



BEFORE

DISTRICT JUDGE (MC) EZZAT

IN THE WESTMINSTER MAGISTRATES' COURT

NATIONAL CRIME AGENCY (NCA)

V

PACNET SERVICE LIMITED (PNUK)

Application for Costs

Representation:

Mr. Andrew Bird QC for the NCA

Mr. Kennedy Talbot QC and
Miss. Rachel Barnes for PNUK.

Application

1. This Application has been determined following written submissions from both the Applicant and the Respondent.
2. This is an application for costs under section 64 of the Magistrates Court Act 1980 (MCA). It is not disputed that an application under section 64 can

be made, the NCA dispute however that an order should be made and if an order is made, it's quantum.

3. As a starting principle it is accepted that costs do not automatically follow the event.

The Test to Apply

4. An order for costs under section 64 should only be made if the court finds it just and reasonable. To make such a determination both parties invite me to give attention to the case of R (*Perinpanathan*) v CWMC [2010] 1 WLR 1508. In deciding whether an order should be made it is agreed that I should consider whether the NCA acted honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in the exercise of its public duty.

Honestly, Reasonably, Properly and on Grounds that reasonably appeared to be sound.

Honestly

5. I have seen no evidence that the NCA dealt with this case dishonestly. I note that the NCA's success would have resulted in some financial advantage to them, but I am not able to conclude that this was a motivating factor in bringing or continuing proceedings.

Reasonably, Properly and on Grounds that reasonably appeared to be sound.

6. I take these all together.
7. In rejecting any suggestion that their case was fundamentally flawed the NCA point to the hearings conducted before District Judge Branston and District Judge Snow in which the initial account freezing order was made and subsequently renewed. It is submitted and I accept, that both judges must have been satisfied that there were reasonable grounds to suspect that the contents of the 4344 account were recoverable property.
8. However, as the NCA are keen to point out in their skeleton argument, it was not inevitable that following the making of an account freezing order that there would be an application for forfeiture. Before such an application was made it was incumbent on the NCA to review the state of their case. This was either not done or not done adequately.
9. As I said my Judgment of 12 February 2021 - The NCA adopts the description of PNUK from Prosecutors in America, '*PacNet was the payment processor of choice for fraudulent mass mailers in the United States and around the world...*'.

10. In order to satisfy the court that the money held in the 4344 account was recoverable property the NCA would need to identify what criminality they were relying on and what evidence they could adduce to support their assertion.
11. As I found in my judgment, the NCA were not able to point to any evidence of the mass fraud that they alleged. Without such evidence they were never going to be successful in their application.
12. A review of the case by the NCA should have taken place prior to a decision being made to pursue forfeiture. Had such a detailed and thorough review taken place, this case would in my view not have been brought.
13. For that reason, I do not find that the application for forfeiture was brought *'Reasonably, Properly and on Grounds that reasonably appeared to be sound.'*
14. I do not accept that the exercise of the indemnity by PNUK means that no order for costs should be made. Expenditure was incurred in resisting the NCA application. PNUK or its client's will be out of pocket because of this application.
15. It is therefore appropriate for an order under section 64 to be made against the NCA.

Quantum

16. The amount of costs sought by PNUK is substantial. I agree with Mr. Bird QC's characterization of the costs being reflective of a 'Rolls Royce' service. The cost of such a service should not be borne by the taxpayer through the NCA.
17. The costs incurred in relation to resisting the application for forfeiture have the feel of the PNUK team being given a blank cheque.

RPC's Fees

18. The costs incurred by RPC LLP are in my view significantly disproportionate to the case overall. While the amount of frozen funds were considerable, it should not be forgotten that this was a 4-day hearing in the Magistrates' court.
19. In terms of approaching the costs claimed, I am not in a position to go through the breakdown of costs line by line and determine whether each cost is just and reasonable. Some costs are clearly unreasonable, such as the costs of attendance at court by a partner, associate and trainee.
20. While I accept it is of only limited use to compare the costs incurred by the NCA to those incurred by PNUK, it does highlight the gulf between the way

in which the case was approached by the parties. The NCA indicate that their costs were £31,319.00.

21. The claim for costs is significantly greater than what would be just and reasonable to allow. I have reduced the claim by 3/4's to reflect what I consider just and reasonable in the context of this case, and allow **£60,962.15**.
22. The disbursements costs claimed are excessive. While I accept that some disbursements have been paid, these should be reduced in line with the way I approached the fees. I therefore allow **£1,073.65**.

C F Forensics

23. The NCA argued that the compliance department of PNUK was a sham and that it did not carry out the proper function of a compliance department. PNUK instructed Mr. Harding of CF Forensics to prepare a report looking at the compliance functions of PNUK.
24. It has been said that no mention of Mr. Harding's report is made in my Judgment of 12 February 2021. This is correct. No mention was made as I did not need to address the issue of compliance as I found that the money held in the 4344 account was not recoverable.
25. Had I reached a stage where I needed to consider the issue of compliance, I would have had to consider the evidence of Mr. Spillett for the NCA who concluded that while he was not an expert and he could not really identify any evidential basis for saying so, the compliance department at PNUK was a sham. Given that the burden was on the NCA to prove their case, Mr. Spillett's evidence would have come nowhere close to allowing me to reach such a conclusion. It is surprising given the NCA's strongly held conviction that the department was a sham that they did not seek any expert evidence to prove the point.
26. The Report of Mr. Harding was not required. The highest that the NCA's case could be put in terms of compliance was the unsupported assertions of Mr. Spillett. The issue in terms of compliance could have been dealt with by someone from PNUK. The instruction of an expert was unnecessary. Furthermore, even if an expert had been required, the amount charged by Mr. Harding is unjustifiable in the context of this case.

Counsel's Fees

27. I share the view that this case could have been more than adequately dealt with by leading junior counsel. I therefore allow **£38, 225.33**. I do not allow the claim for Mr. Talbott QC's fees.

Opus

28. There was in my view no need for PNUK to arrange for a transcript of proceedings. Days 1 to 3 of the hearing took place in a court room where there were audio recording facilities. I had previously indicated that transcripts could be prepared from the court's recordings. Day 4 did not take place in a court room with recording equipment. There was also a potential shortage of court staff on day 4 of the hearing, which could have impacted the taking of a note by the court. As a result of parties wishing to proceed on 4 January 2021 (for day 4) it was agreed that the stenographer instructed by PNUK would attend that hearing. Nevertheless, I take the view that the cost of this service is not a just and reasonable one for the NCA to bear. I therefore make no order in relation to this claim.

Bernstein Report

29. Mr. Bernstein produced 2 reports, one for the hearing before DJ Branston and the other before me. The cost of the report before DJ Branston is not a cost that should be claimed in this application. It is not unreasonable to conclude that the bulk of the work undertaken by Mr. Bernstein would have been when he wrote his first report and that by the time he wrote his second, he was very familiar with the subject matter and that there was little to add. With that in mind it would be unjust and unreasonable for the NCA to pay for the cost claimed.

Ifrah

30. The bills relating to work carried out during the relevant period (after the forfeiture application was made) total **£4,621.66**. It is just and reasonable for the NCA to pay this.

Conclusion

31. The determination of just and reasonable costs is not an exact science. The figure arrived at is reflective of what I consider to be just and reasonable in the context of this case. I find that it is just and reasonable for the NCA to contribute **£104,882.79** to PNUK's costs. I make such an order under section 64 MCA 1980.

32. The sum of **£104,882.79** must be paid within 28 days of this order.

District Judge Ezzat
30 April 2021