



Neutral Citation Number: [2024] EWHC 2592 (Admin)

Case No: AC-2022-LON-002963

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2024

Before :

MR JUSTICE SWEETING

Between :

DAMIAN FERKO

Appellant

EALING MAGISTRATES COURT
and

1st Respondent

KAPIESA LTD T/A XARA ESTATES

2nd Respondent /
1st Defendant

and

SURINDER KUMAR

3rd Respondent /
2nd Defendant

and

KRISHNA KUMAR

4th Respondent /
3rd Defendant

MR MICHAEL MARSH-HYDE (instructed by **ALEXANDER SHAW SOLICITORS**) for
the **APPELLANT**

The **1st RESPONDENT** did not appear

MR SHARAZ AHMED (instructed **ON DIRECT PROFESSIONAL ACCESS** by
KAPIESA LTD T/A XARA ESTATES) for the **2nd RESPONDENT**

MR KAMAR UDDIN (instructed by **HSBS LAW**) for the **3rd and 4th RESPONDENTS**

Hearing dates: 13th March 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 14th October 2024 by circulation to the parties or their representatives by email and by release to the National Archives

Mr Justice Sweeting :

Introduction

1. This is an appeal by case stated against the decision of the Magistrates sitting at Ealing Magistrates' Court on 27 and 28 July 2022 that there was no case to answer against the Second, Third and Fourth Respondents at the close of the prosecution case.
2. The prosecution had been brought by the Appellant. He and his family live at 59a Silverdale Gardens, Hayes, Middlesex UB3 3LW ("the premises"). The Appellant is a tenant. The Third and Fourth Respondents are the registered legal owners (freeholders) of the Premises. The Second Respondent is the lessee of the premises and a property management company. The Second Respondent sublet to the Appellant under an Assured Shorthold Tenancy.
3. On 27 January 2022 the Appellant's solicitors wrote to the Respondents, by way of a letter before action and notice under sections 82 and 79 of the Environmental Protection Act 1990 ("the EPA"), complaining that the premises suffered from damp and mould and had done so from the start of the tenancy. On 11 March 2022, the Appellant applied for the issue of a summons against the Respondents pursuant to section 82 of the EPA.
4. The complaint alleged that the Respondents were responsible for:
 - a) A nuisance, due to the presence of damp and mould in the property;
 - b) Condensation associated mould growth in the back addition bedroom, bathroom, kitchen and living room;
 - c) A damp stain to the landing ceiling adjacent to the back addition bedroom;
 - d) A defective bathroom extractor fan which was exacerbating condensation and contributing to mould growth in the property;
 - e) A lack of insulation in the loft which was exacerbating condensation and associated mould growth;
 - f) A failed sealed glazing unit to the landing window.

Statutory nuisance under The Environmental Protection Act 1990

5. A statutory nuisance is defined in section 79 of the EPA to include "*any premises in such a state as to be prejudicial to health or a nuisance*". The term "*Prejudicial to health*" is, in turn, defined as "*injurious, or likely to cause injury, to health*". A breach of the EPA is a criminal offence. Condensation or mould growth are examples of defects in premises which have been considered prejudicial to health.
6. Mould is a microscopic fungus that thrives in damp environments. Mould spores are ubiquitous and can cause health problems when inhaled or touched. Common symptoms include respiratory issues, allergies, asthma attacks, and skin rashes. Exposure to mould is linked to health problems, especially for vulnerable populations such as the elderly, children, and individuals with preexisting health conditions.

Approved Judgment

7. The notice of intention to bring proceedings was properly served on the Appellant's behalf by his solicitor. It was ignored. That led to the application for a summons and the laying of an information.
8. A not guilty plea was entered so that a trial was required. In short, what had to be proved, to the criminal standard, against the Defendants at the trial was the existence and cause of a statutory nuisance for which they were responsible.

The Trial - Evidence

9. At trial the Appellant, with the agreement of the Respondents and the Magistrates, tendered his statement and accompanying exhibits as his evidence in chief. These set out when problems of condensation and mould had arisen and the complaints he had made each winter, when the problem was at its worst. His case was that condensation and associated mould had been a persistent problem since he had occupied the premises. The exhibits to his witness statement included photographs and screenshots of dated WhatsApp messages bringing the problem to the attention of the Second Respondent. He gave oral evidence and was cross examined.
10. The Appellant also relied upon the expert evidence of Mr Lawrence (an expert environmental control officer) who tendered his reports and gave evidence about:
 - a) The relationship between moisture and mould;
 - b) The factors causing condensation at the premises;
 - c) The association between dampness, mould growth, the proliferation of house dust mites and respiratory illness;
 - d) How occupancy of a property would generate moisture and how through no fault of an occupier, condensation mould could arise due to faults with the thermal properties of the building and;
 - e) His observations on the day he attended to inspect the property.
11. The material parts of Mr Lawrence's first report of 29 April 2022 in relation to the condition of the property, based on an inspection in March of that year, were:

“6.1 I can confirm there is significant mould growth in the back addition bedroom and kitchen, noticeable mould growth in the living room and some minor mould growth in the bathroom and main bedroom.

6.2 The location and the distribution of the mould growth and the absence of any significant dampness or plaster deterioration indicates the cause of the mould growth is surface condensation and not disrepair related penetrating dampness. High humidities were recorded at the time of my inspection and condensation was also recorded as occurring on the back addition bedroom left external wall, these phenomena will be more severe during colder weather. BS 5250 advises that where the relative humidity in a room stays at 70% for a long period of time then the relative humidity on external wall surfaces will be high enough to support the growth of mould. If the dew point is reached (100% relative humidity) then condensation will occur and this can present as visible sweating

and water droplets on a cold surfaces, this is most commonly seen when warm moist air comes into contact with a cold window pane and condenses on the surface but it can also occur on cold parts of walls, floors and ceilings.

6.3 The occurrence of condensation and the associated mould growth is dependent upon a number of factors and the most important of these are the amount of moisture generated within the dwelling, the provision for ventilation and the use made of it, the thermal properties of the structure and the provision for space heating and the use made of it. An imbalance in these factors can lead to condensation and mould growth and with respect to this dwelling I advise causal factors include;

i) inadequate insulation to the back addition bedroom left wall which is not dry-lined so it will be a colder wall, the dry-lined walls are not significantly mould affected.

ii) some areas of missing or disturbed loft insulation, the ceiling surfaces under these areas will be colder which increases the condensation risk.

iii) inadequate ventilation, in particular the bathroom extractor fan is defective and there is window disrepair which means the windows will be difficult to open and close and ventilation is likely to be reduced.”

12. His conclusions as to the health implications of the condition of the premises and his opinion as to the statutory position were:

“7.1 There is a well documented association between the dampness and mould growth and respiratory ill-health and therefore I considered this dwelling to be prejudicial to health. If a dwelling is not free from dampness prejudicial to the health of the occupants then it may also be considered unfit for human habitation.

8.2 There is a well-documented association between dampness, mould growth and the proliferation of house dust mites and respiratory illness. Therefore I am satisfied the condition of the dwelling was prejudicial to health and a Statutory Nuisance as defined by Section 79 (1)(a) of the Environmental Protection Act 1990.

8.3 Having regard to the Homes (Fitness for Human Habitation) Act 2018 I consider that this dwelling was unfit for human habitation because it is not free from dampness prejudicial to the health of the occupants.”

13. In his second report, following an inspection on 22 July 2022, he stated:

“5.2 I advised in my first report that I considered main causes of the condensation associated mould growth were;

i) inadequate insulation to the back addition bedroom left wall which is not dry-lined so it will be a colder wall, the dry-lined walls are not significantly mould affected.

Approved Judgment

ii) some areas of missing or disturbed loft insulation, the ceiling surfaces under these areas will be colder which increases the condensation risk.

iii) inadequate ventilation, in particular the bathroom extractor fan is defective and there is window disrepair which means the windows will be difficult to open and close and ventilation is likely to be reduced.

5.3 The weather is currently hot and dry and there is currently no dampness, no condensation risk and no mould growth risk but none of the matters above have been addressed so I expect that mould will begin to grow again from October and over the winter months..."

7.2... There has been a reduction in the visible mould, particularly in the back addition bedroom, so this dwelling is now borderline prejudicial to health. However, no repair or prevention works have been undertaken so I consider there will be a recurrence of mould growth and a statutory nuisance during the autumn months..."

14. The Second Respondent instructed its own expert, Mr Simon Hands, a chartered surveyor, who attended the property on 30 June 2022. Mr Hands and Mr Lawrence met at Court and provided an agreed and marked up Schedule based on the original schedule attached to Mr Lawrence's report.

15. At paragraph 4.3.1, the schedule recorded an observation made on the 3 March 2022 in relation to the first floor back addition (Bedroom 2):

"the rear and right external walls have been dry lined, the left external wall has not been dry lined and the surface temperature was colder to the touch."

16. There was then a further comment by Mr. Lawrence:

"I am unable to advise if the rear right walls were dry lined with thermal plasterboard but they are warmer. See photographs 30, 33-35."

17. The final column for this entry recorded "no change" as of 22 July 2022 and was marked as agreed by Mr Hands.

18. Aside from his contribution to the schedule there was no evidence from Mr Hands because, at the close of the Appellant's, case the Third and Fourth Respondents made a submission that there was no case to answer. That submission was allowed, on the basis of insufficiency of evidence (but not on a point taken as to legal ownership), and the Respondents discharged. The Second Respondent then made its own submission that there was no case to answer. After a somewhat longer period of retirement and deliberation the Magistrates also allowed this submission, so bringing the prosecution to an end.

No Case to Answer - The Legal Framework

19. The position in the Magistrates' court is governed by CrimPR Part 24, Rule 24.3(3) (d), which provides that the court may acquit where *"the prosecution evidence is insufficient for any reasonable court properly to convict"*. This is derived from the

Approved Judgment

judgment of Court of Appeal in *R v. Galbraith* 73 Cr.App.R.124 where Lord Lane CJ said:

“(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty - the judge will stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”

20. Although *Galbraith* refers to ‘the jury’ it applies equally to magistrates. The *Galbraith* test has two separate limbs; first, where there is no proof, secondly where there is evidence, but it is weak, ambiguous, or contradictory.

21. In *Goddard* (*R. v. G & F* [2012] EWCA Crim 1756) the Court of Appeal summarised what the application of the *Galbraith* test involved [36]:

“36. We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the “classic” or “traditional” test set out by Lord Lane CJ in Galbraith . (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury.”

22. In the case of *R v Lowther* [2019] EWCA Crim 487, [2020] Crim LR 242 the Court of Appeal reaffirmed the high standard for a successful "no case to answer" submission. Such submissions should only be granted in circumstances where the prosecution's evidence cannot realistically result in a conviction; otherwise the matter should proceed to trial, allowing the entirety of the evidence presented, including any potential defence evidence, to be assessed.

23. In allowing the defence submissions in the present case the Magistrates gave the following judgments.

24. In respect of the 2nd and 3rd Defendants they said:

“We have heard a no case to answer submission by Mr Uddin, for D2 & D3, relies upon 1. Question of ownership, 2, both limbs of Galbraith Test.

We also took into account submissions made by the prosecution. In our deliberation we reminded ourselves of the Galbraith test and the requirement of S-82 of EPA 1990. Whilst we considered there was some elements under Limb 1 of Galbraith, when we then looked at limb 2 of the test, having reviewed both the oral and written evidence provided by the prosecution expert witness and Mr Ferko we find that the evidence was insufficient.

We believe that no reasonable tribunal could convict D2 and D3 upon the evidence and we therefore find no case to answer, therefore the case against Kumars is not proved, dismissed.

We did not consider ownership point. It was not for that reason. evidential issue. We were advised that if one element of complaint is present, still there is a case to answer.”

25. Having had the case against them dismissed the 3rd and 4th Respondents and their representatives left court.

26. In respect of the 1st Defendant they said:

“The defence of behalf of the 2nd Respondent has asked us to consider No Case to Answer based on Galbraith test which we reminded ourselves on it. As well as S82 of EPA 1990. The prosecution addressed the court at a great length, outlining why they believe there is a case to answer stating in particular that tenants cannot be held responsible for statutory nuisance just by undertaking normal living at an address.

We heard evidence from Mr Ferko directly, he confirmed that he never reported broken bathroom extractor fan, or the broken handle on the bathroom window or the other window that did not open. From the outset of his tenancy which started on June 2019.

We have also heard from the Prosecution expert Mr Lawrence, had benefit of reading his report and also considered his oral evidence, we are aware that burden lies with the prosecution to prove their case to the criminal standard which is Beyond Reasonable Doubt, Mr Lawrence gave evidence about relationship between moisture and mould. And whilst he made references to the bathroom fan that did not work, indicated that bedroom wall was not dry-lined, and windows were not been able to open or close easily, Mr Lawrence also confirmed that there is no significant structural disrepair and all the mould caused by the condensation. He said that the damp on the ceiling did not contribute to the condensation. We believe that his report did not provide conclusive evidence regarding damp and mould and whether what has been referred as a structural defect was only factors contributing to the mould or there were significant factors attributable to the damp and mould in the flat.

Approved Judgment

Whist we accept there is some evidence, under the 2nd limb of Galbraith we do not believe the evidence as presented is sufficient that no reasonable tribunal could convict the 2nd Respondent, as a result we find no case to answer, case against the 2nd Respondent not been proved, case is dismissed.

We did not consider the issue of ownership.”

27. The 1st Defendant then left court.
28. Later that afternoon the clerk to the justices sent an email headed “Please find the magistrates’ reasons”, setting out the judgments which had been given in court (in the terms set out above) but drawing attention to the fact that some additional text in relation to the 3rd and 4th Respondents had been added between paragraphs 2 and 3 of the original judgment on their application as follows:

“Mr Lawrence confirmed that there was no significant structural disrepair and that all the mould and damp was caused by condensation”.

29. No explanation was offered for this addition to the judgment.

The Case Stated

30. On 18 August 2022 the Appellant applied to the Magistrates to state a case. They did so, in draft, on the 8th of September and the Appellant in turn submitted representations on the draft, on the 30th of September, together with an amended case stated. The magistrates served the final case stated on the parties on the 20th of October 2022.
31. In the 20th October case stated, at Part 7, the Magistrates:

“recorded in writing and notified the parties for the first time (save to the extent these matters were addressed in our.. (original)... judgments) that we found the following facts:

“a) That the expert was not conclusive in his findings and simply reiterated the issue about condensation but made no causal link to suggest that any of the issues with the property (fan/windows/insulation of a single exterior wall) were responsible for the mould.

b) The Applicant never reported about the extractor fan in the bathroom being not working. The bathroom window’s handle was broken and not easy to open or close.

c) The Applicant was not consistent to his written statement and evidence in court. Could not remember anything specifically and lacked credibility. The evidence provided by the Applicant was inconsistent and doubtful.

d) The Applicant’s case/evidence was not conclusive to indicate that any of the Respondents were liable for the statutory nuisance. While we accepted that there was an existence of a statutory nuisance in the property, we cannot be sure that the Applicant did not contribute towards causing such

nuisance while he accepted that he never bothered although he was aware that the extractor fan never worked.

e) The Applicant's written statement was NOT admitted in court as in evidence in chief, cause his statement was disputed by the respondents and not admitted as section 9 or section 10 admission (CJA 1967) for the trial. Court considered the Applicant's case based on his evidence given in court on the day of trial but also noted his statements where referred in the trial bundle. The bundle was NOT an agreed trial bundle for criminal proceeding."

32. At Part 8 of the Case Stated, the Magistrates also:

"recorded in writing and notified the parties for the first time, save to the extent these matters were already addressed in our judgments that we were of the opinion:

a) In respect of the 3rd and 4th Respondents:

That there was not a case to answer

Having considered the oral and written evidence provided by the Applicant's expert witness and the Applicant, we were of the opinion, that no properly directed tribunal could convict the 2nd and 3rd Respondents and so we found there was no case to answer and we dismissed the case. We did not consider the ownership point. Our decision was based on lack of sufficient evidence.

Whilst we did not give lengthy reasons the factors which we took into account in reaching our decision were-

I. The Applicant was unable to recollect any dates about when he had made a formal complaint, prior to commencing these proceedings. He was unable to provide any evidence of phone calls he may have made or copies of emails he may have sent regarding complaints about the damp/mould. We found that undermined the Applicant's case against the Respondents.

II. The Applicant responded to almost every question with "I don't know" or "I can't remember". The Applicant had lived at the address for a considerable time and elected to renew his tenancy but did not make any complaints about the damp/mould until recently prior to the commencement of the proceedings. We found that as a witness he lacked credibility and it was not clear that the Respondents were liable for the condensation rather than it being caused by his own acts.

III. The expert had failed to establish the causal link between the issues with the property and condensation/the presence of mould.

IV. The expert confirmed that there was no significant structural disrepair and that all the mould and damp cause by condensation. Whilst we did not

say so in our reasons initially but added when explanation was requested on behalf of the Applicant.

b) In respect of the 2nd Respondent:

Again, we found there was no case to answer as we were of the opinion, that no properly directed tribunal could convict the 2nd Respondent.

The Applicant confirmed that he did not report that the extractor fan in the bathroom was broken or that the other windows did not open, even though his tenancy had commenced in June 2019.

Mr Lawrence gave evidence about the relationship between moisture and mould. Whilst he made reference to the bathroom fan, the bedroom wall not being not dry lined, and windows that were not been able to be opened or closed easily, he also confirmed that there was no significant structural disrepair, and all the mould was caused by the condensation. He said that the damp on the ceiling did not contribute to the condensation.

We found that his report did not provide conclusive evidence regarding damp and mould. It was not conclusive as to whether what has been referred to as a structural defect was the only factor or main factor in contributing to the mould or whether there were other significant factors attributable to the damp and mould in the flat.

In conclusion, our judgement that was read out in court, ought to have included the fact that we found the Applicant's evidence both unreliable and insufficient in detail as the bench had much discussion about his evidence when we retired. However, whilst we found the Applicant's evidence to be flawed and unreliable, our main concern was that the evidence produced by the expert witness Mr Lawrence was neither definitive or compelling in convincing us that the respondents were responsible for the mould/condensation that existed as a result of issues for which the respondents as landlords should be duly and properly held accountable for."

33. The case stated included a summary of the evidence which I do not need to set out for the purpose of this judgment.
34. On 9th November 2022 the Appellant applied to the High Court for an order to amend the Case Stated under S.28A (2) of the Senior Courts Act 1981. Ritchie J. directed that the Appellant's application pursuant to s28A(2) SCA should be determined at the substantive hearing listed before him on 11 July 2023. In the event, the time allocated was only sufficient to deal with the application for an order to amend. Ritchie J. handed down judgment on that application on 18 July with a proposed amended case stated attached to it. The following month the court officer for the Magistrates served a duly amended case stated setting out the questions for the opinion of the High Court which are to be answered on the appeal and to which I now turn. For this purpose I refer to the Respondents collectively as Defendants and respectively as First , Second and Third Defendants as the questions for the court use this nomenclature.

Questions for the Opinion of the Court and Conclusions

Reasons

a. Were we wrong to announce in court in relation to each Defendant that we found that there was no case to answer without giving further reasons as to why we had formed that conclusion?

35. On behalf of the Appellant, Mr Marsh-Hyde, relied upon the general proposition that a criminal court is required to give reasons for its judgments citing *R v Harrow Crown Court Ex p. Dave* [1994] 1 WLR 98, *R. v Inner London Crown Court Ex p. Lambeth LBC* [1999] 12 WLUK 186 and *Pullum v Crown Prosecution Service* [2000] COD 206). These are all cases involving appeals from the Magistrates Court to the Crown Court where the issue raised by way of case stated was whether adequate reasons had been given on the determination of the appeal in the Crown Court; they do not relate directly to the position of Magistrates determining “no case” applications in a summary trial.
36. The Criminal Procedure Rules at 24.3(5) requires justices to provide "sufficient reasons" for a conviction or hospital order. However, this does not necessitate a formal judgment. As the Court of Appeal confirmed in *McKerry v Teesdale and Wear Valley Justices* (2000) 164 JP 355 what is required are brief reasons, adequate to inform the defendant of the basis for the conviction. The Divisional Court in *R (McGowan) v Brent Justices* [2001] EWHC Admin 814, reaffirmed this principle following the coming into force of the Human Rights Act 1998. While concise reasons are sufficient, they must be carefully crafted to adequately explain the decision to the defendant.
37. Where a submission of no case is made at a summary trial there is no obligation on magistrates to give reasons for rejecting the submission (see *Harrison v. Department of Social Security* [1997] C.O.D. 220, D.C). There are good reasons for this being the position when rejecting a submission as Maurice Kay J. explained in *Anthony Moran v Director of Public Prosecutions* [2002] EWHC 89 Admin, 2002 WL 45267

“16.. Having regard to all that authority, what then is the position in relation to a refusal by magistrates to accede to a submission of no case to answer? In my judgment, even after 2nd October 2000, there is still no legal obligation on magistrates to give reasons for rejecting a submission of no case. It is now usual for justices to give reasons following a finding of guilt, and that has been done in this case. If a defendant is concerned about the conduct or outcome of a summary trial, he has a number of procedural options: in particular, (1) an appeal by way of rehearing in the Crown Court; (2) an appeal to this court by way of case stated, in which case the justices may be required to explain in the case stated the route by which they reached a particular conclusion; or (3) in some circumstances, on application for judicial review. Summary trial is a highly specific procedure. In my judgment, it would not be in the interests of justice if magistrates were required to give detailed reasons for their current assessment of the evidence and the witnesses at the end of the prosecution case. It is important that if, on applying the Galbraith test, they conclude that there is no case to answer in respect of a particular allegation, the defendant should there and then be acquitted of that allegation so that he no longer remains in jeopardy

in relation to it. However, the price of rejecting such a submission should not be an obligation to proffer what Mr Goddard described in the course of argument as “a half-time report on their view of the evidence”. That is not a prerequisite of a fair trial. Nothing in the Strasbourg jurisprudence disposes me that the view that what was decided in Harrison is not now ECHR compliant.

17.. One of Mr Siddle's submissions is to the effect that judges in the Crown Court, when trying cases on indictment, always give reasons for rejecting a submission of no case to answer, and that procedure on summary trial should reflect that. In my judgment, there are three answers to that submission. First, in my experience, judges in the Crown Court do not always give detailed reasons when the rejection is based on a conclusion that the evidence is such that, properly directed, the jury could convict upon it. Different considerations no doubt apply when the issue is one of pure law. Secondly, even if there is a duty on the judge to give reasons, I doubt whether a successful appeal against conviction could succeed solely on the basis of his failure to do so, as opposed to an appeal on the ground that he erred in law by rejecting the submission of no case, although even on this point the position is not entirely clear on the present authorities (see Archbold 2002, paragraph 7–99). Thirdly, the judge in the Crown Court in a trial on indictment is not the ultimate fact finder. The jury is. In summary trial, the same magistrates determine both the question of law (is there a case to answer) and, if there is, the ultimate factual question (has the case been proved). This demonstrates that the positions as between summary trial and trial on indictment are not wholly analogous. It also illuminates one of the reasons why, if magistrates have lawfully concluded that there is a case to answer, it is generally inappropriate for them to make public assessments of witnesses which may change in the light of the subsequent defence evidence.

38. In *Steward v DPP* [2003] EWHC 2251 (Admin), the Divisional Court established that magistrates retain the discretion to revisit a decision to uphold a "no case to answer" submission. The discretion arises where the prosecution successfully identifies an error in the magistrates' reasoning, and the defendant agrees with the existence of the error. In such instances, the judicial process is considered incomplete, and the magistrates are not precluded from reopening the case and proceeding to trial. The decision in that case was predicated upon the magistrates having acceded to a submission of no case to answer and in doing so giving reasons which contained an error of fact.
39. In rejecting the submission that a “cut off” point had been passed, Maurice Kay J. observed [11]:

“In my judgment that point had not been reached in this case. In making that statement I also have in mind the fact that at the time of the Essex Justices case it was not usual for magistrates to give reasons at all and, therefore, the announcement of the decision one way or the other was laconic in the extreme. Now that the giving of reasons is common, the process of adjudication is extended. Mr Lofthouse suggests that there are also strong policy reasons for this court to adopt the approach taken in the Essex Justices case, the policy being one of discouragement of attempts at second bites at the cherry. However, there are also strong policy reasons for taking a broader view. Where, as here, magistrates make a mistake and both parties agree, and the magistrates agree that they have

Approved Judgment

made such a mistake, policy and common sense favour its immediate rectification without the cost and delay of an appeal by case stated.”

40. Taking all of these matters together I agree with the broad submissions made by Mr Marsh-Hyde that the purpose of giving a judgment when accepting a submission of no case to answer is not simply to announce the result. It is necessary to give reasons which are sufficient for the parties to understand why an application by the defence has succeeded. Both human rights law and English common law require that judicial decisions are supported by adequate reasons. The importance of reasoned decisions lies in ensuring fairness, transparency, and accountability in the judicial process. Since magistrates are the tribunal of fact it is open to them to reject evidence which is in issue in determining a submission at the close of the prosecution case, but that involves an exercise of their determinative fact finding function which requires a reasoned decision.
41. Giving reasons is also a necessary discipline in the present context because the *Galbraith* test involves consideration of the position of a properly directed tribunal assessing the evidence. That required the magistrates to consider what the prosecution had to prove and the evidence which potentially supported its case. They were entitled to reach a conclusion on evidence (for the prosecution) which was in issue but the fact that a witness struggled to remember matters of detail or appeared to be inconsistent counted for little if they had come up to proof, or they were unchallenged, on the matter for which their evidence was relied upon in establishing the offence.
42. The reasons given may be brief but the magistrates should apply their minds to what needs to be proved, the evidence relied upon by the Prosecution to prove those matters and the reasons why it is said that the evidence is insufficient. The judgment given in relation to the Second and Third Defendants did not meet that requirement as it merely recited the legal test without providing any explanation as to how it was satisfied in this case.
43. It follows that the answer to question a. is that the Magistrates’ decision to dismiss the Appellant’s case against the Second and Third Defendants was wrong at law because the Magistrates failed to provide any sufficient reasons for their conclusions. The position is different in relation to the First Defendant in respect of whom reasons were given; whether those reasons are open to challenge on other grounds I consider further below.

Reasons given after the judgment

b. Was it lawful for us to provide additional reasoning for our judgments (1) by adding text to our judgment after the hearing and/or (2) by providing the text contained at parts 7 and 8 of this case stated?

44. In *R (Taylor) v Maidstone Crown Court* [2003] EWHC 2555 the court was considering what could be taken into account in an appeal by way of case stated from the Crown Court. Silber J said at [10 - 11]:

“10. A similar point arose in the case of Pullum v Crown Prosecution Service [2000] COD 206 in which the issue was whether or not reasons given by the Crown Court were adequate. In dismissing the appeal, the Recorder had simply said, “The appeal is dismissed. We find there was no assault.” In the case stated, however, he elaborated on the court's reasons and the issue was whether the Divisional Court should take those factors into account.

11. The Divisional Court, consisting of Lord Bingham CJ and Kay J, stated that:

“Had the court announced its decision in approximately the terms of the case stated the appellant would have no possible grounds for complaint. As it was, and with some sympathy for the Recorder who had no doubt given judgment in terms which must have been followed in very many cases, the court concluded that the reasons given fell short of the minimum required.” (Page 207)

I agree with Mr Lee that the decision in that case shows that, in order to determine whether adequate reasons have been given, it is necessary to consider the allegation that inadequate reasons were given in the terms of the words that were actually used when the decision was given rather than on the basis of reasons given later. That view is also supported by a comment in Archbold, paragraph 2-202 on page 209, where it is said:

“Where no reasons were given by a judge when dismissing an appeal, a note of the proceedings subsequently provided by him which was unsupported by affidavit, not signed by the justices sitting on the appeal, was of no real weight. Reasons should be given contemporaneously with the decision so that the losing party could be sure that there was no ex post facto rationalisation.”

The authority given for that proposition is at R v Snaresbrook Crown Court ex p Input Management 163 JP 533 DC. Mr Lee has been unable to find that case at that reference but the clear position in this case was that there were matters which, in the form of the admission by the complainant of her previous dishonest statements, not only merited but also actually required the Recorder to explain why they had not been accepted at the time.”

45. As far as the Second and Third Defendants were concerned the addition to the judgment, acceding to the submission of no case, was made at 4:15 on the day of the hearing, sometime after the Defendants had left court. It might be inferred that the magistrates had recognised that their initial judgment omitted reasons altogether and that the addition of further text was an attempt to remedy the omission.
46. As to the content of the case stated, whilst some amplification or reformulation of reasons given in a judgment is unlikely to be objectionable the addition of new reasoning to support the outcome is not permissible.
47. On behalf of the First Defendant Mr Ahmed argued that it was enough that the Magistrates had indicated that they rejected the evidence of the Appellant and his expert and that what came later was simply a clarification of the particular matters on which they found the evidence to be unsatisfactory and insufficient. However, in my view the reasons given in the case stated at parts 7 and 8 went well beyond restating what had been said in court and were, as the question suggests, “additional reasons”.

48. This question is essentially the corollary of the first question (question a. above). The answer to this question is ‘no’; where magistrates are required to, but fail, to provide substantive reasons for a decision when it is delivered then it is procedurally improper to seek to provide reasons later. In such circumstances the particular mischief of retrospective reasoning is that it may be based upon post-rationalisation or may appear to be.

Causation

c. In relation to determining causation as to whether the Respondents were responsible for the statutory nuisance at the premises:

i. Was it necessary in law for the Prosecution to establish that “but for” the conduct of a defendant a statutory nuisance would not arise or would have been sufficient for the Prosecution to establish that a defendant’s act or default was such that it materially contributed to the statutory nuisance arising?

49. Where a statutory nuisance is established within s.85 (1) to (4) of the EPA, then s.82(5) provides:

“...where more than one person is responsible for a statutory nuisance, subsections (1) to (4) above shall apply to each of those persons whether or not what any one of them is responsible for would by itself amount to a nuisance”

50. The effect of this section is that a landlord is not liable if a statutory nuisance is wholly attributable to the tenant; for example, where condensation is due to a failure to use the heating system properly rather than as a result of some defect or disrepair (see *Pike v Sefton MBC* [2000] QB). However, there was no evidence of any failure to heat on the part of the Appellant (quite the reverse) and, subject to a point as to notification (see further below) there was no fault identified in his use of the premises.
51. The answer to the question is ‘no’, causation under the statutory provisions does not involve a “but for” test. The EPA does not explicitly require "but for" causation to establish a statutory nuisance under section 85(1)-(4). Causation is a requirement but a defendant maybe liable for a statutory nuisance even if they are not the sole cause of the nuisance, as long as they have made a significant or material contribution to it. The mere fact that a tenant may have contributed to a statutory nuisance does not exonerate others who have also caused the nuisance. The tenant's conduct is only relevant insofar as it casts doubt upon the culpability of others or suggests that the tenant was the sole source of the nuisance.

ii. Were we entitled to conclude based upon the evidence that we had read and heard, that the causal link between the mould and condensation and the state of the property had not been established and so there was no case for the respondents to answer?

52. Mr Lawrence attributed mould and condensation to inadequate ventilation and inadequate insulation; the latter attributable to a failure to dry line one of the walls and the absence of loft insulation; the former to a broken, bathroom fan and defective windows. This undoubtedly established a connection between the condition of the building and the construction or maintenance of its fabric, for which the Defendants were responsible, and the appearance of mould and condensation. There was therefore

Approved Judgment

expert evidence to support the prosecution case which could not sensibly be described as tenuous or weak.

53. It would have been sufficient for the prosecution to establish that a Defendant's act or default was such that it materially contributed to a statutory nuisance. The Magistrates' conclusion that the expert made no causal link between the property issues (fan, windows, insulation) and the mould was incorrect. Mr Lawrence explicitly stated that these factors were causal factors in relation to condensation and mould growth; there was no foundation for rejecting that evidence, which was uncontested, at the close of the prosecution case.
54. I have no doubt that the appellant himself was effectively cross examined on behalf of the Defendants, but the Magistrates appear to have lost sight of the fact that issues with the credibility of his evidence were of limited relevance to the central question of statutory nuisance. Without repeating that error, I would nevertheless add that there is an important distinction between failing to recall details and providing inconsistent evidence. There is little or nothing in the material before me or, I note, in the draft case stated to suggest that the appellant was an inconsistent witness. His witness statement not only set out his recollection of his history of complaints but exhibited contemporaneous communications which bore out the fact that he had brought problems to the attention of the lessor.
55. There was ample unchallenged evidence which demonstrated the defendants' knowledge of the damp and mould problem. It would have been evident on inspection. The expert's evidence clearly established that condensation occurred despite the appellant's normal use of the property and that there was adequate heating. That evidence also directly contradicted any express or implicit case that the appellant was the sole cause of the problems.
56. The answer to the question is therefore 'no'; the Magistrates findings as to causation were not justified as a matter of fact or law in all the circumstances of the case.

Statutory interpretation

d. Were we entitled to conclude in this matter that the fact that there was no structural disrepair at the property would prevent a tribunal from finding that the Respondents were responsible for the statutory nuisance at the premises?

57. Section 82 of the EPA defines a statutory nuisance as "*any matter or thing which is prejudicial to health or a nuisance.*" This definition is broad and encompasses a wide range of issues, including but not limited to structural disrepair. The predicate question is not therefore whether there is structural disrepair but whether the matter or thing identified is "prejudicial to health or a nuisance". To the extent that the question may suggest that structural disrepair is a threshold question in all cases brought under the EPA the answer is plainly 'no'; it is not necessary to establish structural disrepair in order to make out a statutory nuisance under section 82 of the Environmental Protection Act 1990 (EPA).
58. A "person responsible" for a statutory nuisance is the individual whose actions, omissions, or toleration of a state of affairs that should be remedied (sufferance) contribute to the nuisance. Even without a breach of other statutory or contractual

obligations, a council or private landlord can be held responsible for a statutory nuisance arising from their acts, defaults, or sufferance. In such cases, the landlord may be required to take corrective measures to abate the nuisance, even if that necessitates property improvements (see *Birmingham District Council v. Kelly* (1985) 17 HLR 572 per Woolf J at 579-580 – a case in which the poor thermal qualities of the building had led to problems with condensation dampness similar to those identified in this case).

59. Some time was spent in argument on the question of whether the appellant had characterised the problems as resulting from structural defects and then retreated from that position. Arguably some of the matters identified by Mr Lawrence were capable of being described as due to inherent structural defects (rather than structural disrepair) which was relevant to the direct liability of the Second and Third Defendants as freeholders. However, the issues which potentially arose in this respect seem to have been treated as part of the questions of “ownership” on which the Magistrates reached no conclusion in finding that there was no case to answer (and thus could have formed no part of their reasoning).
60. Mr Uddin, on behalf of the Second and Third Defendants submitted that the mould and condensation could be explained by the lack of ventilation as a result of the fan not working and the windows being in a state of disrepair but that since the appellant had not complained about either of these it was not open to him to say that the conditions he complained of were caused by the Defendants. I consider the question of what notice is required (below) in relation to a subsequent question but, in short, notice requires notification of the problem and not a diagnosis of the cause. Causation is a factual and expert issue which cannot turn upon what a tenant knew or said. Mr Uddin also pointed to the fact that Mr Lawrence had indicated that he had not opened up any part of the wall to see whether it was dry lined. It might be observed that he could not have done so without the permission of the freeholder. I have already referred to the agreement reached with the Defendant’s expert as to which walls were cold and which were warm. What Mr. Lawrence did say, in terms, was that he had found that there was inadequate ventilation and inadequate insulation.
61. Where the Magistrates refer in their judgment (in relation to the First Defendant) to structural issues it was, first, to observe that Mr Lawrence attributed the problems to condensation rather than structural disrepair which simply begged a question as to cause and effect and, secondly, to comment that *“his report did not provide conclusive evidence regarding damp and mould and whether what has been referred as a structural defect was only factors contributing to the mould or there were significant factors attributable to the damp and mould in the flat”* . Even allowing for the circumstances in which the judgment was given this statement is remarkably unclear. Since it is confined to the report(s) rather than the oral evidence it is possible to say with some confidence that there is no such deficiency in Mr Lawrence’s evidence. He sets out clearly his opinion as to the cause of the condensation and mould which does not depend upon whether those causes could be described as “structural” or otherwise.
62. In adding text to the judgment given in relation to the Second and Third Defendants the Magistrates appear to have underlined this false distinction between whether there was structural disrepair and whether “all the mould and damp was caused by condensation”.

Approved Judgment

63. The answer to this question is accordingly ‘no’; the Magistrates decision to find that there was no case to answer because there was no structural disrepair was wrong at law because it was not necessary to establish that the property was in structural “disrepair” for the Defendants to be held liable for the statutory nuisance that was alleged to have arisen in this case.

e. Was it correct in law for us to not consider or address the fact that the property was unfit for human habitation in determining whether the Respondents were responsible for the statutory nuisance at the premises?

64. It was an implied statutory condition that the property let to the Claimant should be fit for human habitation during the term of the lease. Whether the property met this requirement had been raised clearly in the prosecution case. Mr Lawrence’s opinion in his initial report was that, having regard to the Homes (Fitness for Human Habitation) Act 2018, the premises were unfit for human habitation.
65. The Magistrates fell into error in focusing solely on the Defendants’ potential breach of repairing obligations. The property’s condition was capable of constituting a breach of the implied statutory obligation under section 9A of the Landlord and Tenant Act 1985. Thus a reasonable tribunal properly directing itself on the law could have concluded on the prosecution evidence that the defendants had failed to meet this standard of fitness for human habitation. Whilst magistrates may rely on their own experiences when determining certain factual questions, when they are assessing whether premises are detrimental to health, they require expert evidence. Magistrates cannot arbitrarily replace expert opinions with their own judgments when deciding such a question (see *Patel v Mehtab* (Queen’s Bench Division) 5HLR 78).
66. Although Mr Lawrence’s second, follow-up, report concluded that the premises were no longer unfit that was because the inspection had been conducted in June and the appellant had undertaken some cleaning of mould. He anticipated that things would worsen in the winter months such that there would be a return to the conditions which constituted a statutory nuisance and rendered the property unfit.
67. The answer to this question is therefore ‘no’; it was not correct in law to fail to consider fitness for human habitation in the light of the case advanced by the appellant as prosecutor and the evidence he relied on.

Notice given by a tenant

f. To what extent was it necessary, if at all, for the Applicant to provide notice of particular defects at the premises prior to providing a notice pursuant to s.82(6) EPA for the Respondents to be held responsible for the statutory nuisance at the premises?

68. In *Pearshouse v Birmingham City Council* [1999] Env LR 536 per at 551 – 552, Lord Bingham described the statutory requirement to give notice as follows:

“Section 82 is intended to provide a simple procedure for a private citizen to obtain redress when he or she suffers a statutory nuisance of any one of the various kinds itemised in section 79(1), which may relate to the state of the premises or the emission of smoke or the emission of fumes or gases, or dust, steam, smell or other effluvia arising on premises, or the accumulation or

Approved Judgment

deposit, or the keeping of an animal, or noise, or anything else declared by statute to be a statutory nuisance. It would frustrate the clear intention of Parliament if the procedure provided by section 82 were to become bogged down in unnecessary technicality or undue literalism. It is important that the system should be operable by people who may be neither very sophisticated nor very articulate, and who may not in some cases, unlike this appellant, have the benefit of specialised and high quality advice.

Against that background one must interpret section 82(6). That requires the aggrieved person to give written notice of appropriate length of that person's intention to bring proceedings in respect of a nuisance. So much is clear from the subsection. The subsection also requires the aggrieved person in his notice to specify the matter complained of. The purpose of giving such notice is to enable the recipient of the notice to make any necessary inspection and, if so advised, take practical and effective steps to cure or eliminate the subject matter of the complaint. From the occupant's point of view the object of the exercise is to obtain a practical remedy: that is, the putting right of whatever he complains of. It seems to me plain that section 82(6) does not require, even in the case of a statutory nuisance alleged to fall within section 79(1)(a), that the aggrieved person should serve an itemised schedule or a specification or a specification of works or any diagnosis of the cause of any defect complained of."

69. The Magistrates' decision to dismiss the case against the First Defendant due, amongst other things, to the appellant's failure to specifically mention the extractor fan and windows was legally incorrect. The appellant's repeated complaints about damp and mould, along with the detailed notice of intended prosecution, were sufficient to satisfy the statutory requirements under section 82 of the EPA.
70. A notice of a statutory nuisance must provide sufficient details to inform the landlord of the issues requiring attention, but it does not need to be overly technical or comprehensive. The primary purpose of the notice is to enable the landlord to inspect the property and take appropriate corrective action. The notice should broadly outline the nature of the complaint, such as "dampness in the premises." Even if the tenant misidentifies specific defects or omits significant ones, the notice may still be valid if it adequately conveys the general nature of the nuisance. That requirement was more than satisfied in this case.

No case to answer

g. Whether it was correct at law for the Magistrates to conclude that there was no case to answer in relation to each Defendant given the evidence available to the tribunal?

71. This is a compendious question which draws together the answers given to the earlier questions.
72. The undisputed evidence established that the defendants had been aware of the persistent damp and mould problems in the property over an extended period, and certainly over 21 days before the information was filed.
73. The expert evidence relied on by the prosecution identified the root causes of the mould and damp as inadequate insulation, a non-functioning extractor fan, and the

Approved Judgment

poor condition of the windows. These were matters for which the Defendants were responsible, either as owners or landlords and in respect of which they were subject to contractual and statutory obligations.

74. The expert evidence was to the effect that that the mould and damp constituted a statutory nuisance, posing a significant health risk to the occupants. The only reasonable conclusion for the Magistrates was to allow the case to proceed because there was a case for the Defendants to answer.

Conclusion

75. In the circumstances the appropriate order is that the decision of the Magistrates should be set aside and that there be a new trial.

END