



Neutral Citation Number: [2024] EWHC 2324 (Admin)

Case No: AC - 2023 - BHM - 000208

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Birmingham Civil and Family Justice Centre  
33 Bull Street  
Birmingham, B4 6DS

Date: 11/09/2024

**Before :**

**MR. JUSTICE EYRE**

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**Between:**

**THE KING**  
**(on the application of**  
**THE DIRECTOR OF PUBLIC PROSECUTIONS)**

**Claimant**

**- and -**

**NORTHAMPTON MAGISTRATES COURT**

**Defendant**

**- and-**

**(1) MARK BEATY**  
**(2) GARETH PHILLIPS**

**Interested Parties**

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**Megan Millar** (instructed by **the Crown Prosecution Service**) for the **Claimant**  
**Christian Jowett** (instructed by **Harrison Clark Rickerbys**) for the **Interested Parties**

Hearing date: 23<sup>rd</sup> July 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.00 am on 11<sup>th</sup> September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

**Mr. Justice Eyre:**

**Introduction.**

1. On 26<sup>th</sup> August 2022 the Interested Parties were sent postal requisitions charging them with interfering with badger setts contrary to section 3 of the Protection of Badgers Act 1992 (“the POBA”). The Interested Parties contested the charges and the Claimant discontinued the prosecution on 1<sup>st</sup> June 2023.
2. Following that discontinuance the Interested Parties applied for their costs pursuant to section 19 of the Prosecution of Offences Act 1985 and regulation 3 of the Costs in Criminal Cases (General) Regulations 1986. That application was considered by District Judge Mehta and on 21<sup>st</sup> September 2023 he ordered that the Claimant pay the Interested Parties £37,909.04 being their costs for the entire period of the prosecution.
3. The judge made that order on the basis that the Claimant’s decision to charge the Interested Parties without first having obtained expert evidence was an unnecessary act or omission for the purposes of section 19 and regulation 3; that if expert evidence had been obtained it would inevitably have shown that the charges were not made out and that the Interested Parties should not be charged; and that it was, therefore, appropriate for the costs order to be made.
4. The Claimant seeks judicial review of the judge’s costs order on two grounds pursuant to permission granted by Henshaw J. The first ground is that the judge erred in law in proceeding on the basis that the Claimant was required to obtain expert evidence before charging the Interested Parties and that this error permeated the decision. The second was that even if the judge had been correct to say that the Claimant was at fault in not having obtained expert evidence, he had erred in concluding that this was an error such as to warrant the making of a costs order.

**The Factual Background to the Judge’s Decision.**

5. The Second Interested Party was employed by the First Interested Party. On 2<sup>nd</sup> March 2022 using a JCB and on the instructions of his employer the Second Interested Party cleared and levelled a spinney on the former’s land. The charges alleged that in doing so the Second Interested Party interfered with a badger sett in the spinney and that the First Interested Party caused or permitted that to be done.

**The Evidence available when the Claimant decided to charge the Interested Parties.**

6. The Claimant had statements from two members of the Northamptonshire Badger Group.
7. Nick Sauntson said that he had found the badger sett in 2015 and had checked it a total of eleven times. He described it as follows though, as Mr Jowett pointed out, it is to be noted that his statement did not state when he had made these observations:

“The sett was not visible from the road and only a small part of it was visible from the bridleway during winter when the undergrowth had died down. However, once you entered the wooded area it was very visible. The main sett was approx five meters from one end to the other and was made up of six entrances quite close together. Two of those entrances were directly next to two big spoil heaps, these were about three feet high and a couple of meters wide. Away from the main sett of six entrances, near the edge of the woodland, there were at least four other entrances that had occasional use. The sett has always been

active ever since I started checking it. All the usual badger signs, fresh bedding, paw prints, fresh latrines, badger hair, a scratching post, and tracks leading to and from the sett.”

8. Mr Sauntson said that he had received a message on the evening of 2<sup>nd</sup> March 2022 from a person who was concerned about scrub being burnt at the site. Mr Sauntson went to the site on 3<sup>rd</sup> March 2022 and said that he found that the area had been cleared and flattened and that “the entire sett had been totally destroyed”.
9. Mr Sauntson exhibited a number of photographs of the site. Three of these showed the position on 3<sup>rd</sup> March 2022. Other than saying that the other photographs were taken before 2<sup>nd</sup> March 2022 and that one was taken in February 2020 Mr Sauntson did not say when the photographs had been taken.
10. Sally Jones received a message from Mr Sauntson and attended with him at the site on 3<sup>rd</sup> March 2022. She confirmed Mr Sauntson’s description of the site at that time. Miss Jones also said that she had attended on 4<sup>th</sup> March 2022 and put small sticks by what she described as being the exposed entrances to tunnels below the surface. She said that when she returned on 5<sup>th</sup> and 6<sup>th</sup> March 2022 some of the sticks had been knocked over and that she saw “badger footprints” near the exposed entrances. She also said:

“We also recorded trail camera footage of two badgers on the site the following week near one of the entrances, but not coming in or out of the entrance. I replaced the sticks and returned again a few days later and we have further video footage showing badgers coming in and out of one of the entrances that we exposed after the clearance work took place.”
11. Miss Jones exhibited to a second statement photographs of the footprints seen on 6<sup>th</sup> March 2022 together with a spreadsheet of her interpretation of the trail camera footage for various dates between 7<sup>th</sup> and 14<sup>th</sup> March 2022. Miss Jones described the footage as showing badgers in the vicinity of what she said was a “sett entrance hole” as well as entering and leaving from that hole.
12. The Claimant also had a statement from Susan Haywood. Miss Haywood was an RSPCA inspector and attended at the site on 4<sup>th</sup> March 2022. She spoke to the Second Interested Party and reported that in that conversation he had:

“stated that he was aware of the badger sett at the location and said that they would be OK as they could just dig their way back out again as the holes were still in the ground”
13. Miss Haywood said that while speaking to the Second Interested Party she:

“saw 4 entrance holes to the sett, but there was no evidence of recent badgers either in/out of the sett as I couldn’t see any footprints in the mud surrounding the holes.”
14. Miss Haywood also met the First Interested Party and recorded the following as part of their exchanges:

“Q Were you aware of the badger sett here?  
A No  
Q Had you seen badgers around?  
A No, not in the day, see them at night, there is some knocked over on the road and I know that there are other badger setts nearby, every other field has a sett, it doesn’t surprise me they are everywhere”

15. The Second Interested Party was interviewed under caution by PC Gillies on 30<sup>th</sup> March 2022. In that interview there was the following exchange:

“Did you know there was a badger sett in there?”

“No, wouldn’t’ve gone in there if there was a badger sett in there, ‘cause you know that. No, we couldn’t see no signs, nothing, it was just a, a load of trees.”
16. The Second Interested Party explained that the thickness of the trees and the undergrowth meant that he was unable to see any holes or spoil heaps as he was moving into the spinney with the JCB. Later in the interview the Mr Phillips was asked about Miss Haywood’s account of the conversation between them. He denied that he had said that he was aware of a badger sett at the location and that he had said that any badgers would be able to dig their way out. Mr Phillips said that he could not remember what had been said but that he would not have said that he had seen a badger sett because he had not and would not have seen the sett.
17. The First Interested Party was interviewed under caution by PC Gillies on 26<sup>th</sup> April 2022. In the early part of the interview there was this exchange:

“Are you familiar with badger setts on that particular farm?”

“Yeah I know of one other, I, I didn’t know that one was there.”

“What the one that we’re gonna be talking about, the spinney?”

“Yeah, yeah. Didn’t know it’s there but you know every farms got badger setts, but this one by the road and by the footpath, I don’t think many badgers live there because I’d have seen the crop damage you know.”

“Yeah, because it had an arable field surrounding it, didn’t it?”

“Yeah, and I personally have driven a combine for the last 40 years and combined that field next to it so I know there is a badger sett now but I don’t think it was a very big one because there wasn’t the evidence of it, probably because it’s next to a footpath and a road.”

“BEATY stated there was one other badger sett on the farm that he was aware of, and it wasn’t near the spinney.”
18. It was not entirely clear from his answers there whether Mr Beaty was saying that he did not know that there was a badger sett in the spinney or that he knew there was one but did not believe it was a large one. His position became clearer in the course of the interview. Mr Beaty said that he had not personally visited this spinney for about 20 years. He said that he “absolutely” did not know that there was a badger sett there. Mr Beaty also said that when he had visited the site in the course of the works he had not seen any evidence of a badger sett or of entrance holes because his employees were still clearing the big fallen trees at the time of his visit.
19. The Claimant’s reviewing lawyer assessed the evidence and concluded that there was sufficient evidence to provide a realistic prospect of conviction such that a properly directed bench was more likely than not to convict the Interested Parties. The Claimant contended that in undertaking that exercise the lawyer was applying the Full Code Test as laid down in the Code for Crown Prosecutors.

The Developments after the Interested Parties were charged.

20. The postal requisitions were sent to the Interested Parties on 26<sup>th</sup> August 2022.

21. On 13<sup>th</sup> September 2022 Mr Sauntson made a second statement. This contained nothing that is material for current purposes and in particular did not specify the dates on which he had seen the site before 2<sup>nd</sup> March 2022.
22. Mr Peter Edwards is the sett recorder for the Northamptonshire Badger Group. On 14<sup>th</sup> September 2022 he made a statement to which he exhibited that group's record of the visits made by its members to the sett in question. On the same day PC Gillies visited the site and made a statement to which she exhibited photographs showing the site's appearance on that date.
23. The first hearing was on 23<sup>rd</sup> September 2022 and directions were given with a view to a trial on 6<sup>th</sup> January 2023.
24. On 14<sup>th</sup> December 2022 Paul Caruana provided an expert report to the Interested Parties and this was served on the Claimant on 19<sup>th</sup> December 2022. In that report Mr Caruana said:

“My conclusion on completion of the sett survey is that it is currently a subordinate sett, one that is in casual use by visiting badgers and subject to not being used in the Winter months, often for many months at a time.

...

I reiterate that with not knowing the true status of the badger sett before the event took place, coupled with the fact that it wasn't visited between 10th January 2022 and the 3rd March 2022, a time when subsidiary and outlier setts can become inactive for many months, I cannot conclude that it was either in current use or inactive at the time the incident occurred.”
25. In his report Mr Caruana commented on the evidence in the witness statements served on behalf of the Claimant. He noted that the last visit to the sett before the incident was on 10<sup>th</sup> January 2022. In light of that he said:

“Importantly, as an Expert Witness with over 30 years of experience, I would not be comfortable designating any badger sett as being in “current use” having not seen it for almost two months as in this case. It was visited on the 10th January 2022 and then again when the incident occurred on the 3rd March 2022. I also note that on the 4th February 2022, an RTA(road traffic accident casualty) was found close by. This may well have been a badger from this sett, potentially the only badger. Assuming that it could/might have been in current use at the time of the incident is pure guess work and should be viewed as such”
26. The hearing on 6<sup>th</sup> January 2023 was used as a directions hearing in light of the Claimant's application for adjournment of the trial so that it could obtain its own expert evidence in response to Mr Caruana's report.
27. The Claimant obtained a report from Tristram Pearce. This appears to have been finalised on 18<sup>th</sup> January 2023 and was served shortly thereafter. Mr Pearce concluded that there was an active badger sett at the site and said:

“From the size and condition of spoil heaps observed and the discarded layered bedding material present in spoil heaps, it is of my expert opinion the sett has been there some years. To second that statement the use and wear on some of the badger paths observed leading to and from entrances and in the woodland would also indicate prolonged and continued use of the sett

28. The experts provided a joint report dated 29<sup>th</sup> March 2023. The experts disagreed as to whether the sett was a main sett (Mr Pearce’s view) or a subsidiary sett (the view of Mr Caruana). They agreed that the sett had been “in use at various times over the previous 7 years”. They also agreed that during the times of their visits they found “activity and indicators that would afford the sett protection under the POBA”. However, they also agreed that they could not “categorically state or prove that the sett was active or inactive when the event occurred in March 2022”.
29. There was a further case management hearing on 3<sup>rd</sup> April 2023. That was followed by an exchange of skeleton arguments. The Interested Parties served skeleton arguments addressing the admissibility of the evidence relied on by the Claimant and the elements of the offence. The Claimant served a skeleton argument in response and the Interested Parties replied to that.
30. On 24<sup>th</sup> May 2023 the Interested Parties’ solicitors emailed the Claimant saying in part:
- “Finally, we would draw submit that there is a significant issue which has not been addressed by the prosecution. The Crown having accepted that their witnesses were not experts and an adjournment was needed as an expert was required by them to give evidence on their behalf. On receiving that evidence there is we submit a failure to address that expert evidence correctly. The prosecution expert having addressed the evidence confirmed he cannot state this was an active badger set, as does our clients’ expert. This should bring all matters to a conclusion and is fatal to the prosecution case. We draw this to the attention of the prosecution and the Court as we intend to raise as an issue in terms of costs.
- ...
- We must by now be clear to CPS that the expert evidence is entirely against them, and they cannot put their lay witnesses forward as experts as previously stated.”
31. The Claimant served notice of the discontinuance of the prosecution on 1<sup>st</sup> June 2023. In response the Interested Parties made the costs application which the judge determined on 21<sup>st</sup> September 2023.

**The Reasons for the Judge’s Decision.**

32. The judge gave an *ex tempore* ruling on the costs application at the end of argument. The only record of that ruling which has been provided in these proceedings is that which was set out in the witness statement of Danny Latham. Mr Latham was the Crown Prosecutor who represented the Claimant at the hearing on 21<sup>st</sup> September 2023. In his statement Mr Latham quotes the note which he made of the judge’s ruling.
33. The proceedings were not recorded. If this had been a civil appeal from a judge’s decision the procedure set out in CPR 52B PD paragraph 6.2(c) would have applied. In those circumstances the parties involved are required to agree a note of the judgment and to send it to the judge for approval. It is regrettable that the parties did not follow that course by analogy here. However, Mr Jowett was present at the September 2023 hearing and he accepted, at the hearing before me, the accuracy of Mr Latham’s note. In those circumstances I will proceed on the footing that it is an accurate record of the judge’s ruling.
34. The judge explained his reasons in very short terms saying:

“It is clear from the authorities that an expert report should have been sought at pre-charge. Their conduct even after charge shows the Crown have shown a lack of understanding or appreciation of the need for an expert report to prove the elements of the offence. That is supported by the contention that the only time a prosecution expert was instructed, it was to rebut the defence expert report. I am satisfied that the decision to charge the case without expert evidence was an unnecessary act / omission on the part of the Crown. If the Prosecution had properly obtained expert evidence prior to charge, it was inevitable that it would have supported the defence, therefore there would have been no prosecution and no costs incurred.”

### **The Grounds of Challenge and the Interested Parties’ Response thereto.**

35. In ground 1 the Claimant says that the judge’s view that the Claimant was required to obtain expert evidence before making the charging decision was wrong in law and did not follow from the authorities to which he had been referred. In the Statement of Facts and Grounds and in Miss Millar’s skeleton argument this aspect of the decision is said to have been either unlawful or irrational but the Claimant’s primary contention is that the judge erred in law.
36. The Interested Parties submit that there was neither legal error nor irrationality in the judge’s approach. The judge was not saying that expert evidence was needed as a matter of law in all cases where a breach of section 3 of POBA was alleged. Rather he was saying that the authorities identified the issues which needed to be addressed when a breach of that section was alleged and that the prosecution case on those issues would almost invariably need to be established by expert evidence and that such was the position in the circumstances of this case.
37. In ground 2 the Claimant asserted an error without qualification but its case was in reality a further contention that the judge either erred in law or reached a conclusion which was not rationally open to him. It says that even if the judge was right to conclude that expert evidence should have been obtained in advance of the charging decision that was not such an error as to warrant an award of costs when the principles governing the making of such awards were properly considered. Therefore, the judge either erred in his understanding of the law or reached a conclusion which was not rationally open to him.
38. The Interested Parties say that the Claimant’s failure to obtain expert evidence was an error of such gravity that an award of costs could be made in accord with the applicable authorities and principles. It was, moreover, rationally open to the judge to make such an award in the circumstances of this case. The Interested Parties say that this ground is in truth an expression of disagreement with the judge’s decision rather than being a properly-based public law challenge.
39. By way of a fallback position the Interested Parties contend that even if either ground is made out relief is nonetheless to be refused. In respect of both grounds the Interested Parties say that the Claimant had an adequate alternative remedy by way of an appeal by case stated. The Claimant chose not to take that course and it is said that, in those circumstances, the court should decline to grant relief. In respect of the first ground the Interested Parties also invoke section 31(2A) of the Senior Courts Act 1981. In that regard they submit that even if the judge was wrong to treat the obtaining of expert evidence as generally necessary or as mandated by the authorities such evidence was required in the circumstances of this case and that the judge would have come to the

same conclusion if he had looked only at those circumstances. Section 31(2A) was also invoked in relation to the second ground substantially by way of adoption of the contentions in respect of ground 1.

40. The judge's award was of the Interested Parties' costs for the entire duration of the case from the laying of the charges. That was on the basis of the failure to obtain expert evidence being an omission of a step which should have been taken before the charging decision was made. The Claimant sought the quashing of that decision and the remission of the matter to the judge. That was because it accepted that it could not be said that a judge properly and rationally applying the correct legal approach would necessarily have declined to make any costs order at all (although the Claimant would say that such an order should not be made).
41. The Interested Parties' case was that even if the Claimant's original failure to obtain an expert report did not warrant a costs order different considerations would apply as the case progressed. In essence the point was that the inadequacy of the Claimant's evidence and the difficulties facing the prosecution became increasingly evident as the case progressed. It was said that an order for the Interested Parties' costs from a time later than the date of charge should be made even if they did not recover all their costs. In the Detailed Grounds of Defence and in Mr Jowett's skeleton submissions this argument took the form of inviting the court to have regard to what was described as the "chronological divisibility" of the claim. It was said that even if I found the grounds to be established by reference to matters as they stood at the time of the issue of the postal requisitions I should "consider that each ground ceased to be met during the lifetime of the case". That course was not open to me. The judge made a single decision in respect of the entirety of the costs of the Interested Parties' defence. I am concerned with the lawfulness and rationality of that decision. The fact that an order giving the Interested Parties their costs from a later date could properly have been made cannot affect the lawfulness or rationality of the decision which was made. It also would not amount to a ground for refusing relief pursuant to section 31(2A) because being required to pay costs from a later date in a lesser sum would necessarily be a materially different outcome for the Claimant than that which resulted from the actual order. The point made by the Interested Parties is relevant to consideration of whether the matter should be remitted for a further decision if the claim succeeds but the Claimant accepts that there should be remission in those circumstances.

#### **The Procedural History of this Claim.**

42. The Defendant has taken no part in the proceedings.
43. The Claimant sought permission on three grounds. The third ground sought to challenge the amount of the costs award which was of the full amount which had been sought by the Interested Parties. The challenge was that the judge had failed to take proportionality into account in the assessment of the costs.
44. Henshaw J gave permission on grounds 1 and 2. He refused permission for ground 3 and that refusal was maintained by Ritchie J on the oral renewal of the application for permission.
45. Henshaw J considered the Interested Parties' argument that permission should be refused on the basis that the opportunity to appeal by way of case stated meant that the



Claimant had an adequate alternative remedy. He declined to refuse permission on that basis saying that this was “not a case where any findings of fact were required and [was a case where] the court’s reasons speak for themselves. The evidential basis was and is a matter of written record”.

**The Issues.**

46. Miss Millar and Mr Jowett had agreed a helpful list of issues in advance of the hearing but matters developed in the course of submissions and in light of those developments the issues to be considered are:
- i) The proper interpretation of the POBA and in particular of the elements which need to be proved to establish an offence under section 3 and the approach to be taken to the need for expert evidence as a consequence.
  - ii) The basis on which the judge decided that the Claimant should have obtained expert evidence at the pre-charge stage. Did the judge reach that conclusion on the basis that expert evidence was always required as a matter of law for a conviction under section 3 of the POBA (an approach which the Interested Parties accept would have been wrong in law) or was his conclusion on the basis that in the circumstances of this case it had been necessary for the Claimant to obtain expert evidence before a proper charging decision could be made?
  - iii) In the light of the conclusions on the preceding issues was the judge’s conclusion that the Claimant erred in charging the Interested Parties without expert evidence lawful and rational?
  - iv) Whether section 31(2A) of the Senior Courts Act 1981 operates to preclude relief even if the judge’s decision was unlawful or irrational. The Interested Parties’ argument in this regard was advanced on the footing that even if the interpretation of the POBA adopted by the judge was incorrect then the adoption and application of the correct interpretation would have led necessarily to the same conclusion.
  - v) Whether the court should decline to grant relief on the basis that the Claimant had an adequate alternative remedy, namely an appeal by way of case stated, which it chose not to pursue.
47. The preceding issues relate to ground 1. If the claim succeeds on ground 1 and the decision that the Claimant erred in failing to obtain expert evidence at the pre-charge stage is quashed then the award of costs falls away and consideration of ground 2 is unnecessary. However, if the challenge on ground 1 fails it will be necessary to consider ground 2. The fact that the judge was entitled to conclude that there was an error on the part of the Claimant does not necessarily mean that he was entitled to make an award of costs against it. The issues to be considered in respect of ground 2 are:
- i) Whether the judge’s decision that the Claimant should pay all of the Interested Parties’ costs because of the error in failing to obtain expert evidence before charge was lawful and rational.

- ii) Whether relief should be declined in respect of this ground because of the Claimant's failure to pursue the alternative remedy of an appeal by way of case stated.

**The Need for Expert Evidence to prove Offences under Section 3 of the Protection of Badgers Act.**

48. The offence of interfering with badger setts was created by section 3 of the POBA which provides that:

“(1) A person is guilty of an offence if, except as permitted by or under this Act, he interferes with a badger sett by doing any of the following things—

- (a) damaging a badger sett or any part of it;
- (b) destroying a badger sett;
- (c) obstructing access to, or any entrance of, a badger sett;
- (d) causing a dog to enter a badger sett; or
- (e) disturbing a badger when it is occupying a badger sett,

intending to do any of those things or being reckless as to whether his actions would have any of those consequences.

(2) A person is guilty of an offence if, except as permitted by or under this Act, he knowingly causes or permits to be done an act which is made unlawful by subsection (1) above.”

49. Interpretation is addressed in section 14 the provisions of which include:
- “‘badger sett’ means any structure or place which displays signs indicating current use by a badger;”
50. What matters need to be proved to establish the offence and what evidence is needed to prove them?
51. The difference which remains between the parties is essentially a matter of emphasis and degree.
52. For the Interested Parties Mr Jowett does not contend that expert evidence will always be needed as a matter of law. However, he does submit that it will only be in the rarest of cases that it will be possible to prove the section 3 offence without expert evidence. That is because of the nature of the elements which have to be proved. Those are, Mr Jowett submits, matters which are outside the knowledge of a person who is not an expert in the lives of badgers. In advancing his argument Mr Jowett pointed out that the POBA imposes criminal sanctions and said that as a consequence it is to be construed strictly.
53. For the Claimant Miss Millar accepted that the POBA was to be construed strictly. She said, however, that there was a difference between strict construction and a construction of the POBA which imposed additional preconditions for a successful prosecution over and above those in the Act. The former course was permissible but the latter was not. Miss Millar accepted that in most cases it would be difficult for the necessary elements

of the offence to be established without expert evidence but she submitted that the question needed to be addressed on a case-by-case basis. There would, she contended, be cases where the court could be satisfied that a particular structure displayed signs indicating current use by a badger without expert evidence. As an example of such a case Miss Millar posited the situation where there was lay evidence of a badger or badgers entering and leaving a particular structure and leaving signs such as pawprints when it or they did so.

54. In *Director of Public Prosecutions v Green & others* [2001] 1 WLR 505 the Divisional Court was concerned with a prosecution appeal against the dismissal of charges under section 3. The defendants had dug to a depth of 2' in an area between the entrances to a badger sett. Their digging had not entered the tunnels of the sett. There was no dispute that there was a badger sett in current use underneath the place where the defendants had been digging. The issue was whether the digging had amounted to interference with that sett for the purposes of section 3 and that involved the court in considering whether the sett included the surface of the ground above the tunnels and chambers of the sett. The prosecution and the defendants had each advanced expert evidence as to whether the surface was to be regarded as part of the sett and whether the digging would have had any effect on the tunnels and chambers of the sett.
55. The Divisional Court dismissed the prosecution's appeal and held that for the purposes of the POBA a sett did not extend to the surface above the complex of tunnels and chambers. The following passages from the judgment of Roch LJ at 512C- D and 512G – 513A are relevant:

“In my judgment, all five sub-paragraphs in section 3 of the 1992 Act throw light on what is meant by the statutory definition of badger sett which is to be found in section 14 of the 1992 Act. That definition refers to any structure or place which displays signs indicating current use by a badger. Section 14 of the 1992 Act, in my judgment, does not define badger sett so much as indicate Parliament's intention that where the phrase "badger sett" appears in the 1992 Act what is being referred to is a structure or place displaying signs indicating current use by a badger. Parliament wished to make it clear that the terms of the 1992 Act were not to apply to tunnels or chambers constructed by badgers which were no longer in current use.

...

The alternative ways in which an offence under section 3 of the 1992 Act may be committed show that Parliament thought of a badger sett as something which had entrances and which could be entered or occupied in a physical sense. If the prosecution's submissions were correct, then disturbing a badger above ground, but over the tunnels and chambers of the sett, would be an offence, or would be capable of being an offence under section 3(e) of the 1992 Act, because such a badger would be occupying a badger sett.

In my judgment, it cannot have been Parliament's intention that a person walking in the country who disturbs a badger in those circumstances, intending or being reckless as to whether he disturbs the badger, commits a criminal offence. Section 3 of the 1992 Act is a penal provision. It creates a criminal offence. The meaning given to the phrase "badger sett" should be clear and it should also be confined. In my judgment, the phrase "badger sett" refers to the tunnels and chambers constructed by badgers and the entrance holes to those tunnels and chambers. It may apply to other structures, where badgers, for example, occupy culverts or disused sheds as their shelter or refuge...”

56. In his short concurring judgment Wright J said that it was “the system of tunnels and chambers” which was “ordinarily described as a badger sett”.

57. The question of the meaning of a badger sett for the purposes of the POBA was considered by Sheriff Drummond QC sitting in the Lothian and Borders Sheriff Court in *McLintock v Harris* (2015) SLT 26. The report sets out the Sheriff's reasons for dismissing the charge under section 3 of the POBA. The defendants had admitted putting a dog into a hole but the Sheriff concluded that it had not been established that the hole was a badger sett for the purposes of the POBA. In the course of his judgment the Sheriff analysed with care what was needed to establish that a structure was a badger sett having regard to the decision in *DPP v Green* when doing so. That decision is not binding on me but Sheriff Drummond's reasoning and analysis is compelling and I adopt it subject to the qualification I express below.
58. At [25] Sheriff Drummond quoted the definition contained in section 14 of the POBA. He noted, at [26], that the court was to "give effect to every word of that definition" and then said:
- "[27] I deal with the meaning of a "structure or place" below but the approach which I take to the remaining words of the definition is as follows: "displays" means visibly shows; "signs" means more than one mark, symbol or indicator; "indicating" means pointing to; "current use" means the fact of being used at the present time.
- [28] It is therefore the statutory requirement that for a structure or place to be a badger sett in terms of the statute there must be more than one mark, symbol or indicator visibly present which points to the fact of the structure or place being in use at the present time.
- [29] The current use by a badger relates to the sett itself as opposed to the locality."
59. At [37] the Sheriff said:
- "I do not consider that actual physical occupation is a necessary attribute of current use. If there is actual physical presence that need not be determinative of actual use at the present time if that actual use is not shown openly. I address the matter in this way because there was some dispute before me in which it was suggested that the mere presence of a badger did not necessarily mean that it was in actual use. Every place in which a badger might take temporary refuge does not become a badger sett in terms of the statute in the absence of other signs. Whether in the circumstances that actual occupation is visibly present will be a question of fact in each case. Mere presence unaccompanied by any other additional indicator would not meet the statutory definition because Parliament has said that there must be more than one visible sign."
60. At [40] – [45] he explained the reasons for his conclusion in light of the evidence before him:
- "[40] I was not satisfied on the foregoing evidence that there was evidence which would entitle me to hold that the structure in question was a badger sett within the meaning of the Act. In addition, it was not disputed in this case that conclusive signs of current use attributable to the structure in question, namely bedding, dung, hair and paw marks were absent.
- [41] The fundamental failure in the Crown case is that none of the witnesses saw or found "signs" which were unequivocally attributable to the use of the structure or place into which the terrier was put. What the witnesses did find were signs of badger activity in the locality: that also happens to be the definition which was applied by Mr Hutchison.
- [42] The Crown have accordingly failed to establish that the structure or place in question was a badger sett in terms of the Act and charges 4 and 5 must fall: I accordingly find the accused not guilty of those charges.

[43] Against the background of the signs said to have been found in the present case the whole factors which were referred to in evidence before me as being capable of constituting “signs” were as follows: 1. the presence of bedding; 2. latrines or dung pits containing fresh dung connected to a sett by recently used paths; 3. pad marks identifiable as badgers entering the sett; 4. well used paths with pad marks evidencing use by badgers; 5. remnants of vegetation present in excavated soil; 6. hairs snagged in entrances or in freshly ejected soil or bedding; 7. foraging marks; 8. the shape of the entrance; 9. a freshly dug latrine pit with no dung.

[44] Whether or not some of these signs are indicative of no more than badger presence in the locality may well be a question of fact and circumstance for each case to be determined on its own merits and in the particular combination or accumulation of them which might be in evidence.

[45] In my opinion, however, the presence of any one of the following signs, namely, bedding, the presence of dung in latrines which can be linked by paths to the structure in question and the presence of paw prints must be considered to be conclusive evidence of current use. I accept that hair may persist for a significant time after use has ceased but that its presence in conjunction with other indicators is capable of providing evidence of current use: its absence is a strong contra-indicator. Compliance with the statutory definition requires that there be more than one visible sign: the presence of any one of what I have described as conclusive signs when accompanied by any of the other visible signs such as the remainder of those listed above is capable of supporting a finding that the structure was a badger sett in current use.”

61. I do not understand the Sheriff to be saying in [45] that as a matter of law the presence of any two of the “conclusive signs” would necessarily mean that a structure was a badger sett. Such a reading would be inconsistent with [44] and with the closing words of [45]. It would, moreover, be introducing an approach which is not warranted by the words of the POBA. Instead, the Sheriff is to be understood as saying that those were matters which were capable of indicating that a structure was a sett depending on the balance of the evidence. To the extent that the Sheriff was purporting to say that the presence of two or more of those signs necessarily and as a matter of law established that a given structure was a badger sett I disagree.
62. In *Foster v Crown Prosecution Service* [2013] EWHC 3885 (Admin) King J heard the defendant’s appeal by way of case stated against his conviction under section 3 of the POBA. The defendant accepted that he had filled a structure of holes, tunnels, and chambers with slurry and that the structure had formerly been a badger sett. The issue before the magistrates had been whether that structure was in current use as a sett at the time of the defendant’s actions. At first instance the prosecution had relied on expert evidence on the issue of the current use of the structure. The principal points on the appeal were, first, that the expert evidence should not have been admitted because of failures to comply with the requirements of the Criminal Procedure Rules and, second, that it was not open to the magistrates to find that the defendant had been reckless as to whether his actions interfered with a badger sett. King J allowed the appeal. He did so having found that the magistrates had been entitled to admit the expert evidence but that there was insufficient evidence to justify the finding of recklessness. The case proceeded on the basis that without the expert evidence the conviction could not stand. However, that was not because of an acceptance that expert evidence was necessarily required but because it had been the evidence on which the prosecution had relied in the particular case. It follows that King J’s decision does not assist with the issues I am to consider.

63. I have already said that I found Sheriff Drummond's analysis compelling and the distinction which he made at [37] between the presence of a badger in a structure and the current use of a structure as a badger sett is an important one. As Mr Jowett put it: evidence of the presence of a badger in a structure is simply evidence of the presence of a badger and does not amount to the structure displaying a sign. Drawing on Sheriff Drummond's explanation that a place where a badger takes temporary refuge does not, without more, become a badger sett for the purposes of the POBA Mr Jowett was also right to emphasise that the necessary current use must be more than transient and must be use as a sett. In that regard it is significant that in *DPP v Green* Roch LJ at 512H – 513A made it clear that a degree of settled occupation of the structure was necessary.
64. Accordingly, for there to be a badger sett the following elements need to be established:
- i) There must be a structure or place;
  - ii) That structure or place must display signs;
  - iii) Those signs must indicate current use;
  - iv) The current use must be by a badger;
  - v) The current use must be more than transient and must be of the nature of an occupation of the structure.
65. When considering whether those elements have been established account is to be taken of the guidance given in *DPP v Green* and in *McLintock v Harris*. In addition, and although circularity is to be avoided, it is to be remembered that the exercise in which the court will be engaged for the purposes of section 3 will be that of determining whether a structure with which there has been interference is a badger sett. It follows that when assessing the evidence as to the structure, signs, and use the court will need to be focused on whether those matters indicate the existence of a badger sett.
66. Expert evidence is not needed as a matter of law to establish those elements. Nonetheless, it is difficult to conceive of circumstances where expert evidence will not be needed in a case where there is an issue as to whether a particular structure is or is not a badger sett for the purposes of the POBA. That is because it will be necessary to prove that the structure displays signs indicating current use and that the use is more than transient and is akin to occupation of the structure. Whether a particular physical feature is a sign of badger use will almost inevitably be a matter of expert evidence. The court will not be able to determine of its own knowledge whether droppings, hair, paw marks, or the like are those of badgers or other animals. The need for expert evidence will be even greater when the court is considering the nature of the use indicated by the signs. It is to be remembered that the signs are to be those displayed by the structure or place and that the relevant use must be more than transient. It is hard to envisage circumstances in which expert evidence will not be needed in order for the court to determine whether the use indicated by the signs goes beyond the transient. Thus, in the example given by Miss Millar (see [53] above) even lay evidence of badgers entering and leaving a particular hole and leaving paw prints at the entrance is unlikely to be determinative as to whether there was a badger sett at a particular location in the absence of expert evidence of the nature of the structure being entered and of the nature of the use being indicated.

67. I emphasise that the preceding analysis is concerned with cases where there is an issue as to whether a structure is a badger sett in current use. The position is likely to be very different where that is not in issue and where the question is, for example, whether the necessary elements of intention or recklessness have been proved.

**The Basis of the Judge’s Conclusion that Expert Evidence was needed.**

68. The meaning of the judge’s ruling is not clear when it is seen in isolation. Was he approaching the question on the basis that expert evidence was needed as a matter of law in every case of a prosecution under section 3 of the POBA? Alternatively, was he saying that the effect of the authorities was that in the circumstances of this prosecution expert evidence had been needed? It is necessary to see the short *ex tempore* ruling in the context of the circumstances of the case; of the authorities to which the judge had been referred; and of the submissions which had been made to him.

69. The ruling was given in the context of the discontinuance of the prosecution and of the Interested Parties’ costs application. The judge was entitled to approach the application on the footing that the decision to discontinue had been made because in the light of the joint stance of the experts the prosecution was unlikely to succeed.

70. Save for the initial case management note and proposed directions the submissions which had been made at various stages in the proceedings had all been made after receipt of the experts’ joint report of 29<sup>th</sup> March 2023. The first point of agreement had said that:

“Both experts agree that they cannot categorically state or prove that the sett was active or inactive when the event occurred in March 2022”

71. In its submissions before the prosecution was discontinued the Claimant had been arguing that the inability of the experts to say whether the sett had been in use at the date of the alleged offence was not fatal to the prosecution. It had argued that it would be open to the court to treat the lay evidence as establishing that the sett was in use at that date. The Interested Parties had been arguing in response that current use at the date of the offence could not be established in the absence of expert evidence and in light of the agreed stance of the experts.

72. Thus, in its skeleton argument of 13<sup>th</sup> April 2023 the Claimant had said:

“3.3 The expert evidence in this matter will be commented on later in this document but the Crown’s case is that because of the lengthy time delay between offence date (between 01/03/2022 and 04/03/2022) and attendance of experts (defence expert 29 November 2022 and the Crown’s (January 2023) the court should pay less regard to the experts reports than the evidence of lay but well informed witnesses as to the condition of the sett in early March 2022.”

73. In their skeleton argument on the admissibility of evidence at that time the Interested Parties had identified the core issues thus:

“2. **Core issue:** The core issues must be borne in mind. As set out in the Offence Skeleton Argument, a/the core issue [‘**current use**’] is:

*Can P prove to the court so that it is sure that there was damage to any structure or place which displays signs indicating current use by a badger at the time of the offence?”*

74. In the same skeleton argument the Interested Parties had also said:
- “b. Opinion / Expert Opinion: opinion evidence generally is inadmissible.
- ...
- ii. Whether a sett is in current use etc. is a matter for expert evidence: *DPP v Green* [2001] 1 WLR 505 (QBD(DC)); *Foster v CPS* [2013] EWHC 3885 (Admin). P and D have obtained expert evidence. There is a schedule of expert areas of agreement and disagreement. P advances none of its lay witnesses as experts, presumably because none are experts; there is no attempt to comply with the CrimPR if P does advance them as experts...”
75. In their separate skeleton argument of the same date addressing proof of the elements of the offence the Interested Parties had said:
- “**Summary:** This case turns on the expert evidence. Neither expert is satisfied that it can be proven that the sett engaged the PBA at the time of the allegations. Even P’s expert states (Heads of [Dis]Agreement 29-Mar-23) that ‘*I cannot prove the sett in question was displaying signs indicating current use by a badger at the time of the alleged offence in March 2022*’, which is the test that must be met to engage the PBA: s14 PBA. P therefore cannot prove to the court that it is sure that the PBA is engaged. Consequently, both Ds must be acquitted. P is invited to reconsider the evidential test and the continuation of this case accordingly.”
76. In that skeleton argument the Interested Parties had cited *DPP v Green*, *Foster v CPS*, and *McLintock v Harris*. *Green* and *Foster* were relied upon as authority for the proposition that proving that there were signs of the current use by a badger at the relevant time was a matter for expert evidence with *Foster* being said to be authority for the requirement that the use had to be current at the time of the alleged offence.
77. The Interested Parties’ skeleton argument for the hearing on 21<sup>st</sup> September 2023 put the matter in stark terms saying at paragraph 9:
- “9. **Context:** Ds’ submissions should be considered in this context:
- a. **Law:** The law is clear. Expert evidence is necessary to establish whether any badger sett falls within s14 PBA.
- b. **Expert evidence:** The overall effect of the expert evidence is clear: it was not possible to establish to the criminal standard that any badger sett fell within s14 PBA. Consequently, there was never any realistic prospect of conviction.”
78. The Claimant’s skeleton argument for that hearing did not address directly the question of what evidence had been needed as a matter of law but did say:
- “It is not agreed that the joint expert report was such that the ending of proceedings was inevitable at that point. The report was unable to categorically state that the sett was not in use at the time of the alleged offences. There remained witnesses who provided direct eye-witness evidence of the appearance of the sett at the time of the offence. The decision to maintain the prosecution at that point was neither unnecessary nor improper.”
79. In response the Interested Parties said:
- “a. **A necessary element of the ss3 and 12 PBA offence is** that any badger sett must fall within s14 PBA: ‘...any structure of place which displays signs of current use by a badger’. This is a question of expert evidence because:



- i. that is the effect of the caselaw;
- ii. the issue falls outside the scope of ordinary factual decisions which would not require expert evidence; and
- iii. it is not understood that the requirement for expert evidence is in dispute. **If it is, CPS is invited to explain how the court can properly decide this, given the expert knowledge, qualifications and reasoning required for both parties' experts to do so."**

80. Against that background I come back to the question of whether the judge is to be understood to have been saying that the effect of the authorities was that expert evidence was needed in the case of every section 3 prosecution or that the effect was such that it was needed in the circumstances of this case. I am satisfied that when seen in context the ruling shows the judge taking the latter approach. The former would have been a stark error and would not have been consistent with a proper reading of the authorities to which the judge had been referred and on which he said he was basing his ruling. It is significant that from the outset the Interested Parties' response to the prosecution had been that the Claimant could not prove current use of the structure as a badger sett at the time of the alleged offence. That was the central issue between the prosecution and the defence. When seen in the context of that and of the matters I have just summarised the judge is to be understood as to have been saying that expert evidence had been needed in the circumstances of this case. I turn next to consider whether it was open to the judge to conclude that on the facts of this case the Claimant had erred in commencing the proceedings without obtaining expert evidence.

**Ground 1: Was the Judge in Error in concluding that the Claimant should have obtained Expert Evidence before charging the Interested Parties?**

81. The evidence contained in the statements of Mr Sauntson and Miss Jones was in part evidence of their observations of the site and in part non-expert opinion evidence. The latter was not admissible and the former needed to be interpreted by an expert. Thus, expert evidence would be needed to confirm that the marks which Miss Jones said were the paw prints of badgers were in fact such. Similarly, although Miss Jones could give evidence of her observations of badgers in the vicinity of the alleged sett expert evidence would be needed before that could be treated as evidence of the current use of the holes as part of a sett at the time of the alleged offence. It is significant that in her statement the RSPCA inspector, Susan Haywood, had said that she saw "no evidence of recent badgers either in/out of the sett".
82. Although the Interested Parties emphasised that they had no knowledge of the alleged sett the Claimant was not entitled to proceed on the footing that the Interested Parties accepted that there was in fact a sett within the meaning of the POBA at this site. The nearest to such an acceptance was Miss Haywood's evidence of the comment which the Second Interested Party had made to her at the site. The Interested Parties subsequently argued that because Mr Phillips had not been cautioned before being questioned by Miss Haywood the evidence of what he was alleged to have said should be excluded. However, that potential argument does not mean that the Claimant was not entitled to take account of Miss Haywood's evidence of the conversation at the stage of the charging decision nor that the Claimant was not entitled to proceed on the basis that Miss Haywood's statement recorded her honest recollection of the conversation. More significant, however, are the points that the Second Interested Party denied making the

comment and that even if the comment was made it was by no means an unequivocal admission that there was a sett in current use at the site.

83. On that evidence the Claimant was not able to prove that the actions of the Interested Parties had interfered with a sett in current use. That means that the judge's conclusion that in those circumstances it was an error for the Claimant to charge the Interested Parties without having obtained expert evidence was neither wrong in law nor irrational. The judge was entitled to conclude that expert evidence was required here and that without expert evidence the Claimant could not properly have concluded that there was a real prospect of a conviction. Therefore, the challenge on ground 1 fails.

### **The Invocation of Section 31(2A) of the Senior Courts Act 1981.**

84. In light of my conclusion that ground 1 fails it is not necessary to consider whether relief is precluded by this provision. A high hurdle has to be surmounted before the court can be satisfied that it is highly likely that the outcome would have been substantially the same even if the conduct complained of had not occurred. However, it follows from my conclusion as to the inadequacy of the evidence which the Claimant had that, if it had been necessary, I would have been satisfied that this section came into play in respect of ground 1. If I had found that the judge had proceeded on the wrong legal basis (namely that expert evidence was always needed for a prosecution under section 3) rather than the correct legal basis (namely, as explained at [66] and [67] above that expert evidence was almost invariably needed when there was a question as to whether there was a sett in current use) I would have been satisfied that the same finding as to the existence of an error would have been highly likely if the correct approach had been adopted. Accordingly, I would have refused relief on this basis even if I had taken a different view as to the judge's approach. However, it is to be remembered that this would have been the position in respect of ground 1 and that this would not without more preclude relief in respect of ground 2.

### **Should the Court refuse Relief on the basis that the Claimant has an Adequate Alternative Remedy?**

85. This line of defence also does not arise in light of my conclusion on ground 1. However, if ground 1 had been otherwise meritorious I would not have refused relief on the basis that the Claimant had an adequate alternative remedy. That is for the reasons which I will explain more fully in relation to ground 2.

### **The Approach to be taken to the Award of Costs against a Prosecutor.**

86. Section 19(1) of the Prosecution of Offences Act 1985 provides that:

(1) The Lord Chancellor may by regulations make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, 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 as to the payment of those costs."

87. The Costs in Criminal Cases (General) Regulations 1986 were made pursuant to that power and regulation 3(1) provides that:

“ (1) Subject to the provisions of this regulation, where at any time during criminal proceedings—

(a) a magistrates' court,

...

is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an 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.”

88. Account is also to be taken of the Practice Direction (Costs in Criminal Proceedings) 2015 which says, at 4.1.1, that when considering whether to make an order under these powers:

“The court may find it helpful to adopt a three stage approach (a) Has there been an unnecessary or improper, act or omission? (b) As a result have any costs been incurred by another party? (c) If the answers to (a) and (b) are “yes”, should the court exercise its discretion to order the party responsible to meet the whole or any part of the relevant costs, and if so what specific sum is involved?”

89. The approach to be taken when exercising the power under section 19(1) is to be in accordance with the principles summarised thus by Coulson J (as he then was) in *R v Cornish & Maidstone and Tunbridge Wells NHS Trust* [2016] EWHC 779 (QB) at [16]:

“From these various authorities therefore, I consider that the principles to be applied in respect of an application under s.19 and Regulation 3 are as follows:

(a) Simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of s.19 (*R v P, Evans*).

(b) Improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly (*Denning*).

(c) The test is one of impropriety, not merely unreasonableness (*Counsell*). The conduct of the prosecution must be starkly improper such that no great investigation into the facts or decision-making process is necessary to establish it (*Evans*).

(d) Where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper, but even then, that does not necessarily follow because “no one has a monopoly of legal wisdom, and many legal points are properly arguable” (*Evans*).

(e) It is important that s.19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions (*R v P, Evans*).

(f) In consequence of the foregoing principles, the granting of a s.19 application will be “very rare” and will be “restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him” (*Evans*).

90. The judge had before him Mr Jowett’s skeleton argument which referred to the legislative position as well as quoting the passages from the Practice Direction and from *Cornish* which I have set out above. In addition, Mr Latham referred the judge to some of the authorities underlying Coulson J’s summary of the principles.

**Ground 2: The Lawfulness and Rationality of the Judge’s Decision to award the Interested Parties the Entirety of their Costs.**

91. The judge is not to be criticised for stating his reasons shortly but it is necessary to consider whether in those short reasons he was applying the correct test.
92. On behalf of the Claimant Miss Millar emphasised the high hurdle which had to be surmounted before an order could properly be made under section 19. It was not sufficient for the judge simply to conclude that the Claimant's approach had been wrong in law. In challenging the decision the Claimant's contention was that the judge had moved straight from the findings that the Claimant had erred in not obtaining expert evidence and that costs had been incurred by reason of a prosecution which was bound to fail to the conclusion that the Claimant should pay the Interested Parties' costs. That was not, the Claimant said, an application of the correct approach. In addition, Miss Millar contended that there had been scope for debate as to whether in the circumstances of this case expert evidence had been needed and whether the prosecution had been doomed from the outset without it. It followed, she submitted, that this was not a case where the Claimant's error was necessarily or inevitably of the required level of gravity.
93. In opposition to the challenge Mr Jowett submitted that the proper interpretation of the POBA and of the authorities was neither a complex matter nor one where there was real scope for debate. In light of that it should have been apparent to the Claimant that it needed to have expert evidence showing the alleged sett was in current use at the time of the alleged offence and that in the absence of such evidence the prosecution was bound to fail. Mr Jowett also pointed out that although it had been said that the Full Code Test had been applied in making the decision to charge the Interested Parties the reasoning leading up to that decision had not been disclosed. He submitted that this meant that the Claimant had failed to show that it had taken a reasoned approach to the issues which it had been necessary to consider rather than simply overlooking the need for expert evidence or failing properly to analyse the position.
94. In addition, it is relevant to note that the judge was referred to the correct test and that Mr Jowett's skeleton argument had set out Coulson J's summary from *Cornish*. There is force in the contention that the judge's reasons are to be seen in light of the test he was being asked to apply and as being an application of that test.
95. I have reflected particularly on that last point. However, I have concluded that even on the most benevolent reading the judge's ruling cannot be seen as having been an application of the correct test. He did not approach the matter on the basis that something more than an error resulting in costs being incurred and even more than an error leading to an unsuccessful prosecution was needed. Having concluded that the Claimant had erred in charging the Interested Parties without having obtained expert evidence the judge did not take a step back and consider whether the error was of such a grave or stark kind that a costs order under section 19 was appropriate. The judge, therefore, failed to apply the test which it was necessary for him to apply.

#### **The Invocation of Section 31(2A) of the Senior Courts Act 1981.**

96. In considering the application of s31(2A) here the analysis I set out at [41] above is again relevant. An order that the Claimant pay only part of the Interested Parties' costs would have been a substantially different outcome for the Claimant from the order which was made. It follows that section 31(2A) will only come into play here if I am satisfied that it is highly likely that applying the correct test the judge would awarded the Interested Parties all their costs. That would have been a possible outcome and it

could be the ultimate outcome following on remission of the matter for reconsideration but it is far from being the only outcome which could follow from the application of the correct test. As was shown by Mr Jowett's argument for chronological divisibility it could be said that even if the Interested Parties did not recover all their costs from the outset they should recover the costs from a particular and later stage in the proceedings. That contention was premised on the view that the hopelessness of the prosecution became increasingly apparent as the case progressed. That was because further evidence came to light and in particular the views of the experts appeared. Although an order that the Claimant pay the totality of the Interested Parties' costs was a possible one on the application of the correct test it was not the only one. I cannot be satisfied that it was highly likely if he had had regard to the necessary test and to the high hurdle to be surmounted the judge would have come to the same conclusion as he did and would have awarded the Interested Parties all their costs. It follows that section 31(2A) does not preclude the grant of relief.

97. In those circumstances ground 2 succeeds and the order cannot stand.

**Is Relief to be refused on the Basis that the Claimant had an Adequate Alternative Remedy?**

98. Mr Jowett accepted that the existence of an adequate alternative remedy as a bar to relief is primarily a matter to be considered at the stage of the grant or refusal of permission. He also accepted the Henshaw J had declined to refuse permission on that basis in this case. He contended that nonetheless, it was appropriate for relief to be refused because the Claimant had an adequate alternative remedy which it had chosen not to take, namely an appeal by way of case stated. In that regard Mr Jowett prayed in aid the decision of Cavanagh J in *R (Hacking) v Stratford Magistrates Court* [2022] EWHC 2733 (Admin). In that case Cavanagh J had refused the claimant permission to apply for judicial review where it had been open to him to appeal by way of case stated. There the claimant had initially applied for a case to be stated but that application had been refused as being out of time. It was after the failure of that application that the claimant had sought permission for judicial review and Cavanagh J explained that it was not appropriate to allow judicial review to be used as a way of circumventing the time limits on a case stated appeal.

99. Here the Claimant accepted that the judicial review claim had been issued after the time limit for applying for a case to be stated had passed. However, it said that this was not because the judicial review claim was being used to escape the consequences of that time limit. Douglas Tomlinson, the senior specialist prosecutor with conduct of the case for the Claimant, provided a witness statement in which he said that the decision to seek permission for judicial review had been made before the case stated time limit had passed and that instructions to counsel had also been drafted before the expiry of that time limit.

100. It follows that this was not a case where permission was sought for judicial review after the case stated time limit had been allowed to expire through inadvertence or delay. Instead, a deliberate decision had been made to proceed by way of judicial review rather than to apply for a case to be stated. Is relief to be refused in those circumstances on the footing that judicial review is a remedy of last resort and that the Claimant had failed to take advantage of an adequate alternative remedy? It is possible that the stating of a case would have resulted in a fuller explanation of the judge's reasons but he had

already given a short judgment, the terms of which are not in dispute, in which he explained why the order was being made. In those circumstances the reasons given by Henshaw J for declining to refuse permission remain applicable and relief is not to be refused on the ground that the Claimant could have appealed by way of case stated.

**Conclusion.**

101. In those circumstances the judge's decision is to be quashed and, subject to further submissions as to the form of relief, the case remitted for determination of the Interested Parties' costs application on the correct legal basis.