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[2008] EWHC 125 (Admin)

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

Royal Courts of Justice

Strand

London WC2A 2LL

Tuesday, 15th January 2008

B e f o r e:

ANDREW NICOL QC

- - - - - - - - - -

Between:

THE QUEEN ON THE APPLICATION OF LONDON BOROUGH OF NEWHAM

Claimant

v

STRATFORD MAGISTRATES COURT

Defendant

SELWYN DUBLIN

Interested Party

- - - - - - - - - -

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Mrs S Robson (instructed by Barclay Taylor) appeared on behalf of the **Claimant**

The **Defendant** and the **Interested Party** did not attend and were not represented

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J U D G M E N T

1. ANDREW NICOL QC: This is an application for judicial review by the London Borough of Newham against the **Stratford** Magistrates' Court. The matter was considered on the papers on 14th November 2007 by Silber J, who ordered that there should be a rolled up hearing for

Back to start

2. The defendant, the **Stratford** Magistrates' Court, has not been represented before me this morning, but I have had the advantage of the helpful written submissions provided by District Judge Gott who heard the matters in question.

3. The decision of District Judge Gott that Newham (to whom I shall refer as "the Council") seeks to challenge was a decision on 30th April 2007 to set aside three liability orders made previously by the court against Mr Selwyn Dublin. Mr Dublin was given notice of these proceedings but he has not been present or represented today. The liability orders in question were as follows: on 31st October 2001 in the sum of £885.74; on 24th July 2002 in the sum of £630.41; and on 19th June 2003 in the sum of £710.52. All three of the liability orders concerned non-payment of Council Tax due to the Council.

4. The application to set aside the liability orders was made on 27th November 2006 by solicitors on behalf of Mr Dublin. In their letter to the Magistrates' Court they said that their client had advised them that he did not receive any of the summonses preceding the liability orders. They said he had no knowledge of the orders and only became aware of them very recently as part of bankruptcy proceedings instigated by the local authority based upon the underlying liability orders. In response to that letter the court wrote to the parties on 4th December 2006 fixing a hearing date for 2nd January 2007. The letter added:

"Bearing in mind the complex nature of these applications, I would request you provide a skeleton argument (for the District Judge at the hearing) outlining the merits of your argument, addressing the criteria set out in case law."

The letter then referred to three cases to which I will in turn refer later in this judgment.

5. The Council wrote to the court asking for an adjournment of the hearing set for 2nd January. That does not appear to have been granted because a hearing did indeed take place on that date. District judge Gott's written submissions record as follows:

"Mr Dublin was not represented and appeared in person. The local authority was represented but not by counsel. At the hearing neither party could give me any coherent explanation of precisely what the orders were that formed the basis of the application to set aside. The letter from Sharpes Solicitors [those are the solicitors for Mr Dublin] referred to business rates liability orders but clearly that was not the case. It was suggested to me that these were all Council Tax liability orders. Given the dates and amounts I thought that actually this was unlikely. No-one was able to provide copies of the orders. I made some robust criticism of Mr Dublin and his solicitors and adjourned proceedings *sine die* indicating that the court would not restore the application until it could be clarified as to what was the subject matter of the application."

6. The application then came back before the Magistrates' Court on 30th April 2007. Again, District Judge Gott has this to say:

"By this time it had been ascertained that of the six orders referred to in the solicitor's letter of 27th November 2006 three were not in fact orders of this court at all or indeed of any court but claims made by the local authority against Mr Dublin in respect of alleged overpayment of housing benefit. I also ascertained that the confusion had arisen in large part because in the bankruptcy proceedings in

the High Court the local authority had indeed asserted that these were all orders made by **Stratford** Magistrates' Court. This in fact is a central issue in this case and germane to a proper understanding of it."

7. The hearing on 30th April 2007 seems to have taken the local authority by surprise and the court made a telephone call to the authority on that date, as a result of which a representative (though not a legal representative) immediately attended. The local authority has said, and Mrs Robson on behalf of the Council today repeats, that it had not received notification of the hearing until that telephone call was made. However, District Judge Gott's written submissions continue:

"I was able to ascertain that they [that, is the Council] had been notified of the hearing date at the same time as Mr Dublin."

The local authority, he also records, asked for an adjournment which he refused to grant. He said:

"The matter had been before the court on a previous occasion and the issues were relatively straightforward. I could see no valid reason not to proceed."

8. In my judgment, I ought not to go behind the comments of District Judge Gott that he had established that the Council had been notified of the hearing date at the same time as Mr Dublin. Indeed, Mrs Robson confirmed before me this morning that the refusal to adjourn the matter was not a discrete decision which the Council sought to challenge by way of judicial review.

9. It is necessary for me at this stage to say something about the power of a Magistrates' Court to set aside orders which have previously been made in civil proceedings before the court. The Magistrates' Court Act 1980, section 142, does provide a power for a Magistrates' Court to reopen cases to rectify mistakes. However, it is plain from the wording of that section, and has been so confirmed in later authorities, that this is a power confined to the decisions of Magistrates' Courts in criminal cases. The application by the Council for a liability order in respect of non-payment of Council Tax is a civil matter. Accordingly, section 142 was not a power that was available to District Judge Gott. It is well known that the High Court and the County Court have various powers to set aside orders made as a result of a mistake. Those powers are set out in the Civil Procedure Rules. Those rules, however, do not apply to the Magistrates' Court when exercising its civil jurisdiction, so those provisions were of no assistance to Mr Dublin or to Judge Gott.

10. There is, however, authority in the three cases mentioned in the Magistrates' Court's letter to the parties of December 2006 that Magistrates have a common law power of a certain extent to set aside previous decisions in their civil jurisdiction. In **Liverpool City Council v Pleroma Distribution Limited** [2002] EWHC 2467 Admin, Maurice Kay J came to the conclusion that such a power existed even in the Magistrates' civil jurisdiction, notwithstanding that all the previous cases that he referred to in his judgment concerned such a power relating to Magistrates' criminal jurisdiction. Maurice Kay J said this at paragraph 10 and following of his judgment:

"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 triable 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 21st 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 second of the trilogy of cases is **R (on the application of Brighton and Hove City Council) v Brighton and Hove Justices, Michael Handon** [2004] EWHC 1800 Admin, a judgment of Stanley Burnton J. He referred to the **Pleroma** decision and then at paragraph 30 of his judgment said this:

"It is important to read that passage in context. In **Pleroma** there had been a substantial procedural defect: the defendant's request for an adjournment had not been considered by the Justices, although it was known to the court clerk: see the account of the facts at paragraph 3 of the judgment. The application to the Justices for them to set aside their order was made promptly: despite the Christmas and New Year break, their Principal Legal Advisor had responded to it by 4th January 2002. Thus the reference in the last sentence of paragraph 10 of the judgment to the absence of a temporal limit cannot be read as a licence for delay.

(31) It is important to take into account that the jurisdiction which Maurice Kay J held to exist cannot be exercised simply because the defendant disputes his liability to pay the NNDR [that appears to be a reference to the National Non-Domestic Rates] in question. That there is a genuine and arguable dispute as to that liability is a necessary condition for a decision by Justices to set aside a liability order, but it is not a sufficient condition. The power of a Magistrates' Court to set aside a liability order it has made is an exceptional one, to be exercised cautiously. In my judgment, in general a Magistrates' Court should not set aside a liability order unless it is satisfied, in addition to there being a genuine and arguable dispute as to the defendant's liability for the rates in question, that:

(a) the order was made as a result of a substantial procedural error, defect or mishap; and

(b) the application to the Justices for the order to be set aside is made promptly after the defendant learns that it has been made or has notice that an order may have been made.

(32) The authority for condition (a) is paragraph 10 of the judgment of Maurice Kay J in **Pleroma** . In most cases, it must be shown that the liability order was unlawful or made in excess of jurisdiction or in ignorance of a significant fact concerning their procedure (such as an application for an adjournment) of which the Justices should have been aware. However, the procedural mishap may not be the fault of the court or of the local authority: Maurice Kay J gave the example of a traffic accident that, unknown to the Magistrates' Court, prevents the defendant from attending at the hearing. But a failure of the defendant to attend when he knows that there will be a hearing will not of itself satisfy this requirement. Thus a failure of the defendant to attend the hearing because he assumes, without good reason, that the local authority will not seek an order, or because he is absent abroad, will not of itself satisfy this requirement. A defendant who will be unable to attend a hearing because of his absence abroad may request an adjournment in writing, or instruct a solicitor to appear on his behalf; but if he does nothing, he is not entitled to an order of the Magistrates to set aside a liability order made against him.

(33) Requirement (b) follows as a matter of principle, applicable to all challenges to administrative and judicial decisions. If promptness were unnecessary, a defendant could circumvent the requirements of CPR Part 54.5 by applying to the Justices for relief instead of to the Administrative Court. In this context, where the defendant is not required to do more than to write a letter stating why he seeks to reopen the decision to make a liability order, promptness normally requires action within days or at most a very few weeks, not months, and certainly not as much as a year. It is to be noted that the jurisdiction to reopen a liability order will be unavailable to a defendant who delays in circumstances in which he has notice that an order may have been made, although he has not received a copy or been informed that an order has been made. A defendant who knows of the issue of a summons, and therefore should appreciate that there may have been an order made on the return day, but makes no enquiry as to whether an order has been made against him, will not in general be entitled to set aside the order simply because some time later the local authority takes further steps to enforce the order."

12. The third of the three cases to which I have referred is a decision of the Court of Appeal, **R (on the application of Periasamy Mathialagan) v London Borough of Southwark** [2004] EWCA Civ 1689. Although this judgment of the Court of Appeal was given on 13th December 2004, some six months after the **Brighton and Hove** case, **Brighton and Hove** and the judgment of Stanley Burnton J does not appear to be referred to in it. In this case the court reviewed the **Pleroma** authority and, as to that, at paragraph 37 Waller LJ, giving his judgment with which the other two members of the court agreed, said this:

"I would make two comments on the above cases. First, the most that can be drawn from them is that, where there has been made 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 . . .

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."

Then at paragraph 39 Waller LJ said:

"I would have thought, respectfully, that consideration should be given to the question whether section 142 [Magistrates' Court Act 1980] 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."

13. I conclude from those three cases that although the Court of Appeal has expressed some doubts as to the matter, I should proceed on the three criteria set out by Stanley Burnton J in the **Brighton and Hove Justices** case: namely that before an order made by a Magistrates' Court in its civil jurisdiction can be set aside, there must be, first, a genuine and arguable dispute as to the defendant's liability to the order in question; second, that the order must be made as a result of a substantial procedural error, defect or mishap; and third, the application to the Justices for the order to be set aside is made promptly after a defendant learns that it has been made or has notice that an order may have been made.

14. I return to the decision of District Judge Gott in the present case on 30th April 2007. There was some confusion on behalf of the Council as to whether on that date the District Judge finally set aside the liability orders or whether he only indicated a provisional view that that was what should happen and that the matter would be considered again -- that is whether or not the liability orders should be set aside would be considered again -- at a future hearing. The District Judge's written submissions, however, make it clear that he considered that he had taken a final view at the hearing on 30th April. He says this:

"I considered the matter in the following way. First, could I be satisfied that there was a genuine and arguable dispute as to the liability for Council Tax. Mr Dublin's case was that he was not resident at the address during the relevant period. In support of this he relied on the local authority's own document, this being a report commissioned by them setting out a visit to the property made by a fraud investigator on 8th March 2001. The purpose of this visit was to investigate a possible fraudulent claim for benefit by Mr Dublin in that he was claiming housing benefit in respect of 1A St Andrews [that is the address for which Council Tax was being claimed] whilst not living there. This report concluded *inter alia* that Mr Dublin had not resided at the address since September 2000. If

that were true then at least a substantial part of the local authority's claim would clearly not be sustainable. It was therefore obvious that Mr Dublin had a genuine and arguable dispute. I annex a copy of this report hereto as exhibit HG2. Next I had to decide whether there had been a substantial procedural error or failure. Mr Dublin asserted that he had not received notice of the application for liability orders made by the local authority. I heard submissions from both parties on this issue and I was satisfied that there was a substantial probability that Mr Dublin was correct in what he said. Finally I considered the question of delay. This was Mr Dublin's weakest point since he had not in fact acted very promptly. However, the apparent strength of his argument on liability persuaded me that it was still in the interests of justice to set aside the liability orders which is what I did. I pointed out to the local authority that they would not be substantially prejudiced by this as they would be able to bring all the evidence they claimed to have as to Mr Dublin's occupancy of the premises at the liability order hearing which was then fixed for 22nd June."

15. On behalf of the Council, Mrs Robson submits that the decision of the District Judge should be quashed, in part because there had been no consideration of the relevant case law at the April hearing. It does appear from the materials before me that there was no argument at that stage, perhaps unsurprisingly since Mr Dublin was present in person and the Council was not legally represented on that occasion. Nonetheless, it is clear from the District Judge's written response to the application for judicial review, and indeed been apparent from the court's letter of December 2006, that the court and the District Judge were aware of the three relevant authorities to which I have referred earlier in this judgment.

16. The second argument advanced by Mrs Robson is that the District Judge could not have found that there was a substantial procedural error, defect or mishap of a kind referred to in the **Brighton and Hove** case. It is argued that what the District Judge found was that Mr Dublin had not received the summonses preceding the liability orders, and that non-receipt of a notice of a hearing may be unfortunate but it is not a substantial procedural error.

17. I agree that mere non-receipt would not by itself necessarily amount to a ground for judicial review. There are provisions in the regulations concerning Council Tax liability order hearings, as one might expect -- indeed it would be surprising if there were not -- to allow for proof of service of a summons in various ways and at least presumptively a rule that such summons should be assumed to have been received. The difficulty though is that the **Pleroma** case referred, by way of example, to a person who was unable to attend the hearing at which the order in question was made because of a traffic accident. Non-attendance at a hearing due to a traffic accident would not give grounds for quashing the subsequent decision on judicial review, and yet nonetheless, in both the **Brighton and Hove** case and the Court of Appeal decision, subsequent courts have appeared to accept that such a mishap could still be sufficient to satisfy this second criterion. If non-attendance at a hearing because of a traffic accident would be sufficient to satisfy that criterion, I find it difficult to see why non-receipt of the notice of the hearing might not also qualify.

18. The third criterion, though, raises more difficult issues. I have earlier given the dates of the liability orders. The first of them was made in October 2001. The last of them was made in June 2003. The interval, therefore, between the making of those orders and the application to have the orders set aside ranged from over five years to approximately two and a half years.

That was very, very substantially longer than the type of period which Stanley Burnton J had in mind in the **Brighton and Hove** case. He expressed that criterion as being that the applicant must apply for the order to be set aside promptly "after the defendant learns that it has been made or has notice that an order may have been made".

19. In this case the solicitor's letter of November 2006 had said that the applicant had only recently learned of the liability orders as a result of the bankruptcy proceedings which had been brought against him by the Council. The District Judge clearly had some knowledge of the bankruptcy proceedings since in a passage which I previously quoted he alludes to them. However, it is not clear how long before the letter of November 2006 the applicant had first learned of the liability orders.

20. In my judgment, this was an important matter which the District Judge ought to have investigated. There is, as Mrs Robson emphasised, an important principle that runs independently of the defendant's knowledge of orders, namely the finality of litigation. In this case, as far as the Council was concerned, the liability orders, concluding the matter in the Magistrates' Court, had come to an end between five years and two and a half years earlier. It would have been an exceptional course for such old orders to be set aside. If it was the defendant's case (by defendant I mean Mr Dublin's case) that they should be set aside notwithstanding their age because he had only very recently learnt of their existence, it was, in my judgment, incumbent upon the court to investigate exactly how long that period of knowledge had been. Obviously, with orders that were so old the obligation on the defendant, if he wanted to persuade the court successfully to set them aside, was to move particularly swiftly.

21. There is another aspect to this third criterion which again, in my judgment, the District Judge did not adequately investigate. As I have said in my reading from his written submissions he commented, and again I quote:

"I pointed out to the local authority that they would not be substantially prejudiced by [the setting aside of the liability orders] as they would be able to bring all the evidence they claimed to have as to Mr Dublin's occupancy of the premises at the liability order hearing which was then fixed for 22nd June."

22. On 22nd June there was indeed a further hearing, but, in my judgment, it was not open to the District Judge to assume, without investigation, that the local authority would still have all the evidence relevant to the questions that were going to be investigated at that hearing, notwithstanding the passage of such long periods of time. It is common knowledge that any organisation can only keep its records for a limited period. It is common knowledge that witnesses' recollections of events are going to fade with time. It may be in this case that the opportunity for live evidence would in any case have been limited. I do not know. I do not know exactly what are the periods within which the local authority would clear the decks, as it were, of old materials and old evidence in their possession. But these were important matters which called for investigation before the District Judge could properly conclude that the local authority would not be prejudiced by the setting aside of the liability orders and would not be

prejudiced at the hearing on the original summonses that he fixed for June 2007.

23. The local authority, as I have said, was under something of a misapprehension as to what the District Judge had decided. It thought, and it came to the hearing in June apparently under the impression, that it was going to have the opportunity to present further argument as to why the orders should not have been set aside. When that misunderstanding was corrected a hearing did take place. The District Judge had also annexed the note of his reasons for finding that the liability orders would not then be granted. He notes that the local authority had not produced any positive evidence that Mr Dublin was living at the address prior to March 2004, except that Mr Dublin did not inform him that he had moved. He also notes that, unsuprisingly, there have been inconsistencies in trying to look back at what occurred six years ago. The possible difficulties which the local authority might have had in assembling or recovering, or being unable to recover, its records of evidence for that hearing were precisely the types of matter which the District Judge ought to have investigated more fully before concluding that they would have suffered no prejudice by the setting aside of the liability orders.

24. In short, I conclude that it was not properly open to the District Judge to be satisfied that that third criterion in **Brighton and Hove** was fulfilled. I bear in mind as well the comments that Stanley Burnton J made in the **Brighton and Hove** case about the exceptional character of the common law jurisdiction to set aside liability orders that have been previously made, even where Justices, Magistrates or District Judges consider that it would be in the interests of justice to do so. Plainly, District Judge Gott did think that it was in the interests of justice for the liability orders to be set aside. But as Stanley Burnton J said at paragraph 37 of his judgment, every court hopes that every decision it makes is reasonable and in the interests of justice. But that formulation is too broad and vague to give a reviewing court confidence that the necessary considerations were taken into account. So even though the court is moved by a conclusion that it would be in the interests of justice to set aside the liability orders, that does not by any means conclude the question as to whether a previous decision of the court, particularly one made so long ago in the past, should be set aside.

25. In conclusion, therefore, I determine that the decision of 30th April to set aside the liability orders should itself be quashed. I will hear counsel as to what further orders I should make.

26. Mrs Robson, in particular I will give you a chance to address me on the question of whether this should be remitted. It is fair to say to you that on the basis that I have reached my decision, which was a failure properly to investigate the matter by District Judge Gott, it does seem to me to follow that it ought to go back to him, notwithstanding what you asked for in the claim form that the matter should not.

27. MRS ROBSON: My Lord, yes. If my Lord is minded to remit it, that is to say the court below must reconsider whether Mr Dublin made the application promptly, we know that Mr Dublin had actual knowledge when he was personally served with the statutory demands.

28. ANDREW NICOL QC: Well, Mrs Robson, that is a matter that you are going to have to argue out before the Magistrates' Court. It is not a basis for me to refuse to remit.

29. MRS ROBSON: The point being that the only purpose of remitting it would be for the District

Judge to consider whether Mr Dublin had the knowledge.

30. ANDREW NICOL QC: First of all, let us take it in stages. Is there anything that you want to say to me as to why it should not be remitted at all?

31. MRS ROBSON: If one is going to remit it, that is to say that it passed the test, if you like. If my Lord is finding that the time test has not been met then there is no purpose.

32. ANDREW NICOL QC: Where is the evidence before me that that is the case?

33. MRS ROBSON: The evidence before my Lord is in the witness statement of Robert Taylor where he states that Mr Dublin had actual knowledge because he was personally served with a statutory demand. It is paragraph 19. I do have the bankruptcy file here with the witness statement confirming the service. There seems little point in sending it back when my Lord is happy that the test is a few days, or at most a few weeks, when it was clearly 28 months. Something else I would be asking if it were remitted is whether it would be remitted to the same judge.

34. ANDREW NICOL QC: Do you have a copy of the evidence of service?

35. MRS ROBSON: I have a witness statement from Navinder Gordon. The matter went before the bankruptcy court on about twelve occasions.

36. ANDREW NICOL QC: I am loath to make a decision on this when this is a piece of evidence that will not have been served on Mr Dublin, when his solicitors have written to the Magistrates' Court in November 2006 to say that their client was only recently aware of it. You may get back to the Magistrates' Court and find that there is or can be no answer to your affidavit or witness statement of service, but I am loath to deprive Mr Dublin of the opportunity to challenge or test that evidence.

37. MRS ROBSON: It says in Sharpes' own letter that he was aware of it from the --

38. ANDREW NICOL QC: Well, let us go back to that letter.

39. MRS ROBSON: I do have all the attendance notes from the bankruptcy hearings. I know that one of the Registrars in this court did actually say "I am surprised you have not applied to set aside the liability order". That was made in the summer before the actual --

40. ANDREW NICOL QC: Well, I am afraid, Mrs Robson, you are going to have to put all that evidence before the Magistrates' Court. I have drawn attention to what Stanley Burnton J said in the **Brighton and Hove** case. It would be very surprising if the court found that that third criterion was satisfied if the evidence that you are talking about is found to be true.

41. MRS ROBSON: Will my Lord be giving any directions as to how the court should consider the case law, or is it simply being limited on the delay?

42. ANDREW NICOL QC: It is being remitted for the application for the liability orders to be set

aside, so my focus has been on the satisfaction of the third criterion but I am not going to confine the remittal to that. You mentioned just now that you wanted an order that it should be heard by a different judge. Why should I do that?

43. MRS ROBSON: No, I was simply asking whether it would be heard by the same judge again or whether it would be heard by a different judge. I do not know if my Lord has any thoughts on that.

44. ANDREW NICOL QC: What do you want to submit to me?

45. MRS ROBSON: I have some concerns that District Judge Gott behaved as he did because he felt that the court had been misled, but I also think that it may be useful for District Judge Gott to reconsider my Lord's findings himself. I am open to it either way.

46. ANDREW NICOL QC: When one is talking about certain lay Justices, sometimes you will send it back to a differently constituted committee, but with somebody who is a full-time professional judge it is a bit unusual to do that. I certainly would not direct that it had to be considered by District Judge Gott, but it would be a matter for the **Stratford** Magistrates' Court to decide who it should be placed in front of.

47. MRS ROBSON: Another matter we would ask the court to consider today is the matter of costs. I do not know if my Lord has our costs schedule. Normally costs would follow the event.

48. ANDREW NICOL QC: Who are you asking me to make an order of costs against?

49. MRS ROBSON: There are very special rules about whether to makes costs against the Magistrates. I have an extract from Halsbury which I would like to draw the court's attention to.

50. ANDREW NICOL QC: Which is the part you want me to look at?

51. MRS ROBSON: This deals specifically with costs of judicial review and there is a reference to paragraph 16 where it deals specifically with awarding costs against Magistrates.

52. ANDREW NICOL QC: Paragraph 16 or footnote 16?

53. MRS ROBSON: Sorry, footnote 16. So the general rule is that costs would follow the event, especially one where the decision has been quashed. It is a discretionary matter. The court should have regard to how the matter has been handled.

54. ANDREW NICOL QC: They have not behaved unreasonably, have they?

55. MRS ROBSON: I think that the judge was very unreasonable in that he allowed no discretionary submissions on case law and that he said that there would be no prejudice to the local authority and yet clearly there was. They had to then come back years after the event. The second provision says that where Justices do not appear or resist the claim that costs will not generally be awarded against them unless a flagrant incident has occurred. Then dropping

down three more paragraphs:

"A court will, however, make an order for costs against such a party if that party has materially contributed to the error in the court below."

Then dropping down two more paragraphs:

"Costs are, however, awarded against Justices or similar tribunals only when they have done something which calls for strong disapproval by the court."

Then after that reference:

" . . . the court will not grant costs against Justices or similar tribunals merely because they have made a mistake in law, but only if the tribunal has acted improperly, that is to say perversely or with some disregard of the elementary principles which every court ought to obey."

My Lord's decision today is saying that the very principle of finality of decisions, that is an important principle over which they rode roughshod. It quotes a case where a court have awarded costs against a tribunal which had refused to follow decisions of the Divisional Court which were cited to it. We say this court is even worse than that in that it refused to allow any submissions to be made on it when saying it would not be prejudiced.

56. ANDREW NICOL QC: Thank you for those submissions. As you rightly say, the circumstances in which the Administrative Court awards costs against Justices are very limited. In my judgment, none of those exceptional circumstances apply to the present case. I have found that District Judge Gott erred in law, but that is a very long way away from saying that the situation in the present case comes within the exceptional circumstance where costs are awarded against the Magistrates' Court. Is there anything else?

57. MRS ROBSON: No, my Lord.

58. ANDREW NICOL QC: Thank you very much.

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