



Neutral Citation Number: [2021] EWHC 2624 (Admin)

Case No: CO/4368/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2021

Before:

LORD JUSTICE HOLROYDE
MRS JUSTICE CUTTS DBE

Between:

THE QUEEN on the application of
TM EYE LIMITED

Claimant

- and -

THE CROWN COURT AT SOUTHAMPTON

Defendant

CLARE PETERS

First Interested Party

THE LORD CHANCELLOR

Second Interested Party

Mr Rupert Cohen (instructed by **Edmonds Marshall McMahon Ltd**) for the **Claimant**
Ms Melanie Cumberland (instructed by **Government Legal Department**) for the **Second**
Interested Party

The Defendant and the First Interested Party were not represented

Hearing dates: 13 July 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10:30am on Thursday, 30 September 2021.

Lord Justice Holroyde and Mrs Justice Cutts:

1. The First Interested Party (“Ms Peters”), trading via her Facebook page, sold jewellery, handbags and clothing which appeared to be, but were not, the products of Pandora, Louis Vuitton and Hugo Boss (“the brand owners”). A private prosecution was brought against her by TM Eye Limited (“the Claimant”). On 4 September 2020, in the Crown Court at Southampton, Ms Peters pleaded guilty to four offences of unauthorised use of a trade mark in relation to goods, contrary to section 92 of the Trade Marks Act 1994. She was sentenced by His Honour Judge Rowland (“the judge”) to a total of six months’ imprisonment, suspended for two years, with a requirement of 150 hours of unpaid work and a rehabilitation activity requirement. The judge declined to make an order for costs against her, on the ground of her impecuniosity. He also refused an application by the Claimant, pursuant to section 17 of the Prosecution of Offences Act 1985 (“section 17”), for payment of its costs from central funds. In a subsequent written ruling, given on 21 September 2020, the judge declined to revisit that decision.
2. The Claimant is aggrieved by the refusal of its application for costs out of central funds. It seeks permission to apply for judicial review, claiming an order quashing both of the judge’s decisions in that regard, which it contends were unreasonable, irrational and unlawful. The claim raises issues as to the correct approach to applications by private prosecutors under section 17. This is the judgment of the court.
3. The court has had the assistance of written and oral submissions by Mr Cohen on behalf of the Claimant and Ms Cumberland on behalf of the Lord Chancellor, who was joined to the proceedings as the Second Interested Party. We are grateful to them both. The Defendant, the Crown Court at Southampton, has in the usual way acknowledged service but played no part in the proceedings. Ms Peters has also played no part.

The Claimant:

4. The Claimant is a firm of private investigators. Many of the investigators are retired police officers, some of whom held high rank. As part of its work, the Claimant carries out investigations into, and in some cases private prosecutions of, persons selling counterfeit goods in the UK. Its managing director Mr David McKelvey has provided a statement giving details of the number of investigations and prosecutions undertaken by the Claimant in this area, and the important deterrent effect of their work.
5. Mr McKelvey states that the Claimant is granted powers of attorney by various brands to investigate and prosecute offenders who are using the trademark of that brand without consent. The powers of attorney are general in their terms. Brand owners provide training to enable the Claimant’s employees to identify counterfeit items. When the Claimant has identified a case which merits investigation, specific authority to proceed is requested from the brand owner concerned.
6. The Claimant’s remuneration for such work is derived from awards under section 17, not from the brand owner concerned. Mr McKelvey states that during the financial year 2019/2020 the Claimant conducted a total of 101 prosecutions (not all involving counterfeit goods), in relation to which it was awarded a total of £1,162,769 from central funds. He makes the point that all of that sum has been assessed as reasonable, and states that the Claimant’s costs are “invariably reduced” by the costs authorities. He further points out that of the total sum awarded, only about £372,000 (a little under

one-third) was paid in respect of the costs of the Claimant: the remainder was compensation for the costs of the Claimant's legal representatives in conducting the prosecutions.

7. During the same period, the total number of private prosecutions in respect of which costs were awarded from central funds was 276: the Claimant therefore conducted about 36% of that total. As a result of a question asked by the court during the hearing, the parties subsequently made further enquiries and helpfully agreed that the Claimant received 9.4% of the total amount paid from central funds in relation to those 276 private prosecutions.
8. Before coming to the circumstances which have given rise to this case, it is appropriate to set out the statutory framework.

The statutory framework:

9. So far as is material for present purposes, section 17 provides:

“17 Prosecution costs

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

- (a) in any proceedings in respect of an indictable offence; 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.

...”

10. Section 18 of the 1985 Act provides for an award of costs to be made against a convicted defendant. By subsection (1) the Crown Court or a magistrates’ court may “make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable”. No issue arises in this case as to the judge’s decision not to exercise that power against Ms Peters.
11. Rule 45.4 of the Criminal Procedure Rules (“rule 45”) applies where a court can make an order under section 17. Its provisions include the following:

“Costs out of central funds.

45.4

...

(4) Where a person wants the court to make an order that person must apply as soon as practicable and –

(a) outline the type of costs and the amount claimed, if that person wants the court to direct an assessment; or

(b) specify the amount claimed, if that person wants the court to assess the amount itself.

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

(a) ...

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

- (6) If the court makes an order –
 - (a) the court may direct an assessment under, as applicable –
 - (i) Part III of the Costs in Criminal Cases (General) Regulations 1986, ...
 - (b) the court may assess the amount itself in a case in which either –
 - (i) the recipient agrees the amount, or
 - (ii) the court decides to allow a lesser sum than that which is reasonably sufficient to compensate the recipient for expenses properly incurred in the proceedings;
- ...
- (7) If the court directs an assessment, the order must specify any restriction on the amount to be paid as the court considers appropriate.
- ...”

12. Those provisions are reflected in the Practice Direction (Costs in Criminal Proceedings) 2015, contained in Division X of the Criminal Practice Directions 2015. Paragraph 2.6.1 states, in relation to an award of a private prosecutor’s costs out of central funds:

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

Paragraph 2.6.4 states:

“If there has been misconduct a private prosecutor should not be awarded costs out of central funds.”

13. The Costs in Criminal Cases (General) Regulations 1986 contain regulations made by the Lord Chancellor pursuant to section 17(2C)(b). Regulation 6 provides for a claim for costs to be submitted, in prescribed form, to “the appropriate authority” – namely (in this context) a Determining Officer (“DO”) in the Criminal Cases Unit. Regulation 7 provides as follows:

“Determination of costs

7. (1) The appropriate authority shall consider the claim, any further particulars, information or documents submitted by the applicant under regulation 6 and shall allow such costs in respect of –

- (a) such work as appears to it to have been actually and reasonably done; and

(b) such disbursements as appear to it to have been actually and reasonably incurred,

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

(2) In determining costs under paragraph (1) the appropriate authority shall take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved.

(3) When determining costs for the purposes of this regulation, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant.”

14. Regulation 8 provides for the payment of costs determined by a DO. Regulations 9-11 provide for the circumstances in which a dissatisfied applicant may seek a redetermination of the costs awarded and thereafter appeal to a taxing master or to the High Court. It is unnecessary, in the circumstances of this case, to refer to those provisions in greater detail.
15. It is also unnecessary to go into any detail about the facts of Ms Peters’ illegal activities or about her prosecution. We therefore turn to the challenged decisions.

The decisions of the judge: (1) 4 September 2020:

16. At an early stage of the hearing, counsel then appearing for the prosecution applied for two orders for costs: an order pursuant to section 18 of the 1985 Act that Ms Peters pay a means-tested contribution to the investigation costs, which totalled a little over £2,500; and an order pursuant to section 17 that –

“... the remainder of the costs incurred by the private prosecutor in this case be remitted to the National Taxation Unit for assessment.”
17. The judge enquired what would be the evidential basis for such an assessment. Counsel referred to “the comprehensive schedules” which she said had been provided to the court, but did not further identify them or provide the judge with any copies. It is in our view clear from the transcript, and Mr Cohen accepts, that the judge had not seen those schedules at the time of this hearing.
18. In answer to a further enquiry by the judge, counsel said that the National Taxation Unit would consider the appropriateness or otherwise of the costs incurred by the prosecution, and would make a determination as to how much, if any, of the costs could be recoverable from central funds.
19. Counsel then summarised the facts of the case. She made only brief reference to the status of the Claimant, saying –

“TM Eye UK Ltd are authorised by all the companies set out in the counts on the indictment to investigate unauthorised activity with their trademarks.”

20. Counsel later returned to the applications for costs. She confirmed that costs awarded under section 18 “would go to the investigators”. She indicated that the section 17 application related to “the proceedings costs”: ie, the costs -

“incurred by the prosecution up to and after the point that the investigation is passed to the prosecution team, so, once the investigation is concluded, all of the work that is necessary to bring the matter to court.”

She informed the judge that the total proceedings costs were £23,751.17 including VAT, saying –

“.. it would be that amount that would be remitted to the National Taxation Unit.”

Counsel confirmed that an order under section 17 would result in the costs, subject to taxation, being paid by the taxpayer to the Claimant.

21. There was then the following exchange between counsel and the judge:

“Counsel: The legislation and the Practice Directions surrounding private prosecution costs state that Your Honour must make the order unless Your Honour concludes that the proceedings were started in a vexatious nature or that it was entirely inappropriate for the defendant to be prosecuted in the first place. So, it gives Your Honour ...

The judge: So, discretion is very limited then, isn't it?

Counsel: Indeed.

The judge: On that test. But that's not an order for costs which will be levelled at the defendant's door in due course.

Counsel: No. That is limited to the £2,513 odd.

The judge: So on the face of it, the taxpayer is paying for very large companies to proceed against this defendant who has probably very little money, which is, some may say, unpalatable.

Counsel: And others have said, and certainly, if it puts Your Honour's mind at rest at all, there are proceedings in other courts that are addressing that as a global position. So far as the National Taxation Unit, in my experience, the amount that is awarded nowhere near reflects the total amount that is claimed.”

22. There was then a pause, when it is apparent that the judge was reading the provisions of section 17. He observed that he could not immediately see anything “which indicates

it's mandatory with no discretion". Counsel replied that the legislation itself "doesn't deal with the reasonableness or otherwise" and referred the judge to rule 45.4(5) of the Criminal Procedure Rules. She mentioned, but did not further identify, an explanatory document which said that an order for payment of a private prosecutor's costs should be made save where there is a good reason for not doing so, for example where proceedings had been instituted or continued without good cause. The judge observed that a good reason for not doing so "may be that the effective prosecutors, the three companies, are extremely wealthy", to which counsel replied "I couldn't possibly comment".

23. The judge then heard mitigation from counsel representing Ms Peters.
24. At the outset of his sentencing remarks the judge dealt with the question of costs, saying to Ms Peters –

"You obviously have no money. You should be able¹ to pay at least some of the costs of the prosecution, but you cannot because you have no money, so I am not going to make any order under section 18. Nor am I going to make any order under section 17, the so-called proceedings costs, and I go back to the words of the statute which does not seem to me to make it mandatory that I should make the order that is sought. I understand why the application is made but this really leads on to the fact that these are three, certainly national if not multinational, companies. The fact that they have money is no excuse for what you did."

25. The judge went on to impose the sentences to which I have referred. He concluded his sentencing remarks by saying -

"And, so far as the section 17 application is concerned, whilst I see the merits of an application for costs of private prosecution, in the circumstances of this case, with those three losers, doesn't seem to me it's appropriate that the taxpayer should bear the burden of financing this prosecution. So, that's the ruling that I make."

The decisions of the judge: (2) 21 September 2020:

26. On 8 September 2020 the Claimant's solicitors sent to the Court Manager a letter before claim in relation to a proposed claim for judicial review of the judge's decision not to make an award under section 17. They asserted, amongst other things, that the clear default position was that "in the absence of misconduct" an order of costs should be made in favour of the private prosecutor. In a covering letter, they drew the court's attention to its power to reconsider its order under the slip rule.²
27. The judge declined to list the case to alter his order. In a written ruling dated 21 September 2020 he noted that when the case came before him for sentence on 4

¹ This is what appears in the transcript, but it may be that the judge said "liable" rather than "able".

² Then section 155 of the Powers of Criminal Courts (Sentencing) Act 2000, now section 385 of the Sentencing Code.

September, the court file contained only a single-sided document headed Memorandum of Costs, which suggested (contrary to what counsel had told him) that the claim for “proceedings costs” of £23,751.17 was exclusive of VAT. He referred to his observation during the hearing that some might find it unpalatable to fund very large companies who elected to prosecute a defendant with very limited means, and said that counsel in response had –

“... indicated that such sentiments had been aired elsewhere and sought to *put my mind at rest* by submitting that in her experience *the amount awarded nowhere near reflected the amount claimed*. Such a submission had the opposite effect to that intended.”

28. The judge then noted that section 17 did not appear to make an order for costs mandatory, as counsel had suggested, and said –

“I formed the view counsel expected me to grant the application on the nod. I was not prepared to do so. [Counsel] indicated that she should have dealt with the question of costs in her opening note. That was a proper concession to make.”

29. The judge went on to refer to counsel’s response “I couldn’t possibly comment”³, saying that he had inferred from that response that “wealth of the companies could amount to a reason why an order should not be made”.

30. The judge then noted that, although the letter before claim had suggested he had failed to follow relevant case law, no authority had been cited to him in support of the costs application. He cited a passage from *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823⁴ at [22], in which Lord Thomas of Cwmgiedd CJ had indicated that a court may have regard to whether the private prosecutor had taken steps to involve the state prosecuting authorities, and had emphasised the need for a private prosecutor to test the market before selecting solicitors and counsel. The judge then referred to what was said by the Lord Chief Justice in that case, at [41-45], about the respective merits and financial implications of state and private prosecutors. The judge said –

“None of these principles were canvassed before me. I was not told if a reference had been made to the CPS and, if not, why not.”

31. The judge concluded his ruling by saying:

“Where an application is made for £23,751.17 (or £28,501.40) to be paid from central funds it is incumbent on the prosecution to advance properly prepared and comprehensive submissions, referring to relevant authorities. Regrettably, that did not happen in this case. I decline to revisit unprepared and incomplete submissions.”

³ See [22] above

⁴ Hereafter, “*Zinga* (costs)”

32. The Claimant's solicitors wrote to the Court Manager on 7 October 2020 seeking clarification of the final sentence of the judge's letter and in particular enquiring whether the court wished to hear further submissions. The Court Manager replied in short order confirming that the judge would not revisit his order.
33. On 24 November 2020 the Claimant issued this claim for judicial review challenging both the decision of 4 September 2020 not to make an award under section 17, and the decision of 21 September 2020 refusing to revisit the earlier order. On 8 March 2021 Dove J adjourned the application for permission to apply for judicial review to a rolled up hearing, with the substantive claim to be determined at the same hearing if permission be granted.

The claim for judicial review:

34. The detailed grounds contend that the first decision was a jurisdictional error of sufficient gravity to take the case out of the jurisdiction of the Crown Court, (a) because the judge relied on an irrelevant consideration (namely, his own assumption as to the wealth of the brand owners) and (b) because, even if the wealth of the prosecutor was a relevant consideration (which it was not), the judge had no evidential basis for concluding that the wealth of the brand owners was such as to weigh against the making of an order, and provided no reasoned basis as to why his assumption as to their wealth justified the dismissal of the application. The second decision is said to have "magnified the jurisdictional errors ... previously made."

The submissions on behalf of the Claimant:

35. In his written and oral submissions, Mr Cohen argues that both decisions should be quashed: the first was contrary to established case law and to rule 45 and the associated Practice Direction; the second wrongly treated the initial application for costs as having been deficient, and failed to have regard to the statutory purpose of the slip rule. He further submits that the prosecution of Ms Peters was not unreasonable, and that there was only one decision which the judge could properly have made. On that basis, he asks this court either to make an order in the form originally sought from the judge or to remit the matter to the Crown Court for redetermination.
36. Mr Cohen's core submission is that the effect of section 17, rule 45 and the Practice Direction is that misconduct is "the litmus test" when a court is deciding whether to award costs out of central funds. He points out that an award may be made even if the accused has been acquitted, but that those conducting a private prosecution must have regard for the public interest and have a duty to act as ministers for justice: see *R v Zinga* [2014] EWCA Crim 52, [2014] 1 WLR 2228 at [61]. Mr Cohen accepts that the Practice Direction⁵ gives illustrations, rather than an exhaustive list, of what may be proper reasons for refusing to make an award. But, he maintains, those examples reflect the duties of a prosecutor and so support his core submission.
37. Section 17(1), he submits, gives the criminal court a binary choice: to make or not to make an order. It does not permit a reduction on a proportionate basis: that is confirmed by the reference in section 17(2A) to the "full amount". Section 17(2A) does enable the court to make a reduction, whether by way of a fixed sum or as a percentage of the

⁵ See [12] above

total award. But, he submits, any such reduction must be referable to, and must appropriately reflect the severity of, misconduct or unreasonableness on the part of the private prosecutor.

38. Mr Cohen suggests that in practice, such a reduction is usually made by the court determining that a reduction of a particular percentage should be made from what would otherwise be awarded, and then directing an assessment of the reasonable costs by a DO. The DOs have relevant expertise and require detailed information to be provided in support of any claim for costs from central funds. Like Mr McKelvey⁶, Mr Cohen emphasises that they sometimes make considerable reductions in the sums claimed by a private prosecutor.
39. It follows, in Mr Cohen's submission, that the wealth of either the private prosecutor (the Claimant), or the brand owners, was irrelevant to the decision the judge had to make; and there was in any event no evidence about it. The judge's reference to the brand owners as "the effective prosecutors"⁷ indicates that he appreciated that the Claimant was a separate entity. Mr Cohen emphasises that the judge's view as to the wealth of the brand owners was the only reason he gave for his first decision. That decision was accordingly based on an irrelevant consideration.
40. Relying on *R (DPP) v Aylesbury Crown Court* [2017] EWHC 2987 (Admin) and *R (Fraser) v Crown Court at Gloucester* [2019] EWHC 2435 (Admin), Mr Cohen submits that the judge's error went to the heart of the reasons for that decision, and was of sufficient gravity to amount to a jurisdictional error and thus liable to be quashed by this court.
41. Relying on *Mirchandani v Lord Chancellor* [2020] EWCA Civ 1260, in particular at [43-45], and on other cases, he further submits that section 17 should not be construed in such a way as to deter private prosecutions, which serve an important public interest.
42. As to the second decision, Mr Cohen contends that the original application for costs was not deficient. The judge was asked to direct an assessment by a DO of the appropriate sum to be paid out of central funds: a draft order had been prepared which invited him to order –

“(a) To the private prosecutor, TM Eye, the payment out of central funds of such amount as is reasonably sufficient to compensate the prosecutor for any expenses properly incurred by it in the proceedings.

(b) The amount to be paid out of central funds in pursuance of this order shall be determined in accordance with regulations made by the Lord Chancellor for these purposes, pursuant to s17(2C)(b) POA 1985.”

Detailed schedules had been sent to the court in case the judge wished, unusually, to determine the amount of costs himself, but he was not invited to do so. The single piece of paper summarising the amount claimed was therefore all that the Claimant was

⁶ See [6] above

⁷ See [22] above

required to put before the judge in support of its application. The amount claimed was irrelevant to the exercise of the court's discretion under section 17, because the process of assessment would determine what sum provides reasonable compensation for the expenses incurred.

43. Mr Cohen accepts that there was no approach to the Crown Prosecution Service ("CPS") with a view to their taking on the prosecution of Ms Peters, but submits that there was no reason for the judge to doubt the propriety of the Claimant's bringing the prosecution. Any person (including a corporation) may bring a private prosecution under section 6 of the Prosecution of Offences Act 1985, whether or not he (or it) has any personal interest in the case, and safeguards exist to ensure that the power to bring a private prosecution is not abused. The Claimant acts with the authority of the relevant brand owner, whose business interests are adversely affected by the selling of the counterfeit goods. Mr Cohen cites *R v Somaia* [2017] EWCA Crim 741 in support of his submission that the fact that the Claimant recovers compensation from central funds for its expenses is not an impediment to its acting as a private prosecutor. Mr Cohen also points to a recent decision in the Crown Court at Southwark by HH Judge Taylor in which a challenge (by way of an application to stay proceedings as an abuse of process) to the Claimant's role as a private prosecutor was rejected.⁸

The submissions on behalf of the Lord Chancellor:

44. Ms Cumberland accepts that the judge proceeded on a mistaken factual assumption that the brand owners were the prosecutors of Ms Peters, but submits that he made that error because the correct position was not made clear by the Claimant either at the sentencing hearing or in the subsequent letters from its solicitors. She points out that the Code for Crown Prosecutors (which the Claimant adopts) requires consideration of the cost of proceedings when weighed against any likely penalty; but the Claimant provided no evidence as to the basis on which the decision was taken to prosecute Ms Peters or as to whether any attempt was made to engage with the CPS.
45. Ms Cumberland submits that the Claimant initiated the prosecution in the expectation that costs would be recoverable from central funds. She accepts that it was in the public interest for Ms Peters to be prosecuted, but submits that a distinction must be drawn between the circumstances in which a private prosecution can properly be brought, and the circumstances in which costs can be paid from central funds. The facts that the Claimant is not itself a victim of the offending, and that its only source of remuneration for a prosecution such as this is an award under section 17, raise a question as to its motivation and make it particularly important for the court to know the basis on which the Full Code Test for prosecutors was said to have been satisfied.
46. Ms Cumberland accepts that this court has in the past intervened more extensively than in cases where the criminal court acted entirely without jurisdiction. She suggests that the court may intervene where the circumstances are such as to provide grounds for judicial review, which she acknowledges would involve a rather circular process of reasoning.
47. Her primary submission is that in the circumstances of this case, this court has no jurisdiction: although the judge fell into factual error, he was entitled to refuse the

⁸ *R v Abdullah*. This was the case referred to by counsel at the sentencing hearing: see [21] above.

application for costs on the basis that it had not been properly formulated, and his decision was therefore not irrational. In the alternative, if this court does have jurisdiction, she submits that judicial review should be refused because the deficiencies in the application for costs justified its refusal on grounds other than that initially given by the judge. In any event, she submits, this would not be an appropriate case for this court to remake the decision: the criterion in section 31(5A)(c) of the Senior Courts Act 1981 is not satisfied, because there were a number of possible orders open to the judge. She invites this court to provide guidance as to the information and materials which should be provided to a criminal court when a private prosecutor applies for costs pursuant to section 17.

48. At the sentencing hearing, Ms Cumberland submits, prosecution counsel did not make clear that the brand owners were not the prosecutors; did not explicitly submit that the judge was not entitled to refuse the application on the basis of the actual or apparent wealth of the brand owners; did not take the judge to what was said in *Zinga* (costs) at [22] and [41-45]; and did not provide the judge with a copy of the advice given to the Claimant as to whether the prosecution of Ms Peters satisfied the Full Code Test, even though the Claimant provides such advices to DOs when costs are being assessed. Ms Cumberland accepts that the wealth of a private prosecutor is not in itself a relevant factor in deciding whether an award of costs from central funds should be made. She submits, however, that the judge was not concerned with the prosecutor's wealth as such, but with the propriety of a wealthy brand owner prosecuting an impecunious offender and seeking costs from central funds. The deficiencies in the application deprived the judge of information relevant to his decision in that regard. In those circumstances, the judge was entitled to refuse the application.
49. There is a presumption in favour of an award of costs to a private prosecutor, but Ms Cumberland submits that it is a matter for the court's discretion: an award may be refused where there is good reason for doing so, not solely upon the basis of misconduct. She suggests that the Claimant, by seeking an order that the costs be assessed by a DO, was in effect trying to bypass any active consideration by the judge of the merits and level of a costs award. She argues that section 17 requires an applicant to provide sufficient detail to enable the court to reach an informed view without needing to adjourn.

Discussion:

50. The judge was in our view correct to say⁹ that the application for costs was made in the expectation that it would be granted "on the nod". It seems to us that the Claimant and its legal representatives prepared and presented the case on the basis that an application for "the usual order" was all that was required. That is not a correct approach to an application by a private prosecutor for an award of costs from central funds. We therefore begin by making some general observations about applications under section 17, before turning to the challenged decisions by the judge in this case.

Applications under section 17:

51. When such an application is made, the court must consider first whether to exercise its discretion under section 17(1) in favour of making an order for payment out of central

⁹ In his written ruling of 21 September 2020: see [28] above

funds. By Criminal Procedure Rule 45.4(5), there is a general rule in favour of an order being made; and often it will be clear that such an award is appropriate. But section 17(1) is permissive, and the court is entitled in an appropriate case to decline to make any award.

52. If the court exercises its discretion in favour of making an award under section 17(1), we agree with Mr Cohen that it must be an order for the payment in full of such sum as is considered reasonably sufficient to compensate the prosecutor for expenses properly incurred in the proceedings.
53. Section 17(2A), however, enables the court in an appropriate case to award the private prosecutor less than the full amount of that reasonably sufficient sum. We reject Mr Cohen's submission that the court can only do so in cases of misconduct. Parliament has imposed no such restriction: section 17(2A) refers more widely to the court's considering that there are "circumstances that make it inappropriate for the prosecution to recover the full amount". Rule 45.4(5)(b) and paragraph 2.6.1 of the Practice Direction provide examples of circumstances which may be regarded as making full recovery inappropriate; but those examples are plainly not exhaustive. The court must make a case-specific decision as to whether it is appropriate to award costs from central funds at all and, if so, whether to limit that award in any way.
54. That is not to say, of course, that a lengthy or detailed enquiry will always, or often, be necessary. As the case law confirms, private prosecutions often serve the public interest: see, for example, *Mirchandani v Lord Chancellor* [2020] EWCA Civ 1260 at [43-45]. A private prosecution may be the only way in which an offender is brought to justice. There will therefore be many cases in which the court can very quickly conclude that an application for costs should be granted pursuant to section 17(1), and that the assessment of those costs should be made by a DO. Whether the process be long or short, however, the court must decide whether, and if so how, to exercise its powers under section 17(1) and (2A).
55. That remains the position even if a private prosecutor applies for an order that the costs be assessed by a DO. True it is, as Mr Cohen understandably emphasises, that rule 45.4(4)(A) only requires a prosecutor making such an application to "outline the type of costs and the amount claimed". It does not, however, follow that a court receiving only minimal information as to the claim is unable to enquire further. An apparently excessive claim may prompt legitimate concern as to the true motive for, or conduct of, the prosecution. The court may take the view that certain costs were wrongly incurred, for example the costs of obtaining expert evidence which was held to be irrelevant and inadmissible, and may therefore wish to make an order under section 17(2A). There may be many circumstances which cause the court to consider that it would be inappropriate for a private prosecutor to recover the full amount of the sum assessed as reasonably sufficient. The court may on occasion wish to exercise its power to assess the amount of costs itself pursuant to rule 45.4(6)(b). It is unnecessary to multiply these examples. The important point is that the court cannot be denied the opportunity to consider matters relevant to the exercise of its discretion. It cannot be manoeuvred into simply granting the application under section 17(1) "on the nod" and leaving it to the DO to identify any respects in which the full amount claimed should be reduced. The court is entitled to call for all such information as it thinks necessary in order to decide whether to grant the application. We do not accept that the affirmation of that simple principle constitutes a deterrent to private prosecutors.

56. We agree with Ms Cumberland that the effect of the Claimant's submissions, if correct, would be to deprive the court of any meaningful role either in making the binary choice presented by section 17(1) or in considering whether to exercise its power under section 17(2A). It is for the court which has actually heard the case presented by the private prosecutor to determine how to exercise those statutory powers. A DO is well-qualified to assess the reasonably sufficient sum, and will no doubt be punctilious in doing so. But the DO will proceed on the basis of the antecedent decision by the court as to whether that sum is to be paid in full or subject to some limitation. As Ms Cumberland put it in her skeleton argument, the factors to be considered by a DO in accordance with the 1986 Regulations "do not align precisely" with those which a court may consider under section 17.
57. Although the offender concerned might assist the DO by raising any issue as to unnecessary or unreasonable expenditure, there will surely be many cases in which the offender has no interest in the detailed assessment of the prosecutor's claim for costs from central funds. Mr Cohen's submission, that a court which directs an assessment of costs awarded under section 17 may make adverse or supportive comments which could generally be expected to be determinative of the relevant issue before the DO, may be correct as far as it goes; but section 17 does not limit a court to the making of comments for consideration by a DO.
58. We therefore reject Mr Cohen's submission that a court considering an application under section 17(1) and rule 45.4(4)(a) should never be concerned at all with the amount of the claim. We also reject his submission that the observations of the Lord Chief Justice in *Zinga* (costs) related solely to the quantum of an award and can never be relevant when a court is deciding whether to exercise its discretion under section 17(1) or (2A). The flaw in the Claimant's argument can be illustrated by imagining that the single sheet which was before the judge in this case showed a claim for prosecution costs of around £250,000, not £25,000. The proposition that in such circumstances the judge would be limited to a binary decision as to granting or refusing costs, with no opportunity to consider whether the making of such a large claim called into doubt the propriety of the decision to prosecute, or whether some limitation should be placed upon the sum to be assessed, is in our view untenable.
59. A private prosecutor should therefore be ready to provide the court with all such assistance as may be required if the court is considering refusing, or limiting, an award of costs from central funds. A prosecutor who is not in a position to do so may find that the court is unwilling to grant an adjournment to enable further information to be provided.
60. Since each application for costs will require case-specific consideration, we do not think it appropriate to offer any wider general guidance as Ms Cumberland invited the court to do. We accordingly turn to the challenged decisions.

The judge's first decision:

61. It is now clear that the Claimant, with the assistance of its solicitors, investigated, initiated and conducted the prosecution of Ms Peters. The brand owners (which, unlike the Claimant, were the victims of her offending) gave their authority for the Claimant to proceed but did not actively participate in the prosecution and did not pay for the services of the Claimant or its legal representatives.

62. It is however equally clear, in our view, that the role of the Claimant, and the very limited role of the brand owners, were not sufficiently explained to the judge at the hearing on 4 September 2020. On the contrary, references by prosecuting counsel to the Claimant being authorised by the brand owners to investigate¹⁰, and to the matter being “passed to the prosecution team” when the investigation had been concluded¹¹, could be understood as indicating that the Claimant’s role was that of investigator but not prosecutor. Prosecution counsel was clearly trying to assist the court, and there is no suggestion that there was any attempt by her or by the Claimant to mislead the judge. But the transcript as a whole shows a lack of clarity as to the fact that the Claimant was the prosecutor in its own right, operating with the permission and authority of the brand owners but having no financial connection with them.
63. As a result, the judge wrongly understood the brand owners to be “the effective prosecutors”. That is unsurprising: most private prosecutions are brought by the victim of the offence alleged, or by a party with a direct concern for the victim (eg a charity); and it may be assumed that a prosecutor who is not directly concerned is acting as the agent of someone who is.
64. We have referred in some detail to what was said at the hearing in order to set the context in which the judge gave his very brief explanation for his refusal of the application. We do not wish to be unduly critical of prosecution counsel, who was acting in accordance with her instructions and was no doubt doing her best to assist the judge.
65. In those circumstances, it is understandable that the judge was concerned about the cost to the taxpayer. In our view, his concern is unlikely to have been simply a distaste that high-profile retailers of luxury goods were prosecuting a woman with very limited means and childcare responsibilities: it is more likely that he was troubled by the prosecution being conducted for the benefit of the brand owners but at the taxpayers’ expense. Had the position been explained to him clearly, his concerns may well have been allayed. Unfortunately, that did not happen: he was not provided with all the information which should have been put before him; and counsel inadvertently misstated the law by her submission¹² to the effect that the judge was bound to make the order sought unless the prosecution was vexatious or entirely inappropriate. It was left to the judge to find, by his own research mid-hearing, that the Act did not limit his discretion in that way. He did not receive the help to which he was entitled.
66. All that said, however, we accept that the actual or apparent wealth of the prosecutor (still less, of the presumed prosecutor) cannot in itself be a proper reason for refusing an application under section 17. It would not be right to refuse an order for costs from central funds which would otherwise have been made solely on the basis that the prosecutor had substantial resources. Nor would it be right to refuse an order which would otherwise have been made solely because there was a complete mismatch between the resources available to the prosecutor and the defendant respectively.

¹⁰ See [19] above

¹¹ See [20] above

¹² See [21] above

67. With all respect to the judge, the passages we have quoted¹³ did not express any very clear reason for his decision to refuse the application for costs. We accept, however, that he appears to have based his decision solely on the assumption that the “effective prosecutors” have money. Even if that assumption is correct, and even if the brand owners had been the private prosecutor seeking compensation for expenses properly incurred in the proceedings, their wealth could not in itself justify the decision. The judge therefore fell into error.

Jurisdictional error?

68. Section 28(2) of the Senior Courts Act 1981 provides that the High Court has no jurisdiction to review “a judgment or other decision of the Crown Court relating to trial on indictment”. To similar effect, section 29(3) provides:

“In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make mandatory, prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court.”

69. It is, however, clearly established by case law that if a judge of the Crown Court has no jurisdiction to make an order which he or she purports to make, then the decision may not be categorised as a matter relating to trial on indictment and so may be amenable to judicial review. The obvious rationale is that a party would otherwise be left without any means of challenging an order made without jurisdiction.
70. In *R v Maidstone Crown Court, ex parte Harrow LBC* [2000] QB 719 a judge in the Crown Court purported to make a supervision order under section 5 of the Criminal Procedure (Insanity) Act 1964. He had no power to do so because the statutory conditions for the making of such an order had not been satisfied. Mitchell J, with whom Kennedy LJ agreed, considered section 29(3) of the 1981 Act. He emphasised that the judge had had no jurisdiction to make any order: it was not a case of a judge having jurisdiction to make an order but exceeding or misapplying his powers in doing so. After a detailed review of the case law, he concluded at page 742F that the High Court has jurisdiction to review a decision which is made “other than in the exercise of” the Crown Court’s jurisdiction in matters relating to trial on indictment.
71. In *R (DPP) v Crown Court at Sheffield* [2014] 1 WLR 4639 at [23] Lord Thomas of Cwmgiedd CJ, giving the judgment of the court, endorsed that decision, agreeing that
- “... if there was no jurisdiction for the judge to make the order ... , no question could arise as to the lack of this court’s jurisdiction under section 28(2) of the 1981 Act to set aside the order of the judge.”
72. In *R (DPP) v Aylesbury Crown Court* [2017] EWHC 2987 (Admin) at [7], Sharp LJ stated the principle in these terms:

¹³ At [24] and [25] above

“... this court has jurisdiction provided there is a jurisdictional error of sufficient gravity to take the case out of the jurisdiction of the Crown Court”.

73. Whether a particular error is of sufficient gravity to have that consequence will require careful consideration in all the circumstances of a particular case. We agree with Ms Cumberland that there would be an element of circularity if the test for this court to intervene were simply that it could properly do so on one of the conventional grounds for judicial review. It may on occasions be difficult to determine whether a particular order was made without jurisdiction or in a mistaken exercise of jurisdiction. The present case, in our view, falls into that difficult category. We are however persuaded that the judge, by basing his decision solely on an irrelevant consideration and by apparently failing to consider any relevant factor, fell into a jurisdictional error “of sufficient gravity to take the case out of the jurisdiction of the Crown Court”.

The judge’s second decision:

74. We do not accept Mr Cohen’s submission that the judge’s written ruling of 21 September 2020 merely compounded his initial error. On the contrary, the judge in that ruling gave a separate reason for his refusal of the application for costs from central funds, namely that the Claimant had failed properly to present the application and had failed to refer to relevant principles and case law. He refused to vary his decision, not because of the apparent wealth of the brand owners, but because he “declined to revisit unprepared and incomplete submissions”.
75. It follows from what we have said at [50] above that the judge was in our view justified in refusing, on that discrete ground, to vary his earlier order. We have found that the judge fell into jurisdictional error in his first decision; but the Claimant in our view contributed to that error because it made its application for costs in an inadequate manner and failed to address the court correctly about the relevant principles.
76. It was clear during the hearing on 4 September 2020 that the judge was troubled about whether the taxpayer should foot the bill for three large companies to prosecute an offender of limited means. We reject the submission that at that stage, only one decision (namely, to make an order in the terms sought) was properly open to him. Certainly, if the judge’s misapprehension had been corrected and his concerns allayed, he might have made that order. But that was not the only course open to him in the exercise of his powers under section 17(1) and (2A). He might have been troubled to learn that no attempt had been made to involve the CPS in the prosecution of Ms Peters, and that there had been no review of the decision to prosecute her when she enquired whether she might avoid prosecution by making a payment. He might have wished to adjourn so that more detailed submissions could be made to him. Most importantly, he could properly have concluded that the Claimant had wrongly treated the application as one which would be granted “on the nod”, declined to receive any further submissions and refused the application. That is what he did in his later written ruling, having received the letter before claim which continued wrongly to assert that the judge was bound to make an award of costs from central funds “in the absence of misconduct”.

Conclusion:

77. We have been persuaded that the judge fell into jurisdictional error in his first decision. Permission to apply for judicial review should therefore be granted. However, we refuse the claim for judicial review, for the following two reasons. First, the granting of any remedy in judicial review proceedings is always discretionary. We decline to exercise this court's discretion in favour of the Claimant, which contributed to the judge's error and continued to misstate the law in its letter before claim. Secondly, for the reasons we have given, the judge was entitled to make the decision he did on the separate ground which he expressed in his letter of 21 September 2020. As we have indicated¹⁴, the brevity of the judge's reasoning in his first ruling has to be seen in the context of the unsatisfactory presentation of the application. His second ruling should in our view be read as his more considered decision. It therefore appears to us to be highly likely that the outcome for the Claimant would not have been substantially different if the judge had not fallen into his initial error: see section 31(2A) of the Senior Courts Act 1981.
78. We therefore grant permission to apply but refuse the claim for judicial review.

¹⁴ See [64] above.