Council Tax Liability Orders

May 8th, 2015

Andrews J began her Judgment in R (Nicholson) v Tottenham Magistrates and Haringey LBC [2015] EWHC 1252 (Admin) as follows:-

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

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

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

"6. The challenge to the legality of the order focuses on the absence of information that the Claimant says was necessary for the Magistrates to address their minds to the question whether the essential causal connection between the costs claimed and the obtaining of the order had been established by the Council, allied with

the complaint that the Magistrates appear to have confused the *reasonableness* of the amount of the costs with the question whether that sum was reasonably *incurred*. "

Andrews J stated the position as follows:-

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

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

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

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

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

"36. … there are no authorities that specifically address these Regulations, and this is an opportunity for the Court to afford some general guidance as to their interpretation and scope.

37. I doubt whether any assistance in this regard can be derived from authorities in relation to the CPR or the pre-CPR costs regimes, as the Regulations do not refer to "costs of the proceedings". There is some limited assistance to be derived from the Regulations themselves as to what kinds of costs are included. Regulation 34(5) sets out the

circumstances in which the application for a liability order shall not be proceeded with. The respondent must pay or tender to the local authority any unpaid council tax plus “*a sum of an amount equal to the costs reasonably incurred by the authority in connection with the application up to the time of payment or tender*.”

38. … I agree that as a matter of necessary implication, and for the policy reason referred to by counsel, costs incurred in obtaining the order must encompass costs incurred in connection with the application for a summons. Plainly the costs would encompass, but are not confined to, the fee for issuing the summons: the expression “*in connection with the application*” is wider than “*the costs of making the application*“. However, there still has to be a sufficient link between the incurring of those costs and the application for a summons.

39. … it is difficult to draw any analogy between council tax and the scope of costs awarded to prosecuting authorities in criminal cases, because in the latter scenario there is a *discretion* to award costs. Moreover, as in cases falling under the CPR, it is possible to have an assessment of the reasonableness and proportionality of the costs; and the nature of the criminal investigations is very different.”

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

process.

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

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

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

the taxpayer in defence).

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

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

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

were excessive – e.g. if the local authority sent a QC along to argue a simple point of law in the Magistrates' Court.

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

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

54. It is a well-established public law principle that where a public authority has to make a decision, it must know (or be told) enough to ensure that nothing that it is necessary, because it is legally relevant, for it to know, is left out of account. That formula … applies with at

least as much, if not greater, force in a context such as the present where the decision is not wholly a matter of discretion."

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