Neutral Citation Number: [2022] EWHC 358 (Admin)

Case No: CO/783/2021

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**SITTING IN LEEDS**

1 Oxford Row, Leeds LS1 3BG
18th February 2022

**Before**:
**MR JUSTICE FORDHAM**

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| **Between:** | |
| **THE QUEEN (on the application of ANDREW PARKER)** | **Claimant** |
| **- and -** | |
| **THE MAGISTRATES COURT AT TEESSIDE** | **Defendant** |
| **-and-** | |
| **(1) DAUD BASHIR** | **Interested** |
| **(2) NAFEES BASHIR** | **Parties** |

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**David Graham** (instructed by Watson Woodhouse) for the **Claimant**
**Ryan Kohli** (instructed by Government Legal Department) for the **Defendant**
The **First Interested Party** appeared in person
The **Second Interested Party** did not appear and was not represented

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Hearing date: 27.1.22

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# Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

## MR JUSTICE FORDHAM :

Introduction

1. This is a case arising out of what happened with a garden wall in the Victorian terrace of Peaton Street, North Ormesby. It has become a case about the magistrates' statutory function of awarding costs ("expenses") where there has been a successful private prosecution in respect of statutory nuisance. It is a case which comes before this Court as a claim for judicial review, commenced on 3 March 2021, for which permission was granted by HHJ Davies-White QC sitting as a Judge of the High Court ("the Permission Judge") on 26 July 2021.

2. The mode of hearing was a remote hearing by Microsoft Teams. The question of the mode of hearing was raised by the Permission Judge in his Order. In the event, the Claimant and Defendant actively requested a remote hearing; and the Interested Parties did not oppose one. I was satisfied that a remote half-day hearing involved no prejudice to any party, and was appropriate in the context of the pandemic. The open justice principle was secured, by publication from the previous afternoon onwards in the online RCJ Cause list (which contains all regional Administrative Court hearings) of this information: the case-name and reference, its start time, the remote mode of hearing, and an email address usable by any member of the press or public who wished to observe the hearing (as several people did).

3. The Defendant, throughout the judicial review proceedings, took a "neutral" position, instructing Counsel (Mr Kohli) to attend the substantive hearing to assist the Court on any questions of law. The Interested Parties were served with the relevant papers throughout the proceedings. This included: (i) service on them by the Claimant with the claim papers (8.3.21) and with the skeleton argument and hearing bundle (11.1.22); (ii) service on them by the Court with the Permission Judge's reasoned order (28.7.21); and (iii) service on them by the Defendant with its Acknowledgment of Service (9.3.21) and post-permission letter (9.8.21). The First Interested Party asserted, at one point at the hearing, that it had not been made clear to them that: (a) the Interested Parties had the right to participate and resist these judicial review proceedings if they wished; and (b) the Defendant was not resisting judicial review but was adopting a "neutral" position. That assertion was refuted by the clear contents of the served documents themselves, as the First Interested Party on reflection accepted when this was put to him. These two things had also been reiterated to him in a phone conversation (19.1.22) with the Defendant's solicitors. The Interested Parties took no step to participate in the proceedings until the First Interested Party contacted the Court on the morning of the substantive hearing asking for the link. He was duly sent it, and the authorities were emailed to him, to ensure that he had everything. He was present at the hearing. Steps were taken to ensure that he could find and follow the bundle references. He made submissions to the Court.

Statutory nuisance and s.82(12)

4. There is a statutory nuisance where "premises" are in "such a state as to be prejudicial to health or a nuisance": see Environmental Protection Act 1990 (the "1990 Act") s.79(1)(a). Following the issuing of a written notice (1990 Act s.82(6)), a person aggrieved by the existence of a statutory nuisance may institute proceedings by way of summary application in the magistrates' court (s.82(1)). In the case of statutory

nuisance arising from a defect of a structural character, those proceedings are brought against the owner or owners of the relevant premises (s.82(4)(b)). There may be more than one person responsible for the statutory nuisance (s.82(5)). It was not in dispute in the present case that, in the context of a party wall (see the Party Wall Act 1996), the owners of the premises sharing that party wall have joint responsibility for it. If satisfied that the statutory nuisance exists, the magistrates' court is obliged to make an order requiring its abatement within a specified time, with the execution of necessary works (1990 Act s.82(2)(a)). In relation to costs (expenses) incurred in the proceedings, Parliament has provided as follows (s.82(12), emphasis added):

> ***Where on the hearing of proceedings for an order under subsection (2) above it is proved that the alleged nuisance existed at the date of the making of the complaint or summary application, then, whether or not at the date of the hearing it still exists or is likely to recur, the court … shall order the defendant… (or defendants … in such proportions as appears fair and reasonable) to pay to the person bringing the proceedings such amount as the court … considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.***

This statutory language is at the heart of this case.

5. Section 82(12) has been considered in a number of cases, of which the following were cited to me:

   i) Davenport v Walsall MBC [1997] Env LR 24 (Pill LJ & Keene J 17.3.95) was a successful appeal by case stated by a private prosecutor (Mrs Davenport), overturning the Walsall magistrates' decision not to award her costs of a successful statutory nuisance proceedings against their local authority landlord, where the magistrates' unreasoned decision that costs were not "properly incurred" was an unreasonable one.

   ii) R v Dudley Magistrates' Court, ex p Hollis [1999] 1 WLR 642 (Schiemann LJ & Moses J 25.11.97) was a successful appeal by case stated by private prosecutors (Mrs Hollis and Mr Probert), overturning the Dudley magistrates' decisions not to award their costs of successful statutory nuisance proceedings against their local authority landlord, where the magistrates had erred in law, having no power to refuse costs on the basis that commencing proceedings had been unnecessary.

   iii) Taylor v Walsall and District Property and Investment Co Ltd [1998] Env LR 600 (Simon Brown LJ & Mance J 13.1.98) was a successful appeal by case stated by a private prosecutor (Mr Taylor), overturning the Walsall magistrates' decision to award him £3,000 out of £4,950 costs of successful statutory nuisance proceedings against his private landlord, where the magistrates' unreasoned decision involved no specific findings as to the objections to costs which had been raised and the hearing had not allowed Mr Taylor's counsel to reply.

   iv) R (Notting Hill Genesis) v Camberwell Green Magistrates' Court [2019] EWHC 1423 (Admin) (Supperstone J 9.5.19) was a successful judicial review challenge to a magistrates' refusal to state a case for appeal, overturning the Camberwell Green magistrates' decision to award a private prosecutor (Ms Smith) full solicitor costs of £21,052.80 against her landlord (Notting Hill

Genesis), where the magistrates erred in law in not considering the individual items challenged and in not addressing a number of significant matters in their reasons.

v) Taylor v Burton [2021] EWHC 1454 (Admin) [2021] HLR 46 (Collins Rice J 28.5.21) was a successful appeal by case stated by the "landlords" (the freehold owner Mrs Taylor and her letting and managing agent Longfield Real Estate), overturning the North Staffordshire magistrates' decision to award a private prosecutor (Ms Burton, their tenant) costs of £29,079.80 (£14,539.90 against each of the landlords) reduced from a schedule of costs of £34,412.60, where the magistrates erred in their approach to the assessment of costs and as to the legal sufficiency of their reasons.

6. Here is what a typical mainstream textbook commentary says in discussing s.82(12). See Cross on Local Government Law at §19-80:

> ***If it is proved that the alleged nuisance existed at the date of the making of the complaint or summary application, the defendant[s] must be ordered to reimburse, in such proportions as appears fair and reasonable, the expenses properly incurred by the person aggrieved in the proceedings.***

The cases footnoted to §19-80 of Cross include Davenport, Hollis, Taylor (Walsall) and Notting Hill. In Taylor (Burton), Collins Rice J similarly encapsulated s.82(12) in this way (at §33):

> ***The magistrates are mandated to order defendants to pay reasonably sufficient compensation for expenses properly incurred …***

Background

7. A reliable encapsulation of the background to the present claim was set out in Mr Graham's skeleton argument, with which no other party took issue. It is from that source that the following description is derived. The Claimant rented No.7 Peaton Street. His landlord was 2020 Homes. The freeholder owners were ZCI UK Properties Ltd ("ZCI"). The Interested Parties were freeholders of the neighbouring house at No.9. A party wall formed the boundary of the back gardens of No.7 and No.9. Buddleias growing in the garden of No.9 had damaged the wall, which had not been properly maintained. That had resulted in a partial collapse, which lacerated the Claimant's hand on 14 January 2020. He required stitches, suffered infection and scarring. He brought proceedings in the magistrates' court for a statutory nuisance abatement order pursuant to s.82 of the 1990 Act. His case was that the party wall constituted premises in a state prejudicial to health or a nuisance (a "statutory nuisance" under s.79(1)(a)), and that the nuisance required to be remedied. Originally, he proceeded against five parties including the Interested Parties (who were the named 3rd and 4th defendants) and ZCI (who were the named 5th defendants). Of these, he discontinued proceedings against the 1st and 2nd named defendants (2020 Homes and their company director). The Interested Parties and ZCI admitted liability and agreed terms of a remedial abatement order, in an agreed draft order. ZCI and the Claimant also agreed that ZCI would pay £4,500 in respect of the Claimant's costs. The Claimant and the Interested Parties agreed (in §10 of the agreed draft order) that:

> ***The 3rd and 4th defendant do pay the Private Prosecutor costs on a joint and severable basis to be assessed, if not agreed, by a Judge at the next hearing (subject to the Courts availability).***

When the case came on for its substantive hearing (on 3.12.20) ("the Hearing"), DJ Capstick ("the District Judge") was informed of the following: that the existence of a statutory nuisance was admitted; that all parties had reached agreement as to the terms of an abatement order; but that the Interested Parties' liability for costs remained in issue (agreement having been reached on costs between the Claimant and the other defendants). The Claimant sought an order for costs against the Interested Parties, pursuant to s.82(12). His claimed costs amounted to £15,630 plus VAT. The First Interested Party attended the Hearing in person. The Second Interested Party did not attend.

8. To that narrative it is worth adding the following points, all reflected in the materials before this Court:

   i) The District Judge had case-managed the case previously. There had been a previous hearing before the District Judge (on 6.10.20), when he had made case-management directions for the Hearing.

   ii) The costs amounting to £15,630 plus VAT (£18,807.72) had been set out in a detailed schedule (statement of costs) prepared for the Hearing, and served by the Claimant's representatives on ZCI and the Interested Parties. It was in response to that detailed schedule that ZCI had agreed to pay, and the Claimant had agreed to accept, a proportion of the costs in the sum of £4,500 (§11 of the agreed draft order). The provision of the detailed schedule was therefore doing, for his part, what Simon Brown LJ had said ought to happen, in this "footnote" in Taylor (Walsall) (at p.606, emphasis added):

   > ***… I would think it appropriate, as a matter of routine in all these cases, for the complainant to give advance notice of any proposed claim for costs, and indeed for the respondents also in advance of the hearing to indicate whether the claim is to be accepted or whether, and if so on what basis, it is to be challenged. I do not suggest that there should be any lengthy pleading process, only that there should be some advance indications given, sufficient to enable both parties to prepare for a hearing before justices at which any outstanding issue can properly then be resolved.***

   iii) The agreed draft order, which included the remedial abatement order, was a document which had been negotiated and agreed between the parties' solicitors. That included the firm of solicitors (PG Legal Ltd) acting for the Interested Parties. PG Legal had filed a skeleton argument on behalf of the Interested Parties prior to the Hearing, at a time when the substance of the abatement order was being contested. As the grounds for judicial review record – and no party has contested – the First Interested Party attended the Hearing "unrepresented", but "had access to his solicitor at PG Legal Limited and indicated that he was speaking to him for advice over the phone". The agreed order – and the order ultimately made by the District Judge – each recorded in a recital that it had been preceded by correspondence from the various solicitors: for the Claimant; for the Interested Parties; and for ZCI.

   iv) The agreed terms recognised the existence of a statutory nuisance, and it was not disputed, including at the Hearing, that that statutory nuisance had existed

at all relevant times. The agreed position (§1 of the agreed draft order), subsequently embodied in an order of the magistrates' court, required that ZCI were to repair or replace the rear boundary party wall so that it was made structurally sound "and no longer prejudicial to health or a nuisance". The phrase "no longer" reflects the clear acknowledgement of the statutory nuisance.

v) The agreed terms (§3 of the agreed draft order), also embodied in the order made by the District Judge, included an agreed obligation on the part of the Interested Parties to pay agreed expenses to ZCI: to "reimburse [ZCI], on a joint and severable basis, a sum equivalent to 50% of the reasonable costs incurred by [ZCI] carrying out the works set out in this Order". Any enforcement of that contribution was specified as being in the county court. The phrase "joint and severable" reflects that each of the Interested Parties was responsible for the whole of these expenses.

9. In the circumstances, there were two key functions for the District Judge to perform at the Hearing. (i) The first was that the Court needed to be satisfied that the substantive nuisance abatement order was an appropriate order to make pursuant to s.82(2). The District Judge was so satisfied. (ii) The second was that the Court needed to deal, pursuant to s.82(12), with the application for costs against the Interested Parties and the question of the assessment of the costs to be borne by them. Unlike the costs as between ZCI and the Claimant (on which there was an agreement), the costs as between the Interested Parties and the Claimant required judicial assessment. The position was similar to that which had arisen in Notting Hill. As in this case, there was in that case an agreement (see Notting Hill at §5), whose effect was that costs needed to be "assessed" by the Camberwell Green magistrates' court.

The Hearing

10. What happened at the Hearing is reliably encapsulated in the grounds for judicial review (3.3.21), with which no other party took issue. It is from that source that the following description is derived. It reflects the contemporaneous note taken by the Claimant's solicitor Ms Magson, a copy of which has also been filed and served in the proceedings. The Defendant has confirmed, through its court clerk, that no note exists within the court of what was said at the hearing. There are signed witness statements before the Court both from Ms Magson and from her colleague Mr Douglas who was the Claimant's advocate at the hearing. In all these circumstances, the Court can be confident, based on evidence, that what follows is an accurate description:

> ***At the Hearing, Mr Douglas handed a copy of the agreed draft consent order to the court clerk, Mr Duncan Towell. District Judge Capstick considered the draft and indicated that he was content to approve the order as drafted, noting that he would need to deal with paragraph 10 in respect of costs against the Interested Parties.***
>
> ***Mr Bashir addressed the Court and informed the Judge that he could not afford to pay any costs as he was in so much debt. Mr Bashir informed the Judge that he could not afford legal representation and that was why he appeared to represent himself. The District Judge said that he would make no order for costs against the third and fourth [defendants] because the third defendant had indicated that he did not have means to pay.***
>
> ***Mr Douglas addressed the court, referring to s.82(12) of the EPA 1990 and explained that a costs schedule had been prepared and was available for the court's consideration if costs were***

> ***to be assessed. He offered the court a copy of the costs schedule. District Judge Capstick did not accept the schedule. The District Judge said 'right then – I'll assess costs - £100'.***
>
> ***Mr Douglas then addressed the District Judge again and read out the wording of s.82(12), submitting that he should consider the costs incurred by the prosecution and the reasonableness of those costs. He referred to paragraph 11 [of the agreed draft order] and submitted that the District Judge could take the fifth defendant's agreement to pay £4,500 plus VAT as a guide as to what was fair and reasonable.***

At this point in the Hearing, Mr Bashir made an affirmation and was asked questions by the District Judge.

> ***The District Judge asked Mr Bashir a limited number of questions about his means. The District Judge asked him whether he owned his own home. Mr Bashir averred that he owned a number of properties but said he was 'getting them all repossessed'. The District Judge did not enquire about how much equity Mr Bashir had in his home, nor about any other assets that Mr Bashir may have had. The District Judge did not require Mr Bashir to fill out a Statement of Means Form. The District Judge did not make any enquiry as to the means of Mrs Bashir who was separately named as fourth defendant in the proceedings. The District Judge did not consider the costs schedule.***
>
> ***Mr Douglas submitted that it was not for the District Judge to consider the likelihood of enforcement, as that would be for the prosecutor to consider at a later date. He submitted that the District Judge should carry out an assessment of the costs schedule and make an award in accordance with section 82(12) EPA 1990.***
>
> ***The District Judge stated "You have done your best Mr Douglas - £100".***
>
> ***The District Judge requested that the draft order be amended by Miss Magson to reflect his decision and to be e-mailed for approval. The final Order was made on 11 December 2020.***

11. In these circumstances, the Order made by the District Judge therefore included the following (at §10):

> ***The third and fourth Defendant to pay the Private Prosecutor costs in the sum of £100, on a joint and severable basis, to be paid within 28 days.***

12. There is a procedural point regarding the materials which are before the Court. Mr Kohli, rightly, reminded me that had the route of an appeal by case stated been pursued by the Claimant, a case stated document would have been prepared by the Defendant (the magistrates) pursuant to Crim PR 35.3. The procedural advantages were identified by Burnton J in R (Brighton and Hove City Council) v Brighton and Hove Justices [2004] EWHC 1800 (Admin) at §23. However, in the circumstances of the present case there is, in my judgment, no procedural disadvantage from judicial review as the mode of challenge. There is no deficit in terms of this Court understanding what the District Judge did or on what basis. As I have explained, it has been confirmed that there is no court note of the hearing (had one existed, I would in any event then have been able to consider it). It is clear what the District Judge did in the present case, and why. There is a contemporaneous note, whose author was a solicitor who was observing the hearing and taking notes, undistracted by playing the role of advocate, which was undertaken by her colleague. The District Judge focused on the First Interested Party's means. That was the 'prism' through which he approached the question of costs. He considered that the First Interested Party lacked the means to pay costs. On that basis, he assessed the Interested Parties' liability by taking a nominal amount: £100.

The judicial review claim

13. The grounds on which judicial review is sought, and the remedy sought, are framed in the following terms in the Claimant's pleaded grounds of claim:

> ***The District Judge erred in law in the manner in which the Claimant's costs application was considered, in that:***
>
> > ***(a) he had regard to the means of the paying party, which were an irrelevant consideration when assessing costs under s.82(12) of the EPA 1990;***
> >
> > ***(b) further or alternatively, he failed to have regard to all relevant considerations in that he: (i) failed to have regard to the amounts claimed and to whether the items of expenses were reasonably and properly incurred; (ii) failed (if, contrary to the submission above) the paying party's means were relevant) to require Mr Bashir to give a complete picture of his means including any equity in his properties and the assets he owns (such as savings, investments and motor vehicles); (iii) failed (if the paying party's means were relevant) to have regard to the means of Mrs Bashir or to make any inquiries about her when considering what the appropriate costs award was against her; and/or (iv) failed (if there was a broad discretion contrary to the submissions above) to consider the financial means of and prejudice to the Claimant in leaving him to bear his own costs, and failed to balance this against circumstances of the paying parties;***
> >
> > ***(c) he acted irrationally or unreasonably in awarding costs of £100 without any justification as to how that figure was arrived at and why that was the appropriate amount (particularly when he had agreed to the provision in the draft order requiring the Interested Parties to pay for remedial works to abate the nuisance, and named £100 before questioning Mr Bashir as to his means); and/or***
> >
> > ***(d) he failed to give any, or any adequate, reasons for the decisions in respect of the Interested Parties, thereby giving rise to a substantial doubt as to whether the decisions were made in a rational and lawful manner having regard to all relevant considerations and without regard to irrelevant considerations.***
>
> ***In the light of the above, the Court should grant … an order quashing paragraph 10 of the Order and remitting consideration of the issue of costs against the Interested Parties to the Magistrates' Court.***

Permission

14. In granting permission for judicial review, the Permission Judge said this, regarding the substance of the challenge:

> ***The grounds that (1) an error of law was made on focusing on means when considering the making of the order rather than its execution; (2) that, if means were relevant, they were inadequately explored and (3) that inadequate reasons were given, are each arguable with a realistic prospect of success.***

15. The Permission Judge also identified a procedural issue, about the Claimant's failure to proceed by way of case stated appeal. He said this:

> ***There may be an issue as to whether this case should have been brought as an appeal by way of case stated but it at the least arguable, with a real prospect of success, that even if this is so, as a matter of discretion, the judicial review should proceed (see R (Brighton and Hove City Council) v Brighton and Hove Justices [2004] EWHC 1800 (Admin)).***

Substance

16. Although there is the important procedural point in this case, raised by the Permission Judge (§15 above), I am going to deal with the substance of the challenge first. I heard argument on the substance. Permission has been granted. Two points, in my judgment, are really at the heart of the substance of the case. As formulated in the grounds for judicial review they are the contentions that the District Judge "erred in law in the manner in which the Claimant's costs application was considered": (i) in the way that he "had regard to the means of the paying party"; and (ii) in the way that he "failed to have regard to the amounts claimed and to whether the items of expenses were reasonably and properly incurred".

17. I have referred (see §5 above) to the line of cases that were cited to me and are directly concerned with s.82(12). In fairness to the District Judge, these cases were not provided to him or cited to him. Unlike me, he had from the Claimant no skeleton argument setting out key passages from those cases. However, what was of course before the District Judge was the applicable statutory provision (see §4 above), to which repeated reference was made by Mr Douglas at the Hearing (see §10 above). And the District Judge was satisfied that the statutory nuisance existed (see §§8(iv) and 9(i) above). Moreover, nobody was denying that it had been "proved" that the statutory nuisance had "existed at the date of the making of the complaint or summary application". So, the words of the statutory provision governing the District Judge's function were those which I emphasised earlier (see §4 above):

> ***the court … shall order the defendant… (or defendants … in such proportions as appears fair and reasonable) to pay to the person bringing the proceedings such amount as the court … considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.***

18. I think it would be helpful to gather together here some points of law which arise directly from the express language of that provision:

    (1) This is a statutory duty (the word is "shall"); not a discretion (as would be connoted by the word "may"). The duty, moreover, involves a specific formula. These features are significant. It is familiar in the law for courts to have conferred on them, by Parliament or by rules, general discretionary powers in relation to costs.

    (2) The discharge of the statutory duty involves the magistrates' court addressing three questions, all of which are set out in the statutory wording. They are:

        - Question 1. What "expenses" were "properly incurred" by the private prosecutor in the proceedings ("properly incurred expenses")? To illustrate this, any item or items of expenditure not "properly incurred" needs to be excluded.

        - Question 2. What amount is "reasonably sufficient to compensate" the private prosecutor for the properly incurred expenses? To illustrate this, any amount which is higher than "reasonably sufficient to compensate" needs to be reduced to an amount which is "reasonably sufficient to compensate".

        - Question 3. If there is more than one defendant responsible, what is a "fair and reasonable proportion" of the expenses – identified by answering

Questions 1 and 2 – which any given defendant should be ordered to pay to the private prosecutor?

(3) In Question 1, the question of propriety ("properly") is not freestanding. Propriety is about whether a step (the step involving the incurring of that item of costs) was a proper one for the private prosecutor to have taken ("properly incurred costs").

(4) In Question 2, the question of reasonableness ("reasonably") is not freestanding. Reasonableness goes to sufficiency, for a purpose: to compensate the private prosecutor ("reasonably sufficient to compensate").

(5) Questions 1-3 all engage an exercise of evaluative judgment – sometimes called "discretion" – to be performed by the magistrates' court. In Questions 1 and 2 the margin (or latitude) for evaluative judgment is reflected in the word "considers". In Question 3 it is reflected in the statutory word "appears". But the judgment (or discretion) arises in asking specific questions posed by the subsection. The magistrates' court thus has a latitude for evaluative judgment – including a judgment in identifying considerations which assist it or do not assist it – provided always that the magistrates' court asks the right questions, correctly recognises legal relevancies and irrelevancies, adopts an answer within the range of reasonable responses, and gives legally adequate reasons.

19. All of these points (§18 above) are derived from the three lines of text in the governing statutory provision. They can be seen without the assistance of the citation of case-law or textbook commentary.

20. To these, it is worth adding some following references. As to point (1) (§18(1) above), there is a useful point of contrast, and a point about history. The point of contrast arises from s.18(1) of the Prosecution of Offences Act 1985, which provides:

> ***… the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.***

That provision is a discretion, linked to a more general formula. Section 82(12) of the 1990 Act contrasts with that. The contrast reflects the fact that Parliament was doing something distinctive. That brings in the point as to the history. The 1990 Act had a statutory predecessor (a 1936 Act). Under the predecessor Act, the costs of the statutory nuisance private prosecutor (who, unlike a local authority prosecutor did not have to give advance written notice) had been authoritatively interpreted by the House of Lords (in October 1990, when a case called Bujok reached its summit) to involve costs being "in the discretion of the justices". The point about history was explained by Keene J in Davenport at p.40:

> ***What is clear to that Parliament, when it enacted section 82(12) did intend to bring about a change in the law in favour of a complainant in cases where a statutory nuisance was established. Under the earlier provision of the Public Health Act 1936 section 99, the costs of proceedings brought by a person aggrieved, rather than by the Local Authority, had been held to be in the discretion of the magistrates (see: Sandwell Metropolitan Borough Council v Bujok [1990] 1 WLR 1350)…***

21. In relation to point (5) (see §18(5) above), this is how that point was put by Keene J in Davenport at p.40:

> ***[T]he magistrates, so long as they apply the right test, must have some degree of discretion in deciding what is or what is not an expense properly incurred. The exercise of that discretion is not something to be lightly interfered with. It is only if they can be seen to have adopted the wrong approach or to have arrived at a decision for which there is no evidential basis or which is unreasonable in the sense that no reasonable tribunal properly directing itself could have arrived at it, that [the High Court] should intervene on the basis that there has been an error of law.***

22. Parliament imposed a duty, and prescribed the questions to be asked. This is a "broad brush", "summary" process. Nevertheless, asking and answering those questions can be expected to involve some inquiry – some "investigation" – by the magistrates, in applying "the right test" and in getting to their evaluative answer. As Collins Rice J said in Taylor (Burton) at §55:

> ***This is a summary process and it is not proper for parties to go to significant lengths and expense in litigating quantum. Nor is it at all incumbent on Magistrates to deliver reasoned judgments on compensation or to be subjected to unrealistic, oppressive and needless standards of point-by-point analysis.***

As it had been put by Simon Brown LJ in Taylor (Walsall) at p.606 (in a passage cited in Notting Hill at §15 and Taylor (Burton) at §9):

> ***Clearly section 82(12) calls for an essentially broad brush approach. It requires only the crudest form of taxation process. But, that notwithstanding, where, as here, a substantial sum is claimed by way of costs, the justices must, in my judgment, take proper steps to investigate just how that claim is arrived at and the detailed grounds upon which it is sought to challenge it. What, they must ask, is the basis upon which any item or head of costs is said by the respondents not to have been properly incurred, whether wholly or in part …***

23. I have illustrated Question 1 ("properly incurred expenses") by referring to any *item of expenditure* not "properly incurred" as needing to be *excluded* (see §18(2) above). I have illustrated Question 2 ("reasonably sufficient to compensate") as referring to a *level of expense* for an included item which may need to be *reduced* (see §18(2) above). These two features were identified in Hollis at p.659F. There, having described the magistrates' court as:

> ***… bound to order costs provided that it is satisfied that the statutory nuisance existed at the time of the complaint***

the Court continued (numbering inserted):

> ***Its consideration is limited to questions [1] as to whether particular items of expenditure were unnecessary and [2] as to whether the amounts claimed are more than those warranted by the particular proceedings before them …***

These same two features can be seen, in a related context, in R v Zinga [2014] EWCA Crim 1823 [2015] 1 Cr App R 2 at §19. That passage was discussing previous authority relating to an equivalent phrase within s.16(6) of the 1985 Act ("such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings"), which is concerned with defendant's costs orders. In that context, what were identified were "two questions": "[1] whether it was proper and reasonable to instruct the solicitors and/or advocates actually instructed …; and [2] if so, whether "the costs were reasonable".

24. I have explained (§18(4) above) that in Question 2, "reasonably" is not freestanding: it goes to sufficiency, and for the purpose of compensating the private prosecutor ("reasonably sufficient to compensate"). Two passages cited in Zinga (at §§19 and 21), taken from earlier case-law concerned with the same statutory phrase (the judgment of Elias LJ in R (Law Society) v Lord Chancellor [2010] EWHC 1406 (Admin) [2011] 1 WLR 234 at §§52 and 48) explain the point:

> ***The obligation is to provide a sum of money which is reasonably sufficient to compensate. The word 'sufficient' presupposes that there is some measure to determine whether the amount paid satisfies that criterion of sufficiency or not… [T]he relevant measure is the principle of compensation, albeit one which is constrained by considerations of what is reasonable and proper expenditure.***
>
> ***[The statutory provision] requires that the compensation must be 'reasonably sufficient'. It should be such amount as is reasonably incurred for work properly undertaken…***

In other words, it is not reasonableness per se. Nor is it whether it is reasonable for the costs to have to be paid by the defendant. The focus of reasonableness is on the costs incurred. It is reasonable sufficiency to compensate.

25. In my judgment, the District Judge clearly fell into error in his approach to the assessment of costs in the present case. If he had tracked the contours of this particular statutory provision, he would have found within it his 'route to verdict'. He would have asked the 3 Questions (§18(2)) embedded in the particular statutory language. He would have evaluated the contents of the costs schedule. He would have considered any "basis" on which it was "challenged" by the Interested Parties (see §8(ii) above). He would have addressed whether any items were to be excluded (as not "reasonably incurred expenses"); or whether any amounts were to be reduced (as not "reasonably sufficient to compensate"); or whether there were any points regarding apportionment as between the Interested Parties or alongside ZCI (as a "fair and reasonable proportion"), in circumstances where ZCI's costs liability had been agreed (at £4,500). The District Judge did not – even in a broad brush, summary way – 'investigate' the position, in a way which set out to answer the 3 Questions, and which then enabled a reasoned conclusion by reference to those 3 Questions, so as to answer the main points which had been made.

26. The District Judge did something different. He looked at costs through the "prism" of the Interested Parties' means – or more specifically, the First Interested Party's means. The District Judge may very well have had in the back, or the forefront, of his mind a general principle regarding costs in criminal cases. This general principle is to be found described – by reference to a line of relevant prior authorities – by Lord Bingham CJ (for the Divisional Court) in R v Northallerton Magistrates' Court, ex p Dove [2000] 1 Cr App R (S) 136 (decided on 25.5.99) at p.142. Lord Bingham CJ had explained that what could be identified, having regard to the "background of authority", were a number of propositions. The first of Lord Bingham's propositions was this:

> ***An order to pay costs to the prosecutor should never exceed the sum which, having regard to the defendant's means and any other financial order imposed upon him, the defendant is able to pay and which it is reasonable to order the defendant to pay.***

Adherence to Lord Bingham CJ's first Dove proposition would explain why a judge in a criminal case, addressing a question of costs, would look at costs through the 'prism' of a defendant's means. Whether or not he had Lord Bingham's first Dove proposition

– or textbook commentary reflecting it – in mind, that is what the District Judge did in looking through the "prism" of a defendant's means.

27. As Mr Graham points out, Lord Bingham CJ's proposition was identified in a case and context of the general statutory power in s.18(1) of the 1985 Act. That is the provision (see §20 above), 5 years before the 1990 Act, by which Parliament conferred the general discretion to make a costs order in favour of the prosecutor in criminal case. Moreover, the discussion in Dove was in a general criminal context where an applicable criminal practice direction stated in terms (see Dove at p.140):

> ***An order [for costs] should be made where the court is satisfied that the offender or appellant has the means and the ability to pay.***

28. There has never been a 'read-across' from Lord Bingham CJ's first Dove proposition – identified by him from the general s.18 case-law and practice direction – into the particular context of s.82(12) of the 1990 Act, with its special statutory design: its mandated duty; its expressly designed 3 Questions; and the 'compensatory sufficiency' focus of 'reasonableness' (Question 2). It is those questions which govern costs under s.82(12). What follows is this. For the purposes of s.82(12), the question whether the defendant has the "means" to pay the costs order imposed in favour of the private prosecutor is a relevant question – always – to questions of recovery and enforcement of the costs which the magistrates' court has ordered under s.82(12). In fact. the present case illustrates the practical implications of that policy choice made by Parliament. Evidence placed before this Court indicates that the Interested Parties are the registered freehold owners of a house in which there is believed to be considerable equity, and on the drive of which two expensive cars were seen parked when the papers were served. What is more, the Interested Parties were under an obligation, through the court order made by the District Judge, to pay 50% of ZCI's costs of the works on the rear boundary party wall, for which they could be pursued by ZCI in the county court (see §8(5) above). The Interested Parties, moreover, had been represented by solicitors. Whether there is the impecuniosity which the First Interested Party professed, and which the District Judge was prepared to accept, would be seen through the enforcement (execution) phase. Whether the Second Interested Party was also impecunious would also remain to be seen. The point is that Parliament in s.82(12) had made a policy choice, to avoid such considerations being a 'prism' applicable to the appropriateness, in principle, of obtaining a costs order itself.

29. These conclusions are quite sufficient to determine the substantive aspects of this claim. But two topics remain. The first is this. Mr Graham argues that, in the application by the magistrates' court of s.82(12), a defendant's means is – necessarily and always – a "legal irrelevancy" to which no regard can ever be had. He limits that proposition to the magistrates' courts' answer to Question 1 and Question 2; he does not advance it in relation to Question 3 (see §18(2) above). His position is as follows. He accepts that considerations of "proportionality" can be relevant to Question 2. He accepts that whether there is a "reasonable relationship" between the level of costs and the subject-matter of the dispute can be relevant to that Question. He says that this is what Supperstone J meant, in describing the need to consider whether there was a "direct correlation" between "the costs" and the remedies ("damages" and "non-financial compensation") secured by the complainant private prosecutor, in Notting Hill (at §24). Mr Graham also accepts that Question 2 could include some, at least, of the considerations listed seen in relation to civil costs under CPR 44.3(5), to which

Supperstone J said there was an "arguable … analogy" (Notting Hill at §23) in a passage to which Collins Rice J referred in Taylor (Burton) at §10. The CPR 44.3(5) considerations which Mr Graham accepted could be relevant were those concerned with whether the costs bear a reasonable relationship to: (a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue in the proceedings; (c) the complexity of the litigation; and (d) any additional work generated by the conduct of the paying party. Next, Mr Graham accepted that a defendant's means could, in principle, be relevant to Question 3 ("fair and reasonable proportion"), when the magistrates come to consider how costs should be apportioned between co-defendants each of whom is liable. At that point, and for that purpose, their relative means could be relevant. Mr Graham submitted that when in Taylor (Burton) Collins Rice J expressed her concern that it was "troubling" that the defendant landlord's "means" had not been addressed in the magistrates' reasons (see §53), she was not doing the following. She was not analysing or endorsing "means" as a legal relevancy; still less beyond Question 3; nor was she analysing why that was so. Rather, she was making a point about legally adequate reasons, which need in principle to address the principal points which have been made (see §20) – of which this was one – and on which there was "silence" from the magistrates (§53). So, this was a reasons point.

30. In his submissions to assist the Court on the law, Mr Kohli – while maintaining the Defendant's "neutrality" as to the lawfulness or unlawfulness of the District Judge's decision in this case – submitted as follows. He said that a defendant's means could, in principle, be a relevant consideration in relation to Question 2, as well as Question 3. In support, he pointed out that the language found in s.82(12) has been used in the context of general criminal costs orders within Crim PR 45.2(6)(a), which says this: "If the court makes an order for the payment of costs (a) the general rule is that it must be for an amount that is sufficient reasonably to compensate the recipient for costs (i) actually, reasonably and properly incurred, and (ii) reasonable in amount…" Mr Kohli – while stopping short of suggesting that Lord Bingham CJ's first Dove proposition (see §26 above) is a proposition applicable to s.82(12) cases – submitted that there would be an obvious principled virtue in a degree of consistency between different aspects of costs in criminal cases. He submitted that it would be "odd" if a defendant's means were "incapable" of being a relevant factor "in an appropriate case" in the context of Question 2 ("*reasonably* sufficient to compensate"); as well as in the context of Question 3 ("fair and *reasonable* proportion") which Mr Graham accepts.

31. In my judgment, it is impossible to "reverse-engineer" a position, from the s.82(12) language as found within Crim PR 45.2(6)(a), so as to create a reliable parallel between the position under the two provisions. If there is a parallel, it would be found in considering the narrow question of the directly-equivalent language within the provision (here, Crim PR 45.2(6)(a)), but not in the broader position or interpretation of that provision. It was a narrow focus of that kind which provided assistance in Zinga (see §§23-24 above). The operation of Crim PR 45.2(6)(a) would need to be seen in the context of the applicable provision of primary legislation: for example, s.18(1) of the 1985 Act (see §20 above). Crim PR 45.2(6)(a) is, by design, inapplicable to s.82 cases: see Crim PR 45.1 ("when this Part applies"). Crim PR 45.2(6)(a) is expressly premised on an "if" ("If the court makes an order"). It is not triggered by a "shall". It involves a "general rule". It is also accompanied by an explicit (non-exhaustive) list of "relevant factors" (Crim PR 45.2(7)).

32. Further, in my judgment, neither Notting Hill nor Taylor (Burton) stands as an authority for the proposition that a defendant's means can be a relevant consideration in relation to Question 2. In Notting Hill (at §23-24), Supperstone J was focusing on 'proportionality' considerations. He had mentioned Dove (at §20). But he did not adopt Dove and he did not refer to the question of means. In Taylor (Burton), Collins Rice J (at §§20 and 53) referred to "Mrs Taylor's limited means and resources and … Longfield's financial struggles". But, as Mr Graham points out, she was focusing on the absence of legally adequate reasons from the magistrates whose silence meant they had not addressed the main points raised. She too mentioned Dove (at §12), when she said: "The financial means of the paying party is a relevant consideration in the award of costs in criminal proceedings". But she did not subsequently anywhere adopt that position in the context of section 82(12), still less analyse the soundness of such a read-across. Indeed, she was at pains ultimately to emphasise the importance of the statutory language of s.82(12) and to warn against making too much of suggested "analogies" (see §56).

33. The Divisional Court cases which I have discussed (see §5 above) – cases which were decided on 17.3.95, 25.11.97 and 13.1.98 – were a line of authority alongside the general criminal costs case-law which Lord Bingham CJ came to discuss in Dove. Lord Bingham CJ was not discussing the s.82(12) cases, arising from a specific context. They would not have supported his first Dove proposition. It was not said in Taylor (Walsall) that the means of the private landlord were relevant (the other two cases were local authority landlords). The general parallel which Mr Kohli draws with Crim PR 45.2(6)(a) is not a safe one, since that wording appears in a broader discretionary setting.

34. It is common ground between Mr Graham and Mr Kohli that the means of a defendant, or the relative means of the private prosecutor and a defendant, would be legally irrelevant to the application of Question 1. I struggle to see how the means of the defendant, or the relative means of the private prosecutor and the defendant, would be a relevant consideration which a magistrates' court could properly take into account in its exercise of evaluative judgment in the application of Question 2. As I have emphasised (see §§18(4) and 24 above), 'reasonableness' in Question 2 is not freestanding. It is not concerned with the reasonableness of the defendant being asked to pay the private prosecutor's costs. It was not designed in that way by Parliament. It is, instead, the reasonable sufficiency to compensate the private prosecutor. The most that could be said, in my judgment, is two things. First, if there is a range of sums which constitute 'reasonably sufficient compensation' for the private prosecutor – when viewed in terms of the reasonableness of the level of costs for the allowable items (Question 1) – then the magistrates' choice of figure *within that range* might take into account the means (whether they be wealth or poverty) of the defendant. Secondly, if the magistrates' court is considering the reasonableness of the level of costs for the allowable items, the magistrates might take into account of the resources of the defendant: an example might be that the private prosecutor was facing a deep-pocketed defendant who was instructing very expensive commercial firm of solicitors or expert, and where the private prosecutor did the same; another might be the deep-pocketed private prosecutor who was instructing very expensive commercial firm of solicitors or expert in a prosecution involving a defendant of modest means deploying far more modest legal or expert firepower. The key point about all of these examples of what may be possible – on a 'never say never' basis – is that it is very far from the adoption

of the "prism" of means, and very far from Dove proposition one. But I cannot, and ought not, exclude the possibility that a magistrates' court, in the particular circumstances of an individual case – correctly applying its mind to Question 2 – could find the relative resources of the parties, or some point linked to those resources, to be of assistance in reaching the correct answer to Question 2. In the end, it suffices to say that this is not what the District Judge did in the present case. He treated the Interested Parties' means as the 'prism' through which to decide the question of costs.

35. The final topic as to the substance concerns Mr Graham's 'even if' arguments. He says that 'even if' – or to the extent – that the focus under s.82(12) were properly on a defendant's means, the District Judge's investigation and inquiry in the present case would nevertheless be legally insufficient; and the outcome would nevertheless be unreasonable. I would have accepted these submissions, so far as concerns the investigation and inquiry, which I would have held were material features of process which vitiated the conclusion as a matter of public law. The First Interested Party came to court for an assessment of costs. He made assertions as to means. There was no documentary evidence in support. There was no statement of means. There was nothing said, or enquired into, in relation to the Second Interested Party's means. The District Judge did not grapple with the fact that the Interested Parties had instructed solicitors who had been acting on their behalf (and still were, in the background); nor that they had agreed an order included a 50% liability for the costs of the work needing to be done to the rear boundary party wall. There are other process problems. The District Judge did not even examine the costs schedule. Nor did he consider the Claimant's means. However, all of this is 'what if' territory. Nothing turns on any of this.

Procedure

36. I turn to the important procedural question which remains. Judicial review is a discretionary remedy in which there are well-established principles as to the appropriateness of this form of recourse to law. It is unmistakeable that the line of authorities (see §5 above) which concern challenges to decisions on costs in statutory nuisance cases in the application of the s.82(12) duty are case stated appeals: Davenport; Hollis; Taylor (Walsall) and Taylor (Burton). Only Notting Hill is a judicial review case, but that was only because the magistrates had been requested to state a case and had refused to do so, and that refusal was challenged by judicial review. Case stated appeals involve a short and clear time limit (21 days) with no discretion to extend time: R (Mishra) v Colchester Magistrates' Court [2017] EWHC 2869 (Admin) [2018] 1 WLR 1351. In the present case there was no attempt to appeal by case stated; there was no request to the District Judge to state a case; there was no action taken within the 21 day time limit. What happened was that a letter before claim was not written until 19 February 2021. That was in the context of a decision which had been made at a hearing on 3 December 2020. What is more, the grounds for judicial review (which cited the line of authorities), and the evidence in support, did not draw attention to the case stated route and its unavailability by reason of the expiry of the time limit.

37. Happily, the Permission Judge was not in any way misled by the Claimant's failure to address the alternative remedy point at the outset, in the judicial review grounds. That is undoubtedly what ought to have happened. But this claim did not, in the event, gain any false momentum at the permission stage. The Permission Judge was fully alive to the unused case stated appeal, and he was alive to a viable answer. It arose from the Brighton case to which he referred in his reasons (see §15 above). As a specialist

regional Administrative Court judge – sitting in Leeds – he had encountered this point in an earlier case: see R (Andy Mann Ltd) v York Magistrates Court [2020] EWHC 2540 (Admin) at §§43-44. That case had turned on its facts: no objection had been raised to the invocation of the judicial review procedure; it was difficult to identify any prejudice to the parties caused by the form of the proceedings; the magistrates court had seemingly positively advised the claimant that judicial review was the only remedy; permission for judicial review had been given; and absent identifiable prejudice caused to another party the court was reluctant to cause a good claim to be defeated by an error as to the form of the proceedings.

38. In Brighton itself, the Judge (Stanley Burnton J) had exercised his judgment and discretion to allow the claim for judicial review notwithstanding the failure to appeal by way of case stated. He identified (at §23) the advantages of the discipline of case stated, in particular relating to the form in which the materials will be before the High Court. So far as that is concerned, I have explained why no disadvantage has arisen in this case (see §12 above). Stanley Burnton J referred to judicial review as most appropriate where there is an alleged procedural impropriety. He then concluded that even in the absence of procedural impropriety, judicial review was appropriate for four reasons which he emphasised (§25): the objection raised to judicial review had been late in the day, not raised until 6 months after the commencement of the judicial review proceedings and after permission for judicial review been granted; the magistrates' court (the defendant to the judicial review) did not object to the form of the proceedings; the court could ensure that no prejudice was caused to a party by the form of the proceedings and none had been suggested; and, absent prejudice or some other good reason to refuse to permit a party to proceed by way of judicial review, the court should be reluctant to cause a good claim to be defeated by an error as to the form of the proceedings.

39. Appeal by case stated was, in my judgment, undoubtedly the route which the Claimant should have taken, and he needed to adhere to the strict 21 day time limit. To allow him to succeed by judicial review serves to prejudice of the Interested Parties, compared with the dismissal of the claim. There is therefore a clear basis for dismissing the claim, on the dual basis that: (a) the Claimant proceeded by judicial review and not case stated; and (b) he would have been out of time to proceed by case stated.

40. In the particular circumstances of the present case, I am not going to dismiss the claim on this basis. I will explain why.

    i) The alternative remedy principle in judicial review is a 'discretionary bar'. There is no 'jurisdictional' bar. The judicial review court retains jurisdiction notwithstanding an applicable, and even an unused, statutory remedy. Parliament has not made provision in the context of appeal by case stated – as it has done in the context of other statutory routes of challenge – to impose a "time-limit ouster". Parliament has thus not made the statutory remedy of case stated appeal an "exclusive" remedy.

    ii) It was open to the Defendant, or to the Interested Parties, to raise the question of the unused case stated and the expiry of the 21 day time limit. That point was never taken by the Defendant, from first to last. No party picked up on the point at the permission stage. Permission for judicial review was granted. No party adopted the point, even after the Permission Judge specifically drew attention to

it in his reasons (see §15 above). The point was subsequently addressed in Mr Graham's skeleton argument. The Interested Parties made contact with the Court for the first time on the day of the substantive hearing. From the Claimant's perspective, the point was not being taken against the Claimant, by any party. It will, moreover, have been on that basis that the Claimant continued to pursue the claim for judicial review and incurred the ongoing costs of doing so.

iii) It can always be said that there is "prejudice" to another party, in granting judicial review rather than dismissing it. I accept that there is "prejudice" in that a case stated appeal would have been out of time, when judicial review was commenced. Having said that, no material has been put beyond the Court to suggest that the Interested Parties knew, or had been advised about, case stated and any 21 day time limit.

iv) In the particular circumstances, it would not be appropriate to allow this claim to be defeated on alternative remedy grounds. The justice of the case is accurately encapsulated by Mr Graham in his skeleton argument. The error of law is manifest and the Interested Parties have been able to defer paying more than £100 in costs to the Claimant pending resolution of the proceedings. Dismissal of this claim will give them an undeserved and unjustified windfall.

In all the circumstances – and emphasising again that no party raised any objection at any stage – it is, in my judgment, in the interests of justice that the remedy which the Court undoubtedly has jurisdiction to grant, to address a legally erroneous approach, should be granted rather than withheld.

Conclusion and remedy

41. For the reasons that I have given the claim for judicial review succeeds. The remedy which I propose to grant is to quash the District Judge's decision on costs and remit the question of costs for determination (as in Taylor (Burton) at §66)), and by a differently constituted bench (as in Notting Hill at §31).