ST JOHNS BUILDINGS
BARRISTERS CHAMBERS

WINNING *WASTED* COSTS AGAINST A PRIVATE PROSECUTOR

By David Pojur, Barrister at St John's Buildings Chambers

Firstly, it *does* happen. You can win costs, but how do you persuade a Local Authority to drop the private prosecution first. Once the wheels of prosecution are turning against your client, it is extremely difficult to get the Authority to reconsider their decision to prosecute, even where it is clear they should. Even if you get the case dropped, it is very rare to secure an order for the defendant's costs to be paid by the prosecutor. In order for such an argument to be successful you are throwing the prosecutor's conduct into the ring, which many people recoil from doing.

Whilst defendant companies are often hit with very high costs orders against them following successful private prosecutions, when such prosecutions are unsuccessful there can, in certain circumstances, be grounds to seek a defence costs order. For a defendant to launch a wasted costs application is rare because of the high threshold to be passed. An application under section 19 of the Prosecution of Offences Act 1985 requires the Defendant to show it has incurred costs as a result of an unnecessary or improper act or omission by the Prosecutor. Judges will not face routine applications and take, as they should, a lot of persuading.

There is some protection for prosecuting bodies if they lose a prosecution and are then challenged on bringing the case. Case law and statute insulates Public Bodies from claims for costs for good reason; to protect the public purse and allow them room to exercise discretion as a prosecuting authority. Further, who wants to take money from a council in the current climate? They will assert there was a realistic prospect of conviction and it was in the public interest to proceed. In most cases this would be sufficient to dissuade a Judge from ordering that the prosecution pay the defendant's costs. However, there are cases where the prosecution's behaviour may be so unreasonable that it can be demonstrated that there has been an unnecessary act or omission, leading to the defendant incurring costs.

In a recent case, the Judge made such a finding, resulting in a significant costs award against the Prosecution.

The case in question concerns a Council investigation into an alleged breach of a smoke control order against a bespoke bakery in Belgravia. The family run business was copied to London from their flagship Paris bakery in 1999. A hand-built brick oven was constructed and imported wood burned to create their distinctive products. It has run successfully for almost 20 years and neither the Bakery's practices nor the applicable environmental law has changed. This was all done with the blessing of the Council to begin with. They gave a temporary permit in the form of an exemption to the Bakery. This guaranteed protection from prosecution until full determination of an application to be exempted from the smoke control order. Decades later the Council had still not determined that application.

Around 2 years ago the Council requested that the Bakery make an application under section 21 of the Clean Air Act 1993 for an appliance exemption. The Bakery agreed to do so and the Council promised not to prosecute until this application had been determined. This time DEFRA were dealing with the exemption application in conjunction with their nominated technical advisors. The disconnect began; the wheels moved slowly, extensive emissions testing was required, yet the exemption application was live and the protection current.

Environmental Solicitors were instructed at the outset and for good reason; to protect the family business. For years in correspondence the solicitors adopted a simple mantra; we have a temporary permit which is still in place, and we have made the appliance exemption to DEFRA as you requested. The solicitors made clear to the Council that any prosecution would be an abuse of the court process and costs would be applied for.

Still, the Council thought they could see smoke from the bakery on one occasion and commenced a prosecution. The fact that the times of the oven use and the smoke didn't match, didn't matter. They prosecuted. Defence experts and counsel were instructed. Eurostar tickets were purchased for bakery witnesses to attend the trial.

The solicitors stated, again, that the prosecution was an abuse of process due to the temporary exemption and the promise not to prosecute. Importantly, the solicitors stated their position clearly and repeatedly: We will argue an abuse of process and we will claim costs against the Local Authority. The solicitors explicitly referred to section 19 of the Prosecution of Offences Act, which became relevant years later as the point from which the Council had been put on notice.

The Council prosecution put the defendant company to significant expense in answering the charges. The defendant's costs dwarfed the maximum £1000 penalty plus daily penalties following conviction. The real issue for the defendant was damage to the brand image and the effect a conviction would have on the business. The bakery would be in breach of a Smoke Control Order and have to close. The defendant felt aggrieved that, having built the bakery many years ago with the blessing of the Council, it was now being prosecuted for operating in exactly the same way, and under the same legislation.

Having identified the issues before the Judge at the case management hearing, a lengthy skeleton argument was served. This quoted everything needed for a full review; the inception of the bakery with the Council's agreement, correspondence from the Council, along with defence assertions of an abuse argument and costs.

When faced with an unusual environmental private prosecution with full challenge and analysis of the decision to prosecute, replies need to be made fast. However, the Council failed to file a response to the abuse argument. Instead, at the last minute they sought to drop the case and vacate the hearing, denying the defendant any application for costs. What's more, the discontinuance letter came with a promise of prosecution within 6 months if the status quo was maintained by the bakery, and the Council sought to prevent any future reliance by the Bakery on the abuse points.

The fact that the case was not being disposed of with No Evidence Offered was of obvious concern. Some would take the win but the client had been put to expense and moreover was personally aggrieved at the stress and insult she felt, not to mention the threat of further

enforcement around the corner. The defendant insisted that the matter stay in the list so that the application for defence costs could be made.

Costs skeletons were ordered and the defendant argued that the prosecution had behaved unreasonably in their approach and handling of the case, so were liable to pay full costs. Part of the issue was the case had only been ditched on receipt of the abuse skeleton at the door of the court.

The Prosecution contested the costs application and argued a lack of jurisdiction to hear the application as the charge had been disposed of without a costs application. It is right that, '*at the conclusion of (the hearing) process the Court was functus officio. Those are matters of general principle, Nothing in section 19 of the 1985 Act undermines that general principle.*' ***Quayun*** [2015] EWHC 1660 (Admin). However, in this case the prosecution were on notice of costs going back years, as well as once they had instituted proceedings, and following their attempt to discontinue proceedings (at which point a detailed costs schedule had been served).

There was rejection of the position that the Authority discontinued the case as a result of a general review of the evidence. The case revealed a lack of oversight and connected thinking on the part of the prosecution whereby early consideration would have disposed of the case, most likely without the abuse argument and costs application. The lateness of the decision in response to the abuse argument was something the judge commented upon. The money spent defending was a sum not easily found in a modern bespoke bakery and the business was out of pocket. The case had dragged on through no fault of the defendant.

The client would have been happy with one pound in wasted costs to make her point about being treated unfairly. The Judge assessed the costs schedule and ordered the Local Authority to pay a contribution of over £40K from the public purse due to their unreasonable conduct in prosecuting.

Prosecuting bodies, especially in private cases concerning environmental law and more esoteric law, must consider carefully how they enforce. They should seek legal advice at the

outset and carefully consider arguments being raised by the defendant, instead of carrying on regardless. So often opinions are sought at the latter stages or in panic. Companies and defendants who should not have been prosecuted will be asking for reimbursement and may well succeed in the future.

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The Company was represented by Environmental Solicitor Julie Goulbourne of Weightmans and David Pojur of Counsel, St Johns Buildings. He sits as a Coroner and specialises in Health and Safety, Environmental Law and Inquests. David is also appointed to List A of the Specialist Regulatory Advocates in Health and Safety and Environmental Law