requirement, not otherwise specified in the subsection, that such proceedings must, in themselves, be "criminal" proceedings.

92. In truth, as I see it, these enforcement proceedings were (in the language of *Montgomery* and of *Lloyd*) part and parcel of the confiscation proceedings. They cannot be said to be too remote so as to be disqualified from falling within the ambit of the section. Moreover, whilst these proceedings were, by designation, civil in nature the whole context for them, indeed the only reason for their existence, was the criminal conviction and criminal sentencing process, including confiscation. As the judge herself rightly said, the confiscation order is toothless (pointless, is another way of putting it) if there is not to be enforcement. Consequently, it makes every kind of sense to permit, in an appropriate case, an award of costs out of central funds for those enforcement proceedings in the same way as such an award is assuredly permitted for the confiscation proceedings themselves.

93. Thus in my opinion the fact that such enforcement proceedings are governed by civil law is not fatal, as Mr Cohen would have it. Indeed, as Dr Friston submitted and I agree, the enforcement proceedings are, in truth, civil proceedings of a rather special kind. Not only, for example, do they – on any view – take place in a criminal context and flow from a criminal conviction and confiscation order, but also they are proceedings which only the "prosecutor" may bring (and he plainly does so in his capacity as prosecutor) and where the criminal defendant is, under RSC O.115, required to be made a party. This is also reinforced by the fact that, under the legislation, the criminal proceedings remain extant until the confiscation order is satisfied; and the Crown Court retains an overall role. Thus, for example, where a certificate of inadequacy is made in the High Court then the matter is referred back to the Crown Court for adjustment of the default sentence of imprisonment. Moreover, a confiscation order enures to the benefit of the Crown: and that remains so in a case such as the present, where the amount of the confiscation order exceeds the amount of the compensation order.

94. Such a conclusion, in my opinion, also coheres with, indeed is reinforced by, the position arising under the 2002 Act and with confiscation and enforcement proceedings thereunder. This is particularly so where (a) the 2002 Act now expressly confers the relevant jurisdiction in enforcement proceedings on the Crown Court and (b) the Criminal Procedure Rules expressly include provisions relating to confiscation enforcement proceedings (as well as to payment out of central funds): connoting that such enforcement proceedings, even if hybrid in nature, are properly to be treated as part of a "criminal case". There is no obvious policy reason at all why the 2002 Act, and rules thereunder, should have been designed to have a different outcome for this purpose from that arising under the 1988 Act.

95. In my view, therefore, the judge's initial thoughts and initial conclusion in her first judgment were the right thoughts and the right conclusion. With all respect to her, I think that her second thoughts and second conclusion were the wrong thoughts and wrong conclusion. I would therefore allow the appeal on this issue.

(b) The Second Issue

96. I can take the second issue altogether more shortly. In fact, the submissions to us on this issue were relatively short.

97. The word used in s. 17 (1) is the unqualified word "expenses". That clearly must be taken as being of wider import than the mere recovery of travel or out of pocket expenses as such. I did not understand Mr Cohen to dispute, on this aspect of the case, that it would at least extend (subject always to the requirement of reasonableness) to the legal costs of the private prosecutor in retaining lawyers to pursue the confiscation and enforcement proceedings. That also accords with the heading to the section.

98. I see no reason why such word should not, in principle, be capable also of extending to the legal costs ordered to be paid by the prosecutor to a successful third party in the enforcement proceedings. That is, on a natural reading of the section, an "expense" incurred in proceedings in respect of an indictable offence. I can also see nothing in the 1986 Regulations which would tell against such a conclusion. Such a conclusion, moreover, would also align with the position of a public prosecutor: who will, directly or indirectly, be able to have recourse to public funds to meet any liability in costs to a third party.

99. With respect, many of Mr Cohen's arguments on this issue really seemed to come down to arguing that it was not fair or reasonable for Ms Gheewala's costs to come out of public funds. He noted, by way of example, that the statutory provisions and the order of appointment of the enforcement receiver in the present case would have permitted Ms Bartlett, as enforcement receiver, herself to have pursued the enforcement proceedings. However, under the legislative scheme the yardstick for recovery is reasonableness, not success. It is, of course, a very important qualification to the recovery of such costs out of central funds that they be appropriately and reasonably incurred. But that is a separate issue from the issue of whether the court has any power (in the sense of jurisdiction) to make such an order at all. If it does - and my view is that it does - then it was common ground before us that this court is not itself in a position to make such a determination. Mr Cohen's points of this nature can thus be left for consideration at that further stage.

100. In her first judgment, the judge decided that the costs payable to Ms Gheewala were in principle payable and had been properly and reasonably incurred. However, the Lord Chancellor – who, as custodian of public funds for this purpose, is the party with ultimate responsibility for the discharge of these costs – had not participated in the first hearing and had no opportunity to make representations on reasonableness, whether in terms of the undertaking and pursuit of these enforcement proceedings relating to the alleged tainted gifts to Ms Gheewala or in terms of quantum. I thus would remit this issue (which, for the avoidance of doubt, will extend to the prosecutor's own costs, as well as those ordered to be paid to Ms Gheewala) to the High Court for further determination.

Conclusion

101. I would, for my part, allow the appeal on both issues.

President of the Queen's Bench Division:

102. I agree with the judgment of Davis LJ.

Sir Terence Etherton MR:

103. I have found this appeal a difficult one on the first issue. Like Davis LJ, I too would pay tribute to the high quality of the arguments presented to us by counsel. I also acknowledge the very full and careful analysis of Davis LJ, which carry particular weight in view of his considerable expertise and experience in this area of the law.

104. My concerns with the analysis and conclusion of Davis LJ on the first issue can be summarised in the following brief propositions and analysis.

105. Although *Steele Ford & Newton* was not concerned at all with confiscation proceedings but rather with whether a jurisdiction to order payment out of central funds on the facts of that case could be implied in section 51 of the (then) Supreme Court Act 1981, the House of Lords laid down general propositions which on their face applied, and were intended to apply, generally. Lord Bridge, with whom all the other members of the judicial committee agreed, considered (in his own words at p. 33G) "in some detail the nature, context and provenance of the legislative provisions in which jurisdiction is specifically conferred to award payment of costs out of central funds". His conclusion (at p. 37 A/B quoted by Davis LJ above) was:

> "Thus, throughout the history of the legislation in which jurisdiction has been expressly conferred to order payment of costs out of money provided by Parliament we find that the circumstances in which such an order may be made have been precisely and specifically defined, that, save in the provisions relating to licensing authorities, those circumstances can only arise in criminal proceedings and that, so far as the Court of Appeal is concerned, jurisdiction to make such orders

> has only been conferred on the Criminal Division of the court."

106. According to that approach, reduced to its most simple and straightforward, the issue in the present case is whether section 17(1)(a) of the 1985 Act precisely and specifically provides that the prosecutor's costs of the enforcement of a confiscation order may be ordered to be paid out of central funds. The conclusion of Davis LJ at [91] above is that enforcement proceedings are "proceedings in respect of an indictable offence" and, in that respect, the words of section 17(1)(a) are clear and explicit.

107. A number of obstacles have to be overcome in reaching that conclusion.

108. Notwithstanding any assumption that might otherwise be made on the basis of section 102(12)(d) of the 1988 Act (proceedings for an offence in a case where a confiscation order has been made only conclude when the order is satisfied), it is now well settled, certainly at the level of the Court of Appeal, that enforcement proceedings under the 1988 Act are not criminal proceedings but are proceedings to which the Civil Procedure Rules apply and not the Criminal Procedure Rules: *Re Norris* at [16] and [23], *Olden* at [17].

109. There was no provision in the 1986 Regulations for the determination of costs by a single judge of the High Court (who exercises the powers in relation to realisation of property under section 80 of the 1988 Act). I agree with Davis LJ that it is legitimate to take into account those Regulations in considering the interpretation of the 1985 Act itself.

110. The Divisional Court in *Taylor v City of Westminster Magistrates Court* found on language that was substantially the same as in section 17(1)(a) of the 1985 Act - "in the case of … any indicatable offence" - that those words did not extend to confiscation enforcement proceedings in the Magistrates Court because they are to be treated as equivalent to the enforcement of a fine (comp. the 1988 Act section 75).

111. The provisions of the 2002 Act and the Criminal Procedure Rules would appear, on their face, to undermine arguments of general policy that the absence of a power to order the prosecutor's costs of enforcing a confiscation order would be inconsistent with the encouragement of private prosecutions and would fatally discourage private prosecutors from enforcing confiscation orders. There is nothing in the 2002 Act itself which provides for the costs of enforcing a confiscation order to be paid out of central funds. There is, however, in Part 33 of the Criminal Procedure Rules, which is headed "Confiscation and Related Proceedings", express provision addressing the making of costs in restraint or receivership proceedings. It makes no provision for payment out of central funds but, on the contrary, provides for the court to exercise a discretion for payment of costs between the parties in terms which mirror Part 44 of the Civil Procedure Rules.

112. Part 45 of the Criminal Procedure Rules, which makes provision for payment of costs out of central funds, addresses costs in the context of, among others, Part II of the 1985 Act, but it does not elucidate further section 17(1)(a). In

any event, that misses the point being made above which is that, when the Criminal Procedure Rules came to be drafted, it plainly was not thought to be against public policy or the encouragement of private prosecutions or the enforcement of confiscation orders for costs to be addressed by way costs between the parties in exactly the same way as in ordinary civil proceedings.

113. Despite my concerns for all those reasons about the conclusion of Davis LJ, with which the President of the Queen's Bench Division agrees, after much soul-searching I have decided not to dissent on this appeal. This is an area of the law with which both the President of the Queen's Bench Division and Davis LJ have a familiarity, which I do not. As I have said earlier, Davis LJ has particular knowledge of the practice and law relating to confiscation orders. As the other two members of the court are both agreed, and any dissent by me would not alter the outcome of the appeal, I consider that it is right in the special circumstances of this appeal that I should defer to them on the first issue.

114. I agree with Davis LJ on the second issue.