Neutral Citation Number: [2022] EWHC 1398 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/06/2022

Before :

LORD JUSTICE EDIS
MRS JUSTICE McGOWAN

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Case No: CO/3707/2021

Between:

LONDON BOROUGH OF BARKING AND DAGENHAM	**Appellant**
- and -	
ARGOS LIMITED	**Respondent**

Case No: CO/3822/2021

And between:

ARGOS LIMITED	**Appellant**
- and -	
LONDON BOROUGH OF BARKING AND DAGENHAM	**Respondent**

Case No: CO/3459/2021

And between:

ARGOS LIMITED	**Claimant**
- and -	
ROMFORD MAGISTRATES' COURT	**Defendant**
LONDON BOROUGH OF BARKING AND DAGENHAM	**Interested Party**

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Adam Heppinstall QC and Thomas Mallon (instructed by **London Borough of Barking and Dagenham**) for the **Prosecutor**
David Hercock (instructed by **TLT LPP**) for **Argos Limited**

Hearing date: 10 May 2022

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Approved Judgment

Lord Justice Edis:

Introduction

1. There are two appeals by case stated and one claim for judicial review before the court. The parties are the London Borough of Barking and Dagenham, whom I will call "the prosecutor", and Argos Limited, whom I will call "Argos". The Romford Magistrates' Court is a party to the judicial review claim but has not taken any part in those proceedings, as is customary. The appeals and the judicial review claim all arise from a decision given in that court by District Judge (Magistrates' Court) Holdham ("the judge"). She heard argument on 15 July 2021, and gave a written ruling on 20 September 2021, which was later amended on 14 October 2021.

2. She decided:-

    i) That the application for a summons which was the basis on which a summons was issued by the Court on 19 June 2020 was a nullity. This was because she held that she was bound so to find by a decision of this court in *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin), decided on 3 November 2020 ("*Bakers of Nailsea*"). The information which led to the issue of the summons did not demonstrate the relevant time limit for prosecutions, as required by CrimPR 7.2(3)(b). This is the subject of an appeal by case stated by the prosecutor ("the nullity appeal").

    ii) That she had no jurisdiction to hear an argument advanced on behalf of Argos that the prosecution was an abuse of the process of the court. This is the subject of an appeal by case stated by Argos to protect the position if the nullity appeal succeeds which would resurrect the proceedings. This appeal is conceded by the prosecutor because of the decision of this court in *Mansfield v Director of Public Prosecutions* [2022] QB 335 which was decided on 3 November 2021, and so was not before the judge. The magistrates' court does have jurisdiction to determine the species of alleged abuse of process which arises in this case. This appeal is the subject of an agreed order for which we are grateful, and we need say nothing more about it, until we come to deal with consequential issues.

3. The judge did not therefore decide whether the abuse of process argument succeeded or not. The judicial review claim, issued by Argos, contends that she should have done and seeks a ruling from this court exercising its concurrent jurisdiction with that of the Romford Magistrates' Court that these proceedings are an abuse of process. The prosecutor responds that we should simply remit that issue to the judge for determination, and that, if we do decide the issue, we should dismiss the application because these proceedings are not an abuse of process.

THE NULLITY APPEAL

The issue of the summons

4. On 19 June 2020, the prosecutor, the London Borough of Barking and Dagenham, applied for a summons at Barkingside Magistrates' Court and a summons was issued on the same day, requiring the defendant Argos to appear at Barkingside Magistrates' Court on 23 October 2020.

5. The application, by statute known as an "information", was laid before the clerk to the justices by Fiona Taylor, the Director of Legal Services of the prosecutor, on a prescribed form. The material parts are as follows:-

> WHO STATES THAT: ARGOS Limited
>
> OF: 489-499 Avebury Boulevard, Milton Keynes, UK, MK9 2NW
>
> Company Number: 01081551
>
> ON 23 December 2019
>
> PLACE: Barking in the County of Essex
>
> OFFENCE 1: On or about 23rd December 2019, ARGOS Limited, did at Argos (in Sainsbury's) 97-131 High Road, Chadwell Heath, RM6 6PB, by the act of another, sell a knife to a person under the age of eighteen.
>
> CONTRARY to s.141A(1) Criminal Justice Act 1988

6. The summons which was then issued was in materially identical terms with the addition of the date, time and place at which Argos was summoned to appear.

7. The issue of a summons is a judicial act by the court which acts, initially at least, on the material supplied by only one party. There is no finding in the stated case about who decided it should be issued or on what grounds. It is to be inferred that the court accepted the information at face value and proceeded to issue the summons for that reason.

8. The offence charged is a summary only offence to which section 127 of the Magistrates' Courts Act 1980 (MCA 1980) applies. This provides

> **127 Limitation of time**.
>
> (1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose.

9. Section127(2) disapplies the 6 month time limit in all cases where the offence charged may or must be tried on indictment. There is a significant number of enactments which expressly make different provision for time limits. Section 141A(1) of the Criminal Justice Act 1988 is not one of them, and proceedings must be brought within 6 months.

The Criminal Procedure Rules

10. Part 7 of the Criminal Procedure Rules deals with "Starting a Prosecution in a Magistrates' Court". It covers all the methods of starting such proceedings, but the

present proceedings involve a prosecutor who wanted the court to issue a summons under section 1 of the MCA 1980 and I will focus on the Rules which deal with that.

11. Section 1 of the MCA 1980 deals with the jurisdiction to issue summonses and the rather more circumscribed jurisdiction to issue warrants. The provision which concerns summonses is as follows:-

Jurisdiction to issue process and deal with charges

1. Issue of summons to accused or warrant for his arrest.

(1) On an information being laid before a justice of the peace that a person has, or is suspected of having, committed an offence, the justice may issue—

(a) a summons directed to that person requiring him to appear before a magistrates' court to answer the information,

12. Rule 7.2 governs "application for summons etc.", and the parts relevant to the applications for the issue of a summons by a public authority (such as the prosecutor) for a summary only offence are as follows:-

7.2.— Application for summons, etc.

(1) A prosecutor who wants the court to issue a summons must—

(a) serve on the court officer a written application; or

(b) unless other legislation prohibits this, present an application orally to the court, with a

written statement of the allegation or allegations made by the prosecutor.

(2) A prosecutor who wants the court to issue a warrant must—

(a) serve on the court officer—

(i) a written application, or

(ii) a copy of a written charge that has been issued; or

(b) present to the court either of those documents.

(3) An application for the issue of a summons or warrant must—

(a) set out the allegation or allegations made by the applicant in terms that comply with rule 7.3(1) (Allegation of offence in application or charge); and

(b) demonstrate—

(i) that the application is made in time, if legislation imposes a time limit, and

(ii) that the applicant has the necessary consent, if legislation requires it.

……..

(10) Where an offence can be tried only in a magistrates' court, then unless other legislation otherwise provides—

(a) a prosecutor must serve an application for the issue of a summons or warrant on the court officer or present it to the court; or

(b) an authorised prosecutor must issue a written charge, not more than 6 months after the offence alleged.

13. Rule 7.3(1) provides:-

7.3.— Allegation of offence

(1) An allegation of an offence in an application for the issue of a summons or warrant or in

a charge must contain—

(a) a statement of the offence that—

(i) describes the offence in ordinary language, and

(ii) identifies any legislation that creates it; and

(b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.

14. The key provision for present purposes is CrimPR 7.2(3)(b)(i). It was introduced into the Rules on 2 April 2018. It was considered by this court in *Bakers of Nailsea* which the judge held bound her to conclude that the application for a summons in the present case was a nullity. In her conspicuously clear and careful judgment she said were it otherwise she would have concluded that the application was not a nullity. She referred to another case in which a District Judge had held that he was not bound by the decision in *Bakers of Nailsea* because no argument had been heard in that case about whether non-compliance with CrimPR 7.2(3)(b)(i) renders the summons a nullity or whether it can be cured by the provision of such further information as fairness requires. She felt unable to take the same course after an examination of the decision in *Bakers of Nailsea* and authorities on the rules of precedent.

15. She therefore posed the following questions in the Case Stated;-

i) Was I correct to consider myself bound by the decision in [*Bakers of Nailsea*] in relation to whether the prosecution's application for a summons complied with Criminal Procedure Rule 7.2(3)(b)(i)?

ii) Does the prosecution comply with Criminal Procedure Rule 7.2(3)(b)(i) by setting out the allegation, which specifies the date(s) on which the offence was said to have been committed, specifies the legislation which creates the offence and dating the application; but without drawing the court's attention to the applicable legislative time limit for the making of an application for the issue of a summons?

iii) Was I correct to consider myself bound by the decision in [*Bakers of Nailsea*] that if the prosecution had not complied with Criminal Procedure Rule 7.2(3)(b)(i) then the application for a summons was a nullity?

iv) If the prosecution had not complied with Criminal Procedure Rule 7.2(3)(b)(i) then is the application for a summons invalid and a nullity?

Bakers of Nailsea **and its status as precedent**

16. In *Bakers of Nailsea* the Foods Standard Agency had secured the issue of three summonses alleging offences contrary to regulations 6 and 9 of the Food Safety and Hygiene (England) Regulations 2013, which, by regulation 19, are either way offences. The informations were laid as follows:

i) An information dated 23 January 2019: relating to four allegations of offences alleged to have been committed between 17 January 2018 and 24 January 2018;

ii) An information dated 19 March 2019: relating to two allegations of offences alleged to have been committed between 30 April 2018 and 4 May 2018;

iii) An information dated 22 March 2019: relating to three allegations of offences alleged to have been committed between 16 April 2018 and 1 June 2018.

17. Regulation 18 of the 2013 Regulations is as follows:-

> **18. Time limit for prosecutions**
>
> No prosecution for an offence under these Regulations which is punishable under paragraph (2) of regulation 19 shall be begun after the expiry of —
>
> (a) three years from the commission of the offence; or
>
> (b) one year from its discovery by the prosecutor,
>
> whichever is the earlier.

18. This means that the proceedings must be begun within one year of the discovery of the commission of the offence by the prosecutor, but may never be begun more than three years after the date of the commission of the offence. The informations said nothing about when the prosecutor had discovered the commission of the offences, which meant

that the court issuing the summonses could not say when that had happened. If the prosecutor had been aware of the commission of the offences immediately, it was possible that some or all of the offences in the first information were out of time, but the proceedings in the second and third information must necessarily have been issued in time. The court could only know this if it was aware of regulation 18, and that the offences were either way offences which were therefore not subject to the 6 month time limit in section 127 of the MCA 1980.

19. As recorded in paragraphs 8 and 9 of the judgment in *Bakers of Nailsea* the prosecution in that case, the Food Standards Agency, had made a considered, deliberate and express concession before the District Judge that the informations did not comply with rule 7.2(3)(b)(i). The issue for the judge therefore was whether that non-compliance meant that the summonses which had been issued on the basis of the defective informations were nullities so that the court was without jurisdiction to try the allegations. He decided that they were, and the Divisional Court upheld that decision. It is necessary to analyse in a little detail how that happened.

20. The question posed for the Divisional Court in the stated case was this:-

> "Did I err in law by concluding that the informations were nullities and that I had no jurisdiction to try them?"

21. This question elides two distinct questions, which are:-

    i) Were the informations compliant with CrimPR 7.2(3)(b)(i)? This is "the compliance question".

    ii) If not, what is the consequence of that non-compliance for the jurisdiction of the court? This is "the consequence question".

22. In view of the way the Divisional Court dealt with the questions posed in that way, it is necessary to examine the way in which the matter was argued by the prosecutor before them. This is not entirely clear from the judgment. When summarising ten points advanced by Mr. Richard Wright QC for the prosecution, Carr LJ (with whom Picken J agreed) at paragraph [17(i)-(vii)] identified seven points made by Mr. Wright in support of the submission that the informations were not defective and summarised the remaining three points in sub-paragraph [17(viii)]:-

> "The final three points overlap and can be summarised as follows. Once a summons is issued, as here, provided that it discloses an offence known to the law and within jurisdiction and is within time, it is not a nullity: it is a valid summons. On the basis that a summons exists, there is, effectively, a presumption of validity, but it would then be open to a respondent to argue a lack of jurisdiction or that the summons had been issued out of time. *The remedy for non-compliance with what is suggested to be only a procedural rule is not to render otherwise valid proceedings irregular*. Such a result would not be in accordance with the overriding objective under the CPR. Thus, on the facts here, submits the FSA, the date of the alleged offence specified in each application, together with the date on which each

> application was served, demonstrated that the FSA had commenced proceedings within the relevant timeframe. The FSA had thus complied with CPR 7.2(3)(b)(i). The fact that the court issued a summons, as already indicated, is said to be *prima facie* evidence that the court at the time of issuing was satisfied that the applications were validly served." [emphasis added].

23. It is not clear to me precisely what three separate points have been summarised together. The submissions being summarised at (viii) appear to include the same as point (vii) which concerned the compliance question and was:-

> "Where an application is received by a court and a summons is issued, then, by definition, the court has been satisfied that it has been demonstrated that the application was made in time. The remedy, if the application were out of time, is for the court to decline to issue it;"

24. In the middle of paragraph (viii) the court records a submission that the remedy for non-compliance was not to "render otherwise valid proceedings irregular". This is an attempted answer to the consequence question identified at [21] above.

25. At paragraphs [21]-[22] Carr LJ said this:-

> "21 Finally, I record that the FSA's skeleton argument contains a brief undeveloped submission that, even if the applications were invalid, the District Judge had jurisdiction "having regard to the overriding objective of the Criminal Procedure Rules". It is suggested that a breach of a procedural rule does not override or trump the jurisdiction of a court to try an information which identifies an offence known in law, contains the essential ingredients of the charge, has been granted with any necessary authority to prosecute and has, in fact, been brought in time.
>
> "22 This submission falls outside the grounds of appeal which were lodged after the case stated was issued. The grounds of appeal, fairly read, are confined to the single contention that the District Judge was wrong in law to conclude that the prosecution had failed to comply with CPR r.7.2(3)(b)(i). Mr Wright points to the breadth of the question in the case stated, but, as indicated, the grounds postdate that. Analysis of this issue would require consideration, as Mr Hercock for BNL points out, of an extensive line of authorities and jurisprudence which have not been placed before the court, with the result that the court is not equipped to deal with the argument in any event. For these reasons, I decline to entertain the additional argument."

26. This "brief undeveloped submission" appears to be the same as that contained in the middle of paragraph 17(viii) as explained at [24] above. Whatever may be the actual status of grounds of appeal in an appeal by case stated, it is clear that the Divisional Court declined to entertain the argument that the District Judge decided the consequence question wrongly. The grounds of appeal were construed as being

"confined to the single question", namely the District Judge's answer to the compliance question which had been conceded before him. The court held that the prosecution was limited to the arguments identified in its grounds of appeal. At paragraphs [25]-[31] Carr LJ explained why the court declined to allow the prosecution to run a different case on appeal from that which it had chosen to run before the District Judge. That being so, the prosecution concession on the compliance issue continued to bind it and its appeal inevitably failed. For my part, I have no difficulty in accepting that this decision was properly open to the Divisional Court and that the case was correctly decided on these procedural grounds. It is perhaps unfortunate that this meant that the court did not address the consequence question, which of the two questions is by far the more important, but that is a result of the way that case was run by the prosecutors (not the same) who appeared in the magistrates' court and the Divisional Court.

27. Where matters become less straightforward is what follows the disposal of the case as summarised above. Carr LJ continued as follows:-

> "32 The question posed by the case stated remains for us to consider, even if only briefly and even although, if the FSA is right, as Mr Wright put it, the FSA would be 'winning the battle but losing the war'.
>
> "33 Before setting out what I consider to be the correct position as a matter of construction, it is worth noting that the setting of time limits for the prosecution of offences is designed to have two important consequences: first, to provide protection to the citizen who may have committed a criminal offence and, secondly, to bring about, in the authority having responsibility for the prosecution, an efficient and timely investigation of the offence (see *Tesco v. Harrow London Borough Council* [2003] EWHC 2929 Admin. at [25]).
>
> "34 I would reject the FSA's construction of and approach to CPR r.72.(3)(b)(i) for the following reasons:
>
> > (i) The Magistrates' Court carries out a judicial function when considering whether to issue a summons or warrant and needs to establish, amongst other things, whether the alleged offence is time barred (see *R (Key and Another) v. Leeds Magistrates* [2018] 2 Cr App R 27). The FSA's position that there is no requirement to draw attention to any applicable time limit is contrary to the clear purpose of the rule, namely to ensure that the court is properly and fully assisted on what is a without notice application'
> >
> > (ii) If the FSA's construction were correct, CPR r.7.2(3)(b)(i), and, indeed, 7.2(3)(c)(ii) and 7.2.(4), would be otiose. Compliance with r.7.2(3)(a) would be enough to satisfy the requirements of CPR r.7.2;
> >
> > (iii) CPR rule 7.2(3) must be taken to have been introduced for a reason. As a matter of objective construction, it must

have been intended that compliance with CPR r.7.2(3)(b)(i) would entail something more than merely setting out the allegation of the offence (which was already required by the pre-existing rule);

(iv) An ordinary and natural interpretation of the language of the rule is that there must at least be a reference to the applicable time limit, otherwise it is not "demonstrated" that the application is made in time. The need for such a reference is supported by the fact that not all offences are subject to a legislative time limit. An application that is silent on the question of time limit could be apt to mislead;

(v)"Demonstrate" is a verb connoting a positive action or the taking of a positive step. CPR r.7.2(3)(b)(i) does not say merely that it must be apparent from the application that it is in time. This construction is confirmed by the wider use of the word "demonstrate"; particularly in CPR r.7.3(2)(b)(ii) where plainly something more is required to be stated;

(vi) There are obvious complications that would arise out of the FSA's construction not least because, as the FSA recognises, some time limits, as in the present case, run from the date of discovery of the offence. The mere identification of the fact of the alleged offence will not necessarily demonstrate whether or not the application has been served in time. The FSA's proposed solution to these problems involves the introduction of different responsibilities for different categories of cases with different requirements under CPR r.7.2(3)(b)(i), depending on the legislative regime applicable to the offence in question. This is not an appealing result in a context where a simple rule for participants in criminal cases is, objectively construed, intended. By contrast, I do not accept that there would be any material practical problems in requiring the provision of specific information in relation to limitation such as to comply with CPR 7.2(3)(b)(i).

"35 For these reasons, the FSA's concession was, in my judgment, in any event made correctly.

"36 In those circumstances, having ruled that it is not open on this appeal for the appellant to argue otherwise, it follows that the applications are to be treated as a nullity and the District Judge had no jurisdiction to entertain them. For these reasons, I would not allow the FSA to resile from the FSA's concession and, in any event, answer the question posed for the court in the negative."

28. This makes it quite plain that the court was not, as Carr LJ had earlier explained, answering the consequence question which it had declined to decide for procedural reasons. The decision is clearly not binding on that question. Although the District Judge in the present case was right to say that an answer to the stated question in *Bakers of Nailsea* required an answer to both questions, the Divisional Court's answer to the consequence question was confined to its own facts and not of any general application. The court answered the compliance question in a case where the time limit was special to the offence, complex, and not the standard 6 month time limit derived from section 127 of the MCA 1980. For reasons which follow, in my judgment any authoritative status which that decision may retain should be strictly confined to that context.

29. Even if that is wrong, and *Bakers of Nailsea* cannot be distinguished, the decision on the compliance question was, in my judgment, unnecessary to the decision in the case (technically *obiter dicta*) and not binding on the District Judge. Paragraph [32] of the judgment says that the question in the stated case remained "for us to consider", without explaining why. It had already been answered. The compliance question had been conceded and the consequence question was not before the court at all because of the way grounds of appeal had been drafted. The answer, therefore, was "no". Nothing else was necessary.

30. Mr. Hercock referred us to *Jacobs v. London County Council* [1950] AC 361 at 369 where Lord Simonds said:-

> "It is not, I think, always easy to determine how far, when several issues are raised in a case and a determination of any one of them is decisive in favour of one or other of the parties, the observations upon other issues are to be regarded as obiter. That is the inevitable result of our system. For while it is the primary duty of a court of justice to dispense justice to litigants, it is its traditional role to do so by means of an exposition of the relevant law. Clearly such a system must be somewhat flexible, with the result that in some cases judges may be criticized for diverging into expositions which could by no means be regarded as relevant to the dispute between the parties; in others other critics may regret that an opportunity has been missed for making an oracular pronouncement upon some legal problem which has long vexed the profession. But, however this may be, there is in my opinion no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be *obiter*, then a case which *ex facie* decided two things would decide nothing."

31. The true nature of the exercise of establishing the binding element of a precedent decision arose for consideration in *R. (Youngsam) v. the Parole Board* [2019] EWCA Civ 229; [2020] Q.B. 387. Nicola Davies and Haddon-Cave LJJ were in agreement that the law was sufficiently stated in the statement of Professor Cross in *Cross & Harris*, *Precedent in English Law* , 4th ed (1991), p 72, namely:

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him …"

32. Leggatt LJ at [48]ff, without the support of the other members of the court and in a passage which was itself *obiter* explained that the process may be more wide ranging than this statement suggests. He did not doubt the decision in *Jacobs* about which he said this, before citing the passage which I have cited above:-

> "The word "necessary" is capable of bearing a range of meanings. On one view, it might be taken to suggest that a proposition of law cannot constitute a *ratio* unless it can be said that, had the court not endorsed that proposition, the court would have reached a different result. Yet such a test does not work. For example, it quite often happens that a judge gives rulings on two (or more) separate points of law, either of which would by itself be sufficient to justify the judge's conclusion. It is generally accepted that in such cases each ruling can have the status of ratio although it is manifest that the judge would still have reached the same conclusion even if that ruling were reversed."

33. He did not suggest that the search for the *ratio* was pointless. On the contrary, he emphasised that it is an essential aspect of the rule of law in a precedent-based system. However he explained that in a marginal case it involves many factors which he sought to identify at his paragraph 59:-

> "Without seeking to be exhaustive, relevant considerations include: (1) the degree of unanimity or consensus among the judges (assuming there was more than one) who decided the precedent case; (2) the clarity or otherwise of the ruling and of the supporting reasoning; (3) whether or to what extent the point on which the court ruled was in dispute and/or the subject of argument; (4) whether or how clearly the court evinced an intention to establish a binding rule; (5) whether and to what extent prior relevant authorities were considered by the court; (6) whether the court would, or sensibly could, have reached the same result if it had not ruled as it did; (7) whether the court's ruling has been applied or approved in later cases; (8) whether the ruling or its underlying reasoning has been criticised by commentators or by judges in later cases; (9) whether the court considered or contemplated the factual situation that has arisen in the current case; and (10) the level in the court hierarchy of the court which decided the precedent case in comparison with the level of the court deciding the current case."

34. I do not treat this passage as binding authority because it was, as Haddon Cave LJ pointed out, on any view itself *obiter* and moreover was the view of only one member of the court. It has perhaps a similar status to that of the distinguished academic legal texts which its author cites before arriving at his conclusion. These qualitative factors involved in determining whether one of two routes to the conclusion of a decision

should be treated as binding by subsequent courts, involve similar considerations to those involved in deciding whether it is not binding because it is wrong. That, as will appear, is the test to be applied where the previous decision is at the same level as the court which is deciding whether to follow it. It may be better to turn now to consider how the decision on the compliance question should be treated if it is not properly capable of being distinguished and if it cannot be regarded as *obiter*. This is because these questions involve some of the considerations which Leggatt LJ suggests are relevant to the identification of the *ratio.* If it is wrong it will not be binding on a subsequent court at the same level, but it will also be more readily regarded as *obiter*. That second conclusion would enable the subsequent court not to follow it even if it was a decision of a superior court.

35. The rules of precedent which determine the extent to which the Divisional Court is bound by a previous decision of a Divisional Court were considered in *R. v. Greater Manchester Coroner, ex p Tal and another* [1985] 1 QB 67, 81A:-

> "If a judge of the High Court sits exercising the supervisory jurisdiction of the High Court then it is, in our judgment, plain that the relevant principle of *stare decisis* is the principle applicable in the case of a judge of first instance exercising the jurisdiction of the High Court, viz., that he will follow a decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity; but he is not bound to follow the decision of a judge of equal jurisdiction (see *Huddersfield Police Authority v. Watson* [1947] K.B. 842, 848, *per* Lord Goddard C.J.), for either the judge exercising such supervisory jurisdiction is (as we think) sitting as a judge of first instance, or his position is so closely analogous that the principle of *stare decisis* applicable in the case of a judge of first instance is applicable to him.
>
> "In our judgment, the same principle is applicable when the supervisory jurisdiction of the High Court is exercised not by a single judge, but by a divisional court, where two or three judges are exercising precisely the same jurisdiction as the single judge. We have no doubt that it will be only in rare cases that a divisional court will think it fit to depart from a decision of another divisional court exercising this jurisdiction. Furthermore, we find it difficult to imagine that a single judge exercising this jurisdiction would ever depart from a decision of a divisional court."

36. In *R (OAO Jollah) v. Secretary of State for the Home Department* [2017] EWHC 330 (Admin), Lewis J, as he then was, was invited to refuse to follow an earlier decision of a single High Court judge sitting in the Administrative Court. He summarised and applied the relevant principles, and I adopt his formulation. His decision on the substantive issue was upheld on appeal to the Court of Appeal and the Supreme Court. On the question of precedent, he said this:-

> "46. A judgment of a judge of the High Court is not binding on another judge of the High Court but that judge will follow the earlier decision unless he or she is convinced that it is wrong: see

> *R v Manchester Coroner ex p. Tal* [1985] 1 Q.B. 67 at 81A-C and *Police Authority for Huddersfield v Watson* [1947] 1 K.B. 842 at 848. The Privy Council has observed that High Court judges are not technically bound by decisions of other High Court judges "but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so" (see paragraph 9 of the judgment of the Privy Council in *Willers v Joyce (No. 2)* [2016] 3 W.L.R. 534). Such principles contribute to coherence and certainty within the legal system. They are likely to contribute to efficient and more cost-effective use of resources as the same point will not normally be re-argued at length and cost before different High Court judges."

37. I consider that the decision in *Bakers of Nailsea* on the compliance question in so far as it relates to the section 127 MCA 1980 time limit is wrong. The reasons given at paragraph [34 (i)-(vi)] are stated to be of general application and not limited to the class of offence actually under consideration in that case. On its face the decision does extend to cases where the time limit arises from section 127 MCA 1980, and the court did not limit itself to considering the type of case which was before it.

38. The rule requires that the information must "demonstrate that the application is made in time, if legislation imposes a time limit." Legislation in this case does impose a time limit: one of six months which cannot be extended and does not depend on any factual question except the date of the offence, which must be stated. If the reader knows that the offence is a summary only offence, knows the date when it is alleged to have occurred, and knows the effect of section 127, the reader knows whether the information is in time or not. *Quod erat demonstrandum*, QED.

39. Is the reader taken to know these additional pieces of information which are required to establish whether the information is in time or not? The reader is the court. This rule is not concerned with provision of information to a defendant. Otherwise, it would apply to all means of starting proceedings in the magistrates' court, but it does not. It does not apply to written charges and requisitions, or to charges preferred against people who are in custody. Those charges are not required to demonstrate that they are in time. The rule applies only when the aspirant prosecutor is making an application for a summons to be issued, without notice to the person who will become a party if the application is successful. All magistrates' courts know about section 127 of the MCA 1980. They may not always have at the forefront of their minds in quite the same way the fact that section 141A(1) of the Criminal Justice Act 1988 creates a summary only offence, but this information is readily available. It is contained in the offence-creating provision referred to in the information. As will appear below, the court is, at common law, required to satisfy itself that the alleged offence is known to law, and it will do that by being aware of the provision which provides for the summary only nature of the offence.

40. Having reached that conclusion, it becomes immaterial whether the decision was *obiter* or not, but it appears to me that the reasons for that conclusion suggest that the decision should be so treated, even if it were not "obviously wrong". It is true that where a judge gives two reasons for arriving at a decision they will generally both be regarded as part of the *ratio*. However, as Lord Simonds in *Jacobs* makes clear, the establishment of the *ratio* is "not always easy". Some of the problems were identified

by Leggatt LJ in *Youngsam.* Where, as here, a court has effectively struck a party out on procedural grounds, its conclusion on the substantive issue must, if expressed at all, be regarded with some caution because the conduct of the proceedings has not been conducive to effective argument. Carr LJ says at paragraph [32] that her consideration of the compliance issue would be expressed "only briefly", suggesting that if the issue were live it would have received fuller treatment. If a court decides to abbreviate the expression of its second reason for a decision, because the first reason has entirely disposed of the appeal, that conclusion will more readily be regarded as *obiter* than otherwise might be the case. In the words of Mr. Wright QC, by the time the court came to treat the compliance question, he had already "lost the war". Whether he won the battle was of little importance to either party.

Decision on the compliance question

41. Accordingly, I would hold that the information did comply with rule 7.2(3)(b)(i) of the CrimPR. I express no view on informations complaining of offences with more complex time limits, and how they should be drafted. That issue is not before us. The error in *Bakers of Nailsea,* if there is one, lies in answering that narrow question by giving a much broader ruling than was required by the facts of the case which was wrong, wider than necessary and therefore *obiter*, and in any event distinguishable. This is because cases involving the six month section 127 time limit did not fall for consideration, but the ruling extends to them anyway. It was also clear that the concession at first instance was a free-standing and sufficient basis for the decision.

42. I would answer the judge's first two questions as follows:-

   i) She was not correct to consider herself bound by the decision in *Bakers of Nailsea* because it can be distinguished and confined to its own facts, because the issue had been conceded below (see [19] above), and the offence there in question had a complex time limit provision, and was not governed by section 127 MCA 1980. Further, it was *obiter*. I commend the District Judge for her excellent written judgment, and also for her scrupulous regard to the rules of precedent and do not criticise her at all for her decision.

   ii) The prosecution do comply with CrimPR 7.2(3)(b)(i) in a case within section 127 MCA 1980 by setting out the allegation in a way which makes it clear it is an allegation of a summary only offence, which specifies the date(s) on which the offence was said to have been committed, specifies the legislation which creates the offence, and dating the application, but without drawing the court's attention to section 127 of the MCA 1980.

The consequence question

43. The third and fourth questions asked by the judge relate to the consequence question, and that issue is undoubtedly before us even though, having decided that the information was compliant, the consequences of non-compliance will not fall on the prosecutor. It is not for me to say whether future courts should regard what follows on these questions as binding, but I can say that I have not abbreviated my consideration of it because of the answers to the first two questions. If the fourth of Leggatt LJ's factors ("whether or how clearly the court evinced an intention to establish a binding rule") is indeed material, then I should make it clear that this question has been very

fully argued before us, with very extensive citation of all relevant authorities by extremely capable advocates. They have not been inhibited in the presentation of their arguments by any procedural failures or concessions made below. I evince an intention to establish a binding rule that a failure to comply with CrimPR 7.2(3)(b)(i) does not necessarily render the summons subsequently issued a nullity. It will never do so in a standard case of a summary only offence governed by section 127 of the MCA 1980. Even if the rule requires a reference to section 127 in all cases where a summary only offence is alleged, it is impossible to regard such a breach of a rule as going to the jurisdiction to try to the case.

44. I leave open for decision, if the point arises again, the case of more complex time limits. In such cases, the issue may be whether the court has in fact properly complied with its common law duty to establish that the proceedings are not time barred, which the rule is intended to facilitate. This issue was not decided in *Bakers of Nailsea* because of the way the grounds of appeal were formulated, and remains undecided. If Criminal Procedure Rules Committee choose to reconsider rule 7.2(3)(b)(i) in the light of this judgment, that rule might specifically require a prosecutor in a case to which a time limit other than the section 127 MCA 1980 time limit applies to say what that time limit is, and why the information is within it. The forms in use in the magistrates' court may perhaps be adapted to deal with this, and it may be that the case management systems could also trigger a notification when such a case is brought before the courts. When section 49 of the Police, Crime, Sentencing and Courts Act 2022 comes into force, this question may come into particular focus. It may be that few cases to which that provision applies will be started by seeking a summons on laying an information, but it contains the kind of complex time limit which will engage Rule 7.2(3)(b)(i) for any which are. If it were to be decided that a summons issued following a breach of that rule is not a nullity, the rule is not entirely without sanction. A magistrate might properly decline to issue a summons on an application which did not allow the court to decide whether it was issued within time or not. The delay caused may be fatal to the prosecution. In this case the summons was issued, no doubt because it was obviously in time.

45. The third question can therefore be quickly answered. I do not consider that the judge was correct to regard herself bound by the decision in *Bakers of Nailsea* on the consequence issue to conclude that if there was non-compliance with CrimPR 7.2(3)(b)(i) then the application for the summons was a nullity. It is true that the Divisional Court, on one view, did answer that question in that case, but this was done by refusing to entertain the argument on procedural grounds. The Divisional Court did not decide the substance of the consequence question at all, and there is no decision on it which is capable of being binding.

46. The fourth question is the consequence question. If there was non-compliance, does this render these proceedings a nullity? The answer is No.

47. The purpose of the rule is clear. It is to assist courts in deciding whether a summons, if issued, will be in time. It is designed to avoid summonses being issued which should not be issued, and to enable the court to function efficiently by having all the necessary material before it in easily accessible form. This summons was properly issued. Treating it as a nullity because of a rule breach, if there was one, is a course which has nothing to commend it at all.

48. The legal status of rule 7.2(3)(b)(ii) is clear. It is a procedural rule, made under section 69 of the Courts Act 2003 which provides:-

> **69 Criminal Procedure Rules**
>
> (1) There are to be rules of court (to be called "Criminal Procedure Rules") governing the practice and procedure to be followed in the criminal courts.
>
> (2) Criminal Procedure Rules are to be made by a committee known as the Criminal Procedure Rule Committee.
>
> (3) The power to make Criminal Procedure Rules includes power to make different provision for different cases or different areas, including different provision—
>
> (a) for a specified court or description of courts, or
>
> (b) for specified descriptions of proceedings or a specified jurisdiction.
>
> (4) Any power to make Criminal Procedure Rules is to be exercised with a view to securing that—
>
> (a) the criminal justice system is accessible, fair and efficient, and
>
> (b) the rules are both simple and simply expressed.

49. The rule making power extends to making rules which govern the practice and procedure to be followed in the criminal courts. It probably does not extend to making rules which govern whether the court has jurisdiction or not. This is an important distinction because of the approach taken in the decisions reviewed by the Court of Appeal Criminal Division in *R v. Gould and other cases* [2021] EWCA Crim 447, at [82]-[86]. The cases there cited, and the cases decided in *Gould* itself, all concerned the approach of the court to the failure of a party to take some step required by primary legislation. The exercise required was to construe the provision to ascertain whether the failure was a procedural failure only or whether it was a jurisdictional failure. The approach in *R v. Ashton* [2007] 1 WLR 181 was overruled by the House of Lords in respect of its classification of the failure to sign an indictment in *R v. Clarke* [2008] UKHL 8. At that time, an indictment was required to be signed by an officer of the court by section 2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933. That requirement was removed by the Coroners and Justice Act 2009 with effect from 11 November 2009. The fact that the requirement appeared in primary legislation, and had done for decades, was of importance to the outcome of the case. This is the high watermark of procedural rigour, by which a failure to take a formal procedural step deprives the court of the jurisdiction to try an allegation. The other decisions in *Ashton* were not overruled and the approach there explained was not undermined except in the context of the Administration of Justice (Miscellaneous Provisions) Act 1933. It has been subsequently re-affirmed in *Gould*. This passage from *Ashton* identifies the proper approach, which derives perhaps from *R v Soneji and another* [2006] 1 A.C. 340:-

> "4. . . . In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ("a procedural failure"), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.
>
> "5. On the other hand, if a court acts without jurisdiction if, for instance, a magistrates' court purports to try a defendant on a charge of homicide then the proceedings will usually be invalid."

50. There is authority for the proposition that if there is no information before the court the court has no jurisdiction. This is the uncontentious starting point in *R. v Norwich Justices ex p Texas Homecare Limited* [1991] Lexis Citation 1772.

> "It is quite plain that the information is the foundation of the magistrates' jurisdiction. To establish that proposition it is unnecessary to go further than the speech of Lord Roskill in *R v Manchester Stipendiary Magistrate ex parte Hill* [1983] AC 328, [1982] 2 All ER 963. At page 342C Lord Roskill said:
>
> > 'First, in their criminal jurisdiction, what magistrates' have jurisdiction to try summarily is an information, and what is required to give them that jurisdiction is that an information has been laid before them.'
>
> "At page 344C Lord Roskill said:
>
> '. . .it is the laying of an information . . . which is the foundation of the magistrates' court's jurisdiction to try an information to summarily . . .'.

The conclusion of the court from that premise was:-

> "Here the person who laid the information had no authority to lay it. In my judgment that renders the information a nullity."

51. The information will be a nullity if it required a consent by statute from, for example, the Director of Public Prosecutions, which it did not have. The same applies if it was laid by a person with no authority to do so, according to *Texas Homecare* and the authorities there cited. Rule 7.2(3)(b)(ii) addresses the first of these requirements and requires the information to demonstrate that necessary consent has been given, but the rule does not address the situation in *Texas Homecare* where an information had been laid on behalf of a local authority by someone who was not authorised to do so.

52. The duties of the court when considering an information were helpfully explained by the Divisional Court in *R (OAO Kay) v Leeds Magistrates Court* [2018] 4 W.L.R. 91. That was a decision about the duty of candour and disclosure when a private prosecutor seeks the issue of a summons, and the actual result is not of direct relevance to the present case. Sweeney J, with whom Gross LJ agreed, said this about the position at common law:-

> "**22** We were referred to various authorities decided after the decision in *Ex p Klahn*, including *R v Clerk to Bradford Justices, Ex p Sykes* (1999) 163 JP 224; *R v Belmarsh Magistrates' Court, Ex p Watts* [1999] 2 Cr App R 188; *R (Newham London Borough Council) v Stratford Magistrates' Court* [2004] EWHC 2506 (Admin); 168 JP 658; *R (Charlson) v Guildford Magistrates' Court* [2006] EWHC 2318 (Admin); [2006] 1 WLR 3494; *R (Chief Constable of Northumbria) v Newcastle upon Tyne Magistrates' Court* (quoted by the DJ); *Barry v Birmingham Magistrates' Court* [2009] EWHC 2571 (Admin); [2010] 1 Cr App R 13; *R (Director of Public Prosecutions) v Sunderland Magistrates' Court* [2014] EWHC 613 (Admin) and *R (Haigh) v City of Westminster Magistrates' Court* [2017] EWHC 232 (Admin); [2017] 1 Costs LR 175. For present purposes, *Ex p Klahn* and the above-mentioned authorities establish that, when considering whether to issue a summons:
>
> (1) The magistrate must ascertain whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are prima facie present; that the offence alleged is not time-barred; that the court has jurisdiction; and whether the informant has the necessary authority to prosecute.
>
> (2) If so, generally the magistrate ought to issue the summons, unless there are compelling reasons not to do so—most obviously that the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay); or is an abuse of process; or is otherwise improper.
>
> (3) Hence the magistrate should consider the whole of the relevant circumstances to enable him to satisfy himself that it is a proper case to issue the summons and, even if there is evidence of the offence, should consider whether the application is vexatious, an abuse of process, or otherwise improper.
>
> (4) Whether the applicant has previously approached the police may be a relevant circumstance.
>
> (5) There is no obligation on the magistrate to make inquiries, but he may do so if he thinks it necessary.

> (6) A proposed defendant has no right to be heard, but the magistrate has a discretion to: (a) Require the proposed defendant to be notified of the application. (b) Hear the proposed defendant if he thinks it necessary for the purpose of making a decision."

53. When that case was decided the provision in the CrimPR currently under consideration had recently come into force. Sweeney J said this:-

> *"The amendment of Part 7 of the Criminal Procedure Rules*
>
> I am fortified in a number of the above conclusions by the recent amendment (April 2018) of Part 7 of the Criminal Procedure Rules, which is intended to reflect the position at common law,…"

54. In other words, the rule is a procedural rule which is designed to assist the court in performing its common law duty. It would be very surprising if such a thing were capable of depriving the court of its jurisdiction. In my judgment this would undermine the process rather than assisting it, even if it were possible to achieve this result by a rule of this kind as a matter of law.

55. If the court asks the *Ashton* question, namely whether the legislature intended that a breach of a procedural rule should deprive the court of jurisdiction, it encounters an immediate problem. It cannot sensibly be suggested that all breaches of procedural rules render the proceedings a nullity, and how is to be decided which have this effect and which do not? It is not possible to do it by interpreting the provision to ascertain the intention of Parliament in enacting it, because it was not enacted by Parliament. The power to make these rules is vested by statute in the Criminal Procedure Rule Committee.

56. The validity of originating process in the magistrates' court is a matter which is governed by the common law, and, where Parliament has legislated, by that legislation.

57. This was the approach taken by the Divisional Court in *Nash v Birmingham Crown Court* [2005] EWHC 338 at [26] and in *R. (OAO Mohamed) v. Waltham Forest LBC* [2020] EWHC1083 (Admin); [2020] 1 WLR 2929 at [24]. I do not accept Mr. Hercock's distinction of these and other similar decisions on the basis that the issue of a summons is incapable of subsequent correction because the summons which should not have been issued was issued, and the moment has passed. If it subsequently transpires that the court's conclusion at that moment that the summons was in time was wrong, then the court will so find and cease to take any further proceedings on the information. This may often happen where, for example, there is an issue as to the date of the offence.

58. I should say something about *Atkinson v Director of Public Prosecutions* [2005] 1 WLR 96 on which Mr. Hercock placed significant reliance. In that case the court had to decide how the magistrates court should address the situation which arose where, because of the way the police computer system then functioned, no-one knew whether the information had been laid within time or not. It held, unsurprisingly, that the court should bring the proceedings to an end (not by staying them as abusive, but by declining

jurisdiction) because it could not be proved they were in time. This appears to me to be an authority against Mr. Hercock's case. It shows that, whether the form of the information and summons is regular or not, the court can try the question whether the summons was issued in time and, if it is not proved that it was, decline jurisdiction. The form of that summons was entirely regular, but the confidently asserted date when the information was said to have been laid turned out to be highly questionable on the basis of agreed police evidence about how its computer system worked. In the ordinary case, the existence of this power and procedure reduces somewhat the importance of the original decision to issue the summons and tends to suggest that errors at that stage should not mean that the proceedings were a nullity. The rules address the fact that there are cases where that decision is liable to be quashed for procedural irregularity, of which *Kay* was one. Rule 7.2(6) imposes particular requirements on private prosecutors (i.e. prosecutors who are not public authorities within the meaning of section 17 of the Prosecution of Offences Act 1985, or persons acting on their behalf). That rule is designed to assist the court in fulfilling the common law duty of enquiry at the issue stage which the District Judge in *Kay* had failed to carry out. Abusive prosecutions of that kind should be knocked out as soon as the abuse becomes apparent. Such considerations simply do not apply to cases where only the issue is whether the summons was issued in time or not.

59. For these reasons, if my lady agrees the appeal will be allowed and the judge's questions answered in the way I have explained. Subject to the outcome of the judicial review application, to which I now turn, the case will return to the magistrates' court for trial.

ABUSE OF PROCESS: THE JUDICIAL REVIEW CLAIM

Procedure

60. The first question is whether, the appeal against the decision of the judge to decline jurisdiction to hear the application to stay the proceedings as an abuse of process having been allowed by consent as explained above, the Divisional Court should decide it, whether it should be remitted to the judge. It is agreed that the High Court and the magistrates' court have concurrent jurisdictions to deal with applications of this kind, see *Kay* and *Mansfield* and paragraph [2(ii)] above. It is agreed that how we proceed is a matter for our discretion. Mr. Heppinstall submits we should remit the case to the judge. Mr. Hercock says we should decide it, and decide it in his favour.

61. I consider that we should deal with the substantive application in this court. This is for the following reasons:-

    i) We have heard full argument, at considerable expense to the parties, one of whom is a public authority.

    ii) We have invested substantial judicial time in reading the authorities and documents including the skeleton arguments, and hearing all the oral argument which the parties wished to present. Judicial time is a public resource which is under pressure, and we should not allow it to be wasted.

    iii) The argument is a complex one, and it is suitable for determination by a Divisional Court. We do not here imply any lack of respect for the magistrates'

court. As the judge's decision in this case shows, that court is capable of decisions of a high quality.

iv) There are no identified issues of fact. That is not always so in applications to stay criminal proceedings as an abuse, not least in the small class of cases in which, according to *Mansfield* the High Court has exclusive jurisdiction. That being so, the existence of factual disputes cannot oust the jurisdiction of the High Court which may in some cases have to vary its procedure to adapt to the jurisdiction. However, it is clearly a factor in favour of the High Court dealing with a case under the judicial review procedure if it does not involve factual issues.

v) We have both formed a clear view about the outcome of the application and consider that it will further the overriding objective if we take the decision.

The substance: an exercise of the High Court's concurrent jurisdiction to stay abusive proceedings in the magistrates' court

62. Argos contends that it is an abuse of the process of the court for the prosecutor to prosecute it when it received and followed advice from another local authority, Milton Keynes Council. This advice was dated 15 August 2018 and has a particular status because it is Advice issued under Argos Limited / Milton Keynes Trading Standards (MKTS) formal Primary Authority Partnership; Primary Authority Assured Advice under the Regulatory Enforcement and Sanctions Act 2008 Section 27 (1) (a). This Act has been called RESA by both counsel and I will adopt the acronym. It is operational advice about what systems should be in place to ensure that knives are not sold to customers of Argos who are under 18 years old. This is of particular significance because of the terms of section 141A(4) which provides a defence of, in summary, due diligence.

63. The offence creating provision is set out below. I have left the square brackets round the age of eighteen because, as will appear, it is important to one of the issues to record that this age limit was achieved by an amendment (from sixteen) made by section 43 of the Violent Crime Reduction Act 2006. This Act is listed in Schedule 3 to RESA, but the Criminal Justice Act 1988 was, until recently not listed there.

> **141A.— Sale of knives and certain articles with blade or point to persons under sixteen.**
>
> (1) Any person who sells to a person under the age of [eighteen] years an article to which this section applies shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.
>
> (2) Subject to subsection (3) below, this section applies to—
>
> (a) any knife, knife blade or razor blade,
>
> (b) any axe, and

> (c) any other article which has a blade or which is sharply pointed and which is made or adapted for use for causing injury to the person.
>
> (3) This section does not apply to any article described in—
>
> (a) section 1 of the Restriction of Offensive Weapons Act 1959.
>
> (b) an order made under section 141(2) of this Act, or
>
> (c) an order made by the Secretary of State under this section.
>
> (4) It shall be a defence for a person charged with an offence under subsection (1) above to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
>
> (5) The power to make an order under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.) an order made by the Secretary of State under this section.

64. The significance of the appearance of an enactment in Schedule 3 to RESA is that if it is listed there, the statutory regime for controlling regulation and enforcement applies. If not, then it does not. I will not set out all the provisions and guidance in this judgment but it is common ground that none of them was complied with by the prosecutor in this case. In summary, the regime involves a Primary Authority (in this case Milton Keynes) which will liaise with a regulated person (in this case Argos) and reach agreements with that person even if the activity which is being regulated extends beyond the geographical boundaries of the jurisdiction of the Primary Authority. If another authority wishes to take enforcement action against the regulated person, it must notify the Primary Authority who may object. If the two authorities cannot agree, the Secretary of State will determine how the case will be dealt with. While that process is continuing, the enforcement action cannot proceed. The aim is to ensure good regulation as defined in the statutory guidance published under RESA. None of that happened in this case because the prosecutor takes the view that RESA did not apply because the Criminal Justice Act 1988 does not apply because it is not listed in Schedule 3.

65. The first question, then, is whether the prosecutor is right about that. I consider that it is. The enforcement action in this case is being taken under section 141A of the Criminal Justice Act 1988. Although that provision was amended by the Violent Crime Reduction Act 2006, it is the 1988 Act which matters and that is not listed. The 2006 Act creates a significant number of offences, including offences which may result in enforcement action by local authorities, and it is not the case that its inclusion in Schedule 3 was necessarily because of its amendment to the Criminal Justice Act 1988. RESA certainly applies to those other offences created by the 2006 Act, but, until its

recent amendment, the 1988 Act was not a relevant enactment for the purposes of RESA.

66. It is further submitted by Mr. Hercock that the apparent failure to fulfil the obvious legislative intent pre-6 April 2022 (and any drafting defect with schedule 3 to RESA) ought to be subject to a rectifying interpretation in accordance with the principles in *Inco Europe Limited v First Choice* [2000] 1 WLR 586. Under that interpretative approach, a court may adopt an interpretation of legislation which has the practical effect of rectifying a defect in its drafting in circumstances where the court is sure of the intended purpose of the legislation in question and that through inadvertence the legislator has failed to give effect to the purpose of the legislation (*Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872) (QB) at paras. 10 and 38 – 39). In this regard, in discharging its interpretative obligation, a court may, for example, add words into schedule 3 to RESA. This submission was advanced in writing but not developed orally. I consider that this is not a situation where the court would be justified in taking the course suggested. I do not doubt that such a course can be taken in criminal cases, although the certainty and accessibility of the law is a cardinal consideration in this jurisdiction. It has been done in cases where the effect of the interpretation was to preserve the continuity of the law where that was the clear intention of Parliament. To take such a course where the Act in question is fourteen years old, and where the effect would be to subject a significant criminal offence to an inhibition on its enforcement would not, in my judgment, be appropriate. Correction of errors like this, if that is what they are, is a matter for Parliament. Parliament has now legislated to make this change and it did not make that change retrospectively. It would be wrong for the court to do what Parliament might have done, but did not do.

67. Mr. Hercock submits that this does not answer his case. He says that even though the advice of Milton Keynes may not have the statutory consequences which it would have now that it is listed in Schedule 3, nevertheless the court should stay the proceedings as an abuse of the process following a decision of this court in *Postermobile plc v London Borough of Brent* [1997] Lexis Citation 4188. This was a case where the London Borough of Brent had given advice to Postermobile that they could put up advertising posters at Euro 96 for one month, and would not need planning consent to do so. They did that, and the London Borough of Brent, without having contacted them first, sought to prosecute Postermobile for it. Schiemann LJ, with whom Moses J agreed, said this:-

> "The law is faced from time to time with conflicting *desiderata*. In the field of Administrative Law a classic example arises when someone, apparently authorised to make a statement on behalf of an authority, makes such a statement and someone else relies on it. There is then a tension between the principle that where Parliament gives an authority only to one person the other has no such authority and cannot give himself authority just by making a statement. The other principle is that the citizen should be able to rely on assurances given by public officials. In fields such as planning which affect neighbours and a segment of the public and have consequences which can last for years, the courts tend to emphasise the principle that these important public powers can only be exercised by a person genuinely clothed with authority to exercise them. In the present case, however, all that

> is at stake is whether or not the Appellants should be prosecuted for what they did in good faith. In those circumstances I, for my part, would give greater weight to that other *desideratum* that the citizen should be able to rely on what a public official tells him."

68. I do not find that an easy passage to apply, at least as a statement of law of general application. It starts with an unimpeachable description of how the Administrative Court may have to resolve a clash between an assurance given by a public official, and the exercise of "important public powers" by those who truly have authority to exercise them. It then moves, without explanation, to a statement that in that case all that was at stake was whether a person should be prosecuted for a criminal offence. Decisions as to whether a person should be prosecuted or not seem to me to involve the exercise of "important public powers". Conduct is criminalised by Parliament or at common law only in the wider public interest. I cannot think that the court was intending to announce a rule which was applicable to all decisions to prosecute and, if it was, this has been overtaken by events. The last two sentences of that paragraph must be read as referring obliquely to the facts of the case which was before the court. I doubt if the court would have stayed a prosecution for murder with quite such ease. I accept that, as a general rule, where a planning authority has, through officers with apparent authority, given advance approval to particular conduct on the basis that it did not require planning consent then it is open to a court to find an abuse of process if it then prosecutes for that very conduct. This will still require a balancing consideration of all relevant factors, including the public interest in the enforcement of the legislation under consideration.

69. It is often said that two types of abuse of process are identified in *R v. Horseferry Road Magistrates' Court ex p. Bennett* [1994] 1 AC 42. As pointed out in the Divisional Court in *Mansfield v Director of Public Prosecutions* [2021] EWHC2938 (Admin); [2022] QB 335, there are perhaps three. This emerges from the speech of Lord Griffiths at 61B to 62B:-

> "As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164, 168-169, Sir Roger Ormrod said:
>
> > "The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable . . . The ultimate objective of this discretionary power is to ensure that there should be a

> fair trial according to law, which involves fairness to both the defendant and the prosecution."

> "There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process. In *Chu Piu-wing v. Attorney-General* [1984] H.K.L.R. 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence, McMulfin V.-P. said, at pp. 417-418:

> "there is a clear public interest to be observed in holding officials of the state to promises made by them in full understanding of what is entailed by the bargain."

> "And in a recent decision of the Divisional Court in *Reg. v. Croydon Justices, Ex parte Dean* [1993] Q.B. 769, the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to section 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise.

> "Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

> "My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law."

70. The first two categories concern fairness. The present case is a suggested abuse of the second kind, namely one in which it is suggested that it would be unfair to try Argos, even though the trial would be fair. This is because Argos say that they complied with the advice of Milton Keynes. It is not suggested that a trial in this case would result from behaviour by the executive which threatens basic human rights or the rule of law.

71. Milton Keynes reviewed the policy of Argos about age related products and the relevant documents. They carried out visits to premises. They noted that:-

> "Whilst a documented policy exists on which products Argos choose to restrict based on the age restricted legislation, Argos choose to apply a broad interpretation of what is considered to be an age restricted product. Consequently, there are a number of products which fall outside of the scope of the legislation but which Argos still treat as age restricted for example knives."

72. The Milton Keynes advice thus extended to all age-related products sold by Argos, some of which are covered by enactments listed in Schedule 3 to RESA. The advice therefore had a statutory impact in relation to some products but not knives.

73. The advice concluded:-

> **"Primary Authority Advice**
> The Primary Authority is of the opinion that so long as the procedures and systems appraised in the audit report are continuously adhered too, the requirements for reasonable precautions and all due diligence will be met by Argos Limited and its Argos stores in the area of age restricted products."

74. When the advice was re-issued in January 2020 it was to much the same effect, and contained a list of relevant legislation which did not include the Criminal Justice Act 1988 further clarifying the position so far as knives are concerned.

75. In the present case on a test purchase a block of knives was in fact sold to a person who is under 18 years old. The shop assistant who did that was himself only 17 years old. He did not ask the buyer's age.

76. It seems to me that the provision of advice of this kind (unless within the statutory scheme) is one factor to be weighed in the balance when deciding if it would be fair to prosecute Argos. It is less potent than an "unequivocal representation" by a prosecutor that a person will not be prosecuted. This is so because it does not say that. In the case of such unequivocal representations they will only bind the prosecutor if the defendant has relied to his detriment, and even then "there can be circumstances where… it would not be an abuse of process to proceed.", see *R. v. Abu Hamza* [2006] EWCA Crim 2918; [2007] QB 659 and *R v. Killick* [2011] EWCA Crim 1608; [2012] 1 Cr App R 10 (121) at [43].

77. Another factor of importance is the fact that the prosecutor is not the person who gave the advice, and now seeks to go back on it. Outside the statutory scheme of RESA, the prosecutor has the responsibility for enforcement in its geographical area, and decisions of Milton Keynes do not bind it. Argos knows this. The prosecutor has done nothing to engender any sense of unfairness.

78. Further, and finally, in *Postermobile* the effect of the advice was to cause Postermobile to engage in conduct where they had no defence to the subsequent proposed prosecution. In the present case, this is not so. Section 141A(4) provides a defence in which the reasonableness of the precautions and the due diligence actually exercised at the relevant site can be considered by the court. Parliament has decided that it is the court which is the body to determine these matters, not Milton Keyes Council. Milton Keynes Council has (or at least had) no responsibility for the operation of Argos at

Sainsbury's, High Road, Chadwell Heath. If Argos can show that it diligently followed the Milton Keynes advice and the court agrees with Milton Keynes that the precautions were sufficient, Argos will be acquitted. In this case, this is likely to include consideration of the training and supervision of the seventeen-year-old shop assistant, among other things. There is nothing unfair about the court undertaking that exercise.

79. For these reasons I would refuse the application by Argos to stay these proceedings as an abuse of the process of the court.

80. We have received written submissions since this judgment was circulated in draft on consequential matters. We will deal with these on the papers without a further hearing and will issue a further short ruling and order in due course. We are grateful to counsel for their clear written and oral submissions at all stages during this hearing.

Mrs. Justice McGowan

81. I agree.