CO/5326/2015

Neutral Citation Number: [2016] EWHC 710 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 25 February 2016

B e f o r e:

LORD JUSTICE HAMBLEN

MR JUSTICE JEREMY BAKER

Between:

THE REVEREND PAUL NICOLSON

Appellant

v

GRANT THORNTON UK LLP

Respondent

LONDON BOROUGH OF HARINGEY
TOTTENHAM MAGISTRATES' COURT

Interested Parties

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(Official Shorthand Writers to the Court)

The **Appellant** appeared in person
Mr A Choudhury QC (instructed by BWB) appeared on behalf of the **Respondent**
Mr T Buley (instructed by London Borough of Haringey) appeared on behalf of the **First Interested Party**
The **Second Interested Party** did not appear and was not represented

J U D G M E N T
(Approved)

LORD JUSTICE HAMBLEN:

Introduction

1. The appellant is a retired clergyman and antipoverty campaigner; I am more than an antipoverty campaigner. I have been working with and representing the poorest debtors successfully as a McKenzie Friend since the 1980s many of whom have owed council tax, rent and fines.

2. The respondent is the appointed auditor to the London Borough of Haringey ("the Council").

3. The Council is the first interested party. The second interested party is Tottenham Magistrates' Court.

4. On 19 September 2014, the appellant raised an objection to the Council's accounts for the year ending 31 March 2014. The respondent produced a decision and statement of reasons in respect of that objection on 12 October 2015 ("the decision"). The respondent decided not to make an application to the court pursuant to section 17(4) of the Audit Commission Act 1998 ("the 1998 Act") for a declaration that an item of account is contrary to law. The respondent also decided not to issue a report in the public interest. The appellant seeks to appeal against those decisions.

5. At the hearing the appellant appeared in person. The respondent and the Council were represented by counsel. The second interested party was not represented.

Factual background

6. Regulation 34(7) of the Council Tax (Administration and Enforcement) Regulations 1992 ("the Regulations") provides that a liability order in respect of outstanding Council Tax should include a sum representing the costs "reasonably incurred by the applicant in

obtaining the order". In the year account 2013 to 2014, the Council's claim for costs in respect of such orders was in the sum of £125

7. The appellant was concerned that the £125 claimed by way of costs seemed to be disproportionate to the likely actual costs of obtaining liability orders. In order to test the point, the appellant refused to pay his Council Tax. On 13 July 2013, the Council issued an application for a liability order against the appellant and he was summonsed to appear before Tottenham Magistrates' Court to show why he had not paid his Council Tax.

8. At the hearing before the Magistrates on 2 August 2013, the appellant raised no objection to the making of a liability order (I raised no objection because I could afford it) but he did question the level of costs being claimed (because I knew many could not afford it – I read a statement to the Magistrates to that effect which was in the bundle for the judge) . The Magistrates heard from the Council's representative that the sum of £125 had been agreed between the Court and the Council in 2010, (they did not hear this underlined bit – it was not said in the court on the 2nd August 2013 - it was made up by the judge, Haringey or Grant Thornton – see Roderick Nicolson's notes of the hearing) and that the sum was based upon the Council's administrative time and number of people involved in the enforcement process. (He has ignored relevant evidence about the scale of the law breaking by the magistrates and he council which I gave the court. 32,237 summons were dispatched by Haringey to late and non-paying residents in 2013/14. None of them were told by how much their costs would be reduced from £125 if they paid off the arrears on receipt of the summons) However, the Council did not

on that occasion provide any detailed breakdown of how the costs had been calculated. Notwithstanding that, the Magistrates proceeded to make an order in the terms sought. (It later transpired and was confirmed by Grant Thornton, that no review of costs had been undertaken by Haringey since 2010. The only calculations available on the 2nd August 2013 were those done in March 2010 and they were inaccurate. No calculations relevant to 2013/14 existed on August the 2nd 2013 for me or the 1,822 others summoned to the court that day.

9. The appellant appealed by way of case stated. The Magistrates refused to state a case and the appellant brought a challenge to that decision by way of judicial review. Green J granted the appellant permission to bring judicial review of the substantive decision of the Magistrates to award the Council costs in that sum against the appellant. The judicial review was heard by Andrews J on 30 April 2015; R (Nicolson) v Tottenham Magistrates and London Borough of Haringey [2015] EWHC 1252 (Admin) [2015] PTSR 1045. In summary, it was held that the order made by the magistrate was unlawful because: (1)the Magistrates did not have sufficient relevant information before them to reach a proper judicial determination as to whether the costs claimed represented costs reasonably incurred in obtaining a liability order; (2) the Magistrates failed to make further inquiries into how the £125 was calculated; and (3) the appellant had been denied a fair opportunity to challenge the lawfulness of the order by reason of the failure to furnish him with information requested.

10. Meanwhile, on 19 September 2014, the appellant wrote a letter of objection to the respondent, inviting them to issue a report in the public interest about the £125 costs for summonses and liability orders imposed at the request of Haringey Council and to "apply

to the court for a declaration that £125 in the accounts since April 2010 is contrary to law".

11. As set out in the witness statement of Paul Dossett, a partner of the respondent, the Council provided a spreadsheet showing its calculation of cost per case of issuing a summons on 2 December 2014. (I was never sent a copy of this letter; GT and Haringey argued in court that they had reason to believe that I had seen the calculations. Even so this was a statutory complaint and unless I saw the letter I had no way of knowing is contents) This led to a cost per case of £130.77, slightly in excess of the £125 sought. (These figures were produced in Grant Thornton's decision of the 12th October 2015. I had never seen them before. I assume they were in the letter to Grant Thornton of the 2nd December 2014; their existence of which was unknown to me until I read Grant Thornton's decision of the 12th October 2015)

12. The appellant met with the respondent and further explained the grounds of his objection on 5 June 2015. The Council provided a further submission explaining its approach on 22 June 2015. As to that general approach, it said as follows:

> "The costs included in the calculation of the £125 are therefore only those deemed to be incurred as an integral part of the overall process leading to the issue of a summons."

13. The respondent's decision is set out in their letter to the appellant dated 12 October 2015. The decision included the following:

> "The Council has provided us with their calculation of costs to support the charge of £125 per summons issued. (on the 2nd December 2014)

...

In our opinion the apportionments contained within the calculation that the Council has provided us were not always sufficiently supported by robust evidence and contain elements of subjective judgment. This means that we are not able to agree the £125 summons charge exactly.

In other more robust language the costs are too high. Which is precisely my point. Grant Thornton and the Judge ignored or rejected any facts related to the poverty of thousands of Haringey benefit claimants being taxed from April 2013 for the first time since the Poll Tax in 1989. I have been working with families and individuals with arrears of local taxes since the 1980s. It is a Wednesbury relevant fact that over-charging on the costs adds to the taxation of the poor. The Judge ignored this point and gave no reasons for doing so. The Supreme Court supported me on the issue of poverty. See attached quotations from Moseley V Haringey.

In our opinion the Council has adopted an approach which is aimed at excluding costs not associated with a summons and whilst the basis would ideally be less subjective there is no evidence to suggest that the Council is deliberately apportioning inappropriate costs to increase the fee charged on summonses as a means to increase the income they receive from charging these costs. We are satisfied that the Council has not set out with any intention to raise income to cover other general fund expenditure. The Council's approach is to aggregate the relevant employees' costs, direct costs, indirect costs and overheads that result from the processes carried out that lead to the issue of a summons. The Council then divides the total aggregated costs by the summons issued to obtain the cost per summons.

Importantly, the Council's calculation does reflect the normal categories recognised by the Chartered Institute of Public Finance and Accountancy ("CIPFA"), ie staff costs, direct costs, indirect costs and overheads. We have reviewed the Council's calculation which results in a total cost of £130, which they have chosen to recharge £125."

But they have not reviewed the calculations made in March 2010 on which the Magistrates based their decision on the 2nd August 2013. There had been no review by Haringey since March 2010. They argue that they cannot review the 2010 costs because the 2010/11 accounts are closed. So what are the auditors doing agreeing to the Haringey's collection of £2 -£3 millions of pounds income and related expenditure which they, Grant Thornton, cannot audit.

14. The decision reviewed and made findings in respect of the figures put forward in relation to staff costs, direct costs, indirect costs and overheads. It noted that:

> "The Council only recovered the costs on cases associated with issuing a summons. The Council do not and are not allowed to add in costs associated with recovery actions in relation to non-payers who are not summonsed. The Council has been clear about differentiating costs across the four broad categories of council taxpayers:
>
> (1) those that pay with no issues;
>
> (2) those who pay with some action but before summonses point;
>
> (3) those costs and activities that are unrelated to summons processes, eg annual billing;
>
> (4) those costs that relate to work involved in issuing a summons where the summons takes place."

15. The following conclusions on costings were set out:

> "The method of calculation used by the Council is not the only method they could have chosen to use and there may well be methods that more accurately assess the amount of those costs.
>
> Although in our view the Council has shown that the level of costs it recovers is on the whole not unreasonable for the purposes of the 1992 Regulations, we consider that a more detailed calculation of the Council's costs will provide the Council with a better understanding of the actual costs associated with issuing a summons. This detailed calculation will then need to be re-performed periodically."

"Not unreasonable" might be OK in private companies which are audited Grant Thornton but it is careless auditing when dealing with taxation and its enforcement of costs which should be calculated under the existing strict regulations. "Not unreasonable" cannot be reconciled with the auditors statement in para 13 "This means that we are not able to agree the £125 summons charge exactly". This means that late and

non payers are being overcharged by Haringey's costs and therefore paying an unauthorised tax on top of the council tax.

16. The decision then referred to the judgment in the Nicolson case and noted that because it had been found that the costs order made by the Magistrates in that case was unlawful, such orders could also be potentially unlawful in other similar cases. It noted that this was a complex issue on which it would be time consuming and expensive to reach any conclusion, and it stated that even if it had been considered that the Council's income was rendered unlawful for this reason, the respondent would not seek a declaration to this effect because:

> "The actions of the Magistrates have already been considered by the court.
>
> The Council has accepted the income in good faith, unaware of any failing in the processes followed by the Magistrates.
>
> As auditors of the Council, of primary concern is the actions of the Council, which are in this instance primarily around the calculation of the costs reasonably incurred, which we have considered above."

17. The decision then set out factors relevant to the exercise of the respondent's discretion as to whether to apply to the court for a declaration under section 17(1) of the 1998 Act. It recorded that they decided not to exercise their discretion to do so because:

> "Whilst the Council need to undertake a more comprehensive fully detailed costing exercise, the amount it is claimed has been shown to **be not unreasonable** and does compare broadly with other London boroughs. Although different processes are used across authorities and surcharges will differ, we would expect them to be broadly similar.
>
> As we consider that the actual costs claimed were broadly reasonable, there will be little or no benefit in applying to the court for a declaration. The lack of a more detailed assessment of costs reasonably incurred can be addressed by the Council implementing the recommendation that it should carry out such an assessment in the future, which it intends to do and which we will monitor. For the reasons set out in the preceding section, we do not believe that, even if we were to conclude that the impact of the judicial

> review of the Magistrates' Court's actions potentially rendered any of the income in the Council's accounts unlawful, that we should seek a declaration for this reason."

All the costs these comments refer to were calculated after the 2nd August 2013. They were not available on or before that date. They were then shunted into the future to avoid dealing with the issue raised in my objection to the accounts – namely the unlawfulness of costs awarded on the 2nd August 2013 that were calculated in March 2010. I started my evidence in court by stating that 32,237 summons were sent out by Haringey Council to late and non-payers of council tax in 2013/14 costing £125 a cost which was not altered when a magistrates issued 21,877 liability orders.

18. The decision noted that whether or not to issue a report in the public interest is a matter for the respondent's discretion. It then sets out relevant factors to be considered, and concluded that no such report should be issued. It noted as follows:

> "We have specifically considered the fact that the Council has not carried out a detailed calculation to arrive at the amounts claimed for costs, but we have concluded that the actual costs charged and the methodology applied were not unreasonable. We have reviewed a selection of summons and liability order costs charged by other councils and the Council's charge for the summons is in line with others when the costs of the liability order are included."

But the calculation was done in 2010 and there was no up-to-date methodology in 2013/14 until after the 2nd August 2013. I also argued in court that looking over its shoulder at other council's was interesting but not decisive when there are strict regulations.

Legal background

The Regulations

19. Regulation 34 of the Regulations provides:

"34. Application for liability order

(1) If an amount which has fallen due under regulation 23(3) or (4) is wholly or partly unpaid, or (in a case where a final notice is required under regulation 33) the amount stated in the final notice is wholly or partly unpaid at the expiry of the period of 7 days beginning with the day on which the notice was issued, the billing authority may, in accordance with paragraph (2), apply to a magistrates' court for an order against the person by whom it is payable.

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

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

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

(5) If, after a summons has been issued in accordance with paragraph (2) but before the application is heard, there is paid or tendered to the authority an amount equal to the aggregate of—

(a) the sum specified in the summons as the sum outstanding or so much of it as remains outstanding (as the case may be); and

(b) a sum of an amount equal to the costs reasonably incurred by the authority in connection with the application up to the time of the payment or tender

The authority shall accept the amount and the application shall not be proceeded with.

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

(7) An order made pursuant to paragraph (6) shall be made in respect of an amount equal to the aggregate of—

(a)the sum payable, and

> (b)a sum of an amount equal to the costs reasonably incurred by the applicant in obtaining the order.
>
> (8) Where the sum payable is paid after a liability order has been applied for under paragraph (2) but before it is made, the court shall nonetheless (if so requested by the billing authority) make the order in respect of a sum of an amount equal to the costs reasonably incurred by the authority in making the application."

20. Regulation 23, referred to in Regulation 34(1) above, deals with payments of Council Tax by instalments and provides that a sum falls due, and therefore liable to the making of an application under Regulation 34, where a person fails to pay that sum within seven days of being sent a reminder notice or where he fails to pay an instalment on time for the third occasion in the relevant year.

21. It follows that an application for a liability order may be made either where there is a failure to pay an instalment in accordance with Regulation 23(3) or (4) of the Regulations, or where there is a failure to pay Council Tax following the issue of a final notice under Regulation 33. It is only in the latter case that the issuing of a final notice is a prerequisite to the making of an application.

22. Pursuant to Regulation 34(7), in obtaining a liability order, the Council is entitled to recover "an amount equal to the costs reasonably incurred by the applicant in obtaining the order". Where there is payment after the application is made, but before it is heard or made, then the Council is entitled to be paid "an amount equal to the costs reasonably incurred by the authority in connection with the application up the time of the payment or tender" under Regulation 34(5), or to an order for "an amount equal to the costs reasonably incurred by the authority in making the application" under Regulation 35(8). In each case, the Council is entitled to the amount referred to if it chooses to recover it.

It is not a matter of discretion.

23. There is no direct authority as to the application of Regulation 34. The provisions were considered by the court in the Nicolson case. However, as the court made clear in that case, it was not concerned specifically with the question of whether the costs claimed there were in fact "reasonably incurred in obtaining the liability order", and any observations made by the court as to the interpretation and scope of the provisions could amount to no more than "general guidance"; see paragraph 36.

24. In the present case the parties have treated the guidance as being helpful but not definitive. I would agree with that approach. One caveat I would raise is that insofar as it is suggested in paragraph 43 that it would be difficult to justify inclusion of costs incurred before the decision to enforce was taken, I am doubtful that such a "bright line" approach can be taken. There may, for example, be necessary steps for enforcement which have to be taken before the final decision to enforce is made. In a case in which such a decision is made, the administrative costs and expenses involved in taking such preliminary steps may well be regarded as costs reasonably incurred in the enforcement process, as counsel for Mr Nicolson in that case acknowledged; see paragraph 41.

25. Of particular relevance to the present case is the following general guidance provided:

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

...

> 46. In principle, therefore, provided that the right types of costs and expenses are taken into account, and provided that due consideration is given to the dangers of double-counting, or of artificial inflation of costs, it may be a legitimate approach for a local authority to calculate and aggregate the relevant costs it has incurred in the previous year, and divide that up by the previous (or anticipated) number of summonses over twelve months so as to provide an average figure which could be levied across the board in "standard" cases, but could be amplified in circumstances where there was justification for incurring additional legal and/or administrative costs."

26. In accordance with that guidance, administrative costs, legal fees and out of pocket expenses may be taken into account in determining what costs are reasonably incurred in obtaining the liability order. Further, in light of the practical difficulties of calculating the costs incurred in an individual case, it may be legitimate to seek to recover an average sum calculated by taking the total costs reasonably attributable to enforcement and dividing that by the number of summonses issued.

The 1998 Act

27. Although it has since been repealed, the 1998 Act governs both the jurisdiction of the respondent in considering the appellant's complaint and the jurisdiction of this court on this appeal.

28. Section 2 required the preparation of annual accounts by local authorities, and that they should be audited in accordance with the Act by an appointed auditor. The auditing of a set of accounts was therefore an annual exercise to be conducted with reference to the tax year to which the accounts related.

29. Section 8 provided as follows:

> "8. Immediate and other reports in public interest.

In auditing accounts required to be audited in accordance with this Act, the auditor shall consider—

(a) whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit, in order for it to be considered by the body concerned or brought to the attention of the public, and

(b) whether the public interest requires any such matter to be made the subject of an immediate report rather than of a report to be made at the conclusion of the audit."

30. Section 16 provided as follows:

"16. Right to make objections at audit.

(1) At each audit of accounts under this Act, other than an audit of accounts of a health service body, a local government elector for an area to which the accounts relate, or any representative of his, may attend before the auditor and (in accordance with subsection (2)) make objections—

(a) as to any matter in respect of which the auditor could take action under section 17; or

(b) as to any other matter in respect of which the auditor could make a report under section 8.

(2) No objection may be made under subsection (1) unless the auditor has received written notice of the proposed objection and of the grounds on which it is to be made.

(3) An elector sending a notice to an auditor for the purposes of subsection (2) shall at the same time send a copy of the notice to the body whose accounts are being audited."

31. Section 17 provided:

"17. Declaration that item of account is unlawful.

(1) Where—

(a) it appears to the auditor carrying out an audit under this Act,

> other than an audit of accounts of a health service body, that an item of account is contrary to law,
>
> The auditor may apply to the court for a declaration that the item is contrary to law.
>
> (2) On an application under this section the court may make or refuse to make the declaration asked for, and if it makes the declaration
>
> Then it may also—
>
> ….
>
> (c)order rectification of the accounts.
>
> ….
>
> (4) A person who has made an objection under section 16(1)(a) and is aggrieved by a decision of an auditor not to apply for a declaration under this section may—
>
> (a) not later than six weeks after being notified of the decision, require the auditor to state in writing the reasons for his decision, and
>
> (b) appeal against the decision to the court;
>
> And on such an appeal the court has the same powers in relation to the item of account to which the objection relates as if the auditor had applied for the declaration."

31. It follows from these provisions that: (1) the auditor will be concerned to audit the accounts for the year in question, in this case the year to 31 March 2014 - see section 2(1); (2) an elector may make "an objection" under section 8 as to any matter in respect of which the auditor may seek a declaration under section 17 that an item in the accounts is contrary to law and decide to make a report in the public interest under section 16; (3)the right of appeal under section 17(4)(b) is restricted to an appeal against a decision not to seek a declaration under section 17(1); (4)there is no right of appeal

against a decision under section 8 not to make a report in the public interest.

32. In R (Moss) v KPMG [2010] EWHC 2923 (Admin), Ouseley J gave guidance as to the court's role on an appeal under section 17(4). He specifically rejected an argument that the court should adopt the same role as it would adopt where the auditor himself sought a declaration, noting that section 17(4) talks of an appeal against a decision of the auditor. In the light of this, he provided the following guidance:

> "16. ... the first question is whether the auditor's decision on lawfulness is wrong and, if so, (and the item is unlawful) the second question is whether the exercise of his discretion not to seek a declaration was wrong.
>
> 17. What makes a decision 'wrong' ... depends on the subject matter, the nature of the decision at issue and the nature of the error relied on ... A pure error of law would simply be wrong. A finding of primary fact would be less readily held wrong than an inference drawn from documents or an evaluation of factual material in which the court was as well placed as the auditor to make a decision. The exercise of the discretion is wrong either where it is wrong in principle or where it is outside the range of decisions reasonably open to the decision maker or has been made without consideration of the relevant factors. This involves an approach to discretion probably indistinguishable from judicial review principles.
>
> 18. This is especially important where an appeal relates to the exercise of a discretionary judgment by an expert and specialist person or body in the course of a specific statutory function, such as local government auditors ..."

This last paragraph 18 tends towards putting Grant Thorntons lackadaisical professional approach above tight regulations designed to ensure summons and liability orders are not used by councils to raise additional tax. This is an important principle under any and all circumstances but in this instance the tax is being levied by Haringey against the lowest statutory minimum incomes and then enforced with additional costs and bailiffs fees.

Grant Thornton and Haringey Council should aim err on the side of Andrews J "Regulations should be construed in such a way as to ensure that the costs recovered are only those which

are genuinely attributable to the enforcement process." Rather than a loose "not unreasonable " or a "broadly reasonable" calculation of costs. .

33. The judgment also makes it clear that it is legitimate for the auditor to address the exercise of his discretion whether to seek a declaration under section 17 on a "contingent" basis, without reaching any settled conclusion on whether a particular item in the account is lawful, by concluding that, even if unlawfulness were established, **the public interest in a declaration would not justify proceedings.**

I cannot find anything in the KPMG judgement that leads "to the public interest in a declaration would not justify proceedings."

The grounds of appeal

34. As set out in his skeleton argument, the appellant raises three essential grounds of appeal. These have been developed before us in oral argument. The three essential grounds are: (1)the decision failed to address an important and material part of his objection, namely evidence about the treatment of costs dating back to the years 2008 to 2009 ("the omission ground"); (2) the respondent erred in their application of the relevant statutory provisions, and in particular took into account impermissible matters ("the error ground"); (3) the respondent acted irrationally in deciding not to issue a report in the public interest ("the irrationality ground").

Ground 1: the omission ground

35. I agree with the respondent and the Council that it is clear from section 2 of the 1998 Act that the respondent's remit on the audit was to consider the Council's accounts for the financial year ending 31 March 2014. The respondent was neither obliged nor entitled to consider the lawfulness of accounts for previous years, and was not even the appointed auditor in respect of later years.

The judge has ingnored the fact that present in the 2013/14 accounts were a substantial sums of income and expenditure of £2-£3 million that apparently cannot be audited because the decisions were made in 2008/9 and 2010/11. I put it to him that was like saying the 1992 regulations can be ignored because the decision was not made in the 2013/14 year.

Council decisions remain unaltered until the council changes them. The 2008/9 and 2013/14 decisions were still effective in 2013/14 and should have been taken into account as relevant evidence by Grant Thornton and the in the judgment.

36. The appellant's entitlement under section 16 of the 1998 Act was to raise an objection as to any matter of which the respondent may make a declaration that an item of account was contrary to law. The only matters in respect of which such a declaration could be made were those which were items of account in the 2013 to 2014 accounting period. Matters raised by the appellant dating back to earlier years were not such items.

37. That is not to say that facts relating to prior years may not be relevant to the consideration of an item of account in the 2013/2014 year. The appellant relies in particular on two earlier policy decisions which he contends had been taken relating to "amalgamation" and to "maximisation" and which he says were carried through into the 2013/2014 year.

38. In relation to "amalgamation", the appellant relies on the fact that prior to around April 2009, the Council charged a sum for the Council Tax summons and

a further sum in cases where a liability order was obtained. Thereafter, however, it charged a single sum, which he contends comprised both of those elements, until 2015, when it again began charging separate amounts. He submits that this is unlawful, because it means that those who payed before there was a liability order were being charged lump sum costs calculated on a basis that included liability order costs. It is also contrary to the clear distinction drawn between the costs recoverable in those two different situations as reflected in Regulation 34(5)(b) and Regulation 34(7)(b).

39. It appears, however, that this contention is factually incorrect. The evidence of Miss Grealish, the Council's head of services for revenues, as set out in the first witness statement she provided in the Nicolson case, is as follows:

> "24. Haringey ceased charging for the post summons costs element in September 2008 as the majority of expenditure was incurred prior to this stage. As the Council had moved towards seeking a higher number of arrangements via telephone call by direct debit, the process was easier and required less manual intervention by officers if the repayment arrangement is not revised by an additional amount once a liability order was granted by the court. We therefore have decided to waive the costs incurred after summons in obtaining the liability order.
>
> ...
>
> 39. As a matter of historical interest, the amount of court costs charged by Haringey in 2004/2005 was £30.33 for the summons and £10.42 in respect of the liability order. In May 2005, Haringey Council charges for court costs were £76.00 for the summons and £12.00 for the liability order.
> In May 2007, Haringey Council charges for court costs were £83.00 for the summons and £12.00 for the liability order. In September 2008, Haringey Council charges for court costs were £95.00 for the summons and nil for the liability order."

40. This is borne out by the decision, which records that:

> "The Council's approach is to aggregate the relevant employees' costs, direct

> costs, indirect costs and overheads that result from the process which is carried out that lead to the issue of the summons. The Council then divide the total aggregated costs by the summons issued to obtain the cost per summons."

41. As stated by Mr Dossett in his witness statement at paragraph 25:

> "The [Council] specifically excluded costs not considered to be relevant (wholly or in part) to the process of issuing the summons. The [Council] excluded ... the cost associated with work subsequent to the issue of the summons."

42. The evidence therefore is that the £125 charge applied during the 2013/2014 year reflected only costs up to the issue of the summons. It did not include such costs as may thereafter have been involved in obtaining the liability order. There was therefore no amalgamated charge and no overcharge. If anything, there was an undercharge in cases in which a liability order was obtained.

With respect to the judge this is nonsense. It simply cannot be true. There are certain costs up to the time the summons is issued and then more costs in obtaining the liability order. For example I have visited Magistrates courts on many occasions when they are considering council tax cases. Two or three council staff are in the court making arrangements to pay with those who attend after receiving the summons. There were 27 hearings at Tottenham Magistrates Court in 2013/14, which were attended by 911 people. The cost of their time, travel and office expenses all happen after the issue of the summons. People who pay on receiving the summons are not required by statute to pay the costs of obtaining the liability order. They obviously do not attend court.

When Haringey and the auditors got round to implmenting his recommendations in July 2015 the summons costs were reduced from that £125 to £102 and they now add £13 for the liability order.

It needs to be said that a reduction of £23 or £10 for a liability order for a summons

matters to the poorest resident who is receiving £73.10 JSA and alos paying the bedroom tax since April 2013. The impact of cuts, caps and council tax can be found here.

43. In relation to "maximisation", the appellant relies in particular on a report produced in 2004 by the Council's Audit and Scrutiny Panel. The conclusions of that report included the following

> "6.11.1. The review panel found that other councils had obtained agreement to raise court costs recharged to non-payers by a significant level. This charge is intended to act as a deterrent to both late and non-payers and enables councils to fund improved recovery measures. The review panel concluded that the benefits and local taxation service could improve performance by ensuring that it agrees the highest possible level of court costs to be charged to non-payers.
>
> Recommendation B2: court costs.
>
> That the benefits and taxation service ensure the maximum possible is charged for court costs and to review the charge at regular intervals subject to any guidance/legislation governing court costs."

In 2010 they ignored the fact that "other councils" charge for the summons and liability order separately; so have Haringey, The Magistrates and Grant Thornton. This evidence was available to the Judge.

Other council's charge two amounts;

	Liability Order	Court Summons
Canterbury City Council	£50	£50
London Borough of Brent	£30	£90
Newcastle Upon Tyne City Council	£42	£42
London Borough of Bromley	£20	£75
Powys County Council	£50	£10
Braintree District Council	£30	£65
Sheffield City Council	£28	£46
Wolverhampton City Council	£40	£36
Dover District Council	£50	£50
Rotherham District Council	£20	£80

44. In the first witness statement of Miss Grealish it is explained as follows:

> "30. My view of recommendation B2 is that it confirms that court costs should be sought at a maximum level in respect of the cost of such action and this should be compliant with the Regulations in this respect. As a principle, I support this statement, and believe that the costs of such action should avoid being sought from council taxpayers who pay on time. The mention of court costs being a deterrent is one that is carried through to the present day with the warning that court costs be incurred."

45. In her second witness statement, she states that:

> "I stand by my comments ... the prospect of incurring courts costs does act, as a matter of fact, as a deterrent."

46. The appellant submits that "maximum possible costs" cannot be the same as "costs reasonably incurred", but that is not so. The reference to charging the "maximum possible" must be read with the rest of the relevant passage, which makes it clear that such charges are to be in accordance with "legislation governing court costs". The "maximum possible" costs in accordance with the governing legislation means the "maximum possible" costs "reasonably incurred". There is nothing unlawful in resolving to charge the maximum which is permitted by law.

47. In fact, as the evidence relating to "amalgamation" shows, from 2009 to 2015, and during the 2013/2014 year, the Council was not seeking its "maximum possible costs" since in cases where a liability order was obtained, it nevertheless only sought a sum reflecting costs incurred up to the date of issue of the summons. The Council also recognises that it may not be appropriate to seek costs in particular cases, such as on the grounds of hardship.

48. The appellant further suggests that seeking costs for deterrent purposes is in some way improper and unlawful. The mere fact, however, that the charges were considered to have a deterrent effect could not render them unlawful. Any order requiring a person not only to pay the sum due but also the Council's costs of enforcement would have some deterrent effect. Moreover, the fact that a person is incentivised to pay the sum due as early as possible after the application is made, thereby only becoming liable for paying the costs up to that point, necessarily means that he is deterred from doing otherwise. What matters are whether the costs are "reasonably incurred" in the meaning of Regulation 34. If they are, then the Council is entitled to those costs as a matter of right.

Ground 2: the error ground

49. The appellant contends that the respondent has not addressed whether the Council was "unlawfully lumping in with the costs of obtaining summons or liability orders costs which are probably attributable to earlier stages of Council Tax enforcement and administration."

50. The Council has not, however, simply taken all the CIPFA categories and divided the total to reach a figure for costs. As set out in the decision, the Council has in respect of each CIPFA category identified the proportion of expenditure in that category that is properly attributable to recoverable costs. These apportionments were considered by the respondent to be "not unreasonable".

51. Importantly, the apportionment was focussed on the costs of cases in which summons were issued and on the costs up to the issue of such summons. It expressly did not include costs associated with those who did not pay without any issues; those who paid with some action but before summonses are issued; matters unrelated to the summonses

processes, such as annual billing; and the costs of staff time spent post summons.

52. The Council has therefore addressed the exclusion of costs concerned with earlier stages of administration and enforcement, and the respondent has found the resulting percentage of apportionments to be "not unreasonable" and the actual costs claimed to be "broadly reasonable".

53. In relation to overheads, the appellant criticised the respondent's statement in the decision that:

> "Inclusion of overheads within the calculation is, in our view, appropriate in the absence of any specific statutory requirement to exclude them, as they are part of the costs reasonably incurred by the Council in connection with the application."

54. The appellant suggests that this is approaching the matter the wrong way round, and that it means that the respondent was not following the statutory requirement of Regulation 34. In my judgment, it demonstrates the contrary. It shows that the respondent was considering the issue of whether the costs were “reasonably incurred” and was finding that overhead costs were appropriately included as costs so incurred "in connection with the application" (the language of Regulation 34(5)(b)).

55. The appellant makes a further point that the sum charged needs to be "equal" to the costs reasonably incurred. It is, however, permissible to use the average amount of costs incurred per order obtained as a basis for the costs claimed, as recognised by the Nicolson case at paragraph 45 and in the appellant's own skeleton argument. In any such exercise, there cannot be precise equivalence with the actual costs incurred, but the result can be said to represent costs "reasonably incurred". Further, on the Council's figures, the amount claimed was actually slightly less than the actual costs incurred for each

summonsed case.

56. Finally, in his oral submissions the appellant criticised the procedure followed by the respondent in dealing with his complaint in: (1)issuing an unqualified opinion in relation to the accounts very soon after receiving his letter of objection; and (2) not supplying him with a copy of the Council's costs calculation which was provided to the respondent on 2 December 2014.

57. As to (1), the issue of an unqualified opinion did not mean that the appellant's objection would fail to be fully considered and addressed. It was considered, as reflected in the meeting of 5 June 2015 meeting, and it was addressed in detail in the decision. Further, the issue of an opinion did not mean that the accounts were closed.

58. As to (2), the appellant had already been provided with a detailed Council cost calculation, as exhibited to Miss Grealish's witness statement dated 18 December 2014.

Ground 3: the irrationality ground

59. Insofar as the appellant is seeking to revisit the respondent's decision not to issue a report in the public interest, there is no right of appeal in relation to that decision.

60. There is a right of appeal under section 17(4) of the 1998 Act in respect of a decision not to seek a declaration, but that requires establishing that the respondent's exercise of their discretion was "wrong in principle" or "outside the range of decisions reasonably open to the decision maker" or "made without consideration of the relevant factors"; see Ouseley J's observations in the Moss case.

61. The decision letter and Mr Dossett's statement make it clear that the relevant factors were considered in deciding how the respondent's discretion would be exercised. The decision which was reached involved the exercise of discretionary judgment by an expert

in the course of a statutory function. The court will be slow to interfere with the exercise of a discretion in such circumstances.

62. In my judgment, the exercise by the respondent of their discretion is amply justified by the reasons they have given. In particular, once they were satisfied that the Council was not seeking to deliberately apportion inappropriate costs and to increase its income, that the Council's costs calculations was "not unreasonable" and that the costs claimed were "broadly reasonable", it is difficult to see the public interest in seeking a declaration under section 17(4).

It is very difficult not to see the public interest when the scale of the enforcement of council tax by Haringey Magistrates and Council is taken into account, a fact that the judge ignored and failed to report in this judgement. It cannot be right in principle to state that the dispatch of 32,237 summons to the magistrates court to residents , the granting of 21,877 liability orders and the imposition of summons and liability order costs in 2013/14 is not a matter of public interest in principle. Andrews J in Nicolson v Tottenham Magistrates and Haringey stated that the issues are a matter of public interest.

63. The appellant emphasises the public interest in matters of taxation and enforcement and the very large number of people affected by Council's costs charges. He stresses the importance of public accountability in such matters and referred the court to general statements as to the public interest to such effect made in various reported cases, such as Roberts v Hopwood [1925] AC 578 at 588, Re Kirkpatrick's Application [2003] NIQB 49 at paragraph 26, and Re City Hotel (Derry) Ltd's Application [2004] NIQB 38 at paragraph 14.

64. In the present case, the respondent's duty to act in the public interest was as set out in the 1998 Act. There was a specific statutory scheme which they had to follow. No unlawfulness or improper purpose in the exercise of their duties thereunder has been shown.

Conclusion

65. For all the reasons outlined above, I conclude that the appeal must be dismissed.

MR JUSTICE JEREMY BAKER: I agree.

MR CHOUDHURY: My Lord, I'm grateful for your Lordship's judgment in that matter.

My Lord, that leaves costs, and I apply for the respondent's costs in this matter. I do so for three reasons: first, of course, there is the general principle that costs follow the event. This is a statutory appeal and the ordinary general principle that the unsuccessful party shall pay the costs of the successful party should apply.

The second reason is that Reverend Nicolson was told from the outset that if the appeal was unsuccessful, costs would be recovered in full. I do have a copy of some correspondence, I don't know if your Lordships wish to see that. **(Handed)**

The second last page of that clip, my Lord, is the first letter sent by my instructing solicitors after the appeal was lodged. Paragraph 3 notes that:

> "It is strongly recommended you seek independent legal advice at the earliest opportunity. Appeals under section 17 are heard before the High Court. As such, these proceedings are likely to involve significant costs. If your appeal is unsuccessful, my client, who is represented by its own counsel, will seek to recover its costs from you in full."

At the very last page of the bundle, a further reminder last month in response to requests from Reverend Nicolson to put further documents into the bundle, that whilst the costs of producing the bundle would not be sought at that stage, the final paragraph of that email of 19 January says that:

> "If the respondent is successful in defending the case, it will seek to recover its costs in full."

Reverend Nicolson describes himself as a seasoned campaigner --

LORD JUSTICE HAMBLEN: You said there was a third reason.

MR CHOUDHURY: Not quite yet, my Lord.

He has been involved in at least two sets of litigation already, and the costs position ought not to

be a surprise to him.

The third reason is this: that the auditor is not acting in its private capacity upon appointment by the Audit Commission. The auditor's costs are therefore met ultimately by the taxpayer. We are talking about public funds here.

LORD JUSTICE HAMBLEN: So what you're saying is that your costs would be paid by ...?

MR CHOUDHURY: The successor body to the Audit Commission, the initials of which are PCAA. But it's right, my Lord, that unmeritorious challenges to the exercise of the auditor's discretion should not be funded by the public purse.

In fairness to Reverend Nicolson, I should point out two matters that are relevant to the exercise of your discretion. The first is that your Lordships can in your discretion make an order different from the normal costs order, of course, and you can take into account whether or not a matter of public interest has been raised. There is an authority suggesting that if that is the case, then the court might not order a full costs award in the usual way.

Our position, my Lord, is that this was simply a challenge to the auditor's exercise of discretion. That challenge has failed. No point of general public interest has been raised or established by the judgment, and the principle ground of appeal, as it became clear yesterday morning, was based upon a misconception on the facts about amalgamation, and that is clearly not a proper basis upon which a normal order for costs should be set aside.

The second matter which I raise, my Lord, is something which arises under the Audit Commission Act, the 1998 Act. Section 17(5), if your Lordships might turn that up, it's at tab 18 of the bundle at page 506.

It provides that:

> "On an application or appeal under this section relating to the accounts of a body, the court may make such order as it thinks fit for the payment by the body of expenses incurred, in connection with the application or appeal, by-

(a) the auditor

...

(c) the person by whom the appeal is brought."

So that provides that expenses incurred can be ordered as against the audited body, that's the Council in this case. We make it clear, my Lord, that the respondent is not seeking an order for expenses against Haringey in this case. There is authority which suggests that expenses as used in this subsection means something over and above, or other than, general costs, so if there's a shortfall as a result of the costs order --

LORD JUSTICE HAMBLEN: So under this section, the order may be made against the auditor, and what was (b) has come out, as I read it.

MR CHOUDHURY: I beg your pardon, my Lord?

LORD JUSTICE HAMBLEN: What was subsection (b) has come out, so where does it say the order can be made against the Council?

MR CHOUDHURY: It's in the second line of the main paragraph, "payment by the body."

LORD JUSTICE HAMBLEN: "By the body," I see.

MR CHOUDHURY: And "the body" is the audited body, which is the Council.

LORD JUSTICE HAMBLEN: Yes, I see.

MR CHOUDHURY: My Lord, it seems that that kind of order ought to be made more properly in a case where the authority itself has acted in a way which has led to the appeal being brought, or has acted in some other way which has incurred further expense for the auditor, and it's probably not a general provision to be used to order costs against --

LORD JUSTICE HAMBLEN: Is there some authority on this section?

MR CHOUDHURY: There is, my Lord. **(Handed)**

This is an extract from Jones on Local Government Audit Law, and at paragraph 9.44 on the second page of the extract it refers to the predecessor provisions to the 1998 Act.

> "The 1982 act differs from the earlier provisions in that a positive order of the court ...(Reading to the words)... repeated in the 1982 Act. However, the continued existence of special provisions indicate that they are intended to serve some other purpose ...(Reading to the words)... are concerned with the question of whether the auditor's unrecouped expenses should be borne by the ratepayers on whose behalf he was acting. It is of course to be expected that in the ordinary way ...(Reading to the words)... by the generality of ratepayers in England and Wales."

And 9.47 on the facing page:

> "It is clear from this decision that expenses in section 19(5) and 27 of the 1982 Act are to be distinguished from tax costs and are expected to exceed them ...(Reading to the words)... in addition to asking for costs in the ordinary way against any losing party other than the authority."

LORD JUSTICE HAMBLEN: So is that what you're doing?

MR CHOUDHURY: We're not doing that, my Lord, although the suggestion has been made by the writer there that it should be sought in all cases, we don't consider this is an appropriate case to seek expenses against the Council. We seek costs against --

LORD JUSTICE HAMBLEN: So insofar as -- if you get an order for costs but don't get all your costs, you'll be seeking reimbursement from the Audit Commission, is that right, whatever the new body's called?

MR CHOUDHURY: Yes, the PCAA.

I point that out merely, my Lord, because it is a power that you have and something that you ought to bear in mind.

LORD JUSTICE HAMBLEN: Yes, thank you.

Do you want to say anything about costs?

MR BULEY: I'm happy to deal with it now, or -- I'm happy to deal with it now or in a minute

if you prefer to rule on the first issue first, but I do also have an application for costs against the Reverend Nicolson. My Lord, in that regard I think I need to draw your Lordship's attention to the general principle that applies in this court to second sets of costs, I don't know if you're familiar with that.

LORD JUSTICE HAMBLEN: No, show me, please.

MR BULEY: Yes, can I hand up the case. **(Handed)**

My Lord, it's a transcript, I've taken the liberty of adding some page numbers. If my Lords could go to page 7 added by me. This was a judicial review claim. There's reference in paragraph 33 to a case called Bolton MDC, which was a planning case, and there was agreement between counsel that the principles in that case originally applied in planning applied more widely in the Administrative Court. Then picking up the passages from Bolton that are relevant, paragraph 34, what is the proper approach proposed by Lord Lloyd, and then the subparagraphs. First, general discretion of the court. The second one is important, so (ii):

> "The developer [for whom read interested party] will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard. That is to say, an issue not covered by counsel for the Secretary of State [the first respondent]; or unless he has an interest which requires separate representation."

My Lord, can I then just take you -- so that's the general principle, that's the principle I have to deal with, as it were. Can I just take the court over the page then to paragraphs 38 and 40. The point being made in paragraph 38, which I won't read out in full, if you look in the middle of the paragraph, was that that was a case where the judge held that:

> "In these circumstances the Secretary of State may have been a convenient defendant, but the real defendant surely was Schering because ..."

If the court then reads paragraph 40 in full**. (Pause)**

It's really the middle of the paragraph:

> "... chose to make very serious allegations of criminality against a well known pharmaceutical company."

So, my Lord, pulling back then and seeing what principles might arise, the starting point I completely accept is that I have to show why a second set of costs should be awarded. One basis for doing that will be that there was a separate interest to be represented, and whether, as pursuant to that principle or pursuant to the court's wider discretion, what this case does demonstrate is that it may be of -- it's a matter for your Lordships in this case -- but it may be a reason to award a second set of costs where a second defendant, or second respondent, is facing allegations of a serious nature against it directly. That is this case, in my submission, because the reality of this case, albeit pursued against the auditor, who of course had no choice but to appear, and I don't claim any priority over their costs, the reality of this case is that it's part of the Reverend Nicolson's wider campaign against my client, and it involves the making by him of very serious allegations of acting pursuant to an improper purpose and matters of that kind, and of illegality by my client, albeit tested by reference to the auditor's decision. In those circumstances, I say it is a proper case for the second award of costs. Obviously there may be issues of quantum, but those are my submissions.

LORD JUSTICE HAMBLEN: Right.

So, Reverend Nicolson, they're both seeking their costs against you.

THE APPELLANT: Can I say something?

LORD JUSTICE HAMBLEN: Yes, of course you can.

THE APPELLANT: Thank you for the serious consideration of what has been put to you, and for the response. I raised this case because since April 2013 the poorest people in

Tottenham, probably among the poorest people in the United Kingdom, have had their benefits taxed by Tottenham Council. That means that somebody on £73.10 a week JSA can be paying £8 a week tax for the first time since the Poll Tax, and also they will be paying the Bedroom Tax, which could be up to £20 taken out of the £73.10 a week. They can't afford that, let alone the £125 costs, so if the costs had any amount put into it which should not be allowed, it had to be challenged, it had to be challenged in the interests of the 58 per cent of households in Haringey Borough which are renters and not owners, so there was a genuine purpose in the interests of the poor, not against Haringey, because what Haringey does affects the poor, and I stand for the poor, rather than against any authority or any of the officials at the Local Authority.

I should say as far as me paying costs, I don't own my house, at the end of the month I have around £1,000 left every month, I am in debt, I don't have my bank statement here, but my annual income is about £26,000 a year and that's made up of three pensions.

I don't regret taking this case, I do think it is important, I'm disappointed, if I may say so, that you haven't raised the issue I did raise, that there is a responsibility on everybody involved to take into account the circumstances of the poorest residents of a borough, but that was not mentioned at all, and the fact that the only costs available on 2 August 2013 were the 2010 costs again hasn't featured either in your answer or in the auditor's investigations.

Those are my disappointments, but I'm grateful to you for having listened.

LORD JUSTICE HAMBLEN: Right. We'll retire and discuss the issue of principle.

(A short break)

LORD JUSTICE HAMBLEN: We have considered the various submissions made to us. The conclusion we have reached is that the respondent is in principle entitled to its costs. It is the successful party. It has not been found to be in any way at fault in the discharge of its

duties. It had no option but to defend the case. It did write to the claimant right at the outset to warn of costs consequences of pursuing the matter, and it had responded in detail to the claimant's objection in its decision before proceedings were issued.

Therefore it seems to us that, although we have sympathy for the claimant's position and we are satisfied he is acting out of the best of motives, in the interests of the poor in the borough, we can see no reason why we should depart from the usual rule in terms of exercise of discretion. We have considered whether there is sufficient public interest to justify a different order, but we do not see there to be a real public interest in the issues on this appeal, which have effectively turned on factual matters particular to this case. The general guidance was set out in the earlier Nicolson case, and this case has really been looking at particular facts. So we do not see a sufficient public interest to call for an order other than one which follows the event.

That said, we are not satisfied that the Council should get its costs against the claimant. It seems to us that there should be no order in relation to those costs.

MR CHOUDHURY: My Lord could offer summary assessment today, because it was a one day matter, but given it is a litigant in person, the usual practice is to order the costs to be assessed.

LORD JUSTICE HAMBLEN: I think that would be preferable. I don't think the Reverend Nicolson could be expected to be going through your schedule, which is quite a high schedule, I would say.

MR CHOUDHURY: Yes.

LORD JUSTICE HAMBLEN: I understand you had the main burden of the appeal, but it still seems quite high.

All right.