Neutral Citation Number: [2024] EWHC 2099 (Admin)

Case No: CO/1326/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 August 2024

Before :

LADY JUSTICE WHIPPLE
MR JUSTICE KERR

- -

Between :

Andrea Clerk	**Appellant**
- and -	
Gas Safe Register	**Respondent**

- -
- -

Appellant appeared in person
Lee Hughes (instructed by **Capita PLC**) for the **Respondent**

Hearing date: 23 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Whipple and Mr Justice Kerr:

Introduction

1. This is an appeal by way of case stated from the decision of DJ (MC) Bone sitting in Willesden Magistrates' Court on 16 January 2023.

2. The appeal is brought by Mrs Andrea Clerk (the "Appellant"). She lives at 10 Nant Road in London NW2. She complains that the boiler flue attached to a boiler which has been installed by her next door neighbour at 8 Nant Road has been emitting fumes and gases in such a way that those fumes and gases enter her property through any window left open on that side of her house. She argues that this is a statutory nuisance for which the Respondent is liable in criminal law.

3. The Respondent is the Gas Safe Register, which is operated by Capita Business Services Ltd, a division of Capita plc. As recorded in the Case Stated (paragraphs 13-15), part of the role of the Respondent is to ensure compliance with the Gas Safety (Installation and Use) Regulations 1998; it will inspect work undertaken by a gas business or engineer upon complaint and can issue a defect notice to correct any faults; however, it does not enforce rectification of gas defects where the consumer will not allow the gas engineer back on their premises; nor does the Respondent investigate or determine whether a statutory nuisance exists in relation to the discharge of products of combustion from gas appliance flue outlets.

4. DJ (MC) Bone held that the Respondent was not responsible in law for the actions complained of. He held that the summons originally issued (in circumstances we shall come to) was a nullity, he declined to issue a criminal summons against the Respondent, and he ordered the Appellant to pay the costs incurred by the Respondent in full.

5. In the Case Stated 29 March 2023, DJ (MC) Bone posed three questions for this Court:

    (1) Was I right in law to find the civil proceedings a nullity?

    (2) Was I right to find the Respondent could not in law be the person responsible in this case?

    (3) Did I make any error of law when imposing costs?

Legal Framework

6. Section 79 of the Environmental Protection Act 1990 ("EPA 1990") defines a statutory nuisance to include "fumes and gases emitted from premises so as to be prejudicial to health or a nuisance" (section 79(1)(c)). It imposes a duty on the local authority to inspect for statutory nuisances and, where a complaint of statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint (section 79(1)).

7. Section 79(7) defines the "*person responsible*" in the following terms: "in relation to a statutory nuisance … the person to whose act, default or sufferance the nuisance is attributable".

8. Section 80 sets out a procedure for the local authority to serve an abatement notice, in circumstances where it is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the authority. That is not the procedure which is in issue in this appeal.

9. Section 82 provides an alternative procedure for persons other than the local authority to issue summary proceedings by way of private prosecution in the magistrates' court for statutory nuisance:

> "(1) A magistrates' court may act under this section on a complaint … made by any person on the ground that he is aggrieved by the existence of a statutory nuisance."

10. The powers of the magistrates' court when such a complaint is made are set out at section 82(2):

> "(2) If the magistrates' court … is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises … the court … shall make an order for either or both of the following purposes—
>
> (a) requiring the defendant … to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose;
>
> (b) prohibiting a recurrence of the nuisance, and requiring the defendant …, within a time specified in the order, to execute any works necessary to prevent the recurrence;
>
> and, in England and Wales, may also impose on the defendant a fine not exceeding level 5 on the standard scale."

11. The person against whom such proceedings may be brought is set out at section 82(4):

> "(4) Proceedings for an order under subsection (2) above shall be brought—
>
> (a) except in a case falling within paragraph (b), (c) or (d) below, against the person responsible for the nuisance;
>
> (b) where the nuisance arises from any defect of a structural character, against the owner of the premises;
>
> (c) where the person responsible for the nuisance cannot be found, against the owner or occupier of the premises;
>
> (d) in the case of a statutory nuisance within section 79(1)(ga) above caused by noise emitted from or caused by an unattended vehicle or unattended machinery or equipment, against the person responsible for the vehicle, machinery or equipment."

12. Breach of an abatement notice issued under section 82(2) is a criminal offence punishable by a fine, pursuant to section 82(8):

> "A person who, without reasonable excuse, contravenes any requirement or prohibition imposed by an order under subsection (2) above shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale together with a further fine of an amount equal to one-tenth of the greater of £5,000 or level 4 on the standard scale for each day on which the offence continues after the conviction."

13. Subject to certain provisos which are not relevant in this case, there is a statutory defence available in the terms of section 82(9):

> "Subject to subsection (10) below, in any proceedings for an offence under subsection (8) above in respect of a statutory nuisance it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance."

14. Although section 82(1) refers to a complaint, a word more commonly associated with civil proceedings, it is common ground that summary proceedings under section 82 are criminal in nature: see *Botross v London Borough of Hammersmith and Fulham* [1994] 16 Cr App Rep (S) 622.

15. That is put beyond doubt by section 50 of the Magistrates' Courts Act 1980 which is headed "Construction of references to complaint in enactments dealing with offences", and provides as follows:

> "In any enactment conferring power on a magistrates' court to deal with an offence, or to issue a summons or warrant against a person suspected of an offence, on the complaint of any person, for references to a complaint there shall be substituted references to an information."

16. Accordingly, in order to commence proceedings under section 82(1) of the EPA 1990, it is necessary to make an application for a criminal summons by laying an information before the magistrates. For confirmation of that undisputed proposition, see *Northern Ireland Trailers Ltd v Preston Corporation* [1972] 1 WLR 203. In *R v Stipendiary Magistrate ex p Hill* [1983] 1 AC 328 Lord Roskill drew the distinction between laying an information to commence criminal proceedings and making a complaint to commence civil proceedings, at p342:

> "First, in their criminal jurisdiction, what magistrates' courts have jurisdiction to try summarily is an information, and what is required to give them that jurisdiction is that an information has been laid before them. Secondly in their civil jurisdiction, what a magistrates' court have jurisdiction to try is a complaint, and what is required to give them that jurisdiction is that a complaint has been made to them."

Procedural History

17. By way of background, the Appellant has complained to Barnet Council and the Local Government and Social Care Ombudsman. None of those complaints has been upheld. The Appellant pursued an application for judicial review of the Ombudsman (with Barnet Council and the Respondent named as Interested Parties). That application was dismissed on 30 October 2020. (See paragraphs 20-22 of the Case Stated.)

18. The Appellant wrote to the Respondent notifying her intention to issue criminal proceedings under section 82 of the EPA 1990 on 13 April 2022 (paragraph 23 of the Case Stated). The Respondent replied on 16 May 2022 disputing the Appellant's claims, denying that the Respondent was the "person responsible" for the purposes of section 82 of the EPA 1990 and warning the Appellant that costs would be sought if she commenced criminal proceedings (paragraph 24 of the Case Stated).

19. On 4 July 2022, the Appellant applied for a summons for an alleged offence of statutory nuisance contrary to section 79(1)(c) of the EPA 1990, naming the Respondent as the "person responsible" (paragraph 25 of the Case Stated). It is common ground that this was the correct application on the correct form to commence criminal proceedings pursuant to section 82(1) of the EPA 1990. It amounted to the laying of an information and the request was for the issue of a *criminal* summons.

20. Willesden Magistrates' Court issued a summons on 1 November 2022. The summons referred to the Appellant's "complaints" which were detailed as "complaints for an order to abate or prohibit a statutory nuisance, namely fumes and gases emitted from the condensing boiler installed in the house next door … in accordance with section 82 of the Environmental Protection Act 1990". The summons stated that the Court would hear the case on 22 November 2022.

21. The summons was served on the Respondent. Mr Hughes, counsel, was instructed by the Respondent. He filed short written submissions on 11 November 2022, in which he made the following points:

    i) that the summons was *civil* in nature. The summons referred to complaints and made no reference to an information or to the commission of a criminal offence. He argued that the whole proceedings were a nullity.

    ii) That the Respondent was not the correct defendant to a charge of statutory nuisance in this case, rather the correct defendant was the owner of 8 Nant Road. The proceedings were vexatious. The Court should not have issued the summons at all as the Respondent was not the proper defendant.

    iii) That the Appellant should pay the costs of the proceedings, on the basis that the Appellant's actions were "unnecessary and improper" for the purposes of the Costs in Criminal Cases (General) Regulations 1986.

22. The Appellant pressed on and the matter came before the Magistrates' Court on 22 November 2022. Shortly before the hearing, we understand that the Appellant presented the Respondent with her IDPC (Initial Details of Prosecution Case). It

appears that at some point during that day Mr Hughes first saw the Appellant's application dated 4 July 2022.

23. The Case Stated records what happened at that hearing (emphasis in the original):

> "27. The case was first heard by DDJ (MC) Smith at Willesden Magistrates' Court on 22nd November 2022. The Applicant sought to proceed with her case, the Respondent however argued among other things that:
>
> - The civil proceedings were a nullity; and
> - The Respondent could not in law be the person responsible for the alleged statutory nuisance.
>
> 28. There is dispute regarding what happened at that hearing, the court record reads as follows:
>
> *Directions made by DDJ BJ Smith 1- Applicant to file at Court an agreed joint bundle by 16 December. 2 – Bundle must include the original application for a summons, copy of civil summons, initial details of prosecution case, and any other materials relied on by the parties. 3 – Respondent to file a written position by 6 January. 4 – Applicant to file written position by 4 January. 5 – Any response by Applicant by 11 January. Hearing on the 16 January 2023 Court 2* ***to determine whether to grant criminal summons and how to deal with civil summons***."

24. There is no longer any dispute about the contents of paragraph 28 of the Case Stated, which both parties accept is an accurate summary of what DDJ (MC) Smith decided.

25. The adjourned case came before DJ (MC) Bone on 16 January 2023. He found that the Appellant had laid an information and had requested a summons against the Respondent in criminal proceedings pursuant to section 82(1) of the EPA 1990; however, the information was incorrectly treated by the Court as a civil complaint so that a civil summons was issued (paragraphs 25 and 26 of the Case Stated). DJ (MC) Bone made no findings about whether there was a statutory nuisance but noted the Respondent's argument that there was not any evidence of such a nuisance (paragraph 36 of the Case Stated).

26. DJ (MC) Bone was satisfied that two issues arose for his determination (paragraph 29 of the Case Stated):

    i) how to dispose of the civil summons; and

    ii) in the event that the civil summons must be dismissed, whether the Court should issue a criminal summons in response to an anticipated renewed application.

27. In answer to his first question, he found that the "civil proceedings" (his words) were a nullity (paragraphs 37 and 57 of the Case Stated). In answer to his second question,

he concluded that the Respondent could not in law be the person responsible for the alleged statutory nuisance and that a criminal summons should not be issued against it (paragraphs 37, 76 and 77 of the Case Stated). He ordered the Appellant to pay the Respondent's costs in the amount of £11,241.60 (paragraph 98 of the Case Stated).

28. The questions posed for this Court in the Case Stated (see paragraph 5 above) ask whether DJ (MC) Bone was correct to reach those conclusions.

Question 1 – nullity

29. Before answering Question 1, it is necessary to address two preliminary points. The first relates to where the fault lies for the issue of the civil summons. Although Mr Hughes' written submissions dated 11 November 2022 had suggested that the Appellant was at fault in pursuing the wrong procedure to commence proceedings under section 82(1) of the EPA 1990, those submissions were written without sight of the Appellant's application dated 4 July 2022 and Mr Hughes readily accepted, on seeing that application, that the Appellant had pursued the right procedure and that it was the Court which had made a mistake in issuing the wrong summons. That this was a mistake by the Court was confirmed in the Case Stated which recorded at paragraph 42 that on receipt of the Appellant's application, a judge (unnamed) provided advice to administrative staff to the effect that the Appellant was not seeking a private prosecution and that her information could be treated as a civil complaint. With the benefit of hindsight, it is common ground that that advice was wrong. DJ (MC) Bone accepted that the Court had made a mistake in issuing a civil summons and he corrected the mistaken impression left (ie, that the Appellant had in some way been at fault) (see paragraph 43 of the Case Stated). It is therefore clear and accepted that the fault lay with the Court and not with the Appellant.

30. The second relates to the status of that summons, in light of the facts as they are now known. The Appellant maintained before this Court that the summons of 1 November 2022 was or could be seen to be a *criminal* summons – after all, she argued, it correctly referred to the parties, the allegations and the offence of statutory nuisance. In response, Mr Hughes complained of defects on the face of the summons which he said meant it was not a criminal summons and could not be treated as one (by reference to the requirements set out at CrimPR 7.4(2)); further and in any event, he submitted that the summons had not been issued in the exercise of any judicial discretion focussed on the key questions which would arise in the context of *criminal* proceedings given the facts as they were now known and relying on *R v West London Metropolitan Stipendiary Magistrate ex parte Klahn* [1979] 1 WLR 933, per Lord Widgery CJ at p 935:

> "The duty of a magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding whether or not to issue a summons. As Lord Goddard C.J. stated in *Rex v. Wilson*, at pp. 46 - 47:
>
> > "A summons is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons."

> It would appear that he should at the very least ascertain: (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not "out of time"; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute."

31. It is not necessary to debate the form of the summons. That issue is not raised within the questions posed for this Court. Question 1 proceeds on the basis that the summons issued was a civil summons. But in any event, Mr Hughes' second argument is determinative of the status of the summons issued in this case. It is quite clear on the facts as they are set out in the Case Stated that no judge brought their mind to bear in any way at all on the question of whether a criminal summons should be issued; there never was a judicial act of that nature. The summons as issued was not and cannot be treated as a criminal summons.

32. We turn then to Question 1. We remind ourselves of the question DJ (MC) Bone posed himself: how was he to dispose of the civil summons (paragraph 29 of the Case Stated)? That was, in our judgment, the right question. He considered *R v Nottingham Justices ex p Brown* [1960] 1 WLR 1315, (paragraphs 54 and 55 of the Case Stated), a case to which we will return. He concluded:

> "57. … the civil proceedings in this case started by information were … a nullity, a defect that could not be cured."

33. He thus answered the question in language which differs from the way he posed the question. His answer referred to "proceedings". His question referred to the "summons". The difference is material. In our judgment, the summons dated 1 September 2022 was a nullity. It was a civil summons issued in response to an information seeking to commence criminal proceedings. It was issued by mistake. It had to be set aside.

34. However, there is no reason to set aside or declare null the Appellant's original application dated 4 July 2022. It is common ground that that application was appropriate and correct for the course of action intended by the Appellant, namely a private prosecution under section 82(1) of the EPA 1990.

35. In our judgment, DJ (MC) Bone's answer, that the civil "proceedings" were a nullity, goes too far by suggesting that the Appellant's original application dated 4 July 2022 was a nullity. The correct answer was that the civil summons was a nullity. That left the Appellant's original application, which was an application for a criminal summons, to be determined.

36. In that respect, this case is materially different on its facts from *R v Nottingham Justices ex p Brown* [1960] 1 WLR 1315, in which purported civil proceedings were commenced by information rather than complaint; in other words, in *Brown,* the originating application was flawed which meant that the whole proceedings were invalidated as "null". That is not the case here where the originating application by the Appellant was correct, but the Court made a mistake in the issue of a civil summons in response to it.

37. The answer we give to Question 1 is as follows:

Qu: Was I right in law to find the civil proceedings a nullity?

A:

(i) You were right to find the civil summons a nullity.

(ii) The Appellant's application dated 4 July 2024 was not a nullity.

Question 2 – person responsible

38. The key issue in this case is whether a criminal summons should have been issued in response to the Appellant's application. DJ (MC) Bone addressed that key issue in the alternative at paragraph 58 of the Case Stated where he said that if he was wrong to declare the proceedings null, he would nonetheless have declined to issue a criminal summons in response to the Appellant's application. That, then, brings us to Question 2.

39. We deal here with one preliminary, which is the Appellant's objection to the suggestion that she renewed her application for a summons at the hearing before DJ (MC) Bone on 16 January 2023 (as is recorded at paragraph 59 of the Case Stated). She says that she did not renew her application on that date and (by implication) that paragraph 60 of the Case Stated, which records her argument that a criminal summons should be issued, is wrong. However, the time for challenging the Case Stated has passed. Further, on the alternative approach adopted by DJ (MC) Bone (paragraph 58 of the Case Stated), which we consider to reflect the correct analysis in law, her application plainly needed to be determined. That was, after all, one of the stated purposes of the hearing on 16 January 2023 according to DDJ (MC) Smith's directions. The Appellant had not prior to that hearing sought to withdraw her application; to the contrary, she was intent on pursuing it.

40. DJ (MC) Bone directed himself that, because the Respondent was not the owner or occupier of 8 Nant Road, the Respondent could only be named as the defendant to the proposed private prosecution if they were the "person responsible" for the statutory nuisance, in accordance with section 82(4) of the EPA 1990 (paragraph 62 of the Case Stated) and that the person responsible in law is the person to whose act, default or sufferance the nuisance is attributable (paragraph 70 of the Case Stated, a reference to the definition at section 79(7) of the EPA 1990).

41. DJ (MC) Bone found that the Respondent was not, even arguably, the "person responsible" for the purposes of section 82(4). His reasons were:

i) The defect in question was structural, and in that circumstance it was the owner or occupier who should be named as defendant, pursuant to section 82(4)(b) of the EPA 1990 (see paragraph 75 of the Case Stated);

ii) Even if the defect was not structural, the person responsible for the purposes of section 82(4)(a) could not be the Respondent, for two reasons:

a) The Respondent had no right to enter the property, and could not therefore comply with any abatement notice in relation to the statutory

nuisance; that the Respondent would have a reasonable excuse for non-compliance with any abatement notice strongly suggested that they were not the correct defendant to name (paragraphs 64-69 of the Case Stated).

b) The Respondent did not instal the flue or commission the installation of the flue; it was not the Respondent's act, default or sufferance which had caused the nuisance, because day to day default or sufferance in the operation of the flue was attributable to the owner or occupier of 8 Nant Road and not to the national register of the gas industry which did not even investigate or determine whether this type of statutory nuisance exists (paragraphs 70-74 of the Case Stated).

42. Before us, the Appellant's central submission was that the Respondent was in default and in consequence was the "person responsible". She submitted that the Respondent had failed to issue a default notice requiring the installer of her next door neighbour's boiler to rectify the defect which was causing the statutory nuisance. The defect was not structural because the flue was working properly; it was just in the wrong place or pointing in the wrong direction or not long enough. It was her understanding that her neighbour had been advised that if the flue was moved in a way or to a distance which would remove the statutory nuisance, the boiler would not work. The defect was not attributable to the owner or occupier of the house because her neighbour had been (wrongly) informed by her installer, and by the Respondent, that there was no defect with the installation.

43. Mr Hughes sought to uphold the reasoning of DJ (MC) Bone which he said was correct. In addition, he took us to a letter from the Respondent to the Appellant dated 14 February 2019, in which the Respondent had reported to the Appellant the results of a full investigation and review, including a meeting with Barnet Council, which is the relevant local authority. The Respondent stated in that letter that the boiler in question did meet the minimum clearance measurements specified in guidance documents; that it was for the local authority to determine complaints of nuisance and not for the Respondent; that Barnet Council had determined that this installation was not causing any nuisance; that the Respondent would not be pursuing the installer of the boiler (and flue) for rectification; and that the Respondent was unable to assist the Appellant further and considered the matter closed.

44. We consider first whether the alleged defect in the boiler is structural. DJ (MC) Bone relied on two authorities to conclude that the defect was indeed structural. We agree with his analysis, based on those two authorities. In *Holland and Another v Hodgson and Another* [1861-73] All ER Rep 237, the Court held that looms attached to the floor of a mill were part of the realty which was subject to a mortgage of the mill entered into by the owner of the mill. In *Pearlman v Keepers and Governors of Harrow School* [1978] 3 WLR 736 the Court of Appeal held that the installation of a central heating system including a gas fired boiler, radiators, pipes and water tank was a structural alteration or addition to the house for the purposes of the Housing Act 1974 (which permitted reduction of the rateable value to reflect improvements by the tenant).

45. The flue is part of the boiler, and the boiler is installed in the house. If there is a problem with the situation, angle or length of the flue, we consider that to be a

structural problem. That being so, it is the owner of the house who should be named as the defendant in any proceedings for statutory nuisance, pursuant to section 82(4)(b) of the 1990 Act.

46. If that is not correct, we have had regard to the scheme and purpose of the EPA 1990 in establishing who is the person responsible on the facts of the present case. Section 82(2) envisages the issue of an abatement notice, possibly accompanied by a fine, in any case where statutory nuisance is established. The purpose of an abatement notice is to ensure that the statutory nuisance is abated, ie, comes to an end. That purpose would be frustrated if the person against whom the abatement notice was issued was, by their very status, unable to comply with it because they had no right of entry to the property and no right, obligation or capacity to carry out remedial works. Such a person would anyway have a reasonable excuse for non-compliance under section 82(8), so that the issue of an abatement notice against the Respondent would be pointless. We agree with DJ (MC) Bone that these are strong indicators that the Respondent was not intended to be the person responsible for any statutory nuisance in this sort of case.

47. Further, the Respondent did not instal or commission the boiler in the first place and it has no regulatory or enforcement powers in relation to the person who did instal or commission the boiler. It would put the Respondent in an invidious position to expose the Respondent to liability for a fine, either under section 82(2) or section 82(8), in those circumstances. That cannot have been intended by the EPA 1990.

48. The answer we give to Question 2 is as follows:

Qu 2: Was I right to find the Respondent could not in law be the person responsible in this case?

A: Yes.

49. It follows from that answer that DJ (MC) Bone was right to refuse to issue a criminal summons in response to the Appellant's application of 4 July 2022. Whatever the Appellant's dissatisfaction with the Respondent's actions, as a matter of law applied to the facts of this case, the Respondent is not the person who should be named on a summons as responsible for any statutory nuisance which might be established.

Question 3 – costs

50. DJ (MC) Bone found that these were criminal proceedings (within the definition at section 14(a) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012). He had jurisdiction to award costs under the Costs in Criminal Cases (General) Regulations 1986, regulation 3 of which provides:

> "**3.— Unnecessary or improper acts and omissions**
>
> (1) Subject to the provisions of this regulation, where at any time during criminal proceedings—
>
> (a) a magistrates' court,
>
> …

> is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, the court may, after hearing the parties, order that all or part of the costs so incurred by that party shall be paid to him by the other party."

51. DJ (MC) Bone referred to the Practice Direction (Costs in Criminal Proceedings) 2015, [2015] EWCA Crim 1568, amended at [2016] EWCA Crim 98, which provides at paragraph 4.1 as follows:

> "**4.1 Costs Incurred as a Result of Unnecessary or Improper Act or Omission**
>
> 4.1.1 A Magistrates' Court, the Crown Court and the Court of Appeal (Criminal Division) may order the payment of any costs incurred as a result of any unnecessary or improper act or omission by or on behalf of any party to the proceedings as distinct from his legal representative: section 19 of the Act [see now s 14 of LASPO] and regulation 3 of the General Regulations. The court may find it helpful to adopt a three stage approach (a) Has there been an unnecessary or improper, act or omission? (b) As a result have any costs been incurred by another party? (c) If the answers to (a) and (b) are "yes", should the court exercise its discretion to order the party responsible to meet the whole or any part of the relevant costs, and if so what specific sum is involved? CrimPR 45.8 sets out the procedure. A form of application is set out in Schedule 5 to this Practice Direction."

52. He further referred to a passage from *R v Cornish* [2016] EWHC 779 (QB). In that case, Coulson J (as he was) set out a number of principles to be applied:

> "16. From these various authorities therefore, I consider that the principles to be applied in respect of an application under s.19 [of the Prosecution of Offenders Act 1985, now see LASPO] and Regulation 3 are as follows:
>
> (a) Simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of s.19 (*R v P* [2011] EWCA Crim. 1130, *R v Evans (Eric) (No.2)* [2015] EWHC 263 (QB)).
>
> (b) Improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly (*DPP v Denning* [1991] 2 QB 532).
>
> (c) The test is one of impropriety, not merely unreasonableness (*R v Counsell* (unreported) 13 March 2014, Crown Court at Bristol). The conduct of the

> prosecution must be starkly improper such that no great investigation into the facts or decision-making process is necessary to establish it (*R v Evans (Eric) (No.2)*).
>
> (d) Where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper, but even then, that does not necessarily follow because "no one has a monopoly of legal wisdom, and many legal points are properly arguable" (*R v Evans (Eric) (No.2)*).
>
> (e) It is important that s.19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions (*R v P*, *R v Evans (Eric) (No.2)*).
>
> (f) In consequence of the foregoing principles, the granting of a s.19 application will be "very rare" and will be "restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him" (*R v Evans (Eric) (No.2)*)."

53. DJ (MC) Bone found the Appellant to have acted in a way that was unnecessary and improper. His given reasons were that the Respondent had written to the Appellant on 11 November 2022, enclosing submissions by Mr Hughes, setting out the Respondent's arguments why the proceedings were a nullity and why the Respondent was not the right person to prosecute for statutory nuisance (paragraph 97 of the Case Stated), but the Appellant had nevertheless persisted for two further months, to the hearing on 16 January 2023, without the appropriate degree of legal analysis and without taking legal advice (paragraph 98 of the Case Stated).

54. DJ (MC) Bone had previously indicated his concern that the Court had issued a civil summons against a person who could not in law be the defendant and that would undoubtedly have caused the Appellant to conclude that she had an arguable case (paragraph 83 of the Case Stated).

55. DJ (MC) Bone also noted that the Appellant had started her actions in 2016 and they were still ongoing more than 6 years later (paragraph 85 of the Case Stated). On several occasions she had been invited to take legal advice and had been warned about the possibility that she would be ordered to pay the Respondent's costs (paragraph 86 of the Case Stated). She had been a litigant in person before the High Court in 2020 and proposed to be so again in 2023 (paragraph 87 of the Case Stated).

56. DJ (MC) Bone concluded, at paragraph 98 of the Case Stated, that

> "Given the background, it was appropriate for me to exercise my discretion and order the [Appellant] to pay the whole of the costs incurred, £11,241.60."

57. The costs claimed by the Respondent were contained in two applications for costs. The first was dated 11 November 2022. It claimed £1,800. The second was dated 15 November 2022, attaching a schedule for £6,681.60. The aggregate claimed at that stage was £8,841.60. We were not shown a costs schedule for the costs of the second hearing on 16 January 2023, but DJ (MC) Bone said that itemised costs had been incurred by the Respondent and awarded the whole of the costs claimed by the Respondent, in the total sum of £11,241.60. We therefore take it that the balance (of £2,400) was attributable to the second hearing.

58. Before us, the Appellant challenged the costs award against her, saying that the costs were connected with the issue of the civil summons which should not have been issued; and DJ (MC) Bone had declined to issue a criminal summons which meant that there never should have been a summons at all. The costs were consequential on the Court's mistake, alternatively related to issues of law (eg, whether the defect was structural) which were far from obvious.

59. The Respondent sought to uphold the decision of DJ (MC) Bone for the reasons given in the Case Stated. Mr Hughes reminded us that litigants in person are not entitled to special treatment (citing *Barton v Wright Hassall LLP* [2018] UKSC 12 at [18], per Lord Sumption, with whom Lords Wilson and Carnwath agreed: "lack of representation will … not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court"). He said that the Appellant had persisted in pursuing the wrong defendant, even though she had been told of her error many times in correspondence.

60. In our judgment, DJ (MC) Bone was entitled to conclude that the Appellant's conduct in laying an information naming the Respondent as the defendant was unnecessary and improper for the reasons he gave and to make a costs order against her. The Appellant had refused to engage with or heed the explanations given by the Respondent that the Respondent was not the right defendant; DJ (MC) Bone was entitled to conclude that this was an exceptional case where costs should be awarded.

61. Further, DJ (MC) Bone was entitled to assess the amount payable as the whole of the costs claimed by the Respondent. He had power to make a partial award, see paragraph 4.1.2 of the Practice Direction. But the amount of any costs award was very much a matter for his discretion.

62. The Appellant's strongest point is that the Court had made a mistake in issuing the civil summons. However, DJ (MC) Bone recognised the Court's mistake and took it into account as part of the exercise of his discretion, see paragraph 83 of the Case Stated.

63. Further and in any event, it is not possible to say that the Court's mistake led to any identifiable increase in costs, overall. It is clear from the background to this case, summarised above, that the Appellant was intent on pursuing the Respondent. She could have withdrawn her application at any time, and so conserved costs, but she did not. Given her extant application, there was an issue which needed resolution, as to whether the Respondent was the right defendant to be named pursuant to section 82(4) of the EPA 1990. Resolving that issue would have consumed a significant amount of time and cost, in any event; it is speculation to contend that the Court's mistake added to those costs.

64. Further, still, there is no good reason why the Respondent should have to bear any of the costs incurred in opposing the Appellant's application. The Respondent was correct in its objection, made from the outset, that it was not liable for any statutory nuisance which might be established.

65. The answer we give to question 3 is as follows:

Qu 3: Did I make any error of law when imposing costs?

A: No.

Costs of This Appeal

66. The Respondent seeks its costs of this appeal, in the event that it succeeds. Those costs are claimed in the total amount of £5,742.90.

67. The Appellant resists the order for costs in the event that the Respondent's arguments prevail in this appeal. She takes issue with the quantum of costs claimed.

68. This appeal by way of Case Stated is governed by Part 52 of the Civil Procedure Rules (see CPR 52.1(b) and 52.1(3)(a), read with Practice Direction 52E). By virtue of CPR 52.20(2)(e), this Court has power to make a costs order. It is established that the criminal costs regime applies to this appeal by way of case stated, see *Lord Howard of Lympne v Director of Public Prosecutions* [2018] EWHC 100 (Admin). Paragraph 4.1 of the Practice Direction therefore applies in this Court also.

69. The Appellant has persisted in this appeal even though she was told by DJ (MC) Bone that the Respondent could not in law be named as defendant. DJ (MC) Bone was right about that. This was, in our judgment, a wholly unnecessary appeal and this is an exceptional case where we should make an award of costs.

70. We assess the Respondent's costs summarily at £4,000, to reflect in part the Appellant's submission that the quantum of costs claimed by the Respondent was excessive.

Summary

71. The answer we give to Question 1 is as follows:

Qu: Was I right in law to find the civil proceedings a nullity?

A:

(i) You were right to find the civil summons a nullity.

(ii) The Appellant's application dated 4 July 2024 was not a nullity.

72. The answer we give to Question 2 is as follows:

Qu 2: Was I right to find the Respondent could not in law be the person responsible in this case?

A: Yes.

73. The answer we give to question 3 is as follows:

Qu 3: Did I make any error of law when imposing costs?

A: No.

74. This appeal is dismissed. We order the Appellant to pay the costs of this appeal to the Respondent, summarily assessed at £4,000. That is in addition to the costs already ordered by DJ (MC) Bone in the amount of £11,241.60.

75. We thank the Appellant and Mr Hughes for their careful preparation of this appeal and their knowledgeable submissions which were ably presented.