



Neutral Citation Number: [2023] EWHC 2968 (Admin)

Case No: AC-2023-LON-000835; CO/700/2023

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London WC2A 2LL

Date: 29/11/2023

**Before:**

**Mr Justice Eyre**

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**Between :**

**Total Sprint Limited**  
**- and -**  
**Swale Borough Council**

**Appellant**

**Respondent**

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**Richard Clayton KC (instructed by ASW Solicitors) for the Appellant**  
**Neil Berragan (instructed by Mid Kent Legal Services) for the Respondent**

Hearing dates: 18<sup>th</sup> and 19<sup>th</sup> October 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.00am on 29<sup>th</sup> November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

**Mr Justice Eyre:**

**Introduction.**

1. This is an appeal by way of case stated from the order of District Judge (Magistrates Court) Leake made on 1<sup>st</sup> February 2022 in the Medway Magistrates' Court. On that day the District Judge made a liability order under the Non-Domestic Rating (Collection and Enforcement)(Local Lists) Regulations 1989 ("the 1989 Regulations") against the Appellant ("Total Sprint") in the sum of £511,120.33.
2. The order related to Units 19 – 20, Craft Marsh Trading Estate in Sittingbourne ("the Units"). The Respondent ("the Council") is the rating authority for Sittingbourne.

**The Factual Background in Summary.**

3. On 12<sup>th</sup> September 2019 the Council issued demand notices to Total Sprint for non-domestic rates on the Units in respect of the period 1<sup>st</sup> April 2015 (later revised to 16<sup>th</sup> April 2015) to 1<sup>st</sup> April 2020.
4. On 9<sup>th</sup> October 2017 and 30<sup>th</sup> July 2018 the Council had obtained liability orders ("the Couriers Liability Orders") against Sprint Couriers (Southern) Ltd ("Sprint Couriers") in sums totalling £504,385.44. Those orders were also in respect of non-domestic rates on the Units and were for periods from 1<sup>st</sup> April 2015 to 1<sup>st</sup> April 2019. On 9<sup>th</sup> September 2019 the Council sent Sprint Couriers demand notices for the periods covered by those liability orders showing a zero balance.
5. The Council made complaint to the Medway Magistrates' Court on 13<sup>th</sup> January 2020 seeking the issue of a summons pursuant to regulation 12(2) of the 1989 Regulations against Total Sprint. At that date the liability orders against Sprint Couriers remained in being although the zero balance demand notices had been sent. Sprint Couriers had been placed in liquidation by court order on 30<sup>th</sup> September 2019.
6. The Council had not disclosed the existence of the Couriers Liability Orders when it sought the issue of the summons against Total Sprint. As I will explain below the District Judge was critical of that omission and of a number of other aspects of the Council's conduct and of its actions in the proceedings. Those actions had necessitated a number of adjournments and repeated hearings: there were a total of six hearings spanning the period from 30<sup>th</sup> January 2020 to 15<sup>th</sup> December 2021.
7. The issues before the District Judge were whether the Council's conduct had amounted to an abuse of the process of the court; whether if there had been such abuse the summons should be stayed as a consequence; and whether, if the summons was not stayed, the requirements for the making of a liability order had been satisfied.
8. As a consequence of the District Judge's decision to attach no weight to the hearsay evidence which it had put forward there was no evidence to which weight could be attached from Total Sprint before the court.
9. The District Judge provided the reasons for his decision on 4<sup>th</sup> April 2022. Those reasons were markedly comprehensive, clearly reasoned, and detailed. They ran to 303 paragraphs and 69 pages. They are to be read alongside the Case Stated of 12<sup>th</sup> February 2023 consisting of 63 paragraphs and 26 pages. I will return to the reasons

below but in essence the District Judge found that the Council's actions had amounted to abuse; concluded that on balance the summons was not to be stayed; proceeded on the footing that the burden of establishing that it was not in rateable occupation (and so not liable for the sums demanded) fell on Total Sprint as ratepayer; found that Total Sprint had failed to discharge that burden; and as a consequence concluded that the liability order was to be made.

### **The Issues.**

10. I have to address four groups of issues to answer the stated questions.
  - i) Were the District Judge's findings as to the Council's failings and as to whether those failings amounted to abuse of process correct in law? Although the Council accepts that there was scope for criticism of its handling of the proceedings it does not accept that all the District Judge's conclusions in that regard were well-founded nor that its conduct amounted to abuse.
  - ii) Did the District Judge err in law in failing to stay the summons in light of the abuse of process? Total Sprint says that the gravity of the abuse of process on the Council's part was such that the only proper response for the District Judge was to stay the summons and that he erred in failing to do so.
  - iii) Which party bore the burden of proof on the question of rateable occupation? This issue turns on the proper construction of regulation 12 of the 1989 Regulations. The Council says that Total Sprint bore an evidential burden in this respect and had to adduce evidence properly putting the question of rateable occupation in issue. Total Sprint says that the burden was on the Council to establish on the balance of probabilities that Total Sprint was in rateable occupation.
  - iv) Was the District Judge's conclusion as to rateable occupation correct in law? The outcome on this issue will depend on the preceding issue. For Total Sprint Mr Clayton KC accepted that if his client bore the burden then the District Judge had approached the fact-finding exercise on the correct basis and that the judge's conclusion followed from the material before him. For the Council Mr Berragan did not suggest that the District Judge's factual finding could remain if he had approached the exercise of determining rateable occupation on the wrong legal basis.

### **The Legislative Framework.**

11. The Local Government Finance Act 1988 makes provision for non-domestic rates and the 1989 Regulations were made pursuant to Schedule 9 of that Act.
12. The liability to pay non-domestic rates depends on rateable occupation of the premises in question. The four ingredients of rateable occupation are that there is actual occupation; that this is occupation which is exclusive for the particular purposes of the possessor; that the possession is of some value or benefit to the possessor; and that the possession is not too transient (*Cardtronics Europe Ltd v Sykes* [2020] UKSC 21, [2020] 1 WLR 2184 at [13] approving the classic formulation of Tucker LJ).

13. The following provisions of the 1989 Regulations are of note.
14. Regulation 3(1) defines “the amount payable” thus:
  - “(a) the amount the ratepayer is liable to pay to the authority as regards the hereditament in respect of the year or part under —
    - (i) section 43 or 45 of the Act, whether calculated by reference to section 43(4) to (6) or 45(4) or (4A) of the Act (as those provisions are amended or substituted in any case by or under Schedule 7A to the Act) or by reference to an amount or rules determined or prescribed under section 47(1)(a), 57A(3)(a) or 58(3)(a) of the Act; and
    - (ii) section 11 of the BRS Act, whether calculated by reference to section 13 of the BRS Act (chargeable amount) or determined in accordance with rules set by the levying authority under section 15 of the BRS Act (BRS relief); or
  - (b) where an amount falls to be credited by the billing authority against the ratepayer's liability in respect of the year or part, the amount (if any) by which the amount referred to in sub-paragraph (a) above exceeds the amount falling to be so credited;”
15. Regulations 4 and 5 provide respectively for demand notices and for their service.
16. Regulation 8 addresses a failure to pay by instalments with sub-regulations (1) and (2) providing thus:
  - “(1) Where –
    - (a) a demand notice has been served by a [billing authority] on a ratepayer,
    - (b) instalments are payable under the notice in accordance with [Schedules 1 or 1E] [or 1F], and
    - (c) any such instalment is not paid in accordance with [Schedules 1 or 1E] [or 1F], the [billing authority] shall (unless all the instalments have fallen due) serve a further notice on the ratepayer stating the instalments required to be paid.
  - (2) If, after the service of a further notice under paragraph (1), the ratepayer –
    - (a) fails to pay, before the expiry of the period of 7 days beginning with the day of service of the further notice, any instalments which fall due before the expiry of that period under the demand notice concerned, or
    - (b) fails to pay any instalment which falls due after the expiry of that period under the demand notice concerned on or before the day on which it so falls due, the unpaid balance of the estimated amount shall become payable by him at the expiry of a further period of 7 days beginning with the day of the failure....”
17. Regulation 10 defines a liability order as an order made under regulation 12.
18. Regulation 11 makes the following provision for reminder notices:
  - “(1) Subject to paragraph (3), before a [billing authority] applies for a liability order it shall serve on the person against whom the application is to be made a notice (“reminder notice”), which is to be in addition to any notice required to be served under Part II and which is to state every amount in respect of which the authority is to make the application.
  - (2) A reminder notice may be served in respect of an amount at any time after it has become due.

(3) A reminder notice need not be served on a person who has been served under regulation 8(1) with a notice in respect of the amount concerned where there has been such a failure as is mentioned in regulation 8(2)(a) in relation to the notice.”

19. Then regulation 12 provides:

“(1) Subject to paragraph (3), if an amount which has fallen due under regulation 8(2) in consequence of such a failure as is mentioned in sub-paragraph (a) of that provision is wholly or partly unpaid, or (in a case where a reminder notice is required under regulation 11) the amount stated in the reminder notice is wholly or partly unpaid at the expiry of the period of 7 days beginning with the day on which the notice was served, the [billing authority] may, in accordance with paragraph (2), apply to a magistrates' court for an order against the person by whom it is payable.

(2) The application is to be instituted by making complaint to a justice of the peace, and requesting the issue of a summons directed to that person to appear before the court to show why he has not paid the sum which is outstanding.

(3) Section 127(1) of the Magistrates' Courts Act 1980 does not apply to such an application; but no application may be instituted in respect of a sum after the period of 6 years beginning with the day on which it became due under Part II.

(4) A warrant shall not be issued under section 55(2) of the Magistrates' Courts Act 1980 in any proceedings under this regulation.

(5) The court shall make the order if it is satisfied that the sum has become payable by the defendant and has not been paid.

(6) [An order made pursuant to paragraph (5) shall] be made in respect of an amount equal to the aggregate of –

(a) the sum payable, and

(b) a sum of an amount equal to the costs reasonably incurred by the applicant in obtaining the order.

(7) Where the sum payable is paid after a liability order has been applied for under paragraph (2) but before it is made, the court shall nonetheless (if so requested by the [billing authority]) make the order in respect of a sum of an amount equal to the costs reasonably incurred by the authority in making the application.”

### **The District Judge's Reasons.**

20. The District Judge began by describing the usual procedure whereby bulk applications were made for liability orders. He then noted the existence of the Couriers Liability Orders which he described as being “a striking feature of the case”. The District Judge referred to the temporal overlap between the period covered by those orders and that of the order sought against Total Sprint; to the fact that the Council had not sought to have the orders set aside; and to the Council's failure to draw those orders to the court's attention either when seeking the issue of the summons or in its statements of case or in the first or second witness statements of the rating officer.

21. The District Judge explained that there was no dispute that the rate had been duly made and published; that it had been duly demanded from Total Sprint; nor that it had not been paid. He identified the following issues:

“Issue (1): Did the complainant fail to comply with the requirement in regulation 5(1)(a) of the 1989 Regulations to issue demand notices to the claimant “on or as soon as practicable after ... 1st April in the relevant year”?

Issue (2): Could the complaint have applied to set aside the Sprint Couriers liability orders before applying for the liability order against the complaint?

Issue (3): Does the application for the liability order against the respondent amount to re-litigation of issues determined in, or a collateral attack on, the making of the Sprint Couriers liability orders?

Issue (4): Did the complainant fail to comply with a duty of candour to the court by not disclosing the Sprint Couriers liability orders when the application was made for the summons against the respondent?

Issue (5): Did the complainant fail to comply with a duty of disclosure to the respondent by not disclosing the fact of the Sprint Couriers liability orders and relevant correspondence concerning occupation of the premises?

Issue (6): Should the summons be set aside and/or the proceedings be stayed on grounds of abuse of process?”

22. Under the heading “the statutory framework” the District Judge set out the relevant provisions of the Local Government Finance Act 1988 and summarised the test for rateable occupation. He then rehearsed the relevant provisions of the 1989 Regulations. Then the District Judge referred to and quoted from the decisions in *Ratford v Northavon Council* [1987] 1 QB 357, *Westminster City Council v Tomlin* [1989] 1 WLR 1287, and *Pall Mall Investments v London Borough of Camden* [2013] EWHC 459 (Admin).
23. At [35] – [42] the District Judge noted that the Civil Procedure Rules did not apply to the proceedings but proceeded, sensibly, to summarise at that stage in his reasons the nature of the disclosure duty under CPR Pt 31.
24. At [43] – [73] the District Judge summarised the proceedings and evidence leading to the trial. He found that the disclosure order to which I shall refer below was made and noted the various points at which the Council provided material to the court without disclosing the existence of the Couriers Liability Orders. In addition the District Judge made reference to the Additional Supplemental Bundle. This had been served by Total Sprint and contained email exchanges between Sprint Couriers and Medway Magistrates’ Court and between the Council’s rating officer, Nick Prior, and Nick Mason of Nick Mason Ltd. The District Judge pointed out that these were the Council’s documents but had not been disclosed by the Council. He explained that these were significant as being the first disclosure to the court of the existence of the Couriers Liability Orders and because the email exchanges between Messrs Prior and Mason were relevant to the question of whether Total Sprint had been in occupation of the Units.
25. At [74] – [160] the District Judge summarised in some detail the hearings before him. Mr Prior was the only witness for the Council. The District Judge explained that at the initial hearing Mr Prior had been adamant that he had not received an email of 26<sup>th</sup> February 2020 from Mr Mason. That email said that Sprint Couriers had left the site on 31<sup>st</sup> September 2019 and that it was only on 1<sup>st</sup> October 2019 that Total Sprint had

taken over responsibility for the whole site including the Units. The District Judge took the view that the effect of Mr Prior's evidence was that the 26<sup>th</sup> February email was either a forgery or, if it had been prepared by Mr Mason, had not been sent. The hearing had been on 18<sup>th</sup> June 2021 and the District Judge had reserved his decision. The court, at the District Judge's request, sent the parties a message inviting them to consider the making of admissions as to the Couriers Liability Orders. The Council had unhelpfully declined to make admissions and the District Judge characterised that as a matter of concern.

26. It was at that stage that Total Sprint sought permission to adduce hearsay evidence including an email from Mr Prior acknowledging and responding to Mr Mason's email of 26<sup>th</sup> February 2020. The District Judge then directed that there be a further hearing for Mr Prior to be recalled and cross-examined about this material. The Council adduced further evidence in respect of which the District Judge accepted Total Sprint's characterisation that this was an attempt to rewrite the Council's case. Mr Prior submitted a further statement and in that and in his answers in cross-examination he sought to explain why he had said that he had not received the 26<sup>th</sup> February email. The District Judge was highly critical of this evidence. He found that Mr Prior's explanation was not credible and said at [159]:

"I have not concluded that Mr Prior was deliberately dishonest; but I am equally not satisfied that he did his best to be as candid and helpful to the court on 18 June as he should have been. I am satisfied (to a higher standard than a balance of probabilities) that this was wilful blindness on his part in that he had failed to look properly for the email (after 14 June 2021) because he did not want to know the uncomfortable truth that he had received it and about what it contained. He then persisted in that stance when he gave his evidence on 18 June and he repeatedly denied the blindingly obvious.

27. At [167] the District Judge set out the findings of fact in relation to matters other than the question of rateable occupation. He noted again the Council's failure to disclose the Couriers Liability Orders; its failure to search for documents adverse to its case or supportive of Total Sprint's case; the Council's possession of documents adverse to its case and/or supportive to that of Total Sprint and which it did not disclose; and the giving by Mr Prior of untruthful evidence. At [[168] – [170] the District Judge recorded the hearsay evidence and stated that the only element of that material which was not otherwise in evidence was the email of 26<sup>th</sup> February 2020.
28. At [171] – [178] the District Judge addressed the question of whether the Council had issued the demand notices to Total Sprint as soon as practicable after 1<sup>st</sup> April in the relevant year as was required by regulation 5(1)(a). He concluded that the notices had not been served as soon as practicable after the relevant dates. The District Judge characterized Mr Prior's explanation for the failure to serve them earlier as "unsatisfactory at best". The notices had not been served until 12<sup>th</sup> September 2019 and related to periods commencing on 1<sup>st</sup> April 2015 (albeit it was later accepted that the liability of Total Sprint could not have begun before it was incorporated on 16<sup>th</sup> April 2015). The demands were served as the result of a line of enquiry which had begun on 29<sup>th</sup> August 2019 and the District Judge's conclusion on this point flowed from his findings that the line of enquiry was an obvious one which could have been followed at the outset of Mr Prior's investigation of the matter. Accordingly, the District Judge found that it would have been feasible for the Council to have served the notices "at a much earlier stage".

29. Before the District Judge the Council's position was that it could not have applied to have the Couriers Liability Orders set aside. The District Judge addressed this issue at [179] – [187] and concluded in light of the dicta of Waller LJ in *R (on the application of Periasamy Mathialagan) v London Borough of Southwark* [2004] EWCA Civ 1689, [2005] RA 43 that such application could have been made.
30. The District Judge then turned to the third issue before him. He set out his reasoning at [188] – [196]. There he expressed the view that the Couriers Liability Orders had been “final and conclusive of the cause of action namely that the sum has become payable by the person summonsed and it has not been paid”. He said that the issue of rateable occupation had been “finally determined” in the proceedings leading to the Couriers Liability Orders. As a consequence the District Judge found that the application for a liability order against Total Sprint was an attempt to re-litigate a matter which had already been determined and was in addition a collateral attack on the Couriers Liability Orders.
31. The District Judge addressed the duty of candour at [197] – [206] concluding that the Council had owed such a duty; that the duty had required it to reveal the existence of the Couriers Liability Orders to the court when it applied for the summons against Total Sprint; and that it had failed to discharge that duty.
32. At [207] – [224] the District Judge addressed the question of disclosure. He explained that as a consequence of the order of 30<sup>th</sup> January 2020 to which I will refer below and “as a matter of natural justice” the parties were required to proceed as if the requirements of standard disclosure under the Civil Procedure Rules applied to the proceedings. The District Judge concluded that the Council had failed to comply with its disclosure duty and identified a number of documents adverse to the Council's case which were in its possession or control and which it had failed to disclose. The District Judge also noted that Total Sprint had a duty to search for and to disclose documents adverse to its case. There had been no disclosure by Total Sprint but the District Judge added that the Council had made no complaint about this and that Total Sprint had not called any evidence at the trial (I note in passing that the latter consideration could not be relevant to the question of whether or not there should have been disclosure by Total Sprint).
33. The District Judge considered at [225] – [245] whether the summons should be set aside or the proceedings stayed on the ground of abuse of process.
34. The Council's procedural failings were summarised thus at [225]:
  225. I have concluded in these proceedings that the complainant:
    - (a) failed to comply with the requirement in regulation 5(1)(a) of the 1989 Regulations to issue demand notices to the respondent “on or as soon as practicable after... 1st April in the relevant year”;
    - (b) could, and should, have taken steps to have the Sprint Couriers liability orders set aside before applying for the liability order sought against the respondent;
    - (c) is seeking to re-litigate an issue that was finally determined by, and is making a collateral attack on, the liability orders made against Sprint Couriers;



(d) failed to comply with a duty of candour to the court by not disclosing the Sprint Couriers liability orders when the application was made for the summons against the respondent;

(e) failed to comply with a duty of disclosure to the respondent by not disclosing the Sprint Couriers liability orders and the email from Mr Mason to Mr Prior on 26 February 2020; and

(f) has presented evidence to the court that was untruthful in part in circumstances which were entirely avoidable.

35. At [226] the District Judge said that these failings were interrelated and that it would be artificial to consider them in isolation. Instead they were to be considered “cumulatively and in the round”.

36. The District Judge set out his understanding of the relevant principles. He had regard to the approach set out by Burnett J in *North Somerset DC v Honda Motor Europe Ltd* [2010] EWHC 1505 (QB) in relation to the consequences of a failure to serve a demand notice as soon as practicable after 1<sup>st</sup> April in the relevant year. The District Judge referred to the authorities in respect of re-litigation and collateral attacks on court decisions which I will consider below. He then expressed the view that the circumstances in which a failure to comply with the duty of candour at the time of requesting the issue of a summons would lead to the summons being set aside were more limited when the summons invoked the magistrates’ civil jurisdiction than would be the position in criminal proceedings. The District Judge then said that the lack of candour did not “give rise to an independent head of abuse in the circumstances of this case” but was “culpable or improper conduct” to which he was to have regard when applying the broad merits-based approach.

37. At [234] the District Judge set out the approach he was to take thus:

Having considered the authorities to which I have referred to above, the principle set out in *North Somerset DC v Honda Motor Europe Ltd* (namely that that the countervailing public interest is in the collection of taxes, the interests of other tax payers and the revenues of the local authority concerned) is, in my judgment, one that should be applied across each of the heads of abuse arising in this case. Accordingly, I consider that the approach that I should in this case is as follows:

(1) The court should apply a broad merits-based approach to determine whether the summons should be set aside or whether the complainant’s conduct is, in all the circumstances, an abuse of process.

(2) The countervailing public interest is in the collection of taxes, the interests of other taxpayers and the revenues of the local authority concerned.

(3) The burden of establishing that the summons should be set aside, or that the proceedings should be stayed, is on the respondent.

(4) The summons should be set aside, or the proceedings should be stayed, only if the conduct of the complainant:

(a) has deprived the respondent of the opportunity fairly to put its case before the court,

(b) gives rise to prejudice or unfairness to the respondent that outweighs the countervailing public interest; or

(c) involves unjust harassment or oppression of the respondent; or

(d) would bring the administration of justice into disrepute.

(5) Culpable or improper behaviour on the part of the complainant is a factor to be taken into account.

38. The District Judge explained that he found the Council's conduct of the proceedings to have been "deplorable and egregious". He found that there was no evidence of actual prejudice to Total Sprint and that the summons was not to be set aside by reason of prejudice without more. In that regard he noted that any cash flow difficulties arising from Total Sprint having to pay a large lump sum for rates covering five years would be balanced by the fact that, assuming liability to be established, it had had the use of its funds for longer than would have been the case if the rates had been paid each year. The District Judge said that the unfairness caused by the Council's disclosure failures had been cured by the passage of time and by the subsequent disclosure of the material in question. As to the Council's failure to apply for the Couriers Liability Orders to be set aside the District Judge said (at [242] of the reasons and as summarized at [43(g)] of the case stated) that if the law had been clear he would have regarded the failure to make such an application as bringing the administration of justice into disrepute and as such being an abuse of process warranting a stay. However, as the law was not settled the administration of justice was not thereby brought into disrepute.
39. The District Judge considered the cumulative effect of the Council's failings and noted the untruthful evidence given by Mr Prior to be "a weighty factor in the balance". However, he concluded that "the countervailing public interest (in the collection of taxes, the interests of other tax payers and the revenues of the local authority concerned) carries the greatest weight overall and that it outweighs each of the other factors in the particular circumstances of this case" and as a consequence concluded that the summons should not be set aside nor the proceedings stayed on the ground of abuse of process.
40. Having expressed that conclusion the District Judge reiterated that he regarded the Council's failings as serious but said that he took the view that the court's power as to costs would provide a remedy in that regard.
41. Next, the District Judge considered the question of the burden of proof. The reasoning and conclusions set out at [246] – [262] of the reasons were accurately summarised thus at [44] of the case stated:

"44. As to the nature of the burden of proof arising under regulation 12 of the 1989 Regulations, I was of the following opinion.

a. The Court was bound by the decisions in *Ratford v North Avon DC* [1987] Q.B. 357, *Westminster City Council v Tomlin* [1989] 1 W.L.R. 1287 and *Pall Mall Investments v London Borough of Camden* [2013] EWHC 459 (Admin), which had confirmed for the purposes of regulations 12 of the 1989 Regulations that:

- the billing authority held the burden of proving that (a) the rate in question had been duly made and published, (b) it had been duly demanded from the respondent, and (c) it had not been paid;
- the person summonsed held the burden of proving that it had not been in rateable occupation of the property during the period alleged by the billing authority;
- those burdens of proof held by the parties are evidential burdens and they are fixed to the party holding them;
- once the billing authority has discharged its burden of proof, there is no requirement on it to establish a prima facie case of rateable occupation, or to do sufficient to raise the issue of rateable occupation, before the burden of proof on the person summonsed arises in relation to that issue;
- whilst the billing authority must have reasonable grounds believing that the person summonsed is in rateable occupation, it does not need to prove them before a magistrates' court in an application to obtain a liability order; and
- any challenge to the application for the summons by the billing authority, and/or the continuing by the billing authority of the application for the liability order, on the basis of a challenge to the billing authority's grounds for believing the person summonsed to be in rateable occupation of the property, is by judicial review.

b. The burden of proof in relation to the issue of rateable occupation is an evidential burden of proof which is fixed to the person summonsed. The "shifting" or "swinging" burden of proof referred to in the authorities considered in *Pall Mall Investments* did not describe the burden of proof in relation to the issue of rateable occupation as moving from the person summonsed to the billing authority or vice versa. The "shifting" burden referred to in *Tomlin* was a description of the burden of proof held by the person summonsed (i.e. in relation to the issue of rateable occupation) arising only once the billing authority had discharged its burden of proof as to the matters described above. The "swinging" burden referred to in the fourth proposition of law in *Ratford* described the balance of probabilities, in that as one party adduced evidence in relation to an issue, then so the other party must adduce more evidence in relation to that issue.

c. If there was evidence having any weight adduced by either party in relation to the issue of rateable occupation, the court would determine the issue on a balance of probabilities.

d. If there was no evidence having any weight adduced by either party in relation to the issue of rateable occupation (or if the evidence adduced by both parties carried equal weight), then the person summonsed would fail on a balance of probabilities to discharge the burden of proof in relation to that issue."

42. Having found that the formal requirements had been established by the Council the District Judge turned to consider whether Total Sprint had discharged its burden in relation to rateable occupation. The first stage in that exercise was to determine whether the hearsay evidence advanced by Total Sprint should be admitted and if so what weight was to be attached to it. The effect of the District Judge's analysis of the material which was being advanced was that he concluded that such hearsay evidence as was to be admitted was either unreliable or such that no weight was to be attached to it. That had the consequence that there was no evidence capable of carrying any weight on the issue of whether or not Total Sprint had been in rateable occupation of the Units at the relevant time. That in turn meant that Total Sprint had failed to

discharge the burden of proof on it in respect of that issue. It was as a consequence of that finding that the District Judge made the liability order sought by the Council.

**The Stated Questions.**

43. The District Judge stated the following questions:

“(1) Was I correct to conclude that the Respondent had failed to comply with the requirement in regulation 5(1)(a) of the 1989 Regulations to issue demand notices to the Appellant “on or as soon as practicable after... 1st April in the relevant year”?”

(2) Was I correct to conclude that the Respondent could have applied to the Magistrates’ Court to have the first and second liability orders made against Sprint Couriers (Southern) Limited on 9 October 2017 and 30 July 2018 set aside before applying for the summons against the Appellant?

(3) Was I correct to conclude that the Respondent’s application for a liability order against the Appellant was a collateral attack on, and amounted to seeking to re-litigate issues that had been finally determined in, the first and second liability orders made on 9 October 2017 and 30 July 2018?

(4) Was I correct to conclude that the Respondent owed: a. a duty of candour when it applied for the summons and, if so, was I correct as to the scope of that duty? b. a duty of disclosure and, if so, was I correct as to the scope of that duty?

(5) Was I correct to conclude that the Respondent acted in breach of either or both such duties?

(6) If I was correct in any or all of my conclusions referred to in questions (1) to (5) above, should the summons have been set aside and/or the proceedings stayed as an abuse on one or more (including the cumulative effect) of those conclusions?

(7) Is the approach to the burden of proof for the purposes of regulation 12 of the 1989 Regulations as follows:

a. the billing authority bears the burden of proving that (a) the rate in question had been duly made and published, (b) the rate had been duly demanded from the person summonsed, and (c) the rate had not been paid;

b. the person summonsed bears the burden of proving that they had not been in rateable occupation of the property during the period alleged by the billing authority;

c. those burdens are evidential burdens of proof and they are fixed to the party holding them;

d. once the billing authority has discharged its burden of proof, there is no requirement on it to establish a prima facie case of rateable occupation, or to do sufficient to raise the issue of rateable occupation, before the burden of proof on the person summonsed arises in relation to that issue;

e. whilst the billing authority must have reasonable grounds believing that the person summonsed is in rateable occupation, it does not need to prove them before a magistrates’ court in an application to obtain a liability order; and

f. any challenge to the application for the summons by the billing authority, and/or the continuing by the billing authority of the application for the liability order, on the basis of a challenge to the billing authority’s grounds for believing the person summonsed to be in rateable occupation of the property, is by judicial review;

g. the references to a “swinging” and “shifting” burden of proof in *Ratford* and *Tomlin* (as applied to reg.12 in *Pall Mall Investments*) are not to be understood as describing

movement of the burden of proof in relation to the issue of rateable occupation from the person summonsed to the billing authority, or vice versa;

h. where there was evidence carrying any weight in relation to the issue of rateable occupation, the court should determine the issue on a balance of probabilities; and

i. where there was no evidence carrying any weight in relation to that issue (or if the evidence that had been adduced by both parties carried equal weight), then the person summonsed would fail on a balance of probabilities to discharge the burden of proof in relation to the issue?

(8) Was I was correct to conclude that the Respondent had discharged its burden of proving that (a) the rate in respect of Units 19-20 for the period 16 April 2015 to 1 April 2020 had been duly made and published, (b) that rate had been duly demanded from the Appellant, and (c) that rate had not been paid; and the Appellant had failed to discharge its burden of proving that it had not been rateable occupation of Units 19-20 during that period?"

### **The Construction of the 1989 Regulations and the Allocation of the evidential Burden of Proof.**

44. Although on one view the issue of which party bears the burden of proof does not fall to be addressed until after that of whether the summons was to be stayed as an abuse of process has been determined it is convenient to address it before the other issues. This is because the conclusion as to the burden of proof will be relevant to the questions of whether there was abuse of process by the Council and if so what the consequences should have been.

45. Before the 1988 Act came into force the liability to pay non-domestic rates was governed by the General Rate Act 1967. That provided at section 97 for a rating authority to institute proceedings leading to the issue of a warrant of distress. Subsection (1) said that:

“(1) The proceedings for the issue of a warrant of distress under this Part of this Act may be instituted by making complaint before a justice of the peace and applying for a summons requiring the person named in the complaint to appear before a magistrates' court to show why he has not paid the rate specified in the complaint.”

46. The approach to be taken to the burden of proof for the purposes of section 97(1) was well-established. In *Ratford* Slade LJ (with whom Ralph Gibson LJ and Sir John Megaw agreed) considered the earlier authorities and then said at 369H to 370H:

“On the basis of these authorities and on general principle, I would derive the following propositions of law as to the burden of proof in rating cases:

(1) A rating authority will not be justified in applying for a summons against a person under section 97(1) of the Act if it has no reasonable grounds for believing that he is or may be in rateable occupation of the premises in question; if it were to decide to apply for a summons in such circumstances, its decision would be open to judicial review. This I infer is what Donaldson L.J. had in mind in saying in *Forsythe v. Rawlinson*, 21 R.V.R. 97, 98, that "the rating authority is only entitled to issue a complaint against people who are within the category of those who may prima facie be liable for the rates." Thus, though for present purposes I find it unnecessary to express any concluded view on this point, it may be that section 97(1) must be read subject to the implicit qualification that it would place no onus on a person who received a summons which so far lacked any reasonable basis that the decision to issue it could be successfully attacked on *Wednesbury* grounds: see *Associated Provincial Picture Houses Ltd. v. Wednesbury*

*Corporation* [1948] 1 K.B. 223. This, I infer, is what Lord Parker C.J. may have had in mind in *Des Salles d'Epinoix v. Kensington and Chelsea (Royal) London Borough Council* [1970] 1 W.L.R. 179, 183B, in saying that section 97(1) contemplates that:

‘assuming that there is prima facie evidence that he is the rateable occupier . . . it is for him then to appear and show for one reason or another why he has not paid.’

(2) Even if this implicit qualification to section 97(1) exists, it can, in my opinion, only apply in a case where on the facts known to the rating authority the person named in the complaint could not have been reasonably regarded by the authority as a reasonably possible candidate for the position of rateable occupier. (3) Subject to (1) and (2) above, at the hearing of a summons under section 97(1) all the rating authority has to show in the first instance is that (a) the rate in question has been duly made and published; (b) it has been duly demanded from the respondent, and (c) it has not been paid. If these three things are shown, the burden then falls on the respondent to show sufficient cause for not having paid the sum demanded: see *Verrall v. Hackney London Borough Council* [1983] Q.B. 445, 459, *per* May L.J. The question whether a person who appears to be in occupation of a particular property is in actual occupation of it will be peculiarly within his knowledge. It seems to me probable that the legislature, in enacting section 97(1), would have contemplated that the burden of proving a defence based on non-occupation of the property would in the first instance fall on the respondent. (4) However, the standard of proof will be merely that of the balance of probabilities, and in Donaldson L.J.'s words in *Forsythe v. Rawlinson*, 21 R.V.R. 97, 98, "like all cases of the burden of proof in litigation, it is a swinging burden." As the evidence of varying weight develops before the magistrates, the eventual burden of proof will, in accordance with ordinary principles of evidence, remain with or shift to the person who will fail without further evidence: see, for example, *Halsbury's Laws of England*, 4th ed., vol. 17 (1976), p. 13, para. 15.”

47. It will be noted that underlying Slade LJ’s conclusion that the burden of proving non-occupation fell in the first instance on the ratepayer was the consideration that the question of who was in occupation would be peculiarly within the knowledge of such a person. Thus Slade LJ looking at matters from the viewpoint of the ratepayer regarded such a person’s position as being one giving knowledge of who was in actual occupation. In *Tomlin Croom-Johnson LJ* (with whom Mann and Fox LJJ agreed) considered knowledge of occupation from the rating authority’s standpoint emphasising the authority’s limited scope for knowledge and saying at 1288H:

“The rating authority cannot know the full circumstances surrounding each rateable property in its area, and section 97(1) contemplates that if the authority establishes a prima facie case that the rates have been properly demanded and not paid, the burden of proof then shifts to the respondent to the summons to appear and show for one reason or another why he has not paid: see *Des Salles d'Epinoix v. Kensington and Chelsea (Royal) London Borough Council* [1970] 1 W.L.R. 179, 182, *per* Lord Parker C.J. ...”

48. The dispute before me as to the construction of regulation 12 turned on the extent to which the approach under section 97 as explained in *Ratford* was applicable to that regulation. In particular does the evidential burden of disproving rateable occupation still fall on the person summonsed once the rating authority has established the formal requirements?
49. In *Pall Mall Investments Holman J* was concerned with the position under regulation 12. In that case the ratepayer had produced no evidence although a form of lease had been admitted in evidence (but with its authenticity and effect being disputed).

Holman J concluded that the *Ratford* approach remained applicable. At [16] he quoted regulation 12(2) and said:

“The actual wording of that part of the regulations is not identical to the wording of section 97(1) of the General Rate Act 1967, but appears to be to exactly the same effect. Accordingly, insofar as the earlier authorities reflect or are based upon the language of section 97(1) of the General Rate Act 1967, they are equally in point, albeit that the relevant provision is now regulation 12(2) to which I have referred.”

50. Applying that approach Holman J explained, at [19], that once the primary facts had been established “there was an evidential burden which ‘swung’ or ‘shifted’ to Pall Mall Investments to show that they were not in rateable occupation”.
51. It is apparent from [19] that the question of who bore the evidential burden was not in dispute before Holman J. However, it is also clear that Holman J considered the wording of section 97(1) and of regulation 12(2) together with the earlier authorities. Having done so he concluded that the similarities in the legislative language and in the issues to be considered were such that the approach applicable to section 97(1) was also applicable to regulation 12(2). I am not bound to follow Holman J’s approach but unless the position in *Pall Mall Investments* is properly distinguishable from the circumstances of this case I should do so as a matter of judicial comity unless I am convinced either that it is wrong (Robert Goff LJ per curiam in *R v Greater Manchester Coroner ex p Tal* [1985] QB 67 at 81A-B) or that there is a powerful reason for not doing so (Lord Neuberger in *Willers v Joyce (No2)* [2016] UKSC 44, [2018] AC 843 at [9]).
52. Mr Clayton says that Holman J’s approach was wrong and that I should not follow *Pall Mall Investments*. He says that the effect of regulation 12 when properly considered and with due weight being given to regulation 12(5) is that the burden of proving that Total Sprint was in rateable occupation fell in the first instance on the Council.
53. Mr Clayton correctly noted that the proper construction of regulation 12 did not appear to have been in issue before Holman J. This would be a factor which would provide some support for taking a different approach from that of Holman J if I were persuaded that his approach was wrong. However, for the following reasons not only am I not persuaded that Holman J’s analysis was wrong but I am satisfied that as a matter of construction of regulation 12 it expresses the correct approach.
54. When interpreting legislation the court seeks to ascertain the objective meaning of the words used when read in context. The relevant context is primarily that of the statute or other instrument in which the words appear when that is read as a whole (see *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343 per Lord Hodge at [29] – [31] and per Lady Arden at [59]). Other legislation can form part of the context in which the language of a particular instrument is to be interpreted but the primary context remains the balance of the statute or instrument in question.
55. It follows that my focus must be on regulation 12 read as a whole and seen primarily in the context of the 1989 Regulations albeit as I will explain below account is also to be taken of the factual context.

56. Mr Clayton contended that the terms of section 97(1) and of regulation 12(2) were materially different. He said that there was a distinction between a summons “requiring the person named in the complaint to appear before a magistrates’ court” (the wording of section 97(1)) and a summons “directed to that person to appear before the court” (the wording of regulation 12(2)). Mr Clayton submitted that the latter formulation was in some way more akin to providing information to the person summonsed. That contention is simply untenable. A summons “directing” a person to appear and a summons “requiring” a person to appear are materially the same particularly as in each case the person is to appear in order “to show why he has not paid”.
57. The next point made by Mr Clayton was that I should not have regard to the authorities as to section 97(1) because the 1988 Act was not a consolidating act and there were differences of wording between the provisions in the 1967 Act and in the 1989 Regulations. In the latter regard Mr Clayton placed particular emphasis on the presence of regulation 12(5). He urged me to consider the language of regulation 12 without reference to the approach in *Ratford*. In response Mr Berragan submitted that the term “to appear before the court to show why he has not paid” was a term which the authorities had found to have a particular meaning in the rating context and that the use of that term in regulation 12 was to be seen as the adoption and application of that established meaning. In my judgement even if matters do not go as far in that regard as Mr Berragan submitted it is nonetheless legitimate to have regard to the decisions in *Ratford* and *Tomlin*. I have already explained that the relevant words are materially the same. What is also significant is that the factual context is the same namely the liability for rates. It follows that *Ratford* and *Tomlin* are Court of Appeal decisions as to the effect of those words in that factual context. It then becomes necessary to consider whether the language of regulation 12 taken as a whole and seen in the context of the 1989 Regulations as a whole means that the context of the words when used in those provisions is such that they are to have a different meaning for the purposes of those regulations from that which they had for the purposes and in the context of the 1967 Act.
58. It is in this respect that Mr Clayton laid particular emphasis on regulation 12(5). He said that the reference there to the court making the order “if it is satisfied that the sum has become payable by the defendant” meant as a matter of basic principle that the onus was on the rating authority as the party seeking an order to satisfy the court of that matter. Mr Clayton said that regulation 12(2) was to be read in the light of and subject to regulation 12(5). He went so far as to say that regulation 12(5) “imposes an express obligation on a local authority to prove that the sum has become payable on the balance of probabilities”.
59. I do not accept that regulation 12(5) has the effect for which Mr Clayton contended. The reference there to the court making an order if it is satisfied does not necessarily mean that the court has to be caused to be satisfied by the Council. It is right that the legal burden of establishing a proposition is normally on the party seeking to rely on that proposition. However, it is to be remembered that the *Ratford* approach is concerned with the question of which party bears the evidential burden of raising the issue of rateable occupation. Moreover, just as regulation 12(2) has to be interpreted having regard to regulation 12(5) so the latter has to be interpreted having regard to the former. Regulation 12 has to be read as a whole with effect being given to all its



provisions. In that exercise the starting point is that the defendant is before the court because of a summons requiring the defendant “to show why he has not paid the sum which is outstanding”. This sets the context for the proceedings and is the reason why there is to be a hearing. The words of regulation 12(2) can only sensibly be read as imposing at least an evidential burden on the person summonsed. The meaning and effect which Mr Clayton sought to give to regulation 12(5) would deprive the words of regulation 12(2) of their clear and natural meaning.

60. Mr Berragan was right to say that regulation 12(5) can properly be read as explaining what happens when the court is satisfied that the sum is payable without laying down the process by which it is to be satisfied still less stipulating who bears the burden of satisfying the court. Mr Berragan was also right to say that while regulation 12(5) does impose an express obligation it imposes that obligation on the court and not the rating authority. The express obligation set out in regulation 12(5) is an obligation on the court to make the order once it is satisfied that the sum has become payable and is unpaid.
61. I find that on a natural reading of the language used and even without having regard to *Ratford* the effect of regulation 12(2) is that the person summonsed bears the burden (at least at the evidential level) of showing a good reason for non-payment and so of showing that such person was not in rateable occupation of the premises in question. The presence of regulation 12(5) does not lead to a different conclusion. Regulation 12(2) does expressly place the burden of showing why he has not paid on the person to be summonsed. Regulation 12(5) is to be read in the context of that and if it was intended to have the effect of providing that such person did not have that burden then one would expect that to be stated expressly and clearly. Moreover, on this interpretation regulation 12(5) still makes complete sense when read as indicating that the court has no discretion once satisfaction has been established and/or as explaining the consequences of such satisfaction.
62. That conclusion is supported by the factual context of the 1989 Regulations. It is here that the points made in *Ratford* and *Tomlin* are of particular note. In those cases the Court of Appeal indicated that the putative ratepayer’s special opportunity for knowledge and the rating authority’s limited scope for knowledge as to occupation of the premises were material to the interpretation of section 97. Those considerations remain present and are part of the factual context of the 1989 Regulations. Account is similarly to be taken of them when interpreting those regulations.
63. A further, albeit subsidiary, point is the use in both regulation 12(2) and regulation 12(5) of the words “the sum”. In regulation 12(2) those words refer back to “the amount which has fallen due” and “the amount stated in the reminder notice” in regulation 12(1) – indicating that those amounts are both seen as “the sum which is outstanding”. The reference to “the sum” in regulation 12(5) must be a reference to the same sum. Mr Clayton was driven to submitting that the references using the same words in the same regulation were to different things. That submission was not supported by the language of the regulation and was untenable. The conclusion that the words “the sum” in both sub-regulations apply to the same amount supports the view that the procedure for satisfaction of the court for the purposes of regulation 12(5) is that laid down in regulation 12(2) with the defendant having to show why he has not paid.

64. Accordingly, the District Judge's approach to the burden of proof derived as it was from *Ratford* and *Pall Mall Investments* was correct. That approach as set out at [260] – [262] in his reasons; at [44] in the stated case; and in the seventh of the questions was an admirably succinct and well-structured summary of the effect of the legislation and of the authorities.

### **The Timing of the Demands.**

65. As noted above, the District Judge had found that the Council had failed to serve the demand notices as soon as practicable after 1<sup>st</sup> April in the relevant years but that, applying the approach in the *North Somerset* case, this delay had neither invalidated the notices nor, even when combined with the other matters, warranted a stay of the proceedings.
66. It had seemed that it would not be necessary to address this aspect of the case. In his skeleton argument Mr Clayton had said, at [34], that Total Sprint did not pursue the ground that the Council failed to comply with the requirement to issue the demand notices as soon as practicable after 1<sup>st</sup> April in the relevant years. Unsurprisingly in the light of that in his skeleton argument Mr Berragan had said that while the Council would have had points to raise by way of challenge to the District Judge's finding it did not, in light of Total Sprint's stance, need to do more than say that no relevant consequences flowed from the determination.
67. So matters stood until after the luncheon adjournment on the day of the hearing. Then, after a morning of full submissions in which the point had not been raised, Mr Clayton said that the court should address this question. He submitted that I should find that the District Judge had been right to find that there had been a failure to serve the demand notices as soon as practicable and that he should at the least have given this weight as a matter going into the balance when deciding whether to stay the proceedings. Even then this issue did not figure significantly in the submissions to me. Mr Clayton did not expand on his submission and Mr Berragan confined himself to pointing out aspects of the District Judge's findings as to the limited information which the Council had and submitting that in light of those the District Judge should not have concluded that the demand notices could have been served earlier. Mr Berragan submitted that it was not until September 2019 that the Council was in fact able to identify Total Sprint as the rateable occupier of the Units.
68. If this issue had been material to the outcome of this appeal I would have had to consider whether it was open to Total Sprint to open up this matter at the late stage which it did. However, I am satisfied that it does not advance matters and in the circumstances I can address the point shortly.
69. There was no error of law in the District Judge's approach to the question of whether the demand notices should have been served earlier. He considered the evidence with a view to determining whether it had been practicable for the Council to serve those notices earlier than it had done. The conclusion which the District Judge reached applying that approach was a finding of fact. He was alert to the limitations in the information which the Council had but his finding in this regard was based on the assessment that the line of enquiry which led to the knowledge of Total Sprint's occupation of the Units was an obvious one which could have been undertaken earlier. The District Judge took the view that if the line of enquiry had been pursued

earlier the result would have been that the Council would have had earlier the knowledge which it obtained in September 2019. That approach cannot be faulted and the finding was clearly open to the District Judge on the evidence.

70. Similarly, the District Judge's conclusion that the demand notices were not invalidated by the failure to serve them earlier does not disclose any error of law. It was not suggested that the delay had prejudiced Total Sprint in its resistance to the application for a liability order. In the light of that and in the context that the sums in question were due from Total Sprint the District Judge was entitled to conclude that any inconvenience to that company in having to find a large lump sum to meet the liability orders was substantially outweighed by the public interest in the collection of sums properly due as taxes. That was particularly so in circumstances where the delay meant that Total Sprint had received the benefit of the use of those funds for longer than would have been the case if the demand notices had been served earlier and the sums due by way of non-domestic rates paid earlier.

### **The Scope for Setting Aside the Couriers Liability Orders.**

71. Before the District Judge there was dispute as to whether the Council could have applied to set aside the Couriers Liability Orders. The District Judge concluded that such an application could have been made but said that the law as to the scope of the magistrates' court's power to set aside liability orders was unclear. His conclusion as to that degree of uncertainty impacted on his approach to the question of whether the issue of the summons was a collateral attack on the Couriers Liability Orders and more significantly on the questions of whether there was abuse and of the consequences which should follow.
72. Before me there was no issue as to whether the Council could have made such an application. Total Sprint said that the law was clear and that the District Judge should have proceeded on the footing that the position was clear. For the Council Mr Berragan accepted that an application could have been made and that the magistrates' court did have power to set aside a liability order. However, he submitted that the circumstances in which the court could exercise that power were not settled and so the District Judge was right to say that the position was unclear. He submitted that it was also significant that the District Judge had not found that the Council should have made such an application. As to the last point the District Judge did in fact say at [225(b)] of this reasons that he had found that the Council "could and should" have made that application. However, that is contrary to the tenor of the balance of the reasons and of the Case Stated where the District Judge notes the uncertainty in the position and where he does not repeat in terms the conclusion that the application should have been made.
73. The nature of the power of a magistrates' court to set aside a previous order was considered by Andrew Nicol QC (as he then was) sitting as a deputy judge in *R (London Borough of Newham) v Stratford Magistrates Court* [2008] EWHC 125 (Admin). Having noted that there is no statutory power for a magistrates' court to do this in civil proceedings the deputy judge identified the salient parts of the authorities where the court's common law power had been considered. At [10] – [12] he said:
- "[10] There is, however, authority in the three cases mentioned in the Magistrates' Court's letter to the parties of December 2006 that Magistrates have a common law power of a certain extent to set aside previous decisions in their civil jurisdiction. In

*Liverpool City Council v Pleroma Distribution Ltd* [2002] EWHC 2467 (Admin), [2003] RA 34, Maurice Kay J came to the conclusion that such a power existed even in the Magistrates' civil jurisdiction, notwithstanding that all the previous cases that he referred to in his judgment concerned such a power relating to Magistrates' criminal jurisdiction. Maurice Kay J said this at para 10 and following of his judgment:

“What is the principle to be derived from the authorities? In my judgment it is that when a Magistrates' Court purports to do something which is unlawful and in excess of its jurisdiction it is competent to correct its error. To convict someone on unsworn and unaffirmed evidence or to commit a person for trial for an offence in respect of which there is no power to commit or try a person summarily for an offence only triable on indictment clearly falls into that category. The present case, it seems to me, is not so clear. The Justices had the competence either to grant or to refuse an adjournment. It was a matter of discretion, to be exercised judicially. However, the reality is that on 21 December they did not purport to exercise that discretion one way or the other in respect of the current demand because they did not know that Pleroma was seeking an adjournment of it. In such a situation, does it follow that they exhausted their jurisdiction upon the pronouncement of the liability order and were powerless to reopen the matter once the true position was made known to them? In my judgment it does not. Let us assume that a liability order had been made in the absence of a ratepayer and his representative because they had been involved in a traffic accident on the way to court, or that an extremely cogent written request for an adjournment had been sent to the court but had been misfiled in the court office, and in such a case the facts were only brought to the attention of the court later in the day or on the following day. It would be unfortunate and contrary to common sense and fairness if the Magistrates were constrained by law to stand on their earlier decision, made in ignorance of the facts, and to have to direct the disadvantaged ratepayer to the Administrative Court and an application for judicial review. Moreover, there is no logical reason why what common sense and fairness justice require within an hour or a day should be subject to a temporal limit.”

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

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

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

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

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

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

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

[12] The third of the three cases to which I have referred is a decision of the Court of Appeal, *R (on the application of Periasamy Mathialagan) v London Borough of Southwark* [2004] EWCA Civ 1689, [2005] RA 43. Although this judgment of the Court of Appeal was given on 13 December 2004, some six months after the *Brighton and Hove* case, Brighton and Hove and the judgment of Stanley Burnton J does not appear to be referred to in it. In this case the court reviewed the *Pleroma* authority and, as to that, at para 37 Waller LJ, giving his judgment with which the other two members of the court agreed, said this:

“I would make two comments on the above cases. First, the most that can be drawn from them is that, where there has been made a clear mistake by the court itself going to the basis of its jurisdiction, or the fairness of the proceedings, where the resulting decision would clearly be quashed on judicial review, it may be open to the court to correct the mistake of its own motion. On the basis of the limited argument we have heard, I would not wish to question those cases, but equally I would not extend them, I would only observe that their legal basis is not free from doubt . . .

Secondly, it seems surprising, in view of the many thousands of cases which are dealt with each year before the Magistrates by bulk procedures such as that described in this case, that this problem has reached the higher courts so rarely. This may be because, where the court or the authority has made an obvious mistake, or where the Defendant has failed to attend through no fault of his own (such as in the traffic accident example given in *Pleroma*), all parties sensibly agree to the case being reopened. In a civil case, I can see no legal difficulty with such a course, and from the authority's point of view it avoids the expense and delay of judicial review.”

Then at para 39 Waller LJ said:

“I would have thought, respectfully, that consideration should be given to the question whether section 142 [Magistrates' Court Act 1980] should not be expanded so as to provide jurisdiction to Magistrates in the civil context. It is difficult to justify a distinction between the power the High Court or County Court in civil proceedings have, as provided by CPR 39.3, and the absence of such jurisdiction so far as Magistrates or District Judges are concerned. However, in my view it is not open to this court to hold that some such general power exists at common law.”

74. His analysis of those authorities caused Mr Nicol to say at [13] that:

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

75. I respectfully agree with that analysis and it was not suggested before me that it was incorrect. It is to be noted, however, that the three criteria identified by Stanley Burnton J were formulated in the context of an application by a defendant seeking the setting aside of an order against that defendant.

76. Here there is no suggestion that there was any procedural error in the steps leading up to the making of the Couriers Liability Orders nor is it said that there was a mistake at the time the orders were made. The Council's position is that further information has caused it to come to a different conclusion as to who was the rateable occupier but that the orders were properly sought and properly made in light of the information it had and in light of the failure by Sprint Couriers to discharge its evidential burden on the question of rateable occupation.

77. I agree with the Council and the District Judge that the position is open to debate at least in some respects. It is clear that the magistrates' court does have a common law power to set aside its own orders. However, whether the power will be exercised in any particular case is less clearcut. In that regard it is to be noted that Stanley Burnton J's three criteria were said to be matters which were necessary “in general”; that they were expressed as preconditions required for the power to be exercisable but not such as necessarily to require it to be exercised when they were present; and that the power was said to be “an exceptional one to be exercised cautiously”. It is also relevant that

the circumstances here are very different from those which were considered in the earlier cases.

78. In practice a consensual application by the Council and the liquidators of Sprint Couriers would have been likely to have resulted in the setting aside of the Couriers Liability Orders but that was far from being a foregone conclusion. In particular there would have been scope for question as to whether the magistrates' court had power to set aside an order in the absence of mistake, procedural error, or a similar consideration.

**Were the Proceedings against Total Sprint abusive as a Collateral Attack on the Couriers Liability Orders?**

79. The District Judge concluded that the application for a liability order against Total Sprint amounted to the re-litigation of issues which had been determined in the making of the Couriers Liability Orders and was as such a collateral attack on those orders.
80. At [190] of his reasons the District Judge said that the making of a liability order was “a decision that is final and conclusive of the cause of action namely that the sum has become payable by the person summonsed and it has not been paid”. At [191] he said that this meant that the former proceedings had finally determined the issue of rateable occupation. He noted that “default judgment gives rise to cause of action estoppel in just the same way as a judgment after trial because it exhausts the cause of action”.
81. The District Judge regarded the Council's failure to apply to set aside the Couriers Liability Orders as significant and agreed with Total Sprint's submission that the Council's actions amounted to building up a “treasure trove” of liability orders.
82. In those circumstances the District Judge found that the application for a liability order against Total Sprint amounted to “re-litigation of the issue of occupation of the property... that issue having been finally determined” by the Couriers Liability Orders. As such it amounted to a collateral attack on those orders.
83. At [230] the District Judge identified the test of whether a collateral attack was an abuse of process as being that set out by Sir Andrew Morritt VC in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 at [38(d)] to which I will refer below. Then, at [241] – [242], he considered whether the collateral attack he had found the application for the liability orders to have been amounted to an abuse of process. His conclusion was expressed thus in the latter part of [242]:
- “...The law in relation to the power to set aside NNDR liability orders is not settled and so the complainant's conduct needs to be considered in that context. If there was a clear statement of law in relation to that issue, I would have concluded that the complainant's conduct in this case would have brought the administration of justice into disrepute and I would have stayed the proceedings as an abuse of process. However, the law is not settled.”
84. That passage could be read as suggesting that the existence of the power for a magistrates' court to set aside its orders was not settled. However, at [43(g)] of the

Case Stated the District Judge put the point as follows placing the emphasis on the scope of the power:

“The administration of justice would not be brought into disrepute by re-litigation of issues finally determined in, and the collateral attack on, the liability orders made against Sprint Couriers (Southern) Limited. This was because there was arguable debate in law about the scope of the Court’s power to set aside those liability orders.”

85. Mr Clayton submitted that the decision as to whether there is an abuse of process is to be made on the basis of a broad merits-based assessment and I was referred to *Johnson v Gore Wood* [2002] 2 AC 1; *Aldi Stores Ltd v WSP Group PLC* [2007] EWCA Civ 1260, [2008] 1 WLR 748; and *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14 (as cited in *Aldi Stores*). Mr Clayton said that the District Judge was wrong to say that it was debateable whether the Council could have applied to set aside the Couriers Liability Orders. In light of the *Newham* decision the District Judge should have accepted that it was clear that the magistrates’ court had power to set aside its former decision. As a consequence he should have held that it was an abuse of process for the Council to seek a liability order against Total Sprint while the Couriers Liability Orders remained extant.
86. For the Council Mr Berragan submitted that the District Judge should not have approached the question of a collateral attack separately but instead he should have looked at matters in the round and decided whether, when the proceedings as a whole were seen in that way, there was an abuse of process. Further, he submitted that in any event the Council’s actions were not to be seen as a collateral attack on the earlier orders. Mr Berragan emphasised that the Couriers Liability Orders were in effect default orders. He relied on *New Brunswick Railway Co v British & French Trust Corporation Ltd* [1939] AC 1 and *Kok Hoong v Leong Cheon Qweng Mines Ltd* [1964] AC 993 as authorities for the proposition that the extent of an issue estoppel arising from such an order was to be confined to the bare essence of such an order. In light of the approach to be taken to the burden of proof the Couriers Liability Orders were not to be taken as findings that Sprint Couriers was in rateable occupation of the Units. Rather the bare essence of those orders (and hence the limit of any estoppel) was that the Council had established the formal requirements and that Sprint Couriers had not shown cause why the liability should not be enforced.
87. In my judgement the District Judge was right to consider the question of whether there was a collateral attack on the earlier orders as a separate head of abuse. If the proceedings were an impermissible collateral attack then that would be an abuse of process potentially warranting a stay even if the proceedings were otherwise unexceptionable. Here although the District Judge identified this as being potentially a separate head of abuse he addressed all elements of the potentially abusive conduct together when considering whether the proceedings should be stayed for abuse.
88. I do not regard the authorities addressing the extent of the issue estoppel arising from a default judgment as being of more than very limited assistance here. Those authorities were concerned with the extent of the issue estoppel which arose between persons who had been parties to the earlier proceedings. The question here was not one of *res judicata* or issue estoppel but one of abuse of process. For the same reason I do not find the District Judge’s references (for example at [191]) to “cause of action estoppel” to be an apt way of approaching the issues. However, for the reasons I will



now explain I find that the District Judge was right to conclude that for the Council to seek a liability order against Total Sprint was not an abusive collateral attack on the Couriers Liability Orders.

89. The Council could have applied to set aside the Couriers Liability Orders but the failure to do so did not render the current proceedings abusive. I have already explained that the District Judge was right to say that the scope of the power to set aside an earlier order was unclear. It might have been preferable if the District Judge had expressly explained that the existence of the power was not in question but that there was scope for debate as to the precise circumstances in which the power would be exercised but that is essentially a matter of language and of emphasis. However, for the following reasons I am satisfied that the same conclusion would follow even if the position had been that the way in which the power would be exercised was clear and that it could have been confidently predicted that an application by the Council would have resulted in the setting aside of the Couriers Liability Orders.
90. The approach is that of the broad merits-based analysis articulated in *Johnson v Gore Wood* and having regard to the principles identified by Clarke LJ in *Dexter* at [49] – [53]. However, most assistance here is derived from the Vice-Chancellor’s analysis in *Bairstow* at [38] and particularly from the fourth of the following propositions:
- “In my view these cases establish the following propositions:
- “a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.
- b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of ss. 11 to 13 Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as to whether the evidence to displace such presumption must satisfy the test formulated by Earl Cairns in *Phosphate Sewage Co. Ltd v Molleson*, cf the cases referred to in paras 32, 33 and 35 above.)
- c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
- d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute.”
91. The circumstances of the Council’s actions in relation to the Units must be seen as a whole. The zero balance demand notices had been sent to Sprint Couriers just over four months before the Council applied for the issue of a summons against Total Sprint. Moreover, questions of the burden of proof and the requirements which the Council had to meet before seeking a summons are relevant. The Council had to have fulfilled the formal criteria and to have rational grounds for believing that Total Sprint was or might be in rateable occupation of the Units but then the evidential burden passed to Total Sprint to show it was not in such occupation. In seeking the issuing of the summons the Council was doing no more than asserting that the formal criteria had been met and that it had the requisite belief.

92. There was no unfairness to Total Sprint in the issuing of the summons while the Couriers Liability Orders remained in being. If Total Sprint had adduced evidence putting the fact of rateable occupation in issue then the Council would have been obliged to disclose the Couriers Liability Orders. It would have had to do so even without the disclosure order which was made. However, that obligation was an aspect of ensuring that the conduct of the proceedings was fair. Indeed, it demonstrates how the trial process could operate to ensure a fair hearing of such issues as were in due course raised by Total Sprint. The issue in the current proceedings would, if Total Sprint had satisfied the evidential burden of raising it, have been whether Total Sprint was in rateable occupation of the Units at the relevant times. That was not a matter which had been litigated previously and the Council was not seeking to have a “second bite of the cherry” against Total Sprint. It follows that the first of the heads of abuse identified by the Vice-Chancellor in *Bairstow* was not present.
93. The issue of the summons was also not an abuse of the second type namely action which would bring the administration of justice into disrepute. This was very far from being an example of the classic type of collateral attack which is where a party who is dissatisfied with or adversely affected by the outcome of one set of proceedings seeks to subvert that outcome by other proceedings. For the issue of the summons to bring the administration of justice into disrepute it would have to have that effect when considered by a reasonable onlooker with full knowledge of the circumstances. Those circumstances would include the fact of the Council having issued the zero balance demand notices to Sprint Couriers. The position in short was that the liability to pay non-domestic rates was a public liability imposed on the rateable occupier. The Council had concluded that Sprint Couriers was not in fact the rateable occupier and had informed that company that nothing was due from it. The Council had come to the view that Total Sprint was the rateable occupier. The commencement of proceedings against Total Sprint would not in those circumstances bring the administration of justice into disrepute even though no application had been made to set aside the Couriers Liability Orders.

**A Duty of Candour: did the Council owe such a Duty and if so was there an abusive Breach of the Duty?**

94. There is no direct authority as to whether a rating authority seeking the issue of a summons under regulation 12 owes the court a duty of candour at that stage.
95. At [202] the District Judge said that in light of Slade LJ’s analysis in *Ratford* by applying for the issue of the summons the authority was implicitly asserting that it had reasonable grounds for believing that the person to be summonsed was the rateable occupier. He noted at [203] the differences between civil proceedings in the magistrates’ court on the one hand and criminal proceedings or *ex parte* applications for search warrants or freezing orders on the other. The District Judge explained that much would depend on the “nature of the proceedings and the particular facts of the case”. He nonetheless concluded that there would be cases where a rating authority had to bring to the court’s attention “any significant matter which is potentially adverse to the application for the summons”. The District Judge viewed the existence of the Couriers Liability Orders as potentially adverse to the issue of the summons. He found as a consequence that there had been a duty to reveal to the court the existence of those orders and that the Council had failed to discharge that duty. That conclusion was heavily influenced by the District Judge’s assessment that the

proceedings were a collateral attack on those orders, albeit not one amounting to an abuse of process, and a re-litigation of matters which had already been finally determined.

96. The District Judge set out the consequences of that assessment at [232] – [233]. He explained that the circumstances in which a summons for a liability order would be set aside for breach of the duty of candour were more limited than would be the case with criminal proceedings. The District Judge explained as follows his conclusion that the duty of candour added nothing to the collateral attack point and was not a separate head of abuse:

“However, in the circumstances of this case, this adds nothing to the tests which I must apply as set out in *Dexter and Bairstow*. I say that because the lack of candour is concerned with the Sprint Couriers liability orders, and it must follow that the summons should only be set aside if the re-litigation or collateral attack amounted to an abuse of process. Had the point been revealed by the complainant at the outside the court would have either directed an on notice hearing for the application for the summons to be determined, or issued the summons and directed that the question of abuse process estoppel be determined in the proceedings. It follows, in my judgment, that the lack of candour by the complainant does not give rise to an independent head of abuse in the circumstances of this case; but it is culpable or improper behaviour to which I should have regard when applying the broad merits-based approach.”

97. There is at least a difference of emphasis between the assessment there of what would have happened if the existence of the Couriers Liability Orders had been revealed and that at [43(e)] of the Case Stated which said:

“It could not be said that the Court might not, or would not, have exercised its discretion to issue the summons if the Respondent had revealed to the Court (as it should) the existence of the liability orders already obtained against Sprint Couriers (Southern) Limited.”

98. In light of the conclusion I have reached in relation to the duty of candour I do not need to explore that difference further.

99. Mr Clayton relied on the decisions in *R v Manchester Stipendiary Magistrate ex p Hill* [1983] 1 AC 328 and *R (Kay) v Leeds Magistrates’ Court* [2018] EWHC 1233 (Admin), [2018] 4 WLR 91 respectively for the propositions that the issue of a summons was a judicial act and that a breach of the duty of candour by way of a failure to make full and frank disclosure of matters potentially adverse to the application was an abuse of process. Mr Clayton’s written submissions appeared to be saying that a breach of that duty was by itself sufficient to warrant a stay of the proceedings. However, in the course of his oral submissions Mr Clayton refined that submission. He accepted that a breach of a duty of candour was not a matter which of itself and without more must necessarily lead to a stay being ordered. He said that although such a breach was not necessarily determinative it was a separate act of abuse and was a weighty matter going into the overall assessment. The submission was that the District Judge had failed to give this act of abuse the considerable weight it merited.

100. Mr Berragan adopted the point made by the District Judge that the nature of the duty of candour was governed by the particular circumstances. He said that the *Kay* approach did not apply in its full vigour to circumstances such as the issue of the

summons here. The issue of the summons was an aspect of the magistrates' civil jurisdiction and would lead to a hearing of which the defendant would be given proper notice and where it would have an opportunity to make representations before any adverse order would be made. It was submitted that reference to a duty of candour was an unnecessary complication on the facts of this case. Rather the real issue was whether there had been an abuse of process in seeking the issue of the summons and where there was no such abuse in circumstances where the Council had reasonable grounds for believing that Total Sprint had been in rateable occupation of the Units.

101. The issue of the summons was, indeed, a judicial act and I am satisfied that the effect of the authorities is that a person seeking to cause the court to issue a summons owes a duty of candour to the court. Such a person must disclose any matters which might cause the court not to issue the summons – a failure to do otherwise means that such a person is misleading the court by giving an incomplete and so a false picture. The duty is present regardless of the nature of the proceedings. It cannot be said that the fact that a summons is issued under the magistrates' civil jurisdiction excuses causing the court to issue such a summons on a false basis.
102. However, the nature of the proceedings and the basis for issuing the summons will potentially be highly relevant to what the duty of candour requires to be disclosed and the consequences of a breach of that duty. The relevance of those matters can be seen in the context of this case. Here it follows from the conclusion that the Council was justified in seeking the issue of the summons that the Council's belief that Total Sprint had been the rateable occupier at the relevant time was not irrational. It is also significant that the evidential burden of raising the issue of rateable occupation was on Total Sprint and that, as noted in *Ratford* and *Tomlin*, Total Sprint was markedly better-placed than the Council to know whether it had been in occupation. The court's role was not simply ministerial but if the Council had satisfied the formalities and provided that its belief as to occupation by Total Sprint was not irrational then it was entitled to the issue of the summons. The extent of the potential caveats to the Council's case which had to be disclosed pursuant to the duty of candour is to be seen against that background. The question of the matters which the Council had a duty to disclose to the court depends on the matters which were relevant to the court's decision to issue the summons. A matter relevant to that decision had to be disclosed but there was no obligation to disclose a matter which was not relevant to that decision.
103. In light of that assessment I turn to consider whether the failure to disclose the existence of the Couriers Liability Orders was a breach of the duty of candour. This is closely linked to the assessment of whether in seeking the issue of the summons the Council was mounting an abusive collateral attack on those orders. If the proceedings were not such a collateral attack how could there have been an obligation to disclose the Couriers Liability Orders? I am satisfied that there was no such obligation here. It is to be remembered that the abuse arising from a breach of the duty of candour consists of causing the court to issue a summons on a false basis and in circumstances where it might not have issued the summons if aware of the full facts. In that regard it is of note that if there had been disclosure of the existence of the orders the Council should also have disclosed the fact that it had issued zero balance demand notices to Sprint Couriers. If the court had been informed of those matters and had been conscious of the requirements on the Council and of the subsequent evidential burden

on Total Sprint then the summons would still have been issued. The existence of the Couriers Liability Orders was not a matter adverse to the Council's case at the time of issue once account was also taken of the zero balance demand notices. Those orders would potentially become adverse to the Council's case if Total Sprint adduced evidence discharging the evidential burden on it in relation to rateable occupation but that would arise in the course of the proceedings and was not relevant at the time of the issue of the summons.

104. It follows that although the Council owed the court a duty of candour at the time of the issue of the summons that duty did not require disclosure of the Couriers Liability Orders and so there was no abuse of process in the failure to make such disclosure.

**The Council's Disclosure Duty: what was the extent of the Duty; was there a Breach; if so did it amount to Abuse of Process?**

105. The disclosure provisions of Part 31 of the Civil Procedure Rules do not, without more, apply to proceedings under the 1989 Regulations. The court gave directions at the first hearing in these proceedings when this matter was removed from the bulk application list. Those directions had been agreed and included a provision that the Council should by 2<sup>nd</sup> June 2020 conduct a search as if CPR 31.7 applied and should disclose the documents on which it relied together with those which adversely affected its case and those which supported Total Sprint's case. There was some question as to whether the order was made but the District Judge found rightly that an order in those terms was made. It is apparent that the Council subsequently intended to apply for the variation of that order but that the repeated adjournments (in part because of the measures to address the Covid-19 pandemic) meant that the court did not consider any variation application and the order remained in force.
106. The District Judge pointed to the large sum in issue here and said that regardless of the court order the imperative of fairness and the needs of natural justice "required the parties to approach the issue as if standard disclosure under the CPR applied to these proceedings". He was highly critical of the Council's failure to conduct a search for documents adverse to its case and/or supportive of Total Sprint's position. In particular he criticised the failure to disclose the Couriers Liability Orders; the email exchanges between Mr Prior and Mr Mason; and the records of Mr Prior's observations at the trading estate. As a consequence he concluded that the Council had a duty of disclosure which it had broken. He then considered that failing as part of the Council's conduct of the case as a whole when deciding whether the proceedings should be stayed on the ground of abuse of process.
107. Mr Clayton submitted that the District Judge was right to find that the Council had owed a duty of disclosure and that the duty had been broken. He said that the breach was a serious one in respect of an important matter and that this should have been given particular weight in the District Judge's consideration of the question of a stay.
108. Mr Berragan pointed out that a one-sided obligation of disclosure was not usual and emphasised that the Council had sought to vary the order but was hindered by the circumstances affecting the hearings as I have noted above. In addition Mr Berragan emphasised that all the documents were ultimately before the court; that no prejudice had in fact been caused to Total Sprint; that Total Sprint had not itself made any disclosure and had thereby failed to disclose documents which might have been

relevant to the issues and which might have been adverse to its case; and that the emails had in any event been in the possession of Total Sprint.

109. Unless and until the directions order made at the first hearing was varied the Council was bound by it. In any event I agree with the District Judge that regardless of the court order the Council had an obligation to disclose potentially adverse material once it knew that liability was being put in issue. It would ultimately be a matter for the court whether the material was in fact adverse to the Council's case and whether it should be admitted in evidence but the Council had to disclose such material. For the Council to fail to do so meant that there was a risk of the court being misled. This was, indeed, an aspect of the requirement of fairness. In *Newman v Commissioner of the Metropolitan Police* [2009] EWHC 1642 (Admin) Richards LJ took a restrictive view of the material which had to be disclosed in the circumstances of that case. However, he emphasised that the question was to be governed by "the imperative of ensuring fairness in the proceedings" [35] and that although fairness did not require "wholesale disclosure" of the source material underlying the statement of a particular police officer it did require disclosure of material known to undermine the police commissioner's case or to assist the other party [37]. The point is reinforced here by the fact that the Council was a public body acting as such to enforce a tax liability. Moreover, just as questions of rateable occupation were peculiarly within the knowledge of the ratepayer so questions of the previous proceedings taken by the Council and of the communications with the Council were peculiarly within that body's knowledge.
110. Although the material in question did not ultimately lead to the rejection of the Council's application it clearly was at least potentially adverse to the Council's case. The fact that the Council had previously taken the view that a company other than Total Sprint was the rateable occupier was at least potentially a factor in favour of Total Sprint's contention that it was not the occupier. It follows that the material should have been disclosed and that the Council was in breach of its duty in not doing so. However, a failure to make proper disclosure will not typically be seen as an abuse of process. In civil litigation governed by the CPR such a failure would be seen as a failure to comply with the rules rather than abuse. The remedy for such a failure would typically be costs orders; adjournments to give the other party an opportunity to consider the documents; and potentially unless orders. In effect the failure would be addressed through the trial process. Mr Berragan was right to emphasise that this was what happened here with all the material ultimately being available to the court. I find that the District Judge was right to characterise the failure to make disclosure as the breach of an obligation owed by the Council but I also find that it did not by itself amount to an abuse of process. I will consider below whether it was to be seen as such when considered together with the other failings of the Council.

**Should the District Judge have stayed the Proceedings on the Ground of Abuse of Process?**

111. Logically this question resolves into two sub-questions namely, first, whether the District Judge was right to find abuse of process and, second, whether such a finding should have led to a stay. However, as will be seen the District Judge's treatment of the issue does not readily lend itself to such an analysis.

112. At [225] the District Judge listed the six procedural failings on the part of the Council in these terms:
- “I have concluded in these proceedings that the complainant:
- (a) failed to comply with the requirement in regulation 5(1)(a) of the 1989 Regulations to issue demand notices to the respondent “*on or as soon as practicable after... 1st April in the relevant year*”;
  - (b) could, and should, have taken steps to have the Sprint Couriers liability orders set aside before applying for the liability order sought against the respondent;
  - (c) is seeking to re-litigate an issue that was finally determined by, and is making a collateral attack on, the liability orders made against Sprint Couriers;
  - (d) failed to comply with a duty of candour to the court by not disclosing the Sprint Couriers liability orders when the application was made for the summons against the respondent;
  - (e) failed to comply with a duty of disclosure to the respondent by not disclosing the Sprint Couriers liability orders and the email from Mr Mason to Mr Prior on 26 February 2020; and
  - (f) has presented evidence to the court that was untruthful in part in circumstances which were entirely avoidable.”
113. In respect of the last of those failings it is to be remembered that the District Judge did not find that the Council had deliberately advanced its case on the basis of evidence which it knew was untrue. Instead the point was that Mr Prior had been wilfully blind to the true position and that the advancing of untrue evidence had been the result of a failure adequately to consider the issues and to have regard to the Council’s obligations.
114. At [226] the District Judge said that some of those matters might individually amount to grounds for a stay by reason of abuse of process (though he did not specify which). He then said that the grounds were interrelated and that it would be artificial to consider them in isolation. Accordingly, he addressed them in the round. In doing so the District Judge set out the principles he was applying as I have noted above. He took account of the public interest in the collection of taxes (reflecting also the interests of other tax payers and the revenues of the Council). This caused him to conclude that Total Sprint had not “discharged the burden of establishing that the summons should be set aside, or that the proceedings should be stayed as an abuse of process”.
115. I have concluded that none of the failings was of itself such as to amount to an abuse of process. In addition I have concluded that the District Judge was wrong to characterise the proceedings as a collateral attack on the Couriers Liability Orders.
116. In his approach to the question of whether to stay the proceedings the District Judge did not distinguish between the questions of whether there was abuse and whether, abuse having been established, there should be a stay as a consequence. Instead he looked at the questions of whether there had been abuse and whether there should be a stay in the round.
117. It would have been better if the District Judge had approached the matter in accord with the three stage process described by HH Judge Cooke in *Asturion Fondation v*

*Alibrahim* [2019] EWHC 274 (Ch) at [19]. The three stages were first, finding the facts as to what had happened; second, determining whether the facts showed that there had been an abuse of process; and, third, assessing whether the abuse should lead to a stay of the proceedings. Such a staged process has been adopted in a number of other cases. It has the benefit of distinguishing between the separate questions of whether there has been an abuse of process and of the appropriate response to the abuse. The two questions are very closely related and the factors relevant to them will often overlap but they are distinct questions. This is so even if in many cases a stay will be the only appropriate response to an abuse and may be the only way to prevent oppression of the other party or to prevent the administration of justice being brought into disrepute. The court's starting point will be to respond to an abuse of those kinds with a stay but a stay is not an inevitable consequence. I also note that although question of the existence or absence of abuse is a matter as to which there can only be one correct answer that is not true of the issue of the appropriate response. The latter is matter of discretion as to which there is scope for different judges legitimately to reach different conclusions.

118. I accept that it is possible for there to be a combination of failings none of which is an abuse of process by itself but which taken together amount to an abuse of process. This would be so if the circumstances of the case as a whole meant that it would properly offend the magistrates' sense of propriety and justice for the case to continue (see *Mansfield v DPP* [2021] EWHC 2938 (Admin)); or if taken as a whole the failings meant that there was irremediable oppression of the other party; or if taken as whole they meant that for the proceedings to continue would bring the administration of justice into disrepute. However, those will be very rare cases and normally if there are individual failings which do not amount to abuse they will not even in combination amount to an abuse of process.
119. This was very far from being a case where the individual failings even when combined amounted to an abuse of process. Not all the criticisms which the District Judge made of the Council were justified and ultimately all the relevant material was before the court. I do not seek to minimise the gravity of the Council's failings and the District Judge was right to characterise its conduct of the case as "deplorable and egregious". Those failings were rightly criticised in the strongest of terms and the District Judge's action in limiting the recoverable costs to the costs of one day was entirely appropriate. Nonetheless, those failings did not even cumulatively amount to an abuse such as to trigger consideration of whether the proceedings should be stayed as a consequence.
120. It follows that in my judgement the question of whether the abuse of process was such as to warrant the proceedings being stayed does not arise. However, in that regard even if the Council's conduct is properly characterised as abusive I would have agreed with the District Judge that in the circumstances of this case and in light of the public interest in recovery of the sums properly due by way of tax a stay was not appropriate.
121. For completeness I will address briefly a subsidiary point advanced by Mr Clayton. In essence as I understood it the contention was that the restrictions on awarding costs in Total Sprint's favour meant that it could not be adequately protected against the financial harm caused to it by the Council's conduct of the proceedings. It was said that merely limiting the costs recoverable by the Council was not an adequate



protection because it did not enable recovery by Total Sprint of the expenditure it had incurred. In my judgement this argument does not advance matters. If there had been abuse on the part of the Council then the irrecoverable costs incurred by Total Sprint would have been a factor which could be taken into account as being relevant to the question of whether or not there should be a stay by reason of the abuse. Even then, however, it would be a factor of very limited weight. If ultimately Total Sprint had been found to be liable for the sums in non-domestic rates demanded by the Council in circumstances where Total Sprint had chosen to resist liability then (given that Total Sprint could have conceded liability at an earlier stage) the fact that it had incurred costs in that resistance could not be of other than the most modest significance even if the Council's actions had caused those costs to be greater than they would otherwise have been.

### **The Application of the Burden of Proof.**

122. The effect of the preceding assessment is that the proceedings did not fall to be stayed on the ground of abuse of process and that Total Sprint bore the evidential burden of raising the issue of rateable occupation. Mr Clayton accepted that the District Judge's approach to the hearsay evidence could not be said to be wrong in law. It follows that Total Sprint had failed to advance evidence and the conclusion that it had failed to discharge the evidential burden on it was inevitable. In light of that the conclusion that the liability orders should be made was also inevitable.

### **The Answers to the Stated Questions and the Determination of the Appeal.**

123. The answers to the questions posed in the Case Stated are:
1. Yes: the District Judge was right to conclude in the light of his findings of fact that the Council had failed to comply with the requirement to issue the demand notices as soon as practicable after 1<sup>st</sup> April in the relevant years.
  2. Yes: the Council could have applied for the Couriers Liability Orders to be set aside.
  3. No: the District Judge was wrong to conclude that the application for a liability order was a collateral attack on the Couriers Liability Orders.
  4.
    - a. The District Judge was right to conclude that the Council owed a duty of candour to the court at the time of applying for the issue of the summons but he was wrong as to the scope of that duty which did not require disclosure at that time of the existence of the Couriers Liability Orders.
    - b. Yes: the District Judge was right both as to the existence and the scope of the duty of disclosure during the course of the proceedings.
  5. The District Judge was correct to hold that the Council had acted in breach of the duty of disclosure but wrong to hold that it had acted in breach of the duty of candour.

6. No: the summons should not have been set aside nor should the proceedings have been stayed by reason of abuse of process.
  7. Yes: the approach to the burden of proof for the purposes of regulation 12 was correctly stated by the District Judge.
  8. Yes: the District Judge was right to conclude that the Council had discharged the burden of proof which it bore and that Total Sprint had failed to discharge the burden which it bore.
124. The appeal is accordingly dismissed.