

Private prosecutor bringing High Court enforcement proceedings can claim costs from central funds (Mirchandani v Chancellor)

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Corporate Crime analysis: The court held that a private prosecutor was entitled to recover their costs from central funds in relation to a High Court application for enforcement of a confiscation order. Such proceedings are ‘in respect of an indictable offence’ for the purposes of section 17 of the Prosecution of Offences Act 1985 (POA 1985). The court also held that, where the private prosecutor, in the same proceedings, had been ordered to pay the costs of a third party (having unsuccessfully asserted that the third party had been in receipt of a tainted gift), then those costs were also recoverable from central funds. While the confiscation proceedings in question had arisen under the Criminal Justice Act 1988 (CJA 1988), the court held that the same principles would apply under the Proceeds of Crime Act 2002 (POCA 2002). Written by Mark Cotter QC and Sarah Wood, barristers, at 5 St Andrews Hill.

Mirchandani v Chancellor [\[2020\] EWCA Civ 1260](#)

What are the practical implications of this case?

Within its narrow factual context this case has limited practical implications given that the number of outstanding [CJA 1988](#) confiscation orders deriving from private prosecutions and which require enforcement proceedings is extremely limited. However, in a wider context this case has two important and practical implications.

Firstly, the judgment emphasises and makes it plain that private prosecutors are entitled to claim their costs from central funds when making enforcement applications pursuant to [POCA 2002](#). The judgment of Mrs Justice Jefford which gave rise to this appeal (*Re Somaia v Lord Chancellor* [\[2019\] EWHC 1227 \(QB\)](#), [\[2019\] All ER \(D\) 126 \(Jun\)](#)) had strongly suggested that her ruling was not confined to [CJA 1988](#) enforcement applications but also extended to [POCA 2002](#) enforcement. However in giving judgment, Lord Justice Davis was keen to stress that any costs incurred by a private prosecutor for enforcement within the [POCA 2002](#) regime could be claimed pursuant to [POA 1985, s 17](#) and that there was no reason to distinguish between the two legislative regimes. Indeed, this was part of his rationale for finding that [CJA 1988](#) enforcement proceedings fell within the remit of [POA 1985](#).

Secondly, the judgment makes it plain that, provided it has brought an application reasonably, a private prosecutor may make a claim under [POA 1985, s 17](#) for a third party costs order it has been ordered to pay. It is not difficult to envisage circumstances where a private prosecutor may be prepared to pursue a variety of applications within criminal proceedings knowing that, provided the application is properly justifiable but ultimately unsuccessful, they will be able to claim the costs incurred in satisfying the order from central funds.

What was the background?

The private prosecutor had successfully prosecuted the defendant in relation to frauds perpetrated in the context of business dealings between the two at the turn of the millennium. Confiscation proceedings were brought pursuant to [CJA 1988](#) resulting in a large order. A finding of hidden assets meant that the order was made in the full sum of the benefit figure. Compensation orders were also made pursuant to the [Powers of Criminal Courts \(Sentencing\) Act 2000](#) and any money recovered under the confiscation order was ordered to be applied, first, in satisfaction of the compensation orders. The defendant failed to pay the confiscation order. An enforcement receiver

was appointed, on the application of the prosecutor. By this stage the defendant had transferred substantial sums to his former wife (AG). The prosecutor unsuccessfully brought proceedings against AG in the High Court to recover the sums transferred as ‘tainted gifts’. The prosecutor was ordered to pay AG’s costs. Jefford J allowed the prosecutor’s application for costs from central funds (including the costs payable to AG). The Lord Chancellor was then given leave to intervene. As a result of that intervention, Jefford J reversed her earlier order and an appeal followed. The central question was whether the civil enforcement proceedings were ‘in respect of an indictable offence’ pursuant to [POA 1985, s 17](#) and, as a sub issue, whether the word ‘expenses’ in [POA 1985, s 17](#) could include legal costs ordered to be paid to a third party.

What did the court decide?

The Court of Appeal found that, when bringing enforcement proceedings in relation to a [CJA 1988](#) confiscation order, a private prosecutor was entitled to claim their costs from central funds pursuant to [POA 1985, s 17](#) despite the fact that the enforcement proceedings were civil in nature. The court also found that this entitlement was wide enough to include the payment of costs that the prosecutor had been ordered to pay to a successful third party who had satisfied the court, within the enforcement proceedings, that they had not been the recipient of tainted gifts, provided that the actions of the prosecutor in contesting this issue had been undertaken reasonably.

In giving the judgment of the court, Davis LJ relied heavily upon the wording of [POA 1985, s 17](#) which allows for a private prosecutor to recover their costs from central funds ‘in any proceedings in respect of an indictable offence’. He expressed the view that the confiscation proceedings were part of the sentencing process and so were unquestionably ‘in respect of’ an indictable offence and that it was too restrictive an approach for the enforcement proceedings not to be; commenting that the enforcement proceedings do not exist in a bubble and that confiscation proceedings are toothless in the absence of adequate enforcement proceedings. He dismissed the argument that [POA 1985, s 17](#) should not have such a wide interpretation, in circumstances when the defendant could not claim their costs in the same proceedings, by highlighting that there are policy reasons why provisions governing payment to a private prosecutor are more favourable than those applying to a defendant. Davis LJ was not persuaded that the case of *Holden; Steele Ford; McGoldrick; Murray v Crown Prosecution Service* [[1990](#)] 2 QB 261, [[1990](#)] 1 All ER 368 was of assistance in this case as there had been no discussion about the status of confiscation proceedings, let alone enforcement proceedings, in that case. Instead the House of Lords was concerned with the true interpretation of [section 51](#) of the Supreme Court Act 1981 within the limited factual context of that case.

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Sir Terence Etherton MR, Dame Victoria Sharp P and Davis LJ
- Date of judgment: 2 October 2020

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