[2018] EWHC 2411 (Admin)

IN THE ADMINISTRATIVE COURT AT LEEDS

Case No: CO/4294/2017

Leeds Combined Court Centre
The Courthouse
1 Oxford Row
Leeds
West Yorkshire
LS1 3BG

Tuesday, 10th July 2018

Before:
HIS HONOUR JUDGE DAVIS-WHITE QC

B E T W E E N:

R (OAO) MR HUSSAIN

and

KIRKLEES MAGISTRATES' COURT

THE CLAIMANT was represented by Mr Timothy Waite who was given rights of audience for this purpose
MR REAY by or on behalf of the Defendant

JUDGMENT
(Approved)

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HHJ DAVIS-WHITE QC:

1. This is my ex tempore judgment on an application for judicial review of the decision of District Judge Fanning, sitting at the Kirklees Magistrates' Court, to refuse to state a case. The case sought to be stated was in respect of his order of 21 June 2017, in which he refused to set aside a liability order dated 10 June 2015. The reason that he did so was that on the hearing of an agreed, preliminary issue, he determined that the application to set aside, made in November 2016, had not been made "promptly" within the meaning of that phrase, as used in the authorities following on from *R (on the application of Brighton and Hove City Council) v Brighton and Hove Justices* [2004] EWHC 1800 (Admin).
2. To explain that, in the *Brighton and Hove* case, as I shall call it, Burnton J decided that there are three conditions that need to be met, before the Magistrates' Court can set aside a liability order. The conditions in question are – and they are separate and cumulative –first that there is a genuine and arguable dispute as to the liability for rates. Secondly, that the liability order was made as a result of a procedural error, defect or mishap. Thirdly, that the application is made promptly after the defendant learns that it has been made, or is on notice that an order may have been made.
3. In broad terms, the liability here is one for rates in relation to the occupation of premises, which are said to have been used as a school, I think, for Muslim girls. Mr Hussain is one of the trustees of the trust, which is said to be charitable and which owns the freehold. As I understand it, he is one of two persons registered as the registered proprietor of title to the land. The other proprietor died in, I believe, 2016 – 26 November 2016.
4. The case raised by the applicant before me in the Magistrates' Court, was, in broad terms, as follows. First of all, as I understand it, the dispute as to liability was said to be two-fold. First it was said that the school in question, or the premises in question, were not occupied by him as one of the trustees, and the rates liability is not his. Instead, that the liability is that of a lady who is said to have run the school and, from a later date, a company that she set up to run the school in corporate form, rather than her running it personally.
5. The second alternative point is that even if there is a liability on Mr Hussain as a trustee of the trust, because the trust was a charity there should be a reduction in the rates that were charged, as I understand it, by 100% – so, with a nil liability at the end of the day.
6. Insofar as the procedural mishap or defect relied upon is concerned, that, as I understand it, was said to be that there had been no notice of the relevant proceedings resulting in the liability order.
7. On the day of the hearing before the district judge, as I understand it, counsel agreed that there should be a preliminary issue regarding the third limb of the test in *the Brighton and Hove* case on the basis that, if that was determined against Mr Hussain, then there would be no need to consider the other two necessary conditions before a liability order could be set aside, and the application to set aside would fail.
8. The district judge found that the application had not been made promptly within the meaning of the relevant authorities. He refused to state a case for the purpose of an appeal when that was requested later on, on the grounds that any appeal was 'frivolous'. This, in fact, was a reference to the test which applies where a statement of case for appeal is basically not required.
9. In the case of *R v North West Suffolk (Mildenhall) Magistrates' Court ex parte Forest Heath District Council* [1997] EWCA Civ 1575, [1998] Env. L.R. 9 –Lord Bingham, then Lord Chief Justice said this:

> 'I think it very unfortunate that the expression 'frivolous' ever entered the lexicon of procedural jargon. To the man or woman in the street, frivolous

> is suggestive of light-heartedness or propensity to humour, and these are not qualities associated with most appellants or prospective appellantsWhat the expression means in this context is, in my view, that the Court considers that the application to be futile, misconceived, hopeless or academic. That is not a conclusion to which justices, to whom an application to state a case is made, will often or likely come. It is not a conclusion to which they can properly come, simply because they consider their decision to be right or immune from challenge. Still less, it is at a conclusion to which they can properly come out of a desire to obstruct a challenge to their decision, or out of misplaced *amour propre*. However, there are cases in which justices can properly form an opinion that an application is frivolous. Where they do, it will be very helpful to indicate, however briefly, why they form that opinion. A blunt and unexplained refusal, as in this case, now, will leave an applicant entirely uncertain as to why justices regard an application as futile, misconceived, hopeless or academic. Such uncertainty is liable to lead to unnecessary litigation and expenditure on costs.'

10. It is common ground before me that the real question, therefore, is whether the prospects of an appeal against the decision on the preliminary issue, is indeed hopeless or not, and whether the district judge was right to reach the conclusion that any appeal was, effectively, hopeless. Helpfully, in this case, in his decision of 31 July 2017, refusing to set out a case, the judge has very helpfully set out his reasons as to why he refused to state a case. The full reasons are set out in an Annex to this judgment.
11. Before me, as below, Mr Reay appeared on behalf of the council. The Magistrates' Court was not represented and did not appear. Mr Hussain appeared in person and Mr Timothy Wheeler – a law graduate – attended as a McKenzie Friend. He asked for rights of audience. He had prepared both skeleton arguments for the judicial review. The matter is a highly legal one. In the unusual circumstances of this case, I gave him rights of audience before me. I should also stress that he did not appear below. Before the magistrates Mr Hussain was represented by a Mr Waiting of counsel.
12. As I have indicated, this is my extempore judgment on the matters argued before me. Permission was granted to bring judicial review proceedings by His Honour Judge Gosnell on 13 February this year, and in his observations, he said as follows:

> '(a) The issue in this case is whether the district judge was wrong to refuse to state a case following the claimant's request to do so. He found the request as frivolous. There is a difference between an unpromising appeal and one which is futile, misconceived, hopeless or academic'.

Pausing there, that largely picks up the distinction that I have already drawn attention to, which the then Lord Chief Justice sets out in the *Mildenhall* case.

> '(b) Whilst the primary facts in this case were essentially agreed as were the principles of law to be applied the claimant submitted that the District Judge was not entitled to find that the application to set aside had not been made promptly on the facts of this case. This was a secondary conclusion drawn from the primary facts, about which there was a genuine dispute between the parties. (c) The claimant is entitled to request the judge to state a case unless the case is frivolous. It is arguable in this case, that the request was not frivolous, even though the district judge considers that an appeal is unlikely to succeed for the reasons he gives. (d) Where the request asks the district judge to state a case on matters he did not actually

decide, then he was right to refuse to state a case as the request was academic in that respect'.

13. A number of points raised in the skeleton arguments, were not pursued before me. First, it was accepted on behalf of Mr Hussain, that a judge can only be required to state a case on matters that he actually decided. In this case, that was limited to the preliminary issue on the question of promptness and his decision as to costs. Matters such as whether or not there was an arguable case that there was no liability, and whether or not there was a procedural error, are not matters for today, or not matters that are relevant to an appeal from the only decision of the district judge that there is. In my view, that concession was entirely correctly made and, of course, reflects what His Honour Judge Gosnell had observed when granting permission.

14. Secondly, it was accepted on behalf of Mr Hussain, that it was not possible to argue any further the question of an appeal so far as the costs decision was concerned. The challenge that was sought to be raised was one to the judge's decision that costs followed the event. However, as is clear from, the judge's findings, but also confirmed to me orally by Mr Reay, it was conceded at the hearing before the district judge that the correct principle was that costs should follow the event, and arguments were more with regards to quantum and liability in respect of particular costs. The learned district judge had been invited to make an order on the basis that costs followed the event. The argument that he should not have made this order on that basis, seems to me to be hopeless, and I, therefore, consider that the concession made before me on this point was correctly made.

15. Thirdly, in the skeleton lodged on behalf of Mr Hussain, it had been suggested that the judge was wrong to deal with the case on the basis that a decision as to whether the application to set aside the liability order had been made promptly, was definitive in the event that the point was decided against Mr Hussain. It is said that – or sought to be argued – that that was incorrect. In particular, reliance was placed on various provisions of the European charter or the European convention on human rights.

16. However, in my assessment, the fact that the agreed preliminary issue was put forward to the Court on the basis that, if it was determined against Mr Hussain, the matter would be determinative, seems to me to result in the conclusion that an appeal, on the ground that the judge should not have followed that course, is hopeless. Accordingly, again, I agree wholeheartedly with the course taken on behalf of Mr Hussain not to pursue this matter before me.

17. The question is, therefore, one of whether there is or is not an arguable appeal on a point of law regarding the judge's approach to promptness. As I have said, the test of promptness is a self-standing test, or self-standing condition, that needs to be met before a liability order can be set aside. See the *Brighton and Hove* case. The facts referred to by the judge in his decision on this point, are set out in paragraphs 11 and 12 of his reasons for the decision to refuse to state a case, on 31 July 2017. Here, what he said is:

> '11. Here, the appellant, having knowledge of the order in December 2015, and having instructed solicitors to attend to the matter, delayed 11 months before applying to the Court to set aside the order. Such as delay was far without the period within which the Administrative Court in *Brighton and Hove Justices* required applications to set aside to be made as to render the Appellants position unarguable on the issue of promptness alone. I did not then need to consider the extent of any substantial procedure error, defect or mishap.
>
> 12. The law is as set out in paragraph 10 above'.

I will come back to that in a moment.

> 'I was taken to it by the parties. I expressly applied it in this case. An agreed fact is that the Appellant delayed 11 months from having actual notice of the order before making application to set aside. That is not prompt. There is no error of law on this issue, which was the sole issue I had to consider as a preliminary issue, that requires me to state a case for the opinion of the High Court. The Appellant has not identified any error of law on the issue of costs. There is no error of law on the issue of costs that requires me to state a case for the opinion of the High Court'.

He then goes on to say that the application is doomed to failure; it is frivolous and a misuse of court time. As regards the relevant law, in paragraph 10 of his decision, he refers to the *Brighton and Hove Justices* case and sets out paragraphs 31 and 33, to which I think I have already referred.

18. Mr Hussain submitted that there would be an error of law where the judge, on the evidence before him, either does not make necessary findings of fact, or makes findings of primary fact, but does not draw correct inferences from them. There must, of course, be an error of law because an appeal is only available on points of law. However, the drawing of inferences from primary facts as to promptness, is, it seems to me, a mixed question of fact and law. See, by analogy, discussion of Hoffmann LJ (as he then was) in *Re Grayan Building Services Limited* [1995] Ch. 241 and *Re Hitco 2000 Ltd* [1995] 2 BCLC 63.

19. In considering whether an application was or was not prompt, if relevant matters are left out of account, or irrelevant matters are taken into account, then, in my view, there will be an arguable appeal available. Here, it is said by Mr Hussain, that there were matters left out of account by the learned judge, which if properly taken into account, should result in a different decision.

20. The first point that he raises, is that the judge failed to consider the overall contextual background, and the first subheading of that is that the judge did not consider matters, he says, which took the case out of the norm – or normal, as described by Burnton J – such that, he says, it is appropriate to consider promptness, not necessarily by reference to the weeks and certainly not months or years, that Burnton J referred to.

21. First of all, the first subhead relied upon is that of the five years' delay, between 2010 and 2015, while the local authority sought to obtain appropriate liability orders against the correct person. Insofar as that is concerned, I am not satisfied that that gives rise to arguable grounds of appeal. The question of promptness, it seems to me, must be viewed from the perspective of the person making the application to set aside the liability order. Whether or not the applicant for the liability order was prompt in applying for the liability order, seems to me on the face of it, neither here nor there.

22. As discussed in the course of argument, there may be circumstances in which a connection can be seen between the delay by the applicant in applying for – or obtaining – an order, and any application by the person against whom that order is made to set it aside. However, here, there are, as far as I could ascertain, no real nexus between the two matters at all. In those circumstances, therefore, I am not satisfied that that is a ground that gives rise to an arguable appeal.

23. The second matter put forward, is that the claimant is said to be a trustee of a charitable trust, and one of only a small number of remaining trustees. Again, on the face of it, it is difficult to see how that has any bearing upon the question of delay or promptness of an application by him to set aside the liability order. The fact in itself is true, but no

surrounding circumstances or explanation is given, as to why that fact would excuse or explain why the application was not made more promptly in absolute terms.

24. The third matter relied upon in the skeleton is delay by the council, which I have already dealt with – it is really a repetition of point one.

25. The fourth point put forward is the council's knowledge that, from the outset, there was a disputed issue as to who the correct, lawful occupier was. Again, it does not seem to me that that bears upon the question of whether or not Mr Hussain's application to set aside was made promptly or not. It may go to prejudice the council; it may go to general discretion issues, but does not, it seems to me, deal with the question of promptness by Mr Hussain.

26. However, the fifth and sixth points relied upon, do seem to me to be matters which may potentially be relevant. First of all, the position between January and November 2016. It seems to me the Court has to look at matters that took place during that period, to see if, in any way, they bear upon the question as to why an application was only made in November 2016, and whether or not, in all the circumstances, that application can be described as being prompt, or can be described as not being made promptly.

27. The fifth matter relied upon is that there was a substantial payment received by the council from the lady I described earlier on as having occupied or run the school according to Mr Hussain, and there is evidence – there was evidence before the district judge – about that in the witness statement. There is also, as the judge refers to in his statement of facts, exhibited correspondence which I have not been taken to, but which clearly covers the relevant period.

28. It seems to me that it is at least arguable that the requirement to apply very, very quickly, may be in part forgiven and may not require the same sort of time scales as set out in the *Brighton and Hove* case, if there are negotiations going on between the relevant parties, and matters in play between them, which justify putting off the matter in circumstances where there seem to have been some sort of discussions – if not agreements – that the lady that I have referred to should be paying some of the rates, it seems to me it demonstrates that there was that sort of situation in play.

29. The sixth matter is that there is said to have been a contract, or in principle agreement, to sell the premises to a proposed purchaser, who was going to be discharging the rates liability on behalf of Mr Hussain. That proposed contract fell through and, thereafter, an application to set aside was made. Again, it seems to me these circumstances and timing of those matters, are matters that the district judge did not on the face address, and which may be capable of giving rise to an arguable point of appeal – that he should have done – and that, if properly taken into account, a decision that the application was, nevertheless, made promptly.

30. It is said on behalf of the local authority that there is no evidence, as such, that there was a causal link between the decision effectively not to make an application more promptly, and the two matters that I have identified. Again, it seems to me that that is a matter for argument on appeal as to whether or not a causal link is required. At this stage, it seems to me arguable that there does not have to be a clear causal link, in the sense of a party deciding positively not to make an application because of a particular matter. As I say, it may be that, at the end of the day, that such a causal link is required, but it seems to me, that the point is, at this stage, arguable.

31. It is also said on behalf of the local authority, that these matters are not in the draft case stated as put before the judge to approve. The answer to that, in my view, is that the draft is only a draft. The relevant matters were in evidence, and even if the case had been put forward, there is an ability to seek amendment of the same.

32. Finally, it is said on behalf of the local authority, that these were not matters relied upon

before the judge below. I am reluctant, without transcripts and more material , to make determinative findings on that. However, even if it is true that these matters were not relied on below, this is really a point of law rather than fact, and I cannot see why, again, there is not at least an arguable case that the appeal court should give permission to rely on the matters that were not relied on below, if that be the case.

33. There is a further point in this area as well, which is that, again, in evidence, during the period in 2016, in which Mr Hussain was clearly aware that there was some form of liability order, the local authority was seeking to obtain another liability order in respect of a later period. During that period, the relevant application was launched, but it was postponed and adjourned, and eventually withdrawn. It seems to me, again, that those may be relevant factors to take into account, when considering whether or not the application in November had been made promptly or not.

34. The final point that is relied upon by Mr Hussain, is that it is said by him that it was only in November 2016, when served with a statutory demand, that he became aware that the liability order of which he was aware in December 2015, had covered, not simply, the period April 2015 to March 2016, but a number of years prior to that. In my view, that in itself is not a good point. There was an awareness of a liability order. There was an awareness of the total sum of the liability order. It does not seem to me that the precise years over which the liability order covered, or knowledge of that, was a significant factor in whether or not the application was made promptly. In any event, I cannot see why – if it was such a relevant matter – the matter was not investigated further by Mr Hussain or his solicitors.

35. Finally, there is the other point in the evidence, which is that it appears that it was put forward to the district judge that part of the reason why the application was not launched more promptly, was because of the solicitors who were involved in the case. On behalf of the local authority, it is said that effectively the sins of the solicitors must be visited upon Mr Hussain.

36. Again, it seems to me that it is arguable, at least, that they should not be, and for all those reasons, therefore, I decide that although this case may not be the strongest case for an appeal, and although the prospects of success may be rather low, they do pass the threshold test of arguability. For those reasons, therefore, I will effectively allow the judicial review and make an order of mandamus to the district judge, that he should state a case on the promptness issue only.

**End of Judgment**

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This transcript has been approved by the judge.