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[2019] EWHC 2415 (Admin)
Case No: CO/4044/2018

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Wednesday, 31 July 2019

Before:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE GOSS

B E T W E E N :

LUTON BOROUGH COUNCIL — Appellant

- and -

(1) ALTAVON LUTON LTD
(2) SAJID SAYED
(3) KATE BUKRASHVILLI — Respondents

J U D G M E N T

A P P E A R A N C E S

MR A RADLEY – MR J WRIGHT standing in on 31 July 2019 - (instructed by Legal Department, Luton Borough Council) appeared on behalf of the Appellant.

THE FIRST RESPONDENT was not represented and did not attend.

MR J L NIETO (instructed by Noble Solicitors) appeared on behalf of the Second Respondent.

MS V RAMSDEN (instructed by City Law Chambers) appeared on behalf of the Third Respondent.

LADY JUSTICE NICOLA DAVIES:

1. This is an appeal by way of case stated from the decision of District Judge Dodd, sitting at the Luton Magistrates' Court, on 9 August 2018.

2. On 15 November 2017 informations were laid against three defendants (now the first to third respondents respectively): Altavon Luton Ltd, Sajid Sayed (alleged to be a director of Altavon Luton Ltd) and Kate Bukrashvilli (alleged to be an officer of Altavon Luton Ltd).

3. The date of the alleged offences upon which the informations were based was 16 May 2017. The informations allege against the three respondents that each had control and/or management of a house in multiple occupancy ("HMO") at 38 Russell Rise, Luton, Bedfordshire. The informations identified four offences contrary to regulations of the Management of Houses in Multiple Occupation (England) Regulations 2006 and section 234 (3) of the Housing Act 2004 and one offence contrary to section 72(1) of the Housing Act 2004.

The law

4. Section 127 of the Magistrates' Court Act 1980 ("section 127") identifies the time limits within which an information must be laid as follows:

> "127 Limitation of time
>
> (1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within six months from the time when the offence was committed, or the matter of complaint arose."

Background

5. At the hearing before the judge, it was the respondents' case that the informations were laid outside the six-month time limit stipulated in section 127. They submitted that time should have run from April 2017 when Mr Paul Fountain, a private-sector housing officer employed by

the appellant, became aware of the situation in the property; in the alternative, at the latest by 12 May 2017. In summary, prior to 16 May 2017 Mr Fountain had sufficient evidence to proceed with the case.

6. In the case stated, the judge summarised the evidence as follows:

> "(a) Paul Fountain gave evidence on 9th August 2018. He told the court he was a 'Rogue Landlord Officer' with Luton Borough Council since 2016. He first had contact with the address, 38 Russell Rise, following an initial complaint, on 20th April 2017, when he visited the address. He spoke with someone on the doorstep but did not ask to go in to the premises. Mr Fountain gave evidence from memory aided by a statement dated 10th October 2017 and notes in a notebook.
>
> (b) On 21st April 2017 he again visited with a colleague but did not enter the premises, but left questionnaires to be completed by the occupiers with a view to obtaining information regarding the house and whether it was an HMO. The completed forms he collected on 24th April 2017.
>
> (c) On 25th April 2017, Mr Fountain stated that he had received a telephone call from Mr Anas Miah, the landlord at 38 Russell Rise from whom Altavon Luton Ltd rented the property. He wanted to talk to Mr Fountain about his property being turned into an HMO, and what he could do about it as he could get no response from Altavon Luton Ltd.
>
> (d) On 12th May 2017, Mr Fountain received a telephone call from Mr Sayed/Bashir on behalf of the company, asking how he could resolve the issue of the unlicensed HMO. He cautioned Mr Sayed and informed him that he could not evict the tenants in order to resolve the issue as that itself would be an offence. Mr Fountain had been made aware of an attempted eviction when he had earlier received a call from one of the occupants. As a result of that call, Mr Fountain informed the community safety officer that 'the agent had turned up at the house and was trying to evict the tenants of an unlicensed House of Multiple Occupation'.
>
> (e) Mr Fountain had had an earlier telephone conversation regarding the eviction, in April, with Kate Bukrashvilli. According to his statement, he explained to her that 'as the property was an unlicensed HMO a section 21 eviction notice could not be issued'.
>
> (f) Mr Fountain next visited the premises on either 15th May or 16th May 2017. In his statement dated 10th October 2017, he wrote 15th but in evidence said it was the 16th, as he said he had not been at work on the 15th.
>
> (g) Whether on the 15th or 16th, he did enter the premises, inspected and took photographs. Mr Fountain in evidence said he needed to enter to inspect and establish that it was an unlicensed HMO."

The judge's findings of fact

7. The judge found that Mr Fountain was aware that the offences alleged were being committed in April or at the very latest by 12 May 2017 when he spoke to Mr Sayed on the telephone. In April, Mr Fountain had distributed questionnaires to the tenants with a view to establishing whether the house required an HMO licence and had collected the completed questionnaires. He had also spoken to the third respondent during which conversation he said, according to his statement, "as" the house was an unlicensed HMO; in cross-examination he said that he had meant "if", not "as". The judge did not accept that as an error.

8. The judge found that the offences were "continuing offences" and that section 127 required information to be laid within six months of the time "when the offences came to light". In issue between the parties was how section 127 applies to a continuing offence. As to that, the judge stated that she was -

> " ... of the opinion that the time should run from when the local authority became aware of the offences and that the offence could not be allowed to continue indefinitely. Having found that Mr Fountain was aware that the offences were being committed in April, the time would run from then, not May, as submitted by the local authority".

The judge continued:

> "It was contended by the local authority that the offence were continuing offences and that an offence takes place every day that the house remains unlicensed and that the last visit on 16th May was the relevant date when they knew an offence was taking place, this being the date when the premises were entered, photographed and inspected.
>
> Had that date been the 15th May the information would have been out of time by one day, but the local authority maintained that the date was in fact the 16th May 2017. If time ran from then, the information laid in time I agree that the offences are continuing offences but took the view that they came to the knowledge of the local authority well before 16th May 2017 and that the information should have been laid when the offences came to the notice of the local authority in April. I was of the opinion that the information, laid on 15th November, was therefore laid outside the six-month time limit.

> Photographs were taken by Mr Fountain on the date of his last visit and the camera displayed a date of 16th May. I did not refuse to look at the photographs but did not consider seeing the photographs would assist. I was told by the Prosecution that the photographs were date stamped the 16th May 2017 and had no reason to disbelieve that. The content of the photographs was not relevant; it was merely the date."

9. Having made the findings set out above, the judge concluded that the informations laid by the appellant were out of time in that they had not been made within the six months required by section 127.

10. Pursuant to a request made by the appellant, the judge formulated the case stated, and the following questions have been posed for the opinion of the High Court:

> "**Questions for the opinion of the High Court**:
>
> 1. Did the District Judge wrongly direct herself on the law regarding the nature of a 'continuing offence case' and the special nature of that type of offence particularly in relation to the daily offence being repeated (where there is an unlicensed house)?
>
> 2. Did the District Judge err in not allowing the photographs to be admitted in legal argument, and was the decision *Wednesbury* unreasonable?
>
> 3. By determining she could not be sure if the visit was on the 15th or 16th May, did the District Judge wrongly direct herself in ruling on questions of 'fact' which should have been determined at trial in light of all the evidence, rather than limiting her ruling to a matter of 'law' as to whether the limitation was applied correctly?"

The appellant's case

11. It is the appellant's primary contention that the offences are continuing offences. They were continuing until the date Mr Fountain entered into and inspected the property on 16 May 2017. Secondly, the appellant submits that four of the five informations identify regulation offences. The evidential detail necessary for the informations in respect of the regulatory offences would not have been known to Mr Fountain until he entered into and inspected the property. Any information that Mr Fountain provided in his affidavit - whether in conversations with the tenants, representatives of the first respondent company or as a result of completed

questionnaires - would represent incomplete knowledge, insufficient to lay informations before the court.

12. The continuing nature of the offence and its consequences are said to be on "all fours" with the authority of *R (Thames Metropolitan Stipendiary Magistrate) ex parte London Borough of Hackney* [1994] 158 JP 305. In that case an inspection took place by a local authority's food safety officers in September 1989, as a result of which offences at the respondents' premises in contravention of the Food Hygiene (General) Regulations 1970 were identified. The appellant informed the respondents of the complaint and the latter promised to take remedial action. In March 1990 another inspection was carried out and it was discovered that no such remedial action had been taken by the respondents. In November 1990, the applicant commenced proceedings against the respondents. At the date of the hearing the magistrate decided that the proceedings were time-barred as they had not been commenced within a year of the discovery of the initial offences by the prosecutor as required under section 95(1) of the Food Act 1984. In his judgment, Simon Brown LJ identified the offences as " ... continuing offences committed afresh each day that the regulations are not complied with".

13. It is the appellant's case that the alleged offences were being committed each and every day at the property as 38 Russell Rise, Luton was unlicensed. The offending continued until the entry and inspection by Mr Fountain on 16 May 2017. The fact that the judge found that Mr Fountain knew or had suspicion that the premises were being used for an unlawful purpose does not alter the fact that the property continued to be unlicensed premises and, as such, the offending continued.

14. The district judge accepted that the date on the photographs indicated that the relevant visit was 16 May 2017.

<u>The respondents' case</u>

15. The first respondent was unrepresented. The second respondent seeks to uphold the findings of the district judge. He accepts that there were continuing offences. However, reliance is placed upon the authority of *Royal Society for the Prevention of Cruelty to Animals v Dean Patrick Shane Webb and Diane Webb* [2015] EWHC 3802 (Admin). In that case, the Divisional Court considered the provisions of section 127 and the relevant time limit in respect of the seizure of animals in accordance with section 18(5) of the Animal Welfare Act 2006. The animals had been seized in accordance with section 18(5) on 9 February 2010, a veterinary surgeon having certified that they were suffering or likely to suffer if their circumstances did not change. The complaint was not laid until 10 August 2010. It was the respondent's case that the matter of complaint arose not on 9 February 2010 when the animals were seized but on 20 May 2010 when the veterinary surgeon instructed by the respondent submitted a written statement setting out the detailed condition of each animal and recommendations as to their future care and treatment. It was the appellant's case that the complaint arose on 9 February 2010 unless the complaint was time barred.

16. At paragraph 20 of the judgment, Beatson LJ, considering the application of section 127 (time limit), quoted from the case stated by the judge and justices as follows:

> "(a) Parliament plainly contemplated that, once a matter of complaint arose, a complainant should be given a reasonable time within which to develop the case in order to justify the issue of proceedings. That period was set at 6 months.
>
> (b) Most cases develop as the investigation unfolds during the 6 months. But that cannot alter the date on which the matter arose.
>
> (c) If the contention of the respondents was correct, then they would be able to proceed at their own pace, holding off issuing a complaint, and putting the matter before the court, until a time of their own dictation when they decided that the complaint had crystallised. The animal owners may be deprived of a court ruling indefinitely.
>
> (d) Accordingly, the complaint having been laid out of time, there was no lawful complaint before the Magistrates, or us, and the proceedings were a nullity. We therefore allowed the appeal."

At paragraph 30 of the judgment, Beatson LJ concluded that:

> " ... there was material upon which the Crown Court could have concluded, as they did, that the judge and justices were entitled to decide that the matter of complaint arose in this case on 9 February 2010, and, ... this appeal should be dismissed because, on the material before the Crown Court at that date, that was the position."

17. Further, the second respondent submits, if there is any uncertainty in respect of dates when knowledge was gained the criminal burden and standard of proof applies: *David Charles Atkinson v Director of Public Prosecutions* [2004] EWHC 1457 (Admin) para.18.

18. The respondents' contention is that the appellant's position is analogous to that of the Royal Society for the Prevention of Cruelty to Animals in *Royal Society for the Prevention of Cruelty to Animals v Webb* (above). The point at which knowledge of the respective complaints arose was before 16 May 2017. The matter of complaint arose when Mr Fountain first attended the house following an initial complaint in April. The judge found that Mr Fountain was aware that the offences alleged were being committed in April or at the very latest by 12 May when he spoke to the second respondent on the telephone. This must be the latest date when the complaint arose for the purpose of section 127 because that is the day when Mr Fountain conducted an interview under caution with the second respondent.

19. In respect of the dates of 20 April, 24 April or 12 May, Mr Fountain was increasingly aware that the offences alleged were being committed and the informations should have been laid at that time. The offences in *Royal Society for the Prevention of Cruelty to Animals* were also continuing offences. Applying the logic set out in the passage quoted above from that authority, Mr Fountain could have started his investigations and then developed them over a period of time. It is not for the appellant to proceed at its pace, putting the matters off until it had decided that the information had crystallised.

<u>The third respondent</u>

20. The third respondent adopts the submissions of the second respondent. Further, counsel on her behalf raised the question as to whether the judge had found that the photographs had been

taken on 15 or 16 May 2017. It was not entirely clear to the court if counsel on behalf of the third respondent was accepting that the offences were of a continuing nature. At one point it was suggested they were hybrid offences.

Discussion and conclusion

21. It is the appellant's case, undisputed by the second respondent, that the offences identified in the informations were of a continuing nature. Given the facts of the case, we do not understand how it could be sensibly argued otherwise. It follows from these facts that the offences were continuing until Mr Fountain's entry into the property. As to when that took place, we note the findings of the judge that the photographs were taken by Mr Fountain on the date of his last visit and the camera displayed a date of 16 May 2017. The judge stated that she had been informed by the prosecution that the photographs were date-stamped 16 May and "had no reason to disbelieve that".

22. In our judgment, the reasonable inference to be drawn from these findings of the judge is that she accepted the evidence of the appellant, namely that the last visit by Mr Fountain to the property was 16 May 2017. This is the date when the appellant contends the offences are alleged to have occurred for the purposes of section 127. We note the wording of section 127(1). It provides:

> "(1) ... a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose."

23. The application before the judge was to lay an information. The information had to be laid within six months from the time when the offence was committed in order to comply with section 127(1). As these were continuing offences, as a matter of fact the offending continued until 16 May 2017 when Mr Fountain visited. Knowledge gained by him prior to that date was relevant in so far as it enabled him to place himself in a position whereby he had sufficient

information/grounds to enter the property. Further, we accept the point made by the appellant that the entry into and inspection of the property was necessary for the identification and detail of the breaches of the regulatory offences contained within the four informations alleging regulatory breaches.

24. Accordingly, we conclude that the information laid on 15 November 2017 was not time barred. It was brought within the six-month time limit prescribed by section 127.

25. In our judgment, the authority of *Royal Society for the Prevention of Cruelty to Animals* (above) can be distinguished on its facts. First, before the court was a complaint relating to civil proceedings in respect of a seizure; it was not an information. Second, the Divisional Court accepted the factual findings of the Crown Court that the complaint arose on 9 February 2010 when the seizure took place. Contrast that with the facts of this case where the alleged multi-occupancy of the property continued until the 16 May 2017 inspection.

26. Addressing the questions for the opinion of the court and the reasons given:

    (i) Question 1 - we find that the district judge did wrongly direct herself on the law regarding the nature of a "continuing offence" given that the offence was being repeated on a daily basis up until the date of 16 May 2017 when the only inference that can properly be drawn is that the district judge accepted the visit of Mr Fountain had taken place.

    (ii) Question 2 - the judge did not err in not allowing the photographs to be admitted in legal argument. She clearly accepted that the photographs had been taken and accepted the appellant's case as to when they had been taken, namely 16 May 2017.

    (iii) Question 3 - in our view this begins with an incorrect premise, namely that the judge could not be sure if the visit was on 15 or 16 May. In the final paragraph of the quote - "Relevant Findings of Fact" – the judge accepted photographs were taken on 16 May and had previously accepted that the photographs were taken on the date of Mr Fountain's last visit.

27. Question 1 having been answered in the affirmative, this appeal is allowed. The order of the district judge is set aside.

28. As to the relief granted, the information against each of the respondents is sought to be reinstated by the appellant.

LADY JUSTICE NICOLA DAVIES: Are there any submissions as to the relief to be granted? That is your submission, yes?

MR WRIGHT: Yes. That is the submission.

LADY JUSTICE NICOLA DAVIES: Is there any submission by either respondent as to that?

MR NIETO: No.

LADY JUSTICE NICOLA DAVIES:

29. Then the order is that the order of the district judge is set aside and the informations against each of the respondents are reinstated.

MR JUSTICE GOSS:

30. I agree.

LADY JUSTICE NICOLA DAVIES: Our thanks to counsel for their assistance and for attending today.

MR WRIGHT: I have been instructed to raise the issue of costs with the court today.

LADY JUSTICE NICOLA DAVIES: Yes.

MR WRIGHT: I understand a schedule of costs was served on the respondents yesterday. However, I have a hard copy available.

LADY JUSTICE NICOLA DAVIES: I have not seen a schedule of costs.

MR JUSTICE GOSS: Neither have I.

LADY JUSTICE NICOLA DAVIES: Mr Justice Goss has not either.

MR JUSTICE GOSS: No.

MISS RAMSDEN: My instructing solicitors received it last night. (Document was handed to judge)

MR WRIGHT: The costs quite simply detail the council's preparation for attendance and solicitor's fee.

LADY JUSTICE NICOLA DAVIES: The first respondent did not appear and was not represented. How are you contending these costs should be----

MR WRIGHT: The most appropriate way would be to split it between the two attending parties.

LADY JUSTICE NICOLA DAVIES: That is the application, is it, that the second and third respondents pay the appellant's costs of the appeal, each respondent to pay 50 per cent of those costs? Yes?

MR JUSTICE GOSS: Or is it joint and several?

MR WRIGHT: I am quite conscious that the first respondent has not attended although, as I understand it, in the appeal brought before the court the first respondent is accompanying the second two respondents, so I suppose in that case joint and several application.

LADY JUSTICE NICOLA DAVIES: So what is your application?

MR WRIGHT: Application for costs joint and several, my Lady.

MR JUSTICE GOSS: In other words, an order for costs against both defendants in that sum. They are both liable for the total sum until it is discharged.

MR WRIGHT: Indeed, my Lord.

LADY JUSTICE NICOLA DAVIES: Right.

MR NIETO: The second respondent has the benefit of legal aid in these proceedings. That may cause some difficulty as to seeking the costs order against him in the way the application is pitched. Perhaps, in my submission, the appropriate manner would have been an application from central funds, bearing in mind the second respondent is legally aided in these matters. However, I ask you to take that into account. I do not have any statement of means or any other financial information with which to assert that. I ask you to take them into account,

that he has had the benefit of legal aid in these proceedings and they were properly responded to. My Lady and your Lordship may wish to take into account some of the features of the case such as the second respondent being added late due to the notice being served administratively by the court fairly late in the proceedings. I would ask you to take those into account when deciding the matter of costs, certainly against the second respondent.

MISS RAMSDEN: On behalf of the third respondent, she is legally aided. She is the mother of three young children. She is in full-time employment. She is a single mother and really on subsistence living. But, of course, perhaps I am not as fully acquainted with the High Court costs procedure as I should be. My understanding was the competitors really levied a fee - the decision of the district judge - and we have been invited to make representations.

As regards the appeal itself, it was listed four days out of time by Luton Council. Then as the matter progressed the wrong parties were added to the -- well, identified on the pleadings, if I can put it that way, and that was subsequently amended by court officers. So throughout these proceedings below there was -- it seemed that Luton Council went to the last moment to institute proceedings. It is clear that matters today show they were on time but it was the last day available. Then when they came to the appeal they were themselves four days late. Then, later on, matters progressed whereby it was the wrong parties and they----

LADY JUSTICE NICOLA DAVIES: Which parties were originally identified and what happened to the court?

MR JUSTICE GOSS: The court was named as the original defendant, was it not?

MISS RAMSDEN: It was Luton Magistrates -- magistrates' courts. One cannot say one was there, but it does show a singular lack of, perhaps, attention on behalf of the council. It could be even later in submitting the appeal, when they are appealing the fact they were not late in

the first place, and then to get the parties wrong. The excuse for having been late was somebody in submitting, was that somebody in the office had gone on holiday and --

LADY JUSTICE NICOLA DAVIES: Anything else?

MISS RAMSDEN: As I have said before, the income of the respondent is extremely limited being the mother of three young children and single.

MR NIETO: Perhaps, my Lady, I should have addressed, when asking you to take those factors into account of course, section 28A gives you discretion in the High Court. I know your Ladyship and your Lordship are aware but I did not specifically refer to it.

LADY JUSTICE NICOLA DAVIES: It is all right. Is there anything you want to say by way of reply, Mr Wright?

MR WRIGHT: No, nothing further.

LADY JUSTICE NICOLA DAVIES: We will rise.

(Short Break)

RULING

LADY JUSTICE NICOLA DAVIES:

31. We are grateful to all counsel for their speeches in respect of the appellant's claim for costs. Having carefully considered them, we are of the view that the only fair order is no order as to costs. Is there anything else?

(No reply)

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