CARC3165 21 March 2000

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY KIERAN CAFFREY FOR JUDICIAL REVIEW

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CARSWELL LCJ

Introduction

In this application the applicant seeks judicial review of a decision of a resident magistrate Mrs Bernadette Kelly, sitting in Londonderry Magistrates' Court on 9 September 1999, whereby she ordered that the applicant pay the sum of £12,000 towards the costs of a prosecution brought by the Maritime and Coastguard Agency (the Agency) under section 100 of the Merchant Shipping Act 1995. The applicant pleaded guilty to the offence of failing in a number of respects to take all reasonable steps to secure that the ship Royal 1 was operated in a safe manner. The magistrate imposed a fine of £5000 and ordered the applicant to pay the sum of £12,000 towards the prosecutor's costs. The applicant submitted that the court did not have jurisdiction to include in the costs so payable any sum representing the expenses involved in investigating the offence and also that the magistrate took into account incorrect considerations when reaching her decision.

The Proceedings in the Magistrates' Court

The prosecution arose out of events on 4 March 1999, when the Royal 1 got into serious difficulties in heavy weather off the north coast of Northern Ireland and nearly sank. The master sent out a Mayday call and a Coastguard rescue helicopter winched three crewmen off the ship, leaving the master alone on board. He succeeded in bringing the vessel into port in Londonderry. The ship was there examined on behalf of the Agency and an investigation was commenced into the safety of her operation. She had been carrying a cargo of logs and when she ran into bad weather the

cargo shifted and the ship listed to 40 degrees. She was taking in water because the wooden hatchboards were covered only with thin plastic sheeting instead of the proper canvas tarpaulins – the master had been instructed not to use the tarpaulins because they were expensive to repair. There were deficiencies in lifesaving and other equipment, in manning the vessel and in the instructions given to the master. In consequence complaints were made on 10 March 1999 against three persons, one of whom was the applicant, that they as managers or part owners of the vessel --

> "did not take all reasonable steps to secure that the ship was operated in a safe manner by any or all of the following namely failure to ensure a qualified GMDSS operator on board failure to ensure a certificated engineer on board failure to ensure sufficient manning on board failure to ensure watertight integrity of the cargo hold failure to ensure proper supply of life saving equipment failure to ensure validity of life saving equipment failure to provide correct instructions to the Master in relation to on board emergency procedures and protection of the environment failure to ensure a proper chart correcting system and failure to ensure proper instructions to the Master for the safe carriage of timber cargoes, Contrary to Section 100 Merchant Shipping Act 1995 as amended."

The three defendants, who all had addresses outside the jurisdiction, were believed to be the owners and operators of the ship. They were arrested pursuant to a warrant when they came to Londonderry on 10 March 1999. They appeared in court on 11 March, when each was granted bail. The court ordered that the applicant be admitted to bail on terms of his own cash bail of £7000, with one independent cash surety in the amount of £10,000. These sums were promptly lodged in court, the surety being the applicant's wife, and the applicant was released.

The case was adjourned a number of times between then and September 1999. In May 1999 the resident magistrate required to be informed what course the defendants proposed to adopt, and the applicant's solicitor told her that he intended to admit the offence. The other two defendants indicated that they intended to contest the charge and the hearing of their case was fixed for 13 September 1999. The applicant's case was adjourned pending the conclusion of that hearing. Prior to 13 September 1999 the Agency decided to withdraw the charges against one co-defendant and the

other admitted the offence. The hearing was advanced to 9 September 1999 by consent and took place on that day.

Counsel for the Agency outlined the prosecution case to the court, setting out the circumstances of the rescue of the crew and the deficiencies in manning and instructions and in the safety precautions on board. He also informed the court of the very bad safety record of this vessel, which had been detained on five occasions in the previous eighteen months with serious deficiencies. The offence with which the applicant was charged carried a maximum fine of £50,000 at the magistrates' court.

The applicant's solicitor informed the court that the applicant was unemployed. He states in paragraph 3(vi) of his affidavit sworn on 18 January 2000 that he informed the court that although the applicant was the beneficial owner of the business he had ceased trading and the vessel had been sold. The magistrate states, however, in her affidavit that although she was informed that the vessel had been sold she was not told that the applicant had ceased trading, nor was she given any information about the amount of the sale price or how the proceeds of sale were applied. The solicitor states that he submitted that the applicant would be unable to pay a substantial fine, which could result in his being committed to prison, but the magistrate avers that no plea of impecuniosity was made and that it was represented only that the applicant was "not well off". Counsel for the Agency pointed out, however, that the ship had made some 83 trips over the previous two years, which at an average of £4500 per trip would have earned £373,500 for the owners. The owner had not spent his earnings in safety precautions, charts or insurance and according to the Agency had not paid the crew members for some time. The magistrate decided to impose a fine of £5000.

Counsel for the Agency then asked for costs. He had earlier produced a schedule setting out the estimated expense of the rescue operation, which came to some £43,720. He did not, however, claim that the Agency was entitled to recoup these costs. He did put forward a claim for the costs of investigation of the offence, totalling £16,464, and for the legal fees amounting to £8500 inclusive of

VAT. He had furnished a schedule to the applicant's solicitor at the commencement of the hearing in which these costs were set out, but very little detail was contained in this document. The magistrate ordered the applicant to pay the sum of £12,000 towards the prosecution costs, regarding that sum as representing approximately half of the costs incurred. She was obliged under Schedule 1 to the Magistrates' Courts (Costs in Criminal Cases) Rules (Northern Ireland) 1988 (the 1988 Rules) to set out in a special order her reasons for ordering legal costs of an amount greater than those prescribed by that Schedule. Her reasons did not appear in the order itself, but were set out separately in the following terms:

> "The proceedings were both technically and legally complex. They concerned in total some nine specific breaches of the legislation which the prosecution said would amount to a breach of Section 100. This was the first successful prosecution under this Section, the only previous one (under the previous Act) having gone to the House of Lords. It is also the first prosecution by the Enforcement Unit of the Maritime and Coastguard Agency in Northern Ireland.
>
> It involved detailed legal advice from an early stage from the issue of proceedings through the investigatory process. Written evidence was served on the Defendants amounting to 178 pages."

In paragraph 6 of her affidavit the resident magistrate set out in detail her reasons for concluding that the applicant had sufficient means to pay the fine and costs ordered by her:

> "The second ground of challenge raises the issue of the Applicant's means. At the hearing, the information presented to me by counsel for the Complainant was that the Applicant had been operating his vessel commercially with frequency and carrying cargo of substantial value, through various countries for some considerable time. This was not challenged by the Applicant. Mr McKeone, the Applicant's solicitor, in making his plea in mitigation, represented to me that the defendant's business was not doing well. There was, however, no suggestion made that the business was being or had been wound up. I was told that the defendant had disposed of his boat but was not told why this was done nor was I given any information as to the amount of proceeds of sale nor any information on how the sale proceeds were spent. The defendant's wife was not referred to during the plea in mitigation. The information given to me about the Applicant's means was extremely sparse and no relevant supporting documentary materials - such as a winding up order or proof of receipt of statutory benefits or proof of disposal of assets - was submitted. I also took into account that no application for legal

> aid had been made at any time. Further, I had regard to the ability of the Applicant and his spouse to lodge in court, with considerable speed, a total sum of £17,000. I was not, at any stage, given any indication that the lodgement of this monies created difficulties for the defendant or his wife. The Applicant was at all times described as a company director - not a fisherman - in the proceedings before me. No protest of impecuniosity had been made at the time when I fixed the Applicant's bail conditions and no subsequent application to vary the terms of bail had been made. No protest of impecuniosity was made during the plea in mitigation though it was indicated that the defendant was not `well off'. On the basis of all the information made available to me, I was not persuaded by the representations made to me by the Applicant's solicitor and was of the opinion that the Applicant was a person of reasonably substantial financial means."

The magistrate also says in paragraph 9 that she disregarded the sum of £10,000 lodged in court as cash bail by the applicant's wife, though she had accepted in paragraph 6 that she took it into account as indicative of the means at the applicant's disposal. The order required the payment of the costs "forthwith", with imprisonment for twelve moths in default. The applicant was obliged to make immediate payment of the fine and costs, for as he resided outside the jurisdiction he would otherwise have been detained until payment was made. The applicant's wife consented to the release of the cash bail lodged by her, having signed a document to that effect in advance of the hearing, and it was credited towards payment of the fine and costs. The remainder of the sum ordered by way of costs was paid by the applicant. In his affidavit sworn on 2 December 1999 the applicant's solicitor states that the applicant had very little money left from the sale of the vessel after discharge of a number of debts. For this reason he advised that the applicant's wife should execute an authority for the use of the cash bail lodged by her towards payment of any fine and costs. None of these facts was communicated to the court when it was dealing with the applicant's means or the amount of the fine and costs.

The Statutory Provisions

Provision for the payment of costs in criminal prosecutions is made by the Costs in Criminal Cases Act (Northern Ireland) 1968. Section 1(1) and (2) provides for payment of the costs of the prosecution:

" **1.**-(1) Where any criminal proceedings are instituted by or on behalf of, or taken over by, the Attorney General, or are instituted by a constable, or by or on behalf of the Ministry of Home Affairs (in this Act referred to as `the Ministry'), the costs of the prosecution of such proceedings (including any costs incurred in connection with any matter preliminary or incidental to, and with any appeal from, those proceedings) shall, subject to subsection (3), be defrayed in the first instance by the Ministry.

(2) Except in the case of proceedings to which subsection (1) applies, the costs of the prosecution of any criminal proceedings (including any costs incurred in connection with any matter preliminary or incidental to, and with any appeal from, those proceedings) shall, subject to subsection (3), be defrayed in the first instance by the prosecutor."

Section 2(1) then makes provision for the payment of costs by a person convicted of an offence:

" **2.**-(1) The court by or before which any person is convicted of any offence may, in addition to any other order which it may make on or in consequence of such conviction, order, subject to rules made pursuant to section 7, that person to pay -

(*a*) where the proceedings have been instituted by or on behalf of, or taken over by, the Attorney General, or have been instituted by a constable, or by or on behalf of the Ministry, to the Ministry; and

(*b*) in any other case, to the prosecutor;

the whole or any part of the costs of the prosecution, including any costs incurred in connection with any matter preliminary or incidental to the trial."

It appears from the wording of these provisions, especially the reference to payment in the first instance by the Ministry, that they are to be read together.

The power conferred by section 7 of the Act to make rules was exercised by the passing of the 1988 Rules. Under Rule 4, where a convicted person is ordered to pay the whole or any part of the costs of the prosecution, legal fees are to be determined by the court in accordance with Schedule 1, which provides:

" 1. The Court may order the payment of -

(*a*) such amount not exceeding £75 as the court thinks just, in respect of the remuneration and outlay (other than outlay

incurred in connection with witnesses recoverable under rule 5 and Schedule 2) of the solicitor for the prosecution or, as the case may be, the defence in taking instructions, preparing the case, attending in court and where counsel is not instructed conducting the proceedings at the hearing and in respect of all other reasonable charges incidental to the proceedings;

(*b*) where it is reasonable to instruct counsel, such amount not exceeding £75 as the court thinks just, in respect of counsel's fees; or

(*c*) such amount for costs and outlay incurred by a party appearing in person as the court thinks just.

2. Where the court, having regard to the exceptional length, difficulty or complexity of the proceedings, is satisfied that the amounts prescribed in paragraph 1 are inadequate, it may, notwithstanding that paragraph, make a special order for the payment of a greater sum.

A special order under this paragraph shall contain a full statement of the reasons for making it."

Allowances for professional and expert witnesses are prescribed by Schedule 2, as substituted by the Magistrates' Courts (Costs in Criminal Cases) (Amendment) Rules (Northern Ireland) 1994 (the 1994 Rules). In view of our conclusions about the ambit of section 2(1) it will not be necessary for us to examine the contents of Schedule 2 in detail, and we need only observe that the hourly rates and other allowances appear to be substantially below the sums claimed by way of expenses of the persons who carried out the investigation of the offence in the present case.

In section 46(2) of the Interpretation Act (Northern Ireland) 1954 it is provided that the term "costs" shall include "fees, charges, disbursements, expenses or remuneration". This is supplemented by section 10(2) of the 1968 Act, which provides:

" (2) Without prejudice to the definition of `costs' in section 46(2) of the Interpretation Act (Northern Ireland) 1954, references in this Act to costs paid or defrayed, or ordered to be paid or defrayed, by the Ministry, or by a prosecutor, defendant, appellant or respondent,

> as the case may be, under this Act shall be construed as including references to any sums so paid or defrayed, or ordered to be paid or defrayed, as compensation to, or expenses of, a witness or other person or as counsel's or solicitor's fees."

Another reference to the components of "costs" in an order appears in section 3(3). Where an order is made for the payment of the "costs of the defence" by the prosecution, it is provided:

> "(3) The costs of the defence mentioned in subsection (1) shall, subject to subsection (4) and to rules pursuant to section 7, be such sums as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred by him in carrying on the defence (including, in the case of a trial, any proceedings preliminary or incidental to such trial) and to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in, or incidental to, his attendance to give evidence."

Costs of Investigation

Mr Maguire argued on behalf of the respondent for a wide interpretation of the meaning of the word "costs" in section 2(1) of the 1968 Act. He relied on the concluding phrase of section 2(1) and cited *Neville v Gardner Merchant Ltd* (1983) 5 Cr App R (S) 349 and *R v Associated Octel Ltd* [1997] 1 Cr App R (S) 435 in support of the proposition that "costs" should include the expense of investigation of the offence. Mr Rodgers sought to establish, however, that in the context of the 1968 Act the meaning was confined to the legal fees, relying on the earlier decision of *R v Maher* [1983] 2 All ER 417, decided under section 4 of the Costs in Criminal Cases Act 1973, which he submitted was more akin to section 2(1) of the 1968 Act than the wider terms of the provisions under which the other cases cited were decided. It is necessary accordingly to examine each of these decisions in more detail.

In *Neville v Gardner Merchant Ltd* the respondent company pleaded guilty to a number of offences under the Food Hygiene (General) Regulations 1970. The magistrates ordered it to pay the costs of the prosecutor, including preparatory work carried out by the prosecutor's senior legal officer, but disallowed any amount in respect of time spent by the prosecutor's senior environmental

officer, who carried out the inspection which led to the proceedings. It was held that the justices had misdirected themselves in holding that they had no discretion to award such investigation costs, for they could be comprehended within the terms of section 2(2) of the Costs in Criminal Cases Act 1973, which provided:

> "On the summary trial of an information a magistrates' court shall, on conviction, have power to make such order as to costs to be paid by the accused to the prosecutor as it thinks just and reasonable … "

The Divisional Court held that not only did the justices have a discretion to award such investigation costs, but that prima facie they should be awarded in full.

The appellant company in *R v Associated Octel Ltd* had pleaded guilty to two counts relating to safety at work, following a serious fire caused by the leak of ethyl chloride due to a failure in the plant. The judge in the Crown Court imposed a fine of £75,000 on each count and ordered the appellant to pay prosecution costs totalling £142,655.33. The appellant challenged on appeal the inclusion in the award of certain costs of the expense of investigation of the incident by the Health and Safety Executive. The trial judge had declared robustly:

> "… if this kind of incident occurs, it has to be properly and carefully investigated. No stone must be left unturned in the investigation of a case of this nature. And if that costs £142,655.33, well, so be it. I do not see why the taxpayer should pick up that particular bill."

Counsel for the appellant did not dispute the existence of a discretion on the part of the court to order the payment of such costs as a matter of principle under the terms of section 18(1) of the Prosecution of Offences Act 1985, which was in the same terms as section 2(2) of the Costs in Criminal Cases Act 1973. His submission, which was rejected by the court, was that the judge should have determined which of the costs of investigation should justly and reasonably be visited upon the appellant. The Court of Appeal confirmed that under section 18(1) of the 1985 Act the costs of the prosecution could properly include the expense of investigation of the incident with a view to prosecuting the defendant.

In both of these cases the court distinguished *R v Maher* on the ground that it had been decided under a more restrictive provision, section 4(1) of the 1973 Act, which provided:

> "Where a person is prosecuted or tried on indictment before the Crown Court, the court may –
>
> (*a*) if the accused is convicted, order him to pay the whole or any part of the costs incurred in or about the prosecution and conviction, including any proceedings before the examining justices …"

The appellants in *R v Maher* all pleaded guilty to counts charging conspiracy to import and supply heroin involving enormous sums of money. Two at differing stages pleaded guilty to murder and another was found guilty of murder after a long trial. The judge made orders for costs against them in varying sums, the largest being £1 million. The Court of Appeal reduced the costs order by a substantial amount, removing large items which it regarded as falling outside the provisions of section 4. O'Connor LJ, giving the judgment of the court, placed some emphasis on the word "incurred", which meant "incurred by the prosecutor". He referred also to the provision in section 3(3) of the 1973 Act (of which there is no direct equivalent in the 1968 Act) quantifying the costs payable out of central funds to the prosecutor:

> " The costs payable out of central funds under the preceding provisions of this section shall be such sums as appear to the Crown Court reasonably sufficient - (*a*) to compensate the prosecutor ... for the expenses properly incurred by him in carrying on the proceedings, and (*b*) to compensate any witness for the prosecution ... for the expense, trouble or loss of time properly incurred in or incidental to his attendance."

He held that such items as jury expenses were clearly not within section 4(1)(*a*), for such expenses were not incurred by the prosecutor or chargeable to him. He added:

> "We hold that the wording of s 4(1)(*a*) does not permit the Crown Court to order the accused to pay as costs the expense of items which it could not order as costs to be paid out of central funds."

He went on to conclude at page 419c:

> " Other suggested items were even more remote: overtime payments to, and travelling expenses of, officers engaged in the

> investigation, at £300,000. Similar payments for security at Lancaster Castle and the judge's lodgings, another £300,000. None of these items could be charged to the Director of Public Prosecutions and cannot be included in any bill of costs.
>
> The only reliable figures for costs of the prosecution available to us were for counsels' fees, the Director of Public Prosecutions' costs and witnesses' expenses, which together amounted to at least £188,000."

If both *R v Maher* and *Neville v Gardner Merchant Ltd* are correct, accordingly, the result under the 1973 Act was that a magistrates' court could order a convicted person to pay the costs of investigation, whereas the Crown Court could not, which might be regarded as a strange and unsatisfactory outcome. It was no doubt for that reason that the provisions were unified in section 18(1) of the Prosecution of Offences Act 1985 in the form thitherto applicable to the magistrates' court. We do not have the same dichotomy, and the only provision whereby a court may order the payment of costs by a person convicted of an offence is section 2(1) of the 1968 Act, which applies in all courts.

We have reached the conclusion that the breadth of section 2(1) of the 1968 Act is not sufficient to include investigation costs. Its terms seem to us to approximate more nearly to those of section 4(1)(*a*) of the 1973 Act than to section 2(2), in that the phrase "costs of the prosecution" is not dissimilar to "costs in and about the prosecution". The use of the word "incurred" in section 2(2) points to the conclusion that the costs to be allowed must be such that the prosecutor is liable to pay them in the first instance. In a cause such as the present, where the investigation and prosecution have both been carried out by the same agency, that requirement is fulfilled. It would not be, however, in very many of the cases in which the Director of Public Prosecutions is the prosecutor, where the costs of investigation by the Maritime and Coastguard Agency or by the police would not have been "incurred" by him. It would be anomalous if a convicted defendant's liability to pay such costs depended on the identity of the person who incurred the costs. Defence costs payable under section 3(3) are clearly limited to legal fees and witnesses' expenses, and it seems to us

from our reading of section 10(2) that prosecution costs are intended to be so confined. In our opinion the words "preliminary or incidental to the trial" in section 2(1) are intended to refer to the cost of remands, adjournments and interlocutory proceedings, not investigation of the incident out of which the prosecution arose. The resident magistrate was accordingly in error in including investigation costs in the award of costs against the applicant.

The Magistrate's Inquiry

We turn then to the second limb of the applicant's submission, that the resident magistrate failed in a number of respects to inquire in the correct manner into his means and ability to pay a fine and costs, and did not have proper regard to the provisions of the 1988 and 1994 Rules. It was submitted on his behalf that in these respects the magistrate failed to take into account the correct considerations or took into account incorrect considerations, which also constituted an error of law. In view of our conclusions on the issue of the allowance of investigation costs, we do not need to make any express finding on the question whether the magistrate was in error in her approach to the assessment of the amount which the applicant should have been ordered to pay in respect of costs, but the observations which follow may be of assistance to her in her reconsideration of the question and to other magistrates when dealing with similar issues.

(a) The Means of the Offender

It is a well established principle, now enshrined in Article 29(1) of the Criminal Justice (Northern Ireland) Order 1996, that a sentencing court when imposing a fine must have regard to the means of the offender, and the same applies when making an order for payment of costs. The principles were reviewed recently in *R v Northallerton Magistrates' Court, ex parte Dove* [1997] Crim LR 760, in the course of which Lord Bingham of Cornhill CJ stated a number of propositions, some of which are material to the present case, and all of which bear repetition in full:

> " (1) An order to pay costs to the prosecutor should never exceed the sum which, having regard to the defendant's means and any other financial order imposed upon him, the defendant is able to pay and which it is reasonable to [] order the defendant to pay.

(2) Such an order should never exceed the sum which the prosecutor has actually and reasonably incurred.

(3) The purpose of such an order is to compensate the prosecutor and not to punish the defendant. Where the defendant has by his conduct put the prosecutor to avoidable expense he may, subject to his means, be ordered to pay some or all of that sum to the prosecutor. But he is not to be punished for exercising a constitutional right to defend himself. If it were otherwise, one would expect to find a right of appeal to the Crown Court under s. 108 of the Magistrates' Courts Act. As it is, there is no right of appeal on the merits of such a costs order to the Crown Court, and a defendant's only right of recourse is on grounds of unlawfulness or excess of jurisdiction by case stated under s. 111 of the 1980 Act or by way of a judicial review.

(4) While there is no requirement that any sum ordered by justices to be paid to a prosecutor by way of costs should stand in any arithmetical relationship to any fine imposed, the costs ordered to be paid should not in the ordinary way be grossly disproportionate to the fine. Justices should ordinarily begin by deciding on the appropriate fine to reflect the criminality of the defendant's offence, always bearing in mind his means and his ability to pay, and then consider what, if any, costs he should be ordered to pay to the prosecutor. If, when the costs sought by the prosecutor are added to the proposed fine, the total exceeds the sum which in the light of the defendant's means and all other relevant circumstances the defendant can reasonably be ordered to pay, it is preferable to achieve an acceptable total by reducing the sum of costs which the defendant is ordered to pay rather than by reducing the fine.

(5) It is for the defendant facing a financial penalty by way of fine or an order to pay costs to a prosecutor to disclose to magistrates such data relevant to his financial position as will enable justices to assess what he can reasonably afford to pay. In the absence of such disclosure justices may draw reasonable inferences as to the defendant's means from evidence they have heard and from all the circumstances of the case. I would draw attention to the proposition stated in the second volume of Dr Thomas' Current Sentencing Practice at para J1-2G where it is stated:

> `It is the obligation of the offender to put before the sentencer any information about his means which he wishes the sentencer to take into account in determining the amount of the fine. If he fails to do so, the sentencer is not obliged to make enquiries on his own initiative.'

I would also draw attention to the authority cited in support of that proposition: *R v Wright* (unreported, 12.11.76). In the course of giving judgment in that case the Lord Chief Justice said:

> `It is of course a fundamental principle of sentencing that financial obligations must be matched to the ability to pay, and there is an overriding consideration that financial obligations are to be subjected to that test. But that does not means that the court has to set about an inquisitorial function and dig out all the information that exists about the appellant's means. The appellant knows what his means are and he is perfectly capable of putting them before the court on his own initiative. If, as happened here, the court is only given the rather meagre details of the appellant's means, then it is the appellant's fault.'

(6) It is incumbent on any court which proposes to make any financial order against a defendant, whether by way of fine or costs, to give the defendant a fair opportunity to adduce any relevant financial information and make any appropriate submissions. If the court has it in mind to make any unusual or unconventional order potentially adverse to a defendant, it should alert the defendant and his advisers to that possibility."

The information before the magistrate in the present case was exiguous, but it has to be borne in mind, as Lord Bingham stated in his proposition (5) in *Ex parte Dove,* that the onus is on the defendant against whom a court proposes to make an order for costs to bring before the court information which may be material to his ability to pay. If the magistrate was to take into account the fact that the applicant had made large profits out of previous voyages, it would have been advisable for her to make some inquiry about what had happened to those profits and the present state of the applicant's business. She may have suspected that the applicant had access to resources which had not been disclosed to the court, but it would have been prudent to investigate in some fashion the applicant's income and capital position before assuming that he could pay a large sum, especially when she had been informed that he was unemployed.

(b) Legal Fees and Witnesses' Expenses

Schedule 1 to the 1998 Rules specified the amounts which a court may order to be paid in respect of fees to solicitors and counsel. A special order may be made for payment of a greater sum where the court, having regard to the exceptional length, difficulty or complexity of the proceedings, is satisfied that those amounts are inadequate. Mr Rodgers did not dispute that the magistrate was entitled to make a special order in the present case, but we would remind magistrates that a full statement of their reasons for doing so should be incorporated in the order of the court. The bill of costs submitted on behalf of the prosecution was rugged in its simplicity, and we would commend to magistrates and prosecutors the observations of McKinnon J in *R v Associated Octel Ltd* [1997] 1 Cr App R (S) 435 at 441-2:

> "(i) the prosecution should serve upon the defence, at the earliest time, full details of its costs, so as to give the defence a proper opportunity to consider them and to make representations upon them, if appropriate. Although the respondent's schedule in this case was served only a few days before the hearing, Mr Hand did not complain about that, nor did he seek an adjournment or intimate that he had any difficulty in dealing fully with the issue of costs. After all, the appellant, with all the expertise at its disposal, was in the best position to assess what a proper investigation would cost;
>
> (ii) if a defendant, once he has been served with a schedule of the prosecution's costs wishes to dispute the whole or any part of the schedule he should, if possible, give proper notice to the prosecution of the objections proposed to be made or, at least, make it plain to the court precisely what those objections are.
>
> It may be, in the exceptional case, that a full hearing for the objections to be resolved would need to be held. There is no provision for taxation of the prosecution's costs in a criminal case. No doubt taxation of such costs would be a more satisfactory way of resolving disputes where they arise. As it is, such disputes fall to be resolved in cases such as the present by applying the principles in *Neville v. Gardner Merchant*."

The statement of costs submitted did not differentiate between investigation costs and expenses which can properly be attributed to the bringing of witnesses to court. It may well be that at least some of the Agency's expenses claimed in the bill fall under the latter head, and such expenses will require to be segregated and specified in proper form before the magistrate when the

matter comes back before her for further consideration. She will also have to bear in mind that the expenses allowable for professional and expert witnesses are strictly limited by Schedule 2 to the 1988 Rules, as substituted by the 1994 Rules, since there is no power to order greater sums under this head of costs. The magistrate will need first to consider whether the Agency witnesses for whom expenses are claimed constitute either professional or expert witnesses within the meaning of paragraph 2 of Schedule 2. If so, she should then apply the appropriate provisions of Schedule 2 to any claim for expenses, and if not she should confine the amount payable to the provisions for "ordinary witnesses".

Conclusion

For the reasons which we have given earlier in this judgment we conclude that the resident magistrate's order for payment of costs must be set aside. We shall make an order of certiorari quashing the order and remit the matter to her to determine the amount which the applicant should be ordered to pay in respect of the prosecutor's costs, in the light of the principles set out in this judgment.

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