Neutral Citation Number: [2015] EWHC 263 (QB)

Case Nos: T20137190 & T20141089

IN THE CROWN COURT IN CARDIFF
AND
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: 12/02/15

Before :

MR JUSTICE HICKINBOTTOM

- -

Between :

(1) ERIC EVANS
(2) DAVID ALAN WHITELEY
(3) FRANCES BODMAN
(4) STEPHEN DAVIES
(5) RICHARD WALTERS
(6) LEIGHTON HUMPHREYS

Applicants

- and -

THE SERIOUS FRAUD OFFICE

Respondent

- -
- -

Patrick Harrington QC and **Benjamin Douglas-Jones**
(instructed by **Blackfords LLP**) for **Eric Evans**
Philip Hackett QC and **David Hassall** (instructed by **McSorely Lewis Law Ltd** and **Morgans Criminal Law**) for **David Alan Whiteley**
Frances Bodman did not appear and was not represented
Michael J Beloff QC and **Guy Ladenburg**
(instructed by **Charles Russell Speechlys LLP**) for **Stephen Davies**
Nicholas Purnell QC and **Jonathan Barnard**
(instructed by **Hugh James**) for **Richard Walters**

John Charles Rees QC and **Jonathan Elystan Rees**
(instructed by **de Maids**) for **Leighton Humphreys**
Michael Parroy QC and **Allison Clare**
(instructed by **the Serious Fraud Office**) for **the Respondent**

Hearing dates: 14-16 January 2015

- -

Approved Judgment

Mr Justice Hickinbottom:

Introduction

1. Following a five-day hearing, on 18 February 2014 in the Crown Court at Cardiff, prior to arraignment, I dismissed the single charge of conspiracy to defraud on which the Serious Fraud Office ("the SFO") sought to try the six Applicants (now reported as R v Evans and Others [2014] EW Misc 5 (Crown C), [2014] 1 WLR 2817). I generally adjourned issues relating to costs. In this judgment, where I refer to "the Dismissal Application", "the Dismissal Hearing" and "the Dismissal Ruling", those are references to the Crown Court proceedings.

2. Following a seven-day hearing, on 14 November 2014 Fulford LJ sitting as a Judge of the Queen's Bench Division, refused the SFO's application for a voluntary bill of indictment containing two counts, one in identical terms to that which I dismissed and a second count, also of conspiracy to defraud, but with different particulars (now reported as Evans & Others v Serious Fraud Office [2014] EWHC 3803 (QB)). Fulford LJ remitted consequential matters, including costs, to me. In this judgment, where I refer to "the VB Application", "the VB Hearing" and "the VB Judgment", those are references to the High Court voluntary bill proceedings.

3. Each of the Applicants, except Ms Bodman, now applies for two costs orders against the SFO, namely:

   i) in respect of the Dismissal Application, an order under section 19 of the Prosecution of Offences Act 1985 ("the 1985 Act"); and

   ii) in respect of the VB Application, an order that the SFO pays his costs on the indemnity basis.

4. These applications give rise to two specific issues, namely:

   i) whether the statutory precondition for the exercise of the court's jurisdiction under section 19 of the 1985 Act (i.e. that the SFO as prosecutor was responsible for an "unnecessary or improper act or omission" that caused the Applicant to incur costs) is satisfied; and

   ii) whether the Applicant's costs of the VB application (which the SFO concedes it should pay) should be assessed on the standard or indemnity basis.

5. At the hearing on 14-16 January 2015, I heard submissions on those issues; and this is the reserved judgment from that hearing.

6. It was sensibly agreed by the parties that submissions on quantum should await this judgment, on the basis that the costs of the VB application should in any event be the subject of a detailed assessment and, if it were in due course necessary summarily to assess the costs of the Dismissal Application, that assessment could almost certainly be dealt with on written submissions alone.

7. However, to put the applications into context, the Applicants have submitted statements of the aggregate costs for both applications, in the following approximate sums: Mr Evans £1,200,000, Mr Whiteley £900,000, Mr Davies £890,000, Mr

Walters £1,210,000, and Mr Humphreys £2,610,000. Those figures are, I stress, wholly untested – the SFO has strongly indicated that it does not accept that anything like those amounts would be reasonable and, if and when appropriate, it will contend that very much smaller sums should be awarded – but the total costs in issue are in the region of £7m. Nothing I say in this judgment should be taken as any indication, one way or other, as to the amounts that might be properly due if and when a costs order is made.

The Charge

8. It will be helpful to set out the charges at the outset. The proposed counts in the VB Application before Fulford LJ were as follows:

> "Count 1
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> STATEMENT OF OFFENCE
>
> CONSPIRACY TO DEFRAUD contrary to Common Law.
>
> PARTICULARS OF OFFENCE
>
> ERIC EVANS, DAVID ALAN WHITELEY, FRANCES BODMAN, STEPHEN DAVIES, RICHARD WALTERS, LEIGHTON HUMPHREYS, between the 1st of January 2010 and the 31st of December 2010, conspired together to defraud Neath Port Talbot County Borough Council, Bridgend County Borough Council and Powys County Council ('the Mineral Planning Authorities') and the Coal Authority by deliberately and dishonestly prejudicing their ability effectively to enforce restoration obligations relating to open cast coal mining at sites known as East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig) situated in South Wales by:
>
> > i) establishing companies registered in the British Virgin Islands, in the ultimate beneficial ownership of Eric Evans and David Alan Whiteley; and
> >
> > ii) transferring the freehold title in the land containing and surrounding the opencast coal mining sites known as East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig) situated in South Wales from Celtic Energy Ltd to those companies registered in the British Virgin Islands;
>
> thereby intending that the financial liability to restore those open cast coal mining sites to open countryside and/or agricultural use would pass from Celtic Energy Ltd to those companies in the British Virgin Islands, thereby releasing some of the money set aside in Celtic Energy Ltd's annual accounts

to restore those open cast coal mining sites, and allowing some of that money to benefit the Defendants personally.

Count 2

STATEMENT OF OFFENCE

CONSPIRACY TO DEFRAUD contrary to Common Law.

PARTICULARS OF OFFENCE

ERIC EVANS, DAVID ALAN WHITELEY, FRANCES BODMAN, STEPHEN DAVIES, RICHARD WALTERS, LEIGHTON HUMPHREYS, between the 1st of January 2010 and the 31st December 2010, conspired together to defraud Neath Port Talbot County Borough Council, Bridgend County Borough Council and Powys County Council ('the MPAs') and the Coal Authority by deliberately and dishonestly prejudicing their ability effectively to enforce restoration obligations relating to open cast mining at sites known as East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig) situated in South Wales ('the sites') by dishonestly agreeing:

i) to establish and control shell companies registered in the British Virgin Islands ('the BVI companies'), and

ii) to cause one or more than one of the BVI companies to act against its/their financial interests by entering into a transaction at an undervalue, by which it/they acquired the freehold title of the sites from Celtic Energy Ltd ('Celtic'), and assumed liability to undertake substantial restoration works in respect of the sites and/or to indemnify Celtic in respect of any liabilities it might have in respect of the sites, without receiving adequate consideration in return and in the knowledge that Oak would be unable to meet those legal obligations, and

iii) to conceal from, and/or misrepresent to, the MPAs and other relevant parties the true nature of the transaction as set out at 1 and 2 intending thereby that:

(a) the MPAs and/or Coal Authority and other relevant parties would accept that substantially all of the financial liabilities to restore the sites to open countryside and/or agricultural use had passed from Celtic to the BVI companies;

(b) the BVI companies would be unable to, and would not, meet any such liability;

> (c) the MPAs and/or the Coal Authority would be unable, during any investigation they conducted, to discover the true nature of the transactions as set out at 1 and 2 above and the MPAs would thereby be inhibited or deflected from carrying out their duty to consider how best to secure compliance with the relevant planning conditions;
>
> (d) the MPAs would be deterred from exercising their planning enforcement rights (including pursuant [sic] section 178 Town & Country Planning Act 1990) against the BVI companies;
>
> (e) provisions in Celtic's accounts in respect of the liability to restore the sites would be significantly reduced;
>
> (f) Celtic monies would be paid to the benefit of some or all of the conspirators personally."

As I have explained, Count 1 was in the same terms as the charge in the proposed indictment in the Dismissal Application before me; Count 2 was new.

9. In respect of Count 1, it is noteworthy that the charge was based upon the following three premises:

   i) the victims of the fraud were the three Mineral Planning Authorities ("MPAs") and/or the Coal Authority – and only those public authorities;

   ii) the conduct relied upon as the means to effect the fraud was (a) the establishment of the British Virgin Islands ("BVI") company to which the freeholds of the sites was to be transferred, and (b) the transfer of the sites to that company – and only that conduct; and

   iii) the conspirators intended the transfer of the freeholds to effect a transfer of the obligations to restore the sites to the BVI company.

Factual Background

10. The factual background to this matter is set out in the Dismissal Ruling (at [5]-[27]) and in the VB Judgment (at [4]-[23]). I can deal with it relatively briefly here, relying heavily upon Fulford LJ's succinct and helpful summary.

11. Richard Walters is the Managing Director, and Leighton Humphreys is the Finance Director, of Celtic Energy Limited ("Celtic"). On 31 December 1994, as part of the reprivatisation of the coal industry, a number of sites in South Wales were transferred to Celtic for about £100m. These included four mines known as East Pit, Nant Helen, Selar and Margam. Although Celtic became the freehold owner of these sites, mining took place under various leases and licences that were issued by the Coal Authority (the freehold owner of the coal under the reprivatisation arrangements) and under grants of planning permission by the relevant local authorities acting as the MPAs.

The leases, licences and grants of planning permission imposed various obligations upon Celtic to restore the sites once mining of them was complete. The estimated cost of restoring the sites was, to an extent, secured by monies that were required to be paid into escrow accounts.

12. However, the gap between the amounts in the escrow accounts (albeit fully paid-up) and the total required to restore the sites was substantial. For example, by 2010, for East Pit, with estimated restoration costs of approximately £115m, only £2-2.5m had been deposited in the escrow account. For Margam, with restoration costs of approximately £57m, only £5.5m had been deposited.

13. Celtic investigated various potential solutions to this shortfall, such as obtaining an extension on the right to mine, deep mining and landfill. However, by early 2010, the financial position of Celtic had become markedly uncertain. In the year ending March 2010, it made a loss of £7.3m on a turnover of £67.6m; it had insufficient funds to effect restoration; and it had failed to gain approval for other uses for the sites.

14. Celtic retained M & A Solicitors to advise them. David Whiteley was the Senior Partner of the firm; Eric Evans was the partner mainly responsible for looking after Celtic's affairs; and Frances Bodman was an assistant solicitor, who worked for Mr Evans. Mr Evans came up with a possible solution to Celtic's problem. On the assumption that most or all of the restoration obligations went with the freeholds, he suggested that, whilst retaining control of the sites and the coal mining activities on them, it should transfer the freeholds to a third party, so that the obligations to restore would automatically pass with them. This would redound to the personal advantage of those involved, because it would enable Celtic to release and distribute significant sums of money, whilst not impacting on Celtic's ability to mine the sites.

15. However, without a vast reverse premium from Celtic, no commercial buyer would take on the liabilities for the sites. It was therefore proposed that various BVI companies, owned and controlled by Messrs Evans and Whiteley (and ultimately, the prosecution alleged, by Celtic), and with no funds other than those they chose to put into it), should buy the freeholds. There was substantial evidence that considerable steps were taken to ensure that the outside world, and most particularly the MPAs and the Coal Authority, should view this arrangement as a conventional arms-length commercial sale to an unconnected entities.

16. A BVI company called Oak Regeneration Inc was consequently incorporated, together with various subsidiaries (which I shall refer to collectively as "Oak") in order to put this plan into effect. It was ultimately owned by Messrs Evans and Whiteley; although the prosecution case was that they were trustees for Messrs Walters and Humphreys who ran Oak, and that all the Applicants were aware of the significant steps that were being taken to hide the true nature of the relationship between Celtic and Oak.

17. It was the prosecution case that Celtic's auditors needed reassurance as to whether the sale of the freeholds transferred the restoration obligations to the purchasers before they would agree to certify the accounts on a basis that recognised the reduction in the future restoration obligations. Without this step, monies could not be released for distribution.

18. So, Stephen Davies QC was asked to advise on the scheme. He provided two written advices. The first, dated 24 June 2010, concluded that, whilst the freehold titles in the sites could be transferred to Oak, apart from the restoration requirements under the Town and Country Planning Act 1990, Celtic would remain liable under the leases to fulfil all of its covenants including those relating to restoration of the sites. He therefore advised that the underlying objective of the scheme was unachievable.

19. However, Mr Davies was asked almost immediately to reconsider the issue and in his second opinion of 30 August 2010, in which he did not refer to his earlier advice, he concluded that, following the transfer of the freeholds to Oak, Celtic would not be left with any substantial restoration obligations. His fee for that second advice was £250,000.

20. Shortly after that second advice, the freeholds of the sites were transferred to Oak for £1 each, with a reverse premium of £1.2m. In due course, Celtic's auditors agreed that the provision for restoration obligations in Celtic's 2011 accounts could be reduced by over £72m to £63.8m. There was evidence that Messrs Walters and Humphreys were rewarded by covert seven-figure payments for the introduction of Oak to Celtic, through another company that they wholly owned; and Mr Evans, Mr Whiteley and Ms Bodman were also rewarded by somewhat smaller – but nevertheless substantial, six-figure – payments through subsidiaries of Oak.

21. Therefore, in pursuit of this scheme, the Applicants had various roles in setting up and using Oak, a BVI company without substantial funds, to unburden Celtic of the freeholds of the four mines and, more particularly, the obligation to restore the sites valued at over £150m. Overall, they benefited personally by way of over £15m from the release of the financial provision that had been set aside for the purpose of restoration, and Celtic's financial position improved by over £120m.

The Prosecutor

22. The Crown Prosecution Service ("the CPS") was established by section 1 of the 1985 Act, as an independent national public prosecution service comprising Crown Prosecutors headed by the Director of Public Prosecutions ("the DPP"). Section 2 imposes a broad duty on the DPP to institute criminal prosecutions where the investigation has been conducted by (e.g.) the police.

23. Section 10 requires the DPP to issue a Code for Crown Prosecutors, to give guidance to prosecutors on the general principles to be applied when making decisions about prosecutions. The current Code was issued in January 2013. The general principles themselves are set out in Chapter 2:

> "2.1 The decision to prosecute… is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care.
>
> 2.2 It is the duty of prosecutors to make sure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible. Casework decisions taken fairly, impartially and with integrity help to secure justice for victims, witnesses, defendants and the public.

> …
>
> 2.4 Prosecutors must be fair, independent and objective…. Neither must prosecutors be affected by improper or undue pressure from any source. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.
>
> …
>
> 3.5 Prosecutors should not start or continue a prosecution which would be regarded by the courts as oppressive or unfair and an abuse of the court's process.
>
> 3.6 Prosecutors review every case they receive from the police or other investigators. Review is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops, including what becomes known of the defence case."

24. Those principles are also reflected in the DPP's Statement of Ethical Principles for Public Prosecution, which states that a prosecutor must "strive to be, and be seen to be, consistent, independent, fair and impartial" (paragraph 3.1) and "must take decisions based upon an impartial and professional assessment of the available evidence, independently and with objectivity within the framework laid down by the law, the Code, all departmental policies currently in force and all guidance issued by or on behalf of the Attorney General…" (paragraph 3.2).

25. This guidance reflects the well-established common law principle, to the effect that prosecutors "are to regard themselves as ministers of justice, and not to struggle for a conviction…" (R v Puddick (1865) 4 F & F 497 at page 499 per Crompton J, approved in R v Banks [1916] 2 KB 621 at page 623).

26. The CPS is responsible for most prosecutions. However, as a result of concerns about the investigation of a number of frauds in the 1970s and early 1980s, the Government set up the Frauds Trial Committee under the chairmanship of Lord Roskill, to report on the investigation and prosecution of serious or complex frauds with a view to a more coordinated approach being adopted. As a result of the recommendations of the Roskill Report, published in 1986, section 1(1) of the Criminal Justice Act 1987 established the SFO, with responsibility for both the investigation and prosecution of serious or complex frauds.

27. The SFO has particular statutory powers. For example, under section 2 of the 1987 Act, it is given special powers of investigation and search, including the power to require individuals to give disclosure and answer questions. By section 51B of the Crime and Disorder Act 1998 (inserted by section 41 of and schedule 3 to the Criminal Justice Act 2003), the Director of the SFO (as a "designated authority") may serve a notice on the relevant magistrates' court that he is of the opinion that the evidence of the offence charged is sufficient for the person charged to be put on trial for the offence and reveals a case of fraud of sufficient seriousness or complexity that

its management should without delay be taken over by the Crown Court, which requires the case to be transferred to the Crown Court immediately.

28. The SFO has adopted the DPP's Code for Crown Prosecutors and the DPP's Statement of Ethical Principles for Public Prosecution. Given its dual role, it has a particular responsibility to ensure that, as prosecutor, the general principles of that Code and Statement are followed.

29. The courts have long made clear – and recently emphasised – that, although decisions to prosecute are susceptible to judicial review, the discretion given to the CPS, SFO and other public prosecutors, which have been identified by Parliament as the appropriate independent prosecutorial decision-makers, is very wide and must be recognised and respected; and the grounds on which they may be challenged are very narrow. Leaving aside cases where the prosecutor's own policy is unlawful (or, if lawful, he has failed to act in accordance with that policy), a decision to prosecute or continue a prosecution is only amenable to challenge if it is perverse in the sense that no reasonable prosecutor could have made that decision (see, e.g., R v Director of Public Prosecutions ex parte C [1995] 1 Cr App R 136 ("ex parte C") at pages 140-1 per Kennedy LJ, and R (L) v Director of Public Prosecutions [2013] EWHC 1752 (Admin) ("L") a case heard by a Divisional Court comprising Sir John Thomas PQBD (as he then was) and Simon J). The cases where challenge is appropriate will arise only in "very rare" or "exceptionally rare circumstances", and, where the prosecutor has conducted a further review of the decision, "the likelihood of success in such cases will be very very small, given the constitutional position of the CPS" or other public prosecutor (L at [5], [7] and [17] per Sir John Thomas).

The Instruction of Ian Winter QC as Lead Prosecuting Counsel

30. M & A Solicitors had five equity partners, of whom Mr Whiteley (46.05%) and Mr Evans (8.64%) were two. The other three partners were Stephen Berry (23.03%), Jonathan Geen (8.64%) and Rachelle Sellek (8.64%) ("the three partners"). A further solicitor was not a party to the partnership deed, but was remunerated with 5% of the partnership profits on the basis that she would become a partner in 2011. Mr Evans retired from the partnership in November 2010 at the age of 65, as he had planned to do; and his share was redistributed in a manner immaterial to these applications. Mr Whiteley retained just under half the equity.

31. In late 2010, the three partners learned of the proposed scheme as set out above; and, on 6 December 2010, they instructed Mr Ian Winter QC to advise them on a number of matters arising. The instructions:

    i) asked for advice as to whether any offences had been committed under the Fraud Act or by way of conspiracy to defraud;

    ii) asked for advice on whether the matter required notification to the Serious Organised Crime Agency ("SOCA");

    iii) asked for advice on their rights as partners as against Mr Whiteley and Mr Evans: the three partners made clear that, upon the basis of the advice, they would consider action against Mr Whiteley and Mr Evans, including expulsion from the partnership; and

iv) emphasised the three partners' concerns about the reputation of the firm, and how to maintain it: they asked for advice as to how to minimise any adverse consequences of the scheme for the firm.

32. On 9 December 2010, the three partners had a conference with Mr Winter, at which he advised (according to Mr Geen's handwritten note): "Essentially strong PF [prima facie] case of conspiracy to defraud."

33. The following day (10 December 2010), the three partners formally notified SOCA. The reference indicated that the advice of Leading Counsel had been taken, and it was to the effect that the transactions amounted to a conspiracy to defraud.

34. Following the conference, Mr Winter produced a draft written advice on 13 December 2010. Mr Berry asked him to remove a paragraph concerning possible reputational damage, which suggested (amongst other things) that the firm consider engaging a PR consultant and that the three partners themselves break the story to ensure that the coverage was favourable to the firm. Mr Berry made clear that it was likely that the advice would be shortly disclosed to SOCA/the SFO (if it accepted responsibility for investigating the case). It was apparently thought that, from this paragraph, the three partners might be seen as attempting to benefit reputationally from the events that had occurred, which Mr Berry thought might be unwise.

35. Mr Winter produced his final advice on 15 December 2010, omitting the paragraph to which Mr Berry had referred. In the advice, he:

i) said that, in his opinion, there was at that stage no evidence of any offence of fraud contrary to the Fraud Act 2006; but that "there is good prima facie evidence of a conspiracy to defraud" (paragraph 72), on the basis that the Coal Authority and MPAs possessed rights enforceable against Celtic, namely "planning rights, the s106 contractual rights and the lease rights to enforce the restoration obligations"; the transfer transaction to Oak was a sham; and the authorities' rights were prejudiced "because [the transfer] at least risked the money not being available for the [restoration] work" (paragraphs 66-69);

ii) gave some limited advice as to publicity and public relations (paragraph 78); and

iii) advised that the three partners "plainly have the ability to remove the suspected partners from the [partnership] agreement": he advised immediate suspension of Mr Whiteley, giving him time to make representations before a decision was finally made as to his expulsion (paragraph 79).

36. Mr Winter's advice makes clear that he was fully aware that the partners were likely to make his instructions and advice available to SOCA and other relevant authorities if they wished to see them; and, Mr Winter said (paragraph 76):

> "Those documents plus the annexures to the brief will place the authorities in the full position to make a decision as to what action should be taken."

37. The SFO contacted the three partners on 21 December 2010. The instructions to and advice of Mr Winter were provided to the SFO, together with copies of documents. On 15 January 2011, the SFO formally accepted the case for investigation, on the basis that there was "clear indication that criminal offences had been committed"; and Mr Davies was included in the list of possible suspects.

38. On 16 March 2011, all of the Applicants save for Mr Davies were arrested. Mr Whiteley was immediately suspended from the M & A Solicitors practice, and was called to a partnership disciplinary meeting on 21 March; at which he was offered the choice of completing the disciplinary process, or waiving all claims against the firm and resigning. He chose the latter course, and signed a prepared letter of resignation at the meeting.

39. The SFO investigation proceeded. By late 2011, the SFO was looking to identify Lead Counsel for the case. Mr Winter was quickly made the first choice.

40. Several disadvantages of appointing him were identified, notably (i) he was not on the SFO panel, (ii) his usual hourly rate was far higher than the SFO threshold, and (iii) potential difficulties arising out of his role in previously advising the three partners, e.g. the three partners might have to be called and examined at trial and Mr Winter was a potential witness at least in any civil trial, about which the SFO Case Controller (Mr Ray Chitham) appears to have had particular concern when he joined the SFO in January 2013. It is important to note that these potential difficulties were recognised by the SFO from an early stage.

41. However, benefits of appointing him were considered to include (i) Mr Winter had already provided a detailed advice "which concluded that the transaction under investigation was prima facie a serious fraud" in the form of a conspiracy to defraud (see paragraph 35(i) above); (ii) Mr Winter's "prior knowledge of the papers in the case" would represent a saving in reading-in time of perhaps 70 hours, recorded as being "a significant cost saving", and would mean he could advise more quickly; (iii) his clerk was prepared to agree an all-in fee of £250,000 through to trial, which offered a significant reduction from his usual hourly fee and a level of certainty; and (iv) Mr Winter advised that he did not see there was any conflict, and did not consider his advice to the three partners was disclosable in the criminal proceedings.

42. On 29 March 2012, the SFO confirmed to Mr Winter that he was retained as the SFO Lead Counsel in respect of the case; and the SFO, by instructions dated 26 March 2012 but sent out that day, instructed him to advise on (i) the position of Mr Davies, and in particular whether he should be considered a suspect or a witness, (ii) whether each of the suspects had committed any criminal offences and, if so, what, and (iii) the potential charges against each defendant and the strength of the evidence against each. He was formally asked to consider any actual or potential conflicts of interest.

43. Mr Winter gave a detailed advice, and a conference took place in April or May 2012, at which he advised the SFO whether:

> "… the first clients [i.e. the three partners], witnesses of fact for the prosecution, should waive privilege. It was decided after careful consideration that they would not do so." (Mr Winter's Advice to the SFO dated 24 April 2013, paragraph 8).

44. Statements were taken from each of the three partners – Mr Geen on 3 September 2012, Mr Berry on 21 December 2012 and Ms Sellek on 9 January 2013. Each referred to the fact that they had obtained advice from Leading Counsel, and broadly the scope of that advice; although the statements did not identify who that Counsel had been.

45. Mr Winter was fully involved in the case for the SFO, including drafting the charge. He maintained that Fraud Act offences had not been committed; and, when the issue was later raised, he advised that "the Insolvency Act has got nothing to do with the case…" (Email to Mr Chitham dated 28 May 2013). Therefore, possible statutory offences were considered, but rejected. On 21 January 2013, the Director of the SFO authorised the decision to charge all six Applicants with conspiracy to defraud.

46. Prior to Mr Davies in fact being charged, the website of Mr Winter's chambers indicated that he was involved in the prosecution of this case, with Celtic itself included as a defendant. That resulted in those representing Mr Humphreys writing to the SFO complaining about what they regarded as premature publicity.

47. Mr Chitham's concerns about Mr Winter's earlier role in advising the three partners remained. On 1 February 2013, at a time when none of the defendant Applicants had any idea that Mr Winter had had any previous role advising the three partners, Mr Chitham wrote to Mr Winter as follows:

> "… [F]ollowing a discussion here with senior management about your role in providing an advice to the partners of M & A and any potential issue that the defence may make of this in the future, it was agreed that we would try and flush out the defence and ask them to articulate their concerns in this regard. I have given them until next Friday… to provide us with a response. We will then probably arrange a con to discuss next steps once you are back."

48. Letters to the Applicants were indeed sent. The only response from those representing the Applicants – unsurprisingly, given their ignorance as to Mr Winter's earlier role – was from those representing Mr Humphreys, to the effect that they were concerned about the premature publicity on Mr Winter's website, which was removed. They asked for enlightenment as to why the SFO had raised the matter.

49. On 6 February 2013, Mr Chitham responded by revealing, for the first time, "the involvement of Mr Winter QC in providing advice in December 2010 to the other partners of M & A Solicitors, who are potential witnesses". That letter did not disclose the scope or nature of that advice. It did not disclose that the advice given to the three partners was in respect of the matters being investigated by the SFO.

50. The response from the Applicants was perhaps predictable. The solicitors for Ms Bodman wrote to the SFO on that day (6 February 2013) saying that they were "fairly astonished that this matter is even being ventilated", that it must be professionally inappropriate for Leading Counsel to be involved with a criminal case in which there were witnesses to whom he had given professional advice, and they considered "Mr Winter too close to the case to impartially and fairly prosecute it". The solicitors for Mr Davies pressed for disclosure of relevant documents.

51. The matter was considered in a conference on 14 February 2013 involving the SFO and Mr Winter, who said the advice he had given the three partners and the SFO was the same, and he did not think there was a problem. The handwritten note of the conference says: "don't want to [illegible] Bar Council (their [or, possibly, 'then'] views are opposing)".

52. The scope and nature of the advice Mr Winter had given to the three partners had still not been disclosed. However, on 29 March 2013, the SFO served the first tranche of evidence pursuant to section 51 of the Crime and Disorder Act 1998, including the statements of the three partners which said that they had instructed a senior silk to advise as to their position in relation to the transaction now in issue in the criminal proceedings; and, at the preliminary hearing before Wyn Williams J on 4 April 2013, it was disclosed that that Queen's Counsel was Mr Winter.

53. The SFO sought a written advice from Mr Winter, who advised on 24 April 2013 as follows:

> "9. In early 2013 witness statements were obtained from the first clients by the SFO. The witness statements go considerably further than they needed to in order to adduce the factual evidence and to produce the documentation. In particular the witness statements purport to give expert evidence to the effect that the activities of the three M & A solicitors (now defendants) were fraudulent. In the course of giving those opinions the first clients detailed the fact that they had sought advice from me and summarised the advice they had received.
>
> 10. I am of the view that in doing so the first clients have waived privilege. I have not, however,… been instructed that this is the case.
>
> 11. As a result of the witness statements having been taken in that fashion (and leaving aside for present purposes whether the purported expert opinion is admissible) those defending necessarily would become aware of the fact that the first clients had instructed and obtained advice from me….
>
> 12. I am of the clear opinion that not only am I not conflicted, the cab rank rule in the Bar Standards Board Code of Conflict [sic]… requires me to accept the instructions to prosecute the case….
>
> 13. The first clients are prosecution witnesses. Their position as a matter of fact is identical to the position taken by the SFO. They themselves have volunteered the information as to the fact that they had instructed me and the nature of the advice I gave them. The summary of that advice in their witness statements makes it clear that my position has been consistent throughout. I was given the same documentation (now

> augmented by the SFO's investigation) to advise the first clients and have taken the same view then as I do now…".

54. By May 2013, the SFO investigation had been on-going for about two years, and each Applicant had set out in writing his or her case, albeit in different forms, but essentially saying (amongst many other things) that the arrangements between Celtic and Oak were not unlawful. Those responses to the investigation were substantial.

55. Mr Winter prepared a Prosecution Case Statement dated 30 May 2013 ("the Case Statement"). In the statement and in line with his view that no statutory offences had been committed, he concluded that there was a proper evidential basis for the prosecution for conspiracy to defraud, and it was in the public interest to proceed against the six Applicants on a charge with particulars substantially the same as those set out in Count 1 above (see paragraph 8). I shall return to the prosecution case as set out in the Case Statement in due course (see paragraph 67 and following below).

56. The SFO also responded to correspondence written on behalf of the Applicants with regard to Mr Winter's role. For example, on 31 May 2013, the SFO wrote to the solicitors for Mr Davies:

> "There is no conflict of interest in Mr Winter QC acting for the SFO having previously advised M & A Solicitors. Even if there were it would be a matter for Mr Winter QC and the Bar Standards Board. Since it is not accepted that Mr Winter QC is not independent then his involvement in the drafting of the Prosecution Case Statement and in the detailed review of the case against your client does not vitiate the quality of that review."

The SFO remained relatively coy about disclosing documents relating to Mr Winter's instruction by, and advice to, the three partners; but his essential advice to them was disclosed.

57. An application was issued on behalf of Mr Davies that the criminal proceedings should be stayed as an abuse of process, on the basis that the SFO had instructed Mr Winter who had earlier advised the three partners in respect of the same subject matter, an application replicated or supported by all of the other Applicants. The basis of the application is conveniently set out in the skeleton argument of Counsel for Mr Davies dated 1 August 2013 in support of the application:

> "1. This application is for an order of stay of the… proceedings on the ground that it is impossible for the Applicant to have a fair trial and/or on the ground that a stay is necessary to protect the integrity of the criminal justice system…
>
> 2. The basis of the application is that the prosecution, and the decisions taken in connection therewith, lack independence, objectivity and fairness and/or are reasonably perceived to do so. These qualities are unarguably fundamental to the fairness of the criminal process and are supported universally by

judicial dicta, prosecutorial Codes of Conduct, and the Bar Code of Conduct. In this case, however, the SFO chose to instruct leading counsel (Ian Winter QC) ('IW') knowing that he had prior to advising received instructions in writing and in conference from them, that he had expressed in writing the opinion to those clients inter alia that there was 'a clear prima facie case of fraud' and conspiracy to defraud, that 'there is sufficient evidence of dishonesty', that the scheme in question 'amounted to a sham'. That there was 'a number of unsatisfactory features' about the [Mr Davies'] written Opinion in this matter; and that [Mr Davies] must have known that it was a sham. IW's Opinion to his clients concluded (at paragraph 76) by stating '… that a copy of my instructions and a copy of this Opinion will be available to the police or the [SFO] should they desire to see them. Those documents plus the annexures to the brief will place the authorities in the full position to make a decision as to what action should be taken.'… The action that the SFO took was to instruct IW as its prosecution counsel. In doing so the SFO breached its Code and that of the Crown Prosecution Service. In accepting instructions IW contravened paragraph 603(d), (e) and (f) of the Bar Code of Conduct of England and Wales.

3. … The SFO has… been in possession of his Opinion to his clients dated 15 December 2010 since about the end of 2010 which it is to be presumed has informed or coloured this investigation.

4. … It is to be inferred that the SFO instructed IW after receipt of a copy of IW's Opinion and on the basis of the conclusions therein….

5. It is the submission of [Mr Davies] that the decisions, or the principal decision, taken to date in this prosecution are vitiated by a lack of independence, objectivity and fairness and that a stay should be ordered of these proceedings.

6. The principal problems are as follows.

(a) that the three private clients of IW are the complainants in relation to these events to SOCA and the SFO and are now prosecution witnesses

(b) that IW received lengthy written and oral instructions from them prior to writing his Opinion. The oral instructions and discussion are not known

(c) that on the basis of those instructions and material given to him by the private clients IW has expressed his Opinion in writing as to whether or not a fraud occurred and on [Mr Davies'] role

> (d) that he had already reached conclusions and given firm advice prior to being instructed as prosecuting counsel
>
> (e) that the SFO instructed him inferentially because of his existing involvement in the case and his conclusions
>
> (f) that IW and his clients have, or are perceived to have, an interest in seeing their construction of events supported by a successful prosecution
>
> (g) that the three private clients in fact would be likely to benefit from the 54.7% of the equity in M & A Solicitors belonging to Eric Evans and Alan Whiteley… if they had participated in a fraud with [Mr Davies]
>
> (h) that the perception of IW going on to represent the prosecution agency to whom a copy of his Opinion and conclusions had been sent for the express purpose of triggering an investigation undermines the integrity of the criminal justice system
>
> (i) that whether or not his private instructions concluded with the provision of his Opinion, IW owes a continuing professional duty to his clients to protect their best interests (Code paragraph 303)… and not to use confidential information received from them to their detriment (Code paragraph 702)
>
> (j) that IW should not have been offered and/or accepted instructions by the SFO because it would be difficult for him 'to maintain professional independence' and/or 'the administration of justice might be or appear to be prejudiced' (Code paragraph 603)
>
> (k) that a conflict, or the risk of conflict, clearly exists."

58. The references in that document were to paragraphs of the Bar Code of Conduct for England and Wales (8th Edition) which, so far as relevant, provided:

> "Paragraph 303
>
> A barrister:
>
> (a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any colleague, professional client or other intermediary or another barrister, the barrister's employer or any Authorised Body of which the barrister may be an owner or manager);

(b) owes his primary duty as between the lay client and any other person to the lay client and must not permit any other person to limit his discretion as to how the interests of the lay client can best be served…"

"Paragraph 307

A barrister must not:

(a) permit his absolute independence, integrity and freedom from external pressures to be compromised;

(b) do anything (for example accept a present) in such circumstances as may lead to any interference that his independence may be compromised."

"Paragraph 603

A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed

…

(d) if the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced;

(e) if there appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions)."

"Paragraph 702

Whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client's affairs and must not without prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person (other than another barrister, a pupil… or any other person who needs to know it for the performance of their duties) information which has been entrusted to him in confidence or use such information to the lay client's detriment or to his own or another's advantage."

59. Following receipt of the application to stay and further internal discussions, the SFO wrote to Mr Winter on 8 August 2013, saying that "it is no longer appropriate" for him to continue as Counsel in the case, for reasons which were set out to him thus:

> "Even after winning the abuse argument (which we confidently expect to do) there remains the fact that the defence will undoubtedly continue to use their best efforts to bring your involvement with the prosecution witnesses into evidence. This could preclude you from examining certain witnesses. There is even a risk that you could become a witness of fact. As I am sure you will understand, we cannot afford to see the focus of any trial drawn away from the evidence to peripheral and unnecessary arguments to do with you. Quite apart from being an unfortunate distraction from the real matters in issue, we feel that it has the potential to place both the SFO and yourself in an embarrassing position".

60. Mr Parroy thereafter took on the role of prosecution Lead Counsel. The application for a stay on the basis of the instruction of Mr Winter was adjourned, pending the outcome of the Dismissal Application; and it was thus never determined.

The History of the Dismissal Application

61. The Director of the SFO authorised the decision to charge the Applicants with conspiracy to defraud on 21 January 2013. At the first hearing before Wyn Williams J on 4 April 2013, Leading Counsel for Mr Davies (then Ian Glen QC) indicated that a dismissal application would be made in due course. The SFO Case Statement was served on 30 May 2013, or very shortly thereafter. On 20 June 2013, solicitors for Mr Davies formally notified the court that he intended to apply for dismissal, and they would seek a dismissal hearing in due course. A copy of that letter was sent to the SFO.

62. A plea and case management hearing was fixed for 23 September 2013, before Saunders J. For that hearing, those representing Mr Davies lodged a note, confirming that a dismissal application would be made. It complained that Mr Davies had been charged without first seeking any explanation from him in respect of what was now, after service of the Case Summary (see paragraph 67 below), central to the conspiracy, namely the allegation that his opinion of 31 August 2010 – that the restoration obligations were transferred with the freeholds – was not only incorrect as a matter of law but, when he gave it, he knew it to be wrong. It contended that that opinion was in fact correct as a matter of law, and the allegation that Mr Davies gave it knowing it was wrong was not seriously arguable; and it set out the basis upon which that contention was made.

63. At the 23 September 2013 hearing, Mr Parroy (who had by then taken over as prosecuting Lead Counsel) undertook to review the case; and, in his written review of 9 October 2013, he confirmed that the Case Statement provided a proper and accurate reflection of the prosecution case; and, in particular, that the second opinion of Mr Davies was plainly incorrect, unsustainable and indeed bogus – and that opinion lay at the heart of the prosecution case.

64. Because of the dismissal application, Saunders J could not take any plea at the 23 September 2013 hearing. However, he gave directions for the resolution of the dismissal application and the abuse application that was also threatened. At that time, it was thought that the dismissal application should be heard only after the abuse application; but, at a further directions hearing before Saunders J on 21 October 2013, after Mr Parroy's review, it was agreed and ordered that the dismissal application should be dealt with first.

65. It was thus that the dismissal hearing was set down before me for hearing in December 2013.

The Development of the Prosecution Case

66. The prosecution case against the Applicants has been put in distinctly different ways over time, the various formulations and developments being set out and discussed in both the Dismissal Ruling (at [93] and following) and the VB Judgment (at [24] and following).

The First Iteration

67. The first iteration was the case as set out in Mr Winter's Case Statement dated 30 May 2013 (see paragraphs 55 and 62 above). The case against the Applicants was, in brief, as follows. None (or, at most, few) of the restoration obligations were transferred from Celtic to Oak, because either (i) the transfer of the freeholds was sham and therefore liable to be set aside, or (ii) the sale of the freeholds only transferred the liability to restore the surface and the obligation to restore the void caused by the mining remained with Celtic. The second opinion of Mr Davies – to the effect that all of the restoration obligations *were* transferred – was not only wrong in law but bogus in the sense that Mr Davies knew it to be wrong in law, being provided by him only because of the large fee he received to change his initial opinion. That dishonest and bogus second opinion was at the heart of the conspiracy – because Celtic's auditors were deceived by it, and consequently agreed that the provision in the accounts for future restoration costs could be very significantly reduced. That in its turn allowed for the large distribution to be made by the company, from which the Applicants benefited.

68. That case did not match the particulars of the offence – because those alleged that the conspirators intended that the financial liability to restore the sites *would* pass to Oak (see paragraph 9(iii) above) – but, as Fulford LJ remarked (at [27] of the VB Judgment), whilst that was a substantial discrepancy, it was clear that the case relied upon by the prosecution was that described by Mr Winter in the Case Statement.

69. As I have indicated, Mr Parroy's review of 9 October 2013, confirmed that the case would proceed on the basis of the Case Statement; and in particular that the prosecution case would be based upon the proposition that the second opinion of Mr Davies was plainly incorrect, unsustainable and indeed bogus.

The Second Iteration

70. The Applicants' defence was many limbed, but each submitted that, far from being plainly wrong and bogus, Mr Davies' second opinion was correct in law – and, for the

purposes of the Dismissal Application, they instructed specialist Chancery and commercial counsel to make submissions on that issue. It was their case that the restoration obligations *were* transferred from Celtic to Oak with the freehold title; and the two elements of conduct relied upon as the means to effect the fraud as set out in the charge – the establishment of Oak in the beneficial ownership of the conspirators, and the transfer of the freehold title in the sites to Oak (see paragraph 9(ii) above) – were also both lawful.

71. The prosecution case remained on the basis of Mr Winter's Case Statement until the Dismissal Hearing. Mr Parroy's skeleton argument for that hearing dated 9 December 2013 suggested that the SFO intended to put its case somewhat differently; and, during the course of the hearing, he set out what the new case was. The focus moved away from the obligations left with Celtic following the scheme, to those that were transferred. It was now accepted by the SFO that significant restoration obligations (including, at least, those in respect of the surface down to the first seam of coal) passed to Oak as a result of the transfer of the freeholds. As a result, the rights of the MPAs and the Coal Authority to recover the costs of restoring the sites were "commercially and practically" prejudiced, should they ever choose to exercise their statutory power to carry out restoration works themselves and thereafter seek to recover the costs: prior to the transfer, the authorities had recourse to a domestic company with substantial assets whilst, after the transfer, the only recourse was to a BVI company worth neither powder nor shot.

72. The SFO suggested that this was not a substantial change in the prosecution case; but, as both Fulford LJ (at [31] of the VB Judgment) and I (at [117]-[124] of the Dismissal Ruling) found, it was a very substantial change, and patently so – the first iteration had been completely abandoned, in favour of a new case founded upon an entirely different legal analysis and being directed at the consequences of successful transfer of obligations to Oak rather than those that were retained by Celtic. This was a quite extraordinary volte face, apparently resulting from the SFO's realisation that there was no realistic prospect of showing that Mr Davies' second opinion was bogus, a crucial premise in the first iteration. The Applicants thereafter faced an entirely new case.

73. As Fulford LJ rightly remarked (at [31]), this change of direction meant that one of the main areas addressed by the defence – the question of ownership of various parts of the sites following the transfer of the freeholds – became irrelevant. The work that had been done on those issues – and the legal costs expended by the Applicants – had proved unnecessary, given the case that they now faced.

74. In the second iteration, the SFO always conceded that the transfer of the relevant restoration obligations – the object of the conspiracy – was lawfully effected by the scheme. As I have indicated (paragraph 9(ii) above), the only conduct or means relied upon in the particulars of charge were the establishment of Oak and the transfer of the freehold titles to Oak. Those were apparently lawful – and, indeed, during the course of the hearing, Mr Parroy conceded that both were lawful. On the basis of those concessions, the prosecution and defence were agreed: the arrangements between Celtic and Oak involved a lawful object to be attained by lawful means. On the basis of conventional jurisprudence, such arrangements could not amount to a conspiracy to defraud.

75. As a result, after the December 2013 hearing, I reconvened the court on 10 February 2014 to consider whether a conspiracy to defraud can comprise an agreement to achieve a lawful result by lawful means. The SFO, through Mr Parroy, contended it could. In the Dismissal Ruling, I held that, as a matter of law, it could not. The point was not revived on the VB Application.

The Third Iteration

76. At the reconvened hearing in February 2014, in addition to contending that a conspiracy to defraud could comprise lawful means to a lawful end, the SFO submitted that the establishment of Oak in the beneficial ownership of the conspirators and the transfer of the freeholds to Oak necessarily involved the conspirators committing offences under the Fraud Act 2006 (notably section 4, which concerns fraud by abuse of position), the victims of which were Oak and Celtic; and obtaining secret profits at the expense of Celtic. It was not alleged that any of the MPAs or the Coal Authority were a victim. Accordingly, it was posited that there was a conspiracy to defraud various public authorities, in which the "illegality" relied on was (i) conduct amounting to statutory offences under the Fraud Act perpetrated against two private companies, both owned and controlled by the conspirators, and/or (ii) taking of secret profits at the expense of one such company.

77. This yet further new case was not raised until the reconvened Dismissal Hearing in February 2014, and the Applicants had not had any opportunity properly to respond to it. In all the circumstances, I refused to allow the SFO to proceed on what was yet again (adopting Fulford LJ's term for it: see [93] of the VB Judgment) "a fundamentally changed case", not reflected in the particulars of charge – a ruling with which Fulford LJ summarily agreed (see [166]-[167] of the Dismissal Ruling, and [89]-[93] of the VB Judgment).

The Fourth Iteration

78. As part of the VB Application, in addition to Fraud Act offences, the SFO relied upon unlawfulness based on two other statutory provisions. Fulford LJ set out this new case as follows ([56]-[57] of the VB Judgment).

79. First, it was said that, under section 418 of the Companies Act 2006, the directors of Celtic were under a duty to reveal in the company's published accounts that the sale to Oak was a related-party transaction. If that information had been included, the MPAs would have had notice of the true nature of the transaction. Whenever the statement by the directors in their report is false as regards the relevant audit information, any director who knew it to be false, or was reckless as to whether it was false, and failed to take reasonable steps to prevent the report from being approved, commits a criminal offence. The Report of the Directors of Celtic and the Financial Statement for the year ending 31 March 2011 contained a declaration that there had not been a breach of section 418 of the 2006 Act, and that there were no transactions requiring disclosure in the current or the future year. It was the SFO's case that an offence contrary to section 418 was committed following the conspirators' agreement to hide the true nature of the related party transaction.

80. Second, it was argued that there was unlawfulness based upon section 423 of the Insolvency Act 1986. The SFO suggested that the transaction between Oak and Celtic

was susceptible to challenge on the basis that it was a transaction that defrauded creditors, i.e. it was a transaction at significant undervalue with the purpose of putting assets beyond the reach of, or prejudicing the interest of, a person with an actual or a potential claim. It was submitted that the MPAs should be considered as potential "victims" of these transactions, if it could be established that they were capable of being prejudiced by them. A substantial purpose of the transaction was to prejudice Oak, which (the SFO argued) was the "debtor" within the meaning of section 423(5) of the 1986 Act, because it would never have the financial means to perform the restoration works. As a result, the interests of the MPAs were prejudiced, because they might wish to bring an action requiring the freeholder to make good the sites. Therefore, the MPAs, using section 423, could challenge the transfer of the freeholds and the restoration obligations; and the court would be able to reverse the transaction in its entirety, thereby requiring Celtic to pay Oak any sums that the court directs.

81. In the VB Application, the SFO employed specialist Counsel to deal with the issues that arose from these new bases of charge; and the substance of these arguments – which had never been deployed in the course of the Dismissal Application – were met by further specialist Counsel instructed on behalf of the Applicants.

82. In the event, Fulford LJ did not deal with the substance of the new bases of claim. He did not have to do so. After reviewing the law with regard to voluntary bill applications, he said of them (at [95]):

> "This has not involved a simple and understandable change of heart by the prosecution. Instead, it reveals, as Hickinbottom J mildly expressed the position, that the SFO has not approached this case with 'particular analytical precision' ([paragraph 130 of the Dismissal Ruling]). I am unpersuaded that it would be in the interests of justice to permit the prosecution to use this exceptional procedure to reformulate the legal basis of the charge or charges when the case should have been presented on the current proposed legal foundations at the time the case was sent for trial. I am reinforced in that conclusion by the repeated shifts in the prosecution's stance in this regard, which have operated to the real prejudice of the accused. One of the consequences of seeking a voluntary bill of indictment is that nearly a year after the submissions of the Dismissal Application concluded, the court is being asked to decide whether the prosecution can conduct a trial against the accused on a wholly new legal basis…. This would constitute a misuse of this exceptional procedure: the trial process should not be used, deliberately or otherwise, to explore in repeat proceedings – from a range of profoundly different options – the most sustainable legal basis for prosecuting alleged criminals."

Costs: Legal Background

83. Although the court in its discretion may make a different order, the general rule for costs in civil proceedings is that the unsuccessful party will be ordered to pay the costs of the successful party (CPR Rule 44.2(2)). The costs of the VB Application are the subject of civil costs rules, and the SFO concedes – quite properly – that it must

pay the costs of the unsuccessful VB Application. The only issue between the parties in relation to those costs is whether their assessment should be on the indemnity basis (as the Applicants contend) or the standard basis (as the SFO contends). I deal with that issue below (see paragraphs 185-194).

84. The Dismissal Application is, on the other hand, the subject of the criminal costs scheme.

85. In criminal proceedings, the principle that a successful party will normally recover his costs was, until recently, reflected in section 16 of the 1985 Act, which provides that:

> "(1) Where –
>
> (a) an information laid before a justice of the peace for any area, charging any person with an offence, is not proceeded with;
>
> (b) a magistrates' court inquiring into an indictable offence as examining justices determine not to commit the accused for trial;
>
> (c) a magistrates' court dealing summarily with an offence dismisses the information;
>
> that court or, in a case falling within paragraph (a) above, a magistrates' court for that area, may make an order in favour of the accused for a payment to be made out of central funds in respect of his costs ('a defendant's costs order').
>
> (2) Where –
>
> (a) any person is not tried for an offence for which he has been indicted or sent for trial; or
>
> (aa) a notice is given under a relevant transfer provision but a person in relation to whose case it is given is not tried on any charge to which it relates; or
>
> (b) any person is tried on indictment and acquitted on any count in the indictment;
>
> the Crown Court may make a defendant's costs order in favour of the accused.
>
> …
>
> (6) A defendant's costs order shall, subject to the following provisions of this section, be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably

> sufficient to compensate him for any expenses properly incurred by him in the proceedings.
>
> …".

In short, where a defendant was charged and he successfully defended that charge, as a general rule he would have been entitled to his costs of defending the charge from central funds. Given that the prosecutor would normally be the State, costs being paid to a successful defendant of central funds was usually broadly equivalent to the "loser" paying the costs of the "winner".

86. However, that changed from 1 October 2012, when paragraph 2(2) of Schedule 10 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into effect. That inserted a section 16A(1) into the 1985 Act, which provides that, subject to exceptions not presently relevant:

> "A defendant's costs order may not require the payment out of central funds of an amount that includes an amount in respect of the accused's legal costs…".

That reverses the general rule so far as criminal legal costs were concerned. Since October 2012, a successful defendant in criminal proceedings has generally not been able to recover the legal costs of defending himself: the only costs that he is now able to recover under section 16 are out-of-pocket expenses, such as fares to court.

87. However, the 1985 Act provides for a number of special costs orders for cases which fall outside the usual, namely:

    i) Section 19 (and regulations made under that section) provides that a court may make an order that one party pay the costs of another party to criminal proceedings, where it is satisfied that the receiving party has incurred costs as a result of an "unnecessary or improper act or omission by or on behalf of" the paying party. Such an order can only be made against a party, but that includes a prosecutor such as the CPS or the SFO. Because a successful defendant does not usually mind by whom his legal costs are paid (as long as he does not have to pay them himself), before the 2012 changes to section 16, orders under section 19 were generally confined to situations where it was not deemed appropriate for costs to be paid out of central funds, e.g. where there was a private prosecutor.

    ii) Section 19A gives the court the power to make a costs order against a legal representative where costs have been incurred as a result of an "improper, unreasonable or negligent act or omission" of that representative or his employee. Such an order can only be made against an individual legal representative (whether a natural or non-natural person), and not against a party.

    iii) Section 19B empowers the court to make a costs order against any third party, where he has been guilty of "serious misconduct".

88. Before me, the Applicants' main applications in respect of the costs of the Dismissal Hearing are made under section 19. No application under section 19A for costs against any legal representative is made; although Mr Parroy contends that section 19A is relevant to the proper construction of section 19, and therefore I consider it immediately below (paragraph 89 and following). Section 19B plays no part in these applications, and I need say nothing further about it.

Wasted Costs Orders under Section 19A of the 1985 Act

89. The history of the courts' power to make costs orders against legal representatives is helpfully set out in the judgment of the Court of Appeal, delivered by Sir Thomas Bingham MR, in Ridehalgh v Horsefield [1994] Ch 205 ("Ridehalgh"). The court heard a composite group of six test appeals, in which the Bar and the Law Society were represented by Leading Counsel and, at the invitation of the court, the Attorney General nominated two Counsel to represent the general public interest. The court therefore had the benefit of full argument from a substantial number of eminent members of the Bar over six days in consolidated appeals specifically brought on to enable the court to consider all relevant principles and authorities, and give authoritative guidance.

90. The now-statutory jurisdiction derives from the inherent jurisdiction of the court over solicitors as officers of the court, "being founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice". Under that jurisdiction, the making of a costs order did not require a finding of dishonesty, criminal conduct or behaviour that would (e.g.) warrant striking a solicitor off the roll (Ridehalgh at page 227C-D, summarising the effect of the House of Lords decision in Myers v Ellman [1940] AC 282):

> "While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross." (Ridehalgh at page 227E).

91. As Sir Thomas Bingham explained in Ridehalgh (at page 224F-225F), the power of the court to order a legal representative to compensate a party to litigation for costs incurred as a result of his acts or omissions is an important safeguard to ensure that the adversarial litigation process, involving an essentially antagonistic relationship between the parties, functions fairly and effectively in the interests of the parties to litigation and of the public at large.

92. The jurisdiction was preserved by the Solicitors Act 1957 and, from 1960, regulated by the Rules of the Supreme Court. RSC Ord 62 rule 8(1) provided a threshold for the exercise of the discretionary jurisdiction, namely:

> "… where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or any other misconduct or default…".

Ridehalgh makes clear that, the expressions "improperly", "without reasonable cause" and "misconduct" were there to be understood in the sense given to them by the House of Lords in Myers v Ellman (Ridehalgh at page 228B).

93. In 1986, the Rules of the Supreme Court were amended, RSC Ord 62 r 8 becoming Ord 62 r 11, but with some rewording, so that an order could be made:

> "… where it appears to the court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition…"

Thus, the implication that the relevant conduct must amount to professional misconduct was removed; and the reference to "reasonable competence" introduced, suggesting the ordinary standard of negligence and not a higher standard requiring proof of gross neglect or serious dereliction of duty (Ridehalgh at page 229H). That was, therefore, a relaxation of the criteria, making it easier to obtain a costs order against a solicitor, in respect of whom the jurisdiction was then unique.

94. The jurisdiction was placed on a statutory footing by the Courts and Legal Services Act 1990, which, from 1 May 1991, so far as civil proceedings were concerned, substituted a new section 51 into the Supreme Court Act 1981 (now the Senior Courts Act 1981), at the same time substantively replicated for criminal proceedings by the insertion of a new section 19A into the 1985 Act. Section 19A of the 1985 Act provides (so far as relevant):

> "(1) In any criminal proceedings [the court] may… order the legal or other representative concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with regulations.
>
> (2) …
>
> (3) In this section…
>
> 'wasted costs' means any costs incurred by a party –
>
> > (a) as a result of any improper, unreasonable or negligent act or omission on the part of any representative or any employee of any representative…".

95. Therefore, as a result of that statutory intervention:

    i) The jurisdiction was extended to all representatives, including barristers.

    ii) "Wasted costs" is a term of art, defined for the purposes of criminal proceedings in section 19A(3) of the 1985 Act (and, for civil proceedings, in identical terms, in section 51(7) of the Senior Courts Act 1981). Although sections 19 and 19B deal with costs that may be rendered unnecessary (and thus "wasted" in a lay sense), "wasted costs applications" is a term properly restricted to applications made under section 19A and its civil equivalent.

96. The meaning of "improper, unreasonable or negligent" as applied to acts and omissions for the purposes of the threshold criteria for a wasted costs order was considered "not open to serious doubt" by the Court of Appeal in Ridehalgh. Sir Thomas Bingham said (at page 232):

" 'Improper' means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

The term 'negligent' was the most controversial of the three. It was argued that the 1990 Act, in this context as in others, used 'negligent' as a term of art involving the well-known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the predecessor of the present Order 62 rule 11 made reference to 'reasonable competence'. That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.

We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the

> ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that 'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.
>
> In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence : 'advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do'; an error 'such as no reasonably well-informed and competent member of that profession could have made' (Saif Ali v Sydney Mitchell & Co, at pages 218D, 220D, per Lord Diplock).
>
> We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."

97. I shall return to this passage in due course; but the following are worthy of immediate note:

i) Judgment in Ridehalgh was given in January 1994, after the section 19 jurisdiction had been established and indeed three years after the meaning of "improper" in the context of section 19 was considered in Director of Public Prosecutions v Denning (1992) 94 Cr App R 272 ("Denning") (see paragraphs 104 and following below). However, the judgment in Ridehalgh did not refer to section 19 or Denning or the post-Denning section 19 cases referred to below; nor was section 19 or any of those cases even referred to in argument in Ridehalgh.

ii) The court considered each of the terms "improper", "unreasonable" and "negligent" to be familiar expressions, the meaning of which was to be considered in a non-technical way, not as hard-edged highly particular terms of art. In particular, the court deliberately declined to give "improper" – or the other terms – a "specific, self-contained meaning", instead preferring to construe them as part of the phrase in which they appeared in a broader, non-technical way – although with a meaning informed by the specific context of conduct during the provision of legal services. Given the derivation of the jurisdiction, it is unsurprising that the meaning of these terms was considered driven by this specific context.

iii) The court were specifically considering the civil wasted costs jurisdiction; but, at page 239G-H, Sir Thomas Bingham said this, under the heading "Crime":

> "Since the six cases before the Court are all civil cases, our attention has naturally been directed towards the exercise of the wasted costs jurisdiction in the civil field. Attention has, however, been drawn in authorities… to the undesirability of any divergence in the practice of the civil and criminal courts in this field, and Parliament has acted so as substantially (but not completely) to assimilate the practice in the two. We therefore hope that this judgment may give guidance which will be of value to criminal courts as to civil, but we fully appreciate that the conduct of criminal cases will often raise different questions and depend on different circumstances. The relevant discretions are vested in, and only in, the court conducting the relevant hearing. Our purpose is to guide, but not restrict, the exercise of these discretions."

I shall return to that passage, which is relied upon by Mr Parroy (see paragraph 140(iii) below).

98. Ridehalgh was endorsed by the House of Lords in Medcalf v Weatherill [2002] UKHL 27 (see [13] and [50]); and, in respect of wasted costs orders against representatives, the scope of "improper, unreasonable or negligent" as set out in Ridehalgh has never been seriously questioned and is now well-established, having been settled for 20 years. Further citation of authority is therefore not necessary; although I should say that Mr Parroy referred me to Persaud v Persaud [2003] EWCA Civ 394, in which Peter Gibson LJ (giving the judgment of the court) followed Ridehalgh, saying that, for conduct to fall within "improper", "… the necessary impropriety must be a very serious one" (see [23]). That is a gloss on Ridehalgh; but it is fair to say that, looking at the authorities as a whole, they generally appear to require a relatively high threshold for the conduct of the relevant legal representative to be "improper" in the context of wasted costs. It is also to be noted that, as in Ridehalgh itself, Peter Gibson LJ in Persaud focused on the context of wasted costs applications and emphasised the need for a breach of the advocate's duty to the court (see [22]).

99. As I have said, there was no reference in Ridehalgh to section 19 or Denning. Further, the diligent researches of Counsel before me have failed to find any case concerning a wasted costs application in which the section 19 jurisdiction has been considered or any section 19 cases raised (with the exception of R v Walker [2010] EWCA Crim 63 ("Walker") to which I refer below: see paragraph 132).

Costs Orders under Section 19 of the 1985 Act

100. Section 19 of the 1985 Act provides :

> "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."

101. The relevant regulations are the Costs in Criminal Cases (General) Regulations 1986 (SI 1996 No 1335) ("the 1986 Regulations"), which came into effect on 1 October 1986 (regulation 1(1)). Regulation 3(1) provides (so far as relevant):

> "… [W]here at any time during criminal proceedings [the 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."

If the court makes an order under section 19, it must specify the amount of costs to be paid (regulation 3(3)).

102. That regulation is complemented by CrimPR rule 76, which sets out the relevant procedure; and the accompanying Practice Direction (Costs in Criminal Proceedings). Rule 76.2(4)(b) provides that, if the court makes any costs order, it must identify the legislation under which the order is made. In respect of section 19 applications, rule 76.8(4)(c) requires an applicant to specify (amongst other things) the party by whom costs should be paid, the relevant act or omission, the reasons why that act or omission meets the criteria for making an order, and the amount claimed. Paragraph 4.1 of the Practice Direction (reflecting the analysis of Lord Woolf CJ in R (HM Commissioners of Customs and Excise) v Leicester Crown Court [2001] EWHC 33 (Admin) ("the Leicester case") at [12]), states:

> "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?".

103. Certainly, if the court embarks upon an exercise considering potential liability under section 19, it must consider and determine whether there has been an "unnecessary or improper act or omission" by a party (which, as I have indicated, includes the prosecution) during the course of the criminal procedure. Before me, there was a significant dispute as to the correct meaning of "unnecessary or improper" in this context, to which I now turn.

"Unnecessary or Improper Act or Omission"

104. The meaning of "improper" in the context of section 19 and regulation 3(1) of the 1986 Regulations was considered by the Divisional Court in Denning. The defendants were charged with contravening section 40(5) of the Road Traffic Act

1972 by using or permitting the use of an overloaded goods vehicle on a road. The proceedings were discontinued when it became apparent that the summons had referred to the wrong axle. The magistrates ordered the prosecution to pay the defendants' costs under section 19, on the basis of the prosecution's failure properly to review the file on receipt and at various times during the course of the proceedings. The prosecution appealed.

105. In dismissing the appeal, Nolan LJ (with whom Roch J agreed) said this (at page 280):

> "… [I]t seems to me impossible to maintain that there were no grounds upon which the justices could reasonably conclude that there had been an improper omission on the part of the prosecutor. I would add in this connection that the word 'improper' in this context does not necessarily connote some grave impropriety. Used, as it is, in conjunction with the word 'unnecessary', it is in my judgment intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly… ."

On its face, that was a clear and unsurprising comment. An act or omission of a party is "improper" if it would not have occurred if the party concerned had conducted his case properly; in other words, if it results from, or is part of, the improper conduct of the case, no more and no less. The focus is therefore on the conduct of a party as a party.

106. Thereafter, for 20 years, that definition of "improper" in the context of section 19 was approved and applied consistently in the Administrative Court, both before single judges (e.g. R (Oddy) v Bugbugs Limited [2003] EWHC 2865 (Admin) (Pitchford J, as he then was) ("Oddy")) and before Divisional Courts (e.g. Suffolk County Council v Rexmore Wholesale Services Limited (1994) 159 JP 390 ("Rexmore"), Bentley-Thomas v Winkfield Parish Council [2013] EWHC 356 (Admin) ("Bentley-Thomas") at [17]-[18] and R (Singh) v Ealing Magistrates' Court [2014] EWHC 1443 (Admin) ("Singh") at [7]) including at least one Divisional Court over which the Lord Chief Justice Lord Woolf presided (the Leicester case, cited at paragraph 102 above, at [12]). Importantly, it was also approved and applied by the Court of Appeal (Criminal Division) in R v Choudhery [2005] EWCA Crim 2598 ("Choudhery") at [2]). In none of these cases was section 19A raised or considered, nor was Ridehalgh, nor were any of the wasted costs cases that followed Ridehalgh.

107. Thus, for more than two decades until March 2014 the wasted costs jurisdiction and the section 19 costs jurisdiction followed parallel courses, based upon different threshold criteria.

108. On 13 March 2014, Simon J sitting in the Crown Court at Bristol determined an application under section 19 for costs against the CPS arising out of a prosecution for gross negligence manslaughter and an offence under health and safety legislation (R v Counsell (Unreported, 13 March 2014) ("Counsell")). On 4 November 2011, Mr Counsell had conducted a firework display at Taunton Rugby Club which (the prosecution said) caused a series of multiple collisions on the nearby M5 motorway in which seven people died and many more were injured. At a late stage, the counts of manslaughter were discontinued; and the defendant was later held by Simon J as the

trial judge not to have a case to answer on the health and safety count. The defendant sought a section 19 order against the CPS on the basis that they failed to carry out fully-informed, complete and reasonable reviews of the available evidence and the applicable law before authorising the charges and following receipt of the Defence Statement.

109. Simon J considered both Denning and Ridehalgh. He said that the wasted costs jurisdiction "should be a simple and summary process for the determination of the issue, without the formalities of disclosure and/or interrogation of the respondent"; and such applications "should not be allowed to become a wasteful form of parasitic litigation" to be used only "where there is a clear picture which indicates that a professional adviser has been negligent etc" (at [16](1) and (2), quoting Lord Woolf MR in Wall v Lefever [1998] 1 FCR 905). He also stressed the width of discretion in prosecutors when it came to decisions to charge or continue criminal proceedings (see paragraph 29 above). He said (at [16](4)):

> "Where the application relates to a decision to prosecute, the Court should be careful to avoid being drawn into carrying out a close analysis either of a decision to prosecute or of a later review of such decision to see whether it was reasonable. There are a number of reasons for this. First, impropriety and not unreasonableness is the relevant test. Second, one of the principles underlying the wasted costs jurisdiction is summary disposal. In most cases where a wasted costs order is made, the conduct which is said to be improper will be clear, obvious and egregious. Thirdly, it is only in limited and confined circumstances that the Court will review charging decisions made by the CPS. The Court recognises that such decisions may be difficult and sensitive, see for example the decision of the Court of Appeal (Criminal Division) R v P [2011] EWCA Crim 1130 ['R v P']."

110. He then quoted from R v P (to which I shall return); and Sir John Thomas in L (referred to in paragraph 29 above) in which the President emphasised the important constitutional position of the CPS as an independent decision-maker assigned by Parliament to make decisions on charging suspects with criminal offences; the very strict self-denying ordinance of the courts in relation to challenges to charging decisions by them; the limited grounds upon which such decisions can be challenged; and the exceptional rarity of the amenability of such decisions to challenge. Simon J was of course in the constitution of the Divisional Court in L.

111. Following this review, Simon J continued (at [38]-[39]):

> "38. In my judgment the test for impropriety is the rigorous test set out in Ridehalgh and for the reasons I have set out above: namely 'conduct which would be regarded as improper conduct according to the consensus of professional (including judicial) opinion'. If that is right, then the conduct of the CPS does not come close to satisfying the test; but even if the word 'improper' is to be construed to mean 'an act or omission which would not have occurred if the party concerned had

> conducted his case properly' (see [Denning]), I am not persuaded that Mr Counsell has proved such conduct…. Whether and how to charge were difficult and sensitive decisions; and the conclusion that charges of manslaughter should be brought was neither perverse nor made in disregard of CPS policy. The HSWA count proceeded to trial and, although the court ruled that there was no case to answer, that fact alone does not establish conduct which should be met with a wasted costs order….
>
> 39. Litigation (whether civil or criminal) is inherently subject to uncertainty and contingency; and any advice is likely to highlight these risks: witnesses who do not come up to proof, new materials which may lead to experts changing or modifying their opinion and unanticipated flaws in the evidential basis of the charge. The Court cannot approach a wasted costs application with the vision of hindsight. It must take a robust but not over-analytical view of what occurred, and unless the impropriety is clear and egregious, it should not countenance a detailed forensic examination of what occurred with a view [to] making a wasted costs order."

112. Simon J thus refused the section 19 application.

113. Mr Parroy relies upon Counsell; and also upon a Divisional Court case in which Simon J's approach was expressly approved, namely R (Director of Public Prosecutions) v Sheffield Crown Court [2014] EWHC 2014 (Admin) ("the Sheffield case"), in which there was a formidable constitution: Lord Thomas of Cwmgiedd CJ, Elias LJ and Mitting J. The Lord Chief Justice gave the judgment of the court.

114. In June 2011, three vehicles were involved in a road traffic accident, which resulted in a pedestrian being killed. The DPP decided that only one driver should be prosecuted for causing death by careless driving. He was tried and acquitted. After the acquittal, the trial judge determined that the failure to prosecute either of the other drivers involved was an improper act or omission, and he made a costs order against the DPP under section 19. There is no right of appeal against such an order. The DPP sought to challenge it by way of judicial review.

115. The Divisional Court held that the judge had no jurisdiction to use section 19 at the end of a trial to impugn the prosecutorial discretion to prosecute by imposing a section 19 order: a challenge to a decision to prosecute can only be made on the well-established grounds described in paragraph 29 above, and it is "a highly exceptional remedy" (the Sheffield case at [15]). The judicial review was consequently allowed on the ground that the judge had no jurisdiction to make the order he did make. That was all that was necessary to determine the case (see [17]).

116. However, Lord Thomas went on to say this (at [28]-[30]):

> "28. As we have set out in the judgment given by the judge in this case he relied upon the definition of 'improper' set out in the decision of the Divisional Court in [Denning]. Although

> we have determined that the order must be quashed as the judge had no jurisdiction to make it, it is important to draw attention to the later decision of the Court of Appeal in [Ridehalgh]…. [The Lord Chief Justice then quoted the passage concerning the definition of 'improper' from Sir Thomas Bingham MR in Ridehalgh, quoted above at paragraph 96].
>
> 29. It is clear from a further passage in the judgment of the court at page 239 that this was meant to apply to criminal as well as civil cases. Sir Thomas Bingham said at page 239:
>
> > 'We therefore hope that this judgment may give guidance which will be of value to criminal courts as to civil, but we fully appreciate that the conduct of criminal cases will often raise different questions and depend on different circumstances.'
>
> 30. We therefore wish to express our agreement with the view recently expressed by Simon J in his ruling in [Counsell] when he made clear that the test for impropriety is the rigorous test as set out in Ridehalgh and not the test set out in Denning."

117. Mr Parroy submitted that the Sheffield case is clear and direct authority for the proposition that, in respect of the meaning of "improper", rather than the test in Denning (i.e. simply a failure to conduct one's case "properly"), the more stringent Ridehalgh test with its higher threshold of impropriety should be applied in the current applications. Those appearing for the Applicants, ably led by Mr Beloff, submitted that the courts in Counsell and the Sheffield case unfortunately fell into error and, in the context of section 19 applications, the test in Denning is not only correct in principle, but I am bound by authority to follow it.

118. I accept that the passage in the Sheffield case upon which Mr Parroy relies was clear in its import – and, of course, the constitution of the Divisional Court in that case was of particular eminence. However, with regret, for the reasons set out below, I am unable to agree with the legal analysis relied upon in the Sheffield case; although, as will become apparent, I do not consider that the issue turns upon a simple choice between Denning and Ridehalgh, as portrayed in those cases and, to a large extent, in the submissions before me.

119. Conduct is "proper" if it conforms to prevailing standards of behaviour. However, what amounts to an appropriate standard of behaviour is necessarily a context-specific question: different standards are imposed on individuals depending upon the role in which they are acting. This is not – or not merely – a matter of the rigour of the standard, or how rigorously it is applied. For example, whilst the conduct of an individual in the context of his everyday affairs is subject to standards of behaviour that the general public would consider appropriate – in respect of which there is usually a very broad band of appreciation, in other words there is a wide range of different legitimate views – whether the conduct of a professional person in the conduct of his work is proper is a matter of judgment necessarily dependent upon his professional obligations and code of conduct, both formal and as generally expected of him by any regulators, fellow professionals and other informed individuals.

120. Legal representatives are the subject of all sorts of obligations that do not apply – or do not apply in the same way – to parties: obligations to the court, obligations imposed by the relevant regulators and codes of conduct and, of course, obligations to their clients including the professional duty of putting their client's case forcefully and fearlessly, a duty specifically identified in Ridehalgh as an important matter of public interest (see page 226A-C). Furthermore, unlike a party, a finding by a court that a professional lawyer has, in the course of his work, acted "improperly" might have serious professional consequences for that individual. Therefore, parties to litigation are in a very different position from that of professional lawyers representing parties in the conduct of litigation; and, as a matter of principle, one would expect different standards of behaviour to apply, reflecting those differences.

121. It should also be said that:

i) parties who enter litigation are not in the same position as general members of the public because, e.g., they do owe some duties to the court; and therefore the standard of their behaviour has to gauged against their position as litigants; and

ii) public prosecutors, who have a particular and unique role in criminal litigation (see paragraph 29 above) have a very different role and different obligations from a party to a civil claim or a criminal defendant who has no choice about his involvement; and so different factors apply to mould the standards of behaviour expected of them. As I have explained (see paragraph 22-29 above), different prosecutors have different roles, powers and obligations, and so what is expected of each may vary.

122. Thus, the behaviour of a civil litigant, a criminal defendant and a public prosecutor are all subject to different factors that make comparisons between them, so far as proper and improper conduct is concerned, difficult and potentially dangerous.

123. The fact that "improper" can have different meanings in different contexts was considered by a Divisional Court in Davenport v Walsall Metropolitan Borough Council [1997] Env LR 24 ("Davenport"), which, albeit obiter, considered the meaning of the word in sections 19A and 19 of the 1985 Act respectively. The case concerned a charge of statutory nuisance under the Environmental Protection Act 1990. By section 82(12) of that Act, where a nuisance is proved, then the court is required to "order the defendant… to pay the person bringing the proceedings such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings". In respect of the issue as to what expenses were "properly" incurred, the parties respectively relied upon Ridehalgh and Denning. Keene J, with whom Pill LJ agreed, said this:

> "Neither party has been able to discover any judicial authority directly dealing with the interpretation of section 82(12) of the Environmental Protection Act 1990. I emphasise that, because words such as 'proper' or 'improper' may be used differently in different statutes. In particular, I do not find that much assistance is obtained from the decision about wasted costs orders in [Ridehalgh]. When what is being contemplated is the making of an order that the legal representatives of a party do

> personally meet the costs of proceedings, one would expect to find that the failings on the part of the representatives have to be shown to be somewhat more serious in order to be considered improper conduct than would necessarily be the case in other contexts. The comment by Nolan LJ in Denning is to my mind somewhat closer to the situation with which this court has to deal, although even then it is to be noted that in Denning the court was dealing with the phrase 'an unnecessary or improper act or omission'. Nolan LJ was, as is clear from his statement, influenced by the presence of the word 'unnecessary' in that phrase, a word which does not appear in section 82(12) of the 1990 Act. Nevertheless, that is a decision which was dealing with the question of costs in criminal proceedings before a magistrates' court and to that extent at least it may be thought to have some bearing on the present problem."

124. That case, in which the meanings in Ridehalgh and Denning were expressly considered, is thus in my view powerful support for the related propositions that (i) "improper" may have different meanings in different contexts; (ii) the contexts of section 19 and 19A are different; and (iii) the meaning of the word in those contexts is different. Keene J also provided sensible justification for such a difference. Until Counsell, this distinction was consistently recognised by the courts for over twenty years.

125. As I have mentioned, there was no reference to Denning in Ridehalgh, either in the judgment or in argument. Mr Parroy submitted that Denning was a highly relevant case on the meaning of "improper" in wasted costs applications, and ought to have been raised and dealt with in Ridehalgh: it was an error on the part of the court, and Counsel, for not doing so. However, I am wholly unconvinced that, if Denning were relevant as Mr Parroy submits, the ranks of more than able advocates in Ridehalgh would have failed to mention it and/or the Master of the Rolls or other members of the court would themselves have failed to raise it. It was, very clearly, not regarded by anyone in that case as a relevant line of authority in the context of wasted costs applications. That applies to those wasted costs cases which have followed and applied Ridehalgh without any reference to Denning (with the exception of Walker to which I refer below: see paragraph 132); and, equally, to all of the cases that have followed and applied Denning without reference to Ridehalgh or those wasted costs cases which have applied Ridehalgh. The parallel lines of authority have consistently regarded sections 19 and 19A as entirely discrete jurisdictions, with well-established and different threshold criteria.

126. If Mr Parroy's submission were right, it would not just be in Ridehalgh that the court erred: a whole generation of courts, and advocates before them, would have been blindly wrong in failing to appreciate that the two jurisdictions are, in this regard, the same and in developing each jurisdiction in parallel without reference to the other line.

127. However, comfortingly, I do not consider that we have all been wrong in the way Mr Parroy suggests. Mr Beloff submitted – and I accept – that there was no cross-reference because the two lines of authority developed in respect of two entirely

discrete powers that did not require or warrant cross-reference. As I have already explained, the derivation of the provisions is entirely different, section 19A was born out of the inherent jurisdiction of the court over solicitors, and it is concerned with, not the acts and omissions of a party itself, but with those of professional lawyers as legal representatives of a party in litigation which result in wasted costs. Although different from the disciplinary jurisdiction of the court over representatives, it is closely associated with that jurisdiction. The focus of it is upon the duty owed by individual legal representatives, as professional lawyers, to the court: an order can only be made against a specific legal representative. On the other hand, section 19 derives purely from the 1985 Act, and is concerned with costs resulting from the acts and omissions of a party: a representative cannot be liable for costs under section 19, because he is not a party to the proceedings.

128. Indeed, this distinction was, in my view, recognised or reflected in Ridehalgh and Denning themselves. As I have indicated (paragraphs 96 and 97(ii) above), in Ridehalgh, Sir Thomas Bingham said that "improper" in section 19A has to be construed as part of the phrase "improper, unreasonable or negligent"; and, in construing that phrase, he emphasised that the focus is very much upon the specific context of the provision of legal services. Indeed, in the comments on each of the three adjectives employed in section 19A, he stressed that context. Nolan LJ made clear in Denning that "improper" in section 19 should be construed as part of the phrase "unnecessary or improper"; and, in construing that phrase, the focus is on the fact that an order can only be made against a party to the case in relation to his conduct in that case. In my view, the two cases can be explained and rationalised as applying the same principle, namely that, in determining what might be "improper", the context is a vital circumstance. Certainly, the distinction with regard to context explains the fact that the two lines of authority developed happily in parallel for twenty years, without any cross-referencing of statutory provisions or authorities.

129. R v P – a case upon which all of the parties before me relied, albeit for different propositions – is relevant in this context. It was another case where the defendant was acquitted by the jury. He had been charged with rape, and the issue was consent. Following acquittal, the trial judge made an order that the CPS pay the costs of the defendant on the basis that the judge disagreed with the decision to mount and continue the prosecution. The order did not identify the power the judge was exercising but, upon a telephone enquiry by the Court of Appeal (Criminal Division), the Crown Court apparently confirmed that it was section 19 of the 1985 Act. The Vice President (Hughes LJ, as he then was) summarised the three different jurisdictions under sections 19, 19A and 19B of the 1985 Act, and indicated the importance of the court identifying the power under which it acts. It is important because the conditions for making each such order vary, as does the person against whom it can be made; and the rights of challenge are different, a section 19A order being appealable, and a section 19 order being subject to challenge only by judicial review.

130. Hughes LJ, in comments reflecting those in ex parte C (see paragraph 29 above) and later reflected in L (again, referred to in paragraph 29 above) and the Sheffield case, said:

> "… [T]he question in this case was not whether the decision to prosecute was right or wrong. It is simply not the judge's

> function to sit on appeal from a decision of the Crown Prosecutor. There may be very rare cases where the decision is wholly unreasonable. [Oddy] was a different case altogether. That prosecution was brought by a private interest group in pursuit of a commercial objective. The point at issue was one of pure law. It had been decided previously against the prosecution. There could have been a challenge to the ruling by way of appeal to the High Court but there had been none. Unlike that case, in most cases such as the present, there will be room for a legitimate difference of opinion. It is important that the making of that decision should not be overshadowed by the fear that if a prosecution is continued and fails there may be an order for the payment of costs. An acquitted defendant will normally receive his costs from central funds unless there is a good reason why he should not. We do not say that there will never be a case where a decision to prosecute is so unreasonable that a costs order is appropriate, but we are satisfied that this case was not arguably such. Here, the complainant's evidence might have been assessed as likely to be accepted. The flatmate's evidence might have been assessed as capable of disbelief. There was, we note, some material which perhaps suggested possible partiality. There were, it was said, some possible injuries to the complainant. We want to make it clear that we simply do not know whether the decision to prosecute was right or wrong. It is clear that it was made in good faith. Supposing, however, that it was a wrong judgment on a difficult issue, that is not enough to justify an order for costs and it would not have been even if the relevant powers had been properly considered. The judge's pejorative reference to political correctness was ill-conceived and inappropriate. There was no basis for his conclusion that no thought had been given to this case."

131. Mr Parroy prayed in aid that passage, because it stressed the wide discretion given to prosecutors and the "very rareness" of cases in which such a decision might be such as to warrant a section 19 costs order against the prosecutor. I shall return to that point. However, Hughes LJ clearly emphasised the need for the court to identify the power under which it is proposing or purporting to act: as I have indicated (see paragraph 102 above), for good reason, it is a requirement of the CrimPR (rule 76.8(4)(c)) that any order for costs identifies the power under which it is made.

132. Walker (to which I refer above: see paragraphs 99 and 125) was an appeal against a wasted costs order under section 19A. It was a non-counsel application, and so it may be presumed that the Court of Appeal (Criminal Division) did not obtain as much assistance as they might otherwise have done. In allowing the appeal and setting aside the wasted costs order, the court apparently applied the threshold test in regulation 3 of the 1986 Regulations ("unnecessary or improper act or omission") and thus in Denning (see [5]). Regulation 3 of course does not apply to wasted costs applications, only to applications under section 19. Although that analysis clearly did not affect the result – because, on the overtly stricter Ridehalgh test, the wasted costs

order would inevitably have been set aside in any event – the case is a further illustration of the importance of identifying the power under which the court is acting, and the relevant criteria in exercising that power. In my respectful view, it is no stronger authority for the proposition that the Denning test is applicable to wasted costs applications, than Counsell and the Sheffield case are for the proposition that the Ridehalgh test is applicable to section 19 applications.

133. Mr Beloff submitted that, unfortunately, in Counsell, Simon J did not focus on the particular power under which he was acting. From the outset, he elided the court's powers under sections 19 and 19A, referring to "the wasted costs application" before him and treating Ridehalgh and other cases under section 19A as if they were applications under section 19.

134. Simon J clearly did not have all (or indeed many) of the relevant authorities placed before him as I have; nor did he have the benefit of the submissions I have had on the issue. With regret, I am driven to the conclusion that, in eliding the two powers as he did and thus transposing the threshold test set out by Sir Thomas Bingham in Ridehalgh in relation to the civil equivalent of section 19A as if it were directly applicable to section 19, Simon J did err in his legal analysis. I am confident that, had he had before him all of the relevant authorities (as I have), his conclusion would have been otherwise.

135. With reluctance, I am also driven to conclude that the Divisional Court in the Sheffield case – again without all relevant authorities before it, and without any debate – were also wrongly persuaded that the transposition made by Simon J in Counsell was appropriate.

136. Mr Parroy made a number of submissions as to the precedential weight to be given to Ridehalgh and Denning respectively.

137. First, he submitted that, until Counsell, Ridehalgh had never been considered in the context of a section 19 case, with the result that Denning had been applied without consideration or debate, such that, in some way, the Denning line of authorities may be less than binding on me. However, I do not agree. I have explained why there was no reference to Ridehalgh in these cases. Denning on its face is clear; until Counsell, it had been consistently applied in section 19 cases and, during that lengthy time, it was approved and applied regularly by the Divisional Court and at least once by the Court of Appeal in Choudhery. Denning is binding on me.

138. Second, Mr Parroy submitted that the Sheffield case was binding on me, or alternatively it was of such persuasive force as to be tantamount to binding. However, as Lord Thomas himself made clear, the passage in the Sheffield case upon which Mr Parroy relies was obiter, the court determining the application before it on the basis that the Crown Court judge had no jurisdiction to make the order he purported to make. It is therefore not technically binding on me as a matter of precedent. I appreciate the comments made were clear, and by a particularly distinguished court. But, the court's comments were made without the benefit of adversarial debate – only the DPP was represented before the court, coincidentally by Counsel who appeared in Counsell – and without any reference to or consideration of Denning or the post-Denning section 19 cases to which I have been referred (which show that Denning has been consistently applied without demur for over two decades), or cases such as

Davenport and R v P which emphasise the difference between the criteria in the various costs regimes. Of particular importance, Choudhery (a Court of Appeal authority, which approved and applied Denning) was not cited to the court. It is also noteworthy that a Divisional Court has approved and applied Denning after the Sheffield case, in Singh (although apparently without any reference to the Sheffield case).

139. Therefore, in my respectful view, I am bound to follow Denning; and, insofar as there is difference in approach between Denning and Ridehalgh, I am bound to decline to follow the Sheffield case.

140. Finally, on this issue, there are four miscellaneous points raised before me with which I should briefly deal.

i) Mr Parroy relied upon the canon of construction that a word has the same meaning within the same instrument (see, e.g., Bennion on Statutory Interpretation (6th Edition), Section 355). However, that presumption is necessarily not as strong where, as here, statutory provisions within the same instrument have different well-established sources which have been consolidated into one instrument. Given the different derivations of the two relevant provisions, the presumption here is extremely weak. In any event, if (contrary to my strong view) there had to be a single meaning of the word, then there would be a compelling argument that the meaning is as the word was construed in Denning, which was first in time (judgment being handed down on 7 March 1991) and, albeit after the 1990 Act had been passed, prior to section 19A of the 1985 Act coming into effect on 1 May 1991. Section 19A was the later statutory provision, and the established meaning of section 19 could not have been altered by the subsequent change to the statute incorporating section 19A. In this case, the presumption within this tenet of construction does not offer any significant assistance to Mr Parroy.

ii) As I have indicated, Nolan LJ in Denning and Sir Thomas Bingham in Ridehalgh each made clear that the word "improper" should not be construed in isolation, but as part of the phrase into which it fits, i.e. for section 19, "unnecessary or improper act of omission" and, for section 19A, "improper, unreasonable or negligent act or omission". Each judge said that it was unnecessary to have discrete and isolated definitions of each of the adjectives, preferring a broader consideration of the relevant phrase. Thus, Nolan LJ in Denning did not seek to define "unnecessary"; but held that that word coloured the meaning of "improper" so that the phrase covered acts and omissions that would not have occurred had the matter been properly conducted by the relevant party. Similarly, whilst, on its own, "unnecessary" (which appears to date to have escaped judicial consideration and comment) has the import of something which could have been avoided, it too has to be read in the light of its juxtaposition with "improper".

iii) Despite the reliance on the passage in the Sheffield case, where Sir Thomas Bingham in Ridehalgh referred to "the undesirability of any divergence in the practice of the civil and criminal courts *in this field*" (emphasis added) and the action of Parliament to assimilate the practice of the two, he was expressly referring to the respective "wasted costs jurisdictions", and not to section 19 to

which, as I have emphasised, the court was not referred in that case. That passage (quoted at paragraph 97(iii) above) is of no assistance to Mr Parroy.

iv) For the sake of completeness, I should say that the academic writers to which I was referred also acknowledge the difference in meaning of "improper" between the jurisdictions, as identified in Ridehalgh and Denning (see, e.g., Hurst on Criminal Costs (2007), paragraphs 7.04 and 7.23 and following).

141. Therefore, for the reasons I have given, in my judgment, on principle and on authority binding on me, in these section 19 applications I am bound to follow Denning.

142. However, that is not the end of the matter, because that does not shed a great deal of light on what is meant by "conducting the case properly" where the relevant party is the prosecutor. As I have indicated, what is proper in these circumstances has to be considered in the light of all the circumstances, including the role and obligations of a public prosecutor.

143. We learn from cases such as ex parte C, R v P and L that the prosecutor has a very wide discretion in relation to prosecutorial decisions such as the decision to charge or (after review) to proceed with a prosecution. Nothing I say in this judgment should be taken as in any way detracting from what those cases say about the very limited grounds on which a prosecutorial decision by a public prosecutor can be challenged, or the rarity of the amenability of such decisions to challenge; or as any indication that I disagree with the forceful comments in respect of those matters in those cases. Indeed, not only are those cases binding on me, I strongly agree with what is said in them on this subject. Furthermore, if I might respectfully say so, I strongly agree with the Lord Chief Justice's comments in the Sheffield case about the inappropriateness of section 19 applications being used collaterally to challenge prosecutorial decisions.

144. Therefore, it is clear that simply because a prosecution fails – even if it is discontinued or the defendant is found to have no case to answer – that in itself will not be sufficient to overcome the threshold criteria for a section 19 costs order. For example, where there is a change of circumstances during the course of a case (e.g. where a witness does not come up to proof) that does not necessarily render improper an earlier decision to charge or proceed. As Hughes LJ indicated in R v P, where the evidential position does not change and a case fails as a matter of law, then the prosecutor may be more open to a claim that the charge was improper; but, as Simon J properly remarked in Counsell, the test is one of impropriety, and not merely unreasonableness. Again, where a claim fails because of an adverse ruling on a question of law, that does not necessarily mean that the decision to charge was improper: no one has a monopoly of legal wisdom, and many legal points are properly arguable.

145. Something else is needed. Bad faith will of course almost always suffice. But otherwise, each case will necessarily be fact-dependent. For example, where a claim fails as a matter of law in circumstances in which the evidential position has not materially changed, then the prosecution may have acted improperly if (e.g) it has patently failed to give the case the appropriate degree of legal analysis that has led to a charge being brought and pursued which, as a matter of law, cannot succeed. Even in those circumstances, I stress that it is important that section 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 prosecutorial decisions. It is also important to bear in mind that the section 19 jurisdiction is summary in nature, and so, to form the basis of an application under section 19, 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.

146. Therefore, respectfully reflecting the comments of Hughes LJ in R v P and Lord Thomas in the Sheffield case, I consider that cases in which it will be appropriate to make (let alone grant) a section 19 application against a public prosecutor will be very rare, and 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. For example, where it is alleged that the decision to prosecute or a similar prosecutorial decision is the improper act upon which a section 19 application is founded, it is difficult to conceive of circumstances in which it could succeed unless the decision was shown to be unlawful in a public law sense, i.e. leaving aside decisions unlawful because made in pursuance of an unlawful policy of the prosecutor (or made other than in accordance with the prosecutor's own lawful policy), if the decision was one which no reasonable prosecutor could have made. If it is a decision that a reasonable prosecutor could have made, then generally a section 19 costs order will not be appropriate.

147. Consequently, although, for the reasons I have given, the threshold tests under section 19 and 19A respectively are conceptually different and not properly comparable, looking at matters more broadly, I do not consider that the hurdle under section 19 should be perceived as greatly "lower" than that under section 19A. In most cases – as the authorities illustrate – the result of applying either would be the same.

Summary of the Principles

148. It would be helpful to summarise the propositions I have derived from the statutory provisions, the authorities and principle, so far as section 19 applications for costs against public prosecutors are concerned.

i) When any court is considering a potential costs order against any party to criminal proceedings, it must clearly identify the statutory power(s) upon which it is proposing to act; and thus the relevant threshold and discretionary criteria that will be applicable.

ii) In respect of an application under section 19 of the 1985 Act, a threshold criterion is that there must be "an unnecessary or improper act or omission" on the part of the paying party, i.e. an act or omission which would not have occurred if the party concerned had conducted his case properly or which could otherwise have been properly avoided.

iii) In assessing whether this test is met, the court must take a broad view as to whether, in all the circumstances, the acts of the relevant party were unnecessary or improper.

iv) Recourse to cases concerning wasted costs applications under section 19A or its civil equivalent, such as Ridehalgh, will not be helpful. Similarly, in

wasted costs applications under section 19A, recourse to cases under section 19 will not be helpful.

v) The section 19 procedure is essentially summary; and so a detailed investigation into (e.g.) the decision-making process of the prosecution will generally be inappropriate.

vi) Each case will be fact-dependent; but cases in which a section 19 application against a public prosecutor will be appropriate will be very rare, and generally restricted to those exceptional cases where the prosecution has acted in bad faith or made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him. The court will be slow to find that such an error has occurred. Generally, a decision to prosecute or similar prosecutorial decision will only be an improper act by the prosecution for these purposes if, in all the circumstances, no reasonable prosecutor could have come to that decision.

Application of the Principles to this Case

149. In the application of the relevant principles to the facts of this case, at the outset, I should make two matters very clear.

150. First, as Fulford LJ emphasised (at [96] of the VB Judgment), in the Dismissal Ruling and the VB Judgment, he and I were only concerned with the case as formulated by the SFO against the Applicants from time-to-time; and nothing said in either should be taken as any kind of broader comment in respect of the criminality of the Applicants. I reiterate that caveat in relation to this judgment.

151. Second, it is important to emphasise that this is an application for a section 19 costs order against the SFO. No application has been made for a costs order against any specific legal representative. Generally, the Applicants have been properly careful to aim their criticism at the SFO, rather than at any specific legal representative(s)); and no individual legal representative has had any opportunity to make submissions in respect of his own conduct. It would therefore be inappropriate and unfair to level criticism at any of them. This judgment is focused on the conduct of the SFO, and nothing in it should be taken as any comment, one way or the other, in relation to the conduct of any specific legal representative.

152. Each Applicant stressed different aspects of the way in which the SFO investigated and prosecuted the alleged fraud against him. However, the focus of all were on two matters, namely, in short:

i) The fact that, despite several fundamental changes in the way the case was put and an acceptance by the Applicants for the purposes of the relevant applications that each had been dishonest, the SFO never formulated even a legally coherent and arguable case against any of the Applicants (or Ms Bodman), such that each iteration of the case was inevitably either abandoned or summarily dismissed.

ii) The SFO appointed Mr Winter as prosecution Lead Counsel, in circumstances in which he had already advised several prosecution witness (i.e. the three

partners) in respect of the same matters, so that the independence and impartiality of the prosecution review and pursuit of the case was compromised, in fact and/or reasonable perception.

153. I have very much in mind that section 19 is essentially a summary procedure, and, as I have indicated, it requires an act or omission on the part of the prosecution that was a stark error. It is not appropriate to entertain a substantial fact-finding exercise: if I am to make an order, the basis of it must be relatively simple and straightforward, and be essentially apparent from the findings made in the Dismissal Ruling. That was generally accepted by those appearing for the Applicants; but they submitted that it *was* clear from the Dismissal Ruling (as confirmed in the VB Judgment) that the SFO committed a series of such errors.

154. The following is clear from that Ruling:

i) The charge as set out in Count 1 in paragraph 8 above was certified by the Director of the SFO (and thus sent by the Magistrates' Court to the Crown Court) on the basis of the prosecution case as set out in the Case Statement settled by Mr Winter on 30 May 2013.

ii) There was an inconsistency between the charge and the Case Statement. In short, the Case Statement was based on the proposition that the financial liability to restore the site did not pass to Oak, the fraud being focused on the second (and allegedly dishonest, bogus and crucial) opinion of Mr Davies to the effect that it did. The charge alleged that the conspirators intended that the financial liability to restore the sites *would* pass to Oak. Nevertheless, as the Applicants understood, the prosecution case was clearly that set out in the Case Statement.

iii) However, there was at least one fundamental problem with the prosecution case. It was dependent upon Mr Davies' opinion that the restoration obligations did pass to Oak being, not only wrong, but bogus in the sense that it was so patently wrong in law that he must have appreciated (and he did in fact appreciate) that it was wrong, only giving that opinion because he was being paid a large sum of money to do so. Of course, no one is infallible in the law – but the allegation that a Leading Counsel had prepared an opinion that was bogus imposed a particularly high hurdle for the prosecution. In the event, it was the Applicant defendants' case that Mr Davies' second opinion was, not only not bogus, but correct in law.

iv) As I have described (paragraphs 61-65 above), that was intimated at the first hearing before Wyn Williams J on 4 April 2013; and the essential basis of the Applicant defendants' case in respect of dismissal was set out in the note prepared and served on behalf of Mr Davies for the 23 September 2013 hearing. At that hearing – and until the Dismissal Hearing itself in December 2013 – the SFO insisted on pursuing a case on the basis that the opinion was bogus.

v) However, whilst the SFO have consistently refused to accept Mr Davies' legal analysis, during the Dismissal Hearing, it abandoned the case as Mr Winter had put it, in favour of a case based upon the premise that the restoration

obligations were, to a very large extent, in fact transferred as Mr Davies had opined. From a case based on the premise that the obligations had not been transferred, it changed to a case based on the premise that they had. Mr Parroy's submission that Mr Davies may have come to a conclusion that the prosecution came to accept, but on a wrong legal basis, is not to the point: the first iteration was grounded on the conclusion of Mr Davies' opinion, not the legal analysis by which he formed it. Nothing had occurred to warrant the whole of the SFO's case being changed, except a belated appreciation that there was no realistic prospect of that case succeeding. That appreciation appears to have dawned upon the SFO at some stage between 9 October 2013 (when Mr Parroy reviewed the case, and confirmed it would proceed on the basis of the Case Statement with its dependence upon the opinion being bogus), and the Dismissal Hearing in December 2013 during which that iteration was unceremoniously abandoned.

vi) In the meantime, most of the Applicants had prepared the Dismissal Application on the basis of the first iteration; and, in response to the separate prosecution specialist legal team, had instructed their own specialist legal teams including Leading Counsel who had fully prepared to argue the merits of the issues raised in the first iteration. Amongst other things, as Fulford LJ emphasised in the VB Judgment (at [31]), all of the expenditure of costs by the Applicants upon the issue were entirely wasted, in the sense that the issues to which the costs went did not arise in the case after the first iteration had been abandoned.

vii) Following the abandonment of the case as set out in the Case Statement at the Dismissal Hearing, the SFO developed the second iteration. It contended that this did not amount to a substantial change in its case; but, clearly, it was fundamental. As I have indicated, the object of this conspiracy was the actual transfer of the relevant restoration obligations, by the means of the establishment of Oak and the transfer of the freehold titles to Oak. However, during the course of the Dismissal Hearing, the SFO conceded – if I might say so, entirely properly – that both the object of the conspiracy and the means were lawful. As a result, on conventional jurisprudence, the charge was bound to fail. I raised the issue of whether it was alleged that a criminal conspiracy could comprise lawful means to a lawful end; and, although Mr Parroy ran with that hare and put the arguments for it as well as they could have been put, I held that such a concept was unknown to the common law; and, in the VB Application, it was not suggested that that was wrong as a matter of law.

viii) The third and last iteration of the prosecution case that was raised in the Dismissal Hearing was clearly designed to find some illegality upon which to hang the conspiracy. At the reconvened hearing in February 2014, the SFO suggested for the first time that the establishment of Oak in the beneficial ownership of the conspirators and the transfer of the freeholds to Oak necessarily involved the conspirators committing offences under the Fraud Act 2006 and obtaining secret profits at the expense of Celtic.

ix) This new case was fraught with difficulties. As I have noted, Mr Winter had opined that there were no statutory offences here. In any event, as I commented in the Dismissal Ruling (at [167]), a charge of conspiracy to

defraud various public authorities and only them, reliant for its illegality only on conduct amounting to statutory offences against two private companies (i.e. Oak and Celtic), would be a strange creature that, whilst conceptually possible, is hitherto unknown to, or at least undiscovered by, the common law.

x) But, in the event, I did not determine the merits of this new case – I did not have to – finding that, in all the circumstances, the prosecution should not be allowed to bring forward such a fundamentally changed case at that stage. That was a decision with which Fulford LJ agreed (see VB Judgment at [93]).

155. Those were the only iterations of the prosecution case prior to the Dismissal Ruling. They comprised an original basis of case which was abandoned at the Dismissal Hearing, and two later cases raised at or after the start of the Dismissal Hearing itself that were either abandoned or found by me to be bound to fail as a matter of law.

156. Of course, as I have said, a prosecutor does not act improperly merely because he brings a case that changes or fails, even if that failure occurs as an abandonment or summary dismissal. As a case proceeds, the strength of a case may change, because (e.g.) new evidence comes to light or witnesses do not come up to proof. A genuinely moot point of law might be decided in favour of a defendant.

157. However, in this case, there was no change in the evidential matrix. As Mr Parroy properly accepted at the costs hearing, other than the SFO's legal analysis of the case, nothing materially changed in the evidence or otherwise from the time the charge was brought to the VB Hearing. The SFO's legal analysis, as I have described, was subject to regular, cataclysmic change, each successive change being fundamental. By way of example only, the first iteration was dependent upon the opinion of Mr Davies that the restoration obligations were substantially transferred to Oak with the freehold of the sites being not only wrong but patently and bogusly wrong: the second iteration not only abandoned that premise, but was wholly dependent upon the restoration obligations having been transferred with the freeholds. The first iteration resulted from a view that no statutory offences had been committed: the third iteration was entirely dependent upon such offences having been committed.

158. Each of these iterations was either abandoned – presumably because the SFO accepted that there was no realistic prospect of a conviction on that basis – or it was summarily dismissed on the basis that, as a matter of law, it could not succeed. Each lacked legal merit and was without any realistic prospect of success. Each was, from the outset, doomed to fail.

159. Rexmore and Bentley-Thomas (cited at paragraph 106 above) suggest that, where a prosecution never stood any realistic prospect of success, that may form the basis for a section 19 costs order against the prosecuting authority (see Bentley-Thomas at [24] and [26] per Fulford J). I agree; but, even in those cases, an order does not automatically flow. All relevant circumstances have to be considered; and I accept that where, as in this matter, the prosecution case was the subject of a number of fundamental changes, with each case being destined to fail in any event, that would not of itself necessarily be sufficient to amount to an unnecessary or improper act or omission by the SFO. There may have been good or understandable reasons for such an unhappy state of affairs.

160. The SFO's difficulty in these costs applications is that both I and, in his turn, Fulford LJ were clear as to why this succession of doomed cases was put forward in the way that they were: the SFO never approached this case with the requisite degree of legal analytical care or precision. As Fulford LJ put it (at [93]):

> "I fear the SFO in this case failed at the outset to identify the proper legal underpinnings of the charges, and instead it varied its case in law against the accused as the arguments unfolded and in response to the restrained but penetrating enquiries on the part of Hickinbottom J."

161. It is incumbent upon any prosecutor to mount a charge upon a clear basis, to which the defendant can respond. That obligation lies particularly heavily upon the SFO because (i) it is concerned with serious and complex crimes, and (ii) it is concerned with both the investigation and prosecution of crimes. In respect of such crimes, the SFO is bound to conduct its analysis of the case, both evidential and legal, with some real precision and care. As Fulford LJ said (at [95] of the VB Judgment), that analysis is required before the case is sent for trial: it is important that the legal basis is crystallised and subject to proper scrutiny before the matter is sent for trial. As the case develops thereafter, the analysis of course has to be kept under review.

162. As is clear from the Dismissal Ruling and the VB Judgment, in this case, the legal analysis by the SFO throughout this case was inadequate. Fulford LJ found (and I agree) that this failure was from the outset. He said (and, again, I respectfully agree) that, as the result of the failure to analyse the case properly, the case presented to the Applicants changed with the wind, most iterations in turn collapsing under the slightest breeze, to the real prejudice of the Applicants. It is simply not acceptable for the SFO to pursue a substantial prosecution without having properly tested the legal basis upon which that prosecution is brought, and to maintain that prosecution through a number of fundamental changes still without performing such an analysis.

163. The Applicants submit that, on that basis, I should find that the SFO acted improperly in launching any investigation against the Applicants into these matters, or alternatively in charging them; and there then followed an improper course of conduct, in which they pursued the case through the various iterations I have outlined.

164. Given the circumstances of the relevant transactions (and the fact that all of the Applicants, save for Mr Davies, conceded for the purposes of the Dismissal Application that, in their case, there was prima facie evidence of dishonesty), I do not consider it is arguable that the SFO's decision to investigate was improper within the meaning of section 19.

165. The contention that the decision to charge them was an improper act – because the decision was taken without an appropriate degree of legal analysis – has more force. As has been submitted on behalf of each Applicant, they had all responded to the investigation in some real detail and had all emphasised that the relevant arrangements were lawful.

166. However, given the relatively high threshold for impropriety even in section 19, the wide discretion in the SFO in respect of charging decisions, the fact that they had an opinion from Leading Counsel that such a charge was good and the existence of

sufficient evidence upon which reasonably to conclude that at least five of the six Applicants had acted dishonestly, whilst the judgment is a fine one, I have concluded that the decision to charge was not improper. Whilst some of the Applicants had a stronger case than others – Mr Davies, for example – that is my conclusion in respect of all Applicants.

167. However, once the Applicants had brought forward their application to dismiss and set out fully the basis of it (i.e. 23 September 2013: see paragraph 62 above), I accept the Applicants' contention that the SFO thereafter acted improperly in contesting that application in the manner that they did. I appreciate that (i) the Applicants say that the case against them was not made clear until the Case Statement was served, so that they did not have an opportunity of responding to the case as put before, e.g. in their interviews, and (ii) prior to the 23 September hearing, each Applicant defendant had set out his/her case in some detail; and I accept that the SFO's conduct of the case might have been less than rigorous or even reasonable before the Dismissal Application was brought on. However, I do not consider their conduct to have included improper (or unnecessary) acts or omissions prior to the Applicants setting out their dismissal case for the purposes of the 23 September 2013 hearing. In my judgment, the SFO acted improperly in defending the dismissal application thereafter.

168. It was clear from the application that the case as put forward in the first iteration had no realistic prospect of success, as the SFO belatedly accepted. The other iterations were attempts to save a fatally-holed ship, that presented as a sequence of different cases that stood no real prospect of success or were in essence too late. Having accepted that the case as it had been sent to the Crown Court was unarguable, the SFO continued to fail to analyse the legal case against the Applicants with appropriate rigour, casting round for some means of saving the case and grasping at a succession of straws in the form of cases with, if anything, decreasing rather than increasing legal coherence and merit.

169. In my judgment, this is a quite exceptional case. This was not simply an error of judgment: once the dismissal application had been formally notified and its essential basis set out, no reasonable prosecutor in the shoes of the SFO would have contested that application in the manner that the SFO in fact did.

170. Consequently, in my judgment, the section 19 threshold is satisfied, on the basis of the Denning test. However, even if the Ridehalgh test were appropriate and applicable, and insofar as it applies a higher threshold, the manner in which the SFO conducted this prosecution after the Dismissal Application had been issued was in my view clearly conduct that would not be regarded as proper according to the consensus of professional (including judicial) opinion, such as to satisfy the Ridehalgh test. This is one of the cases in which the threshold test, no matter how formulated, is satisfied.

171. The identified failure by the SFO clearly resulted in the parties incurring costs. Some of the costs incurred can be seen as particularly starkly caused by the failure – e.g. the costs of the specialist counsel employed by the Applicants at the Dismissal Hearing to deal with and counter the case as set out in the Case Statement concerning the effects of the transfer of the freehold of the sites to Oak – but the omission led to the continuance of the prosecution against each of the Applicants on a variety of bases that could never succeed as a matter of law.

172. The costs resulting from the SFO's improper acts as I have found them are, on the face of it, the costs of each Applicant from the 23 September 2013 hearing before Saunders J, including the hearing itself. Subject of course to appropriate assessment, all of those costs causally flow from that SFO failure.

173. In the light of that finding, I need not deal in great detail with the alternative ground relied upon by the Applicants, namely the instruction of Mr Winter. In any event, in substance, this was generally not portrayed as a separate ground, the Applicants simply contending that the instruction of Mr Winter explains why the SFO became locked into a case that could never succeed. Furthermore, as I have stressed, the applications before me are focused on the conduct of the SFO and not individual legal representatives, who have not had the opportunity of being heard. I therefore deliberately restrict my comments in relation to Mr Winter being instructed by the SFO. I re-emphasise that nothing I say should be taken as endorsing any suggestion that Mr Winter acted improperly or in breach of his professional duty in accepting instructions to prosecute when he was already acting for the three partners, or as commenting at all upon his conduct.

174. However, focusing on the SFO's conduct, it is only right that I say this.

175. Paragraph 603 of the Bar Code of Conduct (quoted at paragraph 58 above) at the material time provided that a barrister must not accept instructions where to do so could cause him to be professionally embarrassed, and he will be professionally embarrassed if:

> "… the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced".

That is now reflected in Guidance Note gC73 of the Bar Standards Board Handbook.

176. It is well-established – and, in any event, common sense – that this might apply where a barrister accepts instruction to prosecute in circumstances in which he is already acting in civil proceedings for the complainant (see, e.g., R v Leominster Magistrates' Court ex parte Hereford and Worcester County Council (Unreported, 19 December 1996)) and/or where he is already acting for potential prosecution witnesses.

177. In this case, the SFO identified from the outset the potential difficulties there would be if Mr Winter was instructed to prosecute, having already advised the three partners, including the possibility of him being a witness in at least a civil claim in respect of the same subject matter (see paragraph 40 above). However, the primary reasons for instructing him were that he had already advised the three partners and thus would need less reading-in time (thus potentially saving costs); and he had already advised them that the relevant transaction was prima facie a serious fraud (see paragraph 41 above). In my view, there was from the outset a real chance that his future review of the prosecution case would be coloured by that earlier advice – or there could be a reasonable perception of such colouring – and that he would advise that there was a conspiracy to defraud because he had already advised to that effect and that was one

reason why he was instructed to prosecute or that there could be a reasonable perception of such entrenchment. I stress that, even if there were no conscious influence – and I do not suggest that there was any such – then there was a real risk that the past advice to the three partners might subconsciously influence a prosecuting Counsel in the circumstances of Mr Winter and/or there might be a reasonable perception of such influence.

178. It is no answer for the SFO to say that Mr Winter himself said to them that he did not consider there was a potential conflict. Mr Winter may not have been the best person from whom to seek advice as to whether he was in a potential conflict. The SFO was required to consider the matter for itself.

179. Nor is it an answer that Mr Winter had given the three partners and the SFO identical advice – if that is what he did – because the three partners would clearly obtain a potential benefit from the successful prosecution of Messrs Whiteley and Evans, particularly as they would or might benefit directly from the expulsion of those two men from the M & A Solicitors partnership.

180. The manner in which this matter was apparently raised with the Applicants is also the subject for some reasonable concern. As I have described (see paragraph 47 above and following), before the Applicants were aware of any earlier involvement of Mr Winter with the matter, the SFO determined to "flush out" what the Applicants knew of it – which was in the event, nothing. It was only when Mr Chitham disclosed that Mr Winter had earlier been retained on some unspecified matter – and, later, the statements of the three partners were disclosed – that his role was revealed. Later requests for disclosure of the relevant documents were also met with a coy, and belated, response.

181. These are only examples of why the Applicants contend the instruction of Mr Winter by the SFO was unwise. All of these matters were clearly appreciated by the SFO Case Controller Mr Chitham from January 2013, and he was concerned by them. In my view, his concern – and that of the Applicants – was fully justified. It is simply impossible to see why it was thought by the SFO that, given his earlier role in advising the three partners (of which the SFO were fully aware), instructing Mr Winter to advise and prosecute this case was a good idea.

182. However, given that this is a summary procedure and on the evidence I have before me, I am unpersuaded that it would be appropriate for me to make a section 19 order against the SFO on the basis that it instructed or continued to instruct Mr Winter. On what I have before me, whatever the reasonable perception might have been, I am not persuaded that Mr Winter was in fact, in giving his opinion to the SFO, influenced by the fact that he was instructed by the three partners and gave them the advice he did give them. In the circumstances of this application, although it may well have been unwise and unreasonable, I am not prepared to find that, in instructing Mr Winter, the SFO acted improperly in conducting the case; or that there was any relevant unnecessary or improper act or omission by the SFO in respect of this aspect of the case. In these applications, it would not be appropriate to make such findings on the evidence I have before me.

Costs of the Dismissal Application: Conclusion

183. For those reasons, I consider it is appropriate to make an order under section 19 of the 1985 Act. I consider the costs caused by the relevant acts of the SFO are the five Applicants' costs of the criminal proceedings from (and including) the 23 September 2013 hearing before Saunders J.

184. Under the section 19 scheme, I must make that order in a specific sum; and, having determined the issue of liability, I propose giving directions for the assessment of the costs due, which will be the subject of a separate exercise if those costs cannot be agreed.

Costs of the VB Application

185. Subject to exceptions not relevant to this case, the costs of an application in the High Court are governed by the CPR, even where arising from a criminal case (CPR rule 2.1(1)).

186. The relevant principles are uncontroversial. The general rule is that costs follow the event (CPR rule 44.2(2)(a)); and, in the case of the VB Application, the SFO accept that there are no circumstances here that would warrant any different order.

187. However, the Applicants seek an order for the assessment of those costs on the indemnity basis, rather than the standard basis. The differences in practice are:

i) Proportionality has no place in indemnity costs. On the standard basis, claimed costs are recoverable only if they are reasonable and proportionate; on the indemnity basis, costs are recoverable if they are simply reasonable. Given the serious nature of the issues in this case, the room for costs that were reasonably but disproportionately incurred might be – indeed, should be – less than in some other cases.

ii) The burden of proof. On the standard basis, the burden of proof of showing the claimed costs are reasonable and proportionate lies on the receiving party; on the indemnity basis, the burden of showing the claimed costs are not reasonable generally falls upon the paying party.

188. The Court of Appeal has consistently declined to give guidance as to when an order for costs might be appropriate, on the basis that there is an infinite variety of situations that might justify an order and CPR Part 44 gives judges a very wide discretion (see the commentary in Civil Procedure (The White Book), paragraph 44x.4.3).

189. In the exercise of that discretion, the court must take into account all relevant factors, but particularly the conduct of the paying party. The courts have emphasised that the making of a costs order on the indemnity basis is only appropriate where the conduct of the relevant party is such as to take the situation out of the norm (Excelsior Commercial and Industrial Holdings Limited v Salisbury Ham Johnson [2002] EWCA Civ 879 at [12] per Lord Woolf MR commenting on CPR rule 44.3). The cases show that, short of deliberate misconduct or dishonesty, unreasonable conduct to a high degree will suffice. To take a case materially outside the norm, there needs to be a significant level of unreasonable or otherwise inappropriate conduct in the wider sense (R (Rawlinson and Hunter Trustees) v Central Criminal Court [2012]

EWHC 3218 (Admin) at [6](c) per Silber J, approving the commentary then appearing in the White Book). Although indemnity costs may be ordered where there is no abuse of process or other conduct deserving of moral condemnation (Reid Minty v Taylor [2001] EWCA Civ 1723), in most cases such an award explicitly or implicitly marks an expression of disapproval by the court of the way in which the litigation has been conducted. Inappropriate conduct is used in the widest sense, to include the party's pre-litigation dealings with the receiving party (National Westminster Bank plc v Rabobank Nederland [2007] EWHC 1742 (Comm)).

190. Examples of cases to which I was referred, illustrate the circumstances in which an indemnity costs order might be appropriate, e.g.:

i) where a party maintains a claim or application which it knew or ought to have known was doomed to fail on its facts and on the law (Wates Construction Limited v HGP Greentree Allchurch Evans Limited [2005] EWHC 2174 (TCC) and Noorani v Calver [2009] EWHC 592 (QB));

ii) where a party changes its case making it more difficult for another party to understand and respond to it (see Select Healthcare (UK) Cromptons Health Care Limited [2010] EWHC 3055 (Pat) at [13]-[14] per Mann J: in which the judge noted that the case changed "with decreasing rather than increasing clarity"); and

iii) where a party casts its case disproportionately widely and requires an opponent to meet such a claim (Digicel (St Lucia) v Cable and Wireless Plc [2010] EWHC 888 (Ch) at [47]).

191. The VB Application was refused by Fulford LJ on the following primary bases:

i) For the purposes of the VB Application, the SFO accepted that a conspiracy to defraud must incorporate some unlawfulness, either in its object or its means. They had conceded at the Dismissal Hearing that both object and means relied upon were lawful.

ii) In relation to the third iteration – based on the premise that the conspiracy did involve unlawful means because the conspirators had committed Fraud Act offences – Fulford LJ found that that the application was based upon a misunderstanding of my Dismissal Ruling, which was that I declined to rule on that fundamentally new case.

iii) With regard to the "new case", Fulford LJ found – in two succinct paragraphs – that it was not in the interests of justice (and would be a misuse of the voluntary bill procedure) to permit the SFO fundamentally to reformulate its case when, if the SFO had wished to pursue such a case, it could and should have been formulated at the time the case was sent for trial. He said he was reinforced in that view by "the repeated shifts in the prosecution's stance in this regard, which have operated to the real prejudice of the [Applicants]" (VB Judgment at [95]).

192. It is submitted on behalf of the Applicants that the conduct of the SFO up to the date of the Dismissal Ruling was (as I have found) "improper"; and its conduct thereafter

was no better. The consequences of its failure properly to analyse the case continued, with the result that a VB Application was brought that itself stood no realistic prospect of success, given the high hurdle that such an application has to surmount. Although there was substantial argument before Fulford LJ – in particular on the merits of the new case, which he dismissed on the ground that it was not in the interests of justice to allow the case to be changed as that new case demanded – the judge dismissed each of the grounds upon which the application was sought in summary fashion. The failure of the SFO to show that any aspect of the application had any merit should (it is submitted) be visited in costs on an indemnity basis.

193. I have considered the circumstances in which the VB Application was brought and contested by the SFO, having particularly in mind that I was not the judge who heard the application. Having done so, I am persuaded that an order should be made on the indemnity basis. In coming to that conclusion, I have taken into account all of the relevant circumstances, but particularly the following:

i) The application sought to bring a voluntary bill against the Applicants following a Dismissal Application during which, as I have found, the SFO's conduct of the case was "improper" within the meaning of that word in section 19 of the 1985 Act, in that, even after the deficiencies in the prosecution case had been presented to it, the SFO failed adequately to analyse the legal case against the Applicants with the result that it pursued against them a number of iterations of case, each of which as formulated had, from its advent, no realistic chance of success. That pre-VB Application conduct is a relevant factor in relation to this issue. The failure legally to analyse the case against the Applicants – and the consequences of earlier failure so to do – continued through the VB Application.

ii) The application was brought without proper cognisance of the high hurdle a prosecutor has to overcome in relation to a voluntary bill. The application in respect of the charge brought before me was summarily dismissed by Fulford LJ. The application in respect of the iteration based on Fraud Act illegality was (Fulford LJ found) founded on a misunderstanding of the way in which I dealt with that issue in the Dismissal Hearing: if I might say so, I do not see how that (mis)understanding could have reasonably been formed, given what I said in the Dismissal Ruling. Fulford LJ ruled that the other, new iteration was simply too late, and that it would be a misuse of the voluntary bill procedure to allow the SFO to try and proceed on that basis. He found that there was no merit in any ground.

iii) In respect of the new iteration, that was the subject of full argument over several days, involving specialist Counsel. As with the specialist Chancery and commercial Counsel before me, the costs of those issues were in any event wasteful, because the basis of charge was disposed of by Fulford LJ summarily. On any view, the SFO tried to widen the scope of the claim beyond its proper limits.

194. This application was, on any view, outside the norm. In my view, the conduct of the SFO took it there; and, despite the very high hurdle, I am satisfied that that conduct is worthy of being marked by this court with costs on the indemnity basis.