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[2010] UKUT 444

Case title:	NA (Excluded decision;identifying judge)
Appellant name:	NA
Status of case:	Reported
Hearing date:	7 Sep 2010
Promulgation date:	20 Oct 2010
Publication date:	21 Dec 2010
Last updated on:	4 Oct 2022
Country:	Afghanistan
Judges:	Mr C M G Ockelton, Vice President, Senior Immigration Judge Grubb
Keywords	Excluded decision;identifying judge

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The decision

Upper Tribunal
(Immigration and Asylum Chamber)

NA (Excluded decision; identifying judge) Afghanistan [2010] UKUT 444 (https://www.gov.uk/utiac/decisions/37623) (IAC)

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
Determination Promulgated
On 7 September 2010

……

Before

MR C M G OCKELTON, VICE PRESIDENT
SENIOR IMMIGRATION JUDGE GRUBB

Between

NA

Appellant
and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representative
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

1. There is no right of appeal to the Upper Tribunal against a decision not to extend time under rule 10 of the First-tier Tribunal Procedure Rules when a notice of appeal has been given out of time. It is a "preliminary decision made in relation to an appeal" within Art 3(m) of the Appeals (Excluded Decisions) Order 2009 (as amended) and consequently is an "excluded decision" for the purposes of s.11 of the Tribunals, Courts and Enforcement Act 2007.

2. The parties are entitled to know the judge who makes a decision in an appeal. In the case of an appeal determined without a hearing that means that the determination or decision must identify the judge. The absence of the Duty Judge's name identifying the decision-maker of the decision not to extend time resulted in a fundamental breach of justice which vitiated the decision.

DECISION

1. On 16 April 2010, the Secretary of State refused the appellant's claim for asylum and made a decision to remove him as an illegal entrant. The deadline for lodging an appeal by a notice of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) was 11 May 2010. In fact, a Notice of Appeal was lodged on 17 May 2010 and thus was four working days out of time. On 19 May 2010, it appears (and the reason for our particular phraseology will become clear shortly) that a Duty Judge of the First-tier Tribunal concluded that the Notice of Appeal was out of time and refused to extend time under rule 19(5) of the First-tier Tribunal's Procedure Rules. The appellant sought permission to appeal this decision to the Upper Tribunal which was granted by SIJ Eshun on 10 June 2010

2. At the hearing before us the appellant was unrepresented. The respondent was represented by Mr Hibbs who helpfully told us something about the appellant's immigration history which was not disclosed on the file. The appellant, who claims to come from Afghanistan, first arrived in the UK on 8 January 2009. He claimed asylum at Calais. He absconded on 10 January 2009 for 6 days and then again on 27 February. His claim was deemed to have been abandoned because he absconded. He reappeared at Reading Police Station on 22 March 2010 claiming that he had just arrived in the UK. He was detained and removal directions were made for 26 March 2010. On 24 March 2010 he claimed asylum again. His claim was processed in the usual way. There was an initial interview, a screening interview on 26 March 2010 and an asylum interview on 8 April 2010. Further representations were made by the appellant's solicitors, Albany Solicitors on 19 April 2010. The Secretary of State's decision refusing asylum was served on 22 April 2010 and also, on that date, he was served with notice to remove him as an illegal entrant. The appellant had undergone a 'Merton' compliant assessment and assessed as an adult.

3. The circumstances that followed the service of the decision are contained in the Notice of Appeal to the First-tier Tribunal, the application for permission to appeal to the Upper Tribunal together with an accompanying handwritten letter dated 25 May 2010 from Ruth O'Neill of Asylum Justice. The appellant told us, through an interpreter, that following the receipt of the Home Office decision on Monday 26 April 2010 he went to see a solicitor (at, we understand, Albany Solicitors) and was told to await a letter. He received a letter from them with an appointment for Thursday 6 May 2010. When he attended he was told that the solicitor would not take his case. On Saturday 8 May 2010, he went to the offices of Asylum Justice. He was told to come back on Tuesday 11 May 2010 which was, of course, the final day for lodging a notice of appeal. When he returned on that day, the offices of Asylum Justice were closed. He subsequently lodged a notice of appeal on Saturday 15 May 2010 with, it is apparent from what it contains, the assistance of Asylum Justice.

4. In their letter of 25 May 2010, Ruth O'Neill points out that Asylum Justice is staffed by volunteers. They operate open sessions only on Tuesdays and Saturdays each week. Asylum Justice was closed

on Tuesday 11 May 2010 due to a shortage of volunteers and, it is noted, it is perfectly plausible that as a result the appellant was delayed until Saturday 15 May when there was the next open session.

5. The letter concludes that the delay in lodging the notice “was not in the most part” that of the appellant.

The Decision

6. The decision which is the subject of this appeal is set out in a document headed “Decision on Preliminary Issue – Timeliness” as follows:

“THE IMMIGRATION ACTS

Between

NA

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Rspondent

DECISION ON PRELIMINARY ISSUE – TIMELINESS
(PURSUANT TO RULES 7 & 10 OF THE ASYLUM AND IMMIGRATION
TRIBUNAL (PROCEDURE) RULES 2005)

1. The Appeal

1:1 The Appellant seeks to Appeal the Respondent’s decision dated 22 April 2010 refusing the appellant’s Asylum/Human Rights applications. The Notice of Appeal records the deadline date as being 11 May 2010. That date has not been challenged by the Appellant. The appeal was lodged 17 May 2010. I am satisfied that the appeal is out of time.

2. The Relevant Law

2:1 For an extension of time to be granted I must be satisfied on the balance of probabilities that there are special circumstances that would render it unjust not to do so (Rule 10(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005).

2:2 The principles to be followed in considering an out of time application are set out in the AIT decision of BO and Others (Extension of time for appealing) Nigeria [2006] 00035. The decision sets out the factors that are to be taken into account when determining the application. These include: the explanation for the delay, the strength of the grounds of appeal, the consequences of the decision and the length of delay.

2:3 BO provides that the starting point must be the explanation for the Appeal being out of time. If there

is no explanation at all, or no satisfactory explanation, or an explanation which is not supported by evidence that ought to have been readily available, it is very unlikely that time should be extended. In the absence of an explanation time could only be extended where there are obvious and quite exceptional reasons for doing so and where the issue is one of wider public importance or where (despite the lack of information provided by the Appellant) it is clear that there has been a serious denial of justice.

3. The Explanation for the Delay

3:1 The application asserts that the Appellant was asked to attend at the offices of Asylum Justice on the deadline date for the appeal. On arrival there was no volunteer lawyer available to assist. No action was taken. The Appellant revisited AJ at the “next possible opportunity” namely Sat 15 May 2010.

4. The Decision

4:1 I am satisfied that the Appellant would have been aware of the time constraints for the Appeal as these are set out in the body of the decision Notice. They also appear in the margin notes in the Appeal form which would have been delivered with the Decision Notice. It was for the Appellant or his Representatives to arrange for the despatch of Appeal forms to ensure that they were received by the AIT on or before the deadline date.

4:2 The extension application is inadequate. I observe that there is no evidence from Asylum Justice to support the Appellant’s application and no explanation as to why the Appellant was unable to seek assistance again before 15 May. The application refers to the Appellant revisiting at the “next possible opportunity” but it is unclear why he was not able to do so earlier. In any event it is not a prerequisite to an appeal that a person be represented or have accessed a lawyer. Accordingly the lack of assistance from a Legal Representative cannot in itself justify an extension of time. The application fails to establish why the Appellant was unable to complete and submit the appeal form himself particularly as he was aware of the deadline date for the appeal. I conclude that the Appellant has failed to establish to the standard of proof required that there is an acceptable explanation for the entire period of the delay.

4:3 Having considered the papers as a whole to include the Grounds of Appeal I am satisfied that this Appeal does not fall within the category as outlined in paragraph 2:3 above. I am not assisted by the fact that the Appellant has failed to submit a copy of the refusal letter. I am unable to identify any special circumstances relating to this Appeal which would render it unjust not to exercise my discretion under Rule 10(5) by enlarging time.

DECISION

The Appeal is out of time.

The time for Appeal is not extended.

Signed Date: 19 May 2010

Judge of the First-tier Tribunal”

7. Mr Hibbs submitted that the Duty Judge had not erred in law. He had applied the correct approach set out in BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035 (https://www.gov.uk/utiac/decisions/37988).

8. We have to say that we see considerable force in that submission. The only explanation offered by the volunteer from Asylum Justice in "section 2" of the Notice of Appeal relates to the appellant being required to attend on the last day for lodging (Tuesday 11th May) and then explaining no volunteer was available and the appellant was asked to attend "at the next possible opportunity" which was Saturday 15th May. The more detailed explanation which we have from Asylum Justice was not submitted with the Notice of Appeal and was not available to the Duty Judge who made the decision not to extend time. The appellant's explanation of what happened in respect of his previous solicitors prior to his seeking advice from Asylum Justice was not made available to the Duty Judge. Further, the Notice of Appeal was not accompanied by the Refusal Letter. The only basis for the appellant's claim and the strength of his claim was as set out by him (or on his behalf) in the Notice of Appeal. What is found there is cursory and, at times, wholly unenlightening when attempting to assess the strength of his claim. In essence, it is repeated on three occasions that he has "told the truth" and is in "grave danger" or faces a "real risk of serious harm" if returned. His country of origin is not mentioned.

9. The Duty Judge correctly applied the approach in BO (cited with approval by Dyson LJ in R (MK) v AIT [2007] EWCA Civ 554 at [4]). Given the patent lack of information about the appellant's claim and the limited scope of the explanation for the delay in lodging a notice of appeal, we see no basis for saying that the Duty Judge failed to have regard to any relevant matter or reached a decision that was not properly open to her on the evidence for the reasons given.

10. That was the scope of the argument we heard. There are, however, two matters of difficulty raised in this appeal which do not turn upon the particular circumstances of the appellant. One concerns the form of the decision which is unsigned and does not identify the Duty Judge who made the decision. The other concerns the jurisdictional issue of whether there is a valid appeal before the Upper Tribunal. That latter, in particular, is an issue which we are bound to address in dealing with this case.

The Form of the Decision

11. First, there is the form of the Judge's decision. We set it out earlier in the precise way in which it appears. The Duty Judge (if that be whose work it is) has neither included his or her name on the formal part at the beginning or at the end which remains blank and unsigned. It is wholly unclear from the document who has made the decision and whether, in fact, it is the work of one of the Duty Judge's of the First-tier Tribunal. In our judgment, this is a fatal flaw which vitiates the decision.

12. It is a fundamental principle of justice that the public and litigants should know the name of any judge who is deciding or sitting as a judge in a case. That was made clear by the Divisional Court of the Queen's Bench Division in R v Felixstowe Justices, ex parte Leigh and another [1987] 1 All ER 551 (Watkins LJ, Russell and Mann JJ). There, a bench of magistrates adopted a policy of withholding the names of justices during the hearing of cases and from the public and press after cases were heard. In deciding that this was unlawful, Watkins LJ, with whom Russell and Mann JJ agreed, observed that (at p.560h)

"So far as I am able to ascertain, anonymity has never been claimed other than by the number of justices I have mentioned by anyone who can be said to be a judicial or quasi-judicial person. This applies as much to High Court judges and circuit judges as to, for example, members of tribunals."

13. Watkins LJ noted that magistrates took the oath of allegiance and the judicial oath using their names (at p.560c-d). The same is, of course, true of Judges of the First-tier Tribunal. Also, he noted that a litigant was entitled to have his case heard and dealt with by a judge who was not disqualified by actual or apparent bias from adjudicating upon his case. Without knowledge of the judge's name there would be no effective way of the right to object being "fully and properly exercised" (at p.560f). Watkins LJ observed that from time to time judges were the subject of criticism or worse but this was no justification for anonymity (at pp.560j-561b). The Court concluded that it was a principle of open justice that "those who do justice be known" (at p.561b). A bona fide inquirer was entitled to know the name of a magistrate sitting on a case or who had done so (at p.561d).

14. In our judgment, this principle is no less applicable to decisions by judges of the First-tier Tribunal or, indeed, the Upper Tribunal. Watkins LJ specifically embraced within the principle he identified all judicial officers ranging between High Court Judges and tribunal members.

15. Of course, this is not a case where a judge has sought anonymity but that is the effect of what has happened. No-where on the face of the decision in this case can there be found the name of the Judge who made the decision. Indeed, it is simply not possible to know whether the person who made the decision was, or was not, a Judge of the First-tier Tribunal at all. The parties are entitled to know who the judge was. In the case of an appeal determined without a hearing that means that the determination or decision must identify the judge. In practice, of course the decision should, and will, also be signed (personally or electronically) by its author (see Senior President's Practice Statements: Immigration and Asylum chambers of the First-tier tribunal and the Upper Tribunal, para 10.1) and, in any event, where a hearing took place at which the appellant or his representative was present, there is likely to be no difficulty over identity. In some cases, it may be that the omission could be corrected under the 'slip rule' provision in rule 60 of the First-tier Tribunal Procedure Rules. The time for that has, however, passed in this case. The absence of the Duty Judge's name identifying the decision-maker of this decision resulted in a fundamental breach of justice which vitiated the decision.

Right of Appeal to the Upper Tribunal

16. There is a second, and more fundamental, difficulty raised by this appeal. Does a right of appeal lie to the Upper Tribunal against a decision that a notice of appeal is out of time and not to extend that time? The short answer is: it does not.

17. The relevant provisions dealing with the right of appeal from decisions of the First-tier Tribunal to the Upper Tribunal are contained in s.11 of the Tribunals, Courts and Enforcement Act 2007 as follows:

"11. Right of appeal to the Upper Tribunal

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by –
(a) the First-tier Tribunal, or

(b) the Upper Tribunal,

on an application by a party." (our emphasis)

18. As will be clear, the right of appeal is from any decision of the First-tier Tribunal on a point of law other than an "excluded decision". Section 11(5) of the 2007 Act sets out what, for the purposes of subsection (1) is an "excluded" decision. None of the decisions in s.11(5), as originally enacted, are relevant to this appeal. However, Article 3 of the Appeals (Excluded Decisions) Order 2009 (SI 2009/275 as amended) adds a further decision to the category of "excluded decisions" which is relevant. Article 3 states that:

"3. For the purposes of section 11(1) and 13(1) of the Tribunals, Courts and Enforcement Act 2007, the following decisions of the First-tier Tribunal or the Upper Tribunal are excluded decisions –
….
(m) any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British National Act 1981, section 82, 83 or 83A of the Nationality, Immigration and Asylum Act 2002, or regulations 26 of the Immigration (European Economic Area) Regulations 2006."

19. That provision reflects the wording of s.103A(7) of the Nationality, Immigration and Asylum Act 2002 (now repealed) which excluded from the category of decisions of the Asylum and Immigration Tribunal which could be subject to the reconsideration process any "decision on an appeal" which was "a procedural, ancillary or preliminary decision". The words "procedural, ancillary or preliminary" which define the nature of the decision remain the same; the current provision (s.11(1)) requires that the decision be "in relation to an appeal", whilst the reconsideration framework (s.103A(7)) required it to be a decision "on an appeal".

20. There is no doubt that the decision in this case is a "preliminary" decision by the First-tier Tribunal. Indeed, rule 10(6) of the First-tier Tribunal Procedure Rules states, inter alia, that

"The Tribunal must decide any issue as to whether a notice of appeal was given in time, or whether to extend the time for appealing, as a preliminary decision without a hearing…" (emphasis added)

21. That, in our judgment, reflects what must be the natural meaning, and consequent effect of, the legislative words initially in s.103A(7) of the 2002 Act and now found in Art 3(m) of the 2009 Order as amended.

22. Is it, however, a decision made "in relation to an appeal"? It might be argued that only if an "appeal" is pending before the First-tier Tribunal could any decision be "in relation to an appeal". If so, any decision made prior to an appeal being instituted – such the decision in this case that one has not been instituted – would not fall within the category of "excluded" decisions. We do not consider that argument to be correct. The argument we have identified, if good, would also have meant that such a decision would have been subject to reconsideration when the AIT existed. Such a decision could no more be said to be a preliminary decision "on an appeal" than one "in relation to an appeal". It is the collective understanding of the members of the Upper Tribunal sitting in this case that the effect of s.103A(7) was understood to exclude reconsideration of 'out of time' decisions made by judges of the AIT. The only legal recourse was to judicial review to challenge adverse decisions (see, e.g. R(MK) v AIT [2007] EWCA Civ 554). We do not consider that the minor change in the legislative wording in the excluded category from a preliminary decision "on an appeal" to one "in relation to an appeal" was intended to effect, or has in fact effected, any change in the legal procedure by which a challenge to 'out of time'

decisions can be made. Such decisions were not subject to reconsideration and are not subject to appeal to the Upper Tribunal. We are in no doubt that the decision was “in relation to” an appeal, namely whether one had been properly instituted by the lodging of a notice of appeal in time or, if not, because time was to be extended. A decision such as the one in this case can only be challenged by way of judicial review.

23. In our judgment, there was no statutory basis upon which to grant permission to appeal to the Upper Tribunal in this case. The fact that it was granted cannot confer a jurisdiction upon the Upper Tribunal which it does not have. There is no valid appeal before the Upper Tribunal.

24. Although we have expressed our views on the merits of the case and the validity of the decision itself, the decision we make is that there is no valid appeal before the Upper Tribunal. Having said that, it will be apparent from our comments on the form of the decision that our view is that the First-tier Tribunal has not yet made any valid decision on whether time should be extended or the appeal accepted. It may well be that in the light of those views the First-tier Tribunal will take the opportunity to look at the appellant’s Notice of Appeal again and make a further decision on it.

Signed

Senior Immigration Judge Grubb
Judge of the Upper Tribunal

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Neutral Citation Number: [2018] EWHC 1684 (Admin)
Case No: CO/1374/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET
04/07/2018

B e f o r e :

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE SINGH

Between:

Powys County Council	**Appellant**
- and -	
John Bernard Hurst	**Respondent**

Jonathan Elystan Rees (instructed by Solicitor, Powys County Council) for the Appellant
The Respondent in person

Hearing date: 19 June 2018

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Lord Justice Singh :

Introduction

1. This is an appeal by way of case stated against the decision of District Judge (Magistrates' Court) Neil Thomas given on 18 February 2018. By that decision the District Judge held that the Appellant was required to consider proceeding under the Attachment of Earnings Act 1971 ("the 1971 Act") as an alternative method of recovering unpaid council tax before applying to commit the Respondent to prison for non-payment of that tax. Accordingly he discharged the earlier order for committal which he had made but then suspended on terms.

2. The District Judge reached his decision on the basis that it was open to the Appellant to seek an attachment of earnings order in the County Court in respect of the Respondent's pension. The main issue in this appeal is whether that course is open to a billing authority such as the Appellant as a matter of law.

3. At the hearing before this Court, which took place in Cardiff, we heard submissions from Mr Jonathan Elystan Rees on behalf of the Appellant. We also heard from the Respondent, who appeared in person. We are grateful to them both for their submissions. At the hearing the Respondent applied for an adjournment. We refused that application and said that we would set our reasons for doing so in our written judgment, which we now do (at paras. 54-55 below).

Factual background

4. For present purposes the relevant factual background can be summarised very briefly.

5. The Appellant is the relevant billing authority for the purposes of council tax. The Respondent is liable to pay council tax. The Appellant has pursued council tax liabilities against the Respondent over a number of years. Liability orders were obtained by the Appellant.

6. On 1 December 2016 an order was made by the District Judge committing the Respondent to prison for non-payment of council tax. It was found that the Respondent had wilfully refused to pay. That committal was suspended on payment terms. The Respondent subsequently defaulted on payment and so, on 29 September 2017, the Appellant applied to the Court for an order committing the Respondent to prison in accordance with Regulation 47 of the Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992 No. 613) ("the 1992 Regulations").

7. The District Judge observed that the Respondent was in receipt of a police pension and raised the issue whether an application could be made under the 1971 Act. The Appellant indicated that this option was not open to it and therefore had not been considered. The application to commit was adjourned on a number of occasions for reasons which are unconnected to this appeal.

8. A further hearing took place on 18 February 2018. On that occasion the District Judge held that pensions are income for the purposes of the 1971 Act; that a liability order is a "judgment debt" within the meaning of that Act; and therefore that the Appellant was not precluded from applying to the County Court for enforcement. On that basis he was of the view that all other enforcement options had not been exhausted prior to the application to commit. Accordingly the District Judge quashed the committal order which had been made on 1 December 2016.

The case stated for the opinion of this Court

9. The two questions stated for the opinion of this Court are:

> "(i) Are the local authority precluded from applying to the County Court for an attachment of earnings order under the Attachment of Earnings Act 1971?
>
> (ii) Was I entitled to dismiss the application and quash the commitment because I concluded that the local authority had not satisfied me that they had exhausted all alternatives to custody before applying to commit Mr Hurst to prison?"

The Legal Framework

10. It is unnecessary for present purposes to rehearse the legal framework in great detail. It was helpfully set out by Hickinbottom LJ in *R (Woolcock) v Secretary of State for Communities and Local Government and others* [2018] EWHC 17 (Admin); [2018] 4 WLR 49 ("*Woolcock*"), at paras. 3-17. Here I will do no more than to outline the legislative scheme by reference to the judgment of Hickinbottom LJ.

11. Council tax is a system of local taxation introduced by the Local Government Finance Act 1992 ("the 1992 Act") to replace the community charge. It is now used in England, Wales and Scotland to fund approximately one-quarter of expenditure on local services. The applicable law and procedure in England (where there are 326 billing authorities) and Wales (where there are 22 billing authorities) is materially the same: see para.3 of *Woolcock*.

12. Section 14(3) gives effect to the provisions of Sch. 4 to the 1992 Act. That schedule is entitled 'Enforcement: England and Wales' and contains provisions about the recovery of council tax: see para. 9 of *Woolcock*.

13. Para. 1 of Sch. 4 to the 1992 Act confers a power on the Secretary of State to make regulations in relation to the recovery of council tax. By Article 2(a) of, and Sch. 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999 No. 672) and para. 30(2)(a) of Sch. 11 to the Government of Wales Act 2006, in respect of Wales that function now lies with the Welsh Ministers, to whom is also devolved general competence in respect of "Local Government Finance" (sections 107-108 of, and para. 12 of Sch. 7 to, that Act) see para. 10 of *Woolcock*.

14. The relevant regulations which have been made under para. 1 of Sch. 4 to the 1992 Act are the 1992 Regulations. They enable council tax to be collected in monthly instalments. Regulation 23 requires a local authority to send out a reminder notice to a council tax payer when an instalment is missed, giving him 7 days to pay the outstanding instalment. If no payment is made, the right to pay by instalments is lost, and the entire amount of council tax becomes due. If the taxpayer fails to pay that sum, and does not respond to a final notice served under Regulation 33, then the authority can seek a liability order from the Magistrates' Court, under para. 3 of Sch. 4 to the 1992 Act and Regulations 33-36 of the 1992 Regulations: see para. 12 of *Woolcock*.

15. At para. 13 of his judgment Hickinbottom LJ said:

> "A liability order confirms the amount of the outstanding debt, and the identity of the liable person. It is, in many ways, the equivalent of a judgment, which can be enforced in any of the ways set out in Regulation 52 of the 1992 Regulations, i.e. (i) making an attachment of earnings order (Regulation 37 of the 1992 Regulations); …"

16. Para. 8 of Sch. 4 to the 1992 Act provides that Regulations made under para. 1 may provide for a council tax debtor, who is an adult, who is the subject of a liability order and who has been the subject of the Sch. 12 procedure (that is a reference to Sch. 12 to the Tribunals, Courts and Enforcement Act 2007) but has been found to have insufficient goods to satisfy the amount due, to be committed to prison: see para. 14 of *Woolcock*.

17. After setting out the provisions of Regulation 47 of the 1992 Regulations and referring to earlier authority, at para. 17 Hickinbottom LJ set out a number of propositions which are now well-established and uncontroversial. It is unnecessary to set them all out here in full but I commend that summary of the relevant principles.

18. The power to commit is coercive. It is intended to be used to extract payment of the debt from those who are able to pay, not to punish the debtor: see para. 17(i) of *Woolcock*.

19. Before applying for committal, the local authority must first obtain a liability order and seek to enforce payment by taking control of the subject's goods and selling them under the Sch. 12 procedure, and a bailiff must have reported that he was unable to find any or sufficient goods to enforce payment: see para. 17(iv).

20. Notice of an application to commit must be made and served: see para. 17(v).

21. Before making a committal order, the Magistrates' Court must conduct a means enquiry in the presence of the debtor: see para. 17(vi).

22. The Court must consider, and determine, whether the failure to pay is the result of "wilful refusal or culpable neglect" since any committal order (included one which is suspended) can only be made if that is so: see para. 17(vii).

23. Before making any committal order (including a suspended order), the Magistrates' Court must consider enforcement options to secure payment other than imprisonment: see para. 17(ix).

24. At para. 17(x) Hickinbottom LJ said:

> "If, and only if, the Court is of the opinion that the subject's failure to pay is due to his wilful refusal or culpable neglect, it may, if it thinks fit, issue a warrant of commitment, or make a suspended committal order (i.e. fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions as the Court thinks just, usually of course as to payment of the arrears)."

25. It is usual, although not obligatory, for Magistrates to suspend at least a first committal order on condition that the subject makes regular instalment payments towards the arrears. However, they cannot make any unreasonable order for repayment. Furthermore, the period for which instalments are to be paid must be reasonable. Generally this will be a period of no more than 2 or 3 years: see para. 17(xiii).

26. The maximum period of imprisonment that may be specified in a committal order (whether suspended or not) is three months: see para. 17(xv).

27. The serving of a term of imprisonment does not formally eradicate the subject's debt but it does make that debt unenforceable. Service of the term of imprisonment is, to that extent, in lieu of enforceable payment: see para. 17(xvi).

28. No general appeal lies from a committal order, which may only be challenged in the Divisional Court by way of judicial review or an appeal by way of case stated (the latter being the procedure which has been adopted in the present proceedings).

The Appellant's submissions

29. On behalf of the Appellant authority Mr Rees adopted the written submissions which were made to the District Judge by Mr Robert Brown (solicitor for the Appellant) and also made supplementary submissions to this Court.

30. Mr Rees submits that the billing authority is not able to obtain an attachment of earnings order under the 1971 Act in respect of the Respondent's private pension. He points out that Regulation 32 provides that, for the purpose of the 1992 Regulations, the phrase "attachment of earnings order" means an order under Regulation 37. Regulation 37(1) provides that:

> "Where a liability order has been made and the debtor against whom it is made is an individual, the authority which applied for the order may, subject to paragraph (4), make an order under this Regulation to secure payment of the appropriate amount."

31. Regulation 37(2)(a) requires an order under Regulation 37 to be "in the form specified in (and accordingly contain the matters specified in) Schedule 3". That form is headed "Deductions by Employer under Attachment of Earnings Order", which defines "attachable earnings" in terms of "the earnings which remain payable to the debtor on [a particular payday]". That brings one to the definition of "earnings" set out in Regulation 32.

32. Mr Rees submits that the decision of the District Judge failed to have sufficient regard to the difference in the definition of "earnings" which is to be found in the 1992 Regulations and the 1971 Act. Section 24 of the Act defines "earnings" for the purposes of the Act. They include any sums payable to a person

(b) "by way of pension". The term "earnings" is also defined in the Regulation 32 of the 1992 Regulations. However, that definition does not include a pension.

33. Mr Rees also submits that the decision of the District Judge that a liability order is enforceable as a "judgment debt" is contrary to the provisions of Regulation 35(3) of the 1992 Regulations, which states:

> "The amount in respect of which a liability order is made is enforceable in accordance with this Part; and accordingly for the purposes of any of the provisions of Part III of the Magistrates' Courts Act 1980 (satisfaction and enforcement) is not to be treated as a sum adjudged to be paid by order of the court."

34. For reasons that will become apparent I will summarise the Respondent's submissions later, after I have set out what I consider to be the correct legal analysis, to see whether his submissions cause me to alter that analysis.

Analysis

35. The central question which arises in the present appeal is whether the scheme for enforcement of liability orders under the 1992 Regulations is self-contained and exclusive. On behalf of the Appellant Mr Rees submits that it is. He submits that as a matter of law it was simply not open to the billing authority to go to the County Court and seek to enforce the liability order, whether directly or indirectly by "converting" it into a judgment debt. Accordingly, he submits that the District Judge fell into error because he considered that it was open to the Appellant to go to the County Court and thereby obtain an attachment of earnings order under the 1971 Act. Before I address that central issue I will deal with one aspect of the District Judge's reasoning which, in my judgement, reflected an erroneous approach on his part.

36. At para. 8 of the case stated, the District Judge stated that Part III of the Magistrates' Courts Act 1980 ("the 1980 Act") is "the provision which deals with fines enforcement in the Magistrates' Court." That is not accurate. Part III of the 1980 Act in fact deals with convictions and orders made by the Magistrates' Court. It does not deal only with fines.

37. Also at para. 8 of the case stated, the District Judge said:

> "… It does not lead me to conclude that a liability order is not a judgment debt within the meaning of the Attachment of Earnings Act."

38. At para. 9 of the case stated the District Judge said:

> "… I was aware that any Local Authority could apply to the County Court to enforce by way of charging order but of course in this case this Local Authority had not tried to obtain an Attachment of Earnings Order and so there was no definitive judgment upon which they could rely to demonstrate that they were not permitted by law to apply.
>
> The skeleton argument failed to persuade me that they could not do this and I found nothing in their submissions to satisfy me they were precluded from applying to enforce in the County Court.
>
> I came to the view that the Local Authority ought to have applied to the County Court for an Attachment of Earnings Order and that the absence of that enquiry was fatal to their application."

39. Earlier, the District Judge had set out his reasons in writing. In those written reasons, at para. 12, he referred to the decision of this Court in *Woolcock*. In that case, at para. 13, Hickinbottom LJ did refer to a liability order as being in many ways the "equivalent of a judgment". However, he went on to say that it "can be enforced in any of the ways set out in regulation 52 of the 1992 Regulations, ie (i) making an attachment of earnings order (regulation 37 of the 1992 Regulations); …" Those dicta could be regarded as lending some support for the view taken by the District Judge in the present case but also

some support for the submissions made on behalf of the Appellant. However, the issue of law which arises in the present appeal was not before this Court in *Woolcock* and was not resolved by it in that case.

40. In my view, the appropriate starting point in addressing the central issue in this appeal is to be found in sections 1 and 2 of the 1971 Act. Section 1(2) provides that the County Court may make an attachment of earnings order to secure "(b) the payment of a judgment debt, other than a debt of less than £5 or such other sum as may be prescribed by Rules of Court". Section 1(3) expressly deals with when a Magistrates' Court may make an attachment of earnings order and provides that it may do so to secure "(c) the payment of any sum required to be paid under regulations under section 23 or 24 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012." That provision in subsection (3) is clearly immaterial to the present appeal. The District Judge did not suggest otherwise.

41. The phrase "judgment debt" in the 1971 Act is defined by section 2(c) to mean a sum payable under

> "(i) a judgment or order enforceable by a Court in England and Wales (not being a Magistrates' Court);
>
> (ii) an order of a Magistrates' Court for the payment of money recoverable summarily as a civil debt; or
>
> (iii) an order of any Court which is enforceable as if it were the payment of money so recoverable,
>
> but does not include any such sum payable under a maintenance order or an administration order; …"

42. In my view, a liability order in the context of the enforcement of council tax does not fall within that definition of "judgment debt". It is not an order of a Magistrates' Court for the payment of money recoverable summarily as a civil debt. Further sub-paragraph (i) expressly excludes a judgment or order made by a Magistrates' Court in other circumstances.

43. This is to be contrasted with provisions in the Magistrates' Courts Act 1980. Section 87(1) provides for the enforcement of payment of fines by the High Court or the County Court. It provides that:

> "Subject to the provisions of subsection (2) below, payment of a sum adjudged to be paid by a conviction of a Magistrates' Court may be enforced by the High Court or the County Court (otherwise than by issue of a writ of control or other process against goods or by imprisonment or attachment of earnings) as if the sum were due to the designated officer for the Magistrates' Court in pursuance of a judgment or order of the High Court or County Court, as the case may be."

44. That provision is to be contrasted with the absence of any similar provision rendering a liability order in the context of council tax a judgment debt or providing that it should be treated like a judgment debt and so enforceable in the High Court or the County Court.

45. The second important stage of the analysis is that one needs to consider the combined effect of section 25(6) of the 1971 Act and Regulation 35(3) of the 1992 Regulations. Section 25(6) of the 1971 Act provides:

> "This Act, so far as it relates to Magistrates' Courts, and Part III of the Magistrates' Courts Act 1980 shall be construed as if this Act were contained in that Part."

46. Regulation 35(3) of the 1992 Regulations provides:

> "The amount in respect of which a liability order is made is enforceable in accordance with this Part; and accordingly for the purposes of any of the provisions of Part III of the Magistrates' Courts Act 1980 (satisfaction and enforcement) it is not to be treated as a sum adjudged to be paid by order of the Court."

47. Mr Rees submits, and I accept, that the combined effect of those two provisions is that a liability order is to be regarded as falling within the provisions of Part III of the 1980 Act and is not to be treated as a sum adjudged to be paid by order of the Court. For that reason, amongst others, it cannot be regarded as a "judgment debt" within the meaning of section 2(c) of the 1971 Act.

48. The third element of the correct analysis, in my view, is to be found in the definition of "earnings" in the 1992 Regulations as contrasted with the definition of "earnings" in the 1971 Act.

49. Section 24 of the 1971 Act defines "earnings" in the following way. It provides that:

> "(1) For the purposes of this Act, but subject to the following subsection, 'earnings' are any sums payable to a person –
>
> (a) by way of wages or salary ….
>
> (b) by way of pension …
>
> (c) by way of statutory sick pay."

50. There is a significant contrast between that definition of "earnings" and the one to be found in regulation 32(1) of the 1992 Regulations, which provides that:

> "'Earnings' means sums payable to a person –
>
> (a) by way of wages or salary … or
>
> (b) by way of statutory sick pay …"

51. Those two definitions are materially in identical terms save for the important omission of the reference to "pension" in the meaning of "earnings" in the 1992 Regulations. That omission must be taken to be deliberate on the part of the legislator.

52. The underlying social policy which that provision no doubt reflects is that it was considered that a person's pension should be insulated from the possibility of an attachment of earnings order being made against it. If the District Judge were right and it is possible for the billing authority to go by way of the County Court to obtain a judgment in its favour to reflect the liability to pay council tax, and then to obtain an attachment of earnings order within the meaning of the 1971 Act, it would be able to obtain such an order in respect of a person's pension. In my view, that would be contrary to the underlying policy behind the more limited definition of "earnings" which is to be found in the 1992 Regulations. In that sense it would be to enable the billing authority to bypass the purpose of the legislation read as a whole.

53. Finally, Mr Rees submits that there is a "general rule" that "where an Act creates an obligation, and enforces the performance in a specified manner … that performance cannot be enforced in any other manner": see *Doe d.Murray v Bridges* (1831) 1 B & Ad. 847, at p. 859 (Lord Tenterden CJ), which was quoted with approval by Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, at p. 185. I would observe that that was said in the context of a different question of law, namely whether a cause of action in tort can be found to exist for breach of statutory duty where legislation provides for criminal penalties for certain conduct. Nevertheless, I would accept that this reflects a more general principle, that specific legislation which governs a particular subject matter will usually be regarded as dealing with that subject matter even if there is more general legislation in that area of law. I would accept Mr Rees's submission that this lends some support to the Appellant's interpretation of the legislation in this case.

The Respondent's submissions

54. The Respondent appeared before this Court in person. His main submission was that the hearing of this appeal should be adjourned. The Respondent submits that the legislation which falls to be interpreted in this appeal is ambiguous and that research needs to be done in relation to what was said in

Parliament when the legislation was enacted. In my view, there are at least three difficulties with that submission.

55. First, I do not consider the relevant legislation to be ambiguous or that any of the other criteria for the admissibility of Hansard which were set out by the House of Lords in *Pepper v Hart* [1993] AC 593 are met. Secondly, the present appeal concerns in part at least secondary legislation (the 1992 Regulations), not only primary legislation. Thirdly, and in any event, there has been nothing to prevent the Respondent from doing research into Hansard if that were considered to be relevant to this appeal.

56. In relation to the substantive merits of this appeal, the Respondent submits, first, that there has been a miscarriage of justice which forms the background to this case. In that context he cited para. 419 in Halsbury's Laws, vol. 8(2) (Reissue) in which it is said that, in cases "where no illegal act and consequently no action lies, but the subject deems himself to be unduly oppressed by the sentence of a judge or the conduct of an official, the law of the constitution has provided a remedy by petition to the Crown." The Respondent submits that he has suffered an injustice and oppression even if not an illegal act, something which deserves a legal remedy. The difficulty with that submission is that what the passage from Halsbury's Laws is concerned with is not any legal remedy (since, as that passage says, no illegal act has been committed and "no action lies") but with the right of the subject to petition the monarch. No one has interfered with that right and, in any event, this has nothing to do with the present appeal. On this appeal this Court is limited to answering the questions which are set out for its opinion in the case stated by the Magistrates' Court.

57. Next the Respondent submits that the 1992 Regulations cannot "repeal" the 1971 Act. However, in my view, that is not the effect of either the Appellant's argument in this appeal or of the above analysis, which I believe to be correct. The two pieces of legislation need to be read as a whole and sit together. There is simply no question of one "repealing" the other.

58. Next the Respondent submits that the interpretation which I believe to be the correct one is "unconstitutional" and for that reason in breach of the Bill of Rights 1689. Suffice to say that I do not consider that submission to have any merit for the reasons that I have already given.

59. Finally the Respondent relies upon the decision of the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 (the "Brexit" decision). In that case the Supreme Court held that it was not open to the executive to give notice under Article 50 of the Treaty on European Union ("EU") that the United Kingdom will leave the EU by exercising the royal prerogative and that it could only do so if authorised by an Act of Parliament. In my view, there is nothing inconsistent with the analysis which I believe to be the correct one in the present appeal and the decision of the Supreme Court in *Miller*. If I understood the Respondent's submission correctly, it is that in some way the above analysis would lead to the executive being able to disapply an Act of Parliament (the 1971 Act). I do not consider that submission to have any merit, again for the reasons I have already set out.

Conclusion

60. For the reasons I have given I would allow this appeal and answer the two questions which have been stated for the opinion of this Court in the following way:

(1) The Appellant local authority was precluded from applying to the County Court for an attachment of earnings order under the Attachment of Earnings Act 1971.

(2) The Magistrates' Court was not entitled to dismiss the Appellant's application or to quash the earlier commitment on the ground that it had not exhausted all alternatives to custody for applying to commit the Respondent to prison.

61. In the circumstances I would remit this matter to the Magistrates' Court (a District Judge other than DJ Thomas) for redetermination in accordance with the judgment of this Court.

62. After this judgment was circulated to the parties in draft in the usual way the Respondent filed further written submissions on 3 July 2018. Those submissions were filed late. Furthermore the Court did not

invite further submissions. The normal practice is that a draft of a judgment is circulated to the parties on a confidential basis so that typing corrections and obvious errors can be pointed out to the Court before a final version of its judgment is handed down. This does not (and should not be taken to) provide an opportunity to make further submissions as to the substance of the case. Nevertheless, since the Respondent is a litigant in person and so as to avoid any possibility of injustice, I have taken into account what the Respondent has said in his most recent document but find nothing in it which causes me to change the views to which I have come in this judgment.

Lord Justice Hickinbottom :

63. I agree with both the analysis and conclusion of my Lord, Singh LJ.

64. Insofar as it might be said that para. 13 of *Woolcock* suggests that a liability order is indistinguishable from a judgment debt, it was never intended to do so. The point raised by this appeal (i.e. whether the enforcement scheme for liability orders set out in the 1992 Regulations is self-contained and exclusive) was not in issue in that case, and that paragraph does not assist one way or the other in determining it. For the reasons given by Singh LJ, in my judgment, the scheme is intended to exclude recourse to methods of enforcement outside those set out in the 1992 Regulations themselves. Those, of course, to an extent replicate methods of enforcement found elsewhere; but, crucially for the purposes of this appeal, not in respect of attachment of earnings orders to sums payable by way of pension.

65. I also agree with the disposal suggested by Singh LJ. Having answered the questions posed to this Court as he indicates in para. 60 above, this appeal will be allowed and the matter remitted to the Magistrates' Court (a District Judge other than DJ Thomas) for redetermination in accordance with the judgment of this Court.

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Ref. J90SA002

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
SWANSEA DISTRICT REGISTRY

2 Park Street
Cardiff

Before HIS HONOUR JUDGE HARRISON (Sitting as a Judge of the High Court)

IN THE MATTER OF

WAYNE LEIGHTON (Claimant)

-v-

BRISTOW AND SUTOR (Defendant)

THE CLAIMANT appeared in person
MR C FENDER appeared on behalf of the Defendant

JUDGMENT
20th SEPTEMBER 2023
(AS APPROVED)

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JUDGE HARRISON:

1. This case concerns claims made by Mr Wayne Leighton regarding the activity of the defendants, who are an enforcement agency based in Worcestershire, but who carry out enforcement work for local authorities on a national basis. The agency were instructed by City of York Council to pursue council tax liabilities said to be owed by Mr Leighton in relation to 2 Oldman Court in York. This property was owned by the claimant but not occupied by him; rather, it was let under a tenancy agreement and/or was unoccupied.

2. The agency contends that they were instructed to enforce four liability orders obtained by the council over the period 2015 and 2021, and acted accordingly. The claimant argues that in fact, in seeking to enforce the same, the defendant acted unlawfully in a number of ways, or a number of different alternative ways, for which liability in damages attaches. These can be summarised as follows:

> (a) Breach or paragraph 66 of the Tribunals and Courts Enforcement Act 2007, the TCEA
> (b) Harassment, contrary to section 3 of the Protection from Harassment Act 1997
> (c) Breach of the Statute of Marlborough 1267, and
> (d) Breach of a commercial lien.

Mr Leighton has represented himself in these proceedings. It is clear that these are matters about which he feels strongly, and in respect of which he has invested much time and research. It is equally clear that much of his concern is directed towards the City of York Council, who are not party to these proceedings.

Background

3. In order to understand these proceedings, it is perhaps necessary to consider briefly the background. Mr Leighton was aggrieved at how the City of York Council dealt with his council tax liability. Specifically, he considered that he should have had some discount from his liabilities over the relevant years for periods when Oldman Court was unoccupied. It appears that the City of York Council had, in the exercise of its discretion, made a decision not to apply discounts to vacant properties. Mr Leighton wanted to challenge this, and sought disclosure of documentation relevant to the decision-making process. He felt, indeed he feels, that he did not get a satisfactory response, and informed the council of his intention to challenge their decision. He also felt that in relation to at least some of the periods of council tax claimed, the liability was that of his tenant, rather than his own.

4. Notwithstanding this, the council proceeded to enforce what they saw as a legitimate obligation on the claimant, and one which they felt they were obliged to pursue. The procedure for enforcement involved issuing a summons to appear before the Magistrates' Court. It is worth noting in passing that this area of enforcement is one of those areas that remains within the remit of the Magistrates' Court, albeit perhaps, for reasons that may become apparent within this judgment, it is one which is ripe for reform.

5. Mr Leighton only answered one of the summonses. That was the first, and it was the summons sent to his address at number 175 Kingsway West in York.

6. Thereafter and in relation to subsequent years, summons were sent to 2 Oldman Court. During this period, the claimant was out of the country, travelling, and he says he was

unaware of the same. Oldman Court was let under a tenancy agreement for at least part of the relevant periods. The liability order purported to be enforced by the defendants arose from these summons.

7. During the course of this case, I received evidence from Mr Paul Sanderson, the revenues and benefits manager at the City of York Council. He explained the process by which liability orders were obtained by the City of York. Specifically, he explained how liability orders were granted by the Magistrates. In many ways, the term "order" is a misnomer, if used in the same way as might be understood in the civil courts of Wales and England. No physical individual order as such is ever actually produced by the court. Rather, the presenting officer on behalf of the council attends, with a list of those summons to appear. Having heard anyone who does attend the court, and subject to any amendment, the list is simply signed by a magistrate, and the liability order is deemed to be made.

8. Mr Leighton makes a number of points about this process, and challenges its legitimacy. He points to the apparent tension between what ordinarily is thought of as a valid order of the court, and that which this process produces. By way of example, he contends that this is not a proper record of the proceedings. It does not identify clearly the maker of the order, and it is neither stamped, nor sealed. Further, insofar as it purports to be the basis for an award of costs, then it does not comply with the obligation to make clear whether or in what sum such costs are rewarded. Of equal importance in these proceedings, Mr Leighton makes the point that, in the absence of any paper record, then the court should not be satisfied that any such liability order was ever made against him.

9. There is, of course, an important practical point to Mr Leighton's complaints about the order. This particular method by which liability orders are produced means that there is no record retained by the court regarding making the same. How then, Mr Leighton asks, is he, as a subject of such an order, able to apply to set such an order aside and/or appeal the same? He says that is precisely what he wanted to do in this case, but when he tried to do so, his attempts revealed the flaw in the process, and potentially Article 6 of the European Convention on Human Rights is engaged.

10. Before moving on from the process before the Magistrates' Court, Mr Leighton also invites me to reflect upon the issue of service. The documents in this case reveal that, save for the first summons, all of the other summons were served on 2 Oldman Court. Mr Leighton points to the fact that at this time he had told the council that he was not resident at that address. In fact, that was the whole point of his argument. Nevertheless, he argues they presumably went to the court and pursued it in his absence, when service of the summons could not be established.

11. In completing my brief synopsis of the background to this claim, it is necessary to note the following: in passing the claim to the enforcement agents, the council simply send a list of persons against whom liability orders have been obtained. The defendants, on the evidence, taken them at their word and proceed accordingly. In their defence, drafted on 15 June of 2022, they plead that they have a general authority to proceed with enforcement from the council. This document is signed by Mr Sanderson, as the corporate income manager of City of York Council, it is dated 18 April 2014, and appears at page 65 of the trial bundle. It reads as follows:

> "In accordance with the Tribunals, Courts and Enforcement Act 2007, we authorise enforcement agents employed by Bristow

and Sutor to enter premises and take control of goods, in connection with debts owed to the City of York Council."

As the case has progressed before me, Mr Fender, counsel for the defendant, recognised that this document could not be read as providing authority to the defendant to do what the letter says. Rather, it can only amount to a written confirmation of instructions to the defendants to act on behalf of the council.

The relevant law and analysis
Tribunals and Courts Enforcement Act 2007

12. The nature of the work upon which the defendants were engaged is strictly regulated. In this case, it is Schedule 12 of the Tribunal and Courts Enforcement Act 2007 that is most relevant to my considerations. Paragraph 66 of Schedule 12 provides:

"Remedies available to the debtor

(1) This paragraph applies when an enforcement agent -

(a) breaches a provision of the Schedule, or
(b) acts under an enforcement power under a writ, warrant, liability order or other instrument that is defective.

(2) That breach or defect does not make the enforcement agent of a person he is acting for a trespasser.

(3) But the debtor may bring proceedings under this paragraph.
…

(5) In the proceedings the court may -

(a) order the goods to be returned to the debtor,

(b) order the enforcement agent or any related party to pay damages in respect of loss suffered by the debtor as a result of the breach, or of anything done under the defective instrument."

Sub-paragraph (6), sub-paragraph (7), I move onto sub-paragraph (8):

"(8) Sub-paragraph (5)(b) does not apply where the enforcement agent acted in the reasonable belief -

(a) that he was not breaching a provision of the Schedule, or

(b) (as the case may be) that the instrument was not defective"

13. Mr Leighton advances his case under paragraph 66 in two ways: firstly, he argues that the defendants have proceeded under a defective instrument, in that no liability orders were in fact made in his case, and/or if they were made, then they should not have been made, for the reasons that I have attempted to outline above, by way of background.

14. The first point that I have to consider is whether I am satisfied that liability orders were actually made by the magistrates. The practice of obtaining a liability order as set out above is potentially problematic for a local authority, or, indeed, any enforcement agent trying to prove that it was made. Here the documents provided to the court appeared at trial bundle 247 to 255, repeated as better copies at trial bundle 273 to 279, comprise effectively extracts from court lists, showing that on the material day the claimant was on the court list, and pairing that with a signature applied at the end of the list by a magistrate or district judge.

15. The documents, as I say, do reveal a series of problems with the process. By way of an example, the name of the individual making the order is not readily discernible. Secondly, what the magistrate or judges certify is the number of liability orders made that day. For example, by way of what appears at trial bundle page 277, the magistrates certify that on 21 June 2017, 1,474 liability orders were made.

16. The defendants argue that, when that document is read in conjunction with the extract of the court list, at trial bundle page 276, then that is enough to establish that Mr Leighton was one of the 1,474. However, the way in which the orders are made certainly makes it difficult for an absent debtor either to challenge the same by applying to set aside, or even appeal the same. In fact, that which appears at trial bundle page 277 goes further than the documents provided in relation to different dates, in that the document at page 277 records an amount of costs to be applied. The other similar documents do not make such a recording. This discrepancy is surprising, to say the least.

17. However, putting my misgivings about the process aside, it seems to me that it is necessary to remind myself that City of York Council are not the defendants in this case. If I ask myself, on the balance of probabilities, whether the Magistrates' Court on the dates shown made liability orders against those persons on the court list, then the contemporaneous documentation suggests that this was the case. Insofar as Mr Leighton gave evidence that his recollection was that no order was made on the one occasion that he attended the Magistrates' Court, then in that regard he must be mistaken; I prefer the evidence set out in the documents.

18. Whether Article 6 of the Convention on Human Rights is engaged, or whether or not the form of the order is capable of challenge is not, in my judgment, central to the resolution that I must resolve in this case. What is relevant is that I am satisfied, on the balance of probabilities, that the Magistrates' Court indicated they were granting liability orders against those shown in the list on the days in question. Furthermore, the council noted the making of the same, and the council then passed on that information to the defendants for enforcement.

19. Putting oneself in the defendants' position, they were being told by a public body that, for enforcement purposes, liability orders had been obtained against individuals on a list. For the purposes of paragraph 66(8)(b), that would amount for grounds for a reasonable belief on the part of the enforcement agent that there was in existence a non-defective instrument. It was not, in my judgment, necessary, in order for the enforcement agent to have a reasonable belief, for him to go further and enquire how the order was obtained, or the process involved.

20. Whilst I am persuaded that paragraph 66(8)(b) is an answer to an argument regarding any defect in the instrument itself, I would reiterate my concerns that the process does, in my judgment, cause the problems that I set out in the following paragraphs.

21. The second point made by the claimant regarding the defendants' failings relates to the argument that in any event there has been a breach of the Schedule. Specifically, he alleges that paragraph 26 is engaged. That paragraph provides as follows:

> "(1) The enforcement agent must on request show the debtor and any person who appears to him to be in charge of the premises evidence of -
>
> (a) his identity, and
>
> (b) his authority to enter the premises.
>
> (2) The request can be made before the enforcement officer enters the premises, or while he is there."

The claimant says that in the context of this case, he has requested provision of the defendants' authority and it was not provided. Specifically, he points to the refusal of the defendants to provide a copy of the liability order on request, or otherwise to identify under what authority they were intending to enter his premises. For example, reference can be made to trial bundle page 96.

22. The defendant argues that these provisions should be read as being restricted to the time of the actual visit itself. In other words, paragraph 26 is restricted to requests made as the enforcement agent enters the premises, or whilst there. Here they say Mr Leighton was never present when agents visited, and so no request relevant to this paragraph could be made. Whilst tenants were there on occasions, and whilst agents did visit Mr Leighton's parents at 28 Elvington Park, neither of those, it is submitted, requested sight of authority to enter.

23. In his skeleton argument, Mr Fender, for the defendant, argues that the authority for an enforcement agent to act comes from the enforcement provisions as set out in paragraph 7 of Schedule 12. Paragraph 7 provides:

> "(1) An enforcement agent may not take control of goods unless the debtor has been given notice.
>
> (2) Regulations must state -
>
> (a) the minimum period of notice,
>
> (b) the form of the notice,
>
> (c) how it must be given,
>
> (d) who must give it.

> (3) The enforcement agent must keep a record of the time when the notice has been given.
>
> (4) If regulations authorise it, the court may order in prescribed circumstances that the notice given may be less than the minimum period.
>
> (5) The order may be subject to conditions."

24. Not unreasonably, Mr Leighton points to that section of the amended defence to which I have already referred above. Paragraph 11 of the amended defence, trial bundle page 45, specifically reads as follows: "With regards to paragraph 4 and 5 of the particulars, the authority of an enforcement officer to enter a premises is given by the council. A copy of one of the letters of authority is attached hereto, marked BS2. Pursuant to paragraph 26(1)(b) of Schedule 12 of the Tribunal, Courts and Enforcements Act 2007, a copy of the relevant authority is carried by the enforcement agent, so that it can be provided if it is asked for by any party upon the agent attending the premises."

25. Now, as set out above, Mr Fender, for the defendants, recognises the problem with this document. The suggestion that the council, as effectively clients, can authorise employees of the defendant to enter premises and take control of goods is problematic, to say the least. Mr Fender characterises the document as an unfortunate piece of drafting, and concedes it could not form the basis for authority for the defendant to enter premises. Hence his argument that the authority for the defendants comes from paragraph 7.

26. There are, in my view, a number of problems with this assertion. Firstly, paragraph 7 is not drafted in a way to confer authority. Rather, it restricts what an agent can do. Secondly, it is in contradiction with the specifically pleaded paragraph that I have set out above. Whilst I do not regard this as fatal to Mr Fender's argument, the point can properly be made that the pleading must have been made on clear instructions from the defendants as to how they regarded this document. Thirdly, paragraph 18(xi) of the amended defence, bundle 49, is even more specific. It reads:

> "On 14 June 2016, the defendant emailed the claimant in response to an email received on 13 June 2016. The defendant explained that there was no requirement for their office of the enforcement agent to hold a copy of the liability order, as the defendant is acting as agent for the council, and as referenced in paragraph 7 above. The defendant hold that there is a different between the liability order obtained by the council and letter of authority the defendant holds to enter the premises to take control of goods, which is what is required by paragraph 26(1)(b) of Schedule 12 of the Tribunal, Courts and Enforcement Act 2007. While the defendant may not hold copy of the liability orders, they still held the relevant authority from the council to enforce their orders."

Lastly, and perhaps most obviously, Sarah Brown for the defendant gave evidence to the court to the effect that the defendants regarded the council's document as being the relevant authority, and furthermore, as the pleadings say, the document was carried by the agents when attending to enforce council tax liabilities, and was presumably produced by agents for

that purpose. It follows that the defendants did not themselves regard paragraph 7 as providing authority to them to act, and even if it was, it rather begs the question of what they would show to a householder if they were asked to produce it.

27. In any event, Mr Fender argues that there is no breach of Schedule 12 paragraph 26, because no request was made contemporaneously to the attendance of the agent at the relevant premises. He submits that this paragraph should be construed as being restricted to the occasion when the agent is physically at the premises. Whilst I can see why this would be the usual situation, I cannot read the paragraph as being so restrictive. If a householder knows that an agent will visit, why should he not seek sight of any authority in advance? There is no doubt that Mr Leighton made it clear that he wanted to see the defendants' authority to enter his premises, and whilst he may himself have focused on having sight of liability orders, it is not, in my judgment, sufficient simply to signpost him to the local authority. In this case, and for the reasons explained above, we have no physical, individual order that can be shown by the defendants to the claimant. He is simply told to contact the local authority. In my judgment, a householder is entitled to ask the defendants on what authority they are purporting to enter his property, and the fact that they cannot do so, and refer him back, effectively to their client, is almost bound to cause him to be dissatisfied. In my judgment, the defendants are in breach of paragraph 26.

28. It is perhaps illuminating to note that, according to the defendants' own evidence, if a request had been made on the day of a visit, then the likelihood is that the householder would have been shown a document that the defendants now accept did not amount to the relevant authority. Furthermore in this respect, I am unable to conclude that the defendant can escape responsibility by relying upon paragraph 66(8)(b). It is, in my judgment, difficult to conclude that the defendants had a reasonable belief that they were acting in accordance with the Schedule, when the basis for doing so seemed originally to have been a letter from their client, purporting to give authority. The provisions at paragraph 26 require the defendant to be able to put themselves in a position where they can provide on request their authority to act. That, it seems to me, is an important obligation placed upon them, and is something in respect of which they needed to address their minds, and make arrangements accordingly. Otherwise they run the risk of not being able to tell the claimant anything useful, and simply signposting him to a client, which is what they have purported to do here.

29. Protection from Harassment Act 1997

> "A person must not pursue a course of conduct -
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other."

Section 7 of the Act provides as follows:

> "(2) References to harassing a person must include alarming the person or causing the person distress."

"A course of conduct" is defined as follows:

> "It must involve -

> (a) in the case of conduct in relation to a single person, conduct on at least two occasions in relation to that person, or
>
> (b) in the case of conduct in relation to two or more persons, conduct on at least one occasion in relation to each of those persons."

Thus to succeed, a claimant must establish (1) a course of conduct, (2) that course of conduct must amount to harassment, and (3) the defendant must know or ought to have known that the course of conduct amounted to harassment.

30. The assessment of the alleged conduct is by way of an objective test. It is the point of view of the alleged victim of harassment that is relevant to this objective test, and the test can be met by correspondence. See *Ferguson v British Gas Trading Limited* [2009] EWCA 46. In *Dowson & Ors v Chief Constable of Northumbria* [2010] EWHC 2612, Simon J provided some assistance in the consideration of what was required:

> "(a) There must be conduct which occurs on at least two occasions,
>
> (b) which is targeted at the claimant,
>
> (c) which is calculated in an objective sense to alarm or distress,
>
> (d) which is objectively judged to be oppressive and unacceptable,
>
> (e) what is oppressive and unacceptable may depend on the social or working context in which the conduct occurs, and
>
> (f) a line has to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways as torment of the victim, or is of an order which would sustain criminal liability."

31. Section 1(3) of the 1997 Act sets out statutory defences to the Act as follows - I summarise:

> "Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it"

- the relevant sub-paragraphs being (b) and (c) -

> "(b) that it was pursued under any enactment or rule of law, or to comply with any condition or requirement imposed by any person under any enactment, or
> (c) that in the particular circumstances, the pursuit of the course of conduct was reasonable."

32. The argument advanced by Mr Leighton as regards this element of the claim is reasonably straightforward. He contends that during the period complained of, there were a total of about 35 enforcement actions by the defendants in various forms of contact, including email and correspondence. There were 15 visits to three separate properties, namely Kingsway West, Oldman Court and Elvington Park. Whilst the claimant was not present for any of the visits, his tenants were present at Oldman Court some of the time, and his parents were at Elvington Park for the two visits made in April and June 2021. The defendants do not contend otherwise, and at paragraph 11 of the amended defence, set out the Schedule of the 15 visits.

33. Mr Leighton points to the upset caused by the prospect of visits of this sort. He also points to the type of correspondence received by way of enforcement visit warning, for example, at trial bundle 302, warning the recipient that his goods were banned, that there would be a return visit, and that costs could become substantial. Mr Leighton explained that the visits to the premises occupied by his parents were particularly troublesome for him. He felt that the defendants were using them as a means to get to him.

34. Set against this, the defendants argue that on any proper analysis of the evidence, their activity could not be categorised as actionable harassment. In order to make a proper assessment of the same, they submit that the court must first look at the period over which the activity is alleged. Here the relevant period is between May 2015 and June 2021, a period a little over six years. Mr Fender submitted, and it was not contradicted, that within that period there were periods of no enforcement activity taking place at all. On his calculations, made at paragraph 20 of the skeleton argument, there were a total of about four and a half years out of the six during which no activity took place. If, it is submitted, this is combined with the fact that the defendants were dealing with four separate liability orders, then the amount of contact is consistent with fairly normal enforcement activity.

35. Of course the court cannot ignore the fact that the work undertaken by the defendants by definition involves sending letters and undertaking visits to people who would rather not receive the same. While such contact might still amount to harassment in the right circumstances, it does seem to me that the court has to approach the same with a degree of care when applying the guidance set out in *Dowson*. Can the conduct be said to be objectively oppressive and unacceptable when considered against the working context in which it occurs? Is the conduct over the period alleged such that the court can conclude that the threshold for a finding of harassment is met - ie, the conduct is of an order that would sustain criminal liability if proved to the requisite standard?

36. In my judgment, the conduct does not reach that threshold, especially seen in the context of enforcement activity. In my judgment, the period over which the activity took place and the long periods of no activity lead me to that conclusion.

<u>The statute of Marlborough 1267</u>

37. The claimant raises this ancient provision as potentially giving rise for a cause of action for him against the defendants. Specifically, he contends that the Act prohibits unreasonable distresses wherein it provides:

> "None from henceforth shall cause any distress that he hath taken to be driven out of the county where it is was taken, and if one neighbour do so to another, of its own authority and

> without judgment, he shall make fine, as above is said, as for a thing done against the peace. Nevertheless, if the Lord presume so to do against his tenant, he shall be grievously punished by amerciament. Moreover, distresses shall be reasonable and not too great, and he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses."

Now, apart from the fact that the language is far removed from today, it is of course relevant to try to analyse what the statute was intended to prevent. The practice of exercising distresses over another person's property or livestock involves taking control or impounding the same. The Statute of Marlborough is intended to limit the practice of distress to that which is reasonable. The Act provides a penalty, by way of amerciament, to be applied to any person taking unreasonable distress. What is an amerciament? In *Dayani v Bromley LBC* [1999] 3 EGLR 1 44, the court considered a different part of the 1267 statute, and was referred to the meaning of amerciament provided in Jowitt's Dictionary of English Law. The definition is set out in that judgment. Whilst the court appears not to have ruled decisively on the issue, the following is relevant to my consideration. Namely, an amerciament was a punishment for an offence, and was described as being "more merciful than a fine". They were, it is said, a source of revenue to the Crown.

38. In my view, therefore, the statute was not intended to convey a right of action for damages on an individual. Rather, as submitted by Mr Fender for the defendants, it takes its place as part of the criminal law, whereby an individual could be fined or amerced for a transgression. It is also difficult to see what the provisions of the statute would add to the claimant's case in this particular action.

The commercial lien

39. Whilst travelling in Thailand in 2015, Mr Leighton appears to have visited a notary, to draw up a notice. The document is dated and signed by Mr Leighton before the notary on 13 August 2015, and appears at trial bundle 337. It was sent on to the defendants' email address. In that document Mr Leighton states as follows:

> "Your unlawful, nonsensical, threatening correspondence has caused me to suffer a tort. Any future unlawful correspondence from your corporation will be the subject of a commercial lien in the sum of £10,000 sterling. All agents, representatives and individuals should be made aware that they are subject under common law for full commercial liability for their actions, and inform any bonding agents or insurers accordingly. Any further contact from you or anyone acting on behalf of your corporation will be confirmation of this contract."

Mr Leighton contends that, rather like a motorist driving into a car park might be deemed to accept the terms and conditions of the same regarding parking his vehicle, so the defendants, in continuing in this case with their conduct of contacting him and visiting his property, should be held liable to accepting a contractual liability of £10,000.

40. Applying first principles of contract, it cannot, in my judgment, be said that the defendants accepted the terms as set out in that document. There was no meeting of the minds of the claimant and the defendants on this issue, and it simply cannot be inferred that

the defendants accepted that in attending the property, for example, they accepted a contractual liability to the claimant in the way now alleged. The defendants were not seeking to attend the property pursuant to the alleged contractual term; rather, they attended pursuant to their work as enforcement agents. Whilst, as considered above, their conduct in this regard is rightly regulated, the claimant cannot, in my judgment, unilaterally impose such conditions, as he appears to have tried to do.

Conclusion

41. In summary, I am satisfied that the claimant has established a breach of paragraph 26 of the Schedule, in that the defendants failed to provide evidence of their authority. I am not persuaded that the other pleaded causes of action are established. For reasons that I have set out above, there is a danger in conflating Mr Leighton's grievance with the City of York Council with the position of the defendants. Mr Leighton's Article 6 argument is a case in point. Whilst I have made such observations as I am able about the process adopted to obtain liability orders, I remind myself that City of York Council are not party to the proceedings, and therefore have not had the opportunity to argue their position in detail. I have confined myself to the position of the defendants, who, as enforcement agents, are rightly subject to the regulatory framework of the 2007 Act.

42. Having established such a breach, paragraph 66 provides the claimant will remedy in damages. There is no real guidance as to how the same should be assessed. Here there is no obvious, direct pecuniary loss. The claimant has, however, suffered a non-pecuniary loss by way of injury to feelings and/or frustration, consequent upon the protracted period of engagement between the claimant and the defendants on this issue. The claimant invested significant time in this matter, and was plainly frustrated by what he saw as the defendants' failure to appreciate what he was asking for, together with their persistence in continuing with a process against a background of what I have concluded was a breach of the Schedule on their part.

43. In my judgment, the quantum of any award would not be the same as for an harassment case, albeit, the approach adopted by the courts in such cases is informative. Harassment cases themselves have often turned to discrimination cases for guidance. Specifically, the approach in the *Chief Constable of West Yorkshire Police v Vento (No 2)* [2003] ICR 318. The court is also mindful of the view expressed by Nicol J in *S & D Property Investments Limited v Nisbet* [2009] EWHC 1726 (Ch). Here the point was made that discrimination, by its very nature, involved an element of humiliation for being treated differently, and this is generally absent from most harassment claims.

44. In reaching a conclusion as to this non-pecuniary loss, it is relevant to consider the period over which the conduct complained of persisted, and it is relevant to consider that effectively the conduct is one of a repeated breach, perhaps caused by a lack of understanding of their obligations under the Schedule. Whilst the defendants might have been somewhat dismissive of the claimant's point, I am not satisfied that they behaved in a way that suggested either malice or bad faith on their part. We now know that they felt that the letter from City of York Council was enough to act. As it transpires, it is accepted that the letter cannot amount to the same. I have concluded that, had they stopped to think about it at the time, they should have realised this and perhaps sought to put in place a system that allowed them better to evidence their authority to act. Equally, it seems to me that someone in the claimant's position is entitled to be told on what authority he is threatened with entry to his premises.

45. The protracted period relevant to this case was, as highlighted above, punctuated by periods of inactivity. Nevertheless, in my view the breach must be marked by an award of damages. To mark the breach, the frustration suffered and the repeated failure to comply with the Schedule, I will assess damages as being in the sum of £4,000. This sum is less than I would have awarded if harassment had been established. If established, I would have awarded a sum perhaps nearly double that sum. Aggravated damages arise where the injury to feeling suffered by the claimant is increased by the flagrancy, malevolence, and the nature of any particular unacceptable behaviour on behalf of a defendant. My analysis of the case, set out above, does not allow me to bring this case within the same, and I make no reward in respect of aggravated damages.

46. For completeness' sake, I have also considered whether an award of exemplary damages is justified. Such damages arise where the court is able to conclude that the established conduct was malicious, oppressive, arbitrary or unconstitutional, and/or where the conduct is calculated by way of profit. The point of such damages is to punish the defendant. Again, on the basis of the analysis set out above, I am unable to conclude that exemplary damages are applicable to this situation.

47. It follows from my judgment that there will be judgment for the claimant in the sum of £4,000. In ordinary circumstances the issue of interest would arise, which would, in the nature of these damages, be at the rate, I think, of 2 per cent per annum from the date of issue of proceedings.

This transcript has been approved by the Judge

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Neutral Citation Number: [2023] EWHC 2443 (Ch)
Case No: BR-2022-000188

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
In the Matter of the Insolvency Act 1986
Re Abdulla Al-Hindi

Royal Courts of Justice,
Rolls Building,
Fetter Lane,
London EC4A 1NL
5th October 2023

B e f o r e :

ICC JUDGE MULLEN
Between :

Between:
(1) Sunset Limited
(2) Morville Limited **Petitioners**

- and –

Abdulla Al-Hindi **Debtor**

Mr Sami Rahman (instructed by Alomo Law Solicitors) for the Petitioners
Mr Carlton Christensen (instructed by Lexsure Solicitors) for the Debtor

Hearing date: 30th June 2023

HTML VERSION OF JUDGMENT APPROVED

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This judgment was handed down remotely at 10.30am on 5th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg [2022] EWCA Civ 1169).

ICC Judge Mullen :

1. A bankruptcy petition was presented by Sunset Limited and Morville Limited in respect of Mr Abdulla Al-Hindi on 23rd June 2022, based on the failure to comply with statutory demands dated 29th March 2022. The petition debt is £248,750 said to be due by way of unpaid rent due under leases of four properties, being:

   i) Flat A, 102 Star Street, London W2 1QF;

   ii) Flat B, 102 Star Street, London W2 1QF;

   iii) Flat C, 102 Star Street, London W2 1QF; and

   iv) Flat 3b, Hyde Park Mansions, Transept Street, London NW1 SEP

2. Directions for evidence in answer and reply were given by ICC Judge Barber on 9th August 2022. Mr Al-Hindi did not file evidence in answer and, on 12th December 2022, Deputy ICC Judge Schaffer ordered that unless he do so by 4pm on 17th December 2022, together with a notice of opposition, he would be debarred from defending the petition. He adjourned the matter to 23rd January 2023.

3. Mr Al-Hindi filed a statement in answer, dated 19th December 2022, in which he agreed the arrears, although he disputed subletting in breach of the leases and raised questions as to whether the named petitioners were in fact the landlords of the premises. He also referred to an undated statement of Mr Garth Dooley included in the bundle for the hearing on 12th December 2022. I cannot see that statement on the court file but it was included in the bundle for the hearing before me. A statement in reply was filed by Riccardo Rovati of Rovati Consultants Limited, then acting for the petitioners, dated 22nd December 2022.

4. The petition returned to court on 23rd January 2023 on which occasion ICC Judge Barber gave directions for Mr Al-Hindi to make an application for relief from sanction. The relief application was made on 20st February 2023, together with an application to strike out the petition on the basis that Rovati Consultants Limited was not entitled to conduct litigation.

5. The relief application was dismissed by ICC Judge Prentis on 21st February 2023. He listed the matter for final hearing with a time estimate of one and a half hours and directed that Mr Al-Hindi could raise only the following matters in his defence:

   i) those contained in the strike out application;

   ii) that the debt relied on was not due and payable by reason of section 48 of the Landlord and Tenant Act 1987 ("the 1987 Act");

   iii) that the petitioners could not put in evidence of the tenancies relied on by reason of the tenancy agreements not having been stamped.

   He gave directions for further evidence in relation to the strike out application, the details of which I need not set out now.

6. The matter returned before me and, regrettably, one and a half hours proved to be inadequate, with the result that it was necessary to reserve judgment in a case in which I would have ordinarily hoped to give an ex tempore judgment. This was particularly so given that I felt that I was not greatly assisted by

the petitioners' skeleton on the question of the effect of section 48 of the 1987 Act or its account of the procedural history. For example, it said as follows:

> "2… Judge Barber granted a further adjournment through her case management powers because the Respondent claimed that he had not received the section 48 Notice of the Landlord's address. It is at least rather convenient that the Respondent only raised this issue after failing to comply with an 'unless order'. The Respondent was debarred from defending this petition, ultimately as a result of several breaches of an unless order.
>
> …
>
> 8. The issues in dispute between the parties are as follows:
>
> > 8.1 At the hearing on 21 February 2023, ICC Judge Prentis ordered that following the dismissal of the Respondent's application for relief from sanctions emanating from breach of an 'unless order', the defendant remained 'debarred from defending the Petition on the basis of any fact raised by him' (**page 237**). It is respectfully submitted that that in line with ICC Judge Prentis' order, the Respondent's attempt to relitigate this interim application and seek relief from sanctions must be dismissed. At its highest, this serious breach of an "unless order" would be prohibit [*sic*] the respondent from defending any of the other three issues raised by him.
> >
> > 8.2 If the court is still minded to consider the issues raised by the Respondent, it is submitted that Rovati Consultants were not authorised to instruct Mr Rahman because they were not entitled to be on the record and conduct litigation. The Respondents further argue that that all of the important steps undertaken by Rovati would be held to be void or voidable.
> >
> > 8.3 The second issue is nothing more than another attempt by the Respondent claiming that he had not been properly served with notice as to where and to whom rent is payable. The Respondent argues that as such no rent was lawfully owed during the time both the Statutory Demand and Petition were served, because he was only served with notice on 3 February 2023.
> >
> > 8.4 Finally, the Respondent argues that as Stamp Duty Land Tax (SDLT) was due on account of arears, the Petitioner's failure to pay SDLT makes any agreement unenforceable. The Respondent argues that this is because it is the duty of the petitioner to ensure that the SDLT has been paid."

While they are somewhat opaque, the impression created by these paragraphs is that Mr Al-Hindi had been debarred from raising these issues and was seeking to do so improperly when in fact the order of ICC Judge Prentis is clear that it remained open to him to do so. The notice of adjournment giving the date of this hearing, prepared and served on Mr Al-Hindi on behalf the petitioners, also baldly states that "The Respondent is debarred from defending the petition on the basis of any fact raised by him", without referring to the three matters that Judge Prentis had expressly stated the debtor could raise, although it is fair to say that Judge Prentis's order was in the bundle. There was another error in the petitioners' skeleton that did not assist in the determination of the case in the time allowed, to which I shall refer below. The bundle, aside from not complying with the Chancery Guide as to the preparation of hearing bundles, also omits certain documents, such as Mr Al-Hindi's strike out application, so that the history of the matter was not as clear as it might have been. Having now had the opportunity to consider the court file in conjunction with the hearing bundle, however, I am satisfied that I have seen everything of relevance.

7. In fact, at the hearing before me, the only question was the effect of the section 48 of the 1987 Act, which provides:

> "**48 Notification by landlord of address for service of notices.**

> (1) A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.
>
> (2) Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall (subject to subsection (3)) be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.
>
> (3) Any such rent, service charge or administration charge shall not be so treated in relation to any time when, by virtue of an order of any court or tribunal, there is in force an appointment of a receiver or manager whose functions include the receiving of rent, service charges or (as the case may be) administration charges from the tenant."

This is a matter which the debtor is expressly permitted to rely upon under the order of ICC Judge Prentis.

8. It is not in issue that the address for service given in the tenancy agreements in relation to the properties was an address in Jersey and not in England and Wales as required by section 48(1) of the 1987 Act. A notice of an address in England and Wales expressed to be given pursuant to section 48 was served on the debtor only on 6th February 2023, long after presentation of the petition. Mr Christensen's point on behalf of Mr Al-Hindi is thus a short one. No proper address for service of notices had been given and the rent was therefore not due when the petition was presented.

9. In *Dallhold Estates (UK) Pty Ltd v Lindsey Trading Properties Inc* [1994] 1 EGLR 93 the Court of Appeal considered a case in which the tenant of an agricultural holding failed to pay rent. A notice to pay rent dated 7th August 1991 was served pursuant to the Agricultural Holdings Act 1996 ("the 1996 Act"), followed by a notice to quit based on the arrears of rent. On 3rd December 1991 notice was served under section 48 of the 1987 Act, together with a further notice to pay rent. Chadwick J (as he then was) held that the notices were invalid. The further notice to pay rent set out that the rent had been due on the usual quarter days, in apparent compliance with the requirements of a notice to pay rent under the 1996 Act, but since a section 48 notice had not been served as at those times the notice to pay rent was inaccurate and invalid. The landlord appealed and the tenant cross-appealed on the ground that the failure to serve a section 48 notice before 3rd December 1991 meant any rent otherwise due before that date was forever irrecoverable, alternatively it was not due on 3rd December 1991.

10. Chadwick J considered various documents relied upon to show compliance with section 48 of the 1987 Act, including a statutory demand, which stated that any correspondence regarding the demand was to be sent to the landlord's solicitors in London. He said:

> "Second, reliance is placed on a statutory demand dated August 6 1991 made by or on behalf of the landlord under the Insolvency Act 1986. That asserts that the demand is served by the creditor, Lindsey Trading Properties Inc. It gives the registered office in Panama and includes an address 'care of' Franks Charlesly at Hulton House in London. The statutory demand, at Part A, indicates that any communication regarding that demand is to be addressed to Franks Charlesly. It does not anywhere contain notice that Franks Charlesly are authorised to receive notices which may be served by the tenant on the landlord in connection with matters under the lease other than the rent which is the subject-matter of the statutory demand."

11. The Court of Appeal agreed that no proper notice had been given prior to 3rd December 1991. Ralph Gibson LJ, with whom Hirst and Peter Gibson LJJ agreed, said at 97:

> "The requirement is that the landlord 'by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant'. By section 54(1) such a notice shall be in writing and may be sent by post. There is no prescribed form for such a notice. Chadwick J proceeded upon the basis

> that such a notice must state that the address given is the address at which notices, including notices in proceedings, may be served on the landlord by the tenant; and that it would not be sufficient to state an address which is shown to be such that, if notice in proceedings were served on the landlord at that address, it would in any particular circumstances be held to be effective service. In short, the tenant is to be told at what address notices, including notices in proceedings, may be served. In my judgment, Chadwick J was right to proceed on that basis."

12. The failure to serve a section 48 notice did not however extinguish the right to rent for all time and the notice to pay rent dated 3rd December 1991 was effective:

> "The letter of December 3 was a valid notice under section 48(1). This provision can be given no effect in derogation of the landlord's legal rights beyond that required by the terms of the enactment. The rent 'otherwise due', therefore, is to be treated as not due from the tenant 'at any time before the landlord does comply with' section 48(1); but such rent becomes due at the time when the landlord so complies and continues due thereafter. There is no justification for any extension of the period of time over which the rent is treated as not due whether until the end of that day, or for a reasonable time, or until the next rent day. The cases cited for this purpose are, in my judgment, of no relevance. No question of construction of contractual obligations arises as to when the rent was 'otherwise due from the tenant'. The rent in respect of which the notice was served was due from the tenant when he received the notice."

13. In *Rogan v Woodfield Business Services Ltd* [1995] 1 EGLR 72 the Court of Appeal again considered the operation of section 48 of the 1987 Act. In that case, a valid section 48 notice was served in August 1993, after the first day of trial in July 1993 and before its conclusion on 8th October 1993. The judge allowed the landlord's claim for arrears of rent. He found that rent had been paid at the landlord company's registered address and letters passed between the landlord and tenant at that address. It was the landlord's only address in country and was known to the tenant at all times.

14. The Court of Appeal held that the statement of the landlord's address in the tenancy agreement, being an address in England, was, without more, sufficient to comply with section 48. Sir Ralph Gibson said at 76:

> "If the landlord wishes to avoid the consequences of the unqualified statement in his address given in the agreement, he may serve a separate section 48(1) notice at once or at a later date if he changes his address. That result seems to me to be in conformity with good sense and with the provisions of section 4 and 5 of the Landlord and Tenant Act 1985, and with the intention of Parliament as expressed in the 1987 Act."

Stuart-Smith LJ said at 76:

> "What the section requires is that the tenant is told, so that he knows, the landlord's name and address in England or Wales at which he can be served with notices. If the name and address is stated in the lease or tenancy agreement without limitation or qualification, it is a necessary implication that he, or in the case of a corporation it, can be communicated with at that address and hence it is a place to which notices can be sent. The section does not require that the notice shall state that it is the address at which notices can be served. The mischief at which the section was aimed was the problem created where the landlord's identity was not known and/or the tenant did not know of an address within the jurisdiction to which notices could be sent and proceedings served. Mr Baker, in his attractive submissions, argued that notice within section 48(1) did not have to be written; oral notice was sufficient. There are, of course, occasions when notice of something can be given orally. Someone has notice of a fact when he knows it, and hence when he is told it. The means of telling is immaterial. But in some contexts the word 'notice' implies a written notice. In my opinion, quite apart from section 54 of the Act, it does so here, to give meaning both to the words 'furnish' and 'notice'.

> This is also consistent with the purpose of the section, which is to provide certainty and ease of proof, but provided the name and address is communicated to the tenant in writing, which it is if it is stated in the lease or tenancy agreement, there is no need for a separate notice."

All three Lord Justices held that, whether or not section 54 of the 1987 Act, requiring certain notices to be writing, covered a notice under section 48, it was implicit in section 48 itself that writing was required. It did not however require that the address given should be expressly stated to be the address to which notices should be sent pursuant to section 48 or to follow the statutory language.

15. Here the tenancy agreements do not give an address in England and Wales for the petitioners. They give their Jersey addresses. The proprietorship registers maintained by HM Land Registry in respect of the properties also give the petitioners' addresses in Jersey. Also in evidence are rent statements from an organisation called DFO Consulting, but no address is given for that organisation on the documents as far as I can see, still less an address which can be identified as being the landlords' address for service in England.

16. The petitioners' case is that the necessary details were provided both before and after presentation of the petition. Paragraph 13 of the petitioners' skeleton says:

> "The Respondent argued at Paragraph 7 in his skeleton that the only address for service was provided in cl. 42 of each of the tenancy agreements. This is incorrect as the Respondent was provided with an address for service in England and Wales (being the address for Bernard Graham [*sic*] found at **p. 22**) when he was served with the statutory demand on 8 April 2022 by Richard Lessing, the Process Server of Trademark Associates. Further at **p. 218**, Rovati Consulants [*sic*] Limited, the Landlord's agent wrote to the Respondent providing him with the Landlord's agent's [*sic*]. This was written in line with Section 48(1) of the Landlord and Tenant Act 1987. There have also been other instances of the Respondent being asked to pay off his arears by former solicitors to the Petitioner, JPS Law Solicitors at **pages 166-169**, Bernad Graham [*sic*] at **pages 170-171**, along with the Notice to Quit that also provided addresses for service at **p. 212**."

17. The statutory demands gave the Jersey addresses of the petitioners. They also gave the address of a firm of solicitors as the address of "the individual or individuals to whom any communication regarding this demand may be addressed". The address given is expressly limited to communications regarding the demand. That self-evidently cannot meet the requirements of section 48. It is not a "general" address in England for the landlord to which notices can be sent. Nor can the address printed on letter paper from solicitors in connection with the recovery of arrears or the address given for the landlords' agents on notices to quit constitute a section 48 compliant notice. They, like the addresses for service given in the court documents in these proceedings, are addresses given for a specific purpose. They do not suggest that they are addresses at which notices may be served on the landlords generally. The provision of a solicitor's address for service in connection with a set of proceedings does not imply that those solicitors are authorised to accept service of any other notice on behalf of their client.

18. I was given no other candidates for a valid address for the purposes of section 48 prior to notice being given on 6th February 2023. None of the documents that I have had my attention drawn to indicate an address for the landlords in England and Wales at which all notices may be served, rather than to which correspondence or notices might be sent for specific purposes. Section 48 was not complied with prior to 6th February 2023 and the arrears of rent were thus until then to be treated for all purposes as not being due.

19. I should say that if it were to be argued on behalf of the petitioners that the course of dealing between the parties was such that the debtor was left in no doubt as to the address in England and Wales at which notices, including notices in proceedings, could be served prior to service of the statutory demand and presentation of the petition such as to satisfy the requirements of section 48, the evidence in the bundle comes nowhere near to establishing that. Whether that was so would fall to be determined in ordinary proceedings and the petition would be dismissed on the basis that the matter was genuinely disputed on substantial grounds.

20. The question is then whether the section 48 notice dated 6th February 2023, provided after presentation of the petition, cures the defect. The petitioners' skeleton argument says this:

> "It is submitted that facts in ***Rogan v Woodfield Building Services Ltd*** **[1995] 1 EGLR 72** to the pertinent as in this case [*sic*], a s48(1) notice was served in the course of proceedings rectifying and 'perceived' [*sic*] failure to provide a s48(1) notice. The Court of Appeal dismissed the tenant's appeal, with Stuart-Smith LJ clarifying at **page 78** of *Rogan* that a landlord can provide a compliant notice after the point has been taken in a defence by a tenant in proceedings for arears [*sic*]. Therefore, once an address is provided, it has retrospective effect over all of the unpaid arears [*sic*] right from the beginning of the tenancy."

The report of *Rogan* runs to page 77 and I was left unclear as to the passage that Mr Rahman intended to refer. The word "perceived", appearing in quotes in the skeleton, does not appear in the report at all, as far as a word search of the PDF shows, and I cannot see that Stuart-Smith LJ's judgment says anything of the sort.

21. Sir Ralph Gibson, however, said as follows at 74:

> "I accept the submission of Mr Baker that, if this court is required to set aside the conclusion of Judge Rountree as based upon an erroneous reading of section 48(1) and as contrary to the decision of this court in *Dallhold*, justice requires that the defendants be permitted to amend the counterclaim so that it is to be treated as reissued in October 1993 and, accordingly, rent was lawfully due as the basis for upholding the suspended order for possession."

Again, at 75 he continued:

> "If the point of a purely formal failure to comply with section 48 should be taken, the county court would often be able to deal with it effectively by allowing a notice to be served followed by amendment. For my part, however, I am persuaded that the submissions of Mr Baker are, in substance, right on the construction of the tenancy agreement, correspondence and section 48(1), and that the appeal should be dismissed on that ground."

In *Rogan*, the point was academic because the giving of the landlord's address in England and Wales in the tenancy agreement, without more, was sufficient. Sir Ralph Gibson did not say that the giving of the section 48 notice during the currency of proceedings would be curative in all circumstances, though one can see that it may have that effect in some situations. Nor does he say that such a notice has retrospective effect. Indeed, he stated that the amended counterclaim would need to be treated as "reissued in October 1993" – i.e. after service of the section 48 notice, not that the effect of section 48 simply fell away.

22. I was not referred to any authority in relation to the failure to serve a section 48 notice until after presentation of a bankruptcy petition. Nor was any authority cited to me where some analogous step was taken after presentation and held to cure a procedural defect retrospectively. It appears to me that one must look at the requirements of the Insolvency Act 1986 ("the 1986 Act") as to the circumstances in which a petition may be presented. Section 264 of the 1986 Act provides:

> "(1) A petition for a bankruptcy order to be made against an individual may be presented to the court in accordance with the following provisions of this Part—
>
> (a) by one of the individual's creditors or jointly by more than one of them,

Section 267 then provides:

> "(1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.

> (2) Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—
>
> > (a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,
> >
> > (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,
> >
> > (c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and
> >
> > (d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts."

Section 268 provides, insofar as is relevant:

> "(1) For the purposes of section 267(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—
>
> > (a) the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as 'the statutory demand') in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules…"

Was the debt due "immediately" or "at some certain, future time" "at the time the petition was presented" for the purposes of section 267? The answer must be no. The failure to serve the section 48 notice meant that the debt cannot be treated as due at the time the petition was presented. Nor was it due at some "future, certain time" as a compliant notice might never have been served.

23. The later service of a section 48 notice does not cure the defect. Section 267 of the 1986 Act is clear that one must look at the time the petition is presented. This is consistent with Sir Ralph Gibson's observations in *Rogan* that the counterclaim in that case would have to be treated as having been re-issued in October 1993, *after* service of the section 48 notice. I cannot treat the petition as having been presented after 6th February 2023. Even if I could, the statutory demand, which was a necessary pre-condition to the presentation of the petition, would remain defective as it would not have been served at a time when the debt was payable immediately for the purposes of section 268.

24. The service of a section 48 notice after presentation of the petition does not cure the defect. The petitioners were not entitled to present the petition on 23rd June 2022 as the debt was not due as a matter of law.

Conclusion

25. The petition therefore falls to be dismissed and, in the absence of another creditor being entitled to take carriage of it, it will be dismissed at the next hearing. There is no injustice in this. The failure to serve a section 48 notice does not prevent recovery of the debt, or the presentation of a petition, for all time. All that is needed is for the landlord to comply with the requirements of section 48, which are not at all onerous, prior to service of the statutory demand.

26. I will list the petition on the first open date for disposal and any consequential orders.

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This judgment was delivered in private. It consists of 39 paragraphs The judge hereby gives leave for it to be reported.

Neutral Citation Number: [2023] EWHC 1892 (Fam)
Case No: DE20C00043

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
21/07/2023

B e f o r e :

MRS JUSTICE LIEVEN

Between:

DERBYSHIRE COUNTY COUNCIL	**Applicant**
- and -	
SHANNON MARSDEN	**First Respondent**
- and -	
STEPHEN BODEN	**Second Respondent**
- and -	
THE CARERS	**Third and Fourth Respondents**
- and -	
CHILD A (A Child, through the Children's Guardian)	**Fifth Respondent**

Ms Julia Cheetham KC and Mr James Cleary (instructed by Derbyshire County Council) for the Applicant
Ms Clare Grundy (instructed by Derbyshire Family Law Group) for the First Respondent
Mr Anthony Finch (instructed by Elliot Mather) for the Second Respondent
Ms Lorraine Cavanagh KC and Ms Penelope Stanistreet-Keen (instructed by Banner Jones) for the

Third and Fourth Respondents
Mr Andrew Norton KC and Ms Anne Williams (instructed by Kieran Clarke Green) for the Fifth Respondent
Ms Louise Asprey for His Majesty's Courts and Tribunals Service
Sanchia Berg, an accredited journalist of the British Broadcasting Corporation, attended and made submissions
Patrick Sawyer, of 'The Daily Telegraph', and Callum Park, of the Press Association, attended the hearing

Hearing dates: 27 April & 18 May 2023

HTML VERSION OF APPROVED JUDGMENT

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This judgment was handed down remotely at 10.30am on 21 July 2023 by circulation to the parties or their representatives by e-mail.

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MRS JUSTICE LIEVEN

This judgment was delivered in private. It consists of 39 paragraphs The judge hereby gives leave for it to be reported.

Mrs Justice Lieven DBE :

1. This is an application by three media organisations for the release of various documents relating to care proceedings under the Children Act 1989 ("CA"). The background to this matter is particularly tragic as the proceedings related to Finley Boden, a young child who was killed by his parents on 24 December 2020. Finley and his sibling, Child A, were the subject of care proceedings brought by the Local Authority, Derbyshire County Council ("LA"), and had been returned to their parents following a hearing on 1 October 2020.

2. I held two hearings on this matter, at the first on 27 April 2023 I ordered that certain documents could be released to the media, but a process of redaction and, as appropriate, gisting had to be undertaken before the documents could be released. At the second hearing, the documents had been redacted in a way that all parties were content with, and the only outstanding issues were whether the Lay Justices and the Legal Adviser who had been involved in the original decision could be named by the media.

3. The LA was represented by Julia Cheetham KC and James Cleary, the mother was represented by Clare Grundy, the father was represented by Anthony Finch, Child A's carers were represented by Lorraine Cavanagh KC and Penelope Stanistreet-Keen, Child A was represented by Andrew Norton KC and Anne Williams, and His Majesty's Courts and Tribunals Service was represented by Louise Asprey. Sanchia Berg, an accredited journalist of the British Broadcasting Corporation, attended and made submissions, Patrick Sawyer, of the Daily Telegraph and Callum Park, of the Press Association, also attended the hearings.

4. The brief outline of the factual background of this case is that Finley and Child A were made subject of an Interim Care Order ("ICO") on 13 March 2020. The matter was allocated to the Lay Justices. The children were placed with the Maternal Grandparents ("MGP") under the terms of the ICO.

5. The case came before the Justices on 1 October 2020 for an Issues Resolution Hearing ("IRH"). That hearing was held by telephone, as was normal for Justices hearings at that point in the Covid Pandemic. All parties at that hearing agreed that the children should be transitioned back to the care of the parents. The principal issue before the Justices was the length of the transition plan. The LA submitted that the transition period should be four months, and the matter then to come back before the

court for final orders to be made if the transition had been successful. The LA in their submissions pointed to the fact that the parents had not been honest in relation to their drug taking, and to the particular challenges that had been posed by the Pandemic in relation to contact between the parents and the children.

6. The Cafcass Guardian set out a careful final analysis. She took the view that the children should be in the full time care of their parents within a period of 8 weeks. This position was supported by the parents.

7. I do not consider it appropriate to seek to summarise the arguments on both sides, particularly as the very point of this application is for the press to be able to see and report on the issues that arose in the case. It is sufficient to say that it was a balanced decision of the type that very frequently comes before the Family Court, at whatever level. There was nothing surprising, or in my view inappropriate, about the decision that was made or the process undertaken.

8. The Justices accepted the position of the Guardian and the parents and determined that the children should be transitioned back to the full time care of the parents within 8 weeks. A final hearing was fixed for late January 2021.

9. Tragically, Finley died on 24 December 2020. The parents were arrested and subsequently charged with murder. On 14 April 2023 they were convicted at Derby Crown Court of murder.

10. In the light of Finley's death, the care proceedings in relation to Child A were reallocated to High Court level and on 20 May 2022 Morgan J made a Reporting Restriction Order ("RRO"). I made subsequent RROs on 4 October 2022 and 3 April 2023. There is no application to vary the RRO and the terms by which it seeks to preserve the privacy of Child A and his/her carers.

11. Unsurprisingly there has been a great deal of media interest in the trial and in understanding the circumstances by which the children were returned to the care of the parents.

12. The applications before me are:

    (a) An application by Sanchia Berg for the BBC dated 21 April 2023 seeking disclosure of:

        i) The ruling made on 1 October 2020;

        ii) Supporting documents and reports which were presented to the court which included skeleton arguments and case summaries for the hearing on 1 October 2020

    (b) An application by Patrick Sawyer for The Telegraph dated 11 April 2023 seeking a copy of the ruling of the Family Court on 1 October 2020.

    (c) An application by Callum Parke for the Press Association dated 17 April 2023, that which is being applied for is unclear from the face of the application.

The law

13. A combination of s.97 of the Children Act 1989 ("CA") and s.12 of the Administration of Justice Act 1960 ("AJA") prohibit, to a significant extent, the publication of information about care proceedings and the evidence generated therein. Unauthorised breach of these requirements renders the publisher liable for contempt of court.

14. Rule 12.73 of the Family Procedure Rules 2010 ("FPR") deals with the communication of information relating to proceedings held in private, which includes care proceedings. Rule 12.73 states:

    "Communication of information: general

    (1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court)

may be communicated –

(a) where the communication is to –

(i) a party;

(ii) the legal representative of a party;

(iii) a professional legal adviser;

(iv) an officer of the service or a Welsh family proceedings officer;

(v) the welfare officer;

(vi) the Legal Services Commission;

(vii) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;

(viii) a professional acting in furtherance of the protection of children;

(ix) an independent reviewing officer appointed in respect of a child who is, or has been, subject to proceedings to which this rule applies;

(b) where the court gives permission;

(c) subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G".

15. These applications fall within FPR r12.73(1)(b), namely where the court may give permission for the publication.

16. The leading cases on the disclosure of material out of care proceedings are *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76; *Re EC (Disclosure of Material)* [1996] 2 FLR 725; *Re H (Care Proceedings: Disclosure)* [2009] 2 FLR 1531 and *X & Y (Children: Disclosure of Judgment to Police)* [2014] EWHC 278 (Fam).

17. The Court of Appeal in *Re EC*, in the judgment of Swinton-Thomas LJ, set out ten points for a judge to consider when conducting the balancing exercise in deciding whether to order disclosure:

"(1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.

(2) The welfare and interests of other children generally.

(3) The maintenance of confidentiality in children cases.

(4) The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies. The underlying purpose of section 98 is to encourage people to tell the truth in cases concerning children, and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently, it is important in this case. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.

(5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.

(6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.

(7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.

*(8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the *86 police service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children.*

(9) In a case to which section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.

(10) Any other material disclosure which has already taken place."

18. The law as to the balancing of the competing matters under the Human Rights Act 1998, namely Article 8 (right to privacy and a private life) against Article 10 (right to freedom of the press), has been considered in the family law context in *Tickle v Griffiths* [2021] EWHC 3365, upheld by the Court of Appeal in [2021] EWCA Civ 1882.

19. In *Newman v Southampton City Council* [2021] EWCA Civ 437 the Court was dealing with an application for the release of documents from care proceedings to the press. The legal framework is set out at [12] to [34]. At [27] King LJ emphasised the importance of identifying the purpose to which it is intended for the material to be put and the scope of the information sought. The facts of Newman were very different from the present case. Ms Newman was a journalist who wished to carry out an investigation into the background of the case that had come before the Court. At [48] to [49] King LJ said:

"48. In my judgment, what Ms Newman seeks is beyond anything that either the guidance or authorities have to date had in mind. Ms Newman seeks to embark upon what has been referred to as an "archaeological dig". She wishes to trawl through thousands of highly confidential documents, many of which refer in detail to the most intimate medical and psychological details of this child's life, in order to see if something turns up. Almost certainly something would 'turn up' as it has long been acknowledged that things went wrong in this case to the significant prejudice to the mother, but mainly to the detriment of M. This is abundantly clear from the Court of Appeal judgment in the appeal against the making of the placement order.

49. Ms Newman is not seeking to push the boundaries of transparency in the family courts by way of a better understanding of the court process, or of the hearings which took place in respect of M, or even particularly to hold the judge or the family justice system to account. Ms Newman seeks to delve beyond the court proceedings themselves and to have access to documents such as social care and medical records in her capacity as an investigative journalist in order to track through the decision-making process which informed the decision to apply for a placement order. It should be understood that in saying this I do not in any way criticise Ms Newman's proper journalistic desire to hold the local authority to account. I am, however, seeking to establish the context in which the balancing exercise had to be conducted by the judge."

20. In recent times there has been a shift in the Family Court towards recognising the public importance of greater openness in the family justice system. This was articulated by the former President of the

Family Division, Sir James Munby, in *Re J* [2013] EWHC 2694, where he said: *"there is a pressing need for more transparency, indeed much more transparency, in the family justice system."*

21. In January 2023 Sir Andrew McFarlane, President of the Family Division, launched the Transparency Pilot which allows reporters to report what they see in the pilot courts, subject to strict rules about preserving the anonymity of the children, families, and some professionals involved in the cases. The present case does not fall within one of the pilot courts. However, the public importance of allowing greater public knowledge and scrutiny of the family justice system is now well established.

22. None of the parties in principle resist the application for disclosure of documents sought by the press, subject to the protection of Child A and his/her carer's privacy. The Guardian highlights the emotional harm that Child A has already suffered and the great importance of protecting his/her current placement, and his/her privacy into the future. The Guardian accepts the public interest in the case and the fact that a good deal of information about the family is already in the public domain by reason of the criminal trial.

23. On the facts of this case, I do not consider the balance between Article 8 and 10 rights particularly complicated. On the Article 10 side of the balance, there is significant, and legitimate, public interest in understanding the circumstances of Finley's death. He was, at the time of his death, subject to Family Court proceedings and had been allowed to go home to live with his parents. It is important that the public have sufficient information to understand the difficult decisions, with competing considerations, that have to be made in cases such as this. The release of the documents sought allows informed press and public consideration of the roles of the various agencies involved, the LA, Cafcass and the Courts, and the various matters that were taken into account before the decisions were made.

24. The release of relevant documents allows press reporting and debate to be based on full information, as opposed to speculation and partial knowledge of the circumstances of the case. It is important here that the criminal trial, although doubtless having large amounts of information about the circumstances of Finley's death, will not have had information about the care proceedings.

25. On the Article 8 side of the balance, it is of great importance to protect the privacy of Child A and of those caring for him/her, including the wider family. They have had to deal with the tragic loss of Finley, and the trauma of the criminal trial.

26. I have put in place a RRO that limits any reporting to protect the anonymity and Article 8 rights of Child A and those caring for him/her. Given the criminal trial, the press necessarily has information which they are restricted from publishing in the interests of protecting those privacy rights. In broad terms, the RRO restricts the publication of names, photos and information about schools which could lead to the identification of Child A or his/her carers. I have ordered that any material disclosed as a result of this judgment is redacted to ensure that that information is not disclosed.

27. None of the parties disputed that the documents listed, subject to redactions, should be given to the press. The parents expressed some concern about releasing any information which could lead to Child A's identification. However, in the circumstances, I put very much more weight on the submissions of the Guardian and the carers, both of whom accept the principle of the documents sought being released.

28. The next issue is whether the names of the Magistrates and the Legal Adviser should be allowed to be published. As I said in *Tickle v Herefordshire CC* [2022] EWHC 1017, it is important to be clear that the statutory restrictions on information relating to care proceedings have the purpose of protecting the anonymity of the children (and possibly their families) in proceedings rather than professionals involved. At [78] I said:

> *"However, the powers of the Court to order anonymisation in relation to professionals need to be exercised with considerable care. Social workers are employees of a public authority conducting a very important function that has enormous implications on the lives of others. As such, they necessarily carry some public accountability and the principles of open justice can only be departed from with considerable caution."*

29. The role of the judge is one that beyond any doubt requires public accountability and openness. No party submitted that the Magistrates should not be named. Further, I was shown no case that gave any support to an argument that the names of judges in a case could not be publicly named.

30. Society is necessarily very grateful for the role undertaken by Lay Justices for no remuneration and involving giving up much of their time. However, Lay Justices are judges and, in cases such as this, making very important decisions that impact on children and families in the most significant way. As such, there is no case for their names not to be in the public domain when decisions are made, in the same way as would the names of judges who had made such decisions.

31. I note that no person specific information was put before me concerning either the Lay Magistrates or the Legal Adviser which would impact on the balance to be struck here, save that they may live in small communities where they would be known.

32. The position of the Legal Adviser is potentially somewhat different because they are an HMCTS employee rather than a member of the judiciary. At the second hearing HMCTS was represented by Ms Asprey who submitted that the Legal Adviser should not be named as they were not conducting a judicial function.

33. However, during the course of the hearing it was made clear that a panel of Lay Justices cannot make a decision without the presence and involvement of a Legal Adviser.

34. Section 3(1) of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 provides in its schedule for authorised court and tribunal staff to "(a) provide legal advice to judges of the family court and justices of the peace, and (b) exercise judicial functions where procedure rules so provide".

35. The Legal Adviser derives their authority from the appointment by the Lord Chancellor pursuant to section 31O of the Matrimonial and Family Proceedings Act 1984 as inserted by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.

36. There does not appear to be any statutory provision stating that the family Lay Bench cannot make a decision without a Legal Adviser. However, rule 27.2 (5)(6) Family Procedure Rules 2010 set out the functions of the Adviser when a decision is given. Implicit in those terms are that consultation and presence of the Legal Adviser is required before the Bench can make the decision:

> **Rule 27.2 Reasons for a decision : proceedings before a lay justice or justices**
>
> (1) This rule applies to proceedings in the family court before a lay justice or justices.
>
> (2) After a hearing, the court will make its decision as soon as is practicable.
>
> (3) The court must give written reasons for its decision.
>
> (4) Paragraphs (5) and (6) apply where the functions of the court are being performed by –
>
> (a) two or three lay justices; or
>
> (b) by a single lay justice in accordance with these rules and Practice Direction 2A.
>
> (5) The justices' legal adviser must, before the court makes an order or refuses an application or request, make notes of –
>
> (a) the names of the lay justice or justices constituting the court by which the decision is made; and
>
> (b) in consultation with the lay justice or justices, the reasons for the court's decision.
>
> (6) The justices' legal adviser must make a written record of the reasons for the court's decision.

(7) When making an order or refusing an application, the court, or one of the lay justices constituting the court by which the decision is made, will announce its decision and –

(a) the reasons for that decision; or

(b) a short explanation of that decision.

37. It follows from this Rule that a Lay Bench cannot make a decision unless a Legal Adviser exercises their functions.

38. As such, the Legal Adviser is an integral, and legally required, part of the decision making process. As such it appears to me to be right that their names can in principle be placed in the public domain. Again, no person specific circumstances were put before me as to why this particular Legal Adviser should not be named.

39. For these reasons I find that the press are entitled to name, if they so wish, both the Lay Magistrates and the Legal Adviser who were involved in this case.

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England and Wales High Court (Administrative Court) Decisions

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Neutral Citation Number: [2024] EWHC 685 (Admin)
Case No: AC-2024-MAN-000021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

27th March 2024

B e f o r e :

FORDHAM J

Between:
THE KING
(on the application of SHARON KOFA) **Claimant**
- and -
OLDHAM METROPOLITAN ~~BOLTON~~ BOROUGH COUNCIL **Defendant**

The Claimant in person
Anam Khan (instructed by Oldham MBC) for the Defendant

Hearing date: 20.3.24
Draft judgment: 22.3.24

HTML VERSION OF APPROVED JUDGMENT

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- -
FORDHAM J

FORDHAM J:

Introduction

1. This is a case about council tax. The specific governing legislation is the Local Government Finance Act 1992 (the "1992 Act") and the Council Tax (Administration and Enforcement) Regulations 1992 (the "1992 Regulations"). The case came before me as a renewed application for permission for judicial review. I had to decide, afresh, whether there is (a) an arguable claim with a realistic prospect of success (b) to which no 'discretionary bar' applies. The arguability threshold is described in the Administrative Court Judicial Review Guide 2023 §9.1.3 and the principal 'discretionary bars' are described at §§9.1.4 to 9.1.6.

2. Ms Kofa has been in dispute with the Council about her council tax, since 2021. Council tax bills in respect of her dwelling at Foxdenton Lane in Chadderton have since then gone unpaid. Council tax, and associated costs, have mounted up. A Reminder Notice on 13 May 2021 asked for payment of £233.43 in full by 27 May 2021, warning that otherwise legal proceedings would be commenced through Tameside Magistrates Court, incurring recovery costs. A Reminder Notice on 13 April 2022 asked for payment of £122.36 in full by 27 April 2022, with the same warning. Ms Kofa's case has now been in three courts. First, it was in the Magistrates' Court for summonses and liability orders (see regulations 34 and 35 of the 1992 Regulations, pursuant to Schedule 4 §3 to the 1992 Act). That was in mid-2021 and mid-2022. Secondly, it was in the Manchester County Court for an interim charging order (in May 2023) and a continuation of that order (in October 2023) (see regulations 50 and 51, pursuant to Schedule 4 §11). Thirdly, it has now arrived here in the High Court.

3. For the High Court, Ms Kofa's case had been set out in a November 2023 letter before claim, January 2024 judicial review grounds and February 2024 grounds of renewal. She then complied – on time – with the Court's invitation to file a skeleton argument. Through no fault of Ms Kofa's, that skeleton argument had not reached me for my pre-reading. When this dysfunction came to light, I paused the hearing mid-morning, so I could take proper time to read that skeleton argument and its supporting materials. During the hearing, Ms Kofa and then Ms Khan (who had also filed a skeleton argument) made focused oral submissions. In the circumstances, I allowed the hearing time slot to be extended long beyond the 30 minutes allocated, to take a full morning, after which I decided to deliberate before issuing a written judgment. The hearing was a hybrid hearing. This was an appropriate adjustment, promptly and properly requested on the Council's side, securing continuity of Counsel. I was satisfied that the hearing, and the mode of hearing, involved no unfairness or prejudice. Open justice was preserved.

Form N461

4. It is appropriate to start with the judicial review claim form (Form N461). The date of the decision being judicially reviewed is described as 10 October 2023. The claim was filed on 5 January 2024, within 3 months of that challenged decision. In the Form N461, the person who made the decision to be reviewed is identified as District Judge Clarke ("Judge Clarke"). The first of the remedies sought in the claim form is that the charging order be declared void and removed from Ms Kofa's property. What had happened on 10 October 2023, in the County Court, is that Judge Clarke had extended the interim charging order. That is the charging order dated 10 October 2023 which the Claimant is asking, in these proceedings, be declared void and removed from her property. What that means, in substance, is that this is an in-time challenge which seeks to have the Charging Order (10 October 2023) set aside.

The Charging Order

5. The Charging Order is in the Court bundle. It is in the form of a court order in which the Council is the named claimant and Ms Kofa is the named defendant. The order records amounts owing under two previous orders which were given on 18 June 2021 and 20 May 2022. The total is £2,568.79, to which Judge Clarke added costs (£249).

Liability Orders

6. That express description, within the terms of the Charging Order, to two previous orders given on 18 June 2021 and 20 May 2022 is to two "liability orders". In the bundle are two 'print outs' generated by the Council, describing the Magistrates' Court as having made those liability orders on those dates.

The County Court is not a Defendant

7. Notwithstanding the contents of the Form N461 which I have described, Ms Kofa has chosen not to name the Manchester County Court as the defendant to her judicial review claim. Instead, she has named the Council. The Council issued the Reminder Notices. It was the applicant for liability orders. It was also the applicant for a charging order. She says the principal focus for the points she wants to make is the Council.

8. Sometimes, a public authority who applies to a court can properly be named as a second defendant in judicial review proceedings. An example is where a public authority applies to a court for a warrant and there are issues about how the warrant was obtained, granted or enforced. The judicial review claim may properly name the court as first defendant and the applicant authority as a second defendant. This is a situation where there are two bodies responsible for the conduct under challenge (see Judicial Review Guide §3.3.2).

9. In this case, an Administrative Court Lawyer made a court order (26 January 2024) directing that the Manchester County Court be named as defendant and served with the claim papers. Ms Kofa replied, objecting to that order. She was entitled to ask that a High Court judge review the decision (Civil Procedure Rules 54.1A(5)). In my judgment, the Lawyer was correct to identify that the County Court would need to be made a defendant. It was the County Court, and not the Council, who made the Charging Order on 10 October 2023. It would not be right for a claim to continue, whose impugned decision is a County Court charging order, and whose claimed remedies include effectively setting aside that charging order, without the County Court being joined as a defendant.

10. I will put this to one side for now. I am not going to refuse permission for judicial review on this basis. If permission for judicial review is otherwise appropriate, I can address the question of who is – or are – defendant to the claim.

Crux Points

11. At the hearing Ms Kofa was able to explain clearly the points which are at the crux of her claim for judicial review. By way of an overarching submission, she says she had never refused to pay council tax; but that she has instead insisted on it being established and demonstrated that she owes a liability.

12. The first crux point is about demonstrating that liability orders were made by the Magistrates Court. Ms Kofa says that it has never been established and demonstrated that the Magistrates' Court did make the two liability orders (18.6.21 and 20.5.22). This point was put in two ways:

    i) The first way it is put is this. What is required, in law, is a "court-issued" liability order. In this case, no "court-issued" liability order has ever been produced. Ms Kofa has repeatedly asked for their production. In fact, it is known that Magistrates' courts have not issued such orders since 2003. Regulation 35 of the 1992 Regulations was amended (SI 2003 No.2211 regulation 3) to delete the references to a liability order being in a "specified" form or "a form to like effect". The position is described as "a serious flaw in the legislation" in the Council Tax Handbook (13th edition, page 220). The HMCTS guidance "Council Tax and Other Council Enforcement in Magistrates' Courts" (8 June 2023) says (p.5): "There is no longer a prescribed order and so the court does not produce one". A freedom of information response (17 February 2023, Ref. 230124015) says "the court does not generate a liability order". Ms Kofa was herself told by HMCTS (27 July 2021), in response to her request for a copy of the liability order, that "this is not something that the Court deals with". There is also a rule which provides that there is no duty on the court officer to "serve" a liability order (see Magistrates Courts Rules 2019 rule 115(6)). But, in law, nothing short of a "court-issued" order can satisfy regulation 34 and 35. And, in law, nothing short of a "court-issued" liability order can satisfy regulation 50, for the purposes of obtaining a charging order from a county court. A "liability order" must be an "order", which must mean an order issued by the court. That is the first argument.

    ii) The second way it is put is this. Leaving aside the question of a "court-issued" liability order, what is required in law is that the Magistrates' Court must have made an entry in the court record, and this must be produced. The June 2023 guidance says: "It is a legal requirement that an accurate record is

made of every decision of the [magistrates'] court and retained in perpetuity" (p.3) and that a liability order is "made when the presiding justice pronounces is, and [it] is recorded in the court register" (p.5). HMCTS's letter (27 July 2021) spoke of legal advisers to magistrates making notes, it being "noted whether or not a liability order was made". Rule 66 of the Magistrates Courts Rules 1981 requires that the clerk to the magistrates' court "shall keep a register in which there shall be entered … a minute or memorandum of every adjudication of the court". Ms Kofa has requested this. On 29 May 2023, she wrote asking the Magistrates' Court for "a copy of the genuine Memorandum of Entry from the Court's register", with regard to a later "Liability Order" said to have been made on 19 May 2023. In law, nothing short of an entry in a court record can satisfy regulation 34 and 35. And, in law, nothing short of this can satisfy regulation 50, for the purposes of obtaining a charging order from a county court. There must be official evidence from the court's own record that a liability order has been "made". That is the second argument.

13. In support of these arguments, Ms Kofa cites Leighton v Bristow & Sutor (20 September 2023) [2024] RA 65 (HHJ Harrison, sitting as a Judge of the High Court). In that case, the Court held that an enforcement agency instructed by a local authority to pursue council tax liabilities had been unable to show any physical individual liability order, and had not demonstrated that they had "authority" to act (see §§27, 41). Ms Kofa relies on the discussion in that case about the absence of court-issued liability orders and the nature of evidence that orders were made.

14. The second crux point is this. It has never been established and demonstrated that the 1992 Act or the 1992 Regulations authorise the Council to recover council tax from Ms Kofa in respect of her property at Foxdenton Lane. This, in essence, is for what I will call "constitutional" reasons. The essence of the argument was as follows. This legislation does not and cannot bind any individual absent their individual consent. The fundamental common law principle is found in Ashby v White (1703) 91 ER 665, where Chief Justice Holt said: "By the common law of England, every commoner hath a right not to be subjected to laws made without their consent …" The preamble to the 1992 Act refers to "consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same", highlighting that a meeting of minds has taken place. Also relevant are the Bill of Rights and other "constitutional statutes". There has been no individual consent – and no contract – and so there can be no liability. Further, there has been no impact assessment, which is a fundamental requirement for any statutory scheme of this kind to be binding. The statutory scheme is incompatible with fundamental common law principles; and contrary to the rule of law. That, in essence, is the constitutional argument. That is where I will start.

The Constitutional Points

15. Secondary legislation, like the 1992 Regulations, can in principle be challenged directly for incompatibility with primary legislation or incompatibility with an applicable public law principle. Here, however, it is the 1992 Act itself which imposes obligations on local authorities (see s.1) to levy the council tax from individuals (see s.6). The statutory scheme expressly applies to dwellings. The application of the legislation to a property as a chargeable dwelling gives rise to an express right of appeal (1992 Act s.16), and not in the forum of subsequent enforcement (Schedule 4 paragraph 15; regulation 57). The absence of an impact assessment as a vitiating flaw would need an identified superior legal source imposing such a precondition, as well as evidence of breach by the makers of the regulations. Neither of these has been identified. There is no viable argument identified based on unjustified interference with property rights, at common law or under the Human Rights Act 1998 (Article 1 Protocol 1). There is no viable argument based on 'systemic' public law incompatibility. An example of a systemic fairness judicial review challenge in the context of council tax is R (Woolcock) v Communities Secretary [2018] EWHC 17 (Admin) [2018] 4 WLR 49.

16. Ms Kofa's is not the first judicial review case to suggest that there are constitutional limits to what may be done by primary legislation. In R (Jackson) v Attorney General [2005] UKHL 56 [2006] 1 AC 262 at §102, Lord Steyn posed the question whether Parliamentary supremacy would extend to "oppressive and wholly undemocratic legislation" such as "to abolish judicial review of flagrant abuse of power by a government". When interpreting primary legislation, the Courts apply a "principle of legality", to interpret primary legislation compatibly with constitutional rights and values.

17. Here, the specific constitutional principle identified by Ms Kofa – from Ashby v White – plainly does not have the effect for which she contends. That is no surprise. If it did, no rating or taxing statute would apply to authorise levying monies from an individual who had not consented to it. Rating and taxing statutes ensure legal prescription, securing rather than undermining the rule of law, entirely compatibly with the Bill of Rights and other constitutional statutes. The 1992 Act and 1992 Regulations are themselves legislative prescriptions forming part of the "law", to which "rule of law" we are all subject. Ashby v White was a case about actions said to have obstructed the claimant – an individual eligible under the rules of that age – from voting in an election of a representative to serve in Parliament. The full quotation is this:

> ***By the common law of England, every commoner hath a right not to be subjected to laws made without their consent, and because such consent cannot be given by every individual man in person, by reason of number and confusion, therefore that power is lodged in their representatives, elected and chosen by them for that purpose, who are either knights, citizens, or burgesses.***

The point being made was about consent as expressed through the ballot box, with elected representatives in Parliament then deciding collectively about the merits of primary legislation. That is what is reflected in the statutory preamble on which Ms Kofa relies. This focus is precisely because of the impossibility and inappropriateness of individualised consent to legislation, from "every individual … in person". The sense of laws made with consent of the citizenry is a statement about democratic accountability and broad consent through the chance to elect representatives to act as a legislature. The threshold of arguability with a realistic prospect of success is a modest one. But the constitutional arguments, in my judgment, come nowhere near satisfying it.

The Liability Order Precondition

18. That leaves the two lines of argument about establishing that liability orders have been made. The starting point, in the context of this claim for judicial review – with its identified target of Judge Clark's October 2023 Charging Order – is an important statutory precondition. It is found in regulation 50(1), pursuant to Schedule 4 paragraph 11 of the 1992 Act. Regulation 50(1) provides as follows:

> ***An application to the appropriate court may be made under this regulation where–(a) a magistrates' court has made one or more liability orders pursuant to either regulation 34(6) or 36A(5); (b) the amount mentioned in regulation 34(7)(a) or 36A(5)(a) in respect of which the liability order was made, or, where more than one liability order was made, the aggregate of the amounts mentioned in regulation 34(7)(a) or 36A(5)(a) in respect of which each such liability order was made, is an amount the debtor is liable to pay under Part V; and (c) at the time that the application under this regulation is made at least £1000 of the amount in respect of which the liability order was made, or, where more than one liability order was made, the aggregate of the amounts in respect of which those liability orders were made, remains outstanding.***

19. This provision is clear and express. In making a Charging Order, the county court (as the appropriate court) will need to be satisfied that a liability order (or liability orders) have been "made" by the magistrates' court.

An Appropriate Forum

20. This means Ms Kofa had a forum in which she could raise her Liability Order crux points. There was a hearing on 10 October 2023 before Judge Clarke. She was aware of that hearing. She had, as she accepts, received the Council's skeleton argument. She had filed a document – entitled "Motion to Dismiss" – which contained her legal objections. She chose not to attend the hearing before Judge Clarke, to raise her arguments about needing a "court-issued" liability order, or alternatively about needing proof from an entry in the court record. She told me that this choice was taken because of the 'block listing' of the case with its 10 minute time estimate. I am unimpressed by that explanation. She chose to stay away. She could have invited Judge Clarke to direct a longer hearing for her legal points. The Council had filed a skeleton argument, which she had received, filed in her own individual case. The Council was addressing her case individually. So could she. She could have attended her hearing.

She could have pointed to the Liability Order Precondition. She could have raised her two arguments about the crux point regarding establishing and demonstrating that liability orders have been made.

Alternative Remedy (Appeal)

21. Both Ms Kofa and Ms Khan recognised in their submissions that there was a right of appeal – from Judge Clarke to a Circuit Judge – within 21 days (CPR 52.12(2)). Ms Kofa's answer is that 21 days was too tight, as a litigant in person, especially given that she did not receive the Charging Order for 10 days. I am unimpressed by that explanation. Ms Kofa had marshalled her legal arguments in her Motion to Dismiss. She knew about the interim Charging Order. She knew the hearing date for the Charging Order. If she had a good reason to need more time, she could have asked for an extension of time. She could have appealed. She could have pointed to the Liability Order Precondition. She could have raised her two arguments about the crux point regarding establishing and demonstrating that liability orders had been made. And, if relevant, any explanation for not having attended the hearing could have been given in the appeal.

Alternative Remedy (Set Aside)

22. Ms Kofa's procedural rights do not stop there. There was another way. Regulation 51 is entitled "Charging Orders: Further Provision". Regulation 51(4) provides:

> ***(4) The court by which a charging order was made may at any time, on the application of the debtor, the authority on whose application the order was made or any person interested in the dwelling, make an order discharging or varying the charging order.***

As Ms Khan points out, this is reflected in CPR73PD §3A.

23. In Ms Kofa's otherwise meticulously researched legal arguments, this entitlement appears to have been entirely overlooked. She says she is applying – in time – to challenge a decision embodied in the Charging Order. She is seeking, in essence, a remedy which sets aside the Charging Order. For the purposes of regulation 51(4), Ms Kofa is said to be "the debtor". She is also a "person interested in the dwelling". She could apply to Manchester County Court under regulation 51(4). If she had a good point – a crux liability order point relating to a statutory precondition – she could advance that argument. As Ms Khan accepts – given the language "at any time" – Ms Kofa can still make such an application.

A Discretionary Bar

24. Judicial review of county court decisions is relatively rare. That is because there is a system of direct remedies, including appeals and applications to set aside orders. And one of the important 'discretionary bars' to judicial review is where there is an unused alternative remedy (see Judicial Review Guide §§6.3.3, 9.1.6).

25. In my judgment, the discretionary bar of alternative remedy has rightly been invoked by the Council, on all issues capable of being raised to resist, challenge or impugn the Charging Order. That includes whether the Liability Order Precondition was met. I am going to refuse permission for judicial review on the basis that Ms Kofa plainly had an appropriate statutory alternative remedy to judicial review, which she did not use.

26. That, in my judgment, is the correct principled position, even if (a) an application pursuant to regulation 51(4) were now timed-out; or even if (b) Ms Kofa – having failed to attend her hearing – were somehow now precluded from denying that the liability orders had been "made". But the position is all the stronger because, on the face of it – as Ms Khan accepts – the regulation 51(4) route remains available and Ms Kofa can still invoke the absence of the Statutory Precondition. It is, in my judgment and in this case, inappropriate to allow judicial review to be used where Ms Kofa has failed to take advantage of the procedural rights by which she could have raised the crux issues about liability orders not having been made. It would be contrary to the interests of justice, and the public interest, if such points could be 'reserved' for a later High Court challenge by judicial review. The primary forum where they should be considered, subject to further appeal, is the County Court.

Some Further Observations

27. In relation to the crux point about liability orders, I am basing my refusal of permission for judicial review squarely on the alternative remedy discretionary bar. That is the principled position.

28. But it is right, in the light of what I have read and heard, to make some observations identifying difficulties which her arguments on liability orders may face.

29. The 1992 Regulations do not require a "court-issued" order. They did include a requirement of that kind, until an express amendment in 2003. I have been shown no provision of the 1992 Act which requires a court-issued order. Regulation 34(6) provides that the magistrates' court will "make the order". Rule 115 specifically excludes liability orders from the general duty to serve orders. Regulation 50 (charging orders) speaks of whether a liability order has been "made". So do other regulations: eg. regulation 49(1) (insolvency); and regulation 54(4) (joint liability). I have been shown no provision which requires an entry in the court record, to be sent or served on person against whom a liability order is made or enforced, or to be produced to the county court for the purposes of a charging order. The making of a charging order is something which could be treated as "evidenced" without necessarily pointing to an entry in a court record, at least absent a direct challenge properly raised when a court is considering whether a statutory precondition has been satisfied. Suppose the county court has before it evidence from a person who was present in the magistrates court, who owes ethical duties to the court, and who confirms that a liability order was made and on what basis that is being confirmed. Reliance has been placed by Ms Kofa on the June 2023 HMCTS Guidance, but that document speaks of recording in the court register ("recorded in the court register, see section 7") by reference to a mechanism of "resulting" using a "result code" which records the "number" of liability orders made. This practice was what was considered in Leighton (see §§7-9, 15) and "misgivings" were expressed (see §17). There, the judgment in Leighton concluded – based on extracts from a "court list" paired with a signature certifying "the number of liability orders made" – that the evidence set out in the documents satisfied the High Court on the balance of probabilities that the liability orders in question had been made (see §§14-18). Here, the question is about a county court being satisfied, whether based on the Council's generated print-out or what it is told about what happened in the magistrates' Court or both, and all in a case where the individual does not attend the county court hearing to ask for some further inquiry.

30. It is also right to make this further observation, recording that there could be a costs risk, in an individual putting in issue whether liability orders were made and requiring some further evidential enquiry, and the court at a hearing then being satisfied.

31. It is a matter for Ms Kofa whether she wishes to seek to pursue the regulation 51(4) route in this case.

Other Points

32. I record that there were other points raised in the papers before the Court. There was an argument about whether council tax can apply to a private dwelling. As to that, Ms Kofa accepts that there is a right of appeal against "chargeable dwelling" decisions to the valuation tribunal (section 16), and those issues cannot be invoked at the enforcement stage (regulation 57; Schedule 4 paragraph 15). There were points about summonses in the Magistrates' Court (regulation 34(2)), but these are long in the past and I would not extend time or allow a claim now to be made to impugn decisions of the Magistrates' Court; nor do I consider the legal arguments to raise any arguable issue. I interpose that procedural rights to apply to set aside, or to appeal, can arise in the context of a liability order: see Mustafa v Bromley LBC [2021] EWHC 404 (Admin) at §3. There was an argument based on regulation 35(3), which says the liability order sums are "not to be treated as a sum adjudged to be paid by order of the court", but that is a provision which ensures enforcement is through Part VI of the 1992 Regulations (including charging orders under regulation 50). There were a raft of criticisms of the Council, but no point raising an issue distinct from the crux points, still less an issue which is arguable and can be advanced by a legal challenge whose nature and timing are referable to the Charging Order made in October 2023 in the County Court.

Costs

33. I am able to deal here with costs, having heard argument at the hearing on a 'rolled-up' basis including as to the costs implications, if I granted or refused permission for judicial review. The principles as to permission-stage costs are in the Judicial Review Guide §25.4.5. I am entirely satisfied, in the light of what I have read and heard, of two things.

34. First, Ms Kofa must pay the costs of the Council's acknowledgment of service and summary grounds, but with a broad brush discount reflecting the fact that costs are not on an indemnity basis. I will reduce the costs order to £3,250, from the £3,968 provisionally awarded on the papers. In all the circumstances, there is no good reason why Ms Kofa should not pay these costs; but no good reason why the Council should recover on an indemnity basis.

35. Secondly, there should be no order as to the costs of the hearing. That is the 'default' position in judicial review. It enables people to know where they stand, absent some good reason for departing from it. There is no sufficiently good reason to order that Ms Kofa should also pay the Council's costs of the hearing. Yes, she persisted in arguments which did not prevail in obtaining permission for judicial review, following refusal on the papers (but without certification as totally without merit). This, however, is invariably the position in the 'default' category of case. The Council were not required to attend, or spend any further costs. The Council could have left me to hear the application orally, with the advantage of the summary grounds of resistance, and the written submissions on costs of the acknowledgment of service and summary grounds. A skeleton argument was put in by Ms Khan but that can hardly justify the costs order: the only point it developed was as to whether such a costs order should be made.

36. In exercising my judgment and discretion as to costs, I have borne in mind that the Council never specifically drew to the attention of Ms Kofa or the Court to the ongoing statutory entitlement under regulation 51(4) to apply to set aside the Charging Order.

Appeal Rights

37. Ms Kofa is a litigant in person. She has access to the, freely and publicly available Civil Procedure Rules and the Judicial Review Guide which (at §26.3.3) describes her appeal rights. I will nevertheless here that any appeal against the refusal of permission to apply for judicial review must be filed with the Court of Appeal within 7 days of the date of the decision, unless the Administrative Court sets a different timetable (CPR 52.8(3)). Furthermore, because I am giving this judgment in a short time-frame at the end of term, prior to a public holiday period, I will include in my Order that, for the purposes of CPR 52.8(3) and Judicial Review Guide §26.3.3 my refusal of permission is to be taken as 9 April 2024 and the 7 day time limit ends on 16 April 2024. None of this is intended to be understood as encouraging any appeal.

Order

38. I will make the following order. (1) Permission for judicial review is refused. (2) The Claimant is to pay the Defendant's costs of the acknowledgment of service and summary grounds, summarily assessed at £3,250. (3) No order as to costs of the hearing on 20 March 2024. (4) For the purposes of CPR 52.8(3) and Judicial Review Guide 2023 §26.3.3, the timetable for appeal is as follows: (a) the decision of the High Court refusing permission for judicial review is to be taken as Tuesday 9 April 2024; (b) the 7 day time limit ends on Tuesday 16 April 2024; and (c) time is hereby extended accordingly.

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Neutral Citation Number: [2025] EWHC 1493 (Admin)

Case No: AC-2025-MAN-000061

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT IN MANCHESTER

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 17/06/2025

Before:

MRS JUSTICE HILL

- -

Between:

The King (on the application of Peacekeepers Foundation)	**Claimant**
- and -	
Liverpool and Knowsley Magistrates Court	**Defendant**
Liverpool City Council	**Interested Party**

- -
- -

The Claimant was represented by Marc Horn in person
The **Defendant** did not appear and was not represented
Simon Whitfield (instructed by **Liverpool City Council**) for the **Interested Party**

Hearing date: 21 May 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill:

Introduction

1. This is a renewed application for permission to apply for judicial review, permission having been refused on the papers by Mr Mark Ockelton, sitting as a Judge of the High Court, by an order sealed on 3 March 2025. This judgment is structured as follows:

> The factual background: paragraphs [2]-[7];
>
> The procedural history: paragraphs [8]-[11];
>
> The legal framework: paragraphs [12]-[15];
>
> Sufficient interest: paragraphs [16]-[25];
>
> Alleged delay: paragraphs [26]-[36];
>
> Alternative remedy: paragraphs [37]-[52];
>
> The merits (grounds 2 and 3): paragraphs [53]-[97];
>
> The merits (grounds 4 and 5): paragraphs [98]-[115];
>
> The merits (grounds 6 and 7): paragraphs [116]-[130];
>
> The merits (grounds 8 and 9): paragraphs [131]-[154];
>
> Conclusion on the application for permission: paragraphs [155]-[158]; and
>
> Costs: paragraphs [159]-[173].

The factual background

2. The Claimant, PeaceKeepers Foundation, is a corporate entity registered at Companies House. It was incorporated on 3 July 2024. Marc Horn is a director and trustee of the organisation.

3. The application arises out of council tax liability proceedings brought by Liverpool City Council ("LCC") against Mr Horn under regulation 34 of the Council Tax (Administration and Enforcement) Regulations 1992 ("the 1992 Regulations").

4. On 12 August 2024 District Judge Healey sitting in the Liverpool and Knowsley Magistrates' Court heard LCC's application. Mr Horn advanced a series of arguments before the District Judge and judgment was reserved.

5. On 23 September 2024 the District Judge granted the application, making a council tax liability order against Mr Horn for £1,025.66, comprising the £75.66 payable in council tax and £950 for LCC's legal costs. The District Judge's reasons were set out in a detailed written judgment.

6. On 14 October 2024 Mr Horn applied to the District Judge under section 111(1) of the Magistrates' Court Act 1980 ("the MCA"), asking him to state a case for the opinion of the High Court in respect of 17 questions which it was contended arose from the judgment.

7. On 24 October 2024 the District Judge refused to state a case under section 111(5) of the MCA, on the grounds that the application was frivolous (meaning "futile, misconceived, hopeless or academic": *R v North West Suffolk (Mildenhall) Magistrates Court, ex p Forest Heath District Council* (1997) EWCA Civ 1575. Again, the District Judge gave detailed written reasons for the decision.

The procedural history

8. On 20 December 2024 the Claimant filed this application for permission to apply for judicial review. It was issued by the Administrative Court Office in London on 24 January 2025. The claim was duly transferred to Manchester. Seven grounds were initially advanced, but Ground 1 was withdrawn before the hearing.

9. The renewed application for permission proceeded as a "hybrid" hearing in that a very large number of individual members or supporters of the Claimant organisation attended the hearing both in person and online. I am grateful to the court staff for making those arrangements.

10. It was agreed that Mr Horn could make submissions on behalf of the Claimant. I do not understand him to be a legal professional, but he has plainly conducted extensive legal research. The Defendant, as a court, had made brief submissions in its Acknowledgement of Service, but did not participate in the hearing. I was also assisted by written and oral submissions from Simon Whitfield, counsel for LCC, who had appeared in the Magistrates Court proceedings.

11. The renewal hearing had been listed for 3 hours given the number of issues and grounds involved. The oral submissions took all of that time, such that it was necessary to reserve judgment.

The legal framework

12. It is necessary for me to decide, afresh, whether to grant permission to apply for judicial review.

13. Permission should only be granted if the judge is satisfied that there is an arguable ground for judicial review which has a realistic prospect of success: see the cases cited in the Administrative Court Judicial Review Guide 2024 ("the Guide") at paragraph 9.1.3.

14. Even if a claim is arguable, the judge must refuse permission (i) unless they consider that the applicant has a sufficient interest in the matter to which the application relates; and (ii) if it appears to be highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred: the Guide at paragraph 9.1.4. The latter requirement derives from section 31 of the Senior Courts Act 1981, which provides in material part that:

> "(3C) When considering whether to grant leave to make an application for judicial review, the High Court—
>
> (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
>
> (b) must consider that question if the defendant asks it to do so.
>
> (3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.
>
> (3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest".

15. The court may also refuse permission (i) if the court considers that there has been undue delay in bringing the claim; and (ii) if there exists an adequate alternative remedy: the Guide at paragraphs 9.15-6.

Sufficient interest

The relevant law

16. Section 31(3)(a) of the Senior Courts Act 1981 provides that the court shall not grant permission to bring judicial review proceedings unless it considers that the claimant has a "sufficient interest in the matter to which the [claim] relates".

17. The applicable principles are set out in *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement* [1994] EWHC Admin 1, [1995] 1 WLR 386 at 392-396, *R (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin) at [53]-[59] and the other cases referred to in the Guide at paragraph 6.3.2.

The parties' positions

18. LCC contended in its Summary Grounds of Defence that the Claimant organisation did not have sufficient interest in the matter to which the claim relates, namely the tax liability of Mr Horn as a private individual; and thus did not have standing to bring the claim. LCC referred to the organisation's website, stating that it indicated that it was involved, generally, in "[e]mpowering individuals to understand and defend their rights under the Rule of Law", rather than having any particular interest or expertise in council tax enforcement. LCC argued that at most the organisation might seek to assist individuals such as Mr Horn to challenge their liability to council tax. In particular, the Claimant could not be regarded as the "victim" of the District Judge's decision to make a liability order for council tax against Mr Horn and thus could not assert that the Judge had acted in a way which is rendered unlawful by section 6(1) of the Human Rights Act 1998 ("the HRA").

19. In his various written submissions, Mr Horn described the Claimant as "a not-for-profit incorporated entity advocating for due process, transparency, and constitutional

compliance in local authority enforcement proceedings" and indicated that it brings this claim "in the public interest" as it addresses "systemic legal failures in council tax liability proceedings". He submitted that the organisation's constitution and activities focus on the rule of law and due process of law, in particular what it considers to be "systemic and procedural unlawfulness affecting council tax payers generally". He stated that it represents over 9,000 interested persons and conducts public education forums on statutory enforcement procedures.

Mr Horn's application to be joined as a Claimant

20. Judge Ockelton refused permission, in part, on the basis that the Claimant did not have standing.

21. On 13 May 2025 Mr Horn submitted a document to the court by which he "consented" to being added as a Claimant to the proceedings should the court consider it in the interests of justice to make such an order. He was advised by court staff before the hearing that he was required to file an application notice in order to apply to be added as a party to the proceedings under CPR 19.2(2)(a) and to pay the necessary court fee. He declined to do so; but said at the hearing that he would complete the application notice and pay the fee if ordered to do so.

22. During the hearing Mr Whitfield accepted that Mr Horn was a proper Claimant (indeed, on LCC's case, the only proper Claimant). He conceded that LCC would suffer no prejudice by Mr Horn being substituted or added as a Claimant and would not object to such a course.

Conclusion on the sufficient interest issue

23. In light of the above chain of events, it was agreed that if permission was granted Mr Horn could be added to the claim as a Claimant. It is accepted that he satisfies the requirements of section 31(3)(a). On that basis, it would not be appropriate to refuse permission on the issue of standing alone.

24. It is not therefore necessary for me to determine the separate question of whether the Claimant organisation also falls within section 31(3)(a) and should remain in the proceedings.

25. Nor do I consider that it would be appropriate for me to do so at this stage, for the following reasons. *First*, in light of the position set out at [23] above, and given the lack of court time, this issue was not fully argued before me. *Second*, the parties appeared to have differing views as to the purpose and functions of the Claimant organisation (see [18]-[19] above) and there was no evidence, as opposed to assertion, before the court on this issue. *Third*, this meant that it was not possible to conduct the sort of detailed analysis that is required in order to determine whether there is standing in relation to each ground of judicial review: see, for example, the exercise carried out in *R (Good Law Project) v SSHSC and Abingdon Health plc* [2022] EWHC 2468 (TCC) at [500]-[550]. After circulation of the draft judgment, the Claimant contended that it was necessary for me to determine the standing issue in order to address the fact that this was one of the reasons for which permission was refused, and to avoid a multiplicity of further cases. The reasons in this paragraph

explain why I do not consider that course appropriate. At [158] below I set out the position I would have adopted had I granted permission.

Alleged delay

26. LCC argued in their Summary Grounds and skeleton argument that permission should be refused on the basis that the claim had been brought out of time.

27. CPR 54.5(1) provides in respect of judicial review claims that the claim form must be filed (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose.

28. The Claimant set out three decisions of which it sought judicial review at section 3.1 of the claim form.

29. The third of these related to the refusal of the District Judge to state a case, which took place on 24 October 2024. This decision only featured in Ground 1, which as I have indicated was withdrawn.

30. The other two decisions related to the District Judge's decision to make the liability order, on 23 September 2024.

31. In its Summary Grounds, LCC relied on the fact that the claim was not issued until 24 January 2025, arguing that it had not been filed "promptly" after the 23 September 2024 order or within 3 months as required by CPR 5.4(5)(1)(a) or (b). It was suggested that it was reasonable to infer that the Claimant had, for some kind of tactical advantage, chosen to wait until the last possible moment to issue the claim.

32. The Claimant served correspondence showing that this was not the case. Rather, the Claimant had filed the claim with the Administrative Court Office in London on 20 December 2024 and had "chased" the court more than once to issue the claim, but this had not occurred until 24 January 2025. The court had apologised to the Claimant for the delay. I observe that some, although not all, of the time period in question was when court offices were closed for the Christmas vacation.

33. Mr Whitfield initially argued that the claim had been filed out of time on the basis that CPR 7.2(1) and (2) provide that (i) proceedings are "started" when the court "issues" a claim form at the request of the claimant; and (ii) a claim form is "issued" on "the date entered on the form by the court".

34. However, as Mr Horn highlighted, CPR 54.5(1) does not refer to when the claim is "started" or "issued", but when the claim form is "filed". CPR 54 makes specific provision for judicial review proceedings, whereas CPR Part 7 addresses claim forms in private law proceedings.

35. Accordingly, Mr Whitfield was right to concede, at the end of the oral submissions, that the claim had been brought in time: it had been "filed" for the purposes of CPR 54.5(1) not later than 3 months after the grounds to make the claim first arose.

36. It would not, therefore, be appropriate to refuse permission on the ground of delay.

Alternative remedy

37. Judicial review is a remedy of last resort. If there is another route by which the decision can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be used before applying for judicial review. If the court finds that the claimant has (or had) an adequate alternative remedy, it will generally refuse permission to apply for judicial review: see the Guide at paragraph 6.3.3.

38. LCC contended that permission should be refused because there were two alternative remedies available in this case which had not been pursued: (i) an application to the High Court under section 111(6) of the MCA for an order requiring the District Judge to state a case, following the procedure set out in CPR PD 52E; and (ii) an appeal to the Valuation Tribunal.

(i): An application to the High Court under section 111(6) of the MCA

39. Mr Horn sought to persuade me that the procedure set out in CPR PD 52E only applies where the Magistrates Court has stated a case, and not where it has refused to do so. His argument was to the effect that although Section III, paragraphs 3.11-3.14 of PD 52E sets out the process to be followed where an application is made to the appeal court to require the tribunal below to state a case, this does not apply here, because cases involving Magistrates Courts are dealt with exclusively in Section II, which makes no such provision.

40. I do not accept that this is the correct interpretation of the PD. Rather, my understanding is that (i) Section II sets out certain specific provisions in relation to applications to state a case involving the Magistrates Court and the Crown Court (largely by reference to the Criminal Procedure Rules); (ii) Section III, paragraphs 3.1-3.13 make similar provision for applications to state a case involving a Minister, Government department, tribunal or other person; and (iii) Section III, paragraphs 3.11-3.14 then make common provision for the process where a case has not been stated, that is applicable to the Magistrates Court, the Crown Court and the other bodies mentioned in Section III. In other words, I consider that "tribunal" in Section III is interpreted as covering a Magistrates Court and a Crown Court.

41. That this is the correct interpretation of the PD is clear from the terms of section 111(6) itself, which specifically provides that "[w]here justices refuse to state a case, the High Court may, on the application of the person who applied for the case to be stated, make an order of mandamus requiring the justices to state a case".

42. Accordingly, on being dissatisfied with the refusal of the District Judge to state a case, the correct route for the Claimant and/or Mr Horn to follow was to apply to the High Court under section 111(6) of the MCA, using the procedure set out in CPR PD 52E to order the Magistrates to prepare a case stated on behalf of the Claimant. After circulation of the draft judgment, I received submissions from the Claimant in which Mr Horn appeared to accept this was the correct analysis (albeit that he maintained that the section 111(6) was not the "correct" route but merely an "alternative" one to bringing judicial review proceedings).

43. However, I do not consider that permission should be refused on this basis, because there is authority for the proposition that a case involving a refusal to state a case can nevertheless proceed by way of judicial review: see *Sunworld Ltd v Hammersmith*

and Fulham LBC [2000] 1 WLR 2102, to which Mr Horn referred in post-hearing written submissions.

(ii): An appeal to the Valuation Tribunal

44. Under Regulation 57 of the 1992 Regulations:

> "Any matter which could be the subject of an appeal under section 16 of the Act or regulations under section 24 of the Act may not be raised in proceedings under this Part."

45. The Act referred to in Regulation 57 is the Local Government Finance Act 1992 ("the 1992 Act"). Section 16 thereof provides that:

> "A person may appeal to a valuation tribunal if he is aggrieved by (a) any decision of a billing authority that a dwelling is a chargeable dwelling, or that he is liable to pay council tax in respect of such a dwelling; or (b) any calculation made by such an authority of an amount which he is liable to pay to the authority in respect of council tax".

46. In *Oyston v Blackpool Council* [2024] EWHC 1224 (Admin) Turner J confirmed that the effect of these provisions is that any person who seeks to challenge his liability to council tax may not raise their arguments in the Magistrates' Court. Rather, they must appeal to the Valuation Tribunal.

47. Mr Whitfield contended that in light of these provisions, the District Judge should not have proceeded to deal with the various arguments Mr Horn raised. It was initially unclear whether LCC in fact drew these provisions to the District Judge's attention, but Mr Horn now concedes that they did (albeit just before the hearing). I note that there had been a failure to do so in *Oyston*: see [5] of the judgment in that case.

48. However, I do not accept that permission should be refused on the basis that an appeal to the Valuation Tribunal is an alternative remedy available to Mr Horn which should have been pursued; and which could indeed be pursued now, for the following reasons.

49. *First*, although LCC maintains the position that the District Judge should not have addressed the various arguments advanced by Mr Horn, the fact is that he did so. Mr Horn now seeks to advance grounds of judicial review challenging the District Judge's conduct of the hearing and the nature of his reasoning. Challenges to a District Judge's decision would not easily fall within the jurisdiction of the Valuation Tribunal.

50. *Second*, the issues in this claim do not concern whether the property in question is a chargeable dwelling or whether Mr Horn is liable to pay council tax on it. The case therefore at least arguably (i) falls outside section 16; and (ii) can be distinguished from *Oyston*, where those were the issues: see [7].

51. *Third*, in *R (Curzon Berkeley Ltd) v Bliss (valuation officer, London Westminster Group Inland Revenue)* [2001] EWHC Admin 1130 at [72], James Goudie QC (as he then was, sitting as a Deputy Judge of the High Court), held that the Administrative

Court rather than the Valuation Tribunal was the appropriate forum for the determination of "the legal and constitutional issue as to whether or not word should be implied into a taxing statute". That sort of challenge resonates with the grounds advanced here and fortifies me in the conclusion that the Administrative Court has jurisdiction in preference to the Valuation Tribunal.

Conclusion on the alternative remedy issue

52. For these reasons I do not consider it appropriate to refuse permission on the grounds that the Claimant or Mr Horn had another alternative remedy available.

The merits

53. The Claimant's statement of facts and grounds supporting the claim form ("SFG") run to some 40 pages. At times the document is a little hard to follow but my understanding of each of the grounds is set out below. As noted at [8] above, Ground 1 was withdrawn before the hearing.

Ground 2

54. Under this ground the Claimant contends that the District Judge unduly limited public access to the hearing both remotely and in person and erred in several respects to this issue.

The legal framework

55. The open justice principle requires Magistrates Courts to take steps to facilitate public access to their hearings, both in person and remotely.

56. The Courts Act 2003, section 85A(2) enables a magistrate to make a direction permitting a member of the public to observe a hearing remotely. Such a direction can only authorise transmission to designated live-streaming premises (which is of no application to this case) or to individuals who are given access only having first identified themselves to the court (or to a person acting on behalf of the court): section 85A(3). It may make provision addressing "the persons who are to be able to watch or listen to the transmission (including provision making that ability subject to conditions, or aimed at preventing persons who are not meant to watch or listen from being able to do so)": section 85A(5)(b).

57. The Remote Observation and Recording (Courts and Tribunals) Regulations 2022, regulation 3 provides that before making a direction under section 85A(2), the court must be satisfied that "(a) it would be in the interests of justice to make the direction; and (b) there is capacity and technological capability to enable transmission, and giving effect to the direction would not create an unreasonable administrative burden".

58. Under regulation 4, before deciding whether, and on what terms, to make a direction under section 85A(2), the court must take into account "(a) the need for the administration of justice to be, as far as possible, open and transparent; (b) the timing of any request or application to the court or tribunal to make a direction, and its impact on the business of the court or tribunal; (c) the extent to which the technical, human and other resources necessary to facilitate effective remote observation are or

can be made available; (d) any limitation imposed by or under any enactment on the persons who are entitled to be present at the proceedings; (e) any issues which might arise if persons who are outside the United Kingdom are among those watching or listening to the transmission; (f) any impact which the making or withholding of such a direction, or the terms of the direction, might have upon (i) the content or quality of the evidence to be put before the court or tribunal; (ii) public understanding of the law and the administration of justice; (iii) the ability of the public, including the media, to observe and scrutinise the proceedings; (iv) the safety and right to privacy of any person involved with the proceedings".

59. Under regulation 5(1) a direction under section 85A(2) must include provisions "(a) prohibiting any person other than a person entitled to be present at those proceedings from watching or listening to the transmission; and (b) requiring any person so entitled to demonstrate, in such manner as specified in the direction, the capacity in which that person is so entitled".

60. Under regulation 5(2) a direction under section 85A(2) must, except where the direction is for transmission to designated live-streaming premises, include provision which has the effect "(a) that no person will be able to watch or listen to the transmission without first, when identifying themselves to the court, providing their full name and their email address, unless the court dispenses with this requirement; and (b) of requiring as a condition of continued access that any person given access will during the transmission conduct themselves appropriately and in particular in accordance with any requirements of the direction or instructions of the judge for persons observing the proceedings".

Relevant guidance

61. The Claimant relies on the 'General guidance to staff on supporting media access to courts and tribunals' published by HM Courts and Tribunals Service. This was published in October 2008 and last updated in May 2025.[1] Page 4 reiterates the "general rule" that "justice is administered in open court where anyone present may listen to and report what is said". It also notes that "[m]ost courts or tribunals will have dedicated press seating and the media should be given priority to those seats during a case or hearing". The Claimant infers from this that if spaces dedicated to the press are not being used by the press, members of the public should be permitted to use them.

62. In June 2022, the then Lord Chief Justice and Senior President of Tribunals issued Practice Guidance to the judiciary on the use of remote observation powers.[2] The guidance makes clear that: (i) the decision whether to make any and if so what direction for remote observation will always be a judicial decision not an administrative one; (ii) decision-makers must give due weight to all the relevant circumstances, including the factors identified in the Regulations; (iii) remote observation should be allowed if and to the extent it is in the interests of justice but it should not be allowed to jeopardise the administration of justice in the case before the court; (iv) the ultimate decision will inevitably depend on the nature of the

[1] https://assets.publishing.service.gov.uk/media/6835888fc239ae3e866c03b0/HMCTS729_HMCTS_media_guidance_May_2025.pdf
[2] https://www.judiciary.uk/wp-content/uploads/2022/06/Practice-Guidance-on-remote-observation-final.pdf

jurisdiction, the particular resources available at the relevant time, and the specific facts and circumstances of the case; and (v) it will not usually be necessary to give more than the briefest reasons for the decision: paragraphs 16, 19, 20, 23 and 24.

63. Paragraph 17 emphasises that decision-makers must give due weight to the importance of open justice. It continues:

> "This is a mandatory consideration. Open justice serves the key functions of exposing the judicial process to public scrutiny, improving public understanding of the process, and enhancing public confidence in its integrity. Remote observation can promote all those purposes. Access for reporters, legal commentators and academics is likely to do so. Judicial office holders may take as a starting point that remote access for other observers is desirable if they would be entitled in principle to have access to a courtroom in which the hearing was taking place, and giving them remote access is both operationally feasible and compatible with the interests of justice".

64. Paragraph 18 reiterates the provision in regulation 4 that the "[t]iming and impact on the business of the court must be considered". It continues:

> "Media applications and others that are timely and uncontroversial may pose no difficulty. On occasion, however, applications may be late, or numerous, or raise complex issues. Judicial office holders might properly guillotine the process, limit the numbers given access, or decline to deal with an application if they would otherwise be disabled or impeded from administering justice in the case itself, or diverted from other pressing judicial duties".

The factual background

65. Prior to the hearing of LCC's application before District Judge Healey on 12 August 2024, there had been an earlier hearing before District Judge Clarke. It is the Claimant's case that, having been notified of the significant public interest in the case, District Judge Clarke made arrangements for the 12 August 2024 hearing take place in Liverpool not the Wirral. It was suggested that this would accommodate 20 observers for the hearing.

66. At 1.59 pm on Thursday 8 August 2024, Mr Horn emailed the "Court Manager / Clerk to the Court" to make sure that this had been communicated. He observed that some members of the public intended to travel for over 4 hours to watch the hearing.

67. At 6.55 pm a member of court staff, J Cooper, replied, in their capacity as "Officer of the Court on behalf of Merseyside/Cheshire Magistrates". They stated that "The number of supporters allowed into the courtroom is limited we would suggest you bring 1 or 2 people with you, any others may need to wait outside".

68. At 9.11 pm Mr Horn replied to the effect that this was not acceptable and "a breach of the court's duty under the open justice obligations". He asked for provision of the lawful authority which allowed the court to restrict public access in this way. He stated that the individuals were not "supporters", but individuals who "have every

right under the open justice principle to see justice being done in their name". He said that District Judge Clarke was fully aware of the situation and that at the last hearing there had been 9 members of public in the gallery. The District Judge had been notified that there would be more people attending the 12 August 2024 hearing and "had no issues including asking that those with assistance dogs make sure they are near the exit".

69. At 11.37 pm Mr Horn sent a further email, citing case law on the open justice principle. He asked that the court "[p]lease ensure public access is not impaired and ensure all your staff are with the knowledge they must identify themselves if asked". He concluded by saying "We are a peaceful group whose purpose is to ensure the rule of law is upheld".

70. At 2.11 pm on Friday 9 August 2024 J Cooper replied, stating that the case was listed in a courtroom that had 8 available seats in the public gallery, but that further supporters could request a video link to watch the hearing remotely. The email indicated that anyone wishing to obtain a remote access link should send the request to a particular email address stating which hearing they wished to observe, providing their full name and email address and setting out whether or not they were a witness in the proceedings.

71. Over the weekend of 10/11 August 2024, approximately 70 people applied for permission to watch the hearing remotely.

72. The SFG asserts at paragraph 10.1.1 that court staff made arrangements for remote access to take place and confirmed to those who had applied that the link would be sent out on the morning of the hearing.

73. The hearing of LCC's application was listed for 2 pm on Monday 12 August 2024. At some point during the day, before the hearing, District Judge Healey refused all the applications.

74. Over 20 people attended the hearing from different parts of England and Wales, hoping to watch in the courtroom. The public gallery was full. The SFG asserts at paragraph 9.5 that there were over 13 empty seats in the courtroom, but the District Judge refused to permit members of the public to use them.

The remote access issue

(i): The District Judge's reasons

75. On 13 August 2024 Sharon Dolan, another Officer of the Court on behalf of Merseyside/Cheshire Magistrates, emailed those who had made remote observation applications, setting out the District Judge's reasons for refusing the applications. These were as follows:

> "Over the weekend and on the morning of 12th August the court received over 70 applications from members of the public to observe remotely the proceedings regarding the application for a liability order in respect of Mr Horn. As a result of the civil disorder prosecutions the court was exceptionally busy yesterday morning and it was simply

> impracticable for the applications to be considered ahead of the afternoon hearing.
>
> Half a days court time was set aside for the application for the liability order to be considered, and if time had been allocated to consider the applications to observe the proceedings remotely there would not have been sufficient time to consider the substantive application. Accordingly I refused the applications to observe proceedings remotely."

76. The District Judge confirmed these reasons at [3] of his judgment refusing to state a case, adding the further details that (i) it was only during the morning of 12 August 2024 that he had been made aware of the applications; and (ii) the morning court concluded at around 1 pm.

77. The District Judge returned to this issue at [26] of his judgment, adding that (i) he had concluded that considering around 70 applications ahead of the hearing would have taken a significant amount of time; (ii) if the applications were granted it would take a significant amount of time to set up the links; and (iii) this would inevitably result in there being insufficient time to consider the application for the liability order. He therefore concluded that considering the applications at that time would have such an adverse impact on the business of the court that he should refuse the applications.

(ii): Submissions and analysis

78. *First*, the Claimant contends that the District Judge misdirected himself because he mistakenly believed he had to authorise each individual application.

79. I do not consider this arguable. The statutory scheme and Practice Guidance make clear that directions permitting a member of the public to observe a hearing remotely are judicial decisions. A judicial office-holder is entitled to scrutinise each application separately. Such an individualised approach is strongly suggested, if not required, by (i) the requirement in regulation 3 that the judicial office-holder be satisfied that the interests of justice are met, and that there is the necessary capacity and technological capability without creating an unreasonable administrative burden, in each case; (ii) the need to consider the factors set out in regulation 4 which is inevitably to some degree specific to each application, even if they are applications for the same hearing; and (iii) the need for them to be aware of the name of the person applying so that sections 85A(3) and 85A(5)(b) and regulations 5(1) and (2) can be considered and complied with.

80. *Second*, the Claimant contends that the regulations are unlawful in requiring people to submit their names before securing a remote access direction.

81. I do not consider this arguable. Courts are required to know who is watching their proceedings remotely. Indeed they are required to do so in order to ensure that section 85A(5), with its reference to "preventing persons who are not meant to watch or listen", is complied with.

82. *Third*, the Claimant submits that the District Judge's decision amounted to an unlawful and unjustified intrusion into the open justice principle. Reference is made

to other court proceedings in which remote access directions have been given without difficulty, including the hearing in this case.

83. While the requirement of public access to court proceedings is important, it is not an absolute requirement. The statutory scheme makes clear that deciding whether or not to permit remote observation of court proceedings involves the exercise of judicial discretion. Other District Judges might have made a different decision in the exercise of that discretion in this case. For example, they might have gone into court at 2 pm, explained the position to the parties and invited submissions. They might have delayed the start of the hearing so that there was time to consider the applications. If that meant that the hearing could not be completed during the afternoon, a further court date could have been found.

84. However, this does not mean that the District Judge's decision to proceed in the way he did discloses a public law error. Regulation 4(b) specifically required him to consider "the timing" of any application to the court and its "impact on the business of the court". Paragraph 18 of the Practice Guidance reiterated that in respect of late applications, which these were, he was entitled to "decline to deal with an application if they would otherwise be disabled or impeded from administering justice in the case itself, or diverted from other pressing judicial duties". In those circumstances it is not arguable that the District Judge's exercise of his discretion was irrational. It was not arguably one that no reasonable District Judge would have reached.

The physical access issue

85. The District Judge's position on this issue is as follows:

> "Prior to the commencement of the hearing, I was made aware that a large number of members of the public had attended in support of Mr Horn, and there were insufficient seats in the public gallery for all of those individuals to observe the proceedings. I was told discussions were taking place with court staff as to which individuals would enter the courtroom as I entered court all of the seats in the public gallery were occupied": [4] of his judgment refusing to state a case.

86. The District Judge does not, therefore, refer to having had any involvement in this issue. However, I assume for present purposes that paragraph 9.5 of the SFG is correct, and that he refused to permit members of the public use empty seats in the courtroom other than the public gallery. Mr Horn suggested during the hearing before me that these were the seats normally reserved for the press, probation officers and others.

87. Again, however, this was a case management decision involving judicial discretion. While another District Judge might have taken a more flexible approach, it was not arguably irrational to limit the numbers of people attending the hearing to the 8 in the public gallery.

Conclusion on Ground 2

88. Accordingly, Ground 2 is not arguable. It is not therefore necessary for me to consider LCC's argument under section 31(3D) of the Senior Courts Act 1981, to the effect

that notwithstanding any open justice issues it is highly likely that the outcome would not have been substantially different.

89. To the extent that this claim should really be characterised as a judicial review challenge to the refusal to state a case, the District Judge was entitled to conclude that these issues were entirely fact-specific and did not generate any questions of law for the High Court: see [24]-[26] of his judgment refusing to state a case.

Ground 3

90. Under this ground the Claimant alleges that the District Judge's denial of a request to record the proceedings was irrational and without reasonable excuse, and amounted to a further breach of the principle of open justice.

91. The Contempt of Court Act 1981, section 9(1)(a) provides that, other than for the purposes of court approved transmissions, it is a contempt of court to "use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court". Sections 9(1)(b) and (c) make it a contempt to "publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication"; or to "to use any such recording in contravention of any conditions of leave granted under paragraph (a)".

92. At [5] and [27] of his judgment refusing to state a case the District Judge recognised that he did have a discretion to allow an audio recording of the proceedings under section 9(1)(a), but that it would be a contempt to publish any such recording by playing it in the hearing of the public or any section of the public.

93. The District Judge noted that he was concerned if a recording was made there was a risk that it would be played to members of the public possibly without the understanding that such an action would amount to a contempt. He specifically indicated to Mr Horn that a written judgement would be provided giving his reasons within 28 days and that he was content for someone to sit next to him to assist him with note-taking. These were all relevant matters. It was therefore not arguably irrational for the District Judge to refuse to exercise this discretion, especially given that permitting such recording is very much the exception rather than the norm.

94. The Claimant effectively also challenges the validity of section 9. Reliance is placed on the increasing recognition of the need for open justice and transparency in the court process. The SFG at paragraph 13.1.3.1 notes that Supreme Court hearings are livestreamed. The same is true of Court of Appeal (Civil Division) hearings and sentencing remarks in certain criminal cases. Remote observation of hearings by video is becoming more common place; and that more judgments are published than ever before. Many people have mobile telephones capable of recording.

95. The Claimant submits that permitting the recording of proceedings imposes no public cost or administrative burden and would save the time and cost of obtaining a transcript of hearings after the event. Mr Horn indicated that those involved with the Claimant organisation have often found the quality of Magistrates Court recordings to be so poor that an accurate transcript cannot be provided. He suggested that

sometimes there is a lack of recording at all. These difficulties undermine accountability and transparency and disadvantage litigants, especially in appeals. In those circumstances he queried why it remains the case that court proceedings cannot generally be recorded by anyone other than the court itself.

96. The Claimant did not contend in terms that these developments in open and transparent justice render the Contempt of Court Act 1981, section 9 incompatible with the rights set out in the HRA. Accordingly, the only issue generated by this ground is the question of whether section 9 in its current form remains appropriate in the current climate. That is a question that cannot properly be addressed in these or probably any judicial review proceedings: legislative change is a matter for Parliament, and nothing in the Claimant's interesting arguments rendered the District Judge's decision in this case wrong.

97. Ground 3 is therefore not arguable. Again, therefore, I do not need to consider LCC's argument under section 31(3D).

Ground 4

98. Regulation 18 of the 1992 Regulations obliges a billing authority to "serve a notice in writing on every liable person in accordance with regulations 19 to 21."

99. Regulation 19(1) states that "The demand notice is to be served on or as soon as practicable after the day the billing authority first sets an amount of council tax for the relevant year…".

100. The Council Tax (Demand Notices) Regulations 2011 ("the 2011 Regulations") make provision for the content of demand notices and the supply of information by the relevant authorities.

101. Under ground 4, the Claimant contends that the council tax notices issued by LCC were unlawful in that they failed to comply with 2011 Regulations as they were entitled "bill" rather than "demand notice".

102. However, neither the 1992 Regulations nor the 2011 Regulations include any requirement that the word "demand notice" as opposed to the word "bill" must be used in the document sent to the payer; nor do they prohibit the use of the word "bill".

103. It is unrealistic to suggest that the recipient of such a document will be confused by the use of the word "bill" rather than "demand notice". The use of the word "bill" complies with the requirement for clear statutory language in the context of financial obligations on which the Claimant relies. I do not consider it arguable that the use of this word contradicts the requirements of predictability and fairness derived from Article 6 of the European Convention on Human Rights, set out in Schedule 1 to the HRA.

104. The District Judge was therefore right to reject Mr Horn's submissions on this issue and to refuse to state a case on it: see [15]-[19] of his judgment on LCC's application and [28] of his judgment refusing to state a case.

105. This ground is unarguable.

Ground 5

106. This ground is addressed at paragraphs 21-24 of the SFG. It is in two parts.

(i): The alleged unlawful delegation issue

107. The Claimant contends that the summons that was sent to Mr Horn was invalid because it was not issued by a magistrate but a member of court staff. That process is permitted by the Schedule to the Magistrates' Court (Functions of Authorised Persons - Civil Proceedings) Rules 2020 ("the 2020 Rules"), regulations issued pursuant to Part 6A of the Courts Act 2003. The Schedule lists certain judicial decisions that can be delegated to an authorised person rather than a magistrate, including the issuing of a summons. The Claimant contends that this process is unlawful.

108. Reliance is placed on the well-established principles derived from (i) *Entick v Carrington* (1765) St Tr 1029, to the effect that government officials cannot exercise public power without specific legal authority; and (ii) *R (Witham) v Lord Chancellor* [1997] EWHC Admin 237 to the effect that when changing the common law or affecting constitutional rights, Parliament can only do so with express clear language. However, here, there is specific legal authority for the delegation of this judicial function, expressed in clear language, in the form of Part 6A of the Courts Act 2003 and the 2020 Rules.

109. The Claimant argues that the 2020 Rules are *ultra vires* as they exceed the enabling authority provided by the MCA, section 44 and the Courts Act 2003, section 67B. The MCA section, 44 is merely the general power to "make rules for regulating and prescribing, except in relation to any criminal cause or matter, the procedure and practice to be followed (a) in magistrates' courts, and (b) by designated officers for magistrates' courts". The wording of the legislative scheme in the Courts Act 2003 illustrates that the Claimant's argument with respect to this specific function is flawed: section 67A(3)-(6) lists a series of functions which cannot be so delegated, and the issuing of a summons is not within that list.

110. The Claimant relies at paragraphs 21.1.3-21.1.5 of the grounds on a series of other cases involving magistrates, namely *R v Brentford Justices, ex p Catlin* [1975] QB 455, *R v West London Stipendiary Magistrate, ex p Klahn* [1979] 1 WLR 933 and *R v Gateshead Justices, ex p Tesco Stores Ltd* [1981] QB 470. However, none of these cases generate the general proposition for which the Claimants contend, to the effect that delegating the function of issuing a summons is in principle impermissible and fatal to the validity of the subsequent proceedings. Indeed, the latter case describes the introduction of the Justices' Clerks Rules 1970, which provided for the first time that certain tasks such as the laying of an information and the hearing of a summons could be delegated to an authorised person, namely the justices' clerk.

111. The District Judge was therefore right to conclude that an authorised court officer has the power to issue a summons in council tax proceedings and to decline to state a case on the issue: see [20]-[25] of his judgment on LCC's application and [29] of his judgment refusing to state a case.

(ii): The signature issue

112. The Claimant also takes issue with the fact that the summons did not bear the name of the person who had issued it, contending that this breaches the principle of open justice. I do not consider this arguable.

113. As the District Judge highlighted at [30] of his judgment refusing to state a case, the Magistrates' Courts (Amendment) Rules 2019, which amended the Magistrates Court Rules 1981 ("the 1981 Rules"), removed the requirement for a signature on a summons of civil applications (see rule 7).

114. Applying the framework set out above, the issuing of a summons is a properly delegated judicial function which has the effect, if the summons is complied with, of bringing the person who is the subject of the summons before a public hearing. That hearing meets the requirements of open justice. Such an approach is consistent with *R v Brentford Justices, ex p Catlin*, in which it was held that any defect or invalidity that there might have been in the summons was irrelevant because the document laid before the justices on the specified date was sufficient to constitute the information against the applicant; so that, when she appeared before the justices within six months of the offence, they were then and thenceforth "clothed" with jurisdiction. I therefore agree with the District Judge's conclusion at [31] of his judgment refusing to state a case, that any challenge to the legality of this legislation would be misconceived

115. For these reasons Ground 5 is not arguable.

Ground 6

116. The MCA, section 64 empowers the court to award costs on the hearing of a summons.

117. Further, under regulation 34(7) of the 1992 Regulations, a liability order made pursuant to regulation 34(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 (which costs, including those of instituting the application under paragraph (2), are not to exceed the prescribed amount of £70)".

118. Under ground 6, the Claimant submits that there were irregularities in the way in which the District Judge calculated the costs reasonably incurred by the applicant in obtaining the order in Mr Horn's case. I pause to observe that the Claimant would, in my judgment, struggle to show any standing to advance this ground, which relates solely to the costs liability the District Judge assessed between Mr Horn and LCC.

119. As to the merits, the Claimant relies on the judgment of Fordham J in *R (on the application of Kofa) v Oldham Metropolitan Borough Council* [2024] EWHC 685 (Admin) at [26], though I think this is intended to be a reference to [35]. However, this does not assist the Claimant because in *Kofa* at [35] Fordham J was addressing the issue of whether the local authority could recover the costs of its counsel attending the renewed hearing for permission in the judicial review claim, an entirely different context.

120. The Claimant contended that the summons costs sought by LCC were unreasonable given that the application in respect of Mr Horn was part of a group or "block" of

applications (see further at [139] below). It was suggested that given the block nature of the application, the reasonable costs in each case were very limited, and in the region of £12, rather than the £56 LCC claimed.

121. The Claimant argued that the District Judge breached the principles set out in *R (Nicholson) v Tottenham Magistrates & Anor* [2015] EWHC 1252 (Admin). There, the costs order was found to be unlawful because the magistrates did not have sufficient relevant information about how the figures were calculated and the local authority had not been forthcoming in providing this information when it was requested by the claimant. It was not enough to simply rely on being told that the costs had something to do with administrative time and the number of people involved in making the application.

122. I cannot accept this submission.

123. The District Judge dealt with the costs issues at some length in his judgment on LCC's application at [26]-[40]. He specifically accepted the principle set out in *Nicholson*, noting at [36] that it is "clear authority that if a respondent requests clarification of how costs are incurred, he is entitled to an explanation".

124. Moreover, he explicitly applied the *Nicholson* principle in Mr Horn's favour: at [40] he held that he was not satisfied in the absence of an explanation of how the costs were calculated that LCC's claimed summons costs of £56, £350 for the attendance of its solicitor Mr Mann and £210 for the attendance of is witness Miss Mabbs had been reasonably occurred in obtaining the liability order. He did not therefore order Mr Horn to pay any of these costs.

125. The only costs the District Judge ordered Mr Horn to pay was the sum of £950 to reflect LCC's counsel's costs. The District Judge noted that prior to the hearing Mr Horn had provided a 21 page document setting out a number of detailed legal and procedural points relating to the lawfulness of the council tax regulations. He was satisfied it was appropriate and reasonable for LCC to instruct counsel to research and address these points at the hearing and that the figure claimed was reasonable: see [21] and [40] of the judgment. This was an unimpeachable decision that discloses no arguable public law error.

126. For these reasons Ground 6 is not arguable.

Ground 7

127. The Claimant contends that the District Judge failed to give a reasoned judgement for his decision which adequately addressed the key issues. It is said that he breached the requirements to follow precedent, acted irrationally and breached the principles of "open justice, transparency, fairness, accountability and legal development".

128. The District Judge clearly gave detailed consideration to the facts and the law and the issues raised by Mr Horn in his reserved judgment. Further reasons were effectively given in the District Judge's second judgment refusing to state a case. The reasons provided were plainly sufficient for Mr Horn and the Claimant to understand why the District Judge made the order he did. It is not arguable that the principles set out in the preceding paragraph were breached.

129. LCC contended that there was one issue which the District Judge did not address, namely its argument that based on regulation 57(1) of the 1992 Regulations and section 16 of the 1992 Act, the magistrates court had no jurisdiction to deal with these arguments. However, the fact that the District Judge did not consider it worked in favour of Mr Horn, as the District Judge could (and LCC contended, should) have determined LCC's application for a liability order on that basis alone.

130. For these reasons Ground 7 is not arguable.

Ground 8

131. The thrust of the complaint under this ground is that the District Judge erred in following the usual practice of magistrates by announcing the liability order orally in court and not making a physical order. Prior to 2003, physical orders were made, in accordance with a standard form. Instead, proof of the order is derived from a copy of the extract from the court register. Complaint is also made that the copy of the extract from the court register did not include the name of the District Judge who made the order.

132. It is argued that judicial functions must be exercised personally and cannot be delegated and that justice must be administered in public. The grounds also cite the *Witham* principle, referred to at [108] above.

133. The process leading up to the making of a liability order is as follows.

134. Before a billing authority can apply for a liability order, generally, it must serve on the person against whom the application is to be made a notice (a "final notice"), which must state every amount in respect of which the authority is to make the application: regulation 33.

135. If the amount stated in the final notice is wholly or partly unpaid at the expiry of the period of 7 days beginning with the day on which the notice was issued, the billing authority may apply to a magistrates' court for an order against the person by whom it is payable: regulation 34(1).

136. Such an 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: regulation 34(2). A summons issued under regulation 34(2) can be served on the person in question by various means set out in regulation 35(2).

137. When the matter comes before the court, "[t]he court shall make the order if it is satisfied that the sum has become payable by the defendant and has not been paid": regulation 34(6).

138. A single liability order may deal with one person and one such amount (or aggregate amount) as is mentioned in regulation 34(7) and (8) or, if the court thinks fit, may deal with more than one person and more than one such amount: regulation 35(1).

139. The regulations therefore provide a clear system for the making of liability orders, including on a "block" basis. The regulations provide for the person at risk of the

liability order to be served with a notice of their liability to pay and a summons to attend court. If they attend court, they will hear the order being made.

140. The regulations do not require that the order is committed to any particular form of writing. However, the position is addressed by certain aspects of the 1981 Rules.

141. Rule 66(1) requires that every magistrates court shall keep a register in which there shall be entered (a) a minute or memorandum of every adjudication of the court; and (b) a minute or memorandum of every other proceeding or thing required by these rules or any other enactment to be so entered.

142. Rule 16(1) provides that a record of an order made on complaint required for an appeal or other legal purpose "may be in the form of certified extract from the court register". Further, rule 68 provides that the register, or an extract from the register certified by the designated officer as a true extract, shall be admissible in any legal proceedings as evidence of the proceedings of the court entered in the register.

143. The combination of these rules, and the right of the person subject to the order to be present when an order is being made, are, in my judgment, a fair and sufficiently open process.

144. It is not therefore arguable that this system amounts to an "unlawful dilution of judicial rights for administrative convenience" or a breach of any "right" to a perfected court order as the Claimant contends.

145. I note that arguments of this kind were made and rejected by Fordham J, albeit *obiter*, in *Kofa* at [12]-[13] and [29]-[30]. *Kofa* was another claim brought by a member or supporter of Peacekeepers International.

146. The process in this case had an added element of fairness in that the District Judge gave a detailed written judgment addressing all the arguments Mr Horn had advanced as to why the liability order should not be made.

147. Accordingly Ground 8 is not arguable.

Ground 9

148. This ground is set out at paragraphs 37 to 56 of the SFG.

149. It begins with a detailed historical overview of a series of constitutional principles. These include the principle that all individuals are equal under the law, the importance of the rule of law and the independent judiciary, the judicial oath, the rules of equity, the principle of precedent, the principle of legality namely the obligation on the court to interpret primary legislation compatibly with constitutional rights and values, the limits on the monarch's prerogative powers including the prohibition on retrospective punishment and the requirement for parliamentary approval to change the common law, and the principle of parliamentary. Reliance is placed on *Ashby v White* (1703) 91 ER 665, in support of the proposition that laws cannot be enforced against individuals without their consent.

150. The specific complaints against the District Judge are addressed much more briefly, at paragraph 53 to 54 of the SFG. These consist of a series of propositions. Many of

these contend that the District Judge failed to apply the constitutional principles summarised in the preceding paragraph by his conduct as described in Grounds 2-7: for example, it is said that he breached the requirement for justice to be seen to be done in an open way by the conduct embraced Ground 2; and failed to provide a reasoned judgement as alleged by Ground 7. It is far from clear to me whether Ground 9 as pleaded advances any new points.

151. In oral submissions Mr Horn took me to *Ashby*. My understanding, shared by LCC, is that the essential point being advanced under Ground 9 is that the District Judge erred in supporting the system of council tax which is constitutionally unlawful and invalid in light of *Ashby*.

152. The difficulty with such a point is that it was addressed and dismissed in *Kofa.* At [14], Fordham J summarised the point the Claimant derived from *Ashby*, namely that the council tax legislative framework of the 1992 Act and Regulations "does not and cannot bind any individual absent their individual consent". At [17], he dismissed the argument as follows:

> "…the specific constitutional principle identified by Ms Kofa – from Ashby v White – plainly does not have the effect for which she contends. That is no surprise. If it did, no rating or taxing statute would apply to authorise levying monies from an individual who had not consented to it. Rating and taxing statutes ensure legal prescription, securing rather than undermining the rule of law, entirely compatibly with the Bill of Rights and other constitutional statutes. The 1992 Act and 1992 Regulations are themselves legislative prescriptions forming part of the "law", to which "rule of law" we are all subject. Ashby v White was a case about actions said to have obstructed the claimant – an individual eligible under the rules of that age – from voting in an election of a representative to serve in Parliament. The full quotation is this:
>
> > *"By the common law of England, every commoner hath a right not to be subjected to laws made without their consent, and because such consent cannot be given by every individual man in person, by reason of number and confusion, therefore that power is lodged in their representatives, elected and chosen by them for that purpose, who are either knights, citizens, or burgesses".*
>
> The point being made was about consent as expressed through the ballot box, with elected representatives in Parliament then deciding collectively about the merits of primary legislation. That is what is reflected in the statutory preamble on which Ms Kofa relies. This focus is precisely because of the impossibility and inappropriateness of individualised consent to legislation, from "every individual … in person". The sense of laws made with consent of the citizenry is a statement about democratic accountability and broad consent through the chance to elect representatives to act as a legislature. The threshold of arguability with a realistic prospect of success is a

> modest one. But the constitutional arguments, in my judgment, come nowhere near satisfying it".

153. Fordham J's reasoning in *Kofa* applies directly to the arguments in Ground 9. The District Judge was therefore right to find that the reasoning in *Kofa* determined the constitutional issues advanced under Ground 9 and to decline to state a case on them: see [14] of his judgment on LCC's application and [23] of his judgment refusing to state a case.

154. I therefore conclude that Ground 9 is not arguable.

Conclusion on the application for permission

155. For all these reasons, I do not consider that the claim is arguable and refuse permission for that reason.

156. I consider that Grounds 4-9 were totally without merit and I certify them as such.

157. Had I concluded that the claim was arguable, neither the issues of standing, delay nor the existence of an alternative remedy would have been a bar to permission being granted, for the reasons given above.

158. Had I granted permission I would have ordered that Mr Horn be added as a Claimant under CPR 19.2(2)(a) and that the issue of whether the current Claimant has standing be determined at the substantive hearing. I would be likely to have given directions as to the future evidence required on the issue.

Costs

(i): LCC's Acknowledgment of Service and Summary Grounds of Defence costs

159. In refusing permission, Judge Ockelton provided at [2] of his order that the Claimant should pay LCC's costs of preparing its Acknowledgment of Service and Summary Grounds of Defence, summarily assessed in the sum of £2,412. This order was not to become final until such time as permission had been refused on all grounds after a hearing. That has now occurred.

160. Judge Ockelton's order made provision at [3](b)(ii) for the Claimant to make submissions contending that the costs order in [2] should not be made even if permission was refused on all grounds provided that search submissions were filed within 14 days of the date of his order.

161. The Claimant filed submissions pursuant to [3](b)(ii), albeit 1 day late. I am content to grant the accompanying relief from sanctions application made by the Claimant on 24 March 2025, given the modest extension of time sought and the lack of prejudice to the LCC. LCC has not taken up the opportunity provided by [3](b)(iii) of Judge Ockelton's order to make any responsive written submissions. The Claimant then filed further submissions on this issue after circulation of the draft judgment, without permission to do so. I have nevertheless taken them into account, not least as the Defendant did not object to these further submissions,

162. A successful defendant or other party at the permission stage who has filed an Acknowledgment of Service should generally recover the costs of doing so from the claimant, whether or not he or she attends any permission hearing: see the Guide at paragraph 25.4.5.1.

163. The Claimant contended that even if permission was refused, Judge Ockelton's costs order should not be maintained for a series of reasons.

164. *First*, the Claimant contended that the claim had a clear public interest. In my judgment this is not a powerful reason not to order the Claimant to pay the costs, especially given my conclusion that grounds 4-9 were totally without merit. To the extent that public interest issues underpinned those grounds, they had been fully argued before and comprehensively dealt with by the District Judge and/or were addressed in *Kofa*.

165. *Second*, the Claimant pointed to the court's delay in issuing the claim, arguing that this had led to LCC being able to rely on delay, when this was misconceived for the reasons set out at [32] above. Again, I do not find this persuasive: LCC addressed procedural bar issues other than delay, as well as the merits of the grounds, in its Summary Grounds. The Claimant also suggested that LCC's legal representatives had breached their professional obligations to the court. This was entirely unmerited: as noted at [35] LCC made an appropriate concession on the delay issue and was otherwise entitled to present its defence in the way it did.

166. *Third*, it said that the Claimant did not act unreasonably, vexatiously or abusively in the conduct of the claim. The general rule set out in paragraph 25.4.5.1 does not require such conduct to be found. Rather it is an illustration of the general costs rule in CPR 44.2(2)(a), to the effect that usually the unsuccessful party will be ordered to pay the costs of the successful party. In any event I have found that grounds 4-9 were "unreasonably" advanced as they were totally without merit.

167. *Fourth*, it is said that LCC has not demonstrated any prejudice justifying it in recovering its costs. Such prejudice is not required to apply the general rule. In any event, LCC has incurred prejudice in the form of costs and the starting point is that it is entitled to recover them.

168. *Fifth*, it is argued that if costs are awarded in public law claims of this nature, individuals or organisations will be deterred from bringing claims that will achieve legitimate scrutiny of local authority conduct. The same could theoretically at least be said in relation to many Defendants to judicial review claims, and yet the Guide sets out the general rule applicable to such claims.

169. *Finally*, the Claimant argued that it had achieved significant success on the preliminary issues (namely the issues of sufficient interest, delay and alternative remedies addressed at [16]-[36] above). That is correct, but it ultimately failed to show that any of the grounds were arguable. It must, therefore, overall be regarded as the unsuccessful party in costs terms.

170. Accordingly, there are no "exceptional circumstances" such as might justify me in departing from the general rule in paragraph 25.4.5.1, as paragraph 25.4.5.3 makes clear would be required. I will order that the Claimant pay LCC's costs of preparing

its Acknowledgement of Service and Summary Grounds of Defence, summarily assessed in the sum of £2,412, within 14 days of the date of my order.

(ii): LCC's hearing costs

171. LCC initially sought an additional £5,412 from the Claimant in their costs of the attending the renewal hearing.

172. In the draft judgment I highlighted that (i) a defendant or other party who attends and successfully resists the grant of permission at a renewal hearing will not usually recover from the claimant the costs of attending the hearing: paragraph 25.4.5.2 of the Guide; and (ii) LCC had not, to date, advanced any "exceptional circumstances" such as might justify a departure from this rule, as paragraph 25.4.5.3 again indicates is required. I asked that any such submissions be advanced in sufficient time for the Claimant to respond, before the final judgment was handed down. LCC thereafter confirmed that the application was withdrawn.

173. Accordingly, the sole costs order I make is that reflected at [170] above.