Neutral Citation Number: [2020] EWHC 1915 (Admin)

Case No: CO/4486/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2020

Before :

THE HONOURABLE MR JUSTICE GOOSE

- -

Between :

THE QUEEN on the Application of ANTHONY WOLLENBERG	**Claimant**
- and -	
THE CROWN COURT AT SOUTHWARK	**Defendant**
- and –	
SECRETARY OF STATE FOR JUSTICE THE LORD CHANCELLOR	**Interested Party**

- -
- -

The Claimant appeared in person
The Defendant was not represented
The Interested Party was not represented

Hearing dates: 7th July 2020

- -

Approved Judgment

Mr Justice Goose:

Introduction

1. Mr Anthony Wollenberg is the Claimant in judicial review proceedings he seeks to bring against the Crown Court at Southwark, in relation to a decision made on the 29 July 2019 by Her Honour Judge Taylor, the Honorary Recorder of Westminster, in refusing his application for prosecution costs pursuant to section 17 of the Prosecution of Offenders Act 1985. The application for permission to bring these proceedings was refused on the papers by Mr Justice William Davis and was renewed orally before me. At the conclusion of the hearing, in which neither the Defendant nor the Interested Party appeared, I reserved judgment.

Background

2. On the 22 March 2018 Mr Wollenberg ("the Claimant") brought a private prosecution against four defendants alleging that they had each been parties to a fraudulent conspiracy and one of them to a statutory fraud, in respect of which he was the victim. Having obtained summonses from the Magistrates' Court, the defendants were sent to the Crown Court pursuant to section 51 of the Crime and Disorder Act 1998 for a preliminary hearing. At that hearing the defendants indicated that they were to apply for the dismissal of the charges, under schedule 3 paragraph 2 of the 1998 Act, on the basis that the evidence against them was insufficient for their conviction. Essentially, the submission was that there was no case against them. On the 6 February 2019, after a two day hearing, Her Honour Judge Taylor provided a detailed ruling in which she dismissed all charges against the defendants. The defendants subsequently made applications for costs to be paid by the Claimant, as the prosecutor, under section 19 of the Prosecution of Offenders Act 1985. Those applications were later withdrawn. On 3 June 2019 the Claimant made his own application for prosecution costs from Central Funds, pursuant to section 17 of the 1985 Act. The application was heard on 22 July 2019 and was dismissed. Her Honour Judge Taylor's ruling was handed down on 29 July and is the subject matter of these proceedings for judicial review.

The Claimant's grounds

3. The Claimant relies upon eight grounds in support of his case that the judge's refusal to award prosecution costs under section 17, exhibited such flaws of reasoning and of sufficient gravity as to amount to jurisdictional errors so that the decision made was without jurisdiction and should be quashed. To obtain permission for these proceedings it must be established that his case is reasonably arguable. The grounds can be stated shortly as follows:

    Ground 1 – there was no proper basis for the court's finding that the prosecution was brought for a dominant improper motive;

    Ground 2 – the court was wrong in law to withhold costs due to insufficiency of evidence at the commencement and during the continuation of the case;

    Ground 3 – the court was wrong in law to attach no weight to any of the experts reports and their core conclusions;

Ground 4 – in refusing to award costs, the judge impermissibly allowed herself to be influenced by the lack of evidence of an award in similar circumstances in which charges had been dismissed; a failure to secure a conviction is not of itself a relevant consideration in the decision upon whether to award costs;

Ground 5 – the court impermissibly allowed itself to be influenced by the quantum of costs claimed by the Claimant;

Ground 6 – the judge was impermissibly influenced by the prosecution's failure to apply for a Voluntary Bill following the dismissal ruling;

Ground 7 – in proceeding to rule on the application for costs without paying due regard to the Claimant's unchallenged oral evidence at the cost hearing, the judge adopted a flawed process which was procedurally unfair;

Ground 8 – the judge appeared to take no account of the Claimant's latest statement and skeleton argument, both dated 3 June 2019;

4. There have been no submissions made by the Defendant or the Interested Party. Whilst there has been an acknowledgement of service by the Southwark Crown Court, by convention no submissions are made by a court in an application for judicial review of its decisions. The Interested Party has also declined to take part in these proceedings.

The legal framework

5. The power to award costs to the prosecution at the conclusion of criminal proceedings is contained within section 17 of the Prosecution of Offenders Act 1985:

> "**Prosecution costs**.
>
> (1) Subject to subsections (2) and (2A)] below, the court may—
>
> (a) in any proceedings in respect of an indictable offence;
>
> ...
>
> order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.
>
> …
>
> (2A) Where the court considers that there are circumstances that make it inappropriate for the prosecution to recover the full amount mentioned in subsection (1), an order under this section must be for the payment out of central funds of such lesser amount as the court considers just and reasonable.

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

6. The power to order prosecution costs is different to the power to order wasted costs under section 19 of the 1985 Act. The tests to be applied are different.

7. The Criminal Procedure Rules "Costs Out Of Central Funds" at Rule 45.4(5) it provides:-

> "45.4(1) This rule applies where the court can order the payment of costs out of central funds…
>
> (5) the general rule is that the court must make an order, but –
>
> …
>
> (b) the court may decline to make a prosecutors cost order, if, for example, the prosecution was started or continued unreasonably".

8. The principles which emerge, and which should be applied when a court is asked to consider an application for prosecution costs under section 17 of the 1985 Act, may be summarised as follows:-

> (i) the general rule is that costs should be paid from central funds, unless a lesser sum is appropriate; the amount of costs to be paid are those that the court considers to be reasonably sufficient to compensate the prosecutor for any expenses properly incurred;
>
> (i) there is a discretion to decline to make an order if, for example, the prosecution was started or continued unreasonably;
>
> (ii) or there is some other <u>good reason</u> for not doing so; examples include where proceedings have been instituted or continued without good cause or there has been misconduct;
>
> (iv) whilst those examples are given in the Practice Direction and in the rules, they are not determinative of the extent of the discretion upon whether to refuse costs to the prosecution. The touchstone is objective reasonableness and proper conduct. Therefore, if the prosecution have behaved unreasonably and/or improperly then the court may refuse to award costs from central funds. Whether the private prosecutors conduct of the prosecution can be reasonably described as unreasonable or improper is essentially a fact specific question: each case will depend on its own facts such that reference to other decided cases on their facts is of little assistance.

9. Whilst the Claimant during the course of oral submissions and in his skeleton arguments has sought to provide assistance from cases seeking to describe the meaning and effect of prosecutorial misconduct, that is not the test for refusing to pay costs from central funds to the prosecution; it is an example of unreasonable or improper conduct.

10. Since these proceedings are for judicial review in respect of a criminal cause on indictment in the Crown Court, namely cost orders consequential upon their completion, ordinarily a decision of the Crown Court cannot be challenged by the High Court – see section 29(3) of the Senior Courts Act 1981. Where, however, there is a jurisdictional error of sufficient gravity to take the case out of the jurisdiction of the Crown Court, the High Court may intervene. In the *Crown Court at Maidstone, ex-parte London Borough of Harrow* [2001] 1 CR App R 117 it was held that a judge had no jurisdiction to make the order he purported to make, such that it could no longer be categorised as a matter relating to a trial on indictment so as to fall within the exclusion in section 29(3) of the 1981 Act. It was, therefore, amenable to judicial review. Also, in *R(M) v Kingston Crown Court* [2015] 1 Cr App R 3 it was said at paragraph 32:-

> "*There is binding decision to the effect that, where an order is made relating to a trial on indictment, nonetheless it may be quashed in circumstances where the defect is so severe that it deprived the court below of jurisdiction to make it …the question is whether there is jurisdictional error of such gravity as to take the case out of the jurisdiction of the crown court*".

11. Accordingly, it is necessary to consider the decision made by the Judge in her refusal to grant prosecution costs from central funds and whether, for the purposes of these proceedings, there were defects so severe as to deprive the court below of its jurisdiction for this court to intervene. It will also be necessary to look at the decision in the round in all its circumstances, to decide whether it is arguable that the decision is amenable to judicial review - *R (DPP) v Aylesbury Crown Court* [2017] EWHC 2987 (Admin).

Discussion and conclusion

12. The criminal proceedings brought against the four defendants in the Southwark Crown Court undoubtedly involved detailed allegations of fraud. It is unnecessary in this judgment to go into the detail of the facts or all of the issues that arose in the course of the proceedings. The applications to dismiss the proceedings required and were given careful and detailed analysis by Her Honour Judge Taylor in her ruling on 6 February 2019. Unsurprisingly the Claimant does not agree with the reasons or conclusions of the Judge. When considering the application for costs made by the Claimant the Judge was entitled to take into account her reasoned view of the evidence in the dismissal ruling, whilst addressing a different test in relation to costs.

13. It is necessary for me to consider each of the grounds raised by the Claimant to decide whether individually or cumulatively, they establish a reasonably arguable claim for judicial review in the context of defective reasoning or jurisdictional error of sufficient gravity or severity as to deprive the Crown Court of its jurisdiction upon that issue. Inevitably, during the course of his oral submissions and in his skeleton

arguments and statements, the Claimant was at times repetitious. Nevertheless, as a solicitor acting for himself, he made clear and comprehensive arguments. This is not to unfairly criticize him, but to explain why it is unnecessary for me to repeat all of his submissions but rather to summarise them.

Ground 1

14. The Claimant submits that in the context of private prosecutions mixed motives for the proceedings are common. Whilst the Crown Prosecution Service is confined to singular motives, private prosecutors may have many different ones, whether being commercial or in self-interest. The Claimant submits that at times his motives may have been more self-interested and commercial than in the public interest but, he argues, that it occurred 6-8 months before the commencement of proceedings and not thereafter. The Claimant also submits that unless his dominant motive was improper, his motives are not a reason for refusing his costs.

Ground 2

15. The Claimant relied upon the fact that he had instructed three experienced leading counsel in obtaining the summonses and in pursuing the proceedings until dismissal. Further, he had instructed nine different experts, all at substantial cost to himself. The support of such counsel and experts, he argues, is indicative of good faith and motive and not bad. The Claimant argues that the judge allowed her views upon the evidence of the dismissal proceedings to taint her judgement in the costs application.

Ground 3

16. It is argued that the judge was wrong to attach no weight to the reports of the Claimant's experts and their core conclusions which, he says, supported the merits of his prosecution. The judge gave too much weight to procedural errors, in not complying with the Criminal Procedure Rules in expert witness reports, or on some expert reports going outside their declared expertise and also upon evidence of the Claimant appearing to try to steer or control the evidence of his experts. Taken individually or together those observations by the judge, argues the Claimant, unreasonably caused her to set aside the support these witnesses gave to the prosecution case.

Ground 4, Ground 5 and Ground 6

17. The Claimant submits that the judge impermissibly allowed herself to attach too much weight to the observation, that no previous similar application for prosecution costs after dismissal of the proceedings had been made. Also, that the judge was over influenced by the amount of the claim for costs as well as the absence for any application for a Voluntary Bill in the proceedings after they were dismissed. Each of these factors was, argues the Claimant, irrelevant to the costs application.

Ground 7

18. It is submitted that there was procedural unfairness when the Claimant gave evidence in the costs application and was asked only a few questions by the judge, none of which revealed the conclusions that she reached in refusing the costs application

itself. It is argued that any concerns that the judge had, should have been raised with the Claimant in his evidence so that he had an opportunity to respond.

Ground 8

19. There was an apparent failure by the judge to read and refer to a further skeleton argument and witness statement, both dated 3 June 2019, such that she did not consider all of the relevant evidence.

20. When considering the issue of whether the proceedings were begun and continued unreasonably or without good cause, the judge expressly accepted the general propositions of the Claimant relating to mixed motives for private prosecutors. The test was not that of misconduct or dominant bad motives, but whether the proceedings were unreasonable or without good cause. Although the Claimant submitted that his email communications in August and September of 2017 (referred to at paragraph 11 of the Judge's ruling) were at a difficult moment for him, and did not indicate his attitude to the whole proceedings, the fact remained that they were only 6-8 months before the Claimant commenced substantial criminal proceedings against the four defendants. The Claimant argued that the judge's decision in the costs application was based solely upon this evidence. I do not accept that it did. It was significant evidence of the Claimant's mindset not long before he commenced his private prosecution, but the judge also dealt with each aspect of evidence upon which the Claimant had relied to support the reasonableness of his prosecution. She assessed the significance of his representation throughout by leading and junior counsel, his instruction of expert evidence, the issues of disclosure and other support for the bringing and continuing of the prosecution. At paragraphs 49 and 50 the judge explained her reasoning for refusing the application for costs on the basis that the proceedings were not brought or continued without reasonable or good cause. She stated:-

> "*49C. It is clear that his motivation and behaviour towards Mr Herd was vindictive even before the Event of Default and the appointment of the Receivers. I do not accept that he was merely frustrated into expression of strong sentiments. In my judgment, based on the emails to Mr Hamilton and Ken Davey, and the email to Edward Kim set out above, amongst many in the context of the case as a whole, the predominant motivation was not the bringing to justice of sustained fraud, but both revenge and to leverage a settlement overall with Summit. There is no sign of any public interest in bringing a prosecution despite Mr Wollenberg's expression to the contrary*
>
> *49D. The weight of the evidence was objectively and entirely against any criminal conspiracy on the part of the … [defendants]*
>
> *…*
>
> *49F. The manner in which the expert evidence was obtained and presented was for the most part not compliant with CPR 19, giving rise to difficulties with integrity. Experts were given information by Mr Wollenberg and in some cases a clear steer*

> *in what there were to say. This is not compatible with the CPR or the role of a Minister of Justice …*
>
> *49G…the approach taken and continued in his statements was partial from the beginning and remained partial till the end. This was not just a presentation of the best aspects of a case, but a sustained ignoring of points obviously against the prosecution's approach*."

21. The Claimant, in oral submissions in this renewed appeal understandably concentrated on challenging the reasons of the judge which led her to the conclusion that she did. Inevitably, he does not agree with the decision to dismiss the prosecution, its reasons, nor the decision upon costs. In argument the Claimant accepted, fairly, that it was open to the judge to rely on her findings in respect of the evidence in the dismissal, whilst applying a different test when deciding upon the application for costs. It must follow, therefore, that the judge's view upon the evidence and its strength must be taken into account as a factor to be considered upon whether the proceedings were continued reasonably and with good cause.

22. The judge, who had dealt with the case from its transfer to the Crown Court until its dismissal, was well placed in assessing the sufficiency of the evidence and the approach to the proceedings by the Claimant. In reaching the conclusion that the Claimant had acted unreasonably and without good and proper cause in the proceedings, it was a decision that the judge was entitled to make. Her reliance upon the evidence being insufficient, leading to the dismissal of the prosecution, was not determinative of the costs application. The Judge plainly made a separate assessment and applied the correct test. She was satisfied that the proceedings were unreasonably or improperly brought and continued.

23. I do not find that the judge was arguably wrong to place little weight upon the fact that the Claimant had instructed three experienced leading counsel and nine experts when assessing the sufficiency of the evidence and the propriety of the prosecution. The judge was entitled to consider the point but also to take into account the evidence of the Claimant's close involvement in martialling the evidence, instructing the experts and managing the process of disclosure. In each of these, the judge found the Claimant's role to have been unreasonable. That was a judgement she was entitled to make on all of the evidence before her.

24. I accept that the lack of a previous decision of a similar type, the large value of the claim for costs and an absence in an application for a Voluntary Bill are each factors of little or no weight at all. Certainly, they should not cause the court to refuse prosecution costs under section 17 of the 1985 Act. However, I do not find that the judge caused those three factors to make the decision to refuse costs. They were observations made but did not, in my view, significantly influence the decision.

25. The contention that the judge should have put all of her concerns to the Claimant when he gave oral evidence in the costs application, is without merit in relation to challenging the decision made. It does not create procedural unfairness in a claim for costs, where all of the arguments are in writing and the legal framework was well known, that the judge should have explained to the Claimant her likely decision and its reasons whilst he was giving witness evidence.

26. Equally, it is not arguable that an apparent failure to mention in a ruling each of the skeleton arguments and witness statements means that there is fault, still less a jurisdictional defect, in the decision reached. Further, the judge expressly referred to the skeleton argument, date 3 June 2019 in her ruling as she addressed arguments within that argument in paragraph 18 of her ruling.

27. Next, I must take a step back and consider the decision in the round in accordance with the approach in *R (DPP) v Aylesbury Crown Court* [2017] EWHC 2987 (Admin). Is it arguable that the decision to refuse prosecution costs was of sufficient gravity in its jurisdictional defects as to require the High Court to exercise judicial review? Firstly, I do not find that it is arguable that the decision, or the reasons, were wrong or irrational. Secondly, the decision was properly within the discretion of the judge who correctly applied the appropriate legal framework and reached the decision she was entitled to make on the evidence before her. Still less arguable is the argument that there have been such flaws in the decision of the judge, of sufficient gravity as to amount to jurisdictional error, to permit a superior court to judicially review the Crown Court's decision.

28. Therefore, I must conclude that the Claimant's case for judicial review is not arguable and is, with respect, without sufficient merit to permit the claim to proceed. Therefore, this renewed application for permission must be refused.