IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

[2017] EWHC 3042 (Admin)

CO/3499/2016

Royal Courts of Justice

Wednesday, 8th November 2017

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

THE QUEEN ON THE APPLICATION OF GAZI KHAN

Claimant

- and -

FELTHAM MAGISTRATES' COURT

Defendant

and

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HOUNSLOW

Interested Party

J U D G M E N T

APPEARANCES

MR C WITCHER appeared on behalf of the Claimant.

THE DEFENDANT was not represented.

MR M PAGET appeared on behalf of the Interested Party.

MR JUSTICE COCKERILL:

1 In this hearing of the application for Judicial Review of a decision by the Feltham Magistrates' Court is brought as to the award of costs in favour of the London Borough Hounslow ("the interested party") which was made against Mr Khan, the claimant.

2 The grounds of challenge are that the Feltham Magistrates' Court, the defendant, erred in law in its decision that (1) it had a statutory power pursuant to the Magistrates' Court Act 1980 s.64 to award costs in favour of the interested party; (2) in the alternative, it is said that the defendant's exercise of its discretion to award costs against the claimant was unreasonable and irrational; (3) in the event that the defendant exercised its decision to award costs rationally the quantum was unreasonable, disproportionate and irrational. A failure to provide reasons is also listed in the statement of facts and grounds, although the focus of the argument is elsewhere.

3 On 21st November 2016 Mr Justice King granted permission to bring Judicial Review proceedings, stating that all three main grounds of challenge were plainly arguable.

4 I note by way of parenthesis that to the extent that the complaint is that the Justices erred in law in finding that they had jurisdiction under s.64 or failed to give reasons - a point which I will deal with later - the normal method of challenge should be appeal by way of case stated, which would have had to have been brought within twenty-one days under s.111 of the Magistrates' Court Act and would have involved paying court fees.

5 However, the argument today proceeds as a Judicial Review between the claimant and the interested party. The defendant, as is often the case in judicial reviews of court proceedings, has adopted a neutral stance.

6 I should also mention that Mr Justice King put down a marker about delay and whether the claim was filed on time. That is essentially a non-issue. No point was taken on this by the interested party or the defendant and in my judgment rightly so - there is no issue. It appears that the claim was issued on 1st July 2016 while the decision was dated 4th April 2016. Confusion appears to have been caused at some point by the date of the sealing stamp on the application being 11th July 2016.

7 With that introduction I shall outline the factual background.

8 On 1st February 2016 Mr Khan sought to re-open nine liability orders, the majority of which dated from 2006 and one from 2013. These had been made in connection with unpaid

Council Tax. The basis of the application was an invitation to the defendant to exercise a common law discretion in his favour. That matter was intended to be determined on 9th November 2015 by way of a final hearing. However, the 9th November hearing was adjourned in circumstances which remain controversial.

9 In essence, there was an issue about the interested party's compliance with a court order in terms of the service of a bundle. It appears that the claimant's counsel had not received the interested party's evidence in response but the claimant's solicitors had. Who was responsible for that and where fault should lie is a matter which remains contested between the parties. What happened was that although an application for costs was made at that time, costs were not awarded against the interested party at that hearing on the basis that it was not concluded that the interested party was solely at fault. The costs were left to be determined at the end of the litigation. This is a point to which I shall return in due course.

10 The final hearing therefore took place on 1st February 2016. The result of that is the claimant's application was unsuccessful. The interested party, logically enough, sought to recover its costs. The position on costs of that hearing is disputed. The claimant says that at the hearing the defendant was not persuaded that it had the power to order costs and the matter was adjourned for a costs hearing with a direction for the filing of skeleton arguments. The interested party says that there was no question of the defendant not being persuaded. Quite simply, the defendant made no order for costs and instead gave directions for a costs hearing. The second hearing had dealt with the substantive issue and dismissed the claimant's application to set aside the liability orders and there was no time for costs submissions.

11 Whichever of these is right matters little. In any event, the interested party filed a skeleton argument pursuant to that direction and three costs schedules. It sought in excess of £13,000 in costs. That is an amount which exceeded the liability orders in dispute. The costs application was opposed by the claimant in writing.

12 There was then a full oral hearing at which both sides made submissions. The arguments for determination by the defendant at the hearing on costs were whether or not there was a discretionary power to award costs, i.e. was there an application to set aside a complaint within the meaning of s.64 of the Act? If there was, whether that discretion should be exercised and, if so, whether the costs claimed were recoverable and, if so, proportionate.

13 The outcome of the hearing was that the defendant found it had a power to award costs under the Act and awarded those costs in the sum of £13,072. The reasons were recorded by Ms McAddy, of counsel, in a note which was at p.46 of the bundle before me.

14 However, I am told that both parties present here today I agree that the Magistrates' written decision is considered by them to be more accurate. That says this,

> "The Bench has been asked to determine if the Magistrates' Court can deal with this matter. There are two issues for the Bench to consider:
>
> (1) whether the application is not a complaint and does not fall under s.64 of the Magistrates' Courts Act 1980;
>
> (2) whether the amount claimed as part of the liability order was reasonably incurred and proportionate.
>
> The Bench has determined that this is a complaint which can be dealt with by this court. There is no clear definition of what is classed as a complaint and we have noted that there is no statutory definition of a complaint. The Bench finds that applying for leave to set aside a liability order is of itself a complaint which triggers s.64 of the Magistrates' Courts Act 1980.
>
> The second part for the Bench to determine is whether the costs were reasonably incurred and proportionate. The Bench have been provided with details of the Council's legal costs. These are the actual costs that have been submitted. The Bench also heard that Mr McKenna attended court on several occasions as a witness and as a solicitor who knew the full history of the case. Therefore, the Bench have decided to award £13,272 less £200 for one hour time of Mr McKenna's time in his capacity as a witness. Therefore, the total due is £13,072."

15 The issues before me today are as follows: (1) Is an application to set aside a liability ordered the making of a complaint, thus triggering the costs provisions of the s.64 of the Magistrates' Court Act; and (2) If the application is such a complaint, did the defendant properly and reasonably exercise its discretion to award costs and its discretion as to the quantum of costs; and (3) if there was any error would the result nonetheless have been the same considering that the interested party contends the Council Tax Regulations would have applied such that discretionary relief should not be granted?

16 The law was helpfully summarised in the claimant's skeleton argument and was not contentious. The Magistrates' Courts Act gives the courts a discretion upon the hearing of a complaint to award costs in favour of the successful party. Section 64 says as follows:

> "Power to award costs and enforcement of costs.
>
> (a) on the hearing of a complaint, a magistrates' court shall have power in its discretion to make such order as to costs;
> (b) on making the order for which the complaint is made, to be paid by the defendant to the complainant;
> (c) on dismissing the complaint, to be paid by the complainant to the defendant as it thinks just and reasonable ..."

17 The power to award costs is nonetheless discretionary. In the case of *Perinpanathan (on the application of) v City of Westminster Magistrates' Court* [2010] 4 All ER, p.680, Lord Neuberger explained that CPR Part 44.3(ii)(a) stated that:

> "The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party".

In para.58 of that judgment Lord Neuberger observed that:

> "There is no such provision [such as 44.3(ii)(a)] in the relevant provisions concerning costs in the present case, namely s.64. The only limitation affecting s.64(1) appears to me to be at least arguably for the magistrates cannot make any award for costs in favour of an unsuccessful party. Apart from that, I consider that the section confers ostensibly unfettered discretion and in particular discretion which contains no presumption such as that plainly contained in CPR 44.3(2)(a)".

18 Section 64 of the Act does not provide any guidance on the approach taken by the court on costs. In *City of Bradford Metropolitan District Council v Booth* [2000] EWHC (Admin) 444 the court observed that s.64(1) confers a discretion upon a Magistrates' Court to make such order as it thinks just and reasonable.

19 Turning to the submissions of the parties and taking them in relation to the various grounds in turn, on Ground 1 the claimant submits that the setting aside of a liability order is a power

conferred upon the Magistrates by common law. It is described as an exercise of discretion. He says no statute defines the application to set aside as a complaint or as anything else. The relevant proceedings have routinely been held, says the claimant, by the higher courts to be neither criminal, nor civil in nature and there are no formal rules which apply. The process of commencing an application, which is sometimes called a request, for an order setting aside the liability order, is relatively informal. There is no prescribed form to fill in to make the application and a letter addressed to the Clerk of the Magistrates' Court will be sufficient.

20 The claimant says that inviting a court to exercise a discretion is not the making of a complaint. There is no prescribed form as there is under the Magistrates' Courts forms for a complaint. Further, relying on **Stone's Justices' Manual** at para.1.291 the claimant says that the provision that a complaint shall not be heard unless the information was laid within a set period indicates that a set aside application, which can arise much later, is not a complaint.

21 Further, the claimant says that even if successful, the set aside application does not remove the underlying liability. If it is successful the liability order is simply set aside and the main complaint or summons is revived against the defendant/ratepayer. So success therefore does not provide any actual redress. The substance of the dispute would have to be litigated elsewhere - for example, in the Land Valuation Tribunal. If a court, on the other hand, dismisses a set aside application the main complaint is not dismissed and no liability order is made; the existing liability order simply remains unaltered. As such, the claimant submits that s.64 is not triggered; there is no essential complaint. The defendant, it says, accepted there was no statutory definition of a complaint but nonetheless found that an invitation to exercise common law discretion was a making of the complaint, yet it gave no reasons for arriving at that conclusion.

22 The claimant submits that the defendant made an error of law in that regard. The Magistrates, in the absence of any authority, saying that such an application was a complaint, erred in law in so concluding.

23 The claimant also prays in aid the authority of the *R (In the matter of d'Souza) v Croydon Magistrates' Court [2012] EWHC 1362 (Admin)* where the court concluded that there was no power to award costs attendant on the laying of information under the Magistrates' Court Act.

24 Regarding the submission that the application to set aside is part of the original complaint, the claimant submitted that in order for that to be the case there would have to be a dismissal of the case. It is essentially a bolt-on hearing with a limited ambit which is only part of the original complaint if successful. Mr Witcher, for the claimant, pointed me to the wording of s.64 and how the costs provisions depend on the grant or dismissal of the complaint, which he said was only apt for the original complaint or its dismissal on a set aside application.

25 The interested party takes, though fairly lightly, an overarching point in reply. It says that adopting a purposive approach to construction is appropriate here; unless costs are recoverable under this provision multiple applications could be made with complete impunity and that would be a lacuna which cannot have been intended by those drafting the statute. It says that the local authority, if that were right, could only get the costs of the original hearing, not an appeal or a preliminary hearing. That, again, would be a lacuna. The interested party submits there is no lacuna here and costs could be awarded.

26 The interested party argues that there are three possible routes by which the defendant could have, or had, jurisdiction. The defendant could have concluded the application to set aside the liability orders was a complaint; the defendant could have concluded the original applications by the interested party were complaints and the subsequent hearings were essentially part of the complaint; or the defendant could have concluded that the jurisdiction under Regulation 34 of the Council Tax (Administration and Enforcement) Regulations 1992 covers any proceedings where the liability orders are challenged.

27 The first two points are not, says the interested party, alternatives. There is no need for there to be an election. The set aside application can be both a complaint in and of itself and a complaint by virtue of being ancillary to the original complaint.

28 On the first point - whether it is a complaint in and of itself - the interested party says there is no statutory definition of a complaint; it simply means a claim or application that seeks redress from an injury or grievance and refers me to **Stone's Justices Manual** at para.1.290. The timing issue raised in respect of para.1.291 in **Stone's**, it says, is illusory: time counts from the making of a set aside application and is in respect of a liability which arises and continues to arise until discharge so that there is no problem as to the timing point. The interested party says that while there is a Magistrates' Court form in existence the use of that

form is, as **Stone's** sets out, not mandatory. **Stone's** also sets out how informality is encouraged in the making of complaints.

29 The word "complaint", it therefore says, should be given a wide scope apt to cover any application to set aside a liability order and that the word "complaint" itself is so wide as to catch the set aside application as a complaint in itself, given the fact of the informality and that it does not even need to be in writing. It is submitted that the wide scope given to "complaint" in the Act is deliberate and allows a breadth of grievances to be challenged in the Magistrates' Court. It submits it is implicit that "complaint" extends to proceedings for enforcement upholding or repeal of the original grievance because the fact that a setting aside application would have the effect, if successful, of nullifying the liability order is not different. It says that the claimant is correct that the underlying liability would remain but that is not relevant as the liability is not challenged in the set aside application and could not be, but that there is redress involved in a set aside application because the party applying is seeking to get rid of the liability orders.

30 So far as the *d'Souza* case is concerned, the interested party submitted that this was entirely distinguishable as the issue there was a statutory nuisance which was properly categorised as criminal proceedings and hence was subject to a different regime.

31 On the second point, the interested party says that the set aside application is properly, and perhaps most elegantly, regarded as part of the original complaint. That is so because either the upholding or the dismissal of the complaint will be the result. Mr Paget directed my attention to **Bennion** and, in particular, to s.174, which says, in relation to implied ancillary powers,

> "The rule in *Attorney-General v Great Eastern Railway Co.* provides that an express statutory power carries implied ancillary powers when needed".

It quotes Lord Blackburn, stating the rule that "those things which are incident to and may reasonably and properly be done under the main purpose of an enactment, though they may not be literally within it, should not be prohibited". And goes on to say:

> "As stated by Lord Selborne, LC, the rule is that, "Whatever may fairly be regarded as incidental to, or consequential on, those things which the legislature has

authorised ought not unless expressly prohibited, to be held by judicial construction to be *ultra vires*". "

32 Mr. Paget then also addressed my attention to example 174.3 where, in the case of *ex parte Guardian Newspapers Ltd.* [1999[1 All ER, 65 the Court of Appeal held that "all or part of a trial in the Crown Court Rules 1982 Rule 24A(1) included a pre-trial application because that was ancillary to a trial".

33 Mr Paget said that this is a clear example analogous to the example in **Bennion** of an ancillary power and what is sought to be taken advantage of here is an ancillary power to the making of the order in relation to set aside. It is said that is plainly ancillary to the power of making the order originally and therefore the application for the set aside should be regarded as part of the original complaint and thus subject to the same costs regime.

34 I shall consider the third point separately below since it only arises if the Magistrates were wrong to find they had jurisdiction under s.64.

35 My conclusion on the first ground is that I accept the interested party's submissions. I am satisfied that the Magistrates had jurisdiction to award costs. I consider that they had jurisdiction and this could be either because, as they found, the application was a complaint itself or because the application to set aside was effectively part of the complaint which led to the original liability orders, or both. In this connection I do not see why the set aside application could not be counted as a complaint on both heads. I accept the submission that there is no necessary disjunction.

36 The word "complaint" is not defined. In looking at this point I have to construe it against its background and the statutory intention so far as that can be inferred. I note that if the Magistrates did not have jurisdiction to make a costs order in such a case there would potentially be a lacuna which it would be surprising if it were to have been intended. Looking at the matters which have been put before me it is correct the word "complaint" is susceptible of a broad construction. So far as this context is concerned, as I read it, s. 64 is the broad costs discretion applicable in civil proceedings under Part 2 of the Act which covers Civil proceedings in Magistrates' Courts. As such an application to set aside within that Part might naturally be regarded as a complaint in itself for the purposes of that section, it being the case that there is no particular formality required for a commencement of a complaint.

37 Equally, the application could be regarded as being part of the original complaint. If I had to choose between the two routes on which the jurisdiction might be said to arise, which, as I said I do not think I do, I would in fact favour the latter approach, i.e. that it is a jurisdiction which arises in relation to the liability order and extends to proceedings ancillary to, and in relation to, that order. That is consistent, for the reasons which Mr Paget put before me. It is also consistent with the earlier use of the term "complaint" in ss.51 and 52 of the Act and also to the reference to "complaint" in the Regulations at Regulation 134(2).

38 I was initially troubled, if this was the correct approach, as to how this cohered with the wording of s.64 so that the costs orders match the outcome. However, I am satisfied that if a set aside application is viewed as part of the original complaint, the costs jurisdiction where a set aside is dismissed, is that under s.64.1(a), i.e. the making of a costs order in favour of the original complainant when the order is upheld and therefore the grant of the liability order is maintained.

39 For those reasons I dismiss the application so far as concerns Ground 1.

40 Turning then to Grounds 2 and 3. The claimant has dealt with these grounds together. He submits that in light of the arguments addressed to the Magistrates, which have been again outlined to me, no reasonable Bench could have reached the conclusion it did and this costs decision is therefore susceptible of judicial review on a *Wednesbury* unreasonableness basis.

41 The claimant says that the court's determination of what is just and reasonable by way of costs must depend on all the relevant facts and circumstances of each individual case. In the Magistrates' Court there is no presumption that costs will follow the event and the court must be persuaded that costs are appropriate in the case and should thus exercise its discretion accordingly. The claimant says that the fact that the defendant found that as the costs were those actually incurred and that the same was just reasonable save for a reduction of one hour of the solicitor's time, that itself shows that the determination was unreasonable, particularly when there is a complete absence of reasoning regarding the detailed submissions made in the Magistrates' decision.

42 The claimant says this outcome was unreasonable and disproportionate on the facts of this case for a number of detailed reasons which, as I have said, effectively mirror the submissions made to the Magistrates at the hearing. Those points in summary are as follows:

1) the claimant is a private individual; the interested party is a local authority with a team of internal lawyers. It is said to be highly questionable why it was necessary in respect of a simple application to set aside liability orders for the interested party to instruct external solicitors and barristers.
2) There were three detailed points on which particular stress was placed as follows:

a) the fee of £2,000 sought by the interested party as counsel's fee for each of the three hearings was not proportionate and thus unreasonable as the case did not require somebody of the interested party's counsel's seniority or experience and that the charges of the claimant's counsel were much less and were indicative of a fair and proportionate rate for a case of this nature.
b) it was wholly inappropriate and unnecessary for the interested party's solicitor also to attend at every hearing, again by way of contrast with what was done on behalf of the claimant.
c) that the claimant incurred his own costs due to the failure of the interested party to file its bundle on time which resulted in the earlier hearing having to be adjourned. The claimant says that on any view he should not be liable for the costs of that hearing which amounted to £3,240, and the absence of any reduction at all reflecting this is a factor which goes to demonstrate *Wednesbury* unreasonableness. The claimant notes that the interested party argues that the hearing of 5th November was not adjourned due to its error, but disputes that and says that the factual position advanced in the lower court had not been properly challenged with supporting evidence.

43 The claimant also says that as a matter of public policy private individuals should be able to ask a court to exercise a common law jurisdiction against public bodies without fear of being liable to significant legal fees which exceed the liability in dispute; otherwise it is in denial of the individual's access to justice.

44 In sum, the claimant says that the defendant's decision to award £13,000-plus in costs against the claimant was unjust and unreasonable to the extent that it infringes *Wednesbury* unreasonableness. By awarding costs actually incurred it substituted the test of "just and

reasonable" for the indemnity basis without any relevant assessment, reason or sound basis and thus applied the incorrect statutory test. It is said that all of these factors showed the result is one which is not one which any rational tribunal could have reached.

45 The interested party, of course, takes issue with these points and says that Ground 2 and Ground 3 can only succeed if the Magistrates' decision on quantum was irrational or *Wednesbury* unreasonable. It was not. Rehearsing the quantum arguments is nothing to the point. At best it is an attempt to appeal the quantum and that is not permissible.

46 So far as that goes, the interested party cites the dictum of Sir Murray Stewart-Smith in *Roache v News Group Newspapers* [1998] EMLR 161 where he outlines the principles on which costs appeals operate.

> "... before the Court can interfere it must be shown that the Judge has either erred in principle in his approach or has left out of account, or taken into account, some feature that he should or should not have considered, or that his decision is wholly wrong, because the Court is forced to the conclusion that he has not balanced the various factors in the scale".

That dictum has been subsequently approved *inter alia* in *AEI Rediffusion Music Ltd. v Phonographic Performance Ltd.* [1999[1 WLR, 1507 at 1523 by Lord Woolf MR.

47 The interested party says that the position in judicial review is *a fortiori* this: unreasonableness in the sense that no rational Magistrates' Court could have made this decision is required.

48 The interested party says, in fact, the result was within the ground between the two parties on their submissions which addressed all of these points. The complaints only go to show there is a difference of opinion between the claimant and the defendant on the level of costs. It does not show that the level awarded was so extreme that no other Magistrates would have assessed at that level or is wholly wrong in the way the authorities indicate. Tellingly, the interested party says the claimant does not assert any specific sum above which he says no Magistrates could reasonably have assessed, or identify any error of principle which would have engaged appeal.

49 So far as the individual criticisms are concerned, the interested party says the private individual and discouragement of challenge points misread *Booth* and *Perinpanathan* which deal with the non-awarding of costs against local authorities. The arguments as to counsel's brief fees and attendance are pure quantum points and cannot meet the hurdle required for unreasonableness. Regarding the November hearing a costs application was refused at that hearing - so costs by default were in the case and to award them to the successful party overall is no error of principle.

50 The interested party also says that the criticisms made actually show that the defendant did engage with the claimant's submissions on the quantum of costs in that it took those into account when deducting non- recoverable solicitor time and. So far as that remained in issue, it is not accepted that the interested party did not seek the costs awarded.

51 My conclusion on Grounds 2 and 3 is that I do not accept that the Magistrates' decision is one which was infected by any error of approach or which is *Wednesbury* unreasonable/irrational as contended. The Magistrates were perfectly entitled to proceed on the usual, if not formally presumed, basis that costs follow the event. So far as the various points relied upon are concerned, these are a covert appeal challenge; but even as such they are not said to be points of principle and they are not advanced by reference to authority.

52 It is plain from the result that the Magistrates did consider the arguments, in that they did make a deduction for the witness. The absence of any further deduction is slightly unusual, in particular as regards the November hearing. However, it is not infrequently seen in summary assessment when the sums in issue are not large and one party has had complete success in the overall litigation. I do not consider it even begins to sustain an argument that there was an error of approach.

53 As a check, when I ask myself the following questions, "Has the defendant erred in principle in his approach? Has the defendant left out of account or taken into account some feature that he should or should not considered? Is the defendant's decision wholly wrong because the court is forced to take into the conclusion that he has not balanced the various factors in the scale?", those being the questions which are indicated for an appeal, the answer to each is, "No". Perhaps tellingly, the submissions made were not advanced by reference to any such suggestion.

54 That being the case, it seems to me that the matter does not come close to the higher hurdle of irrationality. It cannot be said that the conclusion to which the Magistrates came is one which no rational Magistrates' Courts could have reached.

55 Therefore I will dismiss Grounds 2 and 3.

56 I should also, however, deal with the reasons challenge which was lurking within the submissions. The claimant says that the defendant erred in not dealing with any of the factors which I have outlined in its decision. It is submitted that this was made more egregious in that, as Ms McAddy contends in her witness statement, the interested party had not attempted to rebut those arguments in submission. It offered no positive case on why the fees claimed were justified and reasonable in the light of these compelling arguments.

57 As to this point, the interested party informed the Court that while these points were not dealt with in written argument there was oral argument on all the points of detail now relied on. This submission was not contradicted in reply. The point therefore is effectively solely in relation to a contention that there was a failure to give reasons following argument or also that the absence of detailed reasons is itself evidence of irrationality.

58 In relation to this challenge the interested party says that the defendant was only required to give reasons such that its decision was intelligible. It gave reasons showing that it had correctly applied its power under s.64 and that the level of costs should be reasonable and proportionate. It did not consider solicitor/witness costs recoverable and did not order them. It did not therefore need to laboriously dismiss each and every representation made on costs because those representations were not accepted. Further, the claimant had counsel in attendance at that hearing who would have known what costs submissions had been successful and what costs submissions had not.

59 My conclusion on this point, insofar as it was still live as a separate point, is this: as is well-known, the adequacy of reasons falls to be judged by the circumstances of the case and in many cases the provision of adequate reasons can be achieved with reasonable brevity. Sometimes reasons will be obvious and need not be stated to an informed audience. See, for example, *Fordham* at paras.62.3.5, 62.3.14, 62.3.16. Submissions on costs where not a large sum is in issue and the parties make oral submissions against each other and are legally

represented is a case where very brief reasons, even to the point a skeletal-ness, are likely to be adequate.

60 It is also implicit in the cross-arguments followed by a particular result that the reasons of one party are preferred. So what is needed is simply to tell the parties in broad terms what the decision was and why it was reached. This was done in this case because, in broad terms, costs followed the event. The costs of the solicitor as witness were disallowed.

61 So far as concerns the absence of reasons for dismissing the individual points, I do not see that these were necessary in that costs following the event is, even if not presumed, very much the more usual position and the arguments were opposed by the submission that costs follow the event and by and detailed oral submissions. The conclusion implies the dismissal of the attempt to turn the court from the normal course or to make points as to reasonableness by reference to those submissions. I can see no deficiency in the reasons given in context.

62 I return now finally to the discretion issue. This raises the question of whether, if I had concluded that the Magistrates had no jurisdiction under s.64, relief should nonetheless be refused. It is therefore a point which is academic in the light of the conclusion to which I have already come. However, I will deal with it briefly for completeness.

63 The interested party relies on s.31(2a) of the Senior Courts Act 1981. This provides:

> "2(a) The High Court
> (a) must refuse to grant relief on an application for judicial review; and
> (b) may not make an award under subsection (4) on such an application,
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of has not occurred".

64 To engage this provision the interested party relies, as it did before the Magistrates, on the wording of Regulation 34 of the Regulations. This says so far as relevant:

> "34(1) If an amount which has fallen due under Regulation 23(3) or (4) is wholly or partly unpaid or (in a case where a final notice is required under Regulation 33) the amount stated in the final notice is wholly or partly unpaid at the expiry of the period

of seven days beginning with the day on which the notice was issued, the billing authority may, in accordance with para.2 apply to a Magistrates' Court for an order against the person by whom it is payable.
(2) The application is to be instituted by making complaint to a Justice of the Peace and requesting the issue of a summons directed to that person to appear before the court to show why he has not paid the sum which is outstanding.
(3) Section 1271 of the Magistrates' Courts Act 1980 does not apply to such an application but no application may be instituted in respect of a sum after the period of six years beginning with the day on which it became due under Part 5. ...
(5) If, after a summons has been issued in accordance with para.2 but before the application is heard, there is paid or tendered to the authority an amount equal to the aggregate of (a) the sum specified in the summons as the sum outstanding or so much of it as remains outstanding as the case may be; and (b) a sum of an amount equal to the costs reasonably incurred by the authority in connection with the application up to the time of payment or tender, the authority shall accept the amount and the application shall not be proceeded with.
(6) The Court shall make the order if it is satisfied that the sum has become payable by the defendant and has not been paid.
(7) An order made pursuant to para.6 shall be made in respect of an amount equal to the aggregate of (a) the sum payable and (b) a sum of an amount equal to the costs reasonably incurred by the applicant in obtaining the order.
(8) Where the sum payable is paid after a liability order has been applied for under para.2 but before it is made the court shall nonetheless, if so requested by the billing authority, make the order in respect of a sum of an amount equal to the costs reasonably incurred by the authority in making the application."

65 The interested party also refers me to the judgment of Mrs Justice Andrews in *R (on the application of The Reverend Paul Nicolson v Tottenham Magistrates & Haringey LBC* [2015] EWHC 1252 (Admin). The interested party says that in that case Mrs Justice Andrews considered how the court scrutinised the costs sought when this was done on a generic basis and considered the workings of the Regulation.

66 It was accepted that the costs which were sought in that case went beyond the costs of the proceedings. The Judge at para.42 explained why:

> "It seems to me that in principle the intention in the Regulations is to enable the local authority to recover the actual cost to it of utilising the enforcement process under Regulation 34, which is bound to include some administrative costs, as well as any legal fees and out of pocket expenses, always subject to the overarching proviso that the costs in question were reasonably incurred. However, bearing in mind the court's inability to carry out any independent assessment of the reasonableness of the amount of those costs, the Regulations should be construed in such a way as to ensure that the costs recovered are only those which are genuinely attributable to the enforcement process".

67 The Court in *Nicolson* was specifically looking at pre-liability order costs but the rationale, the interested party says, applies equally to post-liability order costs and hence, it says, to upholding the liability order against a set aside application. It says that if the actual costs of enforcement are increased because the taxpayer seeks to set aside a liability order, then those should fall within the ambit of the Regulations. The claimant, having made an application to set aside the liability orders as an attempt to stop the enforcement process, has caused additional costs to the interested party and the defendant should have to be found to have jurisdiction to award those costs under the Regulations.

68 In response the claimant advances two submissions. The second of these is the echo of Ground 2 as to just and reasonable and would therefore fail on the same grounds.

69 As to his first point, however, he submits that the Regulations do not apply and thus the interested party's argument has no merit. The claimant says that the Regulations do not cover unsuccessful applications to the set aside liability orders and points out that Regulation 34.7 applies upon the local authority applying for a liability order and prescribed for an order to may be made equal to the sum payable and the costs. The section, he says, does not provide a power to award costs independent of there being a sum payable or independent for a concurrent application for a liability, save insofar as regards para.8.

70 The claimant points to a number of passages in *Nicolson*. It says that in para.34 the Judge observed that as a matter of straightforward construction of para.34(7) the Magistrates must be satisfied (i) that the local authority had actually incurred the costs; (ii) that the costs in question were incurred in obtaining the liability order; and (iii) that it was reasonable for the local authority to incur them.

71 The claimant also points to the fact that Mrs Justice Andrews made clear at para.40 was that the costs had to be in connection with making the application and also relies on the quote at para.44 of the judgment which says,

> "However, what the court is concerned with are the costs incurred by the applicant in obtaining the liability order (or in seeking to obtain one before the respondent capitulates). I note that in Wales the proviso specifically refers to the cap including "*the costs of instituting the application*" which is consistent with that reading of Regulation 34(5). On the face of it, therefore, … the costs of taking the decision to exercise the discretion to enforce would appear to fall on the wrong side of the line".

72 The claimant says that the *Nicolson* case supports its submission that the Regulations do not cover the costs of this setting aside liability orders.

73 On this point I prefer the argument of the claimant. The interested party very fairly accepted in submissions that its argument in this regard was somewhat strained. Regulation 34 is in fact entitled "Application for a Liability Order". It appears to be designed to deal with just that – the procedure around the application. When one looks at its construction it deals with the mechanics of this part of the procedure, the application for the liability order - and quite a lot of its focus is on what happens if there is no hearing in relation to the liability order.

74 On costs Regulation 34 has three parts: (1) paying the sum plus costs before the hearing under sub-para.(5); (2) paying the costs if there is a hearing under sub-para.7; and (3) paying the sum but not the costs before the hearing under sub-para.8. There is nothing within the text which suggests that it applies to challenges. Further, if one looks at the decision in *Nicolson* itself at para.47 and onwards, where the court looked at the cap imposed in Wales, it can be seen in the passages at paras.47, 48 and 49 that the sum related to the application process, divided into two sections,

> "… ties the costs recoverable to the issue of the summons and the making of the liability order rather than costs incurred at any earlier stage, including [I note] the issue of the final notice. A cap on costs enforcement and also on costs recoverable in the committal proceedings was introduced because the amounts that are charged varies considerably between local authorities".

75 It then goes on to consider how the two stages were then considered to be put together to reflect the cap which is reflected in the Welsh legislation. Those passages support the submission which was made on behalf of the claimant that the structure of Regulation does not support a construction that the Regulations are designed to cover costs of the set aside application. For this reason I would not have found for the interested party in relation to the Regulations point. However, for the reasons that I have given already that point is academic. I dismiss the claimant's application.

MR PAGET: My Lady, we seek our costs of the judicial review. We have a statement of costs. We ask that you summarily assess them.

MRS JUSTICE COCKERILL: Yes. Thank you.

MR PAGET: The total figure of the interested party, including VAT, is £15,000. Let me break that down for you. The work done was by Mr. McKenna, who is Grade A at £200. Fortunately, McKenna & Co. are not in Central London - so we do not have a very high figure. As an hourly rate it is £200. He has obviously had to attend in relation to the local authority. The work done is not very much by the solicitor - only £1,000 worth. Most of the work, as you would expect in a judicial review for the respondent, has been counsel-led. So, bringing the figure forward it is £5,700 for solicitor costs.

Counsel costs are on the last page. There is a one-day hearing fee/brief fee. Then let me explain what the non-hearing matters contain. The Acknowledgement of Service-- Essentially all pleadings in the judicial review. The Acknowledgement of Service, detailed grounds of resistance following permission being granted and advice on merits.

MR WITCHER: My Lady, taking that former point last, the grounds of resistance/Acknowledgement of Service comes to a total of nine pages. So you can imagine one's surprise when those instructing me received this costs schedule yesterday. I do not know how long the advice was - I do not seek to ask for waiver of privilege - but £4,700 plus VAT preparing nine pages-- If one adds the skeleton argument, the interested party submitted a total of fourteen pages in this case. That is it. They have done none of the bundling. All the other side have done is present fourteen pages.

So, we do take issues, I am afraid, with a fee of £4,700. It really does just cover an advice and nine pages of submissions. Without being discourteous, if one considers the grounds of resistance, the skeleton and the Acknowledgement of Service against the original skeleton-- My Lady may have the point one is going to make. It is somewhat a copy-and-paste of the original arguments throughout. So, we do take issue with that fee claimed.

The fee for the hearing is a matter for my Lady. You will be more familiar than I am with appropriate fees for judicial review proceedings. Needless to say, these costs far exceed the costs upon the claimant's schedule which has also been filed.

My Lady, another point to make generally regarding this now is that under the Civil Procedure Rules, which, of course, would apply, on an assessment on a standard basis they have to be shown to be proportionate. That does include, as a matter of legal principle in this case, proportionate to the sums in dispute under para.5(a) - these costs claimed exceed the amount in dispute. So we would say the costs incurred are not proportionate because the sums in issue in these proceedings are far lower than that which has been claimed. Relevant also is the complexity of the litigation and any additional work generated by the conduct of the paying party. My Lady, no work beyond that which is standard in this case has been generated.

In terms of the fees claimed by the instructed solicitors, we would invite my Lady to be insisted by the 5.4 hours of attendance on others. We are somewhat at a loss as to what that may well be. Letters out - almost six hours of letters, not to the claimant and not to the interested party.

If it assists - and it may or may not be - the costs which would have been claimed if we had been successful was £9,134. So, I have to be proper with that before my Lady. Those were the costs which were properly incurred. Whether my Lady feels that this formal assessment has sufficient merits does not matter now.

MRS JUSTICE COCKERILL: I am certainly going to deal with it now.

MR WITCHER: Thank you.

MR PAGET: Dealing with the solicitor attendance on others, what is that? That is dealing with this court, the Magistrates' Court and the defendant - in short, everyone apart from the interested party. Five hours for a substantive judicial review we would not say is at all high.

MRS JUSTICE COCKERILL: How many letters are we talking about?

MR PAGET: That's a combination of letters and emails -- That's an accumulation of units done on letters rather than letters *per se*. So, obviously some emails are going to be quite long; some are going to be short.

What amounted to the £4,700 done by counsel-- Well, if that is done at an hourly rate we are looking at less than twenty hours' work done. I think the criticism is, "Well, these are very short as documents". But, as we know, we are always advised to keep things short. Less is more. Skeleton arguments have to be less than ten pages. They are often not - but they should be. That is the clear guidance from above. It is the distillation of that point down on to the paper rather than the discursive narratives that are so deprecated by these

courts. So, I don't think any criticism can be made by the fact that that was encapsulated within nine pages.

It is also said that when you look at the assessment as a whole and consider its proportionality we need to look at the subject matter of the litigation. Correct. But, the subject matter of this litigation is not whatever debt Mr Khan had with Hounslow. This is a judicial review challenge to the defendant's power to award costs - pure and simple. So, whatever underlined that original liability is neither here, nor there.

MRS JUSTICE COCKERILL: The underlying liability may be neither here, nor there but we are talking about a costs order of £13,072, was it not?

MR PAGET: Yes.

MRS JUSTICE COCKERILL: So you are looking at costs-- At each stage you have the costs which were higher than the amount in issue and then you have the costs which are higher than the costs which are being fought about.

MR PAGET: Yes. Well, if we look at it through that prism-- Let's say we are arguing about a £13,000 liability-- Well, the costs of defending that liability are equivalent. We're in the same order of magnitude. We spent £15,000 seeking to maintain a £13,000 liability which we already had. So, we are not in the situation where we are arguing a disrepair claim of £1,000 where the costs arisen are £50,000 or a neighbour boundary dispute where the costs are completely disproportionate to the issue. In fact it is in the same order of magnitude. For a one-day full substantive judicial review we say it is proportionate.

MRS JUSTICE COCKERILL: Good. Right. Well, I have listened to what you have both have to say. Obviously costs will follow the event in broad terms. I do think that £15,480 is a little on the high side. I do think, with the greatest of respect, to Mr. Paget, whose submissions have been very helpful and his skeleton was very clear-- You have a brief fee for the day; you have £4,700 for "other work" which includes the Acknowledgement of Service, detailed grounds of resistance-- That is said to be less than twenty hours. But, twenty hours is close to three working days. Given the detailed skeleton served beneath and that the thinking in relation to the points must have been substantially done, I do regard the letters out on others as a little on the high side. I have also been looking down some of the schedule of work done and it is a bit on the high side.

So, what I am going to do is I am going to say £12,000. That probably deals with everything we need to deal with.

Thank you very much. Thank you both very much for your very detailed and interesting submissions.

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This transcript has been approved by the Judge.