



Neutral Citation Number: [2022] EWHC 2466 (Admin)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2022

Before :

LORD JUSTICE EDIS
MRS JUSTICE MCGOWAN

Case No: CO/3707/2021

Between:

**LONDON BOROUGH OF BARKING AND
DAGENHAM
- and -
ARGOS LIMITED**

Appellant

Respondent

Case No: CO/3822/2021

And between:

**ARGOS LIMITED
- and -
LONDON BOROUGH OF BARKING AND
DAGENHAM**

Appellant

Respondent

Case No: CO/3459/2021

And between:

**ARGOS LIMITED
- and -**

Claimant

ROMFORD MAGISTRATES' COURT

Defendant

**LONDON BOROUGH OF BARKING AND
DAGENHAM**

Interested Party

Adam Heppinstall KC and Thomas Mallon (instructed by **London Borough of Barking and Dagenham**) for the **Prosecutor**
David Hercock (instructed by **TLT LPP**) for **Argos Limited**

Decision on written submissions without a hearing

Approved Judgment on Costs

1. This is the judgment of the court to which we have both contributed. The appellant (“the prosecutor”) has raised the issue of the costs of these proceedings, and we have dealt with the matter by receiving written submissions and have not held a further hearing. We are very grateful for the assistance we have received.
2. The substantive judgment of the court at [2022] EWHC 1398 (Admin) was handed down on 8 June 2022. The outcome of the 2 appeals and 1 judicial review application is stated and explained there, and it is not necessary to repeat any of that here.

Introduction and Statutory Framework

3. The parties are agreed that the criminal, and not civil, costs regime applies. We are content to accept that position.
4. The statutory framework for awarding a prosecutor’s costs against a defendant is contained in s.18 Prosecution of Offences Act 1985:

18 Award of costs against accused.

- (1) Where—
 - (a) any person is convicted of an offence before a magistrates’ court;
 - (b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or
 - (c) any person is convicted of an offence before the Crown Court;the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.
5. Part 45.5 of the Criminal Procedure Rules is as follows:

Costs on conviction and sentence, etc.

45.5.—

- (1) This rule applies where the court can order a defendant to pay the prosecutor’s costs if the defendant is—
 - (a) convicted or found guilty;
 - (b) dealt with in the Crown Court after committal for sentence there;
 - (c) dealt with for breach of a sentence; or
 - (d) in an extradition case—
 - (i) ordered to be extradited, under Part 1 of the Extradition Act 2003,
 - (ii) sent for extradition to the Secretary of State, under Part 2 of that Act, or
 - (iii) unsuccessful on an appeal by the defendant to the High Court, or on an application by the defendant for permission to appeal from the High Court to the Supreme Court.
- (2) The court may make an order—
 - (a) on application by the prosecutor; or
 - (b) on its own initiative.
- (3) Where the prosecutor wants the court to make an order—
 - (a) the prosecutor must—
 - (i) apply as soon as practicable, and
 - (ii) specify the amount claimed; and
 - (b) the general rule is that the court must make an order if it is satisfied that the defendant can pay.

- (4) A defendant who wants to oppose an order must make representations as soon as practicable.
- (5) If the court makes an order, it must assess the amount itself.

The submissions of the parties

6. The prosecutor submits that, in the event that Argos is found guilty, it may seek its costs of its successful appeal by way of case stated, and Argos's unsuccessful abuse of process application (and attendant appeal by way of case stated and claim for judicial review) in the magistrates' court, along with its further costs which have been or will be incurred in the prosecution of this offence.
7. The prosecutor does not seek an order for costs from this court. It asks instead that this court makes its view known that Argos ought to pay the costs, if convicted, of these appeals and claim for judicial review. It is submitted that there is nothing to prevent this court expressing a view and no reason why it should not. Equally, the magistrates, exercising their unconstrained discretion, might decide to award no costs at all, it being fully within their discretion to do so.
8. The written submissions of Argos make these general submissions:-
 - i) In *Lord Howard of Lympne v DPP* [2018] EWHC 100 (Admin), the Divisional Court decided that a successful Appellant could not recover his costs of an appeal by way of case stated because in an appeal by way of case stated in a criminal matter, the criminal costs regime (Part II Prosecution of Offences Act 1985), as opposed to the civil costs regime (s.28A Senior Courts Act 1981. In that case, there was no provision in the criminal costs regime which entitled the Appellant in that case to be awarded costs of the appeal by way of case stated. Although, at the very least, costs should only become payable by Argos if Argos is ultimately convicted of the alleged offence, the decision in *Lord Howard of Lympne v DPP* also supports a submission to the effect that the prosecutor is not entitled to its costs of the appeal by way of case stated at all given that there is no basis to award the prosecutor its costs of the appeal by way of case stated under the criminal costs regime.
 - ii) It is submitted that, assuming that the costs of the appeal by way of case stated are to be paid by Argos in the event that it is ultimately convicted, Argos is entitled to invite the Court to limit the types of costs which are recoverable by the prosecutor. In order to be able to properly make those submissions, Argos seeks a costs schedule to understand the costs claimed. They wish to question, for example, whether it is appropriate for the prosecutor to recover the costs of both leading and junior counsel.
 - iii) It is suggested that it would be more appropriate for this court, rather than the magistrates' court, to make an assessment on the reasonableness and proportionality of the quantum of costs claimed in the first instance, given that the costs relate to proceedings before this court. It is respectfully submitted that it would be an unusual position to leave it to the magistrates' court to assess the quantum of the costs of proceedings before the Divisional Court.

9. As to the detail of the individual appeals and claim, and their outcomes, Argos makes these submissions:-
- i) Argos' position in respect of the abuse of process issues (i.e., the appeal by way of case stated (CO/3822/2021) and judicial review claim (CO/3459/2021)) is that there should be no order as to costs, i.e., each party bears their own costs. It is submitted that there is no proper basis on which Argos should be ordered to pay the prosecutor's costs of that appeal by way of case stated (CO/3822/2021). In the magistrates' court, the District Judge ruled, by reference to the submissions of the prosecutor, that the magistrates' court did not have jurisdiction to determine the type of abuse of process argument raised by Argos. This was the legal issue which was subject to the appeal by way of case stated (CO/3822/2021). The prosecutor was wholly unsuccessful on that legal issue and conceded the appeal. It cannot now claim its costs of that appeal.
 - ii) Alternatively, if Argos is to be ordered to pay the prosecutor's costs of the judicial review claim (CO/3459/2021), then it is contended that the prosecutor should only be awarded a small proportion of its costs. Argos' position includes the following:
 - a) Argos succeeded on the question of whether the magistrates' court had jurisdiction to determine the type of abuse of process argument raised in this case. This formed part of the judicial review and was still being contested by the prosecutor in its acknowledgment of service and summary grounds. On the substance of the issue, the prosecutor was unsuccessful. It is submitted that the costs order should reflect the fact that the prosecutor was unsuccessful on that issue. Further, Argos would suggest that its costs of succeeding on that issue are set off against the prosecutor's costs of the judicial review claim, rather than Argos pursuing its costs of succeeding on the appeal (CO/3822/2021).
 - b) There were two other issues in the judicial review claim: (i) whether the Divisional Court should determine the abuse of process argument and (ii) if so, whether the proceedings should be stayed as an abuse of process. The prosecutor has only been successful in relation to issue (ii). The prosecutor was unsuccessful in relation to issue (i). It is submitted that any costs order should reflect this. In this regard, it appears that much of the prosecutor's costs of the judicial review claim related to the question of whether the Divisional Court should determine the abuse of process argument, i.e. issue (i) above.
 - c) The prosecutor's costs of the judicial review claim (relating to the costs of the substantive abuse of process argument) should thus be restricted to counsel's fees for the hearing on 10 May 2022 (which will be shared with the nullity appeal).
 - d) Against that background, and given that Argos was successful in its appeal by way of case stated in establishing that the magistrates' court had jurisdiction to determine the type of abuse of process argument raised in this case and that the prosecutor was also unsuccessful in

relation to the question of whether the Divisional Court should determine the abuse of process argument, Argos contends that:

- i) The appropriate order in respect of the abuse of process issues in the Divisional Court is that there should be no order as to costs, i.e., each party bears their own costs.
 - ii) Alternatively, and if Argos is to be ordered to pay the prosecutor's costs of the judicial review claim (CO/3459/2021), the prosecutor should only be awarded a small proportion of its costs, limited in the light of the submissions above.
10. We did not receive a costs schedule from the prosecutor and are content to proceed without one in view of our conclusion.
 11. The prosecutor responds to these submissions by suggesting that Argos, has fallen into four errors which it identifies in this way:-
 - 1) It seems to confuse the criminal costs regime generally with the restrictive rules that apply specifically to a defendant's costs application out of central funds;
 - 2) It suggests that section 18(1)(a) applies only to the costs of proceedings which take place in a Magistrates' Court, rather than to the entirety of a set of proceedings which result in a conviction before the magistrates. This is not correct as a matter of law.
 - 3) It tries to suggest that this court should assess costs in any event, even if a costs order would ultimately be made by the magistrates. This is incorrect as a matter of law.
 - 4) It strangely suggests that it should not pay the costs of its unsuccessful abuse of process application, now asserting that the application should have been heard in the Magistrates' Court.

Decision and discussion

12. The prosecutor is not seeking an order for costs, merely indicating that it intends to seek one in the event that Argos is convicted and seeking some observations from this court which may help it in that later process. We should, however, resolve some of the issues which have been raised by Argos in its submissions to us, because this explains why we simply note the prosecutor's position and make some limited comments about these proceedings.
13. Paragraph 5 of the Defence submissions on costs states:

However, properly analysed, it is contended that *Lord Howard of Lymphe* goes further than this and acts as a barrier to the prosecutor recovering its costs of these proceedings against Argos. In *Lord Howard of Lymphe*, a successful appellant (defendant in the criminal proceedings) could not recover his costs of an appeal by way of case stated because the criminal costs regime (Part II Prosecution of Offences Act 1985), as opposed to the civil costs regime (s.28 Senior Courts Act 1981), was held to be applicable.

14. We do not accept this. The Divisional Court in that case decided that a defendant's costs were not recoverable because part of the criminal costs regime, paragraph 2(2) of Schedule 7 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, removed any entitlement of a defendant to legal costs. Beyond its finding that the criminal costs regime applies to these proceedings, it is therefore irrelevant. We are not concerned with a defendant's ability to recover costs from central funds, but with a prosecutor's ability to recover costs from a convicted defendant. There are no restrictions on that discretion under s.18 Prosecution of Offences Act 1985. The CrimPR do contain a "general rule" which governs the exercise of the discretion, but not in a way which is helpful to Argos. CrimPR Rule 4.5(3)(b) says

"the general rule is that the court must make an order if it is satisfied that the defendant can pay."

Argos can pay.

15. Section 18 of the Prosecution of Offences Act provides that the magistrates may make whatever order they find "just and reasonable". The ambit of the section is not limited to matters which have taken place before those magistrates.
16. It is not the case that the magistrates' costs jurisdiction is therefore limited to parts of the proceedings which have taken place in the magistrates' court, rather than the entirety of the proceedings wherever heard.
17. Further, we are not persuaded that this court has the ability to assess costs payable on conviction in another court, see Criminal Procedure Rule 45.5(5):

Costs on conviction and sentence, etc.

45.5.—

...

- (5) If the court makes an order, it must assess the amount itself.

18. Therefore, assuming the Defendant is convicted, the magistrates must assess costs themselves. That fits with the wording of s.18 Prosecution of Offences Act, which gives the magistrates the power to make such order as they find "just and reasonable." The purpose of the regime is plainly that costs are not assessed until the final order is made, and that discretion as to the amount of those costs rests entirely with the court which is dealing with offender following conviction. This enables the sentencing court to have regard to the means of the offender when imposing fines, compensation and costs to ensure that the overall outcome is just and proportionate.
19. Argos submits that it would be "a highly unusual position to leave it to the Magistrates' Court to assess the reasonableness and proportionality of costs claimed in proceedings before the Divisional Court."
20. But this is how this part of the criminal costs regime functions. Costs are not awarded or assessed in favour of a prosecutor until a conviction is secured in the magistrates' or Crown Court.
21. As to the abuse of process issue, the original question under appeal by Argos (whether or not the magistrates' court had jurisdiction to hear the Defendant's abuse of process

application at all), was answered by this court in *Mansfield v DPP* [2022] QB 335. This issue ceased to be live in these proceedings with that decision. Argos succeeded on it.

22. Argos then decided to proceed with its substantive Application in this court, rather than in the magistrates' court. Argos lost that application, and the prosecutor will therefore ask for its costs of it in the magistrates' court if Argos is ultimately convicted.
23. We do feel that we should make some observations to assist the magistrates' court in considering what costs order to make in respect of the costs of the three sets of proceedings before this court. These observations are descriptive of the proceedings before us. We do not think it right to make any observations about the merits of matters which are for the magistrates' court to decide, and not for us.
 - i) Argos contended that the application for a summons which started the criminal proceedings was a nullity, and lost in this court on an appeal by case stated. That was probably the issue which occupied most time in the hearing.
 - ii) Argos contended that the proceedings against it are an abuse of the process of the court and lost. In the magistrates court this was on the jurisdictional ground. It brought judicial review proceedings in that respect which it lost on the substantive issue. This court decided that these proceedings are not an abuse of process.
 - iii) The contention by the prosecutor that the magistrates' court did not have jurisdiction to hear the application to stay the proceedings as an abuse of process succeeded before the magistrates' court. It was repeated in these proceedings, but abandoned at a fairly early stage. It did not involve any argument at the hearing.
 - iv) The contention by the prosecutor that the Divisional Court should not determine the abuse of process application but should remit it to the magistrates' court did involve some time at the substantive hearing. It was rejected by the court, which proceeded to hear the application, see (ii) above. It occupied only a limited amount of time at the hearing.
24. The observations at paragraph [23] are of course only relevant if the magistrates' court considers that success or failure in particular issues is relevant to the costs order which should be made. That is not inherent in the criminal costs regime, and we are not intending to suggest that the magistrates' court should adopt that approach.