CO/7131/2012

Neutral Citation Number: [2013] EWHC 3765 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 12 November 2013

B e f o r e:

LORD JUSTICE TREACY

MR JUSTICE OUSELEY

Between:

THE QUEEN ON THE APPLICATION OF AYLESBURY VALE DISTRICT COUNCIL

Claimant

v

CALL A CAB LTD

Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Mr J Findlay, QC and Mr R Clarke (instructed by Aylesbury Vale District Council) appeared on behalf of the **Claimant**

Mr P Kolvin, QC (instructed by Public Access) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE TREACY: I will ask Ouseley J to give the first judgment.

2. MR JUSTICE OUSELEY: This is an appeal by case stated against the decision of District Judge Pattinson at the Aylesbury Magistrates Court on 8 March 2013. His decision was to acquit both defendants in respect of five charges arising under section 46 of the Local Government Miscellaneous Provisions Act 1976. The first defendant was charged under that provision with operating a private hire vehicle without having a current licence, "in a controlled district". The second defendant was the sole director of the first defendant. He was charged with aiding, abetting, counselling or procuring those offences.

3. The crucial words for the purposes of this appeal are the words in section 46, "In a controlled district". Section 80 of the 1976 Act defines a controlled district as:

> "Any area for which this part of this Act is in force by virtue of ... a resolution passed by a district council under section 45 of this Act."

The district council in question is the Aylesbury Vale District Council, which was the prosecutor. The relevant area in respect of which it is said a resolution was in force was the whole of its area. Section 45 deals with how such a resolution has to be passed. By section 45(1):

> "The provisions of this part of this Act, except this section, shall come into force in accordance with the following provisions of this section..."

Section 45(3) is the important one:

> "A council shall not pass a resolution in pursuance of the foregoing subsection unless they have
>
> (a) published in two consecutive weeks in a local newspaper circulating in their area notice of their intention to pass the resolution, and
>
> (b) served a copy of the notice not later than the date on which it is first published in pursuance of the foregoing paragraph on the council of each parish or each community which would be affected by the resolution or, in the case of such a parish which has no parish council, on the chairman of the parish meeting."

The foregoing subsection referred to is subsection (2) which provides that if a council does pass a resolution bringing into force in its area the relevant parts of the Town Police Clauses Act 1847, they come into force on the day specified in the resolution.

4. The effect of the application of those provisions is to make private hire vehicles subject to a licensing regime which includes standards, for example in relation to vehicle maintenance, and also to apply Hackney Carriage licensing provisions. The Act does mean that when a section 45 resolution is passed, at least so far as private hire vehicles

are concerned, failure to comply with the requirements creates a criminal offence which hitherto had not been the case.

5. It is agreed that the defence could, by way of a defence to the charge not contained in the statute, show on the balance of probability that no resolution under section 45 had been passed or, if passed, was subject to procedural failings such that it was invalid in consequence. That is the basis of the defence here so far as it gives rise to the appeal.

6. On the first day of the trial the defendant, without notice at all, raised the question of whether the necessary resolution to bring part 2 into operation had been passed. The District Judge adjourned the hearing for just over a month in order for the prosecutor to obtain evidence of the passing of the resolution. During that time it became apparent that the issue went wider than the passing of the resolution itself to the question of whether the requirements in section 45(3)(b) in respect of the resolution had themselves been met.

7. It is important in considering the District Judge's approach to the evidence then produced that the prosecutor accepted, first, that it was open to the defendant to seek to prove not just that the meaning and effect of the resolution produced by the prosecutor did not satisfy section 45, but also to seek to prove that the process leading to that resolution, however effective the resolution was on its face to meet the requirements of section 45, did not comply with section 45(3)(b). There was no dispute about the compliance with the newspaper notice in section 45(3)(a).

8. The prosecutor also accepted that the resolution would not have complied with section 45(3)(b) if any parish which should have been notified of the intention to pass the resolution had not been notified. That was recorded by the District Judge. In other words, a proven failing as to just one parish, irrelevant perhaps to the location of the defendant's business which was not in existence at the time of the passing of the resolution in 1989, would have led to a breach of the requirements of section 45(3) in relation to the resolution.

9. The evidence before the District Judge on the adjourned hearing came from both prosecutor and defendant. The prosecutor provided a statement from Mr White, the District Council's then head of administration. He produced the minutes of the Council's Transport Subcommittee meeting on 4 January 1989 which recorded that the principle of licensing of private hire vehicles be approved and minuted the passing of a resolution authorising the district secretary and solicitor to publish the necessary notice and serve notices on the Parish Council.

10. On 22 January 1989 the Development and Recreation Committee authorised the District Council's solicitor to publish the notices and to serve them on the Parish Councils in accordance with section 45(3), ie it resolved that the procedure under section 45(3) be carried out. It could not adopt, because it lacked the power to do so, the recommendation of the Transport Committee that part 2(b) applied to the area; that was for full Council to approve.

11. On 8 March 1989, full Council approved and adopted the Development and Recreation Committee minutes, seemingly adopting the recommendation. The District Judge had reservations about the effectiveness of that resolution upon which he did not reach any final conclusion. It appears that he had two reservations about its effectiveness. First, it was not specific as to whether the full Council had indeed resolved to apply part 2 to the District Council's area. Secondly, there was uncertainty as to whether the minuted action which it was adopting was the carrying out of the process under section 45(3) or the application of part 2 itself at the final outcome of the process. He appears to have thought that a resolution might have been missing. The evidence from Mr White also was to the effect that the records of notices which the Council might have served on the Parish Councils were not available as the relevant files had been destroyed many years ago.

12. The District Judge contrasted the Local Authority's researches with those of the second defendant who had contacted the clerks to a number of Parish Councils who had referred him on to Buckinghamshire County Council where the Parish Council records were retained. The second defendant managed to obtain copies of several pages of Parish Council meetings covering 12 Parish Councils over the relevant period.

13. In the light of the evidence before him the District Judge made these findings of fact about the process whereby the resolution, such as it was, came to be passed, leaving the question of what the resolution meant as rather uncertain. He concluded that the second defendant research had been meticulous, that he had not picked only evidence favourable to his case and that he was an honest and reliable witness. The judge then said:

> "(iv) I have no reason to believe that any of the Parish Council minutes had been other than detailed, complete and accurate. In none of the minutes presented to me was there any evidence - let alone any convincing evidence - that any Parish Council had been notified.
>
> (v) The prosecution had failed to produce any evidence that any Parish Council had been notified."

His decision two paragraphs further on was:

> "My decision was that the defence had satisfied me on a balance of probabilities that Aylesbury Vale District Council had failed to notify the Parish Councils in breach of section 45(3) of the Act. Even a failure to notify one Parish Council out of a total of 112 would constitute a breach. I was satisfied that 12 Parish Councils had not been notified. Therefore it was not necessary for me to speculate as to whether the remaining 100 Parish Councils had been notified. Accordingly, I decided that the requirements of section 45(3)(b) had not been satisfied."

14. The first question raised in the case stated relates to the facts which I have just set out. I deal with that now. The first question is:

> "1. Whether there was sufficient evidence on which the court could reasonably conclude that the requirements of section 45(3)(b) of the Local Government Miscellaneous Provisions Act 1976 had not been satisfied?"

It is agreed that the question which has to be asked is whether the conclusion which the District Judge reached was irrational. That is, was it irrational for him to conclude that the defendant had succeeded on the balance of probabilities of showing that 12 Parish Councils had not been notified? If the District Judge was entitled to reach that conclusion, then the answer to question 1 is yes. The framing of the question reflects the fact that the defendant bore the burden of proof on the civil standard. True it is that there is a presumption of regularity upon which the Council could rely before him. But in my judgment that presumption is merged into the question of whether the defendant has succeeded in showing, on the balance of probabilities, that there was no notice given to the 12 parishes.

15. The submissions by Mr Findlay QC for the Appellant prosecution to this court are that there are a number of areas in respect of which the District Judge has ignored important components to the judgment on that issue. It was said that he had ignored what was said to be the fact that it was unlikely that the Council had failed to notify the Parish Councils, having decided to do so, and having proved that the notices had been given in the newspapers. It was unlikely that the District Council would proceed to pass a resolution at full Council if the preconditions had not been satisfied. Had there been a failure to comply with the requirements of the statute, there would have been in all probability, a contemporary protest, rather than the issue being raised for the first time, so far as was known, after 24 years despite many intervening prosecutions.

16. It was said to this court, although it appears not to have been submitted in this way in evidence to the District Judge, that the 12 Parish Councils were rural parishes, less likely to contain taxi businesses and so less likely to record the notices sent to them. It was said to be inherently more probable that notices were received but not recorded rather than not being sent at all. The defendant's evidence was insufficient to overcome the presumption of legality or irregularity. It is my judgment that the Council has not succeeded in showing that the conclusion of the District Judge in this respect was irrational.

17. I start from this premise. The District Judge was entitled, upon analysis of the minutes of the Parish Council which he had received, to infer that their record-keeping minuting, including minuting of correspondence was sufficiently detailed and thorough that the receipt of a notice would have been minuted. That was an inference which it was open to him to draw having examined in considerable detail the contents of the minutes. It was therefore open to him to conclude that something was missing from those minutes and that was because the notice had not been served as required.

18. Faced with that, he then was entitled to ask what it was that the Council had produced beyond a presumption that it would have done what it had intended to set out to do. There was no specific evidence from the Council, not evidence even in the form of a report to the full Council stating that the notices had been sent out to the Parish Councils or a minute to that effect or a recital to the resolution. It is said that nothing

can be inferred from that silence and, even if further records had been produced, Parish Councils might have differed in the way in which they recorded the receipt of such notification. That is as may be but it does not show that the conclusion of the District Judge on the evidence he had in relation to what happened to each of those 12 Councils was irrational. There was no evidence that 12 Parish Councils were rural or that Parish Councils in a rural area were disinclined to record notices received of a particular nature.

19. In substance, the factors which Mr Findlay contends were ignored, were not in reality ignored, they were arguments which the District Judge considered, but which he rejected. It is my conclusion therefore that the question should be answered in favour of the defendant: yes.

20. I understand the concern which the Local Authority at this distance in time has about any such conclusion, particularly as after the passage of such time it would regard the presumption of legality as a solid basis upon which to resist such a defence. I accept that the concern is such that legislative changes are considered. I would emphasize the limited nature of the decision here. It does not prevent the Council in a subsequent case producing better evidence of what underlay the resolution, supported perhaps by a contemporaneous report showing or asserting contemporaneous compliance with section 45(3), a state of affairs which would have been of considerable assistance. It does not stop them researching whether other Parish Council records show that notice was given, which would support its contention that there was no great weight to be attached to non-minuting by other Councils, because a random process of sending out notices might be regarded as less probable than a random recording process. Indeed, it can go through the adoption process again. But none of those possibilities is a reason for holding that the District Judge's conclusion in this respect was an irrational one, one which he was not entitled to come to.

21. That leads on to question two. Question two is:

> "Whether, having concluded that those requirements were not satisfied, I was obliged to dismiss the prosecution?"

The argument which this revolves around is whether and to what extent a failure to comply with the giving of notice under section 45(3)(b) necessarily, and without any other matters being brought into play, invalidates the resolution so that it is of no effect. It was the contention below, although it does not appear to have had any particular factual scenario attached to it, that the District Judge was not obliged, merely on finding that one or some of the 12 Parish Councils at issue had not received notice, to conclude that the resolution was automatically invalid. How far the argument actually went is not entirely clear. The parties' submissions are not recorded and, understandably, there is some difficulty at this distance in time in remembering precisely how the arguments were put. Mr Findlay for the prosecutor says that the issue of substantial compliance was raised but not by reference to any particular number of Parish Councils being notified. Mr Kolvin QC for the defendant submits that, in reality, the focus of the debate was whether there had been notification to none (his contention) or notification to 112 Parish Councils (the Council's contention).

22. We have been taken through a substantial number of authorities to provide assistance as to what the effect of the non-compliance found by the District Judge would be. I do not consider it necessary to go through the detail of those submissions. What the cases all show is that the question of whether non-compliance has the effect of invalidating an administrative act is a matter that depends in the first place on the construction of the statute, read as a whole in order to determine the imputed intention of Parliament as to what the consequences of non-compliance with a procedural requirement should be. Here Mr Kolvin prays in aid the negative language of section 45(3)(b): the resolution is not to be passed without compliance with those provisions. Criminal liability can ensue, although part 2 of the 1976 Act goes considerably wider than merely to create a criminal offence in respect of a business activity, up to that moment, still lawful.

23. The notification requirements are an important part of making the public aware of the imminent passing of a resolution. There is no provision whereby an individual is entitled to be notified just because that individual is affected, and there is no means whereby an individual can appeal against the administrative act when first it begins to bite upon him. He drew analogies with the decision of Forbes J in R v Birmingham City Council ex p. Quietlynn Ltd [1985] 83 LGR 461. He emphasized that, this being a criminal prosecution, a defendant should not be in peril of conviction upon an act which would be invalidated by the Administrative Court. Indeed, the decision in Boddington v British Transport Police [1999] 2AC 143 suggested that the powers which the Administrative Court might have to exercise its discretion against quashing an administrative act, or refusing relief on the grounds that it had not been sought timeously, would not apply so as to bar reliance upon invalidity by a defendant to a criminal charge.

24. Mr Findlay submitted that whatever the particular language of section 45 in terms of prohibition, the statutory provisions read as a whole showed that the notice requirement was no more than a notification requirement. It did not incept a process of consultation, nor was it there obviously to give rise to a right of objection. There was no obligation on a Parish Council to do anything with the notice when received apart perhaps, with the benefit of hindsight, to note that the post had arrived. There was no requirement that the notice be sent to the operators of private hire vehicles businesses who might, in 1989, have been affected.

25. Plainly there was no prejudice suffered by these defendants from any failings since even had they been in business in 1989 they would not have received notice and as they were not in business then they could not have received notice, nor was there any obligation to provide notice of the resolution to businesses coming to existence after the passing of the resolution. The notice to the public at large should be regarded as effectively provided by the notice to the press advertisement which requirement was complied with. The fact as is true that these failures were not failures in relation to timing but, as found by the District Judge, failures in relation to giving notice at all did not prevent the failure to meet the requirement being one which did not necessarily give rise to invalidity.

26. In my judgment, although the language of section 45(3) clearly makes it a requirement, mandatory if you will at this stage, that notice be given to each Parish Council, reading

the statute as a whole and recognising the complete lack of prejudice to the defendants from non-compliance with the statutory requirements beyond the fact that non-compliance might give them an argument whereas validity would deprive them of it, the factors have discussed that, if there is substantial compliance with the statutory provision, the act is not invalid.

27. The question then arises as to what this court is to make of what the District Judge concluded. It is my judgment that the District Judge did, in reality, conclude that because there had been a failure in relation to 12 Parish Councils there was simply no need to examine further the consequences of non-compliance. That failure was by itself sufficient to mean that the resolution was invalid.

28. I accept that the District Judge in paragraphs 21 to 24 did consider questions that are relevant to the way in which an argument about invalidity can be raised. Those points are all very well and good in themselves but they only go to the entitlement of the defendants to raise the point. They do not represent any consideration of the consequences of finding that 12 Parish Councils had not been notified for the validity of the resolution. It is my judgment that in paragraph 25, supported by what continued in paragraph 26, that the District Judge did not direct himself to the question of substantial compliance. As I have said, I am satisfied that this is a statute in respect of which substantial compliance with the requirement means that the act is valid even if the compliance has not in all respects been completed.

29. I am also satisfied that the fact that 12 out of 112 Parish Councils were not notified does not mean that it is inevitable that the District Judge should find that there was no substantial compliance. It seems to me, notwithstanding that he appears at that stage not to have accepted Mr Kolvin's submission that it followed that there had been no compliance in relation to serving notice on 112 Parish Councils, that he simply reached no view upon substantial compliance because he did not think it necessary to do so.

30. Once that position has been arrived at, the question is whether there has inevitably been substantial compliance. The issue has not been addressed. In my view, it cannot necessarily be resolved simply by pointing to the existence of a want of notices on 12 out of 112. It seems to me therefore that the answer to question number two is no, and the matter has to be remitted to the District Judge for him to consider what decisions then to make on substantial compliance.

31. There are three issues which it seems to me the District Judge has to consider at least. The first is whether he had to reach a view on the resolution issue itself about which he expressed uncertainty but in my judgment his view on that is one for him to resolve finally. Secondly, he has to reach a view on whether there was in fact substantial compliance. For those purposes he will have to consider whether he wishes to draw an inference about service in relation to the other 100 councils and if he draws no inference that they were not served he has to consider where that leaves him in respect of substantial compliance. He will also thirdly have to consider the operator issue. It is my judgment that although subject to a timetable which it is for the District Judge to set, further submissions on all those issues after so along a lapse of time can properly be made to a District Judge. This is not a case however where any further evidence

should be provided to him for the resolution of those issues. This case will have to be decided on those issues. Accordingly, I answer question one in the case stated, yes. I answer question two, no. I would, subject to what my Lord says, remit the matter to the District Judge on the basis I have set out.

32. LORD JUSTICE TREACY: I would answer question one, yes and question two, no. I would answer the questions in those ways for the reasons my Lord has just given. I, too, would remit this case for further consideration by the District Judge. As identified by my Lord there are three potential issues which he will have to deal with. I agree that the matter should be decided on the basis of further submissions to be heard by the District Judge but not on the basis of any additional evidence.

33. I would only add to the remarks of my Lord that I was concerned on reading these papers to see that the issue of the validity of the by-law had not been raised at the case management hearing, nor had it been raised in the defence statement. Good practice, and the observations on a number of occasions by this court, dictate that an issue of this nature should be raised well in advance of the hearing so that all parties are in a position to present relevant evidence to the tribunal at the time when the case is listed for hearing. In this instance an adjournment of over a month was necessary and a further day of court time was taken up. In reality, the raising of the issue at such a late stage can properly be described and has been described as tantamount to an ambush. I repeat that it is not good practice and it should not happen in the future.

34. Notwithstanding the fact that the prosecutor had been taken by surprise in the way described, the effect of the grant of a month's adjournment and orders for the service of any materials to be relied on during that period enables the District Judge to deal with the matter appropriately. However I would wish to draw attention to this failure to adhere to practice.

35. MR FINDLAY: My Lord, can I raise two matters with your Lordships. One concerns costs and one concerns your Lordship's directions as to evidence. In terms of the matter relating to evidence, following the conclusion of the matter before the District Judge, the District Council took certain steps to ascertain the position in respect of the minutes. I have not raised that before your Lordships because it didn't concern the substance of this case. But there is evidence which calls into question evidence which was put before the District Judge.

36. MR JUSTICE OUSELEY: On what issue?

37. MR FINDLAY: On what minutes the second defendant had sight of and what information he had been given before he gave evidence. I can pass up some correspondence which makes that entirely clear, but there is evidence now that he may not have been as exact, and that evidence hasn't been tried, and hasn't been given an explanation. But he may not have been as exact with his information as the District Judge indicated. I only raise that at this stage because in my submission that is the type of information, albeit exceptionally, that the District Judge should be entitled to have regard to because otherwise it may be he is reconsidering this matter upon

information which is incorrect, particularly as it goes to the issue of the further parishes about which he formed no conclusion.

38. MR JUSTICE OUSELEY: Does the evidence you are talking about go to that issue, that is to say the entirety of the substantial compliance issue, what is he going to refer in relation to the 100, or does it go to the what was done in the 12?

39. MR FINDLAY: It doesn't undermine what was said in relation to the 12, but it does seek to undermine that that was all the evidence he had.

40. LORD JUSTICE TREACY: That was a finding that, in effect, it had been a valid sample. Are you submitting to us that you are possessed of material to show that the court was misled by the second defendant in relation to the validity of that sample?

41. MR FINDLAY: Arguably so, my Lord, yes, in two respects. One is that a parish clerk said that she was contacted by an individual with the same telephone number as the second defendant. She indicated to him that she had minutes which did show a record of receipt. Also the records, the archive office is able to record what minutes the second defendant took out to examine and upon examining those minutes he took out many more than 12 and some but not all of them that he didn't refer to in the magistrates court do contain reference to minutes having been received.

42. I hope your Lordships don't think I have forced your Lordships to conduct this on an improper basis, but it would be improper for me to draw that to your Lordship's attention before your Lordships had given judgment because this appeal is on the facts as the District Judge found them. But in terms of the future conduct of the case in my submission, and I can provide your Lordship with the statements, I have copies of them in court, but in terms of future conduct of the case that provides an exception to which your Lordship could not have contemplated as to how this case may be in the future conducted.

43. LORD JUSTICE TREACY: Yes I see. Do you want to say anything, Mr Kolvin?

44. MR KOLVIN: My Lord, I had no idea Mr Findlay was going to say what he just said. Can I just track back. Following judgment, I can't remember how long after judgment was given by the District Judge I was given by Mr Clarke, or given by the second respondent, the material to which Mr Findlay averts and of course it came as an enormous surprise to me. The question then became what to do about that in the context of this appeal. It was agreed by Mr Findlay and myself that it couldn't really be placed before my Lords because you had to consider the matter based on the facts which were before the District Judge. That is the way the matter was left.

45. In my skeleton argument I put in paragraph 24.3 that the second respondent is no longer with us, he has actually emigrated. Mr Findlay at that point said, in that case, that's a discretion point, I shall need to raise it. But it was left, and I would not raise that point and Mr Findlay has not placed these matters before you because it does not concern the matters on appeal. I have not had an opportunity to think through, as Mr Findlay did not tell me he was going to say what he just said, what the consequence should be in a

completed criminal trial if it is remitted to the court of the reopening when it has already given --

46. LORD JUSTICE TREACY: It is not a completed criminal trial. We have remitted the matter for further consideration which in effect has the position of reopening the proceedings.

47. MR KOLVIN: Yes.

48. MR JUSTICE OUSELEY: Even if question one is closed in terms of a finding of fact that 12 were not notified, the question of whether the District Judge will need to consider whether or not he is going to treat that as the limit of non-notification, whether he is going to infer that there must have been more, whether he is going to infer that none were notified and the existence of evidence available to the second defendant but which was not shown to the court which is capable of showing that the inferences should be drawn on a different basis seems to me on the face of it relevant to question two.

49. MR KOLVIN: I see force in that, my Lord. Can I say I do not represent Mr Raja now. It is an enormously uncomfortable position to be in.

50. LORD JUSTICE TREACY: We understand your position. I personally have in mind a finding at paragraph 18(ii), he had presented all the evidence within his power, ie he had not omitted evidence which might have been damaging to his case.

51. MR KOLVIN: And he was cross-examined on the matter and that led to the District Judge's finding. What I don't want to do is to have you remit the matter to the District Judge in a situation where the District Judge is able arrive at factual findings, to have him arrive at those factual findings on a false basis. It just seems completely wrong to me. Although Mr Findlay has not raised them before, that's my immediate reaction in the light of the Lord's rulings.

52. LORD JUSTICE TREACY: We do not need to hear further from you, Mr Findlay. You said there was a costs matter, we will deal with that separately.

53. MR FINDLAY: Very well, my Lord.

(A short adjournment)

54. LORD JUSTICE TREACY: The circumstances which have arisen in the immediate aftermath of the giving of the judgment by members of this court are unusual. We accept that the appellant is possessed of fresh evidence which has arisen since the time of the hearing which may call into question the bona fides of the second respondent and the validity of the survey of notification of Parish Councils about which he gave evidence below. We particularly have in mind the finding at paragraph 18(2) of the case stated where the District Judge found that the second respondent had presented all the evidence within his power (ie, he had not omitted evidence which might have been damaging to his case). It appears that there may be material available to the appellant which shows that that is not an accurate statement of the true position. In those circumstances we have had to consider whether to modify the indications which we

gave as to the conduct of the remitting hearing before the District Judge. We are satisfied that in the circumstances which arise that it is appropriate for a change to be made.

55. We conclude our previous reference to the hearing below being conducted without any further evidence being given should be subject to the exception that the appellant is at liberty to present evidence to the court relating to the matter set out at paragraph 18(2) of the case stated. The adducing of that evidence will not be evidence going to the issue raised by the first question in the case, it will be evidence which will be capable of having a materiality on the issues to be considered under the second question in the case stated. To that extent we have varied the order indicated by the judgments given a few minutes ago.

56. MR FINDLAY: Much obliged, my Lord. May I indicate that in the light of my learned friend withdrawing any submissions on relief about the defendant being in the country I had undertaken not to raise that issue and I didn't raise that issue. I did not give notice, in the light of your Lordship's judgment there was little opportunity to give him notice and I hope your Lordships didn't think I misled him in any way.

57. LORD JUSTICE TREACY: No, we understand how this matter arose. Time is running on. You have a costs application.

58. MR FINDLAY: Yes, there is a costs schedule.

59. LORD JUSTICE TREACY: We have not seen any schedule.

60. MR FINDLAY: Perhaps I can pass that up to you.

61. MR JUSTICE OUSELEY: From whom are you seeking costs?

62. MR FINDLAY: I am seeking them from the defendant, the first defendant in the first instance. It is really the first passage that of sheet, it is the sum total of £23,458.10.

63. LORD JUSTICE TREACY: We have a figure of £23,000.

64. MR FINDLAY: Yes, £23,458.10.

65. LORD JUSTICE TREACY: Yes.

66. MR FINDLAY: The Magistrates' Court costs will be dealt with in the Magistrates' Court on remission. My learned friend's costs on direct access in return I think were going to be £12,500.

67. LORD JUSTICE TREACY: Thank you.

68. MR FINDLAY: My application is against both defendants, I should make that clear, but it is against the defendants in the first instance.

69. LORD JUSTICE TREACY: Thank you. Mr Kolvin.

70. MR KOLVIN: The second respondent is not here and one would not normally have made costs orders against absent respondents. But of course I am here on behalf of the first respondent for whom I make the following points.

71. LORD JUSTICE TREACY: What is the second respondent's position with the first respondent? He is the sole director.

72. MR KOLVIN: I do not believe he is a director any more, my Lord.

73. LORD JUSTICE TREACY: Well at the material time he was.

74. MR KOLVIN: It affects me not at all if my Lord were to make an order against the second respondent.

75. MR JUSTICE OUSELEY: You are not appearing for the second respondent?

76. MR KOLVIN: In this court, no, never have been. The matters to which Mr Findlay has just averted ruptured that relationship for reasons that my Lords can well imagine. So far as the first respondent is concerned, can I make the following points briefly, I do have an eye the clock.

77. Firstly, the hourly hours that have been charged are, respectively, £217 and £161 for two solicitors who in the Magistrates' Court were charged almost exactly half that, they will not be making profits from their solicitors costs. Secondly, and more importantly, the solicitors' work involved in this appeal actually directly relating to the appeal involves the service of the notice of appeal. We can see what work that involved by looking at the second page whereby three units, which is to say half an hour, was devoted to preparation in the appellant's notice. All the other paper my Lords have is an authorities bundle which has been prepared by counsel for the appellants. An enormous quantum of time, 139 units for attendance was on the client. Attendance on respondent, very small, 9 units as one would expect because almost no work was down for solicitors in this appeal. Attendances on counsel, 239 units. Well, all that happened was a notice of appeal went in and Mr Findlay and Mr Clarke prepared a skeleton argument. Then we get to work done on documents, drafting, 3 units, and then 20 units for statements of costs. It's very probable that quite a lot of work went into considering what the ramifications of the judgment might be. But it's quite clear that no work went into the progress of the appeal itself, there was no documents to compile or no witnesses to proof, there were no affidavits to put in, 3 units on appellants notice. I respectfully submit that that is really far too high, what has been claimed. It should really be no more than perhaps £1,000 or £2,000 total for the work involved with the litigation solicitors in preparing the case for appeal to the High Court.

78. So far as Mr Findlay's and Mr Clarke's fees are concerned, I don't know whether the fee given includes VAT or not, I haven't been told. But in any case, given this is a case stated appeal, I'd respectfully submit that it wasn't necessary for two barristers to be involved, one counsel would perfectly suffice. I don't mind that it was leading counsel because my client's had leading counsel, but it wasn't necessary to have two counsel involved and some allowance ought to be made for that.

79. My last point is that although Mr Findlay has succeeded to the extent of getting a remission, he lost on one issue and won on the other and there ought to be some reflection of that.

80. LORD JUSTICE TREACY: Thank you. Mr Findlay?

81. MR FINDLAY: My Lord, on the two counsel point, I can deal with that very briefly. The fee for one counsel was set and Mr Clarke and I are going to deal with that as befits ourselves. As to the solicitors' costs, they are quite entitled to the hourly charge out rate that they have set and they are quite entitled to recover for those. As to the time they've spent, it's not just preparation of papers. Your Lordship will see that counsel's fees include advice, conference, documents and hearing. There was a considerable amount of consideration given to whether we should appeal, the merits of the appeal, dealing with the material that has subsequently arisen. My learned friend significantly understates the work that solicitors have to do in order to prepare an appeal. In our submission, the full sum should be awarded or that such diminution should be limited.

82. LORD JUSTICE TREACY: Thank you.

83. MR JUSTICE OUSELEY: I am not sure whether considering whether to appeal on the substantive material should really form part of the costs of the appeal. There were plenty of ramifications but is that what costs should be directed to?

84. MR FINDLAY: In my submission it is normal that advice on the merits of the appeal would be covered by the costs of the appeal, the solicitors' costs leading to such advice and consultation on these issues. There were considerable discussions as to what to do with the evidence I have just alluded to.

85. MR JUSTICE OUSELEY: Why is that?

86. MR FINDLAY: That directly relates to the appeal because in this sense my learned friend Mr Kolvin was going to rely on the emigration of the second defendant abroad. That emigration swiftly followed a letter from my instructing solicitors outlining the material that had been found so that had my learned friend persisted in relying on the absence of the second defendant abroad I would have brought that material before the court earlier on. But that was a matter, because I realised that such material would be highly prejudicial to this case, I alerted him to that beforehand and he withdrew that allegation. But that was all part and parcel of the work that had to be done on the appeal.

(A short adjournment)

87. LORD JUSTICE TREACY: We will make an order for costs against the first respondent. That order will be made in the sum of £15,000 inclusive of VAT. We have not allowed the application for costs in the sum sought. In coming to our collusion we have taken account of the fact that the respondent succeeded on one issue, notwithstanding the appellant's success on the second issue. We have also had regard to the amount of work claimed for and the quantum of counsel's fees and we have

substituted our own assessment of what is reasonable and proportionate in the circumstances of this particular case. The amount overall is £15,000, including VAT.

88. MR KOLVIN: Thank you, just one further matter, very briefly. There's now some gap between the judgment of Forbes J in the Quietlynn case and the judgment of this court in this case. I have an application to appeal to the Supreme Court and ask my Lord to certify as a matter of general public importance whether a failure to comply with the provisions of this legislation is a matter in which substantial compliance is sufficient or creates an absolute requirement.

89. LORD JUSTICE TREACY: Thank you, we will rise to consider that.

(A short adjournment)

90. LORD JUSTICE TREACY: We decline to certify those points.

91. MR FINDLAY: My Lord, just one minor point as to VAT. My instructing solicitors were not suggesting that the total that we might ever pay the first defendant is £15,000. VAT would be charged on myself and Mr Clarke's fees but not on my instructing solicitor's fees, so it would be inclusive of VAT if charged.

92. LORD JUSTICE TREACY: Yes that is what we had in mind, thank you.