IN THE HIGH COURT OF JUSTICE CO/3972/98

QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

Royal Courts of Justice
Strand
London WC2

Wednesday 9th June 1999

B e f o r e:

MR DAVID PANNICK QC

- - - - - - -

ENCON INSULATION LTD

-v-

NOTTINGHAM CITY COUNCIL

- - - - - -

(Computer Aided Transcript of Smith Bernal Reporting Limited,
180 Fleet Street, London EC4A 2HG
Telephone No: 0171 421 4040 Fax No: 0171 404 1424
Official Shorthand Writers to the Court)

- - - - - -

MR G ROOTS QC and MR N BURTON (instructed by Pinsent Curtis, Leeds LS1 2NS) appeared on behalf of the Applicant.

MR G JARAND (instructed by City of Nottingham Legal Services Dept, NG1 4BT) appeared on behalf of the Respondent.

- - - - - - -

J U D G M E N T

(As Approved by the Court)

- - - - - - -

JUDGMENT

MR PANNICK QC: This is an appeal by way of case stated from the decision of the Nottingham Justices dated 27th April 1998 to make a liability order against the appellant in respect of non-domestic rates which are said to have been due and unpaid.

The background facts are set out in the case stated at paragraphs 1, 2 and 3:

"1. On 13th March 1998, complaints were made by Nottingham City Council for liability orders against Encon Insulation (Nottingham) Ltd for non-domestic rates for the rating periods 1st April 1990 - 31st March 1991, 1st April 1991 - 31st March 1992, 1st April 1992 - 31st March 1993, 1st April 1993 - 31st March 1994, 1st April 1994 - 31st March 1995, 1st April 1995 - 31st March 1996 and 1st April 1996 - 31st March 1997 pursuant to Regulation 12 of the Non Domestic Rating (Collection & Enforcement) (Local Lists) Regulations 1989.

2. We heard the complaint on 27th April 1998. Nottingham City Council had instructed Mr G M Jarand of Counsel to represent them and Encon Insulation (Nottingham) Ltd were represented by Mr N Burton of Counsel instructed by Pinsent Curtis, Solicitors.

3. We found the following facts:

a) Encon Insulation (Nottingham) Ltd are the occupiers of the relevant premises 17 - 19 Bloomsgrove Industrial Estate, Ilkeston Road, Nottingham and have been since 1988.

b) The hereditament appeared on the local list as Block B, Bloomsgrove Industrial Estate, Ilkeston Road, Nottingham.

c) Nottingham City Council employ a system of outside inspections as part of the normal process of collecting the rates.

d) An outside inspector had reported that he was unable to locate Block B, Bloomsgrove Industrial Estate, Ilkeston Road, Nottingham.

e) Nottingham City Council discovered that the relevant premises were occupied by Encon Insulation (Nottingham) Ltd on 7th November 1997 and that they were the same premises as had previously been known and entered in the rating list a Block B, Bloomsgrove Industrial Estate, Ilkeston Road, Nottingham. Previously Nottingham City Council believed the premises to have been unoccupied since 1990. Accounts for non-domestic rates were issued for the relevant premises on 14th November 1997.

f) Encon Insulation (Nottingham) Ltd paid the non-domestic rates for the period 1st April 1997 to 31st March 1998.

g) Encon Insulation (Nottingham) Ltd did not pay the non-domestic rates for the periods 1st April 1990 - 31st March 1991, 1st April 1991 - 31st March 1992, 1st April 1992 - 31st March 1993, 1st April 1993 - 31st March 1994, 1st April 1994 - 31st March 1995, 1st April 1995 - 31st March 1996, 1st April 1996 - 31st March 1997. Reminder notices were

sent to Encon Insulation (Nottingham) Ltd by Nottingham City Council on the 20th January 1998.

h) Mr Ward, the Team Leader of the Nottingham City Council Taxation Section regarded the delay in ascertaining the appellant's occupation as a very rare case which should have been picked up on earlier.

i) Encon Insulation were not aware that 17 - 19 Bloomsgrove Industrial Estate, Ilkeston Road, Nottingham was that which had appeared in the rating list of the Nottingham City Council as Block B, Bloomsgrove Industrial Estate, Ilkeston Road, Nottingham.

j) Encon Insulation (Nottingham) Ltd were aware that they were liable to pay non-domestic rates for these premises."

The liability for and collection of non-domestic rates is governed by the Local Government Finance Act 1988 and statutory instruments made thereunder.

The Regulations relevant for present purposes are the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 SI No. 1058.

Regulation 4(1) imposes a duty on the billing authority to serve a demand notice on every rate payer in relation to each chargeable financial year.

Regulation 5(1)(a) says that such a demand notice must be served "on or as soon as practicable after... 1st April in the relevant year."

The Magistrates set out their conclusions in relation to the present case at paragraph 9 of the case stated:

"After advice from our clerk we were of the opinion that:

a) The respondent's use of outside investigators to discover the occupancy of premises was, generally, acceptable although it had been unsuccessful for a period of time in this instance because of the confusion over the addresses. This confusion was shared by both parties. If either party had been aware of the relevant premise's alternative identity this problem would not have arisen.

b) Use of other methods to find out who were the occupants of the relevant premises, such as sending out statutory requests for information, would have been pointless in the circumstances because as far as the respondent was concerned Block B, Bloomsgrove Industrial Estate did not exist.

c) When considering the term 'as soon as practicable' by referring to the cases and the definitions provided, the respondent had served the notices as soon as practicable in the circumstances. In the circumstances the respondent did not know the location or occupancy of the premises until 7th November 1997. It was therefore not feasible until 7th November 1997 to physically serve the notices. The respondent then produced the demand notices on 12th November 1997 and sent them out on 14th November 1997.

d) The demand notices having been served as soon as practicable, a liability order should be made for the taxable periods 1st April 1990 - 31st March 1991, 1st April 1991 - 31st March 1992, 1st April 1992 - 31st March 1993, 1st April 1993 - 31st March 1994, 1st April 1994 - 31st March 1995, 1st April 1995 - 31st March 1996, 1st April 1996 - 31st March 1997.

e) The question of whether the requirement was mandatory or directory did not arise, nor did the issue of whether prejudice had been caused to the appellant because the demand notices were served 'as soon as practicable'."

In paragraph 10 of the case stated the magistrates set out the questions on which the opinion of this court is sought:

"The questions on which the opinion of the High Court is sought are:

a) Whether in finding that the rate demands had been served on or as soon as practicable after 1st April in each of the relevant years we, the Justices, had failed to have regard to a material consideration, namely the practicability for the billing authority of ascertaining prior to November 1997 that the hereditament was occupied;

b) Whether the non-domestic rates for each of the rating years 1990-1991 up to and including 1996-1997 had become payable upon the service of the respective rate demands on 14th November 1997;

c) Whether the finding that the rate demands were served as soon as practicable after 1st April in the relevant year was one to which any reasonable bench of Justices could have come."

On behalf of the appellant Mr Roots QC contends that the Magistrates erred in law in paragraph 9(c) of the case stated in that they focused on whether the billing authority knew the location of the premises prior to 7th November 1997, when they should have asked whether the billing authority took practicable steps on or after 1st April of each relevant year to inform themselves of the location of the premises. Alternatively, Mr Roots contends that if the magistrates asked themselves the right question they reached a perverse conclusion.

On behalf of the respondent Mr Jarand submits that paragraphs 9(a) and 9(b) of the case stated show that the Magistrates considered whether it was practicable for the respondent to have ascertained who the occupier was prior to November 1997, and that the Magistrates answered that question in the negative. Mr Jarand submits that there is no point of law in this case but rather an attempt by the appellant to invite this court impermissibly to consider matters of fact and degree. He reminds me of the limited circumstances in which this court has power to interfere with factual findings by way of judicial review, or by way of appeals in case stated, and he contends that the Magistrates' conclusions were at least open to them on the evidence.

I have been referred to some cases on the meaning of the phrase "as soon as practicable", or similar phrases, in

other statutory contexts. I need mention only the judgment of Ralph Gibson LJ for the Divisional Court in R v Chief Constable of South Wales ex parte Merrick [1994] 1 WLR 663 at 676 H concerning the statutory duty of a detaining authority to comply "as soon as is practicable" with a request by a detained person to consult a solicitor. Ralph Gibson LJ referred, with approval, to the dictionary definition of "practicable" as meaning "capable of being carried out in action; feasible", or "possible to be accomplished with known means or known resources".

In my judgment, the magistrates did err in law.

Paragraph 9(c) incorrectly states the legal test. The issue is not whether the respondent was unaware of the location of the premises prior to 7th November 1997 and therefore whether it was not feasible physically to serve the notices prior to that date, as paragraph 9(c) states. Rather, the issue is whether it was practicable for the respondent to have identified the location of the premises at an earlier date and therefore physically to have served the notices at an earlier date. That the Magistrates focused on the knowledge of the billing authority rather than on what they could earlier have discovered by taking practicable steps is supported by paragraph 5 of the case stated which summarises the Magistrates understanding of the respondent's argument:

"The respondent contended that the duty to serve a demand notice as soon as practicable is triggered by the knowledge of the relevant facts."

I do not accept the respondent's argument that the Magistrates had asked and answered the relevant question in paragraphs 9(a) and 9(b).

Paragraph 9(a) of the case stated addresses the general acceptability of using outside investigators, but that is not in dispute. The issue is whether more should be done where those investigators have not located the premises and when, as here, there is an entry on the valuation list but the premises have not been located by the billing authority. Paragraph 9(a) also refers to the fact that the confusion was shared by both parties. But that does not assist the respondent: it has the statutory duty to ensure that a demand notice is issued as soon as practicable. Paragraph 9(a) ends by stating the uncontroversial proposition that if either party had been aware of the alternative identity of the relevant premises the problem would not have arisen.

Nor does paragraph 9(b) assist the respondent. It focuses on whether the respondent could have taken steps to identify the occupants of the premises. But the issue, as Mr Roots submits, is whether the respondent could and should

have done more to locate the premises. Paragraph 9(b) states that taking other steps would have been pointless "because so far as the respondent was concerned Block B, Bloomsgrove Industrial Estate did not exist". But again this misses the point. It does not address whether the respondent could and should have done more to identify whether that assumption was correct.

I therefore do not accept that the Magistrates were finding that there were no practicable steps with which the respondent could and should have taken to identify the location of the premises. Indeed, in the circumstances of this case, I would be surprised were the Magistrates so to have concluded. As Mr Roots pointed out, the only evidence as to steps taken by the billing authority is that it sent on one occasion an outside inspector who reported that he had been unable to locate the relevant premises (paragraph 3(d) of the case stated). There is no evidence that the respondent investigated the matter further, for example by making enquiries of the valuation officer in the light of the entry on the valuation list. Furthermore, paragraph 3(h) of the case stated records the evidence of Mr Ward, the Team Leader of the Nottingham City Council taxation section who "regarded the delay in ascertaining the appellant's occupation as a very rare case which should have been picked up on earlier". In my judgment this is a recognition that there were practicable steps which could have been taken.

I am therefore satisfied that the Magistrates failed to ask themselves the right question whether there were practicable steps which the respondent could and should have taken at an earlier stage than November 1997 to locate the relevant premises. I am also satisfied that had the Magistrates asked themselves the right question, the only answer to which they could reasonably have come was to find that there had been a breach of paragraph 5(1)(a) of the regulations and so a liability order could not lawfully be made.

I should mention that the Magistrates noted that they did not need to decide whether the requirement imposed by Regulation 5(1) was mandatory. Mr Jarand has not advanced any argument seeking to limit the consequences of there being a breach of Regulation 5(1). That does not surprise me. Regulation 5(1) contains a balance between the interests of the ratepayers and the practicalities of administration. Parliament must have intended that if the billing authority has not complied with the requirement it would be wrong in principle for the ratepayer to have an obligation thereafter to pay.

I would answer the questions posed by the magistrates in the following terms:

(a) The Magistrates erred in law as explained above.

(b) The rates did not become payable.

(c) Question (c) does not arise.

For these reasons, this appeal will be allowed. I am very grateful to counsel for their very helpful skeleton arguments and illuminating oral submissions.

MR ROOTS QC: My Lord, I would ask for an order that the appeal be allowed together with an order quashing the liability orders that were made. Obviously on a case stated the question arises for consideration as to whether it should be sent back to the magistrates but in the light of the remarks made by your Lordship I anticipate that it would not be right to send it back.

MR PANNICK QC: Unless Mr Jarand has any observations, no. I am not proposing to send the matter back. I will allow the appeal, quash the liability orders and no other relief is appropriate.

MR ROOTS QC: I am grateful. Then there is a question of costs. Under the new rules----

MR PANNICK QC: I notice both put in assessments of costs. Obviously yours is the only one relevant. Is it now my task to assess costs even in a non-interlocutory matter?

MR ROOTS QC: My Lord, the rules are not entirely clear on our reading, but the rules refer to a trial of less than a day in which it falls for consideration as to whether your Lordship should make a summary assessment.

MR PANNICK QC: Do the rules suggest that I have a duty to make a summary assessment?

MR ROOTS QC: It says:

"The duty to consider whether your Lordship should----"

I think your Lordship's associate may be able to help.

(Pause)

MR PANNICK QC: You are asking for me to assess your costs in the amounts that you have indicated in your statement?

MR ROOTS QC: My Lord, I am. I am conscious that my learned friend disputes a certain number of the items in that and whether your Lordship will feel it appropriate to deal with it or send it for more detailed assessment is up to your Lordship.

MR PANNICK QC: Perhaps I ought to look at the rules. If I am being told I have a duty to -- Mr Jarand can you help me on this?

MR JARAND: My Lord, does your Lordship have the rules? If not I can perhaps hand up my copy.

MR PANNICK QC: I am not sure I do have the rules.

MR JARAND: The Practice Direction. I have a copy that I can hand to your Lordship.

MR PANNICK QC: Which rule do you want me to look at?

MR JARAND: I am looking at the Practice Direction paragraph 4(3).

MR PANNICK QC: That I have not got.

MR ROOTS QC: It is page 825, my Lord.

MR PANNICK QC: Yes, thank you. The court should consider whether to make a summary assessment of costs. There is no duty.

MR JARAND: Then it goes on, a few lines later on, to say:

"...unless there is good ground not to do so eg where the paying property shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily or there is insufficient time..."

MR PANNICK QC: I see. You do dispute, do you, substantial items in here?

MR JARAND: I do, indeed, my Lord. I think perhaps it is quite sufficient or may well be sufficient to say for that purpose that the assessment, the costs of the respondent on the sheets that have been handed to your Lordship with £2,213 plus a small amount for today come to a total which has been agreed of £2,393.

MR PANNICK QC: I did notice that there is a substantial discrepancy.

MR JARAND: We would very much be anxious to explore the reasons for that discrepancy because we have been unable in the time available to go into such an explanation.

MR PANNICK QC: Let me hear from Mr Roots. Mr Roots, do you dispute that it is more appropriate this matter

should be looked at by a Taxing Master in the light of the discrepancy and projections.

MR ROOTS QC: I do not have detailed instructions. There are reasons that we would put forward, not least getting an appropriate case stated from the Magistrates.

MR PANNICK QC: It does seem to me, in the light of paragraphs 4(3) and 4(4) of the Practice Direction that there are substantial grounds for disputing the sum claimed in this sense that there is a substantial discrepancy between the costs claimed by the respondent and the costs claimed by the appellant and it does seem to me that it is inappropriate in those circumstances for me to seek to resolve the matter. It is far more appropriate in the circumstances of this case that the matter be dealt with by a Taxing Master who will have the expertise that will enable him to decide whether there is any substance in the respondent's objections to the amounts that are claimed by the appellants. Therefore I shall order that the respondent pay the appellant's costs to be taxed if not agreed.

MR ROOTS QC: Could your Lordship make clear that that would include the costs below in the Magistrates Court as well as----

MR PANNICK QC: Were you ordered to pay the costs in the Magistrates court?

MR ROOTS QC: Yes, we were.

MR PANNICK QC: Then that will include the costs - that is right, is it, Mr Jarand?

MR JARAND: I presume it is, my Lord. The actual amount of the order below was only £550 or something of that order.

MR PANNICK QC: I see no reason why the costs should not include the costs incurred by the appellant in the court below.

MR ROOTS QC: Forgive me for raising again, my Lord, but I am asked just to draw to your Lordship's attention the fact that we were asked to enter into a recognisance. Apparently it is something I should at least point out.

MR PANNICK QC: Is there anything that I am ask being asked to do in relation to that, other than note that that was required and that any such requirement lapses?

MR ROOTS QC: I think for the sake of formality to release my client's recognisance.

MR PANNICK QC: Then your clients are released from that.