Case No: CJA 118 of 2001
SCCO Ref: 1904183

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building, Royal Courts of Justice,
Strand, WC2A 2LL

Date: 12/06/2020

Before :

MASTER NAGALINGAM

Between :

Baljit Singh Bhandal — **Claimant**

- and –

The Commissioners for Her Majesty's Revenue and Customs — **Defendant**

Mr Munro (instructed by **Withers LLP**) for the **Claimant**
Mr Holborn (instructed by **A&M Bacon Ltd, agents for HMRC Solicitor's Office**) for the **Defendant**

Hearing dates: 18 May 2020

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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MASTER NAGALINGAM

Master Nagalingam :

1. The Claimant is the paying party and Applicant. The Defendant is the receiving party and Respondent.

2. This is the Claimant's application for:

   (1) An immediate stay of the Consent Order dated 22 November 2019 pending the hearing of this application.

   (2) A variation or stay of the Order (dated 22 November 2019) in accordance with the Court's case management powers under CPR 3.1(2)(f) and 3.1(7), so as to enable a private prosecution against the Defendant to be concluded prior to any determination in these proceedings;

   (3) Relief from sanction for the failure to meet the 9am deadline on 6 February 2020.

3. The order dated 22 November 2019 followed the Defendant's own earlier application which sought to apply a sanction for the Claimant's historic failure to make payments owed to the Defendant. Specifically, £150,000 which the Claimant was ordered to pay on account of costs pursuant to an order dated 11 March 2015 and summarily assessed costs of £17,263 pursuant to an order dated 17 October 2014.

4. Part (1) of the Claimant's application has effectively been achieved by the listing of this hearing and requires no further comment.

5. The underlying action was a claim by the Claimant for compensation pursuant to Section 89 of the Criminal Justice Act 1988. That action was ultimately unsuccessful and the Defendant obtained costs orders in their favour, as outlined above.

6. Whilst the parties have opposing views as to why the Defendant did not commence detailed assessment proceedings until 2019, the fact is no application for an unless order was made. A detailed bill of costs has been served. Points of dispute and points of reply followed. A request for detailed assessment has been made and a hearing has been listed.

7. Whilst the listing of this application has led to the loss of a half day preliminary issues hearing, the reality is that the conduct issues I am now invited to take into account by the Applicant are largely the same as the preliminary point on conduct in the points of dispute. The substantive assessment, listed for 3 days in July 2020, need not be lost as a result of this application.

8. The detailed assessment was originally listed for a preliminary issues hearing on 25 November 2019 to be followed by a 3 day detailed assessment hearing in January 2020. However, following an application by the Defendant that the Claimant be debarred from taking any further steps or actions in the detailed assessment proceedings unless the Claimant met the long outstanding orders to pay sums on account of costs and summarily assessed costs, the parties agreed, by consent, that such a sanction will apply save for where the Claimant, by 9.00 a.m. on 6 February 2020, make such payments to the Defendant.

9. No payments were made and the application before me now was filed after the deadline for payment had passed. In that respect the Claimant accepts that relief from sanctions is required.

Mr Munro's submissions

10. On behalf of the Claimant, Mr Munro described an intended private prosecution against a former HMCE officer, Mr Broad, and against HMRC, the named Defendant in the underlying proceedings. It is said that if the private prosecution is successful then a number of potential consequences will follow. These range from the securing of compensation, to a fresh route of appeal, to a material impact on the assessment of costs based on conduct arguments. It is argued that in any of these scenarios it would be inappropriate and disproportionate to continue the detailed assessment process until the intended private prosecution is heard.

11. On the Claimant's case, a successful compensation claim would be worth several million pounds, relating as it does to the sale of property owned by the Claimant for approximately £14m (sufficient to discharge the outstanding mortgage on the property) when, on the Claimant's case, the property was worth in the region of £75m-£80m.

12. Whilst both Counsel before me have presented their version of events in the underlying action, both in oral submissions and in their skeleton arguments, Mr Munro sensibly commended the full reading of Mr Justice Collins' judgment dated 11 March 2015 in order to understand the background to this case.

13. The Claimant's case as of today is that since the making of the consent order dated 22 November 2019 the circumstances relating to the underlying case have changed, such that the 'Full Code Test' has been satisfied meaning "permission" (as Mr Munro put it) has been granted to bring a private prosecution against Mr Broad and HMRC.

14. That said, as at the date of this hearing, the Defendant's position was that they were unaware of any private prosecution being brought by the Claimant and Mr Munro was unable to say that a private prosecution had yet been commenced. Further, by way of explanation as to why a private prosecution has not yet been commenced, Mr Munro sought to rely on the witness evidence filed in support of the Claimant where reference is made to the reduced capacity of the Magistrates courts during the Covid-19 enforced lockdown.

15. Mr Munro submits that if a private prosecution is successful, the detailed assessment proceedings will be otiose.

16. The Claimant's application, supporting witness statements, skeleton argument of Mr Munro and oral submissions today essentially invite me to find that there has been a material change in the circumstances of this case since the 22 November 2019 order such that relief ought to be granted, and a stay of the 22 November 2019 order and detailed assessment proceedings ought to be ordered.

17. Mr Munro submits that it would be in the interests of justice, the proper administration of justice, consistent with the decision in *Riordan v Moon Beaver*

[2018] EWHC 1452 (QB), and common sense to stay the detailed assessment proceedings.

18. Mr Munro summarised the background to the underlying proceedings, namely that a HMCE restraint order dated 18 July 2001 was used to force the sale of the Claimant's property, Updown Court, on 24 October 2002 at substantial undervalue (sufficient only to discharge the mortgage balance as opposed to realising the property's full value) resulting in a substantial loss for the Claimant.

19. The Claimant brought a claim in compensation on the basis that the restraint order was unlawful. The Defendant argued it was lawful because an application for a warrant was obtained and relied on the warrant in its defence. As a result, the 2014 and 2015 orders were made.

20. The private prosecution brought is to prove to a criminal standard that the information in support and the warrant were forged and were a sham.

21. Mr Munro relies on paragraphs 5 and 6 of Mr Lyndon-Skeggs' witness statement dated 11 May 2020. These paragraphs explain that whilst the Claimant accepts they were "undertaking a criminal investigation into the authenticity of a first instance arrest warrant that was allegedly first issued on 18 July 2001" they had not taken a decision to pursue a private prosecution until after the November 2019 order was consented to. They go on to explain that the "Full Code Test laid out under the CPS Code for Crown Prosecutors had been met and that the Private Prosecution had a realistic prospect of returning a conviction".

22. Mr Munro submits that the meeting of the 'Full Code Test' amounted to a material change in circumstances and that if the defence of the compensation claim was based on a fraudulently obtained warrant then by extension the orders for costs were obtained dishonestly.

23. In those circumstances, Mr Munro argues there is highly likely to be a claim for damages which will include heads of loss equivalent to the value of the costs orders. Alternatively, that the costs orders could be appealed (if fraud is proved), or at the very least if it is found that the warrant was a fraud it would be relevant to conduct arguments in the detailed assessment.

24. The Claimant's position is that where the Full Code Test was met before the 6 February 2020 deadline for costs payments to be made had passed, that amounts to a material change in circumstances such that a stay of the detailed assessment proceedings should be ordered in any event.

25. Procedurally, the Claimant accepts they are in an "awkward" position, as Mr Munro put it, due to the need to obtain relief from sanctions. In this respect Mr Munro accepts the need to satisfy the 'Denton' test.

26. Mr Munro seeks relief primarily on the basis of the following factual matrix. The deadline for payment was 9am on 6 February 2020. No payment was made but an application was submitted at 3pm on 6 February 2020 seeking a stay of the 22 November 2019 order (pending the hearing of this application), a stay of the detailed assessment proceedings and relief from sanctions. Mr Munro accepts that because the

application was made six hours after the 9am (6 February 2020) deadline the 'Denton' test applies.

27. Mr Munro relies on the witness statement of Mr Lyndon-Skeggs dated 11 May 2020 as to why the application was not made before the deadline for payments passed.

28. Mr Lyndon-Skeggs is frank in acknowledging an oversight on his part. Mr Munro argues that this is forgivable because a 9am deadline for payment is unusual. He says the delay in making the application was de minimis and the only causative effect was an e-mail from the Defendant at 2pm on 6 February 2020, which Mr Munro suggested was the only adverse costs consequence of the Claimant's application being made 6 hours late.

29. Mr Munro accordingly invites me to find that the breach was neither serious nor significant which, he submits, means that relief would "normally" be granted.

30. Mr Munro acknowledged that the given reason for the timing of the application, being oversight, is not a good reason.

31. The circumstances he asks me to take into account invite me to accept criticism of the timing of the Defendant's commencement of detailed assessment proceedings and to conclude that the Defendant would suffer no prejudice as a result of the breach. This was on the basis that if the Defendant has taken this long to take measures to enforce payments owed then they had not suffered any prejudice in the intervening period or else they would have sought the imposition of sanctions at a much earlier stage.

32. If I am against the Claimant with respect to their application for relief then Mr Munro submits the Claimant is still entitled to apply for a stay. In that regard he invites the court to find that the meeting of the 'Full Code Test' amounts to a material change of circumstances. He argues in those circumstances "permission" to bring a private prosecution has been granted and that this is a good reason for withholding or not making the costs payments due.

33. Mr Munro closed by arguing it would be just and appropriate to grant a stay because if the proposed private prosecution is successful it will have a significant impact on the detailed assessment in that the sums paid in costs would be subject to a claim for compensation from the Defendant, or could be subject to an appeal of the costs orders pursuant to which costs were obtained, or would sound in arguments as to conduct when the costs are being assessed.

34. Finally, to alleviate any concerns the court may have as to an indefinite stay, Mr Munro suggested in the alternative a time limited stay with liberty to apply after 6 months.

Mr Holborn's submissions

35. Mr Holborn submits that the provision of relief must come first. He says that the breach is the failure to pay, not the failure to make an application for a stay. The sanction is set out in the November 2019 consent order.

36. Mr Holborn, like Mr Munro, invites me to consider the judgment of Mr Justice Collins in this action rather than generally relying on either Counsel's brief summary of the background facts to this case. Mr Holborn also invites me to consider the Claimant's criminal past, historical attempts to evade prosecution, use of different identities on an international basis, previous defaults and attempts to avoid making payments.

37. Mr Holborn additionally invites me to consider Mr Justice Collins' judgment in the context of "other evidence which points to guilt". Mr Holborn submits that the result of the learned Judge's analysis of the "other evidence" is that even absent the 'Broad' evidence there was compelling evidence in support of finding that the Claimant was guilty of the criminal conduct alleged such that his section 89 claim would have been dismissed in any event.

38. In light of the Claimant's history Mr Holborn invites me to treat the Claimant's witness evidence with caution with respect to the Claimant's analysis of the judgment of Mr Justice Collins and commentary unrelated to the 'Broad' evidence and arrest warrant.

39. Mr Holborn submits that the Defendant's reason for consenting to the debarring sanction with a lengthy additional period of time to pay was based on the Claimant telling the Defendant he needed more time to pay. This is quite distinct from saying the Claimant did not intend to pay.

40. With regard to the detailed assessment proceedings generally Mr Holborn explained that the Defendant took a considered decision to hold the commencement of the same in abeyance until the Claimant had exhausted all the avenues of appeals and alternative claims available to him. He says that the timing of the debarring application had merit and the Claimant has not demonstrated otherwise.

41. With regard to the making of payments Mr Holborn observes that there is no evidence that the Claimant cannot afford to make the payments which he has been ordered to make.

42. With respect to the relief sought, Mr Holborn submits that it is untenable to argue that the breach is the timing of the application for a stay. The breach is the delay in making the payments. The Claimant is now effectively arguing that the ordered payments shouldn't be made at all.

43. Mr Holborn submits that the breach is serious and significant, and that there is no good reason for the breach. The bringing of a private prosecution is not a good reason. The inability to afford making the payments may amount to a good reason, but that is not the argument advanced by the Claimant.

44. With regard to all the circumstances, Mr Holborn invites me to note that the Claimant has still not complied with the orders for payments of costs and to grant relief in the circumstances of this case would be to sanction an abuse of the court's powers and processes.

45. Mr Holborn also argues that the Claimant would not be prejudiced because if his private prosecution and potential subsequent compensation claim or second appeal is

successful, they retain the opportunity to recover any costs payments made as heads of loss in a compensation claim. However, if relief is granted then the Defendant runs the risk of long delays until payments are obtained and a risk of non-payment if the Claimant dissipates his funds in the intervening period.

46. Mr Holborn additionally raised concerns about the Claimant's conduct and whether the Claimant has been truthful about why he needed until 6 February 2020 to make the ordered costs payments. With reference to paragraph 19 of the Claimant's witness statement dated 11 May 2020 Mr Holborn observed the Claimant came into settlement monies in February 2019. This indicates the Claimant was in at least some funds up to a year before the last date on which the Claimant consented to making the long overdue ordered costs payments.

47. Mr Holborn submits there is no evidence the Claimant could not have afforded to make the payments before the need for an unless order and there is no legal privilege in the question of why the Claimant needed more time to pay.

48. Regarding the application for a stay Mr Holborn submits this is made on two footings. Firstly to stay the effect of the 22 November 2019 consent order, and secondly to stay the detailed assessment proceedings generally.

49. With regard to the application to stay the effect of the order, Mr Holborn observed that the 22 November 2019 order followed an application to debar the Claimant from taking any further steps or acting in the detailed assessment proceedings. The 22 November 2019 order is linked to the orders giving rise to payments of costs and applies a sanction for any continued failure to make the ordered payments.

50. Mr Holborn submits that even if a private prosecution was successful, that alone would not lead to the orders for costs payments being set aside. A stay of the 22 November 2019 order is sought on the basis that the orders giving rise to costs will be overturned but that would require an application to re-open the first appeal of the underlying orders.

51. With reference to Costs Practice Direction 47, paragraph 2, Mr Holborn observes "An application to stay the detailed assessment of costs pending an appeal may be made to the court whose order is being appealed or to the court which will hear the appeal". At this stage there is no appeal nor can an appeal even be contemplated until the Claimant has successfully completed a private prosecution which itself, as this stage, has not even been commenced.

52. Mr Holborn argues that as things stand the Defendant has 'won' (the underlying action) and until a second appeal is opened there cannot be a stay.

53. In so far as I am invited to take into account all the circumstances, Mr Holborn took me through his own analysis of the Claimant's witness evidence and exhibits. He says there is nothing in the evidence which the Claimant has elected to file and serve which demonstrates the Claimant has any prospects of securing a successful private prosecution, save for submission that the Full Code Test has been met. Further, Mr Holborn takes issue with Mr Munro's oral submissions that "permission" to bring a private prosecution has been obtained, when in fact the proposed private prosecution has not yet been before a court.

54. The costs orders in this matter are in favour of HMRC. The evidence relied on by the Claimant indicates a private prosecution is to be brought against Mr Broad but not HMRC. Mr Holborn submits that the Claimant has not explained how he makes the jump from a prosecution against Mr Broad for a false warrant into overturning the findings of the court that the Claimant is a fraudster (and that Updown Court was obtained by the proceeds of crime).

55. Mr Holborn submits that no claim for compensation will succeed without first overturning the court's order and there is therefore no more than a negligible prospect of a private prosecution resulting in any change to the Claimant's liability to pay the Defendant's costs.

56. Mr Holborn points to the Claimant's historic inability to prove he was the victim. With regards to any reliance on *Takhar v Gracefield Developments* [2020] A.C.450. Mr Holborn observes that fraud in respect of the warrant is not a new issue raised. *Ladd v Marshall* [1954] EWCA Civ 1 was not overturned by *Takhar* and Mr Justice Longmore therefore applied *Ladd* in a way consistent with *Takhar* when he refused permission to re-open the underlying proceedings on the basis of the witness evidence from Ms Buckledee.

57. It is in this respect that Mr Holborn relies on *Owens Bank Ltd v Bracco* [1992] 2 AC 443 in support of the principle that matters may be re-opened on the basis of new evidence where the issue has not been decided in earlier proceedings. He observes, with reference to paragraph 41 of *Takhar* that "The rule rests on the principle that there must be finality in litigation which would be defeated if it were open to the unsuccessful party in one action to bring a second action to relitigate the issue determined against him simply on the ground the opposing party had obtained judgment in the first action by perjured evidence."

58. Mr Holborn submits that the extent of Mr Broad's allegedly perjured evidence is that he obtained a warrant. That doesn't assist with the existing determination that the Claimant is a fraudster and that Updown Court was obtained using the proceeds of crime. Mr Holborn submits that is the finding the Claimant must overturn if he is ever to set aside the orders against him, and that the Claimant's future potential application to the court of appeal (which hasn't even begun yet) is hopeless in any event.

59. Finally, with respect to the argument that even if a claim in compensation or second appeal were unsuccessful, a private prosecution could still make a finding of fraud which would have an impact as to conduct arguments in the detailed assessment, Mr Holborn observed that the costs incurred by the Defendant in the underlying proceedings were all incurred *after* the alleged forging of documents, yet the Claimant is inviting the court to re-open all of the underlying proceedings within the forum of the detailed assessment proceedings based on alleged criminal conduct which has already been considered by another court and not proven.

60. Mr Holborn submits that the assessing court is concerned with the reasonableness of costs, not the principle of payment of costs. The Claimant cannot retrospectively seek what would effectively be an issues-based costs order. It wasn't unreasonable to get a statement from Mr Broad and on an assessment of costs the court may still consider any pleaded points of dispute which seek to challenge the reasonableness of any time spent in relation to Mr Broad.

Mr Munro counter-submissions:

61. In response, Mr Munro submits that if the private prosecution were to succeed, and the warrant was found to be a fraud, then that would go to the conduct of the underlying litigation and therefore be relevant to the detailed assessment proceedings.

62. Further, if the warrant was found to be a fraud then there would be a claim for compensation. If for any reason there couldn't be claim for compensation then there could be a r52.30 exceptional circumstances second appeal.

63. Mr Munro submits that paragraph 1 of Mr Justice Collins' judgment underlines the importance of the warrant, and argues that without the warrant there would have been no proceedings and no prosecution against the Claimant.

64. In inviting me to follow *Riordan*, Mr Munro invites me to consider paragraph 29 of that judgment and Mr Justice Foskett's finding that the court should be concerned with the position "now" when deciding whether or not to intervene.

65. Mr Munro submits that the Claimant's criminal history outside of the substantive action has no relevance and warns that people with a criminal past would always be prejudiced in this position if the court is influenced by such factors.

66. With regard to whether or not HMRC are named in the proposed private prosecution Mr Munro argues it is irrelevant because if the warrant is found to be a fraud then it has a material effect on the reasoning behind Mr Justice Collins' judgment in any event.

67. With regard to paragraphs 64 onwards of Mr Justice Collins' judgment Mr Munro submits they are obiter and I should attach little weight to the same. The whole proceedings were based on the warrant and it would put into question the quantum of the interim amounts of costs ordered if the warrant was found to be a fraud, as well as enforcement of those amounts.

Judgment

68. During the course of submissions each party sought to bring to my attention factors in particular which they considered I ought to find persuasive in arriving at my decision. The Claimant, in relation to the timing of the commencement of detailed assessment proceedings by the Defendant. And the Defendant, in relation to the Claimant's character and historic criminal record. I consider it helpful to give my comment on both.

69. Any criticism of the Defendant commencing detailed assessment proceedings out of time are betrayed by any evidence of efforts on the part of the Claimant to progress the resolution of his liability for costs, whether that be informally in correspondence or formally with an application for an unless order. In any event, I accept the Defendant's explanation that whilst the Claimant was exploring various avenues of appeal and alternative resolution of his pursuit of compensation, and whilst the Defendant had concerns as to whether or not the Claimant was impecunious before committing more funds to recovering costs owed, at least some elements of the period of delay are arguably justified.

70. In any event, detailed assessment proceedings were commenced and since then the Claimant has served points of dispute which will be considered at a detailed assessment hearing whether the Claimant is present or not.

71. Additionally, I fail to see how the Claimant's past criminal history is of use or relevance in deciding whether or not to grant relief from sanctions.

72. The Claimant's application, in part, seeks a stay of the order dated 22 November 2019 pending the hearing of this application. That has been effectively achieved and in any event between the making of the application and the hearing of the same there has been no further steps in the detailed assessment that the Claimant could have been debarred from.

73. The present position is that the Claimant has served points of dispute but due to a failure to make ordered payments on time he may not participate in the detailed assessment hearing when that takes place in July 2020. Instead, he will be bound to rely on his written points of dispute, which the Costs Judge will be bound to take into account when assessing the Defendant's costs.

74. The Claimant seeks relief from the debarring sanction on terms which, if granted, would mean they face no consequences for their continued failure to comply with orders that costs payments be made to the Defendant. The Claimant does not seek relief on terms that he complied with the debarring order shortly out of time or at all. Instead, the Claimant seeks relief on terms that he be permitted to continue to effectively ignore the orders requiring costs payments to be made to the Defendant and regardless of whether the detailed assessment proceedings are stayed or not.

75. The key provision of the 22 November 2019 order is that "Unless the Claimant, by 9.00 a.m. on the 6 February 2020, makes payment to the Defendant of [sums as set out in the order] then the Claimant be debarred from taking any further steps or actions in the detailed assessment proceedings.

76. The Claimant's application, at paragraph (3) of the same, seeks "Relief from sanction for the failure to meet the 9am deadline on 6 February 2020."

77. The Claimant relies on *Riordan*, which is a case relating to an order which included a specific provision for an application to vary the clause specifying a sum to be paid on account and by when, with the deadline for that application being some 28 days before the payment was otherwise due.

78. Firstly, had that application been made even 27 days out of time it would not have put the Claimant in *Riordan* in breach of the clause requiring a payment on account to be made. Secondly, the application was made on time such that there was no breach to consider. The remainder of that decision focused on whether or not to order a stay of the detailed assessment proceedings, which was ultimately a fact sensitive decision.

79. In the present case, the breach is clearly the failure to pay the sums ordered. These are not sums which were first ordered in November 2019 but rather sums that date back as far as five years previously. All the 22 November 2019 order did was to impose a sanction for any continued failure by the Claimant to comply with existing orders.

80. That was an order agreed by consent. Had the Defendant's unless order application come before me I would have had no hesitation in allowing the Claimant no more than 14 days to make the outstanding payments. Instead the Defendant consented to allowing the Claimant some two and a half months to make payment.

81. Further, it has not escaped my notice that the Defendant, rather than seeking to strike out the points of dispute or otherwise lock the Claimant out of the detailed assessment process altogether instead sought a measured sanction of debarring the Claimant from taking any further steps – in circumstances where the further steps relate only to the detailed assessment hearing itself. The Claimant has put in points of dispute and the court will therefore take these into account in conducting the assessment.

82. Notwithstanding the Claimant's consent to the terms of the order, where a lengthy additional period for payment was agreed based on a request from the Claimant, and where the Claimant was well aware of the sanction for failure to comply, the payments were not made on time and no application was made before the deadline for payment had passed.

83. The breach is clearly serious and significant. The Claimant has for several years wilfully ignored orders requiring him to make costs payments. When faced with the imposition of a sanction for any continued failure to make payment the Claimant agreed consent terms which provided for a generous additional period in which to make payment and set out in clear terms the consequences of failing to make payment.

84. Not only were the payments not made by 6 February 2020 but they continued to remain unpaid at the hearing of this application on 18 May 2020. Further, no application for an extension of time or otherwise was made before the expiration of the deadline imposed by the 22 November 2019 order. Additionally, there is in fact no application post expiry to retrospectively extend the time for payment.

85. The application for a stay does not excuse the breach of the 22 November 2019 order.

86. The Claimant offers no good reason for the breach. This is perhaps because of the manner in which the Claimant has elected to approach this application, which seems to assume or treat the application for a stay as enabling of relief from historic orders to pay costs without consequence.

87. In so far that an application for relief has been made for the failure to make payment on time (as opposed to applying for a stay after the deadline for payment had passed) I disagree there would be no prejudice to the Defendant if relief was granted. Taken in conjunction with the application for a stay, the net result faced by the Defendant is that they could be deprived of funds they have been entitled to receive since 2014 and 2015 respectively, and would continue to be deprived of those funds for many more months or even years.

88. The breach is serious and significant. There is, by the Claimant's own admission, no good reason for the breach. Finally, having considered all of the circumstances, I am satisfied that relief should not be granted and the Claimant shall therefore remain as being debarred from taking any further steps or actions in the detailed assessment proceedings.

89. Matters do not end there because it still falls to me consider the application for a stay of the effect of the 22 November 2019 order and a stay of the detailed assessment proceedings.

90. Given the alternative scenarios of a completed detailed assessment in July 2020 and a possibly very lengthy delay to the detailed assessment proceedings, it is the latter if anything which would convince me that a stay should not be granted.

91. The Defendant has been deprived of their monies since 2014 and 2015. Mr Munro suggested I may wish to consider a stay of 6 months rather than indefinitely (with liberty to apply) but the reality is that if the Claimant is successful in a private prosecution and then by extension a fresh claim for compensation or a fresh appeal (of which there is no guarantee of success), it will be much longer than 6 months before the detailed assessment proceedings could resume. The Defendant has already been deprived of their monies for over 5 years.

92. If the detailed assessment hearing proceeds as listed in July 2020, the Defendant will be entitled to a Final Costs Certificate and may take action to enforce payment of the full amount of the same as well as any other outstanding costs orders.

93. The Defendant is HMRC. There is no risk that the Claimant would not be able to recover any monies paid were he to secure a successful private prosecution followed by a successful claim for compensation or second appeal.

94. There is a balance to be struck between continuing to deprive the Defendants from the monies owed and the potential for the Claimant to find himself out of pocket for sums the Claimant may be found ultimately not liable for.

95. In striking that balance I have been invited to consider and take into account a lengthy history of litigation, the context in which the Claimant found himself in dispute with the Defendant, and circumstances in which the Claimant (on his case) was deprived of potentially significant returns from a substantial property investment.

96. There is no dispute that a number of prosecutions brought by HMCE in the early part of this century raised concerns as to the practices of HMCE up to and at the time.

97. In November 2002, Mr Justice Grigson observed that there was a need for an urgent inquiry into the role of the National Investigation Service, as an arm of HMCE, and their relationship with other branches including the solicitors' department of HMCE. This was primarily linked to collapsed prosecutions following material non-disclosure.

98. As a result, Mr Justice Butterfield was appointed to undertake the inquiry, and his report was taken into account by Mr Justice Collins in arriving at his judgment dated 11 March 2015, from which the latter order for costs against the Claimant flows. At paragraph 31 of his judgment Mr Justice Collins observed:

> "31. It is important to note that Butterfield J expressly decided that he found no evidence that officers of HMCE or any employee of LCB incited or persuaded any trader to commit fraud or that they actively encouraged crime which would not otherwise have occurred."

99. LCB is a reference to one of two bonded warehouses on which an investigation was focussed as to evasion of excise duty and value added tax, and the subsequent laundering of the proceeds of such evasions. HMCE secured what was described as a "participating informant" in the form of the manager of a bonded warehouse known as London City Bond (LCB). A decision was taken to allow the evasion of excise duty and value added tax to continue so as to enable apprehension of those higher up the "chain of command". Unless I have misunderstood matters, the decision to ultimately not disclose evidence relating to the HMCE's informant led to the collapse of a number of prosecutions or no evidence being offered.

100. Notwithstanding previous decisions which have not gone in favour of the Claimant, it is now argued that there has been a material change in circumstances such that I am invited to stay both the November 2019 order and the detailed assessment proceedings.

101. In that regard the Claimant argues the relevance of the decision in *Riordan v Moon Beaver* [2018] EWHC 1452 (QB). That case concerned a client's Part 8 claim for a solicitor/client assessment of costs in which there was an order for a detailed assessment of the solicitors' costs provided that a substantial payment on account of costs be made by 4pm on 2 February 2018, with a sanction that non-payment on time would result in the client's claim being dismissed. That is if the payment was not made on time Mr Riordan would be shut out of the detailed assessment process and have no right to challenge his former solicitors' costs.

102. Within the same order was a provision for permission to apply in respect of the payment on account order, provided such application was "on notice to the [Defendant] and served on them and a copy of the application and evidence in support sent by email to [a named partner in the Defendant] by 4pm on 5 January 2018…".

103. The Claimant in *Riordan* subsequently made an application for an extension of time for compliance with the unless order to make a payment on account on 4 January 2018, i.e. before 4pm on 5 January 2018.

104. In so far as I am invited to consider analogy with the index case I do not consider the basis of the decision in *Riordan* assists the Claimant because in the index case the Claimant failed to make their application before the deadline for compliance with the November 2019 order had passed.

105. Further, *Riordan* concerned an order which carried a sanction that failure to comply would result in the detailed assessment proceedings effectively coming to an end and therefore denying the Claimant a right to assessment. That is likely why the order contained a specific provision for permission to apply on notice in respect of extensions of time to the deadline for payment.

106. The index case involves no such sanction. The detailed assessment proceedings are not at an end as a result of the Claimant's failure to make payments. The Claimant has served points of dispute and a detailed assessment hearing remains in the list. That hearing will proceed in any event, and the court will consider all of the Claimant's filed points of dispute. They are simply debarred from being represented by an advocate at the detailed assessment hearing. Accordingly, the consequences of the default are not analogous with those in *Riordan*.

107. The extent to where the decision in *Riordan* may assist the Claimant is the argument that there had been a "material change in circumstances".

108. *Riordan* concerned a solicitor and client assessment of costs where Mr Riordan had been ordered to pay £650,000 on account of costs by a certain date failing which the detailed assessment proceedings would be effectively dismissed. A professional negligence claim by Mr Riordan against his former solicitors was intimated and it was upheld on appeal that the detailed assessment proceedings should be stayed pending the outcome of the proposed professional negligence claim.

109. The judge in the Court below arrived at that conclusion having had the benefit of reading the initial protocol letter which he concluded raised "serious allegations in substantial litigation, not only in relation to the costs but also in relation to the litigation itself." He went on to say "I am satisfied that, on the evidence, that represents a material change in circumstances." Which justified a stay of the detailed assessment proceedings.

110. The "now" test at paragraph 29 of *Riordan* took into account that "there is now (which there was not before) a fully articulated claim for professional negligence". That is distinct from the index case where it cannot be said, based on the evidence before me, that there is a "fully articulated" private prosecution nor can it be said that is something which was not contemplated when the 22 November 2019 order was sealed nor is there, on the face of it, any new evidence available to the Claimant since 22 November 2019.

111. Whilst the Full Code Test may have been met between the making of the 22 November 2019 order and the 6 February 2020 deadline, it is clear from the evidence before me that a private prosecution was in the contemplation of the Claimant at the time they consented to an order which required them to make outstanding costs payments to the Defendant by 6 February 2020.

112. Further, as at the date of the Claimant's application and today's hearing, the Claimant cannot say that the proposed private prosecution has even been commenced. Limited evidence has been put before me in respect of the proposed private prosecution and whilst the witness evidence of Margaret Buckeldee might on its face appear to be of concern, it is not new evidence and has indeed already been considered in earlier proceedings.

113. In addition, I do not consider that Mr Justice Collins' comments at paragraphs 64 onwards of his judgment can be treated as dismissively as the Claimant would invite. They amount to a careful analysis of whether or not Updown Court was acquired from the proceeds of crime and a conclusion that, beyond any reasonable doubt, the Claimant was guilty of criminal conduct and that Updown Court was acquired from the proceeds of crime. I therefore do not read Mr Justice Collins' judgment as effectively linking the legitimacy of a warrant to the outcome of the underlying litigation. Not where that underlying litigation was heard with the benefit of substantial evidence not only of the Claimant's criminal conduct but also as to how the purchase and renovation of Updown Court was funded.

114. Whilst it is incumbent upon me to take into account all of the circumstances, what I cannot do is second guess the outcome of a private prosecution and by extension the

likelihood of a successful application for compensation or a successful second appeal if a private prosecution succeeds, without sight of convincing evidence. It strikes me that to a large degree that is precisely what the Claimant is inviting me to do.

115. On the evidence before me I am not satisfied that there has been a material change in circumstances.

116. Further, on the evidence before me, and taking into account the arguments raised, I am unable to conclude that the Claimant will not be able to progress his proposed private prosecution due to impecuniosity either now or as a result of refusing the stays requested.

117. It is clear from the evidence presented that the Claimant has been able to engage expert solicitors and leading Counsel. The submissions made indicate the Claimant is ready to issue his proposed private prosecution and I have seen no evidence that course of action would be imperilled were the Claimant compelled to make the payments he owes the Defendant now.

118. If a stay is granted and remains in force until the Claimant has pursued firstly a private prosecution, followed by a claim for compensation, or pursuit of a second appeal in the alternative, and where the outcomes of any of the same are entirely uncertain such that if no orders are secured which overturns the Claimant's liability for costs, then the Defendant could find themselves deprived of funds for many more months or years.

119. That uncertainty has to be balanced against any prejudice to the Claimant for simply meeting the terms of the orders with which he is faced. The Defendant is HMRC. The Defendant is, as Mr Holborn put it, "good for the money". I have no concern that the Defendant would be unable to afford to reimburse the Claimant any sums in costs paid out by the Claimant if he secures a successful private prosecution leading to a successful claim in compensation and/or second appeal. In those circumstances the Claimant could seek reimbursement of any sums of costs paid out as heads of losses.

120. The justice that the Claimant seeks is not the avoidance of costs orders or a detailed assessment of the Defendant's costs. Those are, on the Claimant's case, merely consequences of an injustice the Claimant says he has suffered.

121. However, debarring the Claimant from taking any further steps or actions in the detailed assessment proceedings will not prevent the Claimant from pursuing a private prosecution against Mr Broad, the Defendant or any other persons or bodies.

122. The common sense argument advanced may, put at its highest, have some merit when one considers the proportionality of proceeding with a detailed assessment where there is a risk that all of the costs associated with the same may later form a head of a compensation claim or become otiose due to a successful second appeal.

123. However save for the 3 day assessment listed in July 2020, all of the costs of detailed assessment have already been incurred and I do not consider any additional cost of the detailed assessment hearing now could be considered disproportionate to the substantial bill of costs which falls to be assessed.

124. A refusal to grant a stay will not prevent the detailed assessment process from being completed, it will not prejudice the Claimant because his served points of dispute will still be considered by the court, it will not prevent the Claimant from pursuing a private prosecution and it will not prevent the Claimant from seeking whatever sum in compensation may be required at a future date for sums in costs paid out now.

125. Finally, in so far that a private prosecution may find that the originating warrant was a fraud but absent any successful claim for compensation or a second appeal, I am not persuaded that arguments as to conduct that may follow would justify staying the detailed assessment now.

126. The Claimant argues for fraud committed by Mr Broad before the underlying litigation. Having considered the underlying litigation I can see no circumstances in which costs would not have been incurred in relation to Mr Broad. It may be that argument is made as to the reasonableness of the amount of costs incurred in relation to Mr Broad. However, if anything, I consider delays to the completion of the detailed assessment process based solely on the outcome of a proposed private prosecution against Mr Broad would be disproportionate when considering the potential impact on the bill and unfairly prejudicial to the Defendants in terms of further delay.

127. Therefore, having considered all of the circumstances, the application for a stay of the 22 November 2019 order and a stay of the detailed assessment proceedings generally is dismissed.

128. Within 7 days of the handing down of this judgment the parties shall file their dates of availability for a 30 minute telephone hearing to deal with the costs of the Claimant's application. Such hearing may be avoided where the parties are able to agree the principle and quantum of the application costs.