**Neutral Citation Number: [2023] EWHC 1817 (Admin)**

# In the High Court of Justice
# King's Bench Division
# Administrative Court

**CO/3940/2022**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th July 2023

**Before** :

**MR JUSTICE RITCHIE**

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**BETWEEN**

**DAMIAN FERKO**

**Appellant**

**- and -**

**EALING MAGISTRATES COURT [1]**
**KAPIESA LTD T/A XARA ESTATES [2]**
**SURINDER KUMAR [3]**
**KRISHNA KUMAR [4]**

**Respondents**

**Mr Michael Marsh-Hyde** (instructed by **Alexander Shaw Solicitors**) for the **Appellant**
The 1st Respondent did not appear
**Mr. Sharaz Ahmed** (instructed on direct professional access) for the **2nd Respondent**
**Mr K Uddin** (instructed by **HSBS Law**) for the **3rd and 4th Respondents**

Hearing date: 11th July 2023

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**APPROVED JUDGMENT**

**Mr Justice Ritchie:**

**The Parties**

1. The Appellant is the tenant of a first floor, two bedroom flat at 59a Silverdale Gardens, Hayes, Middlesex (the Flat). He complains of serious internal mould growth and asserts a statutory nuisance caused by his landlord and the owners of the Flat.

2. The first Respondent is the Magistrates Court which heard the Appellant's complaint and dismissed it.

3. The 2nd Respondent has a lease of the Flat and sub-let it to the Appellant.

4. The 3rd and 4th Respondents are the freehold owners of the Flat.

**Bundles**

5. For the appeal I was provided with an appeal bundle and an authorities bundle and a skeleton argument from the Appellant. At the last minute the Respondents filed skeleton arguments and a few authorities.

**The Issues**

6. Although this was listed for a day as the the full appeal by way of case stated, with an application at the start, the application took the day so the appeal will take place later.

7. This judgment concerns the Appellant's application to have the Case Stated (CS) amended, better to reflect and summarise the proceedings below and to identify the real issues on the appeal. Currently, so the Appellant asserts, the CS asks the wrong questions, fails accurately to summarise the evidence and contains "after the event" findings and reasons, which were not expressed when the decisions were actually made.

8. The first Respondent (the Magistrates Court) did not appear. The other Respondents either disputed the entirety of the application to amend (R3&4) or agreed that the questions should be expanded and better phrased but disputed the need to amend the other parts of the CS.

**Law and procedure**

**Summary procedure for Abatement of Nuisance**

9. Under S.82 of the *Environmental Protection Act 1990* [EPA 1990]:

> "**82.— Summary proceedings by persons aggrieved by statutory nuisances.**
> (1) A magistrates' court may act under this section on a complaint … made by any person on the ground that he is aggrieved by the existence of a statutory nuisance.

(2) If the magistrates' court … is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises or, in the case of a nuisance within section 79(1)(a) above, in the same street or, … the court … shall make an order for either or both of the following purposes—

(a) requiring the defendant … to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose;

(b) prohibiting a recurrence of the nuisance, and requiring the defendant … within a time specified in the order, to execute any works necessary to prevent the recurrence; and, in England and Wales, may also impose on the defendant a fine not exceeding level 5 on the standard scale.

(3) If the magistrates' court … is satisfied that the alleged nuisance exists and is such as, in the opinion of the court … to render premises unfit for human habitation, an order under subsection (2) above may prohibit the use of the premises for human habitation until the premises are, to the satisfaction of the court or of the sheriff, rendered fit for that purpose.

(4) Proceedings for an order under subsection (2) above shall be brought—

(a) except in a case falling within paragraph (b), (c) or (d) below, against the person responsible for the nuisance;

(b) where the nuisance arises from any defect of a structural character, against the owner of the premises;"

…

"(5) Subject to subsection (5A) below, where more than one person is responsible for a statutory nuisance, subsections (1)
to (4) above shall apply to each of those persons whether or not what any one of them is responsible for would by itself
amount to a nuisance."

10. By S.79 of the EPA 1990:

"**79.— Statutory nuisances and inspections therefor.**

(1) Subject to subsections (1A) to (6A) below, the following matters constitute "statutory nuisances" for the purposes of this Part, that is to say—

(a) any premises in such a state as to be prejudicial to health or a nuisance;"

**S.79:** *"person responsible" —*

(a) in relation to a statutory nuisance, means the person to whose act, default or sufferance the nuisance is attributable;"

11. Thus, a tenant can apply for (1) an abatement and repair order triggered by proof of prejudice to health or nuisance and/or (2) a declaration that the Flat was unfit for human habitation and a repair order. Causation is expressed in terms of attributability. Nuisance is expressed in terms of (1) injuriousness or (2) fitness for habitation.

**The complaint and the hearing**

12. The Appellant issued two letters before action on 27.1.2022, one to R2 and another to R3 and R4 (together). These included pictures of the severe mould in the Flat in the 2nd bedroom, bathroom, kitchen and living room and alleged the mould had been present since October 2019, that the Appellant had complained many times and that the Respondents had tried to abolish it by painting over many times with little success. The Appellant stated that he suspected penetrating dampness was the cause and was going to get an expert to report. The Appellant had two young children and his wife living in the Flat with him.

13. The Appellant served a report from an expert environmental control officer (this was in my bundle) who declared the mould was injurious to the family and the Flat was unfit for human habitation in the winter. He did not find penetrating dampness, he concluded the mould was caused by internally produced water/steam which condensed on the walls causing the mould.

14. The Appellant issued a complaint under S.82 of the EPA 1990. The complaint went to trial before the Ealing Magistrates [the Court]. The Appellant gave evidence himself and he called Mr Lawrence his environmental protection expert. The case against each Defendant was dismissed on the basis that there was no case to answer (NCTA).

**The Decisions or Judgments**

15. The decisions of the Court were made in two parts. The first was on the application at half time, after the close of the prosecution case (the Appellant's case), made by the owners of the Flat, (D2 and D3, now R3 and R4), that there was no case to answer. Counsel's note of the reasons given matches the official note. The operative part was: *"having reviewed both the oral and written evidence provided by the prosecution expert witness and Mr Ferko we found that the evidence was insufficient."* The case was dismissed and the Defendants acquitted. No further reasons were given.

16. After that success for the owners, the company (D1, now R2) made the same submission through its counsel on the same and on different grounds and the Court concluded that the company faced no case to answer and gave the following reasons: (1) Mr Ferko (the Appellant) had never reported to the Defendant: the broken bathroom extractor fan, broken window handle, or non-opening window. (2) That Mr Lawrence gave evidence that the bathroom fan did not work, a bedroom wall was not dry lined and one window could not be opened or closed easily, but he also

"confirmed" that there was *"no significant structural disrepair"* and all the mould was caused by condensation. The Court explained that *"we believe that his report did not provide conclusive evidence regarding damp and mould and whether what has been referred to as structural defect was only factors (sic) contributing to the mould or there were significant factors attributable to the damp and mould in the flat."* The case was dismissed.

**The appeal procedure**

17. Under S.111 of *the Magistrates Courts Act 1980* the following right of appeal is granted:

> "S.111 **Statement of case by magistrates' court.**
> (1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved; but a person shall not make an application under this section in respect of a decision against which he has a right of appeal to the High Court or which by virtue of any enactment passed after 31st December 1879 is final.
> (2) An application under subsection (1) above shall be made within 21 days after the day on which the decision of the magistrates' court was given.
> (3) …
> (4) …
> (5) If the justices are of opinion that an application under this section is frivolous, they may refuse to state a case, and, if the applicant so requires, shall give him a certificate stating that the application has been refused; but the justices shall not refuse to state a case if the application is made by or under the direction of the Attorney General."

18. The Appellant questioned the proceedings and asked for a case stated and the Court considered the application and drafted a Case Stated (CS). The procedure is governed by Part 35 of *the Criminal Procedure Rules 2020.* Rule 35.2 states this:

> "Criminal procedure
> **35.2.— Application to state a case**
> (1) A party who wants the court to state a case for the opinion of the High Court must—
> (a) apply in writing, not more than 21 days after the decision against which the applicant wants to appeal; and

(b) serve the application on—

(i) the court officer, and

(ii) each other party.

(2) The application must—

(a) specify the decision in issue;

(b) specify the proposed question or questions of law or jurisdiction on which the opinion of the High Court will be asked;

(c) indicate the proposed grounds of appeal;"

19. So, the Respondents were aware of the appeal on receiving service of the application dated 17.8.2022. The application had a full section setting out the issues raised. These, in summary were: (1) there was no evidence of Tenant misconduct to cause the mould; (2) the factors causing the condensation and hence the mould were: (a) inadequate (absent) dry lining on one wall in the 2nd bedroom (cold = condensation = mould); (b) missing loft insulation (cold = condensation = mould); (c) inadequate ventilation – defective bathroom fan, window handle disrepair (reduced ventilation = condensation = mould). (3) there was no structural disrepair (none of the structure was unrepaired), the fittings were in disrepair (fan & window handles) and the structure was inadequate to prevent mould (lack of dry lining and insulation); (4) the reasons given for the decisions were either absent or inadequate. The questions to be asked of the High Court which the Appellant suggested were (I summarise them): (1) **Structural disrepair:** was the lack of structural disrepair a bar to a finding of statutory nuisance by the owner or landlord? (2) **Notice:** was the absence of a tenant complaint setting out the details of the defects or factors causing the mould a bar to a finding of structural nuisance? (3) Was there NCTA on the evidence led and elicited in cross examination? The grounds of appeal in law were (again in summary): (1) The NCTA decisions were wrong because they were founded on the incorrect ruling that the tenant had to prove structural disrepair. Statutory nuisance does encompass that as a cause but also encompasses mould caused by structural inadequacy or broken fittings as well. (2) The Court ignored or failed to take into account the agreed evidence by both experts that: fixtures or fittings were broken (fan, window handles); one wall in the 2nd bedroom was not dry lined and that loft insulation was missing or inadequate. (3) The Court ignored the expert evidence that the Flat was unfit for human habitation in the winter when the mould formed. (4) The Court was wrong to hold in law that the tenant had to identify the causes of the mould and to notify the Landlords/Owners of those. All that the tenant was required in law to do was to notify then landlord/owners of the nuisance. It was then the responsibility of the Landlord/Owners to inspect and identify the precise causes. (5) Hence the NCTA decisions were wrong in law.

20. It is apparent from the above summary that the Appellant questioned the Court's legal ruling and the decision that there was insufficient evidence to prove statutory nuisance at the Flat or the asserted unfitness for human habitation of the Flat.

21. The Court drafted a CS and under CPR r.35.3 served it on the parties seeking representations thereon. Rules 35.3 provides as follows:

> "**35.3.— Preparation of case stated**
> (1) This rule applies where the court decides to state a case for the opinion of the High Court.
> (2) The court officer must serve on each party notice of—
> (a) the decision to state a case, and
> (b) any recognizance ordered by the court.
> (3) Unless the court otherwise directs, not more than 15 business days after the court's decision to state a case—
> (a) in a magistrates' court, the court officer must serve a draft case on each party; or
> (b) in the Crown Court, the applicant must serve a draft case on the court officer and each other party.
> (4) The draft case must—
> (a) specify the decision in issue;
> (b) specify the question(s) of law or jurisdiction on which the opinion of the High Court will be asked;
> (c) include a succinct summary of—
> (i) the nature and history of the proceedings,
> (ii) the court's relevant findings of fact, and
> (iii) the relevant contentions of the parties; and
> (d) if a question is whether there was sufficient evidence on which the court reasonably could reach a finding of fact—
> (i) specify that finding, and
> (ii) include a summary of the evidence on which the court reached that finding.
> (5) Except to the extent that paragraph (4)(d) requires, the draft case must not include an account of the evidence received by the court.
> (6) A party who wants to make representations about the content of the draft case, or to propose a revised draft, must—
> (a) serve the representations, or revised draft, on—
> (i) the court officer, and
> (ii) each other party; and
> (b) do so not more than 15 business days after service of the draft case.
> (7) The court must state the case not more than 15 business days after the time for service of representations under paragraph (6) has expired.
> (8) A case stated for the opinion of the High Court must—
> (a) comply with paragraphs (4) and (5); and
> (b) identify—

(i) the court that stated it, and
(ii) the court office for that court.
(9) The court officer must serve the case stated on each party."

22. The Court sent the draft CS out to the parties on 8.9.2022. It contained no findings of fact. Thus CPR r.35.3 (4) (d) was not fulfilled by the draft. It contained 4 questions for the High Court to answer. These concerned: (1) whether structural disrepair was the only trigger for statutory nuisance – see the first two questions; (2) Whether notice of the detailed defects was required from the tenant; (3) NCTA. There were other errors and omissions raised by the Appellant in relation to the evidential summary and the summary of the submissions, so the Appellant sent representations and a tracked changes redraft of the CS. The Respondents took no part. The Court then redrafted the CS and sent out the final version dated 20.10.2022. It contained only two questions for the High Court: (1) **Reasons:** did the Court fail to give any or any sufficient reasons for the NCTA decisions? (2) **Causation:** was the Court entitled to conclude that causation was no proven to a sufficient level to enable the case to proceed? It contained findings of fact disclosed for the first time.

**The application to amend the CS**

23. On 9th November 2022 the Appellant applied to the High Court for an order to amend the CS.

24. The power to amend is set out in S.28A (2) of the *Senior Courts Act 1981:*

"**28A.— Proceedings on case stated by magistrates' court or Crown Court.**
(1) This section applies where a case is stated for the opinion of the High Court—
(a) by a magistrates' court under section 111 of the Magistrates' Courts Act 1980; or
…
**(2) The High Court may, if it thinks fit, cause the case to be sent back for amendment and, where it does so, the case shall be amended accordingly.**
(3) The High Court shall hear and determine the question arising on the case (or the case as amended) and shall—
(a) reverse, affirm or amend the determination in respect of which the case has been stated; or
(b) remit the matter to the magistrates' court, or the Crown Court, with the opinion of the High Court,
and may make such other order in relation to the matter (including as to costs) as it thinks fit.

> (4) Except as provided by the Administration of Justice Act 1960 (right of appeal to [Supreme Court] 2 in criminal cases), a decision of the High Court under this section is final."

25. PD 52 E of the *Civil Procedure Rules* is also relevant. This governs case stated appeals to the High Court. This states:

> **"SECTION I – INTRODUCTION: APPEALS BY WAY OF CASE STATED**
> 1.1 An appeal by case stated is an appeal to a superior court on the basis of a set of facts specified by the inferior court for the superior court to make a decision on the application of the law to those facts.
> 1.2 (1) This section applies where, under any enactment –
> (a) an appeal lies to the court by way of case stated; or
> (b) a question of law may be referred to the court by way of case stated.
> (2) This section is subject to any provision governing a specific category of appeal in any enactment or Practice Direction 52A, 52B or 52D.
> **Application to state a case**
> 2.1 The procedure for applying to the Crown Court or a Magistrates' Court to have a case stated for the opinion of the High Court is set out in the Criminal Procedure Rules.
> **Filing of appellant's notice**
> 2.2 An appellant must file the appellant's notice at the appeal court within 10 days of the date of the case stated by the court.
> **Documents to be lodged**
> 2.3 The appellant must lodge the following documents with the appellant's notice –
> (a) the stated case;
> (b) a copy of the judgment, order or decision in respect of which the case has been stated; and
> (c) where the judgment, order or decision in respect of which the case has been stated was itself given or made on appeal, a copy of the judgment, order or decision appealed from.
> **Service of appellant's notice**
> 2.4 The appellant must serve the appellant's notice and accompanying documents on all respondents within 4 days after they are filed or lodged at the appeal court."

26. It can be seen that the case stated appeal route is an odd mixture of criminal procedure and civil procedure. However, running through it is the main theme that the appeal is only as to matters of law and jurisdiction and that the Appellant does not handle and

prepare the CS, the Magistrates Court does in consultation with the parties. The evidence before the appeal Court is not provided in an appeal bundle collated by the Appellant, it is set out only in the CS. Therefore, it is crucial to the appeal process that the CS contains an accurate summary of the relevant matters. Those matters are defined by the *Criminal Procedure Rules* which require that the CS "must": (a) specify the decision in issue; (b) specify the question(s) of law on which the opinion of the High Court will be asked; (c) include a succinct summary of (i) the nature and history of the proceedings, (ii) the court's relevant findings of fact, and (iii) the relevant contentions of the parties; and (d) if a question is whether there was sufficient evidence on which the court reasonably could reach a finding of fact— (i) specify that finding, and

(ii) include a summary of the evidence on which the court reached that finding.

(5) Except to the extent that paragraph (4)(d) requires, the draft case must not include an account of the evidence received by the court.

27. These provisions are in contrast to the provisions of PD52E relating to cases stated by Ministers, which include at para. 3.9 the power for the High Court to amend the case stated or to remit. The provisions relating to appeals from Magistrates Courts do not include the power to amend. So, I conclude that I have no power simply to amend the CS, my only power is to remit the CS to the Magistrates Court for amendment and to give an opinion on what needs to be amended and to say why, pursuant to the SCA 1980 S.28A(2).

**The Appellant's submissions**

28. No "tracked changes" redraft of the CS was provided with the application to amend it. I ordered the Appellant to provide one. It was provided 24 hours after the hearing ended. I have received additional Respondents' submissions in writing in the time permitted on the redrafted tracked CS and I take into account those made in writing and at the hearing for the suggested amendments.

**Suggested amendments to the CS**

29. I have redrafted the Appellant's tracked changes CS. The tracked changes version I have drafted will be returned to the Magistrates Court along with the clean copy of the suggested amendments to the CS. I have not attached these to this judgment. The changes set out therein are for the Magistrates to consider and to amend as I suggest, and to add to if they think fit. It is for the Magistrates to add any cross examination answers they wish to highlight, I have seen no transcript. I accept that the final draft of the CS will be for the Magistrates, however my opinion, as the legislation so calls it, should be firm guidance on what I consider should be in the CS. In addition, I have referred in the CS to various exhibits which should be sent to the appellate Court with the CS as attachments. These are: the witness statement of Damian Ferko with exhibits and the expert reports of Mr Lawrence and the agreed Scott Schedule written upon by Mr Hands (the Defendants' expert). I consider these will assist the appeal Court because they stood as evidence in chief. The expert report of Mr Hands was

never admitted into evidence because the case stopped at half time. I set out my reasons for the suggested amendments below.

**Questions**

30. The Appellant submitted that the two questions stated in the CS do not cover the issues raised. I agree. So did R3 and R4. R2 did not agree and submitted that no amendments to the CS should be made.

31. The issues raised in the appeal are:

29.1 **Sufficient reasons for a decision.** The Appellant asserts that the Magistrates gave no reasons for their NCTA decision in relation to the case against R3 and R4 and few in relation to R2. The Appellant relies on a raft of case law in support of the assertion that reasons must be given including *R v Harrow Crown Court ex. P. Dave* [1994] 1 WLR 98; *R v Inner London Crown Court Ex. P Lambeth LBC* [1999] 12 WLUK 186. The Respondents did not put forwards any persuasive arguments to gainsay this. The question posed by the Court covers this but, in my judgment, needs to be focussed on each Defendant.

29.2 **Ex-post facto reasons.** Further reasons and findings of fact were provided by the Magistrates Court hours, days and in some cases months after the cases were stopped at half time on the submissions of NCTA. The Appellant asserts that such reasons were unlawfully provided. A question for the appeal Court in relation to that assertion is needed.

29.3 **Causation.** The Appellant asserts that the second question asked by in the CS, which relates to causation, should be framed more clearly. The root of the question in law is whether the Defendant's responsibility needs to be proven to have been the sole cause of the mould (the but for test) or merely a material cause of it (the material contribution test) to establish "attributability". The criminal standard of proof applies. The Respondents' submissions did not undermine the need for the right questions to be asked of the appeal Court on causation and I have drafted them.

29.4 **Interpretation of the Statutes.** The Appellant submits that the foundation of the Magistrates Court's NCTA decision was the fact that the expert opined that there was no structural disrepair at the Flat. However, it is submitted that structural disrepair is not the crucial element of all statutory nuisance and that fixtures and fittings disrepair and structural inadequacy can also lead to statutory nuisance so the Magistrates were wrong in law. Furthermore, the Appellant submitted that the question of whether the Flat was unfit for human habitation was overlooked by the Magistrates and that was part of the statutory nuisance case. There was no persuasive substantive argument against an appropriate set of questions being asked on interpretation and I have allowed them.

29.5 **Notice requirements.** No question was drafted by the Magistrates to deal with the Appellant's assertion that they imposed a notice requirement on the tenant which was too strict and not required by the Statute. There was no persuasive argument against framing such a question and I have allowed it.

29.6 **NCTA.** The final question I have allowed goes to the overall decisions on NCTA, which I consider are at the root of the appeal and was not asked by the Magistrates.

32. The Statute requires the CS to include a succinct history of the case and the issues on appeal and, if the issue relates to sufficiency of evidence, then the relevant findings of fact and the evidence just in relation to those, but not all the evidence. I have made some alterations to the text and consider that the attachments resolve the issues in most of the examples raised.

**Chronology of disclosure of reasons and findings**

33. One of the grounds of appeal is the chronology of the disclosure of Magistrates Court's reasoning and findings of fact. The Appellant asserts that the findings of fact and reasons were given after the event not at the time of the decisions. To make the chronology clear I have allowed the dates of the provision of the reasons and the findings to be made clear on the CS.

**Conclusions**

34. I have considered the judgment of Mrs Justice Lang in *R. Estate and Agency v Westminster Magistrates Court* [2012] EWHC 4637 (Admin). At para. 8 she ruled thus:

> "The aim of this court, in a case management role, is to seek to ensure that all the issues that have been raised by the appellant are included so that there is an effective hearing of the appeal, subject, of course, to any issues which it would be an abuse of process to include."

35. I agree. I consider that the appeal Court will be better able to do justice between the parties if I grant the application under S.28A of the SCA 1981. I consider that the amendments to the CS in the form returned to the Magistrates Court with this judgment will provide that assistance.

**NOTE**

36. I should mention that it would aid efficiency and cut costs if, in such appeals, the parties asked for such applications under S.28A to be listed for a case management hearing for 1-2 hours straight after the application is filed, rather than to have such applications heard at the start of the full appeal hearing.

END