IN THE BRISTOL CROWN COURT

SITTING AT LEEDS COMBINED COURT CENTRE

Before the Hon Mr Justice Simon

13/3/2014

Regina

v.

Geoffrey Counsell

Ruling on the Defendant's application for costs under CPR 76.8

Introduction

1. The applicant, Mr Counsell, applies for a Wasted Costs Order against the Crown Prosecution Service ('CPS') arising out of decision to prosecute him for offences of manslaughter and, subsequently for an offence under ss.3(2) and 33 of the Health and Safety at Work Act 1974 ('HSWA 1974'),

2. Since the underlying facts and the chronology are well-known to both sides, they can be summarised shortly.

3. On 4 November 2011 Mr Counsell conducted a firework display at Taunton Rugby Club. Shortly after the end of the display a series of multiple collisions occurred nearby on the M5 motorway, near junction 25. As a result of those crashes seven people died and many more were injured.

4. A large-scale investigation was carried out by Avon and Somerset Police, during which many witnesses were spoken to, scientific tests undertaken and experts consulted.

5. From an early stage one of the principal lines of enquiry pursued by the police was whether the crashes and the firework display were causatively connected.

6. On 19 October 2012 Mr Counsell's solicitors, Reynolds Porter Chamberlain LLP, were informed by telephone that he was to be charged with 7 counts of gross negligence manslaughter. It is that decision to charge him and the subsequent decision to drop the charges which forms the main focus of the first limb of the present application. Subsequently, the CPS proceeded with the charge under the HSWA 1974 offences up to the point on 9 December 2013 when the Court ruled that there was no case to answer. That ruling was not challenged by way of appeal and the jury returned a not guilty verdict on 10 December 2013.

The legal framework for the recovery of costs

7. It is common ground that the source of the authority to make an order of the type sought by Mr Counsell is s.19 the Prosecution of Offences Act 1985 ('the Act')

> 19 - Provision for orders as to costs in other circumstances.
> (1) The Lord Chancellor may by regulation make provision empowering ... the Crown Court ... in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order for the payment of those costs

8. The regulations made pursuant to the s.19 are the Costs in Criminal Cases (General) Regulations 1986 [S1 1335/1986]. Regulation 3(1) provides that where the Crown Court,

> is satisfied that costs have been incurred in respect of proceedings by one of the parties as a result of unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, the court may, after hearing the parties, order that all or part of the costs so incurred by that party shall be paid to him by the other party.

9. Three points may be noted. First, the power may be invoked by either Prosecution or Defence. Secondly, the parties must be heard, although in the present case the parties (by agreement) have been heard by means of written submissions. Thirdly, even where the statutory test for making an order is met, the court's powers are discretionary and not mandatory.

10. An important issue on the present application is what is meant by the words 'improper act or omission' as used in s. 19 of the Act and Regulation 3. There have been a number of cases which have considered these words.

11. In *DPP v. Denning* [1991] 2 QB 532 at 541, Nolan LJ giving a judgment in the Divisional Court said that meaning of the word 'improper' as used in Regulation 3,

> ... does not necessarily connote some grave impropriety. Used, as it is, in conjunction with the word 'unnecessary', it is in my judgment intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly.

12. In *Ridehalgh v Horsefeld* [1994] Ch 205, the Court of Appeal Civil Division considered similar words in s.51(1) of the Supreme Court Act 1981 in the context of a civil wasted costs order,

> 'wasted costs' means any costs incurred by a party - (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative ...

13. The wording is different: 'improper, unreasonable or negligent act or omission' in the latter provision is not the same as 'unnecessary or improper act or omission' in the former provision. Nevertheless, in the course of giving the judgment of the Court of Appeal, Sir Thomas Bingham MR gave clear guidance on the word 'improper', in the context of an application for a special order for costs.

> 'Improper' means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking-off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion would be fairly stigmatised as such whether it violated the letter of a professional code or not.

14. To similar effect are the observations of the Court of Appeal in *Persaud v Persaud* [2003] EWCA Civ 394, [2003] P.N.L.R. 26, where Peter Gibson LJ (with whom Mummery LJ and Blackburne J agreed) stated at [23]:

> To my mind the necessary impropriety must be a very serious one. I have already referred to the sort of conduct that is entailed, justifying disbarment, striking off, suspension or other serious professional penalty. Sir Thomas Bingham in *Ridehalgh* went on to say that it covered any significant breach of a substantial duty imposed by a relevant code of professional conduct.

15. As already noted, the wording of the criteria for recovery of wasted costs in the civil and criminal context is different. However the Court of Appeal in *Ridehalgh v Horsefeld* plainly had in mind these differences, see p.239.

> Attention has ... been drawn in authorities such as *Holden & Co v. Crown Prosecution Service* [1990] 2 QB 261 and *Gupta v. Comer* [1991] 1 QB 629 to the undesirability of any divergence in the practice of the civil and criminal courts in this field, and Parliament has acted so as substantially (but not completely) to assimilate the practice in the two. We therefore hope that this judgment may give guidance which will be of value to criminal courts as to civil, but we fully appreciate that that the conduct of criminal cases will often raise different questions and depend on different circumstances.

16. Among the relevant guidance which emerges from the principles set in *Ridehalgh v Horsefeld* are the following.

(1) The jurisdiction to make a wasted costs order should be a simple and summary process for the determination of the issue: without the formalities of disclosure and/or interrogation of the respondent.

(2) An application for wasted costs orders should not be allowed to become a wasteful form of parasitic litigation (see p.225-6); see also the observations of Lord Woolf MR in *Wall v. Lefever* [1998] 1 FCR 905 at 614.

> The wasted costs jurisdiction is salutary as long as it is not allowed to be a vehicle which generates substantial additional costs to the parties … It must be used as a remedy in cases where the need for a wasted costs order is reasonably obvious. It is a summary remedy which is to be used in circumstances where there is a clear picture which indicates that a professional adviser has been negligent etc.

(3) It is important to bear in mind the existence of the residual discretion as to whether or not to make the order in the particular case, even if the statutory criteria are made out.

One further point may be noted.

(4) Where the application relates to a decision to prosecute, the Court should be careful to avoid being drawn into carrying out a close analysis either of a decision to prosecute or of a later review of such decision to see whether it was reasonable. There are a number of reasons for this. First, impropriety and not unreasonableness is the relevant test. Second, one of the principles underlying the wasted costs jurisdiction is summary disposal. In most cases where a wasted costs order is made, the conduct which is said to be improper will be clear, obvious and egregious. Thirdly, it is only in limited and confined circumstances that the Court will review charging decisions made by the CPS. The Court recognises that such decisions may be difficult and sensitive, see for example the decision of the Court of Appeal (Criminal Division) *R v. P* [2011] EWCA Crim 1130

> [13] More generally, the making of a costs order against the Crown in circumstances such as this is a very serious and unusual matter. That it should be exercised even after adjournment in a manner which is, on any view, thoroughly flawed throughout is a matter of the greatest regret. Moreover, we are satisfied that this is an order which should never have been made. The decision to prosecute or not is a thoroughly difficult and delicate one. It is one on which two perfectly responsible lawyers may easily differ. It is only in the clearest possible cases that a decision taken by the appropriate authority in good faith could possibly justify a penalty in costs.
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> [14] We accept that there did exist in this case a number of potentially quite strong indicators which might, and possibly for all we know which should, have led the decision maker within the Crown Prosecution Service to reach the opposite conclusion from the one that she did ...
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> [15] That said, the question in this case was not whether the decision to prosecute was right or wrong. It is simply not the judge's function to sit on appeal from a decision of the Crown Prosecutor. There may be very rare cases where the decision is wholly unreasonable. *R (Oddy) v Bugbugs Ltd* [2003] EWHC 2865 (Admin) was a different case altogether. That prosecution was brought by a private interest group in pursuit of a commercial objective. The point at issue was one of pure law. It had been decided previously against the prosecution. There could have been a challenge to the ruling by way of appeal to the High Court but there had been none. Unlike that case, in most cases such as the present, there will be room for a legitimate difference of opinion. It is important that the making of that decision should not be overshadowed by the fear that if a prosecution is continued and fails there may be an order for the payment of costs. An acquitted defendant will normally receive his costs from central funds unless there is a good reason why he should not. We do not say that there will never be a case where a decision to prosecute is so

> unreasonable that a costs order is appropriate, but we are satisfied that this case was not arguably such. Here, the complainant's evidence might have been assessed as likely to be accepted. The flatmate's evidence might have been assessed as capable of disbelief. There was, we note, some material which perhaps suggested possible partiality. There were, it was said, some possible injuries to the complainant. We want to make it clear that we simply do not know whether the decision to prosecute was right or wrong. It is clear that it was made in good faith. Supposing, however, that it was a wrong judgment on a difficult issue, that is not enough to justify an order for costs and it would not have been even if the relevant powers had been properly considered. The judge's pejorative reference to political correctness was ill conceived and inappropriate. There was no basis for his conclusion that no thought had been given to this case.

17. This diffident approach to reviewing decisions by the CPS to prosecute or, in that case, not to prosecute was recently restated by Sir John Thomas PQBD, in *L v DPP and another, and Pratt v CPS* [2013] EWHC 1752 (Admin).

> [4] It is not necessary to restate the law, bearing in mind that these are renewed applications. But it was made clear in [*R v. DPP, ex parte C* [1995] 1 Cr App R 136, 140-141] by Kennedy LJ that the grounds upon which challenge can be made are very narrow: (1) because there has been some unlawful policy; (2) because the Director has failed to act in accordance with his own set policy; or (3) because the decision was perverse; that is to say it is a decision that no reasonable prosecutor could have reached.
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> [5] In subsequent decisions, including *Sharma v Brown Antoine* [2007] 1 WLR 780 being against *DPP ex parte R v Inland Revenue Commissioner ex parte Mead* [1993] 1 AER 772 in *Kostuch v Attorney General for Alberta* [1995] 128 DLR 440, and in *R (Pepushi) v Crown Prosecution* Service [2004] IMAR 549 and *R (Birmingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635, the courts have indicated that these applications will succeed only in very rare cases.
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> [6] That is for the good and sound constitutional reason that decisions to prosecute are entrusted under our constitution to the prosecuting authorities, in this case the Director of Public Prosecutions and those who work under him in the Crown Prosecution Service.
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> [7] It is very important that the constitutional position of the Crown Prosecution Service as an independent decision maker is respected and recognised. The courts have therefore adopted this very strict self-denying ordinance. They will, of course, put right cases where an unlawful policy has been adopted or where there

has been a failure to follow policy, or where the decisions are perverse. But each of those is likely to arise only in exceptionally rare circumstances and that must be born in mind.

The argument on behalf of Mr Counsell

18. The defence application is founded on what are said to be a series of improper omissions by the CPS: in effect, omissions to carry out fully-informed, complete and reasonable reviews of the available evidence and the applicable law, (1) before authorising the manslaughter charges; (2) before authorising charging the offence under the HSWA 1974, and (3) following receipt of the Defence Statement on 27 August 2013. As a result, Mr Counsell incurred the costs up to the point at which the submission of no case to answer succeeded.

19. These were not, say the defence, simply wrong judgements on difficult issues, but clear failures by the CPS to discharge its duties in circumstances where there was no significant pressure. The proceedings were misguided and premature, and brought in a way that the CPS's internal procedures were designed to avoid.

The chronology

20. Since the defence submissions are closely concerned with the charging decisions, the relevant evidence necessarily comes from the CPS; and it is this evidence which must be evaluated by reference to contemporary documentation (such as it is) and the statutory criteria.

21. The circumstances in which Mr Counsell came to be charged with the offence of manslaughter have been set out in the witness statement of Andrew Walters, dated 21 February 2014. Mr Walters is a Senior Crown Prosecutor in the Complex Casework Unit (CCU) in CPS South West, with responsibility for the conduct of the most serious and complicated cases which are investigated by the three police forces in the South West Region. His evidence is that his decisions were based on the available evidence in accordance with the two-stage test set out in the Code for Prosecutors: (i) whether there is sufficient evidence to provide a realistic prospect of conviction on the charge; and (ii), if so, whether prosecution is in the public interest.

22. His first full meeting with the Senior Investigating Officer was on 9 May 2012. By this stage there were various possibilities: (i) that one or more drivers were responsible for the collisions, or (ii) there were other factors which were outside the drivers' control. If (ii), it was necessary to identify such factors, consider whether anyone was responsible for them and whether that gave rise to criminal liability.

23. By August 2012 it became evident to him that no driver was responsible for what occurred, and he notified his view to the police. He then focussed on the alternative possibility: that the sudden loss of visibility was caused by a cloud of fog and smoke, and that the smoke came from the firework display.

24. After receiving evidence from experts and discussing the matter with his line manager (the Head of CCU), he instructed Mr Peter Blair QC, an experienced leading counsel in the field of gross negligence manslaughter and health and safety cases.

25. Following a consultation on 19 September 2012 (also attended by representatives of the police and Taunton Deane Borough Council), and a further consultation on 11 October, Mr Blair gave a written advice dated 12 October 2012.

26. An issue arises over the contents of that advice. Mr Counsell's legal team has asked for a view of its contents; and it is clear that at a hearing before the Recorder of Bristol (HHJ Ford QC) on 22 July 2013 the Court was told by Mr Blair that his written advice would be made available at the conclusion of the trial. The hearing before the Recorder of Bristol was in relation to an earlier application for a wasted cost order arising out of the decision by the CPS not to pursue the manslaughter charge.

27. If the advice were made available there would have to be a waiver of the legal privilege attaching to the advice: that privilege being that of the CPS and not Mr Blair. The evidence of Mr Walters is that it has been decided 'at a high level of the CPS that it is not appropriate to waive privilege in respect of Counsel's Advices,' and that he has therefore considered it inappropriate to disclose the gist of the statement.

28. In any event, Mr Walters's evidence is that he felt entitled to rely on Mr Blair's written advice when making the decision to charge Mr Counsell with manslaughter, which occurred on 19 October 2012.

29. A decision by the CPS to charge is subject to internal review; and the Code for Crown Prosecutors prescribes that the review should be a continuous process which should take into account changes in circumstances. In the present case, in view of its seriousness, a formalised system of case management panels was adopted, and at those meetings all aspects of the case were discussed.

30. It is clear that the decision whether or not to charge Mr Counsell with manslaughter was the subject of more than one view within the CPS; and as a result, a decision was taken to seek a second opinion from another experienced leading counsel, Mr Richard Lissack QC. Following receipt of Mr Lissack's

written advice, a further consultation was held with Mr Blair and further meetings with experts took place.

31. On 9 January 2013 a Director's case management panel meeting took place. Among those present was the then Director of Public Prosecutions, Keir Starmer QC, and the Chief Operating Officer of the CPS. In the words of Mr Walters,

> At this time consideration was given to all of the evidence, the various advices given by both QCs and the representations made at that point by the defence, During the [meeting] it became apparent that whilst some of those present felt that that there was sufficient evidence to justify prosecution for Gross Negligence Manslaughter offences, most did not, and it was decided that further specific advice should be sought from Mr Blair QC as to the Health and Safety at Work aspects of the case.

32. The reference 'representations made ... by the defence' was to a letter of 3 January 2013 from Reynolds Porter Chamberlain LLP which contained criticisms of the decision to charge counts of gross negligence manslaughter.

33. A third advice was received from Mr Blair on 10 January 2013; and it was in the light of that advice that the decision was taken to discontinue the original manslaughter counts and to proceed only with an offence under the HSWA 1974. This decision was notified to the defence on 14 January.

34. On 17 January Mr Counsell attended Taunton Police Station and was charged with the HSWA 1974 offence.

35. A detailed and comprehensive Defence Case Statement relating to this charge was served on 27 August. This was considered, but did not result in any change of view by Prosecuting counsel about the propriety of proceeding with the Health and Safety at Work Act prosecution.

Conclusion

36. This was a complex factual case, which involved an evaluation of expert evidence which was not straightforward. All this against a background of a strong public interest in whether criminal proceedings would be brought in relation to the events of 4 November 2011.

37. I have not seen the written advices of Mr Blair and Mr Lissack; but I am not prepared to draw any inferences adverse to the CPS from the failure to disclose those advices. Common sense suggests that Mr Blair advised, at least at an early stage, that there was sufficient evidence to provide a realistic prospect of convictions for manslaughter, and that Mr Lissack advised that there was not.

Importantly in the present context, the CPS consulted leading counsel who was experienced in the field and it is reasonable to assume that such advice was followed. The charging decision was later reviewed at the highest level within the CPS and further advice was taken before the manslaughter charges were dropped. There is no evidential basis for saying that there was no proper review of the evidence or the applicable law. I accept the evidence of Mr Walters which, although necessarily untested, is inherently credible.

38. In my judgment the test for impropriety is the rigorous test set out in *Ridehalgh* and for the reasons I have set out above: namely, 'conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion'. If that is right, then the conduct of the CPS does not come close to satisfying the test; but even if the word 'improper' is to be construed to mean 'an act or omission which would not have occurred if the party concerned had conducted his case properly' (see *DPP v. Denning*, above), I am not persuaded that Mr Counsell has proved such conduct. The CPS acted cautiously and took advice when necessary; and although it decided that the count of manslaughter should be discontinued, this does not demonstrate impropriety in the original decision. Whether and how to charge were difficult and sensitive decisions; and the conclusion that charges of manslaughter should be brought was neither perverse nor made in disregard of CPS policy. The HSWA count proceeded to trial and, although the Court ruled that there was no case to answer, that fact alone does not establish conduct which should be met with a wasted costs order. Although the defence conducted a tenacious campaign to persuade the CPS to drop all charges against Mr Counsell, ultimately the views of the defence however cogently expressed, cannot be determinative. The decision as to how to proceed was that of the CPS and the CPS alone.

39. 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 making a wasted costs order.

40. I should add that I do not consider that an application for disclosure of privileged material should be made unless there has been some clear and authorised waiver of privilege or where the disclosure of material would be ordered on established legal principles. The defence approach is characterised by a passage from a note dated 27 January 2014 at §21.

> There is ... absolutely nothing before the Court capable of beginning to justify how or why this clearly wrong and soon-to-be-reversed decision was reached. In the circumstances, the reasonable inference is that proper documents do not exist, or are so inadequate or unhelpful to the prosecution that the Crown consider their interests better served by refusing to disclose them despite having previously undertaken to the Court to do so, than to reveal what in fact occurred.

This is an illegitimate attempt to finesse privileged material and I am not prepared to draw the adverse conclusions that I am invited to draw. I would also add that the wasted costs application should not have been advanced until the conclusion of the trial. An application which proceeds in tandem with preparations for a trial is likely to lead to disruption of that trial and unlikely to be in the interests of justice.

41. For these reasons I refuse the application. I would in any event have refused the application as a matter of discretion in the light of Mr Walters's evidence.

42. I also refuse an application by the CPS that the defence should pay the costs of application for wasted costs. The uncertainty over disclosure of legal advice may have led to the continuation of the application in circumstances which it might otherwise have not.

43. There will be an order that the defence should have allowable costs from Central Funds under s.16 of the Act.

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Adrian Darbishire QC and Simon Antrobus, for Mr Counsell (instructed by RPC)

Gregory Treverton-Jones QC and Anna Vigars, for the CPS