IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 404 (Admin)

No. CO/1046/2020

Royal Courts of Justice

Thursday, 4 February 2021

Before:

MR JUSTICE HOLMAN

B E T W E E N :

MUSTAFA KEMAL MUSTAFA — Appellant

- and -

(1) THE LONDON BOROUGH OF BROMLEY
(2) BROMLEY MAGISTRATES' COURT — Respondents
(COUNCIL TAX: NON ATTENDANCE AT HEARING)

THE APPELLANT appeared in person.

THE FIRST RESPONDENTS were not present and were unrepresented.

THE SECOND RESPONDENT was not present and was unrepresented.

J U D G M E N T
(A s a p p r o v e d b y t h e j u d g e)

MR JUSTICE HOLMAN:

1 This short hearing concerns a now very long-running matter. The London Borough of Bromley claim that the appellant, Mustafa Kemal Mustafa, owes unpaid council tax for a period between September 2017 and 31 March 2019 in respect of premises located at 14, West Street in Bromley. It is common ground that the appellant is the owner of that property. However, his assertion from start to finish has been, and is, that he is not the person liable to pay the council tax because the property has been leased to a lessee whose legal liability it is to pay the tax.

2 The London Borough of Bromley applied to the local magistrates' court in Bromley for liability orders. There were earlier proceedings during 2018, and orders were first made and later set aside. As a result, the local authority reissued notices, and on 8 March 2019 the Bromley Magistrates' Court issued a summons that the application for the liability orders would be heard at that court at 9.30 a.m. on Friday, 29 March 2019. The appellant did not, in fact, attend the hearing on 29 March 2019, and liability orders were duly made. I will return to the facts and circumstances surrounding his non-attendance a little later.

3 As soon as he learned that the liability orders had been made on 29 March 2019, the appellant applied to the court for them to be set aside. His application was ultimately heard by the magistrates' court on 21 October 2019. At that hearing, the magistrates' court refused to set aside the earlier liability orders. It is from that refusal that the appellant now appeals to this court by way of case stated. He seeks, therefore, that the decision and order of the magistrates' court of 21 October 2019 be reversed and set aside, and that the liability orders made on 29 March 2019 should also be set aside, with a view to a fresh hearing and redetermination by the magistrates' court of the question whether or not he is the person liable to pay the council tax in question.

4 It is now necessary to focus on the reason why the appellant did not attend the hearing on 29 March 2019, of which he freely admits that he had had sufficient and proper notice. The reason was that on that date he was obliged to attend the Woolwich Crown Court where he was on trial for an alleged breach of planning law or regulations. The case stated sets out at paragraph 18 the facts that were found by the magistrates at the set aside hearing on 21 October 2019. They found as a fact that the appellant did not attend the hearing before the magistrates on 29 March 2019, and that "the appellant attended Woolwich Crown Court instead." It is, accordingly, a finding of the magistrates themselves that on 29 March 2019 the appellant was in attendance before the Crown Court. No further information or detail is given within the case stated, but it has seemed to me to be permissible and appropriate that I should find out a little more information from the appellant, who appears in person before me today.

5 The appellant has explained to me, and I accept, that he was being prosecuted in the Woolwich Crown Court for a breach of planning law. He says that the trial had become lengthened by various delays, including the judge becoming ill for a period. The result was that, in the end, it spread over about two to three weeks and overran and, in fact, concluded on Friday, 29 October 2019 with the verdicts of the jury to the effect that he was guilty. Although it is completely irrelevant to what I have to decide, I should mention in fairness to the appellant that he has told me that subsequently the Court of Appeal Criminal Division has allowed an appeal and set aside the verdict of the jury.

6 Clearly, therefore, the appellant had a very good and powerful reason indeed why he could not be physically present before the magistrates' court on 29 March 2019. It is nothing to do with some hierarchy between courts, but obviously the final day of a lengthy criminal trial in which a person is the defendant on trial has to take precedence or priority over a

relatively routine and short hearing in relation to a disputed liability to council tax. Far more people would have been involved in the criminal trial than in the hearing before the magistrates, and the latter hearing could much more easily have been rearranged.

7 The real issue in this case was, and is, around the lack of any clear notification to either the magistrates' court itself or the council tax department of the London Borough of Bromley that the Crown Court trial had overrun and that the appellant accordingly could not attend the magistrates' court. This is where the case runs into a much more grey area. The case stated states at paragraph 18(h):

> "The appellant did not inform the court or the council tax department of the London Borough of Bromley that he would not be attending. It was incumbent upon the appellant to notify the court and the council regarding the reason for his non-attendance."

Earlier, at paragraph 18(f), the justices stated:

> "It was within the control of the appellant to notify the court on 29 March 2019 or before that date, that he could not attend on 29 March 2019 due to the overrunning case at the Crown Court. It was within the control of the appellant to notify the council tax department of the London Borough of Bromley on 29 March 2019, or before that date, that he could not attend on 29 March 2019 due to the overrunning case at the Crown Court."

8 Although there is no express finding with regard to what follows, it is stated within paragraph 20 of the case stated that at the hearing on 21 October 2019 the appellant contended that the case in the Crown Court overran unexpectedly and that he could not be in two courts at the same time. Further, he contended that:

> "He told the housing department of the London Borough of Bromley about the Crown Court hearing. Council departments all communicate with each other."

9 This morning, the appellant has elaborated a little on that, and he tells me that when it became clear that the Crown Court trial was going to overrun into Friday, 29 March 2019 his wife sent an email (which he cannot produce this morning) to the housing department informing them of that fact. He has also said in a vague and unevidenced way that he understood that his solicitors in the Crown Court proceedings were themselves going to notify the magistrates' court that he would not be able to attend.

10 When the magistrates heard the set aside application on 21 October 2019, an authority was cited to them to which they now refer in their case stated. That is the decision and reserved judgment of Stanley Burnton J, which was handed down on 29 July 2014, in *R (on the application of Brighton and Hove City Council) v Brighton and Hove Justices and Michael Hamdan* [2004] EWHC 1800 (Admin). I will, for convenience, refer to that authority as *Hamdan*. Those were, in fact, proceedings in judicial review in which a local rating authority were challenging a decision of justices to set aside liability orders that had earlier been made. In other words, the factual situation was effectively the reverse of that in the present case. The local authority had chosen to proceed by way of judicial review, although Stanley Burnton J held that it would have been preferable that there had been an appeal by way of case stated.

11 In a passage beginning at paragraph 26, Stanley Burnton J described the power of a magistrates' court to set aside a liability order. He said, at paragraph 26, that magistrates do have an inherent power to set aside a liability order made by their court. So, the existence of the power that the magistrates were being asked to exercise in the present case on 21 October 2019 was not, and could not be, in issue. Mr Justice Stanley Burnton then referred to an earlier authority of *Liverpool City Council v Pleroma Distribution Limited* [2002] EWHC 2467 (Admin) in which Maurice Kay J had described the power and made observations about the circumstances in which it should be exercised. I will return in a

moment to what Maurice Kay J had said in paragraph 10 of his judgment in the *Pleroma* case, but first I will cite what Stanley Burnton J was to say in paragraphs 31 and 32 of his judgment in *Hamdan*, to which the magistrates in the present case clearly referred. Mr Justice Stanley Burnton said:

> "It is important to take into account that the jurisdiction which Maurice Kay J held to exist cannot be exercised simply because the defendant disputes his liability to pay the [rates or council tax] in question. That there is a genuine and arguable dispute as to that liability is a necessary condition for a decision by justices to set aside a liability order, but it is not a sufficient condition. The power of a magistrates' court to set aside a liability order it has made is an exceptional one, to be exercised cautiously. In my judgment, in general a magistrates' court should not set aside a liability order unless it is satisfied, in addition to there being a genuine and arguable dispute as to the defendant's liability for the rates in question, that:
>
> > (a) the order was made as a result of a substantial procedural error, defect or mishap; and
> >
> > (b) the application to the justices for the order to be set aside is made promptly after the defendant learns that it has been made or has notice that an order may have been made."

12 Pausing there, it is clear, therefore, that there are three pre-conditions before a liability order may be set aside. The first is that there is a genuine and arguable dispute as to the defendant's liability. The second is that the application for the order to be set aside has been made promptly. The third is that the order was made as a result of a substantial procedural error, defect or mishap. In the present case, the magistrates were satisfied, and clearly held at paragraphs 18(a) and (b) of the case stated, that "it was accepted that there was a genuine and arguable dispute as to the appellant's liability for the rates in question" and that "the application to the justices for the order to be set aside was made promptly after the appellant learned that the liability order had been made or had notice that the order may have been made." The whole issue, therefore, turned on whether or not the order was made as a result of a substantial procedural error, defect or mishap. In this regard, I mention that at paragraph 18(e) of their case stated the justices said:

> "On an analysis of the word 'mishap' contained in the test set out in… *Hamdan*… the magistrates found that the order was made without mishap."

At paragraph 26(d) of their case stated the magistrates said:

> "On an analysis of the word 'mishap' contained in the test formulated by the case of… *Hamdan*…the non-appearance of the appellant was not a 'mishap'. It was within the control of the appellant to notify the court and the council on 29 March 2019, or before that date to notify them, that he could not attend on 29 March 2019 due to the overrunning case of the Crown Court. The liability order was made without 'mishap' on 29 March 2019."

13 The questions which the justices state for the opinion of this court are:

> "1. Were we correct to refuse the application to set aside the liability order by finding that the word 'mishap' in the test in… *Hamdan*… has its usual meaning and the appellant's decision to attend the Crown Court without notifying the magistrates' court amounted to a deliberate failure to attend and not a mishap?
>
> 2. Does the word 'mishap' have a wider meaning and should it include a failure to attend court where the appellant has not notified the court of the reason for the non-attendance?"

14 Pausing there, it does seem to me, with respect to the magistrates who have clearly considered this case very conscientiously indeed, that there was some over-focus by them on the precise meaning or effect of the word 'mishap', as if it was a word appearing in a statute which required to be construed by the court. I am sure that the word was carefully chosen by Stanley Burnton J in his judgment in *Hamdan* in order to enlarge the ambit of "a substantial procedural error [or] defect" to which he had previously just referred. So he was selecting a word as an omnibus word for the multifarious situations which may arise in legal proceedings which cannot necessarily be characterised as a "procedural error" or "defect".

15 Obviously, in the present case, there may be shown to have been what the magistrates characterised in question 1 as "a deliberate failure to attend", in that the appellant made a choice between attending at the Crown Court or attending at the magistrates' court. But the real issue is not his failure to attend but the failure to notify. The magistrates focused on the failure to notify and considered that it did not amount to a "mishap".

16 It is now necessary that I read on in the judgment of Stanley Burnton J in *Hamdan* at paragraph 32, where he said:

> "The authority for condition (a) is paragraph 10 of the judgment of Maurice Kay J in *Pleroma*. In most cases, it must be shown that the liability order was unlawful or made in excess of jurisdiction or in ignorance of a significant fact concerning their procedure (such as an application for an adjournment) of which the justices should have been aware. However, the procedural mishap may not be the fault of the court or of the local authority: Maurice Kay J gave the example of a traffic accident that, unknown to the magistrates' court, prevents the defendant from attending at the hearing. But a failure of the defendant to attend when he knows that there will be a hearing will not of itself satisfy this requirement. Thus a failure of the defendant to attend the hearing because he assumes, without good reason, that the local authority will not seek an order, or because he is absent abroad, will not of itself satisfy this requirement. A defendant who will be unable to attend a hearing because of his absence abroad may request an adjournment in writing, or instruct a solicitor to appear on his behalf; but if he does nothing, he is not entitled to an order of the magistrates to set aside a liability order made against him."

On the facts of the *Hamdan* case itself, it appears that Mr Hamdan was somebody who did, indeed, simply "do nothing".

17 Mr Justice Stanley Burnton referred back to paragraph 10 of the judgment of Maurice Kay J. It is, I think, helpful and appropriate to cite part of that paragraph, which itself appears in paragraph 29 of the judgment of Stanley Burnton J. Mr Justice Maurice Kay said:

> "Let us assume that a liability order had been made in the absence of a ratepayer and his representative because they had been involved in a traffic accident on the way to court, or that an extremely cogent written request for

> an adjournment had been sent to the court but had been misfiled in the court office… It would be unfortunate and contrary to common sense and fairness if the magistrates were constrained by law to stand on their earlier decision, made in ignorance of the facts, and to have to direct the disadvantaged ratepayer to the Administrative Court and an application for judicial review…"

18 It is obvious, from a reading of both paragraph 10 of the judgment of Maurice Kay J in *Pleroma* and the judgment of Stanley Burnton J in *Hamdan,* and, indeed, as a matter of common sense, that there is an infinite range or spectrum of circumstances and situations which may arise or may have arisen when a defendant does not attend court. At a relatively extreme end of that spectrum is the example of a traffic accident on the way to court. At the other end of the spectrum is the example of the defendant who is abroad but does nothing to inform anybody that he is abroad. It seems to me that the facts and circumstances of the present case fall somewhere nearer the middle of that range or spectrum.

19 The appellant found, perhaps unexpectedly, that his case in the Crown Court had overrun. He did, in fact, have a cast iron reason why he could not attend the magistrates' court. But his situation and circumstances are far removed from somebody who merely chooses to be abroad, and knows that he is going to be abroad, and does nothing at all about it.

20 It seems to me, with respect to the magistrates, that in the present case they focused unduly on some literal construction of the word 'mishap', and focused more upon the absence of a communication to the court than upon the compelling reasons why the appellant could not attend. I do not wish in any way to paraphrase the word 'mishap', which was no doubt carefully selected by Stanley Burnton J, and still less to subject it myself to textual analysis or construction. But the essence of this sort of situation is that there has been some unusual and unexpected combination of circumstances such that justice requires that the order be set aside. Once it had been concluded (as the magistrates did conclude) that there was a genuine and arguable dispute as to the appellant's liability for the rates in question, and that

he had promptly applied to the magistrates' court to set aside the liability orders, it is my view that justice required that they be set aside on the particular facts and circumstances of this case.

21 I answer the first of the questions posed in the case stated "no". I reformulate the second of the questions posed in the case stated to delete the words "should it" and substitute the words "can it". Having thus reformulated the question, I answer it "yes".

22 My overall conclusion is that this appeal should be allowed. I will exercise my powers under section 28A of the Senior Courts Act 1981 and reverse the determination of the magistrates' court whereby they refused to set aside the liability orders. I will myself set aside the liability orders. I will remit the application of the London Borough of Bromley for the liability orders to the magistrates' court for redetermination by that court, and I direct that the magistrates' court shall redetermine the application for the liability orders as soon as reasonably practicable at a hearing on notice to both parties.

23 Although I have allowed this appeal, I wish to express my gratitude to the legal advisor of the Bromley Magistrates' Court, S. Deonarine, for drafting the case stated in this case; and I wish to express to the magistrates who personally heard this matter on 21 October 2019 my appreciation that they dealt with the matter conscientiously and with care, albeit that I have reached a different conclusion from them.

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