Neutral Citation Number: [2019] EWHC 2407 (Admin)

Case No: CO/1083/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING AT BRISTOL CIVIL AND FAMILY JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2019

Before:

MR. JUSTICE SWIFT

- -

Between:

MEMET ALDEMIR	**Appellant**
- and -	
CORNWALL COUNCIL	**Respondent**

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- -

MR. PHILIP KOLVIN QC AND DAVID DADDS Solicitor Advocate (instructed by **DADDS LLP**) for the Claimant
SUSAN CAVENDER (instructed by **CORNWALL COUNCIL, LEGAL SERVICES**) for the **Defendant**

Hearing date: 5th July 2019

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JUDGMENT

MR JUSTICE SWIFT :

A. Introduction

1. This is an appeal by way of case stated from a decision of the Cornwall Magistrates' Court sitting at Bodmin. The decision under appeal is dated 21 November 2018 and was made by District Judge Diana Baker following a hearing on 19 – 20 November 2018.

2. The primary issue in this appeal is whether magistrates acting pursuant to their appeal jurisdiction under section 181 of the Licensing Act 2003 have the power to make non-party costs award i.e. awards of costs against persons who are not the parties to the appeals before them. In this case District Judge Baker made such an order against the Appellant in these proceedings, Mr Memet Aldemir ("Mr Aldemir")

3. The appeal before District Judge Baker was against a decision taken by Cornwall Council ("the Council") on 25 April 2018. (In fact, the decision was taken by the Council's Licensing Sub-Committee, but in this judgment, for sake of simplicity, I shall refer to the decision as a decision of the Council.) On that occasion, and following review proceedings under section 51 of the Licensing Act 2003 ("the 2003 Act"), the Council in exercise of its power under section 52 of the 2003 Act, revoked the premises licence previously granted to Eden Bar Newquay Ltd ("EBNL") pursuant to the provisions of the 2003 Act. EBNL operated premises at 1 Beach Road in Newquay, known as Eden Bar ("Eden Bar"). The sole shareholder in and director of EBNL was Mr Aldemir's brother Nimetullah Aldemir. Nimetullah Aldemir is resident in Cyprus.

4. Although the precise details are not clear, it appears that as at April 2018, the Beach Road premises were owned by Mr Aldemir, and leased by him to EBNL. Mr Aldemir also owned the fixtures and fittings used on the premises; he was employed by EBNL as its general manager. Finally, for the purposes of section 15 of the 2003 Act, he was the designated premises supervisor for Eden Bar. By reason of section 19 of the 2003 Act, the position of designated premises supervisor is critical. Section 19 provides that where a premises licence authorises the supply of alcohol, the licence must contain each of two mandatory conditions: *first* that no supply of alcohol may be made either at a time when there is no designated premises supervisor in respect of the premises licence, or if the designated premises supervisor does not hold a personal licence, or if his personal licence is suspended; *second* that every supply of alcohol must be made or authorised by a person who holds a personal licence. A personal licence is one issued under section 110 of the 2003 Act which authorises the person concerned to supply or authorise the supply of alcohol in accordance with a premises licence. By section 14 of the 2003 Act "supply of alcohol" includes retail sale of alcohol.

5. Section 181 of and Schedule 5 to the 2003 Act establish various rights of appeal against decisions of licensing authorities. Following the decision of the Council under section 52 of the 2003 Act, EBNL had a right of appeal under paragraph 8 of Schedule 5. By paragraph 9 of Schedule 5, the appeal is to a Magistrates' Court. EBNL commenced its appeal by a Notice of Appeal dated 14 May 2018. At a preliminary hearing in August 2018, the date for the hearing of EBNL's appeal was fixed for 19 - 21 November 2018. In the meantime, the Council had heard and

refused an application to transfer the premises licence from EBNL to Max Leisure Ltd. That decision was the subject of an appeal initiated by Max Leisure Ltd on 17 August 2018. However, that appeal was withdrawn on 10 October 2018. Mr Aldemir is the sole director of Max Leisure Limited.

6. The appeal to the Magistrates' Court under section 181 of the 2003 Act is an appeal by way of rehearing. At the appeal hearing in November 2018, District Judge Baker considered a significant amount of evidence and heard evidence from eight witnesses. The events that had led to the Council's decision to revoke the premises licence had comprised: (a) an incident involving Mr Aldemir on 4 August 2017 which had resulted in his conviction for an offence under section 4 of the Public Order Act 1986 (fear or provocation of violence); and (b) evidence from the police of various and frequent breaches of licence conditions. District Judge Baker considered the merits of these matters for herself. Her conclusion was that the incident that had taken place on 4 August 2017 was "appalling", and that Mr Aldemir had been the aggressor in an unprovoked and sustained attack. She concluded that the Council had reached correct conclusions about the various licence breaches; she rejected the argument made on EBNL's behalf that the Council had not reached a decision by a fair process. As to Mr Aldermir's behaviour following the Council's decision, District Judge Baker stated as follows:

> "His behaviour post the review has been violent on a number of occasions and caused significant disorder. His interference with due process is evidenced in the statement of Colin Fowler. I have watched the video clip taken by Mr Aldemir of one of the alleged victims of an assault by him, who purports to say that the two were in fact playfighting and that Mr Aldemir was asked to knock out his tooth. Such an explanation is not corroborated by the video evidence, and is in my view without total credibility. I fear the taking of the clip is a further attempt to interfere with the due process. The clip is contrived and the alleged victim appears uncomfortable.
>
> Mr Aldemir's attitude towards authority is of extreme concern. His lack of co-operation with the police and his unbalanced attitude towards Inspector Meredith causes me further concern.
>
> I am satisfied the sub-committee made the correct decision on the facts before them and that the continued behaviour of Mr Aldemir adds weight to that decision.
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> Mr Aldemir's manipulative behaviour, disrespectful attitude and his apparent belief that he is above the law causes me to seriously reflect on whether the new lease and transfer of the business is in fact a bona fide transaction made at arm's length."

The references to the "new lease" and "transfer of business" are to agreements, both dated 18 November 2018, which were shown to the District Judge at the hearing. By

those agreements Mr Aldemir (a) leased the premises used by Eden Bar to Newquays Ltd; and (b) sold to Newquays Ltd the goodwill of the Eden Bar business and the trade fixtures and fittings used in the premises. The District Judge was told that the directors of Newquays Ltd were Emma Redhead and Kevin Wills. At the hearing, it was contended that the change in circumstances meant that the decision to revoke the premises licence should itself be overturned. District Judge Baker disagreed. She was far from convinced that the 18 November 2019 documentation was genuine. Not even the solicitor advocate who appeared for EBNL on the appeal appeared to be certain whether the documents were in final form or were merely drafts. The District Judge further anticipated that it was likely that in the event of default under the lease, the premises would revert to Mr Aldemir. Her conclusion on the appeal was as follows:

> "When I consider:
>
> 1. Mr Aldemir's character;
> 2. His manipulation of due process;
> 3. The delays in the proceedings;
> 4. His application to transfer the licence to another company entirely operated by him;
> 5. The hastily drafted documentation that does not appear to have been properly executed and even if correctly executed does not in fact transfer ownership until a defined completion date that is not yet in force;
> 6. The directors' naivety and lack of licensing experience,
>
> the Appellant has failed to satisfy me that the current situation (in force for only three weeks) would allow me to grant the appeal on the changed circumstances.
>
> The Appeal is therefore refused on all grounds raised by the Appellant."

7. It is more than apparent from the judgment that District Judge Baker was entirely unimpressed by Mr Aldemir's conduct of the proceedings. At the Case Management Hearing prior to the appeal, the Court had been told that Mr Aldemir would give evidence at the appeal hearing. That was not at all surprising given his involvement in the August 2017 incident which had been central to the Council's decision to revoke the licence. In fact, Mr Aldemir did not give evidence at the appeal hearing, even though it appears that he was at court and was seen in the company of others who did give evidence in support of the appeal. The explanation given for why Mr Aldemir did not give evidence was the suggestion that it would be "inappropriate" because the business had been transferred to Newquays Ltd. It is as apparent to me as it was to the District Judge that this explanation is entirely contrived. Mr Aldemir's behaviour had been central to the decision to revoke the premises licence, that behaviour together with the possibility that, notwithstanding the transactions with Newquays Ltd which had (so it was said) been completed the day before the commencement of the appeal hearing, he might in future be involved in the business

of running Eden Bar, were clearly matters of central relevance to the appeal. It is obvious that Mr Aldemir was simply seeking to dodge these matters and his own responsibility for them.

8. Having dismissed the appeal, District Judge Baker was then asked to make an order for costs. By section 181(2) the powers of magistrates on an appeal are framed as follows:

> "(2) On an appeal in accordance with that Schedule against a decision of a licensing authority, a magistrates' court may -
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> (a) dismiss the appeal,
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> (b) substitute for the decision appealed against any other decision which could have been made by the licensing authority, or
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> (c) remit the case to the licensing authority to dispose of it in accordance with the direction of the court,
>
> and may make such order as to costs as it thinks fit."

The application for costs sought an order against Mr Aldemir rather than against EBNL. District Judge Baker made an order against Mr Aldemir. The material part of her reasons is as follows:

> "… Mr Dadds seeks an adjournment because instead of the costs being asked for against the company they are asked for against Mr Aldemir personally. Mr Dadds feels that Mr Aldemir should be put on notice. In normal circumstances I would agree but these are not normal circumstances. It has been conceded that Mr Aldemir personally is the driving force behind Eden Bar Newquay Ltd. There has been no involvement of his brother. The business we are told is entirely owned by Mr Aldemir as he is the only person to enter into the contract and lease and sale.
>
> There are times when a court can look behind the veil of incorporation and in my view Mr Aldemir is de facto Eden Bar Newquay Ltd.
>
> It would be entirely inappropriate to put the directors and shareholders of the new company at risk of costs.
>
> Mr Dadds has always been in a position to know that costs may well be ordered if the appeal was lost. He knows Mr Aldemir is in fact the controlling force behind the company and no doubt the person who pays his fees.

> In relation to Max Ltd, it was quite clear that the appeal was bound to fail. Mr Dadds concedes the sum of £2,431.50 for Max Ltd. I order that Mr Aldemir should pay these costs.
>
> I find that the costs in the matter of the Eden Bar appeal are entirely appropriate and order Mr Aldemir to pay them."

The reference to costs relating to the appeal bought by Max Ltd is a reference to the appeal initiated by Max Leisure Ltd in August 2018 against the decision of the Council to refuse to transfer EBNL premises licence to it, which appeal was withdrawn in October 2018. In respect of the appeal brought by EBNL the order of costs against Mr. Aldemir was in the amount of £30,935.50.

9. The application to the Magistrates Court to state a case was made on 10 December 2018. District Judge Baker stated the case on 7 March 2019 which contained the following questions: (1) Did I have any statutory power to order costs against a non-party? (2) If I had such a power was it reasonable to make such an order in this case? (3) Were the total costs reasonable? (4) Was I wrong to hear and determine an application for costs against Mr Aldemir who was not a party to the licensing appeal, was not present at court, did not have legal representation in court, and had no notice of the application?

10. The argument before me has focused on the first and fourth questions; the submissions on the other two questions have been much more limited. In this judgment I will consider the first question first, then the fourth question, and then the second and third questions.

B. Decision

(1) Does section 181 of the 2003 Act provide a basis for non-party costs orders to be made?

11. When the costs application was argued before District Judge Baker it was not suggested she had no power to make a costs order against Mr Aldemir. The primary submission made on that occasion was that it would be unfair to consider whether or not to make such an order without first giving Mr Aldemir notice of the application and the opportunity to respond. Consistent with that, Mr Dadds the solicitor advocate instructed by EBNL at the hearing, requested an adjournment. That request was refused; instead Mr Dadds was permitted a short time to take instructions from Mr Aldemir by phone before making his submissions in response to the costs application.

12. Before me, it was accepted that the power at section 181(2) of the 2003 Act is framed in broad terms: the court *"may make such order as to costs as it thinks fit"*. However, Mr Kolvin QC's submission on behalf of Mr Aldemir was to the effect that the provision should be construed as limited to a power to make costs orders only as between the parties to the appeal. He contended that there is a clear gap between the language used in section 181(2) of the 2003 Act and the language necessary to

establish a power to make a costs order against a non-party[1]. He drew comparison with the language that is now in section 51(3) of the Senior Courts Act 1981. That provides *"the court shall have full power to determine by whom and to what extent the costs [of and incidental to proceedings] are to be paid"*. Mr Kolvin placed particular reliance on the power to decide "by whom" costs are to be paid. Those words do not appear in section 181(2) of the 2003 Act. He relied on the judgment of the House of Lords in *Aiden Shipping Ltd v Interbulk Ltd* [1986] 1 AC 965, and submitted that the reasoning in that case supports the conclusion that in the absence of language that is the same as section 51(3), section 181(2) does not provide the power to make a non-party costs order.

13. In *Aiden Shipping Ltd*, the House of Lords reversed the judgment of the Court of Appeal that section 51(1) of the Supreme Court Act 1981 did not permit a court to make a costs order against a non-party. At the time of the proceedings in that litigation section 51(1) of the 1981 provided as follows:

> "(1) Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal and in the High Court, ... shall be in the discretion of the court, and the court shall have full power to determine by whom and what extent the costs are to be paid."

Section 51 of the (then) Supreme Court Act 1981 was revised by section 4 of the Courts and Legal Services Act 1990. In the new version of section 51, the substance of that which had previously been in section 51(1) of the Act was redistributed between a newly worded section 51(1) and a new section 51(3). These provide as follows:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –
>
> a. the civil division of the Court of Appeal;
>
> b. the High Court; and
>
> c. any County Court,
>
> shall be in the discretion of the court
>
> …
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

[1] Neither Mr Kolvin QC, nor Ms Cavender (who is instructed in this appeal by Cornwall Council), was instructed for the purposes of the hearing before the District Judge.

Section 51 has been further amended on three occasions since the 1990 Act. However, the material parts of subsection (1) and subsection (3) have remained the same. Thus, the wording considered by the House of Lords in *Aiden Shipping Ltd*, then in section 51(1) of the 1981, is in all material respects the same as the provision now made by section 51(1) and section 51(3) of the Senior Courts Act 1981 ("the 1981 Act").

14. The Court of Appeal had concluded, on the basis on the judgments in *Forbes-Smith v Forbes-Smith* [1901] P 258; and *John Fairfax and Sons v EC de Witt and Co* [1958] 1 QB 323 (both decisions of the Court of Appeal), that section 51(1) was subject to an implied limitation such that it conferred no power to make a costs order against any person who was not a party to the proceedings before the court. When *Forbes-Smith* was decided, the relevant statutory provision was section 5 of the Supreme Court of Judicature Act 1890; when *John Fairfax and Sons* was decided the relevant provision was section 50(1) of the Supreme Court of Judicature (Consolidation) Act 1925. Both provisions were materially identical to section 51(1) of the Supreme Court Act 1981, and therefore materially identical to the present provisions in the Senior Courts Act 1981.

15. The reasons for the House of Lords judgment are in the speech of Lord Goff. He concluded that there was no basis to read-in any limitation to the section 51(1), and that in any event, a limitation by reference to whether the person concerned was a party to the proceedings was not intellectually valid: see generally, his reasoning at 979C to 980D. However, save that when considering the judgment of the Court of Appeal in *John Fairfax and Sons*, Lord Goff noted: (a) that the decision had rested on the provisions of Rules of Court (RSC Order 65) rather than the language of the underlying statute (the 1925 Act), and (b) that RSC Order 65 had not included the words *"the court… shall have full power to determine by whom and to what extent such costs are to be paid"*, I do not consider that Lord Goff's reasoning suggests that the presence of such language is a condition of the existence of a power to make an non-party costs order. He did say that had Parliament intended the costs jurisdiction to be limited to orders as between parties to proceedings it could have said so in terms (see speech at 980A). But I do not take that to mean that his reasoning rests on the opposite proposition i.e. that without the words *"full power to determine by whom… costs are to be paid"* there would be no power to make a non-party costs order. Rather, and throughout his speech he emphasises (a) that the power to make costs orders is framed in broad terms, and (b) that there is no compelling reason to read-in any limitation. While Lord Goff emphasises that in the vast majority of cases a non-party costs order is likely to be unjust (see at pp. 980E – 981B), his view was that was not a consideration going to jurisdiction, rather it went only to the exercise of the power, which could if necessary be controlled either (in the context of High Court litigation) by rules of court, or (in all proceedings) by guidance from the higher courts.

16. For these reasons, the key consideration for the purposes of the first issue in this appeal is not whether or not section 181(2) of the 2003 Act contains language materially identical to section 51(3) of the Senior Courts Act 1981. Nor is the point taken any further by the fact that section 29(2) of the Tribunal Courts and Enforcement Act 2007 (the Act which establishes the First-tier Tribunal and the Upper Tribunal) is materially identical to section 51(3) of the Senior Courts Act 1981. By using the same language in each statute, Parliament can reasonably be taken to

have intended the same result on each occasion. But this does not determine the effect of section 181(2) of the 2003 Act. That provision, as enacted, is to be construed on its own terms.

17. In his submissions, Mr. Kolvin also referred to section 19B of the Prosecution of Offences Act 1985. This contains a power for the Lord Chancellor to make regulations which permit Magistrates' Courts, the Crown Court and the Court of Appeal in criminal proceedings, to make *"third party costs orders"* if a non-party has been responsible for serious misconduct and the court considers such an order to be appropriate. Further provision about this power is at Rule 45 of the Criminal Procedure Rules. I do not consider the existence of an express enabling power in the very different context of criminal proceedings to have any bearing on the construction of section 181(2) of the 2003 Act.

18. As a matter of simple language, the material part of section 181(2) of the 2003 Act, that the court *"may make such order as to costs as it thinks fit"* is framed in the widest of terms – wide enough to encompass the power to make costs orders against non-parties. Mr. Kolvin has emphasised the absence of words referring to a power to determine *"by whom"* costs are to be paid. But the power to determine by whom costs are paid is inherent in any power to make any costs order at all. The only issue is whether under section 181(2) of the 2003 Act it is only the parties to the appeal who may be required to pay costs. Section 181(2) of the 2003 Act, as enacted, is silent as to any such limitation. The language of the provision is, in this respect, strikingly different from section 64 of the Magistrates' Courts Act 1980. That section contains the power of Magistrates to make costs orders in civil proceedings under the 1980 Act and is expressly restricted to orders against either complainants or defendants to such proceedings. Section 64 of the 1980 Act is in my view, a much more material guide to the effect of the language at the end of section 181(2) of the 2003 Act than section 51 of the 1981 Act. Under Rule 34 of the Magistrates Courts Rules 1981:

> "Where under any enactment an appeal lies to a Magistrates' Court against the decision or order of a local authority or other authority, or other body or person, the appeal shall be by way of complaint for an order."

Thus, absent section 181(2) of the 2003 Act, the cost powers of the Magistrates' Court on an appeal under the 2003 Act, would be governed by section 64 of the 1980 Act. The broad frame provided by the words in section 181(2) of the 2003 Act, and the contrast with the prescriptive approach in section 64 of the 1980 Act is strongly indicative of the conclusion that the power at section 181(2) is to be construed as including a power to make non-party costs orders. Mr Kolvin submitted that the power *"to make such orders as to costs as it thinks fit"* at section 181(2) was equivalent only to the words now in section 51(1) of the 1981 Act that the costs of proceedings *are "in the discretion of the court"*. His further submission was that there was nothing in section 181(2) of the 2003 Act that was the equivalent of the words now in section 51(3) of the 1981 Act that the court has *"... full power to determine by whom and to what extent the costs are to be paid"*. I do not consider this is a point of true substance. In section 51(1) of the 1981 Act as originally enacted, the words now in subsection (1) and (3) respectively, appeared in subsection (1), side by side. They were separated out only in October 1991 when the 1981 Act was amended by the Courts and Legal Services Act 1990. I can see no significance in

this reorganisation of the original version of section 51(1). Nor can I see any significance in the fact that the 1981 Act refers, sequentially, to costs being in the discretion of the court and to the court being able to determine by whom costs are to be paid, while section 181(2) of the 2003 Act is formulated in terms of a power to make such order as to costs as the court thinks fit. Each formulation creates a broadly-framed power; the difference in the language used has no material consequence.

19. I see nothing arising from the context of proceedings under section 181 i.e. appeals to Magistrates' Courts against decisions of licensing authorities, that requires the section 181(2) power be limited to making costs orders only against the parties to such an appeal. Mr Kolvin submitted that it was significant that paragraphs 1 to 8B of Schedule 5 to the 2003 Act were highly prescriptive as to when a right of appeal arises and who can exercise a right of appeal. He contrasted this with the position in general civil litigation where persons may choose for themselves whether to litigate. In the latter situation, submitted Mr Kolvin, a non-party costs jurisdiction was warranted because the circumstances in which proceedings might be taken could be very complex. I do not see a relevant distinction. The material parts of Schedule 5 to the 2003 Act identify the rights arising from determinations by licensing authorities. That is a common feature of many statutory schemes. Functionally, these provisions correspond to the common law and equitable principles that determine the availability of non-statutory causes of action. The fact that claims before the County Court or the High Court may arise from common law rights is immaterial in terms of appropriateness or otherwise of a power to make non-party costs orders. As to complexity of circumstances behind claims, that may be material to where responsibility for the costs of proceedings ought to lie, yet claims before the County Courts or the High Court are no more or less likely to entail such complexity as proceedings under section 181 of the 2003 Act, a point made good by the circumstances before the District Judge in this case involving EBNL, Mr. Aldemir, his brother, Newquays Ltd, the directors of Newquays Ltd, and Max Leisure Limited. In any event, the rigid distinction between parties and non-parties that this part of Mr. Kolvin's submission suggests is somewhat undercut by the conclusions reached by the Divisional Court in *R(Chief Constable of Nottinghamshire Police) v Nottingham Magistrate Court* [2011] PTSR 92. In that case the court accepted that the provisions of paragraphs 1 to 8B of Schedule 5 to the 2003 Act do not exclude the possibility that magistrates may, in the exercise of their powers to regulate and control proceedings before them, join other persons as parties to such appeal proceedings. Finally, in respect of the context of proceedings under section 181 of the 2003 Act, Mr Kolvin submitted that much licensing litigation involves small, sometimes family-run, businesses; it would be inappropriate, he said, for persons working within such companies, or directors of such companies to face the possibility of non-party costs orders. In my view this point harks back to one considered and rejected by Lord Goff in *Aiden Shipping Ltd* (see at 980E to 981B). As Lord Goff stated, the existence of a power to make a non-party costs order says little as to the circumstances in which it may be appropriate to exercise the power, and in the vast majority of cases it may be unjust to make a costs order against a non-party.

20. My conclusion is that the power at section 181(2) of the 2003 Act includes the power to make a costs order against a non-party. The effect of the language used at section 181(2) is materially the same as the language used in the successive iterations of what

is now section 51 of the Senior Court Act 1981, and the corresponding sections of its predecessors, the 1890 Act, and the 1925 Act. My answer to the first question is that the District Judge did have the power to make a costs order against Mr Aldemir.

(2) Was a fair procedure followed when the costs orders were made against Mr Aldemir?

21. The substantive appeal was heard on 19 and 20 November 2018. Argument on the appeal concluded by 3pm on the second day, and the District Judge then adjourned the hearing to consider her decision. District Judge Baker gave her judgment on the appeal at 3pm the following day, 21 November 2018. The applications that Mr Aldemir should pay the Council's costs both of the appeal by EBNL and of the appeal that had been brought but then discontinued by Max Leisure Ltd were made only after the judgment was handed down. It does not appear that any prior notice had been given that if the appeal failed applications would be made against Mr Aldemir. Mr Dadds appeared for EBNL on the appeal. He explained to the court that he was not instructed by Mr Aldemir. It is apparent from the reasons for the costs decision that he requested that the costs applications be adjourned. District Judge Baker refused that application. Instead Mr Dadds was permitted a short time, fifteen minutes, to take instructions from Mr Aldemir by phone, before responding for the applications for costs.

22. In the Case Stated, District Judge Baker provides further narrative and comment on her decision to determine the costs applications in Mr Aldemir's absence. She says that Mr Dadds did not object to being asked to take instructions from Mr Aldemir; and having spoken to Mr Aldemir by phone, Mr Dadds did not ask for further time. The Case Stated then continues as follows:

> "… I did not consider that to proceed in Mr Aldemir's absence was a breach of natural justice. Mr Dadds had spoken to him. Mr Dadds is an experienced licensing practitioner and had always known costs could be an issue if the appeal was not successful. Mr Aldemir had attended the hearings prior to the final hearing. Mr Dadds took to no issue as to the power to award costs against a non-party.
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> I considered my findings that Mr Aldemir's behaviour in the proceedings at times was manipulative and the numerous applications and legal issues raised on his behalf had already caused significant delay. I asked myself whether it was necessary to have him personally present. Mr Dadds had spoken to him and I allowed him to make representations about costs both as to quantum and whom should pay. At no point did he say he required further time. I pointed out to him that the contract purporting to sell the business was between Newquays Ltd and Mr Aldemir personally and not the company. He conceded that was the case.
>
> It is not the case that Mr Aldemir was unrepresented at the hearing. Mr Dadds made representations on his behalf. The

> court heard those representations. They were considered and rejected."

23. I can fully understand District Judge Baker's frustration at the way in which Mr Aldemir had conducted himself during the litigation. Nevertheless, an application for costs against a non-party is a course of action that is out of the ordinary and can, as was the case here, lead to significant financial consequences. It is important that such an application is heard and determined in accordance with a fair procedure. There is no need for anything elaborate; there are no particular hard and fast rules; but the principles of natural justice must be observed. The person against whom the application is made must have fair notice of the application and the grounds on which it is made, and a fair opportunity to respond to the application.

24. I do not consider those principles were observed in this case. No notice of the application was given. The application was raised without notice, and only after the judgment had been handed down. I appreciate that any application for costs may be conditional on the outcome of the substantive issue, but where a party intends if successful on the substantive issue, to make a non-party costs application, there is no reason why it cannot or should not give notice of that intention well in advance of the moment the application falls to be made. Similarly, although the precise grounds of any such application may be finally formulated only after the reasons for the substantive decision have been given, it may in many instances, well in advance of that, be possible to indicate in general terms the nature of the grounds that are to be relied on. If such notice is given, it is perfectly possible that an application may be made and considered at the time the judgment is handed down. However, if prior notice is not given it is likely that the hearing of a non-party costs application will need to be delayed for a short time to allow the non-party a fair opportunity to consider and respond.

25. In the present case, the lack of prior notice was the cause of the problems that followed. Mr Aldemir did not have a fair opportunity to respond to the applications. Mr Aldemir had behaved inappropriately in the course of proceedings to date. Nevertheless, he should have been given more than fifteen minutes to respond to the costs applications. The District Judge's comment in the Case Stated to the effect that what happened was fair because Mr Dadds "is an experienced licensing solicitor" who must have realised that "costs would be an issue", misses the point. Costs are always likely to be an issue when an appeal under section 181 of the 2003 Act has been determined. But not so an application for a non-party costs order. Mr Dadds may be a solicitor with great experience in this area, but the lack of notice of the applications put him in a difficult if not impossible situation. No doubt in an effort to assist the court, he spoke to Mr Aldemir briefly and then made such response to the applications as he could. But those steps in the circumstances of this case provide only the barest appearance of a fair procedure. The substance of a fair procedure was lacking.

26. In most if not all cases it will be good practice for the grounds on which a non-party costs application is made to be reduced to writing; to be provided to the respondent to the application before the application is made; and for the application to be heard and determined only after the non-party has had the chance to consider the grounds and respond to them. In the present case, because no prior notice of the applications was

given, fairness required the District Judge to adjourn those applications for a short period, in all likelihood for no more than a day, to allow the grounds of the applications to be provided to Mr Aldemir, and allow him the chance to attend court in person or through a representative. If having had that opportunity Mr Aldemir had not attended it would have been open to the District Judge to decide whether or not to hear the applications in his absence.

27. For these reasons I consider a fair procedure was not followed when the applications for costs against Mr Aldemir were determined.

(3) Was it reasonable to make a costs order against Mr. Aldemir?

28. The consequence of my conclusion that a fair procedure was not followed is that the costs orders must be set aside and the applications for costs reconsidered. That being so, my comments on the third issue can be brief. When the applications are reconsidered they should be determined in accordance with the principles formulated by the courts in the context of non-party costs applications under section 51 of the Senior Courts Act 1981. These principles are well known and do not need to be set out again in this judgment. Suffice it to say that any application for a non-party costs order should entail careful consideration in particular of the principles set out in the decision of the Privy Council in *Dymocks Franchise Systems (NSW) PTY Ltd v Todd and others* [2004] 1 WLR 2807 per Lord Brown at paragraphs 25-28; as further considered in the judgment of the Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc.* [2014] 4 WLR 17 per Moore-Bick LJ at paragraphs 15-22, 30-31, and in particular 61-62. The power to make costs orders under section 181(2) of the 2003 Act is a broadly formulated power. The overriding principle is that this power must be exercised justly. So far as concerns this case, I note only that two separate applications were made against Mr. Aldemir (for the costs of the EBNL appeal; and the costs of the appeal commenced and then discontinued by Max Leisure Ltd, respectively) and that the outcomes of each application will be independent of the other.

(4) Were the total costs reasonable?

29. My comments on the fourth question can be briefer still. In an appeal by way of Case Stated the Court's role is to determine, by reference to the questions stated in the Case, if the court below has erred in law. The fourth question is directed to District Judge Baker's conclusion on the assessment of the amount of costs that should be paid. In this case, it is not obvious that the assessment involved consideration of any question of law let alone any actual error of law on the part of the District Judge.

30. At the hearing, Mr Kolvin indicated that he placed little if any weight on this ground of appeal. The only point advanced was that the hourly rates claimed were high by reference to rates paid by Attorney General to his panel counsel when they undertake civil work for government departments outside London. This may be so, but I fail to see how a conclusion that a rate higher than the Attorney General's panel rate should be allowed entails any error of law.

C. Conclusion

31. For the reasons set out above, although the District Judge had the power under section 181(2) of the Licensing Act 2003 to make a non-party costs order against Mr Aldemir, the appeal is allowed on the basis that a fair procedure was not followed when the applications for costs were determined. The costs orders made against Mr Aldemir must be set aside and reconsidered by the District Judge.