Waste not, want not

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Corporate Crime analysis: In R v Cornish, the High Court has provided guidance on how to approach wasted cost applications against the prosecution following an acquittal. Edward Henry, a barrister at QEB Hollis Whiteman, considers the implications of this decision.

Original news

R v Cornish and another [2016] EWHC 779 (QB), [2016] All ER (D) 167 (Apr)

The Queen's Bench Division in an application under section 19 of the Prosecution of Offences Act 1985 (POA 1985) and regulation 3 of the Costs in Criminal Cases (General) Regulations 1986 SI 1335/86 held that the decision to prosecute an NHS Trust and a doctor or the continuation of the prosecution was not improper. It was based on expert evidence which was put forward with some force and clarity.

What was the background to the application?

The number of wasted costs applications against the prosecution has arisen in relation to privately funded defence cases, following an acquittal. The government's restrictive approach to the recovery of defence costs is the prime reason for this. It legislated first to prevent outright the recovery of legal costs incurred by a victorious defendant under POA 1985, s 16. Thereafter, it relented—but only to the extent that one could reclaim one's costs capped at legal aid rates.

Paragraph 2(2) of Schedule 10 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 inserted s 16A(1) into POA 1985, which provided that:

> '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…'

This grotesque provision applied to criminal proceedings started between 1 October 2012 and 27 January 2014. In respect of criminal proceedings commenced in that period, under POA 1985, s 16, a successful defendant was able to recover only out-of-pocket expenses, such as fares to court. Subsequently, the Costs in Criminal Cases (Legal Costs) (Exceptions) Regulations 2014, SI 2014/130 inserted a new s 16A(5A) into POA 1985 under which, for proceedings commenced after 27 January 2014, legal costs were again recoverable but effectively only at legal aid rates.

This provides the background as to why acquitted defendants are pursuing special costs applications against prosecutors or other interested parties, as these applications allow (in theory) the victorious defendant to pursue costs up to an indemnity basis.

In this matter, Maidstone and Tunbridge Wells NHS Trust applied for a wasted costs order against the Crown Prosecution Service (CPS) arising out of the decision to prosecute it for corporate manslaughter. The factual allegations arose from the tragic and avoidable death of a young mother following a caesarean section. The prosecution failed and was stopped at half-time. A consultant, also acquitted, did not pursue a wasted costs application.

The trial judge, Coulson J, rejected the Trust's application.

What issues relating to the making of costs applications against prosecutors did this case raise?

The courts have been consistently opposed to protracted costs litigation, and have repeatedly stated that this is a summary jurisdiction, reserved for stark or obvious cases. The rising number of wasted costs applications, caused by the government's policy, creates a clear tension with the courts' approach.

This decision provides yet another interesting case study on the difficulties facing any defendant pursuing costs against the CPS, where the case is complex, multi-factional and largely dependent on expert evidence. In this respect it is similar to the approach of Simon J in *R v Counsell* (unreported) 13 March 2014, Crown Court at Bristol [2014] EW Misc B58 (CrownC). Those advising defendants in such cases must assiduously avoid the wisdom of hindsight. The argument that the prosecution ought to have realised that its case was doomed to fail is an easy assertion to make, but somewhat difficult to prove. There have been manifestly flawed and moribund prosecutions, such as *Evans v Serious Fraud Office* [2015] EWHC 263 (QB), [2015] All ER (D) 148 (Feb), where wasted costs applications have succeeded on the basis that they were moribund from the outset, but Coulson J did not consider that this case fell into this category.

What were the main legal arguments put forward?

That the case ought never to have been brought, and should have been discontinued at an early stage following prosecutorial review. Additionally, the prosecution expert's shortcomings ought to have been spotted earlier before trial.

What did the judge decide, and why?

The judge rejected these submissions. This was an extremely complex factual case, which involved a minute evaluation of expert evidence which was far from straightforward. The demolition of the prosecution's expert evidence was not foreseeable and there was, on the face of it, a very strong public interest in bringing criminal proceedings. Other prosecutors might have declined to do so, but that was far from stigmatising the decision to prosecute as perverse or wrong.

As Coulson J pointed out:

> 'Mr Cooper QC was obliged to argue, for the purposes of this s 19 application, that the trust's points in cross-examination were obvious and should always have been apparent to the Crown, either prior to the decision to prosecute, or at least prior to trial. But, as I suggested to Mr Cooper QC during submissions, that underplays and underestimates the skill with which Professor Hopkins was cross-examined. He was not bullied; words were not put into his mouth; he was given every opportunity to answer fair and patient questions. Some of those questions might have been predicted; some might not. Professor Hopkins' inability to answer the questions, at least in a way that was remotely convincing, was the principal reason why I concluded that there was no case to answer against the trust. But to say that this position would always have been apparent fails to give sufficient credit to Mr Cooper QC's cross-examination of him, and to allow hindsight to play too big a part in this s 19 application.'

To what extent is the judgment helpful in clarifying the law in this area?

This decision is to be welcomed as it is, for now, the last word on the subject, and Coulson J provides an admirably clear summary of the existing law. While it is only a first instance decision, it provides useful guidance as to the approach the court will adopt in resolving these disputes. Coulson J distilled the principles underlying such applications succinctly as follows:

- simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of POA 1985, s 19 (*R v P* [2011] EWCA Crim 1130, *Evans v SFO*)
- improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly (*DPP v Denning* [1991] 2 QB 532, [1991] 3 All ER 439)
- the test is one of impropriety, not merely unreasonableness (*R v Counsell*)—the conduct of the prosecution must be starkly improper such that no great investigation into the facts or decision-making process is necessary to establish it (*Evans v SFO*)
- where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper—however, even then, that does not necessarily follow because 'no one has a monopoly of legal wisdom, and many legal points are properly arguable' (*Evans v SFO*)
- it is important that POA 1985, s 19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions (*R v P*, *Evans v SFO*)
- in consequence of the foregoing principles, the granting of a POA 1985, s 19 application will be 'very rare' and will be 'restricted to those exceptional cases where the prosecution has made a clear and stark error as a result

of which a defendant has incurred costs for which it is appropriate to compensate him' (*Evans v SFO*)

Are there still any unresolved issues lawyers will need to watch out for in this area?

The law is settled and, essentially, these matters are fact-specific—but one has to be cautious and ensure that the grounds withstand the criteria Coulson J summarised.

What practical lessons are there from this case for corporate crime lawyers dealing with the issue of costs after successfully defending a corporate criminal case?

The words of Simon J, in *R v Counsell*, are worth bearing in mind:

> 'Litigation (whether civil or criminal) is inherently subject to uncertainty and contingency; and any advice is likely to highlight these risks: witnesses who do not come up to proof, new material which may lead to experts changing or modifying their opinion and unanticipated flaws in the evidential basis of the charge. The court cannot approach a wasted costs application with the vision of hindsight. It must take a robust but not over-analytical view of what occurred, and unless the impropriety is clear and egregious, it should not countenance a detailed forensic examination of what occurred with a view to making a wasted costs order.'

Interviewed by Lucy Trevelyan.

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