Case No: T2018-0033

IN THE CENTRAL CRIMINAL COURT

Date: 31/01/2019

Before :

MR JUSTICE EDIS

- -

In the Matter of an Application for a production order under paragraph 5 of Schedule 5 to the Terrorism Act 2000

Between :

CHANNEL 4 TELEVISION CORPORATION	**Respondent**
- and -	
THE COMMISSIONER FOR POLICE FOR THE METROPOLIS	**Applicant**

And in the Matter of an application by JAMES MATTHEWS for a defendant's costs order under s. 16(2) of the Prosecution of Offences Act 1985

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Ben Silverstone (instructed by **Simons Muirhead Burton**) for the **Respondent**
Stuart Biggs (instructed by **Metropolitan Police Legal Department**) for the **Applicant**
James Matthews did not appear and was not represented

Hearing date: 14th December 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE EDIS

Mr. Justice Edis:

1. On 31st July 2018, at a hearing before me in *R v James Matthews*, the Crown informed the court that it considered that there was not a realistic prospect that Mr Matthews would be convicted of offences under the terrorism legislation and therefore offered no evidence against him. A verdict of not guilty was entered. At the same time, I dismissed the application which had been made by the Commissioner of Police for the Metropolis ("**the MPS**") against Channel 4 Television Corporation ("**Channel 4**") under s37 and paragraph 5 of Schedule 5 to the Terrorism Act 2000 ("**TA 2000**"), associated with the prosecution of Mr. Matthews ("**the production order application**").

2. In this judgment the Criminal Procedure Rules are referred to as CrimPR, the Criminal Practice Directions as CrimPD and the Criminal Procedure Rule Committee as CrimPRC.

3. This is an application for an order that the MPS pay the costs of Channel 4 incurred in opposing the production order application. The production order application does not constitute "criminal proceedings", because it involves different parties and is conceptually distinct from "criminal proceedings". There must be a "terrorist investigation" in being before such an order can be made, but there is no requirement that any person should have been charged with any offence. Such an investigation may or may not result in proceedings. In my judgment it is clear that such an application does constitute a "criminal cause or matter", see *R (OAO Belhaj) v. DPP* [2018] UKSC 33 and *R (OAO McAtee) v. Secretary of State for Justice* [2018] EWCA Civ 2851. These definitions have some significance to the construction and application of some of the relevant statutory provisions under consideration, as well as to the route by which my decision may be challenged.

4. Sch. 5 to the TA 2000 confers powers in a Circuit Judge or a District Judge (Magistrates Court). Given that what follows is somewhat technical, it may be sensible to explain the basis on which I have dealt with this part of this case. I am not a Circuit Judge, but s. 66 of the Courts Act 2003 provides:-

> 66 **Judges having powers of District Judges (Magistrates' Courts)**
>
> (1) Every holder of a judicial office specified in subsection (2) has the powers of a justice of the peace who is a District Judge (Magistrates' Courts) in relation to–
>
> (a) criminal causes and matters.
>
> [...]
>
> (2) The offices are–
>
> (a) judge of the High Court;
>
> …….

5. The 2003 Act amended Sch. 5 to the TA 2000 by bestowing the relevant powers on a District Judge (Magistrates' Court) in addition to the Circuit Judge who had previously had exclusive jurisdiction. I therefore have the power to deal with this case. That question was raised in correspondence by the solicitors to the parties before the hearing on 17th April 2018 and no objection was taken to my hearing the case thereafter.

Factual background

6. Between April and May 2015 the majority of filming for the documentary in respect of which the production order application was brought, entitled "The Brits Battling ISIS" ("**the Documentary**"), took place in Iraq and Syria. This resulted in some footage which was broadcast and a great deal more which was not. Both in the broadcast and the un-broadcast footage Mr. Matthews was filmed explaining how he came to be training and preparing to fight against ISIS alongside Kurdish units. On 16th September 2015 the Documentary was broadcast on Channel 4. The indictment subsequently preferred against him alleged that he had attended a place or places in Iraq and Syria and whilst there weapons training for terrorist purposes had taken place, and that this was an offence contrary to s.8(1) and (2)(b) of the Terrorism Act 2006 ("**TA 2006**"). The evidence against him was, essentially, the Documentary.

7. In February 2016 Mr Matthews was subject to a port stop under the TA 2000, Sch. 7 by MPS officers, arrested on suspicion of preparing terrorist acts and released on police bail. He was subsequently interviewed by police in relation to the Documentary. In October 2016 he was informed that no action would be taken against him at that stage, but on 7th February 2018 he was requisitioned to attend Westminster Magistrates' Court to be charged with the offence contrary to TA 2006, s 8. His case was sent to the Central Criminal Court.

8. On 14th February 2018 DC Antonia Holt first made contact with Amos Pictures, which produced the Documentary, stating that the MPS wished to "*[get] hold of some material from the Documentary 'The Brits Battling Isis'* ". DC Holt was referred to Channel 4. Further correspondence followed between the MPS, Channel 4 and Channel 4's legal representatives, Simons Muirhead and Burton.

9. On 1st March 2018 Mr Matthews appeared before the Central Criminal Court at a Preliminary Hearing and Haddon-Cave J made various directions and orders managing the case towards trial in late 2018. He did not provide specifically for the determination of an application by Mr. Matthews to stay the proceedings as an abuse of process. The possibility that such an application might be made was mentioned at the hearing and in a Note prepared by counsel for Mr. Matthews dated 27th February 2018, and the directions included an order that any defence applications had to be made by 27th April 2018. At that stage there was no production order application in being.

10. The production order application was served on 15th March 2018. The MPS requested that the application be heard in the absence of Mr Matthews because "*it is believed disclosure of the information relied upon to him, would prejudice the investigation and prosecution against him*".

11. On 27th March 2018, I was assigned to be the trial judge for this, and another unconnected case involving similar issues, *R. v. Aiden James*. I was informed at the same time that both cases involved an application to stay as an abuse, although in fact such an application had by then only been issued in *James.*

12. On 28th March 2018, Channel 4 served its evidence and skeleton argument in response. The application was opposed.

13. The MPS served its skeleton argument in support of the application on 4th April 2018.

14. The production order application was heard before me in open court on 17th April 2018. At the start of the hearing I said that I believed that Mr Matthews would apply for a stay of the prosecution as an abuse of process ("the stay application"). Channel 4 had not previously been aware of Mr Matthews' position that the prosecution was abusive or of the possibility of a stay application. There had been no reference to either fact in the MPS's production order application notice or any other documents communicated to Channel 4 by the MPS. I said that determination of the production order application should await the outcome of the stay application because it would be inappropriate to make an order for production of journalistic material, which would engage Channel 4's rights under Article 10 ECHR, in circumstances where the prosecution may be stayed for reasons unrelated to that order. If that were the outcome, the intrusion would not have been necessary. I said that this was subject to the possibility that Mr Matthews himself would seek disclosure of any of the material in advance of the hearing of the stay application, because it may include material relevant and helpful to his argument for a stay. I said that Mr Matthews' views should therefore be sought. Counsel for Channel 4 and for the MPS agreed with that approach. Since the parties were ready to make submissions on the production order application, I heard full argument. At the end of the hearing, I directed a further hearing at which directions could be made in respect of the production order application, taking into account Mr Matthews' stance on whether the production order application should be determined before the stay application.

15. The directions hearing took place on 18th May 2018. Counsel for Mr Matthews stated his client's position that the production order application did not need to be decided before the stay application. I therefore directed, among other things, that: (a) the stay application should be heard on a day to be fixed at the end of July 2018 and (b) in the event that the application was unsuccessful, the MPS and Channel 4 would have 14 days to make further submissions and/or seek a further hearing in the production order application, absent which the production order application would be determined on the basis of the written and oral submissions already made. The stay application was subsequently fixed for 31st July 2018.

16. At the hearing on 31st July 2018 counsel for the Crown stated that the CPS and the Attorney General believed that there was no longer a realistic prospect that Mr Matthews would be convicted and therefore offered no evidence against him. A verdict of not guilty was entered. At counsel's invitation I directed that Mr Matthews should submit written representations on the issue of costs within 28 days (subsequently extended), with a decision to be communicated in writing. I ordered that the production order application would be dismissed. I said that Channel 4 may wish to make an ancillary application consequent on that dismissal. I did this in order to ensure that the outcome of the criminal proceedings was communicated to it so that

it could do so if it saw fit. I did not do it because I intended to encourage Channel 4 to make an application if it was not otherwise intending to do so.

17. During the hearing, counsel for Mr. Matthews invited me to press for an explanation of exactly what had changed to alter the assessment of the prospects of Mr. Matthews being convicted. I declined to make any order requiring any explanation to be given, being concerned about jurisdiction, but also about whether I might in due course be asked to order disclosure of the basis of that decision in the case of *R v. Aiden James*. I did not want to prejudge any questions which might arise if that happened. I simply asked Mr. Little QC, who appeared for the prosecution, whether he was prepared to explain why the decision had been made and he repeated that it was a decision based on a change in the evidence in the case against Mr. Matthews which meant that the prospects of success were no longer realistic, and was not a decision that it was no longer in the public interest to prosecute him. He did not accede to my invitation to explain what that evidential change was.

The defendant's costs order for Mr. Matthews, under s.16 POA 1985.

18. On 2nd October 2018 Mr. Matthews' solicitors submitted a claim for costs under s.16 of the POA 1985 as a person who had been sent to the Crown Court for Trial, but not tried and acquitted. This claimed £2,364.00 for Pre-charge Advice and assistance given by a firm of solicitors (Bindmans) who had acted for and advised the defendant on a private basis prior to charge and the grant of legal aid. It also claimed the usual travel costs amounting to £171.60 which were incurred by Mr. Matthews travelling to and from courts, conferences and police stations to comply with bail conditions.

19. This email was placed before me, and at my direction the Court responded

> "His Lordship requires submissions in writing from you addressing the effect of s.16A of the Prosecution of Offences Act 1985 on that part of this claim which relates to the costs of Bindmans."

20. On 12th October 2018 I was informed by email that the element of the claim on which I had sought submissions was not pursued.

21. I therefore make a defendant's costs order in the sum of £171.60 in favour of Mr. Matthews.

22. It may be of some relevance to what follows that Parliament has established a costs regime for criminal proceedings which is a very long way removed from that which applies in civil proceedings in which the starting point is that the successful party is entitled to its costs from the unsuccessful party in litigation. Mr. Matthews must, by statute, bear his own legal costs of defending himself where those costs were privately incurred, even where the proceedings against him were brought by the state, involved his detention while under arrest, and were ultimately not thought to be worth taking to trial. The relevant provisions are ss.16 and 16A of the POA 1985, which are part of the same statutory regime which I am about to consider in dealing with part of Channel 4's submissions.

The application for an order for payment of Channel 4's costs of the production order application

The submissions on the power/jurisdiction to award costs

23. By emails dated 9th and 10th August 2018 Louis Charalambous, the solicitor with conduct of the case for Channel 4, informed the MPS that Channel 4 would seek its costs of the production order application against the MPS, under s.19 of the Prosecution of Offences Act 1985 ("**POA**") and r.3 of the Costs in Criminal Cases (General) Regulations 1986 ("**the 1986 Regulations**").

24. In response, Daniel Futter, a Senior Lawyer with the MPS Directorate of Legal Services, set out the MPS's position that it was not liable for costs on the basis that:

    i) there is no jurisdiction to make an order for costs in relation to an application for a production order under the TA 2000, s.37/Sch 5, para 5;

    ii) the application was not "*inappropriate or unnecessary*"; and

    iii) the application did not meet the test set out in the authorities for an order for costs under the POA s.19.

25. Mr. Ben Silverstone on behalf of Channel 4 filed written submissions on costs on 24th August 2018. On the same day Channel 4 issued an application for costs in the sum of £57,653.22 which is on a form which recites that it is made under rules 45.8, 45.9, or 45.10 of the CrimPR.

26. In the written submissions, Mr. Silverstone said that the power, which undoubtedly exists, under s.19 POA 1985 should be read so as to allow an award of costs to be made in this case.

27. In the original written submissions Mr. Silverstone said:-

    i) Channel Four accepts that there is no directly applicable statutory jurisdiction to award costs. However, it submits that not to award it its costs would be a breach of its Article 10 rights. It submits, that s.19 POA 1985, which ordinarily governs costs in *criminal proceedings* can (and therefore must by reason of s.3 of the Human Rights Act 1998 ("**HRA**")) be read down so as to enable a successful broadcaster-respondent to be awarded costs even in proceedings which are not criminal proceedings and even where the requirement in section 19 for there to have been an *improper act or omission* is not met;

    ii) Alternatively, he submits:

        a) section 19 may be read to permit the award of costs where the Applicant's conduct of the application constituted unnecessary or improper acts or omissions, *and,*

        b) the conduct of the MPS in this case constituted such impropriety.

28. Mr. Nicholas Yeo, counsel for MPS, responded with written submissions dated 21st September 2018. In essence, he submitted that I should dismiss the application because:

    i) There is no jurisdiction to award costs in proceedings for a production order under the TA 2000.

    ii) The refusal of cost would not breach Article 10.

    iii) The court is not equipped (under section 3 of the HRA) to fashion a costs power where there is none because to do so would call for legislative deliberation. This includes reliance on the clear words of the two Acts of Parliament under consideration, the TA 2000 and the POA 1985 and the submission that Parliament clearly intended the effect contended for and was entitled so to do.

    iv) Section 19 cannot be read down in a manner such as to apply to proceedings which are not criminal proceedings, or to award costs where there is no requisite impropriety, as to do so would change the substance of the provision entirely.

    v) In any event, the MPS's conduct of the proceedings did not constitute or involve "an unnecessary or improper act or omission".

29. Perhaps prompted by these submissions, Mr. Silverstone recast Channel 4's argument significantly in the course of a further written note and then in his oral submissions.

30. In a Note submitted on 13th December, the day before the hearing, Mr. Silverstone responded to MPS's reliance on the presumed intention of Parliament as reflected in the absence of a costs discretion in Sch.5 to the TA 2000. Mr. Silverstone submitted that, on the contrary, when the TA 2000 was enacted, Parliament would have assumed that there was power to award costs, even if the Schedule itself was silent on the subject. He pointed out that prior to the TA 2000, a Circuit Judge had the power to order the production of excluded or special procedure material for the purposes of a terrorist investigation under s 17 of, and paras 3-4 of Sch. 7 to, the Prevention of Terrorism (Temporary Provisions) Act 1989 ("**PTA**"). Those provisions did not contain any express power for the award of costs in such applications.

31. However by rule 12(2) of the Crown Court Rules 1982, SI 1982/1109 ("**CCR 1982**"), made under s 52(1) of the Senior Courts Act 1981 ("**SCA**") the Crown Court had a general jurisdiction to "*make such order for costs as it thinks just*" subject to (immaterial) exceptions: see *R (Chaudhary) v Bristol Crown Court* [2015] EWHC 723 (Admin), Fulford LJ and Nicol J. That power could be exercised by a Circuit Judge in proceedings under s.17 of, and paras 3-4 of Sch. 7 to, the PTA 1989 since by s 8(1)(b) of the Senior Courts Act 1981 the jurisdiction of the Crown Court was (and is) exercisable by a Circuit Judge. The power existed alongside the other powers of the Crown Court, including costs powers, under such provisions as s.45 of the SCA and s.19 of the Prosecution of Offences Act 1985 ("**POA**").

32. It is clear from the Parliamentary debates which led to the enactment of paras 4-10 of Sch. 5 to the TA 2000 (with which the Court is concerned in the present application)

that those provisions were modelled on paras 3-4 of Sch. 7 to the PTA 1989. In the debate on the Terrorism Bill in Standing Committee D on 25.01.00, the Rt Hon Charles Clarke (then Minister of State at the Home Office) stated, in relation to Sch. 5: *"…the schedule provides the police with powers to obtain search warrants, production orders and explanation orders in terrorist investigations. It is based on schedule 7 of the PTA*".

33. Mr Clarke went on to observe that *"[t]he essential difference between the powers in schedule 7 and those in PACE is that the PTA provisions do not require the police to satisfy a magistrate or judge that they have reasonable grounds for believing that a serious arrestable offence has been committed*". Sch. 1 to PACE contains an express power to award costs, and one issue which arises is whether that is a material (even if not "essential") further difference between the two schemes. Mr. Silverstone makes the point that there is no suggestion in this debate that Parliament considered that the court should not have the power to award costs in proceedings under paras 4-10 of Sch. 5 to the TA 2000. He submits to the contrary that since, by rule 12(2) of the CCR 1982, the Crown Court had a general jurisdiction to award costs (as well as, in Channel 4's submission, under the SCA, s.45 and POA, s.19), it is to be assumed that Parliament enacted Sch. 5 on the basis that the court did exercise such a power in such proceedings. Following a review of the other Hansard material concerning the passage of the Terrorism Bill, no other substantive debate of those provisions has been identified.

34. Only after the enactment of the Courts Act 2003 did rule 12(2) CCR 1982 cease to apply: see *Chaudhary* at §§23-33. It is submitted that that chronology undermines the MPS's reliance on Parliament's intention in enacting the regime for production orders under the TA 2000.

35. Mr. Silverstone submitted that the fact that Parliament did not actually consider that costs should be unavailable in such proceedings means that little, if any, margin of appreciation should be accorded to the state by the court in conducting the proportionality test under Article 10 ECHR: see *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (ECtHR (Grand Chamber)) at §§78-79.

36. On oral submissions, Mr. Silverstone's position was somewhat further refined.

i) First, he said that because Sch. 5 to the TA 2000 is silent on costs, it is not necessary to read it down or to apply s.3 of the HRA. Instead, the court is required by s.6 of the HRA to read CrimPR 45.7 as if it did contain a provision permitting the court to award costs because that is necessary in order to comply with its statutory duty. s.6 provides as follows:-

> 6.— **Acts of public authorities**.
>
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—

> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

ii) He relies on s.3 of the HRA only if necessary, and contends that the court is required to read Sch. 5 as though it contained a discretionary power to award costs.

iii) In oral submissions, Channel 4's reliance on s.19 POA and s.45 SCA was relegated to a subordinate position. These had been his principal contentions previously.

37. During the hearing on 14th December 2018 before me, my attention was drawn to the current CrimPR and CrimPD and I was invited by both sides to consider whether the absence of a costs power was a consequence not of Parliamentary decision, but of the CrimPRC's decision not to replicate rule 12(2) of the CCR 1982 in the CrimPR. Whereas it is possible, to some extent, to ascertain the mind of Parliament for the purposes of identifying any relevant "margin of appreciation" from the words of the statutes it enacts and from the debates which precede them, it is far more difficult to do this with the CrimPRC.

The submissions on the merits, if power exists

38. So far as the outcome of the application, if there is a power to make the order sought, Channel 4 submits that

i) it is necessary for the preservation of the Article 10 rights of journalists and broadcasters that there should be a power to award costs if production orders are unsuccessfully sought against them. This is because otherwise there would be a chilling effect in the free investigation of difficult subjects, such as the present, which would inhibit the freedom of the press and would be contrary to the public interest. The chilling effect would operate at two levels, and would particularly affect individuals or small corporations. First, it would tend to affect their decisions about what to investigate, and what they should steer clear of for fear of becoming embroiled in costly litigation with the state. Secondly, at the point where a production order is sought, it would encourage the journalist to surrender his or her material for fear of otherwise incurring substantial costs in resisting the production order;

ii) these consequences would be highly undesirable because it is of the utmost public importance that the activities of British subjects involved in conflict abroad, and of the state in dealing with those activities, should be subject to scrutiny. It is submitted that this scrutiny becomes impossible where the journalist is unable to give a reliable assurance to sources that they will not be exposed (unless, like Mr. Matthews, they want to be). It is also suggested that

any perception among such sources that the journalist was a *de facto* investigative arm of the British state would be dangerous to the journalists and render their investigations impossible. I am condensing these submissions because they rely on the evidence served in answer to the substantive production order application and because they rely on concepts and factual situations which are very well rehearsed in the authorities. The production order application was heard in open court, and the evidence in support is in the public domain. It is not necessary to set it out further in this judgment on costs. I accept that these concerns are well-founded in fact, and that together they are a very important consideration. The authorities which drive this conclusion are well-known and will not benefit from a further digest in this first instance ruling on costs. In the present context the principles were set out in *R. (oao Malik) v. Manchester Crown Court* [2008] EWHC 1362 (Admin). I have them well in mind without setting them out.

iii) So far as the conduct of the production order application in this case is concerned, Channel 4 principally relies on the failure of MPS to tell it in the application that an application to stay the proceedings as an abuse was likely. If it had known that, it is argued, it would have made an application to adjourn the application pending the outcome of the stay application and would not have spent nearly as much as it did. This failure is said to be a breach of the duty to give full disclosure when making applications of this kind. An aspect of that is the decision to apply for a production order without notice to Mr. Matthews, the defendant in the criminal proceedings. That decision prevented him from telling Channel 4, as otherwise he might have done, that he was planning to apply to stay those proceedings as an abuse of process.

39. Mr. Stuart Biggs, who appeared for the MPS at the hearing, advanced submissions to the contrary.

The legal background

40. As will appear from the summary of the submissions above, the law in this area requires a number of sources of law to be considered. I will do this in two strands. First I will try to identify the materials relevant to the submission that Sch. 5 to the TA 2000 should be read as if it contained a provision in the same terms as paragraph 16 of Sch. 1 to the Police and Criminal Evidence Act 1984, and secondly I will approach the POA 1985.

Strand 1: materials relevant to the construction of Sch. 5 of TA 2000.

41. Sch. 1 to PACE includes the following provision, which Sch. 5 of the TA 2000 lacks:

> "Costs
>
> 16
>
> The costs of any application under this Schedule and of anything done or to be done in pursuance of an order made under it shall be in the discretion of the judge."

42. The regime in Sch. 1 to PACE and that in Sch. 5 to the TA 2000 are similar, but the context in which they may be applied is different. PACE relates to a wide spectrum of alleged criminal activity, whereas the TA 2000 concerns terrorism. Terrorism presents a level of threat to the public at large, nationally and internationally, which most other crime does not. As Mr. Clarke pointed out in the passage quoted above, the TA 2000 powers are available even where there are no reasonable grounds to suspect that an offence has been committed. The threshold is that the material to which the application relates must be likely to be of substantial value to a terrorist investigation. It is unnecessary to set out a full analysis of all the differences between the two regimes. It is only necessary to say that there are differences, and that they flow from the particular type of criminality which the TA 2000 addresses. A somewhat broader scope for the making of orders in terrorism cases was created for its production order regime than applies to other criminal cases. It is conceivable that a rational legislature might decide that the absence of a costs power would be conducive to the efficacy of the regime because a risk as to costs may deter the police from making applications which ought to be made. There is no evidence that Parliament, or anyone else, ever actually did think this.

43. The power in paragraph 16 of PACE allows the judge to make an order either for or against a journalist or broadcaster. It creates a position where the holder of journalistic material is at risk of an adverse order for costs if its resistance to a production order application is unsuccessful, as well as to the chance of recovering costs if it succeeds. It does not, however, contain any "steer" as is found in CPR Part 44.2 which contains a general rule that the starting point where a civil court decides to exercise its discretion to make an order for costs is that the unsuccessful party will be ordered to pay the costs of the successful party. It is therefore difficult for any police officer seeking a production order to know what order for costs may be made depending upon the outcome of the application. It is equally difficult for a person responding to such an application to anticipate what might happen as far as costs are concerned.

44. By s.45(4) of the SCA 1981 it is provided that

> (4) Subject to section 8 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (substitution in criminal cases of procedure in that Act for procedure by way of subpoena) and to any provision contained in or having effect under this Act, *the Crown Court shall, in relation to* the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and *all other matters incidental to its jurisdiction*, have the like powers, rights, privileges and authority as the High Court. [emphasis added].

45. The High Court has an inherent power to award costs, and it is submitted that s.45(4) carries that power into the Crown Court. As appears below, that submission has been settled against Channel 4 by a decision of the Divisional Court in *R (on the application of Chaudhary) v Bristol Crown Court and Anor* [2015] EWHC 723 (Admin) Fulford LJ and Nicol J, but I record that it was made to me nonetheless.

46. At the time when TA 2000 was enacted, and at the earlier time when its predecessor the PTA was enacted, there were Rules for the conduct of cases in the criminal courts.

These were the CCR 1982. They contain rules made under a number of enabling Acts and include the following

> Costs Between Parties in Crown Court
>
> **12 Jurisdiction to award costs**
>
> (1) Subject to the provisions of section 109(1) of the Magistrates' Courts Act 1980 (power of magistrates' courts to award costs on abandonment of appeals from magistrates' courts) and sections 22(4) and 81B(4) of the Licensing Act 1964 (application of section 109(1) of the Act of 1980 to appeals under sections 21 and 81B of the Act of 1964), no party shall be entitled to recover any costs of any proceedings in the Crown Court from any other party to the proceedings except under an order of the Court.
>
> (2) Subject to section 4 of the Costs in Criminal Cases Act 1973 and to the following provisions of this Rule, the Crown Court may make such order for costs as it thinks just.
>
> …….

47. Rule 12 was made under the enabling power contained in s.52 of the Supreme Court Act 1981, as it then was, in force at the time of its making. This said

> 52 Costs in Crown Court
>
> (1) Crown Court Rules may authorise the Crown Court to award costs and may regulate any matters relating to costs of proceedings in that court, and in particular may make provision as to—
>
> (a) any discretion to award costs ;
>
> (b) the taxation of costs, or the fixing of a sum instead of directing a taxation, and as to the officer of the court or other person by whom costs are to be taxed ;
>
> (c) a right of appeal from any decision on the taxation of costs, whether to a Taxing Master of the Supreme Court or to any other officer or authority ;
>
> (d) a right of appeal to the High Court, subject to any conditions specified in the rules, from any decision on an appeal brought by virtue of paragraph (c);
>
> (e) the enforcement of an order for costs; and
>
> (f) the charges or expenses or other disbursements which are to be treated as costs for the purposes of the rules.

> (2) The costs to be dealt with by rules made in pursuance of this section may, where an appeal is brought to the Crown Court from the decision of a magistrates' court, or from the decision of any other court or tribunal, include costs in the proceedings in that court or tribunal.
>
> (3) Nothing in this section authorises the making of rules about the payment of costs out of central funds, whether under the Costs in Criminal Cases Act 1973 or otherwise, but rules made in pursuance of this section may make any such provision as is contained in section 4 of that Act (awards by Crown Court as between parties).
>
> ……

48. It will be noted, therefore, that Rule 12(2) was made under a direct statutory power to authorise the Crown Court to award costs. The Crown Court has no inherent costs jurisdiction, and exercises that power only when authorised to do so by primary legislation. There is a general rule making power in paragraph 10(2) of Sch.5 to TA 2000, but not a specific power relating to costs in the form which appears in s.52 SCA 1981.

49. The CrimPR do not contain an equivalent provision to Rule 12(2) of the CCR 1982 and Mr. Silverstone submits that this may be oversight and, in any event, cannot retrospectively alter the proper understanding of Parliament in enacting Sch. 5 to the TA 2000 which would have been on the basis that a costs power existed.

50. On the other hand, it may be that the CrimPRC took the view that its powers were limited. The Committee's competence under s.69 of the Courts Act 2003 is to make rules governing the practice and procedure to be followed "in the criminal courts". Its competence is not expressed to extend to the practice and procedure on the exercise of a jurisdiction conferred on a particular category of judge, as distinct from a jurisdiction conferred on one of the criminal courts, the jurisdiction of which court then is exercised by a particular category of judge as a judge of that court. The powers in consideration here are given not to the Crown Court, but to a Circuit Judge or District Judge (Magistrates Court). The application for a production order does not constitute "criminal proceedings" and it is not automatically to be assumed that a judge deciding such an application is sitting in a "criminal court" in respect of which the CrimPRC has power to make rules.

51. The distinction just identified derives support from a decision of the Divisional Court in *Chaudhary*, in which Fulford LJ said at [31]

> It is to be noted that the scheme of the CPR was to preserve many of the Crown Court Rules by adoption and I stress that section 69 Courts Act 2003 only covers the criminal aspects of the work in the Crown Court and the Magistrates' Courts. Section 84 Senior Courts Act 1981 continued to give the Crown Court Rule Committee (now abolished: S.I 2012/2398) the power to make Rules of Court that regulate the practice and procedure in non-criminal cases in the Crown Court. Therefore,

> the pre-existing rule-making scheme was only partially replaced. Therefore, the Crown Court Rules did not, in their entirety, cease to have effect and, for instance, they continue to govern aspects of civil cases in those courts. In summary, the pre-existing rule-making powers were varied to exclude any power to make procedural rules in relation to criminal matters (see, for example, Courts Act 2003, Schedule 8, paragraph 245(1) and (2) and the Schedule to the Courts Act 2003 (Consequential Amendments) Order, paragraph 15(1) and (2), along with the changes that were made to the wording of section 84 of the Senior Courts Act 1981)."

52. That decision is authority for the propositions that

    i) The old power conferred by CCR 1982 r.12 no longer exists in relation to proceedings which are properly categorised as a "criminal cause or matter", see [43]; and

    ii) The Crown Court does not acquire a general jurisdiction to award costs by virtue of s.45 of the SCA 1981, set out above: see [45].

53. The rule making powers under Sch.5 of TA and Sch. 1 of PACE were further amended by s.82 of the Deregulation Act 2015. So far as the latter regime is concerned, the 2015 Act says

> (4) In the Terrorism Act 2000, in Part 1 of Schedule 5 (making of orders and issue of warrants in respect of obtaining information in terrorist investigations: England and Wales and Northern Ireland), in paragraph 11 (which deals with the issue of warrants in respect of excluded or special procedure material), after sub-paragraph (4) insert—
>
> "(5) Criminal Procedure Rules may make provision about proceedings relating to a warrant under this paragraph."

54. I do not think it possible to say whether the decision of the CrimPRC not to replicate rule 12(2) from the 1982 Rules in relation to criminal causes or matters being dealt with by the Crown Court, and in particular, to production order applications under paragraph 5 of Sch.5 to TA 2000 arose from a concern about the ambit of its powers, or from oversight, or from a decision that there should be no costs power. I do not think it helpful to speculate.

55. No rules concerning costs have been made in relation to production order applications under the TA 2000. The costs provision of the CrimPR is Part 45, which is derivative in that it does not create a power to make an order about costs. It only applies where the court has a statutory power to make such an order and regulates how that power should be invoked and exercised. Part 47 of the CrimPR first appeared in the CrimPR 2015 which came into force in October 2015 and did not then, and does not now, contain any provision as to costs. It provides a procedural scheme for the making of production order applications, among other things.

56. There is no provision in the CrimPR for any costs power which replicates r.12(2) of the CCR 1982. There are costs powers which derive from s.52 SCA 1981, which are included in the definition of the scope of CrimPR 45 contained in rule 45.1 and the Note beneath it, which lists the powers to make costs orders. These are CrimPR 45.6(1)(b) and 47.7(1)(b). CrimPR Part 45.1 deals with costs, but lists the statutory origin of the powers it concerns, and does not itself purport to be the origin of such a power. That list includes the costs regime in the POA and the 1986 Regulations. There is no rule which purports to create a power to make an order for costs which does not derive from a statutory power, nor is there any specific statutory power conferred on the CrimPRC to make such rules. Paragraph 16 of Sch. 1 to PACE is, of course, a specific statutory power to make a costs order. There appears to be no instance of a power to make an order for costs in the absence of a specific statutory power which may then result in rules being made under its aegis.

Strand 2: legal materials relevant to the application under s.19 POA 1985

57. This strand of materials begins with s.19 itself:

> **Other awards**
>
> 19 Provision for orders as to costs in other circumstances
>
> (1) The Lord Chancellor may by regulations make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order as to the payment of those costs.

58. The relevant regulations are the 1986 Regulations:

> **Part II**
>
> **Costs Unnecessarily or Improperly Incurred**
>
> 3 Unnecessary or improper acts and omissions
>
> (1) Subject to the provisions of this regulation, where at any time during criminal proceedings--
>
> (a) a magistrates' court,
>
> (b) the Crown Court, or
>
> (c) the Court of Appeal
>
> 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
>
> …..
>
> (3) An order made under paragraph (1) shall specify the amount of costs to be paid in pursuance of the order.
>
> …….

59. This jurisdiction, as I have recorded above, is subject to CrimPR Part 45. Part 45.8 contains procedural rules for the conduct of applications under s.19 POA and Reg. 3 of the 1986 Regulations. This is because this jurisdiction is expressly conferred on, among others, the Crown Court and s.52 of the SCA 1981 provides the necessary rule-making power. Nothing turns in this application on those rules.

60. The legal grounds of opposition to this application contend that

    i) these proceedings are not "criminal proceedings" even though they are a "criminal cause or matter" and therefore the power under s.19 does not arise. I have started my judgment by concluding that these are not criminal proceedings, but that they are a criminal cause or matter.

    ii) the conduct issues said to amount to "unnecessary or improper acts or omissions" in this case, taken at their highest, lack the necessary "impropriety" to justify the making of an order.

61. *Materials relevant to whether these are "criminal proceedings"*

    i) *Customs & Excise v. City of London Magistrates' Court* [2000] 1 WLR 2020 is authority against Channel 4 on this issue, albeit one decided before s.3 HRA came into force.

    ii) The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.14 provides a definition of "criminal proceedings", albeit only for the purposes of that provision:-

> 14 Criminal proceedings
>
> In this Part "criminal proceedings" means—
>
> (a) proceedings before a court for dealing with an individual accused of an offence,
>
> (b) proceedings before a court for dealing with an individual convicted of an offence, including proceedings in respect of a sentence or order,
>
> (c) proceedings for dealing with an individual under the Extradition Act 2003,

> (d) proceedings for binding an individual over to keep the peace or to be of good behaviour under section 115 of the Magistrates' Courts Act 1980 and for dealing with an individual who fails to comply with an order under that section,
>
> (e) proceedings on an appeal brought by an individual under section 44A of the Criminal Appeal Act 1968 (appeal in case of death of appellant),
>
> (f) proceedings on a reference under section 36 of the Criminal Justice Act 1972 on a point of law following the acquittal of an individual on indictment,
>
> (g) proceedings for contempt committed, or alleged to have been committed, by an individual in the face of a court, and
>
> (h) such other proceedings, before any court, tribunal or other person, as may be prescribed.

62. A review of the use of the phrase "criminal proceedings" in the CrimPR and CrimPD reveals no example which requires any broader meaning than that which was given in *Customs & Excise v. City of London Magistrates' Court*.

Discussion and decision

The costs power in Sch.5 of TA 2000

63. The first and most important question in relation to this series of submissions is whether it is necessary to construe Sch. 5 as containing a power to make a costs order in order to give effect to Channel 4's Article 10 right to freedom of expression. Sch. 5 as drafted gives a journalist a right to challenge the making of a production order before a judge, and the order is only made if the judge is satisfied of the access conditions. This enables a journalist to fulfil his or her duty to protect sources and journalistic material. That duty is an inherent and important aspect of the journalist's right to freedom of expression under Article 10. Because the law is somewhat technical and these issues can give rise to difficulty, it is common for media organisations to instruct lawyers to conduct these cases. Although not necessary because of any rule of court, this is a sensible step. As events have shown in this case, this can lead to substantial costs liabilities being incurred. Unless I accede to Channel 4's submissions, this will be effectively a "no costs regime".

64. I do not accept that the inability to recover costs after successfully resisting a production order application is a breach of the article 10 rights of the broadcaster and neither do I accept that the existence of a costs discretion would necessarily have the beneficial consequences contended for by broadcasters as a matter of policy and no adverse consequences.

65. The first point is that I see no reason to assume that a "no costs regime" inhibits access to justice. That is what I am invited to do on the basis of evidence from one source only. I have no broader evidence on the likely behaviour of different parties if there is a costs discretion, as contrasted with their behaviour if there is not. It is

asserted that journalists who are self-employed or who work for small organisations are likely to be deterred from investigating cases and resisting production order applications if they know they cannot recover costs if they win. I find that difficult to accept. It is much more likely that they would be deterred by being exposed to a potential liability to pay the costs of the police if an order were made despite their resistance. It will not be easy to predict the outcome of applications of this kind and, while a journalist can control the size of his or her own costs bill by using cheaper and fewer lawyers than a national broadcaster might choose, the journalist cannot control the costs of the police legal team. There may be sources of funding for a journalist from trade unions or other interested bodies, and, if not, the journalist is likely to be able to make the necessary points without legal representation. Self-representing parties are frequently encountered in civil proceedings of all kinds, and journalists, at least, have the necessary professional skills and knowledge to understand the issues involved in their duties as journalists.

66. I also find it difficult to accept that costs should necessarily follow the event, as if this were private litigation. The nature of the jurisdiction is to enable a judge to permit intrusion into legitimate journalistic activity in furtherance of the public interest in the effective investigation of terrorism. Notionally, these applications involve the police on the one hand trying to investigate terrorism in the interests of public safety, and journalists carrying out their important work in the public interest ensuring that power is held to account in a free society. It is the role of the court to balance these opposed public interests and it is quite conceivable that an order may be made or refused without the losing side having done anything wrong at all. They may, on the contrary, have contributed valuably to the court's consideration of the issues even though the interest they were seeking to protect did not prevail. Both parties to these applications will be seeking to perform duties on many occasions: the duty to investigate as against the duty to keep sources confidential. The journalist may well be duty bound and also entitled to decline to hand over material without a court order, and may also desire to ensure that an order is made only if it lawfully should be. This is a matter of some importance in the present case because the application has never been adjudicated upon. It is not to be assumed that Channel 4 would have won if it had been fought out. There was only one confidential source involved, a person called "the commander", and the police were not interested in knowing who he is. They were happy to have footage only of Mr. Matthews and images of "the commander" could have been pixelated out. Mr. Matthews was not a confidential source but a willing participant in the making of the documentary about him. I do not think he had editorial control over what footage of him was broadcast and what was not. This is not to say that the order must inevitably have been made, but it does indicate that the issue here was more balanced than the result taken in isolation may suggest. If an order had been made requiring disclosure would it necessarily have been right to order Channel 4 to pay the police costs? Mr. Silverstone accepted that the discretion for which he argued would cut both ways. In my judgment, there are good reasons why a "no costs regime" may be a sound approach for the legislature to take in this area.

67. More generally, there has been a very considerable amount of work done over the last few decades to improve access to justice after the effective abolition of civil legal aid in the civil courts where the usual rule is that the loser pays the winner's costs. Before that happened, the position was that commercial organisations which were

sued by litigants with the benefit of legal aid did not recover their costs if they won. Subsequently a contingency fee system was established which was then replaced in some areas of litigation by Qualified One Way Costs Shifting. This involves insurers in bearing costs when they win.

68. In Tribunals where an increasing amount of important litigation is now decided, costs orders are the exception and not the rule. This is to preserve access to justice for those of modest means.

69. In the European Court of Human Rights a practice has developed which is quite different from the English and Welsh system which involves an award of costs to the winning party applying the "indemnity principle", so that the winner is entitled to an indemnity against the costs he has incurred (subject to adjustments for reasonableness and proportionality). A very modest award of legal expenses is made in that court. It seems hard to contend that the English and Welsh system is an essential part of the effective vindication of Convention rights.

70. I mention these examples to show that the position as far as costs is concerned is much more nuanced than Channel 4's submissions would suggest. I do not believe that the question is one which a judge sitting alone with very limited evidence should approach by making assumptions. It is a matter for investigation and considered legislation or, at least, rule making by an informed committee reflecting on information collected from multiple sources after consultation. Would a costs power of the kind suggested, exercised in the manner suggested, have a beneficial or adverse impact on the proper functioning of the production order system?

71. At [42] above, I offer a possible explanation for the difference between Sch. 1 to PACE, with its express costs power, and Sch. 5 to TA 2000 where it is absent. I did not suggest that this was actually the explanation. My function, as I understand it, is to construe the legislation according to ordinary principles and then to read it differently if required to do so by either s.6 or s.3 of the HRA. Ordinary principles require a construction which gives effect to the presumed intention of Parliament as deduced primarily from the words used and the statutory context. As a matter of historical fact it may not be possible to ascertain what Parliament actually intended or even whether it ever considered the issue and formed any intention one way or the other. That does not allow the court to rewrite the legislation as it likes. As a matter of generality, as I have explained, costs powers vested in the Crown Court or in a Circuit Court Judge or a District Judge (Magistrates Court) are specifically granted by statute. The Act which conferred the power to order production, sch. 5 to the TA 2000, did not confer a costs discretion. The historical reason for this is unknown, but it is obvious from the statutory context that the provisions of the TA 2000 are modelled on the PTA which was itself influenced by PACE. The inclusion of a costs power in PACE and its exclusion from TA 2000 is not, in my judgment, simply to be ascribed to error and ignored. Rule 12(2) of the 1982 Rules was in existence when PACE was enacted and if the submission of Channel 4 were sound there would be no need to have a specific costs power in Sch. 1 to PACE. There is one, however.

72. I therefore conclude that, before applying the HRA, Sch. 5 to the TA 2000 should be read in conjunction with the other costs provisions applying to criminal causes or matters in the Crown Court or the statutory jurisdiction of Circuit and District Judges and should be read to exclude a costs discretion. That is because that is what it says.

73. For the reasons given above at [63]-[70] I do not accept that the HRA requires any other reading than the natural one which I have just accepted. Channel 4 does not have a Convention right to an order for costs because the production order application against it was dismissed without being determined. Such a right could only be acquired if it were necessary in order to render the primary right in Article 10 to be effective. For the reasons I have given I am not persuaded that this is so.

74. Accordingly, I cannot accept the principal case now advanced by Channel 4.

s.19 POA 1985

75. The application for an order under this provision must fail because these are not "criminal proceedings" to which the POA 1985 applies. I think it is acceptance of this point which led Mr. Silverstone to relegate s.19 to the position of a fall-back case. Given what I have already said about my view of the relevance of Article 10 in this area, I see no reason to attempt to read s.19 in any other way than its natural meaning. I also accept Mr. Biggs' submission that to do otherwise would create a different provision. In order to explain this, it is necessary to examine the provision and its purpose with a little care.

76. It is not a general costs discretion. It has nothing to do with the "costs follow the event" approach found in most (but not all, as I have pointed out) civil proceedings. It exists for a purpose which is to be ascertained from the words of the section construed in its statutory context. That purpose is to give the criminal courts a power to apply a costs sanction to parties to criminal proceedings who are in breach of their obligations. This is necessary to address a culture which may once have existed where the parties routinely failed to comply with the directions of the court and to prepare and present their cases efficiently. The CrimPR, CrimPD and Better Case Management are all the result of attempts to improve the efficiency of the criminal courts in the interests of witnesses, victims, parties and the public generally. The criminal justice system does not exist for the resolution of private disputes, but as a means of determining guilt or innocence and dealing justly with offenders. Many individuals who are drawn into it have legitimate expectations of the way they will be treated, and an acute personal interest in the outcome and the quality of justice which is achieved. Ultimately, the public interest in efficient, fair and effective criminal justice is the principal justification for the system and for many of the statutory powers given to the courts by Parliament in this context. This is true of the POA 1985, and of s.19 in particular. In my judgment its primary function is to equip the court with a power to encourage efficiency, rather than to compensate parties who have incurred legal expenses as a result of their involvement in criminal proceedings. The fact that it achieves that function by the award of such compensation is a benefit to the recipient which is essentially a by-product. That, in my judgment, follows from the focus in s.19 on the conduct of the paying party as the factor determining whether an award is made, rather than on the circumstances of the receiving party or the outcome of the proceedings. If the aim of the provision were to compensate a party who has been put to expense by being involved in criminal proceedings then a simple costs discretion would be all that is required. Instead, there is s.19, and also, as I have pointed out at [22] above, s.16A which exists to deny such compensation to a defendant who has been acquitted or not tried having been sent for trial to the Crown Court (among other things). Further, there is the power under s.18(1) of the POA 1985 to order a convicted defendant to pay the prosecution costs. In other words, the

statutory scheme provides for the treatment of the legal costs incurred by the prosecution and the defence in the course of criminal proceedings, and s.19 is an additional power aimed at something other than that. It exists to deal with procedural misconduct. It deals with parties. Ss.19A and 19B confer powers to make costs orders against legal representatives and third parties respectively and also require a finding of misconduct before an order can be made. It is now necessary to consider the nature of the misconduct required for a costs order under s.19 or, more accurately, the meaning of the statutory phrase "unnecessary or improper act or omission".

77. There has been some controversy in the decided cases about the circumstances in which an order for costs should be made against a public prosecutor under s.19 POA. A public prosecutor is in a broadly similar position to the police when making an application such as the present. The issue is what the word "improper" means in that provision. Hickinbottom J (as he then was) in *Evans and others v. SFO* [2015] EWHC263 (QB); [2015] 1 WLR 3595 [146] held that it did not mean "impropriety" in the usual sense of that word:-

> "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."

78. I harbour some doubt about the basis on which Hickinbottom J decided that he was bound not to follow the Divisional Court in *R v. Sheffield Crown Court* [2014] 1 WLR 4639 at [28]-[30] which held

> **The meaning "improper act or omission"**
>
> 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 *DPP v 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 v Horsefield* [1994] Ch 205 where Sir Thomas Bingham, MR (as he then was), gave the following definition 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."
>
> 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 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 *R v Geoffrey Counsell* given at the Crown Court at Bristol on 13 March 2014 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*.

79. That case undoubtedly did consider the earlier decision in *Director of Public Prosecutions v Denning* (1992) 94 Cr. App. R. 272 and declined to apply it in the light of the subsequent enactment of s.19A which came into force on May 1st 1991 and subsequent judicial interpretation of that new provision. *Denning* was decided on 7th March 1991. The court in the *Sheffield* case held that the meaning of the word "improper" in s.19 was the same as it is in s.19A, namely that explained by Lord Bingham MR in the passage cited by the Divisional Court at its paragraph 28.

80. There is an issue of statutory construction which has never been fully considered in any of the cases. As I have said, *Director of Public Prosecutions v Denning* (1992) 94 Cr. App. R. 272 was decided before s.19A was enacted and s.19 was not considered in *Ridehalgh v. Horsefield*. *R v Choudhery* [2005] EWCA Crim 2598 was a decision in which the issue was not argued at all, as far as I can see, and I would not attach the same importance to it as Hickinbottom J did. The misconduct in that case would satisfy any of the proposed tests and was egregious. The issue as to the test was not only not considered it was not necessary to the decision. Similarly, in *R (Singh) v Ealing Magistrates' Court* [2014] EWHC 1443 (Admin) the *Sheffield Crown Court* case was not cited or considered. Hickinbottom J attached significance to this, although the *Ealing* case was decided on 8th May 2014 and the *Sheffield* case on 20th June 2014. The latter could not have been cited in the former. The sequence of events recorded in the *Evans* judgment at [138] is therefore not right. In the *Ealing* case the blameworthy act was the failure to serve papers so that none were available at the time when the case was to be heard. There had to be an adjournment and the defendant paid his lawyer twice instead of once. There was no satisfactory explanation for this. The court directed itself in accordance with *Denning* in the absence of any argument to the contrary and made an order under s.19. An order could plainly also have been made under s.19A if the defaulting legal representative had been identified because his or her mistake was both negligent and unreasonable. Whether it was also improper would not have required decision.

81. The statutory construction issue is this: the word "improper" appears in s.19 with the word "unnecessary" and there is a presumption that it was intended to add something

to that word. Its meaning is to be derived from its context so that, taken with the word "unnecessary", it forms a satisfactory and intelligible test for the threshold for making a costs order against a party. The word appears in s.19A with the words "unreasonable" and "negligent" and is intended to add something to them. That is a different context from s.19 and this may lead to the conclusion that the meaning is different. On the other hand, it may be the same and Parliament may have used a different formula in s.19A because it deals only with legal representatives whose duties are established as a matter of law, procedural rules and codes of conduct. S.19 deals with "parties" which includes alleged criminals, who may be individuals or multi-national corporations, to whose conduct such things may be less relevant. Where the party is also, in effect, a lawyer it would not be wholly unreasonable to say that the test is likely to be the same under both provisions. A difference would require some justification. In theory (given that the CPS largely acts through "legal or other representatives" as defined in s.19A) an application could often be made under either s.19 or s.19A in respect of the same conduct. Did Parliament when adding s.19A by the Courts and Legal Services Act 1990 intend that a CPS lawyer should avoid liability because of the higher test in that section, but that the CPS should be exposed to liability for the same conduct under the already extant s.19? It is to be noted that s.19 allows an order to be made against a party for acts done or omissions made on its behalf, presumably usually by a lawyer. Should the party be liable for an act or omission in this way for which the lawyer is not liable under s.19A? If so, this might allow the CPS to make costs applications much more frequently than they do where defence lawyers fail to conduct their cases properly, in the s.19 sense, but do not act improperly in the s.19A sense. In most such cases the defence lawyers would be liable to compensate their client for the liability to which they had exposed him or her. Is this desirable? If not, is it an inevitable consequence of the words used by Parliament in s.19 which now have to be construed in the light of the 1990 amendment to add s.19A and, perhaps, s.19B?

82. In *R v. Cornish (Erroll); R v. Maidstone & Tunbridge Wells NHS Trust* [2016] EWHC 779 (QB); [2016] Crim LR 560 Coulson J considered *Evans* and it was agreed by the parties in the case that *Evans* was rightly decided.

83. Hickinbottom J in *Evans* said that the dispute about the correct test is largely academic in the case of a state prosecutor, see his judgment at [147]:-

> "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."

84. The argument is, perhaps, interesting in theory but not of great moment. Hickinbottom J's test for impropriety under s.19 is somewhat lower than mine would be, but they are both high. I consider that the statutory purpose, which I have endeavoured to identify above, namely controlling procedural misconduct, militates in favour of the word "improper" being given the same meaning in both s.19 and s.19A, and that the meaning should be that identified in the *Sheffield* case. Although the word "unnecessary" has received little attention in the cases, it may also warrant some

explanation. Not every proper step taken by a party to criminal proceedings can be described as "necessary". A prosecutor or a defender may have a wide range of options about what evidence to serve, or what allegations to make, and about many other things which are done, or not done, depending upon the exercise of professional skill and judgment. A party is not liable to pay costs caused by an act of this kind, merely because what was done was not "necessary" but optional. It must also have been improper in some way.

85. For all these reasons, it would, as I have said at [75] above, fundamentally change the nature of the provision to construe s.19 as conferring a general discretion to make a costs order in favour of a person who is not a party to criminal proceedings as defined. It would also fundamentally change the provision to treat it as a general discretion to make a costs order based on the outcome of the proceedings. It would also fundamentally change the provision to read it as applying to proceedings other than "criminal proceedings" as defined above. That type of proceedings has a costs regime of which s.19 is just one part.

86. If that is wrong, then in my judgment the application would also fail on the facts. I am prepared to assume that the failure to tell Channel 4 that there was to be an application to stay as an abuse was "improper". I also assume that ticking the box contending that the hearing should be held without notice to Mr. Matthews was both unnecessary and improper. On the facts of this case there was obviously no reason why he could not be given notice and, therefore, he should have been. On my interpretation of the law this is an assumption which is generous to Channel 4, because these failures were errors of judgment rather than acts or omissions of "impropriety". No evidence has been served on behalf of MPS to explain or justify them. However, this does not mean that there would necessarily have been any saving of costs, at least without the supervening decision of the Attorney General and the CPS to discontinue the prosecution. In *Aiden James* I dealt with the application to stay the prosecution as an abuse by refusing it. The Court of Appeal on an interlocutory appeal upheld my decision and the trial starts in March. I am confident that the result would have been the same in this case also, because the applications were extremely similar. On that basis, if the MPS had told Channel 4 about the application to stay, the application for the production order would have been heard at a later date after the stay had been refused. Whether it would have failed or succeeded cannot be known, but it would, I am sure, have been contested in the same way and at the same cost as was the case in April. Therefore, the first omission which I have assumed (but not held) to be improper for this purpose did not cause Channel 4 to incur the costs in question. The second assumed omission may have caused very modest additional costs because a hearing was held to ascertain Mr. Matthews' views about the production order. However, because I did not adjourn the argument to enable him to be notified the real costs to which this application relates were not wasted by the failure to give notice of the application to the defendant.

87. Channel 4 is entitled to contend that, on the facts of this case, the improper act did cause them to incur costs which would otherwise have been avoided. This is because the prosecution offered no evidence against Mr. Matthews on 31st July 2018, before any hearing of the production order application could have taken place if it had been postponed until after the determination of the proposed application to stay the proceedings as an abuse of process. The decision by the prosecution to take that step

was not foreseeable at the time when the MPS made its application for a production order, and did not tell Channel 4 that there was to be an application to stay. It was not connected to the production order proceedings in any way. It happened on 31st July but, as far as I know, might have happened at any time once the change in the evidence (whatever it was) became apparent. If different directions had been given in relation to the stay application it might have been decided before 31st July. The costs may have been avoided by a decision which was unrelated either to the stay application or the production order application but arose out of the substance of the evidence against Mr. Matthews on the charge he faced. I consider that this factor is relevant to the exercise of my discretion as to whether to make a costs order which is contingent on misconduct. Had matters proceeded as anticipated at the time of the misconduct no costs would have been saved. The misconduct was not, therefore, of a kind which might reasonably have been expected to cause costs to be incurred unnecessarily. Investigators cannot stop all preparation for a trial as soon as an application to stay is mentioned by the defence. They have to carry on, otherwise the trial, if the application fails, will be avoidably delayed. It would not be a sensible use of the s.19 power, which exists to encourage efficiency, to make an order which might have exactly the opposite effect. Although a causal relationship connecting the costs with the misconduct is not a legal requirement for an order under s.19, and although there was a causal relationship of a kind between the misconduct and the fact that the costs might otherwise have been saved, it seems to me that it is relevant to the exercise of my discretion that the costs concerned would have been incurred in any event, but for an unforeseeable event not related in any way to the misconduct.

88. I would therefore decline to make an order as a matter of discretion under s.19 even if I were satisfied that I had power to make one.

s.45 SCA 1981

89. I have dealt with this at [52(ii)] above and it is not necessary to say more. The matter is settled by authority which is binding on me and with which I respectfully agree.