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Neutral Citation Number: [2004] EWCA Civ 1689
Case No: C1/2004/0698

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Queen's Bench Division
The Administrative Court
Mr Justice Leveson
CO/6498/2003

Royal Courts of Justice
Strand, London, WC2A 2LL
13 December 2004

B e f o r e :

LORD JUSTICE WALLER
LORD JUSTICE CARNWATH
and
SIR WILLIAM ALDOUS

Between:

The Queen on the Application of Periasamy Mathialagan	**Appellant**
- and -	
(1) London Borough of Southwark	**Respondent**

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Philip Engelman (instructed by Anthony Ogunfeibo & Co) for the Appellant
Robert Bowker (instructed by Legal Dept of London Borough of Southwark) for the Respondents

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HTML VERSION OF JUDGMENT

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Lord Justice Waller :

Introduction

1. On 19th September 2003 the Camberwell Green Magistrates made Liability Orders against the appellant in respect of non-domestic rates in respect of two properties. The orders were made in the absence of the appellant or any representative. The representative who should have attended was a solicitor and incidentally the appellant's wife. In her statement dated 1st December 2003 (her first statement in these proceedings) she says that unfortunately she had put 16th September as the date of the hearing, and went to court on that date, where she was informed the court was not sitting because of a flood problem. In that statement she also says that on return to her office she phoned the court and spoke to a lady, who confirmed that the court was closed, that there was no one at the court who could give her a new date, and that a new hearing date would be sent in due course.

2. In that statement she also said that after she was notified of the decision taken on the 19th September she telephoned the Magistrates "to find out whether the decision can be appealed or set aside", and was advised there could be no appeal, and that "the court could only reopen the case if Southwark Council agrees".

3. It was on the basis of that statement, without any of the correspondence or Miss Wong's attendance note that we now have, that proceedings seeking judicial review were commenced in December 2003 claiming the following remedy:-

> "1) The decision of Camberwell Green Magistrates Court of 19 September 2003 be quashed;
>
> 2) To direct that the learned Magistrates to exercise his judicial discretion to re-open the matter;
>
> 3) An interim injunction Order that the first Defendant/Respondent refrain from taking any action to enforce the Liability Orders made on 19 September 2003 until the Judgment of this application is known.
>
> 4) To give directions that the landlords of these properties be added to the summonses when the matter is remitted back to the Magistrates Court.
>
> 5) The costs of this application to be paid by the first Defendant/Respondent."

4. The thrust of the application was to obtain an order requiring the magistrates to exercise their discretion to reopen the matter. Reliance was placed on *Liverpool CC v Pleroma* [2002] EWHC 2467 (Admin) a decision of Maurice Kay J by which he decided that, although there was no statutory power, magistrates did at common law have the jurisdiction to reopen proceedings in certain circumstances. In that case the circumstances were that through a mistake at the court, the magistrates had not appreciated that an adjournment had been requested. They in the result reopened the case and reheard it and Maurice Kay J held they had jurisdiction to do so.

Decisions of the Administrative Court

5. Beatson J refused the application on paper in the following terms:-

"**Permission is hereby refused.**

Observations: The mistake by your advisors, even though it deprived you of the opportunity to be heard before the Magistrates, does not arguably entitle you to relief on public law grounds since you have not been the victim of unfair procedure (See Al Mehdawi [1990] 1 AC 876). This was the third occasion on which one of the matters had come to court and the fourth occasion on which the other had come. Those representing you had been informed that if you failed to attend the court on 19th September 2003 the hearing would go ahead in your absence."

6. The application was renewed and on this occasion 12th March 2004 the appellant was represented by different counsel. Further evidence was introduced including a statement from Claudette Gayle pages 74 –76 in the bundle. Claudette Gayle's statement was slightly strangely worded asserting that she "presided over the NNDR court at Camberwell Magistrates' Court". It was assumed before Leveson J that she was the court clerk. Leveson J having recorded Beatson J's ruling and that the application was being put somewhat differently said this:-

> "6. Before me, Mr Adenekan renews the application for permission but on slightly different grounds, although he is correct to assert that both grounds, in fact, are said to engage Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely the right to a fair trial. He no longer focuses on the hearing in the absence of the applicant, but rather on the failure of the district judge to pay attention to the documents that had been placed before the court and to give a reasoned judgment. He relies on a note in Stone's Justices' Manual to the effect that it is a requirement of a fair trial in both criminal and civil matters that a court should give reasons for its judgment. The note goes on, 'The extent of the duty to give reasons may, however, vary according to the nature of the decision.'"

7. He then quoted a passage from the judgment of the Master of the Rolls in *English v Emery Reinbold and Strick Limited* [2002] WLR 385 and refused the application in these terms:-

> "8. What are the circumstances of this case? In this case, the applicant did not attend, and neither did his lawyers. No arguments were advanced which required the district judge to condescend to explanation to elaborate upon why he was rejecting that same contention proffered to him. The case was put before him as a liability to pay, and there is no reason for not accepting what Claudette Gayle said, namely that she advised the district judge that the case had come up before and gave a brief synopsis of the case. There is no further detail of what she said but no reason to doubt that she did that which she describes responsibly and appropriately.
>
> 9.The judge granted the orders. It would have been plain to anyone sitting in court that he granted the orders because the basis for the liability had been established by what had been said, and nothing had been contended to the contrary. In my judgment there is no breach of Article 6. This renewed application, although made attractively and with cogency, fails."

Proceedings in the Court of Appeal

8. Permission to appeal was sought by an application filed on 29th March 2004. That application sought permission to put in further evidence and sought an extension of time. The application was refused by Pill LJ on paper in the following terms:-

> "I agree with the reasoning and conclusion of Leveson J. The reasons were obvious. "

9. The application was renewed and when it came on before Pill and Neuberger LJJs it seemed that new points were being taken at the last minute, which led to the matter being adjourned. The adjourned hearing came on before Pill LJ on 2nd August 2004.

10. The aspect which concerned Pill LJ and on which he granted permission to appeal was a point which turned out to be factually inaccurate. He thought as a result of a letter sent by the London Borough of Southwark (LBS) that Claude Gayle had acted as the clerk of the court and that LBS had not been represented at the hearing on 19th September. He thought therefore that no attempt had been made by them to establish their case through sworn evidence. That it transpired was a total misunderstanding. A Statement from Claude Gayle now confirms (what correspondence had actually already made clear if it had been drawn to the attention of Pill LJ), that Claude Gayle represented LBS and gave sworn evidence. That actually disposed of any point which was of concern to Pill LJ.

11. On one view that could have led to the dismissal of this appeal, but Mr Engelman for the Appellant still wished to argue, first, that on the material before the District Judge he should have held that LBS had not established that the appellant did occupy either of the premises in respect of which proceedings were brought; and secondly that the District Judge should have given reasons for his decision. He also raised in new grounds of appeal expanded in his skeleton a third general point on fairness "inherent in the claimant not attending before the justices as a result of the error of his wife", and a fourth point as to whether the District Judge could be satisfied that adequate notice of the date of the adjourned hearing had been given relying on section 54 of the Magistrates Courts Act 1980.

Concerns raised by the court

12. At the hearing of the appeal we raised certain aspects that concerned us. We were concerned that we simply had no record of any order of the court or any documentation showing how proceedings were conducted. We questioned for example how LBS proved the vital ingredient "occupation", and what form of order made by the court LBS relied on once the order was made. The submissions on behalf of LBS seemed to demonstrate that LBS carried out what at first sight might be considered to be the court's functions, and it seemed the court (and indeed on this occasion LBS) had no record of any decision taken. No order appeared to have been drawn up by the court. We were told that for enforcement purposes LBS would rely on its own document recording that an order had been made.

13. We also raised a concern about the assertion of Miss Wong in her statement that the Magistrates (or, as we were told it actually was, the District Judge) had refused to consider reopening the case without the consent of LBS. The decision of Maurice Kay J in *Liverpool City Council v Pleroma,* as I have said, held that magistrates do have power to reopen hearings in certain circumstances. Although the circumstances of that case were ones where the court had made an error which caused the magistrates to act under a mistake, the judgment seemed to contemplate the jurisdiction existing where the mistake was due to circumstances where the court had not made an error.

14. When the application for judicial review was launched in this case originally, as I have already indicated, *Pleroma* was relied on. It was dealt with by LBS in their acknowledgement of service in these terms:-

> "3. It is submitted that the magistrate who granted the liability orders did so in the proper exercise of his powers and that once he did so he was *functus officio* and cannot thereafter set aside the orders based on new information that was not before the court at the time of making the orders.
>
> The Claimant has cited the case of *Liverpool City Council v Pleroma Distribution Ltd* as authority for the magistrate to reconsider the matter. It is submitted that the Pleroma case is not analogous to this claim. In Pleroma, there was an error on the court's part in not considering a written request for an adjournment that had been delivered to the court prior to the date of the hearing. In the present case the hearing was to take place on 19 September and the magistrate had already warned that the matter would be heard in the Claimant's absence if he did not come to court on the day. The fact that no-one arrived at court on the correct day for the Claimant is entirely attributable to the Claimant and/or his solicitor/wife. The court exercised its discretion properly on the day and has no authority to reverse its decision."

15. It was then dealt with by Beatson J in the terms I have indicated in reliance on *Al Mehdawi*[1990] 1 A C 876. *Al Mehdawi* held that a judgment obtained in a party's absence due entirely to the fault of that party or his advisor was not one obtained in breach of the rules of natural justice for the purpose of judicial review. It was not however concerned with the question as to whether the Magistrates had the power to reopen a case where the first trial has been conducted in the absence of a party.

16. Our anxiety was that it seemed arguable that the magistrates' court in the circumstances of this case, on the basis of *Pleroma*, had a jurisdiction to reopen the case, and on Miss Wong's evidence had either refused to consider whether they should do so or refused to consider whether to do so without the consent of LBS.

17. Once these concerns had been raised by the court with Mr Engelman, he was swift to reintroduce into his appeal the point that the decision by the magistrates, either to refuse to consider reopening the case or to refuse to do so without the consent of LBS, was unlawful. Mr Bowker to his credit and the credit of LBS, did not resist its reintroduction. But clearly it was a point on which he and they should have the opportunity to consider their position, and in particular the correctness of *Pleroma,* or the width of the jurisdiction to reopen if it existed. In the result we allowed time for further written submissions.

18. I say at once that it is unfortunate that this issue, which has emerged as the most significant in the case, was dropped by counsel then instructed for the hearing before Leveson J. Although LBS have fairly not objected to it being raised in this court, that has the result that we have not had the benefit of a considered judgment of the administrative court, nor of any submissions the magistrates court might have wished to make had they been notified that this point was to be argued in this court. In those circumstances it is necessary to exercise caution in expressing any final views on the wider procedural aspects

19. The adjournment has led to the putting together of the complete correspondence which took place between those representing the appellant and the Camberwell Magistrates Court and the production of an attendance note from Miss Wong. It is a matter of great regret that this documentation was not before the court previously, and it is a matter of some concern that Miss Wong put in her first statement the very short paragraph she did when the further documentation gives a very much clearer picture.

20. The adjournment has also enabled Mr Bowker to set out helpfully precisely how cases of this nature are dealt with before the Magistrates or the District Judge. It is possible to see that the absence of records for this particular occasion is even more surprising. The normal procedure is as follows:-

> i. The local authority is represented by the same person on each occasion. That person is not legally qualified but has been trained and has shadowed an experienced advocate. A typical hearing at the beginning of the financial year is concerned with up to 1,000 summonses. As the year progresses, and liability orders are made or debts discharged, the number of cases to be heard on each occasion diminishes significantly.
>
> ii. The documents described below are prepared in advance of each hearing and accompany the local authority representative to court.
>
> iii. There is the complaint which is computer-generated by the local authority, a copy of which is faxed to the court and returned by fax.
>
> iv. There is a declaration that the relevant summons has been posted and the proof of posting itself.
>
> v. There is then a very extensive court list which is prepared by the local authority and which is handed to the district judge or lay bench (each member of a lay bench receives a copy). A copy is also provided to the court clerk. The procedure is that the magistrate will make a manuscript endorsement on the right-hand of the list in respect of any case which does *not* result in a liability order being made that day or which carries any additional orders. For example, where a case is adjourned, the adjournment is endorsed or where a costs order which is less or more than the standard costs order of £100 is made, a specific endorsement is made.

vi. In a simple case, where a debtor does not attend, there has been no communication by the debtor and standard costs are awarded on the summons, the magistrate will make no endorsement. The right-hand of the list will remain blank.

vii. At the conclusion of the hearing, the bench members or district judge will return the list or lists to the local authority representative who will then telephone Liberata plc in order to confirm the outcome of each case which did *not* result in a standard liability order. For all cases where a standard liability order was made, a notification of liability will be automatically computer-generated and despatched by post that night (see pp. 35 and 36 of the appeal bundle). In all other cases, a letter will be drafted and sent to the debtor (see pp. 139 and 140 of the appeal bundle)

viii. The court list is then returned to the offices of Liberata plc and archived.

ix. The court list which is in the possession of the court clerk is endorsed in manuscript during the hearing by the clerk and is retained by the court and archived.

x. There is also an evidence list. This document summarises the dealings between the local authority and each debtor.

xi. There is further an extract from the valuation list which is a large compendium of all business rate valuations for properties in the borough. The extract will show the subject premises.

xii. There is a declaration of authority. In addition, the local authority representative is sworn at the commencement of each hearing, and there is a further form of authority which is recited in addition to the oath being given.

xiii. There is then signed by the district judge or magistrate at the conclusion of the hearing, a form of order in favour of LBS, but for the purpose of authorising a bailiff a liability order is drawn. This document is generated by the local authority's computer but is not sent to the debtor. It is only printed if a decision has been taken to instruct the bailiff and is used solely for the purpose of confirming to the bailiff that he has authority to act. It is printed off the local authority's computer system without any further reference to the court; the court stamp is automatically created by the local authority's software.

21. I would make two comments on the above:-

i) The above description makes it extremely surprising that the documents which would have been produced for, and marked up on, 19th September are not still available. But there has been no suggestion on behalf of the appellant that the procedure on that day would not have been the normal procedure, and Claude Gayle in her recent statement says that it was.

ii) I find it very surprising that the only document with a court stamp (under xiii) is not produced by the court, but is created automatically by the local authority's software, even though the local authority is a party to the proceedings. (The example before us adds, under the court stamp, the words "Justice of the Peace for the area aforesaid (or by order of the Court Clerk of the Court)". The intended significance of these words is not clear to me.) This document apparently is used only for the purpose of confirming to the bailiff that he has power to act. However, for that purpose the rules require no more than "the written authorisation of the authority" (Non-domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 r.14(5)). It seems both unnecessary, and wrong in principle, for it to be presented as though it had been stamped by the court. Nothing turns on this point in the present case, and we have not heard any submissions about it, but it seems to me an aspect of the procedure which merits reconsideration.

22. It is important to emphasise that so far as the proceedings against this appellant is concerned, there had been a number of hearings. They can be summarised in a schedule as to which there is no dispute taken from LBS' Acknowledgement.

231-232 Elephant &	**Castle Shopping Centre**	**1 St Georges Road**	**Road**
Hearing Date	Outcome	Outcome	Hearing Date
30.05.03	Adjourned to 18.07.03	Adjourned to 18.07.03	-
18.07.03	Adjourned to 29.08.03	Adjourned to 29.08.03	18.07.03
29.08.03	Adjourned to 19.09.03	Adjourned to 19.09.03	29.08.03
19.09.03	Liability Order granted by court	Liability Order granted by court	19.09.03

Miss Wong had been present at at least one of these hearings and only not present when she had the agreement of LBS to an adjournment. So far as the hearing on the 29th August 2003 was concerned, it was she who wrote a letter of the 26th August (136 in the bundle) in which she asked for a further adjournment, having regard to the fact that the appellant was not currently in the United Kingdom. I am not clear whether she actually attended the hearing on the 29th August 2003, but it is clear that she received the responses from LBS dated 1st September 2003 and 3rd September 2003 (pp.139 and 140 in the bundle) in which it was confirmed that the hearing had been adjourned on 29th August 2003 to 1.30 pm on Friday 19th September 2003. The advice was further that the magistrate would be going ahead in the appellant's absence and would not accept another letter suggesting an adjournment because the appellant was out of the country. Miss Wong, it seems, mis-diarised the hearing, she asserting that it was not absolutely clear to which date the matter had been adjourned. The suggestion that it was not clear must be rejected on the terms of the letters themselves.

23. I now turn to the issues which arise on the appeal. There is a distinction between points which affect the original decision of 19th September and those which go to the question whether there was a wrongful refusal to consider reopening the matter.

Issues relating to original decision

24. It is convenient and logical to deal with the points which attack the original decision of 19th September first. I can deal with Mr Engelman's first two points on the evidence before the court and the giving of reasons by posing the following questions. Should the District Judge, in the context of these liability hearings, on an occasion when after three or four hearings and a warning to the solicitor acting for the defendant, and when thus under the impression that the defendant or his representative has deliberately not turned up to argue his defence, take up time in court carefully scrutinising the correspondence to see whether the defendant has the defence which he has chosen not to come to court to make? Should the District Judge give reasons why he has rejected the case which the defendant has as far as the judge is concerned deliberately not appeared to present? In *English* the court of appeal considered the duty to give reasons in the context of the Human Rights Act. It concluded as follows:-

> "13. All of the Strasbourg decisions to which we have so far referred were considering judgments which determined the substantive dispute between the parties. The critical issue in each case was whether the form of the judgment in question was compatible with a fair trial. Where a judicial decision affects the substantive rights of the parties we consider that the Strasbourg jurisprudence requires that the decision should be reasoned. In contrast, there are some judicial decisions where fairness does not demand that the parties should be informed of the reasoning underlying them. Interlocutory decisions in the course of case management provide an obvious example. Furthermore, the Strasbourg Commission has recognised that there are some circumstances in which the reason for the decision will be implicit from the decision itself. In such circumstances article 6 will not be infringed if the reason for the decision is not expressly spelt out by the judicial tribunal: see *X v Federal Republic of Germany* 91081) 25 DR 240 and *Webb v United Kingdom* (1997) 24 EHRR CD 73."

25. Although magistrates may now in certain circumstances give reasons, it has always been recognised that there will be circumstances where they do not. Furthermore it must be remembered that even in *English* it was contemplated that if inadequacy of reasons was going to be relied on, one avenue open to the litigant complaining would be to go back to the court to obtain further reasons. In the

Magistrates context that procedure has a more structured basis because it is always open to a party to request the magistrates to state a case, and there is no reason to think that what Lord Bingham said in relation to a complaint on a failure to give reasons by a magistrate is not as applicable now as it was in *McKerry v Teesdale and Wear Valley Justices* [2001] EMLR 5:-

> "It is not usual for magistrates to give detailed reasons; nor is it usual for juries, who make very important decisions affecting human rights, to give any reasons at all. If an aggrieved party wishes to obtain more detailed reasons from a magistrates' court, then a request can be made to state a case, as was done here, and the justices have given their reasons at somewhat greater length."

26. It seems to me that in the kind of proceedings with which this case is concerned the appellant would not have any doubt that the District Judge had rejected his submission that on the facts he was not in occupation. With the documentation that was before the District Judge and in the way the proceedings were conducted it would be obvious that the District Judge would be rejecting such arguments as the appellant had put up but had not chosen to present. If further reasons were required the appropriate course would have been to request a case to be stated but that was never done. This deals also with the point made that there was no actual evidence of occupation. We now know the type of material which went before the District Judge. It is obvious that if a party has been made aware on a number of occasions as in this case that the Council are asserting that he was in occupation, and have been doing so by the production of detailed lists and information which they on each occasion placed before the District Judge, it lies ill in the mouth of the defendant to say now that there does not actually appear in the written statements the words "and the defendant was in occupation". It is well understood that "occupation" is the only basis on which the rates could be due and nobody could be under any misunderstanding that this was the evidence being given on behalf of the LBS.

27. There is finally, so far as the original decision is concerned, the point on notice of adjournment and Section 54 of the Magistrates' Courts Act 1980.This as it seems to me is a bad point. Section 54 of the Act provides as follows:-

> "**Adjournment**
>
> 1) A Magistrates Court may at any time, whether before or after beginning to hear a complaint, adjourn the hearing and may do so notwithstanding anything in this Act when composed of a single justice.
>
> 2) The court, may when adjourning either fix the time and place at which the hearing is to be resumed, or, unless it remands the defendant under s.55 below leave the time and place to be determined by the court; but the hearing shall not be resumed at that time and place unless the court is satisfied that the parties had had adequate notice thereof."

28. Reference is made in the skeleton put in by Mr Engleman to Regulation 15 of the Magistrates Court Rules 1981, SI 1981/552. That rule relates to the adjourning of a trial of "an information". The suggestion in the skeleton is that by para 678 of Halsbury's Laws of England those rules apply to the civil process as well as the criminal process. In my view, there is no support for that suggestion in para 678. Rule 15 is clearly applicable to a trial of information.

29. Section 54 itself provides the answer to this point in that all that the court must be satisfied of is that "the parties have had adequate notice" of the adjourned hearing. In this case clearly Miss Wong on behalf of the appellant did have notice of the adjourned hearing and indeed no suggestion of any inadequate notice was made until very late in the day.

Jurisdiction to re-open

30. I now turn to what seems to me the most difficult point on the appeal, and one on which my mind has wavered. Did the Magistrates have the power to reopen and thus should they have considered doing so? Did they refuse to do so, or refuse to do so unless LBS consented?

31. In Civil proceedings in the High Court or County Court there has for many years existed under the rules a power to rehear a case where the decision has been given in a party's absence. The present CPR 39.3, which provides the court with jurisdiction to proceed in the absence of a party, provides under sub-rule:-

> "(3) where a party does not attend and a court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
>
> (4) An application under para. (3) must be supported by evidence.
>
> (5) Where an application is made under para. . . (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –
>
> > (a) acted promptly when he found out that the court had exercised its power . . . to enter judgment or make an order against him,
> >
> > (b) had a good reason for not attending the trial; and
> >
> > (c) had a reasonable prospect of success at the trial."

32. For magistrates to have such a power would at first sight seem sensible. It would be open to the magistrates to consider why a party was not present, and if that was through some mistake, to weigh up the sort of mistake with which they were concerned, and where responsibility for the mistake lay. They could consider how swiftly the application for a rehearing had been made, and they could consider the merits of the case and then decide whether fairness required a rehearing.

33. But the position so far as magistrates are concerned is that their powers are statutory, although some limited common law powers have also been recognised. Under the Magistrates Courts Act 1980 the magistrates are given jurisdiction over both criminal and civil cases. The Act is divided into parts covering those different jurisdictions and then there are parts or sections which seem to cover both jurisdictions e.g. Section 97 (Summons to Witness) and Section 111 (Statement of Case by Magistrates Court). The Act only gives an express power to rehear cases when dealing with "an offender", or "where a person is convicted". Section 142(1) and (2) are in the following terms:-

> "**142. Power of magistrates' court to re-open cases to rectify mistakes etc.** (1) A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make. . . . (2) Where a person is convicted by a magistrates' court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by different justices, the court may so direct."

34. .There seems no doubt that those provisions are concerned with the magistrates' criminal jurisdiction and not their civil jurisdiction. That does, at first sight, seem surprising, but the starting point seems to me to be that Parliament has intentionally not given a general power to magistrates to reopen civil proceedings.

35. .Certain authorities have recognized a power to rehear cases at common law and without any statutory power being invoked. Those cases have on the whole been in the criminal context but there is no reason to think that their reasoning should not be applied in the civil context. Taking them in turn those cases dealt with the following circumstances:-

> 1. *Rex v Marsham ex parte Pethick Lawrence* [1912] KB 362: that was a case in which the magistrate failed to swear a witness and purported to convict the applicant in that case. The case was reheard on sworn evidence and Lord Alverstone CJ refused to quash the conviction. He held that the magistrate correctly treated the first hearing as "a nullity" because "it proceeded on

evidence which must have compelled this court to quash the conviction had an application for that purpose been made."

2. *Bannister v Clarke* [1920] JP 598: in this instance the Earl of Reading CJ held that the act of the justices in purporting to commit the appellant for trial on five informations was a nullity and thus did not deprive the justices of jurisdiction to hear those informations summarily at a subsequent date, following *Rex v Marsham* (supra).

3. *Rex v Norfolk Justices and Anor* ex parte *DPP* [1950] KB 558: in this instance the justices, having convicted a defendant, purported to commit him to quarter sessions for sentence but the case was not one to which the sub-section applied. It was held that the committal was a nullity and thus that the justices were entitled to proceed to sentence and an order was made compelling them to do so.

4. *Regina v West* [1964] QB 15: in this case it was held that the action of the justices, in purporting to hear and determine an information of accessory after the fact of a larceny, was a nullity; and thus the defendant's acquittal was also a nullity. Thus it was held the justices had not exhausted their jurisdiction and had not barred themselves from acting in their other and quite distinct capacity of examining magistrates. Thus it was held the committal of the defendant to stand trial at quarter sessions was a valid committal. The court relied on *Rex v Marsham* and *Bannister v Clarke*.

36. .These were cases examined by Maurice Kay J in his judgment in *Pleroma. Pleroma* was concerned with the civil jurisdiction of magistrates, indeed their jurisdiction to make liability orders against rate payers. Having reviewed the above cases he said this:-

"10. What is the principle to be derived from the authorities? In my judgment it is that when a Magistrates Court purports to do something which is unlawful and in excess of its jurisdiction it is competent to correct its error. To convict someone on unsworn and unaffirmed evidence or to commit a person for trial for an offence in respect of which there is no power to commit or try a person summarily for an offence only viable on indictment clearly falls into that category. The present case, it seems to me, is not so clear. The Justices had the competence either to grant or to refuse an adjournment. It was a matter of discretion, to be exercised judicially. However, the reality is that on 21 December they did not purport to exercise that discretion one way or the other in respect of the current demand because they did not know that Pleroma was seeking an adjournment of it. In such a situation does it follow that they exhausted their jurisdiction upon the pronouncement of the liability order and were powerless to reopen the matter once the true position was made known to them? In my judgment it does not. Let us assume that a liability order had been made in the absence of a ratepayer and his representative because they had been involved in a traffic accident on the way to court, or that an extremely cogent written request for an adjournment had been sent to the court but had been misfiled in the court office, and in such a case the facts were only brought to the attention of the court later in the day or on the following day. It would be unfortunate and contrary to common sense and fairness if the magistrates were constrained by law to stand on their earlier decision, made in ignorance of the facts, and to have to direct the disadvantaged ratepayer to the Administrative Court and an application for judicial review. Moreover, there is no logical reason why what common sense and fairness justice require within an hour or a day should be subject to a temporal limit.

11. The Justices in the present case only became aware of the written request for an adjournment at a later date. They were understandably concerned that, having been unaware of the letter of 17 December, they had not considered an application which had been made and had not exercised a discretion to grant or to refuse an adjournment which had been requested in a customary and economical way. In my judgment it does not need a

statutory provision to enable them to put right such a perceived omission. Although they had not purported to do something inherently unlawful of the type illustrated by the authorities to which I have referred, they were entitled to reopen the matter so as to address a discretion which, at the time, they had not realised was the subject of a specific request. In my judgment they did not exceed their jurisdiction or act unlawfully when they proceeded to set aside the liability order and the question posed by the case stated must be answered in favour of Pleroma."

37. I would make two comments on the above cases. First, the most that can be drawn from them is that, where there has been a clear mistake by the court itself going to the basis of its jurisdiction, or the fairness of the proceedings, where the resulting decision would clearly be quashed on judicial review, it may be open to the court to correct the mistake of its own motion. On the basis of the limited argument we have heard, I would not wish to question those cases, but equally I would not extend them, I would only observe that their legal basis is not free from doubt. Some of the language reflects the assumption that a decision made without jurisdiction can be treated for all purposes as a "nullity", or in effect waste-paper. That is a questionable assumption in the modern law. It is true, as Mr Engelman rightly observes, that since *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, distinctions between errors of law within and without jurisdiction have been largely eroded. However, by the same token, the modern authorities emphasise the need in all such cases for an order of a competent court setting aside the decision (see Wade, Administrative Law 9th Ed p 300-2). Certainly, it would be wrong for magistrates to regard themselves as having power to set aside their own decisions, merely because of the existence of grounds which might support an application for judicial review.

    Secondly, it seems surprising, in view of the many thousands of cases which are dealt with each year before the magistrates by bulk procedures such as that described in this case, that this problem has reached the higher courts so rarely. This may be because, where the court or the authority has made an obvious mistake, or where the defendant has failed to attend through no fault of his own (such as in the traffic accident example given in *Pleroma*), all parties sensibly agree to the case being reopened. In a civil case, I can see no legal difficulty with such a course, and from the authority's point of view it avoids the expense and delay of judicial review. In any event, I am quite satisfied that those cases do not assist the defendant in this case.

38. .The difficulty for the appellant in the instant case is that *Al Mehdawi* holds quite clearly that a failure on the part of a party to be present due to the negligence of the party's advisor gives no ground for quashing the decision. To hold therefore that the District Judge in this case still had jurisdiction to reopen the case after learning of Miss Wong's error would be to hold there was such a power even where the first decision was valid and not susceptible of being quashed on judicial review. It would be to recognise some general power to reopen hearings which the statute has as it would seem to me deliberately not provided.

39. I would have thought, respectfully, that consideration should be given to the question whether s.142 should not be expanded so as to provide jurisdiction to magistrates in the civil context. It is difficult to justify a distinction between the power the high court or county court in civil proceedings have, as provided by CPR 39.3, and the absence of such jurisdiction so far as magistrates or district judges are concerned. However, in my view it is not open to this court to hold that some such general power exists at common law. So far as this case is concerned what may at first sight seem an injustice would only be so if the appellant's case on the merits were strong. As to that I understand him to have lost on the issue in relation to one of the properties in proceedings between himself and the landlord so far. That may be some indication as to the true merits of his position. In any event, if he was right in law, any injustice could have been cured by a request to state a case, but that was not done. Insofar as Miss Wong might be suggesting that she was advised by the magistrates or on their behalf that there was no appeal by way of case stated, her attendance note does not support it. She was correctly advised that there was no prescribed form of appeal and as a solicitor she must be presumed to know of the case stated route. The appellant's real remedy, if he can demonstrate a case that he was not in occupation of either of the relevant premises, would appear to lie against the lawyers who failed him, although since they would have their own claim against the appellant's wife that might not be a course he would wish to pursue.

40. In any event, for the reasons I have endeavoured to give, I would dismiss this appeal.

Lord Justice Carnwath: I agree

Sir William Aldous I also agree

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