

## Chapter 12 (Legal aid and costs): Update

### 12.3 Costs orders

#### 12.3.2 Prosecution costs from central funds

In *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823, Lord Thomas CJ observed (at [19]) that, when considering what costs are recoverable there were two questions:

- i) Whether it was proper and reasonable to instruct the solicitors and/or advocates actually instructed. It did not matter whether the work could have been done adequately by someone less experienced, provided it was proper and reasonable to instruct those instructed.
- ii) If it was proper and reasonable, then the costs were recoverable, provided the costs were reasonable.

His Lordship went on (at [22]) to say:

- i) In determining the first question, namely whether a person, whether it be a corporate body or private individual, has acted reasonably and properly in instructing the solicitors and advocates instructed, the court will consider what steps were taken to ensure that the terms on which the solicitors and advocates were engaged were reasonable. It was submitted on behalf of the Interveners that they do not pursue private prosecutions lightly, but only where state prosecuting authorities are unwilling to prosecute or where the nature of the case makes it inappropriate; as this is the position of highly responsible industry bodies, a court may also have regard to the steps taken to involve State prosecuting authorities.
- ii) In any significant prosecution the private prosecutor would be expected properly and reasonably to examine the competition in the relevant market, test it and seek tenders or quotations before selecting the solicitor and advocate instructed.
- iii) We must emphasise that it will rarely, if ever, be reasonable in any such case, given the changes in the legal market to which we have referred, to instruct the solicitors and advocates without taking such steps. Although for the reasons we give at paragraphs 23 and 24 below that issue does not arise in this matter, it will be highly material on all future applications.
- iv) In determining whether the costs which are charged are proper and reasonable in a criminal case, the court will also have regard to the relevant market and the much greater flexibility in the way in which work is done.

### 12.3.4 Wasted costs orders

#### 12.3.4.1 Wasted costs orders against parties

Section 19(1) of the Prosecution of Offences Act 1985 enables regulations to be made giving criminal courts power:

....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.

Regulation 3 of the Costs in Criminal Cases (General) Regulations 1986 repeats the wording of the test set out in s 19(1) of the Act.

In *R (Singh) v Ealing Magistrates' Court* [2014] EWHC 1443 (Admin), the Court rejected a submission that a mere mistake without repetition cannot be grounds for an order under s 19. Bean J, at [10], said:

If the act or omission giving rise to the application consists of someone on the prosecution side ... not conducting the case properly, and it causes the defendant to incur additional costs, the discretion arises. Section 19(1) and regulation 3 say nothing about the act or omission having to be repeated. A single mistake, if it can be shown to have caused the

defendant to incur costs, is enough to trigger the court's discretion to make an order. We emphasise, however, that s 19(1) creates a discretion, not a duty, and that the jurisdiction is highly fact-sensitive. The court is not bound to make an order in every case of a mistake causing costs to be incurred. If there is a satisfactory explanation for the mistake, the court may decide that it would not be just to make any order.

In *R (DPP) v Sheffield Crown Court* [2014] EWHC 2014 (Admin), Lord Thomas CJ (at [16]) said:

What a judge has no jurisdiction to do, in our view, is to use s 19 of the 1985 Act at the end of the trial as a means of impugning the prosecutorial discretion given to the DPP and other state prosecutors under our constitution by imposing costs on such prosecutors. It is outwith the power under s 19 of the 1985 Act. It is not the judge's role to discipline the DPP for what he considers was an aberrant exercise of prosecutorial discretion. The ways to challenge the decision to prosecute are clearly established in the cases to which we have referred; those ways cannot be circumvented by an application or decision at the conclusion of the trial to revisit the issue by means of the power under s 19.

In *Quayum v DPP* [2015] EWHC 1660, it was held that a court has no power to make a costs order under s 19 of the Prosecution of Offences Act 1985 after the case has been concluded.