R (on the application of Reverend Nicolson) v Tottenham Magistrates
[2015] EWHC 1252 (Admin)
Queen's Bench Division, Administrative Court (London)
Andrews J
06 May 2015
Helen Mountfield QC and Eloise Le Santo (instructed by The Bar Pro Bono Unit) for the Claimant

Josephine Henderson (instructed by Legal Services Department, London Borough of Haringey) for the Interested Party

The Defendant did not appear and was unrepresented.

Hearing date: 30 April 2015

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Approved Judgment

Mrs Justice Andrews:

1. This case raises issues of significant public interest to both council tax payers and local authorities relating to the costs sought by local authorities with regard to the enforcement of unpaid council tax.

2. Regulation 34(7) of the Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992 No.613) ("the Regulations") provides that when granting a liability order the court shall make an order reflecting the aggregate of the outstanding council tax and "*a sum of an amount equal to the costs reasonably incurred by the applicant in obtaining the order.*" In England there is no legislative cap on those costs; in Wales there is a proviso that the costs "*including those of instituting the application under paragraph (2), are not to exceed the prescribed amount of £70.*"

3. The issue at the heart of this claim is what is required, prior to making an order for the costs claimed, to satisfy the court that the requirements of the Regulation are met, i.e. that those costs have been reasonably incurred by the local authority in obtaining the liability order.

4. The claim began as a challenge by the Claimant, then acting in person, to the refusal by Tottenham Magistrates on 20 December 2013 to state a case in respect of an order for costs in the sum of £125 made against him on 2 August 2013 in favour of the London Borough of Haringey ("the Council") under Regulation 34(7). However, at the oral hearing of the permission application, in line with the approach suggested by Simon Brown LJ in Sunworld Ltd v Hammersmith and Fulham LBC [2000] 1 WLR 2102 (referred to later in this judgment) Green J granted permission to bring judicial review of the substantive decision by the Magistrates to award the Council costs in that sum against the Claimant. By that time, the Claimant had secured representation by leading and junior counsel via the Bar Pro Bono Unit. I am most grateful to Ms Mountfield QC and Ms Le Santo for the assistance they have provided to the Claimant and to the Court on this occasion.

5. As is quite often the case in claims of this nature, the court whose decision is under challenge has chosen not to make submissions or to instruct counsel to appear at the hearing. It has been left to the Interested Party, the Council in whose favour the impugned decision was made, to decide whether or not to defend it. In this case, the Council instructed Ms Henderson to appear and to resist the application. I am also grateful to her for the assistance that she has provided. Given the nature of the public interest in the issues in this case, this Court would be at a severe disadvantage if it did not have the opportunity to hear (and test) the legal argument opposing the grant of relief as well as the legal argument supporting it.

Indeed, had the Council taken a different stance it might have been necessary to appoint an *amicus curiae*.

6. The challenge to the legality of the order focuses on the absence of information that the Claimant says was necessary for the Magistrates to address their minds to the question whether the essential causal connection between the costs claimed and the obtaining of the order had been established by the Council, allied with the complaint that the Magistrates appear to have confused the reasonableness of the *amount* of the costs with the question whether that sum was reasonably *incurred*.

7. In consequence of disclosure ordered by Green J, both the Claimant and this Court are now far better informed than the Magistrates were on 2 August 2013 as to how it was that the Council arrived at the figure of £125 and what elements it took into account in doing so. Two witness statements have been provided by Winifred Grealish, the Council's Assistant Head of Service for Revenues, Benefits and Customer Services, together with documents relating to the process through which and the manner in which the Council calculated the £125, and the political process by which it decided to seek those costs from defaulting taxpayers. Although the information provided may have allayed some of the Claimant's suspicions, it casts more than a little doubt on whether there is a sufficient causal connection between the costs as computed, (or at least certain of the elements that were included in the computation) and the legal process undertaken by the Council in order to obtain a liability order. The Claimant has now taken up that particular battle with the Council's auditors.

8. It is possible that if this information had been made available before this claim for judicial review was initiated, matters would have taken a different turn. However, it was not available: indeed, its absence and the failure by the Council to produce it are at the heart of the Claimant's complaint.

9. In consequence, as Ms Henderson was understandably anxious to remind me, this claim does not involve consideration of whether the sum of £125 was in fact reasonably incurred by the Council in obtaining the liability order; the scope of my investigation is confined to examining whether it was lawful for the Magistrates to conclude that it was, in the circumstances in which they did. I do not need to say anything more about the evidence as to how the Council reached its figure of £125 in order to reach a conclusion on that issue.

10. In determining whether the substantive decision was lawful, I must consider:

i) whether the Magistrates had any or any sufficient relevant information before them to reach a proper judicial determination of whether the costs claimed represented costs reasonably incurred by the Council in obtaining the liability order;

ii) whether they erred in law by failing to make further inquiries into how the £125 was computed and what elements it comprised; and

iii) whether the Claimant was denied a fair opportunity to challenge the lawfulness of the order before it was made, by reason of the failure to answer his requests for an explanation of how the sum of £125 was arrived at.

Those matters cannot be determined without also considering the proper interpretation of the relevant provisions of the Regulations, including, but not limited to, Regulation 34(7). Before I do so, I should explain how the claim for judicial review arose.

Background

11. The Claimant, Reverend Nicolson, is a retired clergyman. He is an active campaigner on issues affecting the rights of those on low incomes, including the effect upon them of cuts in council tax benefit and other benefits. Since 2012, when the impact of those cuts started to be felt, the Claimant became increasingly concerned about the level of enforcement costs being levied by the Council on people who had fallen behind with their council tax, which seemed to him to be disproportionate to the likely actual costs of obtaining liability orders. He suspected that the costs were being used as a form of penalty or deterrent, or as a means of covering the Council's general administrative costs of collecting council tax, rather than reflecting any actual or fair appraisal of the actual costs incurred by them in enforcing the obligation to pay. This concern led the Claimant to take the decision to refuse to pay his own council tax as a matter of civil disobedience, so that he could experience the enforcement process for himself and investigate the procedures used and the basis upon which the costs claimed by the Council were calculated.

12. On 10 July 2013, the Council issued an application for a liability order against the Claimant under Regulation 34 of the Regulations. As a matter of procedure, this is done by making a complaint to a justice of the peace requesting the issue of a summons directed to the person against whom the liability order is sought ("the respondent") to appear before the Magistrates' Court to show why he has not paid the sum which is outstanding (Regulation 34(2)).

13. Before such an application can be issued the local authority must take the preliminary steps prescribed by Regulation 33, which requires a final notice to be served on the respondent, stating the amount in respect of which the application is to be made. It must then wait for seven days beginning with the day on which the final notice was issued (Regulation 34(1)). It is only if the claimed amount of council tax remains unpaid in whole or in part on the expiry of that period that the authority may seek the issue of the summons.

14. On 2 August 2013 the Claimant appeared at Tottenham Magistrates' Court in answer to the summons. His son went with him to take a note of the hearing. The Claimant read out a prepared statement expressing his concerns about the impact of benefit caps and cuts on the health and wellbeing of benefit claimants. He raised no objection to the making of a liability order, but he did raise queries about the level of costs that were being claimed by the Council. He challenged the figure of £125 (the figure claimed by this Council in every case, whether or not the summons results in payment without the need for a hearing) on the basis that, having regard to the large number of summonses being determined and the scale of the issue fee (£3), this sum appeared to be far greater than the amount of costs likely to have been reasonably incurred in obtaining each order.

15. The Claimant specifically asked both the Magistrates *and* the representative of the Council who was present in court seeking this and other liability orders, to explain how the figure of £125 for costs had been arrived at. He also pointed out that the figure was different from the amounts charged by other local authorities (giving the examples of Newark and Truro where the costs recovered are £80 and £100 respectively) and asked for an explanation of these regional differences.

16. According to the Claimant, whose evidence is unchallenged, the Council's representative stated that the sum of £125 had been agreed between the Council and the court by email in March 2010. The Claimant was not shown the email, nor was he given any breakdown or rationale for the "agreed" level of costs. Moreover, neither the Council's representative nor the court provided him with any explanation of how the figure of £125 represented costs reasonably incurred in obtaining the liability order. The Magistrates just told him that since he personally had the means to pay the costs, they would approve the liability order.

17. The Magistrates proceeded to make the order in the sum claimed against the Claimant. They then made identical costs orders against a large number of other people against whom liability orders were made, mostly in their absence.

18. The primary remedy for correcting an error of law made by a Magistrates' Court is an appeal by way of case stated under Section 111 of the Magistrates' Court Act 1980. This provides that:

"*Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved."*

The Magistrates are entitled to refuse to state a case if the application is "frivolous" (in the sense of raising questions that are futile, misconceived, hopeless or academic), or inappropriate, or if it raises issues which are irrelevant to the court's decision.

19. The Claimant was plainly entitled to know *how* the court was able to satisfy itself that the £125 costs awarded against him did in fact represent costs reasonably incurred in obtaining the liability order, in the absence of any information as to how that figure was computed. Neither the Magistrates nor the Council's representative provided an answer to his enquiries during the hearing, despite being asked. Therefore the Claimant's only avenue for obtaining an answer to that question, which is a question of law, was to seek an answer by way of case stated.

20. On 22 August 2013 the Claimant made an application to state a case under s.111 of the Magistrates' Court Act 1980, asking the Magistrates to justify the basis upon which the court had satisfied itself that the sum of £125 represented costs "reasonably incurred" and submitting that there had been an error of law in this respect. He said that he was concerned that there was no lawful basis for the sums being awarded in costs in his and other cases. He needed to know how it was that the Magistrates had reached the conclusion they did.

21. After an exchange of correspondence in which further clarification of the Claimant's position was sought by the deputy clerk to the justices, on 4 December 2013 the Claimant sent a letter which spelled out in no uncertain terms what he was seeking. The delay was partly due to the (mutual) mistaken belief that the Criminal Procedure Rules were applicable in this context – they are not; the Magistrates were exercising a civil jurisdiction. In the letter the Claimant expressly asked what factors the Magistrates took into account in reaching their decision that the costs were "reasonably incurred". He said that he could see no basis upon which they could lawfully have concluded that the costs incurred by the Council amounted to £125 per liability order, and pointed out that not only was the issue fee only £3, but the summonses were sent to respondents by post using computer-generated standard letters.

22. If, as the Claimant had discovered by making freedom of information requests in the intervening period, the number of summonses issued on application by the Council in 2012-2013 was 17,200, that would mean that the costs of obtaining these orders in bulk batches during that period amounted cumulatively to some £2.5 million. Given that instinctively that figure seems excessive, he queried how the court could find that costs of that magnitude had been actually incurred, let alone "reasonably incurred" by the Council in obtaining those orders.

23. The Claimant pointed out the serious consequences that orders of this type can have on some of the poorest people in society, and the anxiety which the making and consequences of such orders can cause. He made this observation (with which I agree):

"The making of such an order is not, therefore, a matter of rubber-stamping, but one in respect of which it is vital that the due process of law is observed."

24. On 20 December 2013 the Magistrates decided not to state a case and provided a certificate of refusal with their reasons. The Magistrates said that they were of the opinion that the application was "futile and academic". Their reasoning indicates that they had either completely missed the point that the Claimant was making, or else they were trying to justify their decision after the event on the basis of patently inadequate material.

25. The Magistrates pointed out, correctly, that once they were satisfied that the costs had been reasonably incurred, they had no discretion but to award costs in that amount, and that the ability of a particular respondent to pay those costs was not a relevant consideration. However, that begged the question as to whether they had lawfully reached the stage where it was compulsory for them to make the order.

26. They then went on to explain how they reached the view that the costs were "reasonably incurred" and on the basis of what information:

"*we heard from [the Council] in general terms about the justification for their claim for costs being based upon their administrative time and number of people involved in the process for making an application for the Liability [sic] all adding to the expense….* [my emphasis]

we heard representations that the amount was higher than in other Boroughs but we are of the view that the amount is not so disproportionate as to give rise to a possibility of our decision being properly considered as wrong in law or being in excess of jurisdiction…

we are entirely satisfied that our decision on quantum was a discretionary one, based on facts submitted by the [Council] and the amount imposed was no more than the standard sum claimed in each and every case." [my emphasis]

27. This suggests that, contrary to the Claimant's evidence, the Council's representative said something at the hearing in addition to mentioning the email agreement in 2010 between the Magistrates' Court clerk and the Council. The email exchange was not produced to the Claimant or to the Magistrates at that time, and would not have added to their store of knowledge even if it had been, because a schedule of calculations that was supposed to have been provided to the clerk to the justices at the time has never been found.

28. Even if what is stated in the reasons for refusal is correct (though the Council have not adduced any evidence from the person concerned) the only "facts submitted by the Council" that the Magistrates say they relied upon appear to have been general and vague assertions with no supporting particulars, that the costs were somehow based upon (i) administrative time (ii) the numbers of people who were somehow "involved in the process for making the application" (other than presumably pushing a button on the computer to generate the standard form letters).

29. The Magistrates sought to rely on the fact that the £125 claimed was no more than the standard amount claimed in every case; but the fact that a standard sum is attributed to costs recoverable in every case where a summons has been issued was one of the matters that gave rise to the Claimant's concerns. That is why the Claimant was seeking to find out how it was computed and what was the Council's justification for claiming it across the board. For all he knew, there might well have been a plausible justification, but in the absence of further information he was in no position to tell – and neither were the Magistrates.

30. The Magistrates were plainly in error in characterising their decision as "discretionary". They are bound by law only to award costs that satisfy the requirements of Regulation 34(7). What the requirements are is a matter of law, whether they are satisfied in a particular case is a matter of fact. Consequently the question whether the requirements are satisfied is an issue of mixed fact and law, not a matter of discretion. The Claimant was entitled to ask upon what basis the Magistrates had reached the conclusion that those requirements were met, and to challenge the decision as wrong in law if it was based on no information, inadequate information or irrelevant factors.

31. Of course, if the information provided to the Magistrates does establish the essential causal nexus between the costs and the obtaining of a recovery order, the question of whether those particular costs were "reasonably" incurred by the local authority in a particular case will be a matter for the Magistrates to determine, and their decision on that question would only be subject to challenge on Wednesbury grounds. However there is nothing in the reasons attached to the certificate of refusal addressing the causal connection that must be established between the costs claimed and the obtaining of the liability order. Indeed, as Ms Mountfield submitted, it would appear from the reasons given that the focus of the Magistrates was upon the wrong question altogether, namely, whether the amount of the costs claimed was a reasonable amount, rather than upon whether those costs were reasonably incurred in obtaining the liability order.

32. If Magistrates decline to state a case, the proper approach is set out helpfully by Simon Brown LJ in Sunworld Ltd v Hammersmith and Fulham London Borough Council [2000] 1 WLR 2102 at 2016F-H:

"*1. Where a court, be it a Magistrates Court or a Crown Court, refuses to state a case, then the party aggrieved should without delay apply for permission to bring judicial review, either (a) to mandamus it to state a case and/or (b) to quash the order sought to be appealed;*

2. If the court below has already (a) given a reasoned judgment containing all the necessary findings of fact and/or (b) explained its refusal to state a case in terms which clearly raise the true point of law in issue, then the correct course would be for the single judge, assuming he thinks the point properly arguable, to grant permission for judicial review which directly challenges the order complained of, thereby avoiding the need for a case to be stated at all."

Given that this case plainly fell into the latter category, Green J granted permission to seek judicial review of the legality of the underlying decision. With that by way of background, I turn to consider the merits of the claim.

The legal obligations of the Magistrates

33. The proceedings before the Magistrates were civil in nature, but the Civil Procedure Rules do not apply to them. Thus there is no provision for the assessment of costs, as there would be in normal civil litigation. By contrast with the Civil Procedure Rules, there are no provisions in the Regulations requiring the costs to be reasonable or proportionate, nor is there any requirement that any doubt be resolved in favour of the paying party. The Magistrates were bound to decide the matter of costs in accordance with the Regulations.

34. As a matter of straightforward construction of Regulation 34(7) that means that the Magistrates must be satisfied:

i) that the local authority has actually incurred those costs;

ii) that the costs in question were incurred in obtaining the liability order; and

iii) that it was reasonable for the local authority to incur them.

35. It is clear that there must be a sufficient link between the costs in question and the process of obtaining the liability order. It would obviously be impermissible (for example) to include in the costs claimed any element referable to the costs of executing the order *after* it was obtained, or to the overall administration of council tax in the area concerned.

36. Since the question whether the costs claimed in this case were "reasonably incurred in obtaining the liability order" is not a matter I have to decide and I have not heard argument on it, it seems to me that I should be circumspect in any observations that I make which could have a bearing on that issue should it arise on a future occasion. On the other hand, there are no authorities that specifically address these Regulations, and this is an opportunity for the Court to afford some general guidance as to their interpretation and scope.

37. I doubt whether any assistance in this regard can be derived from authorities in relation to the CPR or the pre-CPR costs regimes, as the Regulations do not refer to "costs of the proceedings". There is some limited assistance to be derived from the Regulations themselves as to what kinds of costs are included. Regulation 34(5) sets out the circumstances in which the application for a liability order shall not be proceeded with. The respondent must pay or tender to the local authority any unpaid council tax plus "*a sum of an amount equal to the costs reasonably incurred by the authority in connection with the application up to the time of payment or tender."*

38. Ms Henderson submitted, and Ms Mountfield agreed, that if such costs were recoverable at the stage in between issue of the summons and hearing for the liability order, they must necessarily be subsumed in the expression "*costs reasonably incurred in obtaining the order*" in Regulation 34(7). Otherwise there would be no incentive to the respondent to pay the council tax before the hearing. I agree that as a matter of necessary implication, and for the policy reason referred to by counsel, costs incurred in obtaining the order must encompass costs incurred in connection with the application for a summons. Plainly the costs would encompass, but are not confined to, the fee for issuing the summons: the expression "*in connection with the application*" is wider than "*the costs of making the application*". However, there still has to be a sufficient link between the incurring of those costs and the application for a summons.

39. Ms Henderson submitted that the expression "costs" is not necessarily confined to legal costs and that in other contexts it has been held to encompass time spent in investigations and elements of administrative costs. She referred to R v Tottenham Justices ex parte Joshi [1982] 1 WLR 631 in which the Divisional Court decided that the statutory discretion to award costs in criminal proceedings was wide enough to cover the time of an investigating officer paid out of public funds whose job it was to investigate alleged offences, and time spent by clerical staff. However, as Ms Henderson frankly admitted, it is difficult to draw any analogy between council tax and the scope of costs awarded to prosecuting authorities in criminal cases, because in the latter scenario there is a *discretion* to award costs. Moreover, as in cases falling under the CPR, it is possible to have an assessment of the reasonableness and proportionality of the costs; and the nature of the criminal investigations is very different.

40. Ms Henderson pointed out that before it makes its application, the local authority has to be satisfied that it is requesting the issue of a summons for the right amount of tax against the right respondent, and that may take up staff time, which is a cost to it. She submitted that it was at least arguable that such administrative or investigatory costs fell within the expression "*in connection with the making of the*

application." She also submitted that the costs of deciding whether or not to exercise the discretion to enforce could properly be included.

41. Ms Mountfield accepted that the expression "in connection with" might extend to some administrative expenses and overheads provided they were properly referable to taking enforcement steps against the respondent. She submitted that, for example, it was arguable that the expression might be interpreted as extending to the administrative costs and expenses of issuing and serving final notices in those cases in which the local authority then goes on to seek a summons, because they are a compulsory step without which the application for a summons against that respondent cannot be made. On the other hand, it would be difficult (if not impossible) to establish the necessary connection between the enforcement process and costs incurred by a local authority in the normal course of events, such as the costs of sending out reminder notices to taxpayers.

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

43. Apart from the costs of the final notice, which can arguably be justified on the specific basis adverted to by Ms Mountfield, (though only in those cases where a summons is issued) it seems to me, both as a matter of language and purposive interpretation, that it would be difficult to justify including any other costs incurred *prior* to the decision being taken to enforce (which is a matter of discretion under Regulation 34(1)). In order for costs to be incurred in connection with *the making of the application*, a decision to make such an application must have been taken. It is only then that the process of enforcement gets underway. Indeed Regulation 34(5), which includes that phrase, is specifically addressing the scenario where a summons has been issued, and thus the decision to enforce has been taken.

44. That does not necessarily mean that the costs have to be incurred on or after the date on which the summons was issued – once the decision to enforce has been taken there may still need to be checks carried out to ensure that the summons is issued in the correct amount and against the right person. However, what the court is concerned with are the costs incurred by the applicant in obtaining the liability order (or in seeking to obtain one before the respondent capitulates). I note that in Wales the proviso specifically refers to the cap including "*the costs of instituting the application*" which is consistent with that reading of Regulation 34(5). On the face of it, therefore, contrary to Ms Henderson's submissions, the costs of taking the decision to exercise the discretion to enforce would appear to fall on the wrong side of the line.

45. I bear in mind the practicalities of the enforcement system; time in the Magistrates' court is limited and given the large number of summonses issued, it would not be practical for the local authority to carry out and provide a detailed calculation of the actual costs incurred in each and every case (save possibly where the actual costs are well in excess of the norm, for example if the local authority has to instruct counsel to turn up and argue specific points of law raised by the taxpayer in defence).

46. In principle, therefore, provided that the right types of costs and expenses are taken into account, and provided that due consideration is given to the dangers of double-counting, or of artificial inflation of

costs, it may be a legitimate approach for a local authority to calculate and aggregate the relevant costs it has incurred in the previous year, and divide that up by the previous (or anticipated) number of summonses over twelve months so as to provide an average figure which could be levied across the board in "standard" cases, but could be amplified in circumstances where there was justification for incurring additional legal and/or administrative costs. If that approach is adopted, however, it is essential that the Magistrates and their clerk are equipped with sufficient readily available information to enable the Magistrates to check for themselves without too much difficulty, and relatively swiftly, that a legitimate approach has been taken, and to furnish a respondent with that information on request.

47. Ms Henderson helpfully drew my attention to the Explanatory Memorandum to the Council Tax and Non-Domestic Rating (Amendment) (Wales) Regulations 2011 which explained how the £70 cap on costs recoverable under s.34(7) came to be introduced in Wales. Consistently with my interpretation of the Regulation it ties the costs recoverable to the issue of the summons and the making of the liability order (rather than costs incurred at any earlier stage, including, I note, the issue of the final notice). A cap on costs in enforcement (and also costs recoverable in committal proceedings against those who failed to pay the liability order) was introduced because the amount that was charged varied considerably between local authorities in Wales.

48. The explanation given for introducing the rule that no more than £70 may be charged to the debtor in total for the issue of a summons and for a liability order was that:

"*This will allow for some flexibility for local authorities to set charges at the two stages that are proportionate to the amount of administration required to process the debt whilst also providing fairness and consistency for individual debtors across Wales*".

In context the reference to "processing the debt" must mean processing it after the decision to enforce has been taken.

49. The memorandum goes on to explain that the £70 would enable the local authorities to recover the costs of court fees and "*a reasonable amount for administration costs*". It explains why the limit was not set at £35 for each of the two stages, on the basis that during the consultation process "*several local authorities pointed out that the greatest amount of work is incurred before the initial summons is issued and argued that the charge should be higher at this stage."* Ms Henderson said that this explained why in the case of some local authorities, such as the Council in the present case, the costs were set at the same figure regardless of whether payment was made after the summons was issued. The costs of obtaining a liability order were very small in comparison with the costs incurred in connection with the issue of the summons.

50. In principle there is no reason why a local authority should not decide to limit the costs it claims to the costs in connection with issuing the summons, although in practical terms that approach provides no incentive to the respondent to pay up after the summons is issued. What matters is that the costs that it does decide to claim are properly referable to the enforcement process.

51. If the necessary causal link is established to the satisfaction of the court then the next question is whether the costs claimed have been "reasonably" incurred. It may be that the method by which the costs are calculated demonstrates this without the need for further evidence; but there may be individual cases in which it would be open to the respondent to argue that the costs were not reasonably incurred, for example, if it was not reasonable for the local authority to take steps to enforce payment, or if the costs which were incurred were excessive – e.g. if the local authority sent a QC along to argue a simple point of law in the Magistrates' Court.

52. Establishing that the costs were reasonably *incurred* is not the same thing as establishing that the costs were reasonable in *amount*. Of course, the latter may have a bearing on the former, since if the costs appear to be excessive, or disproportionate, there may be legitimate grounds for querying whether it was reasonable of the local authority to incur costs in that amount. However so far as proportionality is concerned, one has to bear in mind that in the present context where the recoverable sums are relatively small (though by no means insignificant to many of those who have to pay them) it is inherently likely that there will be a disparity between those sums and the costs of recovering them. On the other hand, the practice of processing applications in bulk could drive the average costs of obtaining liability orders down rather than up.

53. Given the absence of any independent assessment, the scope for abuse of the system is self-evident, and that makes it all the more important that due process is observed. Therefore, it is incumbent upon the Magistrates to reach a proper judicial determination of the amount of costs reasonably incurred by the applicant, in this case, the Council, in obtaining the liability order. In order to do so they need to have sufficient information as to how the figure was arrived at, and what "costs" it represents; and they need to have enough information on which they can be satisfied that the costs were incurred in obtaining the order and not, for example, in sending out council tax bills to all the taxpayers in the Borough.

54. It is a well-established public law principle that where a public authority has to make a decision, it must know (or be told) enough to ensure that nothing that it is necessary, because it is legally relevant, for it to know, is left out of account. That formula was adopted by Sedley LJ in the context of a ministerial decision in R(National Association of Health Stores & Another v Department of Health) [2005] EWCA Civ 154 at [62]. It applies with at least as much, if not greater, force in a context such as the present where the decision is not wholly a matter of discretion.

55. Ms Mountfield referred me to Browning v Lewes Crown Court [2012] EWHC 1003 (Admin) in which the Divisional Court directed the Crown Court to state a case in respect of an order for costs made in favour of the prosecuting authority, in that case, the RSPCA. The basis on which the claim for judicial review succeeded was stated in paragraph [16] of the judgment of Wyn Williams J: "*at least arguably, the court failed to address matters which were highly material to whether or not an order for costs should be made."* That is precisely the complaint made by the Claimant here, and in my judgment it is well-founded.

56. In June 2013 the Department for Communities and Local Government issued a document entitled "Guidance to local councils on good practice in the collection of Council Tax arrears." Under the section entitled "Enforcement", in paragraph 3.4, the Guidance states as follows:

"*Local Authorities are reminded that they are only permitted to charge reasonable costs for the court summons and liability order. In the interests of transparency, Local Authorities should be able to provide a breakdown, on request, showing how these costs are calculated. While it is likely that authorities will have discussed costs with the Clerk to Justices it should be recognised that the Court may wish to be satisfied that the amount claimed by way of costs in any individual case is no more than that reasonably incurred by the authority."*

57. The Claimant asked for that information and it was not forthcoming. The Magistrates did not have that information before them either. It was not good enough for them to be told "in general terms" that the costs had something to do with administrative time and the number of people who were involved in the process for making the application. Nor was it good enough for them to be told that some arrangement or agreement had been reached in 2010 between the Council and the clerk to the justices about the level of the costs without carrying out any investigation of what the agreement was and the

basis for it. Looking to see whether the costs were broadly in line with costs being charged by other local authorities was all well and good, but it was not enough to discharge the court's obligations.

58. Ms Henderson said that the Claimant did not ask for disclosure of documents, nor did he seek an adjournment. That is no answer, because whatever the Claimant did or did not do, the fact remains that the Magistrates did not have any information before them which would have enabled them to evaluate whether the costs that were being claimed had been reasonably incurred in obtaining the liability order. In any event, the evidence demonstrates that the Magistrates and the representative of the Council can have been under no illusion as to what the Claimant was asking them for.

59. The Claimant was entitled to have the information he requested in order that he could form a view as to whether the proposed order was within the powers of the Magistrates under Regulation 34(7) and make submissions on it. The fact that he did not ask for an adjournment has no bearing on the lawfulness of the decision made in the absence of that information. Ms Henderson submitted that the Magistrates had sufficient material to enable them to make the decision, but in my judgment it is patent that they did not. In fact, they had no material which would have justified them in reaching the conclusion that the costs that were claimed were incurred in connection with the issue of the summons or obtaining the liability order. All they had was the say-so of a Council representative, who was unable to give any better explanation when he was challenged than (at most) the vague statements recorded in the Magistrates' reasons for refusal to state a case.

60. I also consider that the decision was unlawful because the Claimant was not provided, on request, with the information that would have enabled him to make properly informed submissions on whether the costs claimed were reasonably incurred in obtaining the liability order. It is immaterial that he made no request from the Council for disclosure before the hearing. There was no requirement on him to do so. It was perfectly proper for the Claimant to expect that the Magistrates would be able to provide him with information as to what costs were comprised in the £125 and how that figure was calculated, since they needed to know that information in order to discharge their legal duties.

Conclusion

61. This application for judicial review of the decision taken by the Magistrates must therefore succeed. I was told that since the hearing the order for costs against the Claimant has been withdrawn, but that does not render the proceedings academic; as I have said, it raises issues of wider public importance. Had the order not been withdrawn, I would have quashed it. Since it has been withdrawn, I will declare that the order was unlawful, because:

i) the Magistrates did not have sufficient relevant information before them to reach a proper judicial determination of whether the costs claimed represented costs reasonably incurred by the Council in obtaining the liability order;

ii) the Magistrates erred in law by failing to make further inquiries into how the £125 was computed and what elements it comprised; and

iii) the Claimant was denied a fair opportunity to challenge the lawfulness of the order before it was made, by reason of the failure to answer his requests for the provision of information as to how the sum of £125 was arrived at.

62. Ms Henderson submitted that if I were to reach the conclusion that the Magistrates fell into error, I should not make an order for costs against the Council, which is not a Defendant but only an Interested Party. It was not the Council's fault that the Magistrates reached an unlawful decision. Whilst I am very

grateful that the Council chose to instruct Ms Henderson to appear at the hearing, her instructions were to try to defend the indefensible. It was the Council that benefited from the unlawful decision, and they were responsible for the failure to adhere to the Guidance, which had been promulgated before the hearing in the Magistrates' Court took place. Their representative should have been in a position to provide the breakdown of the costs requested at the hearing. If that information had been forthcoming, then these proceedings would not have been necessary. In principle, therefore, there is no injustice in ordering the Council to pay the Claimant's pro bono costs, and the fees, costs and expenses that the Claimant incurred earlier, whilst acting in person. There is no good reason to depart from the normal rule that the party who unsuccessfully resists the application should pay the costs of the other party.