HSE ordered to pay the entirety of the Defence's costs for a prosecution which "*should not have taken place*" and was "*starkly improper*" R v Falcon Tower Crane Services Limited

Prashant Popat KC
Christopher Adams

HHJ Everett DL sitting in Chester Crown Court has ordered the HSE to pay total Defence costs of £587,382.76 pursuant to s.19(1) of the Prosecution of Offences Act 1985 and Regulation 3 of the Criminal Cases (General) Regulations 1986 on the basis that the fact and manner in which the prosecution was brought constituted an unnecessary or improper act or omission by the HSE. Counsel were instructed by Richard Crockford of FSW Law (formerly of Clyde & Co).

BACKGROUND TO THE COSTS APPLICATION

The incident, investigation, decision to prosecute and Prosecution Opening

The Defendant tower crane supplier was prosecuted for alleged breaches of sections 2 and 3 of the Health and Safety at Work etc Act 1974 following a tower crane collapse in Crewe on 21 June 2017 in which 3 employees died.

In opening its case the Prosecution asserted that an admitted error in the written method statement could and should have been identified before the crane was erected, but was not because the Defendant had not appointed an 'Appointed Person' (AP) to oversee the erection of the tower crane, including production of the method statement and that, consequently, the Defendant's system for ensuring the safety of relevant persons was deficient.

The Defendant had contended throughout the investigation and subsequent proceedings that it had appointed an AP and identified that person. Following the incident, the person identified as an AP by the Defendant was interviewed by the police as a suspect with a view to a potential prosecution for manslaughter. During those interviews, he denied that he had ever been appointed or instructed to carry out the role of AP for the Defendant, including in relation to the job in Crewe. Once a decision was made to take no further action against him, he provided a witness statement in the same terms as a prosecution witness against the Defendant and was called by the HSE as its principal witness in support of the case against the Defendant.

The Prosecution decision to offer no evidence

At trial in November 2024 the person identified by the Defendant as the AP was called as the second prosecution witness and cross-examined by the Defence over the course of 3 days, principally by

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reference to documents which had been acquired in the course of the investigation and were available to the HSE at the time it made the decision to prosecute the Defendant, but also by reference to additional material produced by the Defence, including emails involving the witness during the course of his employment by the Defendant between 2015 and the date of the incident.

By the end of his cross-examination the witness had completely reversed his position, agreeing that:

a) He was an AP working for the Defendant, having been appointed as such in his initial employment contract in 2015;
b) He had carried out approximately 90 similar jobs for the Defendant between 2015 and 2017, where he was aware that he was the AP for the Defendant in similar terms as for the job in Crewe;
c) By taking on the responsibilities that he had undertaken for the job in Crewe, he was fulfilling the role of an AP; and
d) In his view the Defendant had set up a safe system of work for the erection of tower cranes generally.

As a result of his evidence the HSE conceded that, on the basis on which the prosecution had been brought, there was no evidence to show that the Defendant was guilty of either of the two counts on the indictment, and the jury was directed to acquit the Defendant.

THE DEFENCE APPLICATION FOR COSTS

Liability to pay costs

The Defence application for the HSE to pay its costs of defending the prosecution was made pursuant to s.19(1) of the Prosecution of Offences Act 1985 and Regulation 3 of the Criminal Cases (General) Regulations 1986 on the basis that the fact and manner in which the prosecution was brought constituted an unnecessary or improper act or omission by the HSE. The application set out a detailed chronology of the investigation and prosecution which made clear the evidence available to the HSE at each stage.

In determining the application the Court held in a comprehensive 37-page written judgment that:

a) It must have been apparent to the police and the HSE throughout the investigation that the Defendant would provide any documentation requested;
b) The interviewing officers did not robustly challenge the purported AP's untruthful accounts in his two interviews;
c) Evidence as to that person's role from the date of his employment by the Defendant in 2015 until the date of the incident in 2017, which *"undoubtedly was readily available"*, was *"conspicuous by its absence from the prosecution case"* and *"could and should have been obtained by the prosecution"*;
d) The annotations on a version of the method statement produced during a site visit made clear that he had discussed the sequence for crane erection in the method statement but had not spotted the error in it;
e) A significant majority of the evidence used in cross-examination came from the Prosecution's own material and from information and evidence that the Prosecution could and should have considered and obtained, but failed to do so; and
f) The HSE fell far short of that which was required of it in considering this case, the prosecution was wholly flawed, and any reasonable prosecutor should have realised that the evidence pointed away from the Defendant and not towards it, when considering who, if anyone, was at fault during the events leading up to the tragic loss of life of three men.

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Quantum of costs

In determining the quantum of costs to be paid, the Judge noted that any costs ordered must be reasonable, with fees calculated on the basis of a hypothetical counsel, capable of conducting the case effectively, but unable or unwilling to insist on the higher fees sometimes demanded by counsel of pre-eminent reputation. He also noted the guidance in Archbold that those practising in criminal law can expect to receive lower fees than their civil counterparts, although where insurers have monitored and approved fees that may be an important factor to take into consideration when determining whether they are reasonable. The Judge wholeheartedly rejected the HSE's argument that this case did not require the Defence to instruct leading and junior counsel, finding that it was wholly appropriate for both leading and junior counsel to represent the Defence given that this was a serious and sensitive case where three men lost their lives.

The Judge went on to note that the parties agreed that the costs claimed were significantly lower than if the same defence team had been representing the Defendant in civil proceedings, and that he should take account of the fact that the Defendant's insurers had agreed to the level of costs claimed.

He also stated that any order should not be one intended to punish the HSE, but that if it had been he would have been considering a much higher figure to recognise the sheer distress and stress that the HSE's decision had caused the owners of *"a decent and well-run company, subjecting them to many years' trauma, during which time they were undoubtedly vilified by the families of the three deceased men, simply because, by bringing the prosecution, the HSE had undoubtedly falsely encouraged those families to believe that it was the company that was at fault, rather than any individuals."*

The sum awarded included the costs claimed by the Defence not only for the trial, but also for the application itself.

Delay

Although not a factor relied on in making his decision, the Judge described the delay in bringing this case (the prosecution having been brought around 6 years after the incident) as *"unacceptable"*, finding that it was principally as a result of the *"inordinate length of the initial investigation by Cheshire Police"*, but that there had been a further delay of 15 months once the HSE took over *"for which there is no apparent reasonable explanation"*. He found that there was no relevant time delay caused by the inquest procedure or through a lack of an authorised District Judge to send the case to the Crown Court, as suggested by the HSE in their written submissions, and expressed the view that *"the HSE could have done much more than it did to ensure that this case proceeded sooner than it did"* and that *"this is a matter which the HSE should now take the time and trouble to review"*.

COMMENTS

In this case the Defendant provided all the information requested by the police and the HSE and robustly challenged the basis on which the prosecution was brought at every stage, including in correspondence and in its detailed defence statement. The Defence assertions as to the unreliability of the evidence relied on by the HSE and the flawed basis on which the prosecution had been brought proved to be correct at trial. Whilst there is a high bar for an order under s.19 POA 1985 to be made, which will not be overcome simply because a prosecution is unsuccessful, prosecuting authorities need to be alert to the need properly to pursue all reasonable lines of inquiry and to consider the evidence in their possession, including properly interrogating documentary evidence, prior to making a decision to prosecute. The threshold for an order under s.19 POA 1985 may be high, but it is by no means insurmountable.

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Generally, this case also shows the value of contesting a health and safety prosecution if there are proper grounds to do so. Often, and particularly following a very serious incident leading to one or more fatalities, there is an assumption that a conviction is almost inevitable. However, a careful analysis of the arguments and evidence available can repay considerable dividends when seeking to challenge such charges.

ABOUT THE AUTHORS

Prashant Popat KC

Prashant has been instructed by defendants in many of the largest, high profile health and safety cases of recent times. His work has encompassed incidents in industries including construction, transport, retail, oil and gas, manufacturing and mining. In the field of health and safety Prashant has been awarded 'Corporate Crime Silk of the Year' by Legal 500 and twice been awarded 'Health and Safety Silk of the Year' by C&P. He is listed by C&P as a Star Individual and described by Legal 500 as "The leading most impressive advocate for health and safety, public inquiries, and inquests. Head and shoulders above all contemporaries". He is a silk of choice for large corporate entities and C&P says of him "Prashant's ability of dealing with cases involving large corporates is second to none". Similarly, Legal 500 (2023) say that he is "the best in his field and is very persuasive with his cerebral attention to detail which Judge's and clients respect and appreciate".
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Christopher Adams

Christopher regularly acts both led and unled for corporate and individual defendants in health & safety, corporate manslaughter and gross negligence manslaughter investigations and prosecutions. He is also regularly instructed in relation to coroners' inquests. His clients include public entities, private businesses and individuals working in the construction, tower crane hire, pier refurbishment, property development, education, transport, port, healthcare, pharmaceutical and manufacturing sectors. He is ranked in Legal 500 as a leading junior in Health & Safety, described as "a silky-smooth advocate with a perceptive eye". He is also a member of the committee of the HSLA.
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