Judgments

QBD, ADMINISTRATIVE COURT

CO/6273/2012

Neutral Citation Number: [2013] EWHC 2144 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Friday, 15 February 2013

B e f o r e:

MR CMG OCKELTON

(Sitting as a Deputy High Court Judge)

Between:

LITTLE FRANCE LIMITED

Appellant

v

LONDON BOROUGH OF EALING

Respondent

Computer-Aided Transcript of the Stenograph Notes of

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(Official Shorthand Writers to the Court)

Mr Jeremy Phillips (instructed by Dadds) appeared on behalf of the **Appellant**

Mr Josef Cannon (instructed by the London Borough of Ealing) appeared on behalf of the **Respondent**

J U D G M E N T

(Approved)

1. THE DEPUTY JUDGE: This is an appeal by way of case stated against a decision, dated 2 February 2012, of the Justices for West London Local Justice Area sitting at Ealing Magistrates' Court. They had before them an appeal by the appellant against a decision of the London Borough of Ealing's Licensing Sub-committee (the licensing authority) imposing restrictions and conditions on the premises licence of the Black George nightclub.

History

2. The history of this matter is in brief as follows: there was a firearm-related incident near the Black George in the early hours of 4 September 2011. On the application of the police there was thereupon an expedited review of the premises licence. The police requested interim steps and the licensing authority imposed certain interim steps. As required by law the licensing authority then heard a full review on 3 October 2011.

3. The licensing authority decided to impose a number of new conditions on the premises licence for the Black George nightclub (I should make it clear that these proceedings do not concern the Black George Public House at the same address) including a new limit on the hours during the night for which the nightclub could remain open. The new limit was 2am on every day except Sunday morning.

4. The decision of the licensing authority was unaccompanied by a reasons. It is a remarkable feature of that decision, but it is accepted by both parties that that was the case, and indeed that feature is confirmed in subsequent correspondence between the appellant and the licensing authority.

5. As the appellant was by statute entitled to, he appealed to the magistrates against the decision of the licensing authority. The appeal was based solely on the new restriction in relation to opening hours. The magistrates held the hearing on 2 February 2012, as I have said.

6. Before me there is a transcript of what occurred at that hearing. I was told during the course of today's proceedings that the transcript was prepared by an articled clerk working for the appellant's solicitors, and I have to say that the author of the note should be commended for producing a full note, which has not been the subject of any issue as to its accuracy. The note sets out the submissions made by both parties. It sets out submissions made on the written evidence upon which the licensing authority relied. There was no evidence called or adduced by the appellant. The note goes on to indicate the magistrates' decisions and their reasons for them. I read from the note:

"DECISION

We are dismissing the appeal.

Believe the decision was proportionate.

There has been a catalogue of problems dating back to before the firearms incident. Located in a mixed commercial/residential area and there have been a lot of complaints regarding the premises.

Decision to limit the hours of the nightclub was reasonable."

Those reasons produced a further question from the appellant's representative, to which the response was, "We have given our reasons".

7. There was then an issue about costs. The respondent licensing authority submitted a costs schedule indicating costs of £4,300. The appellant did the same; the amount was £3,912. On behalf of the respondent it was submitted that as they had succeeded in the appeal it would be reasonable for them to have their costs on behalf of the appellant. It was said that the need for the appeal had arisen from the entire lack of reasons given by the licensing authority. The appellant also suggested that the respondent's claim was excessive.

8. The magistrates' decision was to award costs to the respondent in the sum of £3,000. The legal adviser to the magistrates asked them to give a reason and the Chair of the magistrates said "I thought it was at our discretion?". The legal adviser said "Yes, it is but you must still provide reasons". The Chair gives the reasons:

"reasons for awarding £3,000 costs - because work could have been carried out more expeditiously by the respondent.

Even if appellant didn't know reasons at the time of the committee hearing, would have known upon receiving the respondent's witness statements and representations so could have withdrawn them."

9. There was a protest at that reason entered promptly by the appellant's representative. The appellant then required the magistrates to state a case for the opinion of this court. The questions to be answered were submitted by the appellant and it is those questions which form the crucial part of the case stated. I will read them out in a moment, but in the mean time I observe that in paragraph 6 of the case stated the Justices summarised their decision as follows:

"We were of the opinion that the decision of the licensing committee was correct, proportionate and reasonable. We found that there was a catalogue of reported incidents going back over some time, well before the firearms incident and up to the voluntary closure of the club in September. Since closure there had been no such incidents. We noted that the club is in a mixed commercial and residential area with residents ranging from young children to senior citizens. There had been several complaints from residents particularly regarding the high level of noise throughout the night when the club was open. We agreed that the hours of the club should be limited to 2am and accordingly dismissed the appeal. Costs of £4360.00 were requested by the respondent and we awarded £3000 in the interests of justice. We found that the appellant could have withdrawn its appeal earlier and avoided this hearing once it became aware of the respondent's case."

10. In my view those reasons are exactly in line with the reasons which were expressed and recorded in the appellant's representative's clerk's note, with one exception, and that is to say the addition of the word "correct" in relation to the justices' opinion of the decision of the licensing committee. Whether that makes any difference is a matter to which I shall return.

11. Following that paragraph the questions for the opinion of this court are set out as follows:

"(1) Where the licensing authority had failed to give any or any adequate reasons for its decision were we, following the decision in R (on the application of Hope and Glory) v Westminster JJ [2009] EWHC 1996 (Admin) required in our reasons to state what weight, if any, we had attached to that decision, upon our determination of the appeal?

(2) Where the appellant called no evidence, but sought through submissions to place a different interpretation on the respondent's evidence, were we obliged to give specific reasons for preferring that evidence?

(3) In the determination of the appeal were we wrong, in law, to hold that the decision below to reduce the licensing hours had been 'reasonable', when the test for the imposition of sanctions in such cases is that the tribunal must 'take such(...) steps (...)(if any) as it considers necessary for the promotion of the licensing objectives'?

(4) Were our reasons in relation to the award of costs to the respondent ones that could have been given by any bench of magistrates acting reasonably (in the Wednesbury sense)?"

The law

12. There are three areas of the law to which I must make specific reference. First, the proper test for the imposition of conditions on a premises licence was, at the relevant time, whether they were "necessary for the promotion of the licensing objectives". That requirement is set out in section 52(3) of the Licensing Act 2003. The word "necessary" has since been replaced by "appropriate" in an amendment made by the

Police Reform and Social Responsibility Act 2012. The licensing objectives themselves are set out in section 4(2) of the 2003 Act and include the prevention of crime and disorder, public safety and the prevention of public nuisance.

13. I have not been referred to any authorities on the meaning of the word "necessary" in this context. But, as I said during the course of argument, it seems to me that it is different from "reasonable" or "proportionate". The amendment of the statute seems to suggest that it is also different from "appropriate". In my judgment to show that something is necessary is a more difficult task, a higher hurdle, than to show that it is reasonable or proportionate or appropriate.

14. Secondly, the duty to give reasons. In the context of licensing decisions there are at least three separate potential sources for the duty to give reasons.

(a) Section 52(10) of the 2003 Act requires the licensing authority to give the reasons for making its determination on a review such as that it undertook in the present case.

(b) Section 4(3) of the same Act requires the licensing authority to have regard to guidance. Guidance has been issued by the Secretary of State under section 182 of the Act. Paragraph 12.9 of the guidance in force, dated October 2010, requires the licensing authority to give reasons for a decision.

(c) There is a general common law duty on decision-makers, and particularly on courts, to give reasons for their decisions.

15. I do not need to set out all the authorities. The locus classicus is now South Buckinghamshire District Council v Porter (No 2) [2004] UKHL 33 in the speech of Lord Brown of Eaton-under-Heywood at paragraph 36:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

16. Those observations were made, as their content makes clear, in a planning case. But although Mr Cannon points that out, he does not say that there is any material distinction in relation to the general principles set out in the licensing cases. The licensing authority is bound by the duties derived from section 52(10) from the guidance and from the general common law duty, save in so far as the latter is superseded by the statutory duty. The magistrates hearing an appeal are bound by the guidance and are bound also by the general common law duty. Whether they inherit also the duty under section 52(10) and whether it makes any difference I leave for decision in another case. I do not think that Article 6 of the European Convention on Human Rights adds anything material in the context of this case.

17. What the duty may mean in an individual case is illustrated by the judgment of Lindblom J in R v (on the application of Townlink Ltd) v Thames Magistrates' Court [2011] EWHC 898 (Admin) at paragraphs 60 and following:

"60. Mr Gouriet submits, and I accept, that it is trite law that a litigant should know why he had won or lost his case. In a case such as this it was not enough, in my judgment, for the District Judge simply to say that the decision taken below was not wrong. He needed to explain why. That does not mean that he needed to provide extensive reasons, but his reasons needed at least to show that he had addressed the main issues before him.

61. The appeal before him had raised three main questions: first, whether regulated entertainment should be suspended for three months, or a shorter period, or at all; secondly, whether the operating hours of the premises should be cut back; and thirdly, whether the disputed conditions ought to have been imposed either at all or in the form in which they were imposed.

62. In my view one reads the notes of the District Judge's judgment one does not see reasoning sufficient to grapple with those matters, certainly not to the extent that the claimant can understand why in each of those three respects its appeal has failed. The claimant is left without an explanation of why the suspension of regulated entertainment should be left in place. As I have already said, there is no explanation for the judge's rejection of the claimant's argument on conditions. And there is no explanation for the judge apparently having accepted that the operating hours should remain as the Council's sub- committee had left them.

63. In my judgment, therefore, the District Judge was at fault in failing to provide proper and adequate reasons for his decision."

18. The third area of law is this: the appeal to the magistrates against the decision of the licensing authority is not a procedural review. It is an appeal on the merits against the licensing authority's decision. That is as set out in the decision of Burton J, at first instance, in

R (on the application of Hope and Glory Public House Ltd) v the City of Westminster Magistrates' Court at paragraphs 40 and following:

"40. I do not accept Mr Glen's submission that this means that, in effect, there was not an appeal de novo, or indeed that any words of Paterson have any bearing on it. It is a fresh appeal with fresh evidence. However there is this caveat, this stricture, this limitation, imposed by the Court of Appeal and the Divisional Court, both of which are binding upon me, that the conclusion of (in this case) the District Judge, having heard all the evidence, including fresh evidence, will be whether, in the exercise of considering the appeal, he is satisfied that the judgment below is wrong.

41. I do not conclude that this in any way offends against Article 6, as was submitted in writing - although not orally - by Mr Glen, nor that there is any contradiction between that and this being an appeal on fresh evidence. Nor do I conclude that the words of Lord Goddard are in any way restricted to a case in which policy is at stake. His words are quite clear and quite general.

42. One submission that Mr Glen made which requires pause for thought is his pointing out that, because fresh evidence is to be allowed on both sides, there may be a situation in which the appellate court will come to a conclusion on the evidence which will be different from the conclusion of the lower court by virtue of that fresh evidence, and which might not mean that the lower court judgment was wrong. Of course it may often happen, when fresh evidence is given, that the appellate court will come to a conclusion, on information

available to it which is different from that which was available to the court below, which differs from the court below but only because of the fresh evidence.

43. I conclude that the words of Lord Goddard approved by Edmund Davies LJ are very carefully chosen. What the appellate court will have to do is to be satisfied that the judgment below "is wrong", that is to reach its conclusion on the basis of the evidence before it and then to conclude that the judgment below is wrong, even if it was not wrong at the time. That is what this District Judge was prepared to do by allowing fresh evidence in, on both sides.

44. The onus still remains on the claimant, hence the correct decision that the claimant should start, one that cannot be challenged as I have indicated.

45. At the end of the day, the decision before the District Judge is whether the decision of the Licensing Committee is wrong. Mr Glen has submitted that the word "wrong" is difficult to understand or, at any rate, insufficiently clarified. What does it mean? It is plainly not 'Wednesbury unreasonable' because this is not a question of judicial review. It means that the task for the District Judge - having heard the evidence which is now before him, and specifically addressing the decision of the court below - is to give a decision whether, because he disagrees with the decision below in the light of the evidence before him, it is therefore wrong. What he is not doing is either, on the one hand, ignoring the decision below, or, on the other hand, simply paying regard to it. He is addressing whether it is wrong. I do not see any difficulty, nor did the District Judge, in following this course."

19. Paragraphs 43 to 45 of that judgment were expressly endorsed by the Court of Appeal on appeal: [2011] EWCA (Civ) 31 at paragraph 46. Giving the judgment of the court Toulson LJ also said this at paragraph 45:

"It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal."

Decision on the case stated

20. I turn now to the questions posed in the case stated. I begin by observing that Mr Phillips sought to enlarge them by suggesting that where, as in the present case, the licensing authority gives no reasons, the magistrates on appeal ought to remit the matter to the licensing authority for a fresh lawful decision accompanied by reasons. That submission was made to the magistrates in the present case. They evidently rejected it.

21. The questions posed in the case stated are those drafted on the appellant's behalf. I see no good reason to allow the appellant to add to them now, and so I turn to the questions that actually were asked:

22. (1) Where the licensing authority had failed to give any adequate reasons for its decision were we, following the decision in R (on the application of Hope and Glory) v Westminster JJ (2009) EWHC 1996 (Admin) required in our own reasons to state what weight, if any, we had attached to that decision, upon our determination of the appeal? In general no, but it would depend how the reasons given were formulated. It seems to me that the status of the decision of the licensing authority, envisaged by the judgment both of Burton J and the Court of Appeal in Hope and Glory, is as follows. First, the deci-

sion itself is the starting point of the appeal as it is the decision against which the appeal is brought; secondly, it may also be the finishing point of the appeal, as unless the appeal is successful the decision will stand; thirdly, it has a function between those points because as the authorities make clear it is for the appellant to show in the appeal that the decision is wrong, and if the appellant fails to show the decision is wrong he will lose his appeal. Solely as a decision, those, in my judgment, are its functions.

23. The reasons given for the decision have a different function. They may be reasons that help to persuade the magistrates on an appeal that the decision was not wrong. One can envisage an appeal in which the reasons given by the licensing authority are the sole ground on which the licensing authority might successfully contest an appeal. On the other hand, the reasons given for a decision may help an appellant to show that the decision was, on the facts or the law, incorrect. Where no reasons are given for a decision it does not seem to me that the decision itself can have any other function than those I have set out.

24. There is, in my judgment, no obligation on a bench of magistrates to state what weight, if any, they have given to the original decision. What is important is that they leave no room for doubt that they have carried out the correct function, that is to say that they have considered, by way of an appeal against it, whether they are persuaded that the licensing authority's decision was wrong. The fewer the reasons for the original decision, the greater the chance that the magistrates will transgress against that requirement if they express their own decision by reference to the decision under appeal. A wholly unreasoned decision may well be correct, or, which is the same thing, not shown to be wrong: but a wholly unreasoned decision can say nothing itself about why it is correct, and the decision on appeal needs to be expressed so as to recognise that.

25. In my judgment the present decision did not do so. The reasons originally given and confirmed by the words "We have given our reasons" do not indicate that the magistrates were alive to the task before them. The insertion of the word "correct" in the summary of reasons in the case stated may indicate that they had become aware of that defect, but, in any event, that insertion does not cure the defect. The reference to the decision in the reasons given by the magistrates appears to me to read as an endorsement of it, and gives no indication that the magistrates were aware that in dealing with an appeal against an unreasoned decision they needed to consider the matter de novo on the evidence before them, and reach their own conclusion as to the reasons for any conditions or restriction on the licence.

26. (2) Where the appellant called no evidence, but sought through submissions to place a different interpretation on the respondent's evidence, were we obliged to give specific reasons for preferring that evidence? Again, in general, no. The obligation of an appellate body is, in considering the correctness of a decision, to consider all the relevant evidence and submissions. There is no specific obligation to give reasons for reasons, and in many cases the appellate decision will make it perfectly clear what evidence was preferred if evidence on both sides was adduced.

27. In the present case the appellant had the task of showing the magistrates that the decision under appeal was wrong. It is difficult to see how, if any facts were disputed, it could do that other than by calling evidence opposed to that relied upon by the licensing authority. It might succeed in showing that the licensing authority's reasoning process was, or must have been, defective, but that would not show that the decision was wrong. In the present case I can detect no basis upon which it can be said that specific reasons for acting on the licensing authority's evidence had to be given.

28. (3) In the determination of the appeal were we wrong, in law, to hold that the decision below to reduce the licensing hours had been 'reasonable', when the test for the imposition of sanctions in such cases is that the tribunal must 'take such(...) steps (...)(if any) as it considers necessary for the promotion of the licensing objectives'? (3) In general again, no. Provided they say nothing indicating that they are not performing their correct function, the magistrates are entitled to conclude that they are not persuaded that the decision was incorrect because they have not been shown any good reason for taking a

view different from that of the local authority on a matter where there might be a number of possible lawful outcomes of the licensing authority's consideration. In such circumstances the use of the word "reasonable" itself cannot be criticised. That is so even where there is a requirement that the decision in question be one which is necessary.

29. But again, the precise answer to the individual question depends on the context. Here the only material challenge was to the curtailment of hours. In order to provide an intelligible decision the magistrates needed, in my judgment, to show why that particular restriction was not wrong, and they could only do that by showing that they had considered that it was necessary in the context of the uncontested rest of the package of conditions imposed by the licensing authority. It seems to me that the magistrates' decision fails to show that.

30. (4) So far as costs are concerned, the magistrates' decision not to award the respondent, in any event, the whole of the costs claimed, has not been contested. What has been contested is their approach to the application for costs made on behalf of the appellant. It is clear from the note, which I read out, that the appellant sought costs on the basis that it had been prejudiced by the licensing authority's failure to give reasons. The response was that subsequent correspondence (and if I take into account also Mr Cannon's submissions: the witness statement put in prior to the appeal by the licensing authority) would have made it perfectly clear what the reasons were.

31. The magistrates were, in this appeal, dealing with a decision which it is to be hoped was virtually unique. It was a decision entirely without reasons, contrary to all the requirements to give reasons. That, it seems to me, is a matter which any reasonable bench of magistrates would have taken into account in deciding on the award of costs. The position was that the appellant was entitled, both by statute and by common law, to a decision which itself encompassed reasons; and could obtain reasons only by appealing. That ought to have been taken properly into account by the magistrates in deciding whether to make any award of costs to the appellant. They failed to take that into account and for that reason I would regard the decision on costs as being one to which they were not entitled to come.

32. It follows that although the questions are in some cases expressed in a rather broad sense, the answers are in favour of the appellant on the first, third and fourth questions.

33. I will hear counsel on the appropriate order.

34. MR PHILLIPS: I am very much obliged, my Lord. We have had a discussion as to your powers in this case. It seems to me that it must be right that you have power to make any order that the magistrates could have made, and it seems to me logical and appropriate, therefore, that their order clearly dismissing the appeal should be quashed. Further that what they should have said, being met with, as your Lordship has indicated, hopefully a unique situation which faced them, is, "This is unacceptable. It is in breach of statute and we will remit it to the licensing authority to rehear the application and give proper reasons". My Lord, in those circumstances I would ask you, as I say, to quash their order and to order that they remit the matter to the licensing authority.

35. THE DEPUTY JUDGE: Just in case there is any difficulty about it, if the licensing authority does that it will do so on the basis of the law as amended, not on the basis of the law as it was when it made its decision, will it not?

36. MR PHILLIPS: My Lord, my view is no.

37. THE DEPUTY JUDGE: Can you show me why not? It had better be sorted out now because there is certain to be a problem with it otherwise.

38. MR PHILLIPS: My instructing solicitor, who has practised matters on a daily basis, has advised me that at paragraph 1.6 it is saying on the October 2012 guidance that the guidance is not retrospective. We have taken a few moments to identify the relevant provision, but my recollection is when I came to update Patterson on these points that the Police Reform and Social Responsibility Act specifically provides, where the changes are made substituting "appropriate" for "necessary", that it applies to applications made after the coming into force of those provisions, which I think was 25 April 2012.

39. My Lord, given that this application predated that, I think it is remitted. We are still within that arrangement, so the application predated that arrangement. There is, I know, a dispute among licensing practitioners as to whether that is right. Some people take one view and some people take the other. That certainly has been my view to date. It would of course always be open to the police to say, "If it is going to be remitted back for a re- hearing we start all over again and launch a new application". I suppose in which case they would have the benefit of the new test, to the extent the new test is different.

40. There is an argument among practitioners that the difference is actually one of form rather than substance, because European jurisprudence requires no sanction taken. We accept it is necessary and proportionate. The word "appropriate" applies a subjective approach to the matter.

41. THE DEPUTY JUDGE: I do not think I need to decide that. I express my view on the meaning of the word "necessary". Of course it is not a sanction, it is a restriction on a permission.

42. MR PHILLIPS: Quite so. I think Mr Dadds is very helpfully referring me to the relevant section. It is paragraph 1.6 of the 2012 guidance. That is at section 182 of the Act provides "the Secretary of State issues...[read into the words]... charge their functions."

43. THE DEPUTY JUDGE: I am concerned more with the terms of the statute and whether there is any transitional provisions in it.

44. MR CANNON: There is no dispute from my side on the applicability of the guidance. It is clearly right that the current version of the guidance was the first to say expressly it was not retrospective in effect. In terms of which guidance will be applicable on the remitted hearing (inaudible), there is no dispute. On whether the changes in the law, ie the appropriate test is appropriate rather than necessary, that, I am afraid, requires recourse to the commencement orders in the transitional provision which I do not have in front of me. I would be anxious, as my learned friend is on these matters, to only take his word given it is quite an ancient case. The application was reviewed quite some time ago. It is not something that would need to be determined by your Lordship today. We could properly get there with some time to look at those transitional provisions - -

45. THE DEPUTY JUDGE: Thank you, Mr Phillips. Is there anything you want to say in relation to my response to question 4?

46. MR PHILLIPS: Yes, my Lord. You have agreed with the implication of the question that the decision was Wednesbury unreasonable. Clearly we are saying that the magistrates should have remitted the matter to the licensing authority to deal with it properly in accordance with statute. Therefore the only order that would follow from that was that our appeal was proper and appropriate and they should have awarded us our costs below. I would invite you to adopt that course.

47. THE DEPUTY JUDGE: Might it be said that the reasons given by the magistrates at the end of the note were good reasons for you to not have anything like an award of costs pursuing an appeal?

48. MR PHILLIPS: Clearly it would have been.

49. THE DEPUTY JUDGE: If I am to substitute an award it might be a difference of £500, bearing in mind the information that you had subsequent to the decision in relation to the matters in dispute, and the reasons that the licensing authority must have been acting on.

50. MR PHILLIPS: It is the response of the magistrates that we knew the case against us on the (inaudible) evidence. That clearly would be a view you could take and I would be able to advance a strong argument against that if that is the view you took in relation to the costs below.

51. In relation to these proceedings, given that you have substantially found in favour of the applicant, I have a schedule and these were exchanged in advance. I thought they were. I do apologise. Perhaps I can hand that up. That is the sum that I respectfully claim in respect of these proceedings.

52. THE DEPUTY JUDGE: (same-handed) Thank you. Mr Cannon?

53. MR CANNON: Can I deal with remitting it, first of all? Your Honour may have seen from the Townlink case, to which your Lordship made reference in your Lordship's judgment, that in that case the reasons challenge being successful it was said that the right order must be remittal to the Magistrates' Court for a fresh hearing. In my submission that is the obvious right answer here.

54. THE DEPUTY JUDGE: Except that in the Townlink there was not a completely unreasoned decision of the licensing authority, was there?

55. MR CANNON: That is right. Given that what your Lordship finds here, as I understand your judgment, had the magistrates here said, "We attach no weight to the decision below because there were no reasons, and for these substantive reasons we think this is the right decision", there would be no complaint. If it is remitted to the Magistrates Court for a wholly de novo substantive merits decision and there is absolutely no prejudice at all to the appellant, and that is the proper way to deal with it, as my learned friend will no doubt say, that deprives him of a second bite of the cherry. In my submission that is not a substantive prejudice, that is simply procedural. The prejudice will be to deprive him of a de novo substantive review on the merits. He gets that by remittal to the Magistrates' Court. My primary submission will be that is where your Lordship should remit it to.

56. I think, strictly speaking, the powers of a case stated are that the court make further reversal varying the order of the Magistrates' Court, or make any other order your Lordship thinks fit, or they remit the matter to the original court with its opinion. Stretching that language, I suppose, it is conceivable that your Lordship could remit it to the Magistrates' Court. In your Lordship's opinion it should then remit it under its powers under section 181 back to the - -

57. THE DEPUTY JUDGE: Or I can vary it by making a decision that the magistrates could not make.

58. MR CANNON: Yes although I would- -

59. THE DEPUTY JUDGE: You ask me not to?

60. MR CANNON: I would counsel strongly against that, given the lack of evidence, and so on. That is within your Lordship's gift, I suppose, in terms of the strict powers. My submission is that this should go back to the Magistrates' Court.

61. THE DEPUTY JUDGE: I am sorry as I may have misunderstood something: if I can vary the order the magistrates make, or indeed reverse it, I can presumably make the order that they could have made, which is to remit it to the local authority?

62. MR CANNON: Yes.

63. THE DEPUTY JUDGE: In which case all the evidence would be dealt with again by the licensing authority and the new reasoned decision is made.

64. MR CANNON: Indeed. The point I make is that the remedy here is to have a new substantive hearing on the merits and the place to have that is the Magistrates' Court. This is an appeal against that court's decision: its failure to give adequate reasons.

65. THE DEPUTY JUDGE: I understand.

66. MR CANNON: Can I deal with costs in two different ways? First of all, in respect of question 4 costs in that sense, I may have misunderstood my learned friend, but as I read your Lordship's judgment it is this, that what the court should have done is dealt with the suggestion or the argument that this was an appeal made necessary by the absence of reasons below and reflected that in its decision. If this is remitted to the court there is no question, as my learned friend seems to say, of it being implicit they should have remitted it. That seems to be the question Mr Phillips tried to introduce and your Lordship's judgment made it very clear it was not appropriate to introduce. The criticism made, but not upheld by your Lordship's judgment, is that they should have remitted it. As I understand it that is not the import of what your Lordship says today.

67. The costs decision simply falls to be quashed in my decision. It is quashed because it is unsubstantiated with sufficient reasons. Just as the substantive decision because of its lack of adequate reasons gets quashed, so too does the costs decision. I do not say more about that. The point is that if a reasons challenge is successful, then the outcome should be a quashing. On the cost of today - -

68. THE DEPUTY JUDGE: And what?

69. MR CANNON: If it gets remitted to the Magistrates' Court they will deal again at the end of that.

70. THE DEPUTY JUDGE: If it does not get remitted to the Magistrates' Court?

71. MR CANNON: If it goes back, then I suppose if it gets - -

72. THE DEPUTY JUDGE: I need to settle what the proper decision as to costs is, do I not?

73. MR CANNON: My Lord, I hesitate for this reason: the criticism upheld by your Lordship's judgment is not a substantive criticism of the merits case heard by the Justices. It is a reasons challenge. They may have come to the right decision, but it does not say so with enough adequacy in their reasons. In those circumstances, in effect, your Lordship is not in a position to come to the proper decision on costs on that day

today. There is no upsetting of the merits outcome. This is a remittance. It is a quashing of the decision. It should go back to that body for a new decision at the end of that. Whoever wins will no doubt stand up and apply for their costs, as I did below, and whoever lose also will no doubt make the submissions that they need to make. The costs of that hearing seem to be recoverable in any award of costs at the end of that hearing. I am very hesitant to see that it would be sensible, when quashing a decision and remitting a decision, to make an award of costs following from a decision, that in the same judgment is being quashed. Does your Lordship follow what I am saying there?

74. THE DEPUTY JUDGE: If I were minded to remit this appeal to the magistrates for a new decision, on the one hand, the outcome of that appeal might be in your favour or might be in Mr Phillips'. I suspect that it is unlikely that the moments immediately following that decision would be a very obvious time for deciding where the costs of the previous hearing should fall. In particular, I doubt whether it would be right to make any even informal assumption that the costs of the previous hearing should depend on the outcome of the costs of the second hearing. Although what you say in terms of the primary obligation to make a rational decision in the circumstances ought to be on the original decision-maker, I am not very readily persuaded that it is appropriate to put the original decision-maker to that trouble in the context of this case when I have heard the arguments and given my views.

75. MR CANNON: I see the force of that. There is perhaps not very much more I can say about it, other than where a decision is quashed I can see the practical difficulties of a Magistrates' Court sometimes having to go back and deal with it, and I see the force as your Lordship has heard some submissions on the various merits today. What your Lordship has not heard the substantive merits. Perhaps I need say very little more about that, particularly given the indication that my learned friend gives about the suggestion that your Lordship made about that.

76. THE DEPUTY JUDGE: I should make it clear that that is a suggestion of a discount of £500 from the award that was made in recognition of the factors I have identified. It is not an award of £500 instead of the award that was made.

77. MR CANNON: I understand. In which case I say no more about that. Can I deal finally with the costs of today? By way of preliminary I repeat the difficulty that the local authority finds itself in here seeking to defend a decision in the writing of which it had no hand, in particular against criticisms of the way in which that decision was expressed, not in the substance of that decision per se. In my submission any award of costs today (and can I see that there is some force in saying the appellant has been successful so they should have some of their costs, and acknowledge the force of that) there should be some recognition that the party going wrong here was not the respondent.

78. I know it can be said that what the respondent could have done is thrown in the towel earlier when seeing which way the wind was or was not blowing. Of course in those circumstances there might have been some saving of costs, but not a whole saving, because the appellant would still have had to come here and persuade your Lordship, or one of your Lordship's brethren, that the decision should be overturned just because the respondent could not, by concession, overturn a decision of the Magistrates' Court.

79. Although I accept in principle that the respondent should be liable for a contribution to some of the appellant's costs, my submission is recognising the particular decision that it should not be responsible for all of them. I have not had a chance, only having had a schedule when the application was made, to take any instructions on the quantum. I do not know whether your Lordship wants to hear me on that, if so I will turn my back briefly and see what my instructing solicitor has to say on that. It may be that your Lordship takes a view broadly about the numbers and will not be assisted by my nitpicking of the hours.

80. THE DEPUTY JUDGE: Is it fair to say that if you had been handing up a schedule it would have been broadly speaking similar?

81. MR CANNON: I do not know. I can get my schedule and give an honest answer to that. My schedule is just a little over half of the appellant's.

82. THE DEPUTY JUDGE: Have those instructing you learnt something from the magistrates comments?

83. MR CANNON: It may be a fair reading of it. Would your Lordship be assisted by a copy of my schedule?

84. THE DEPUTY JUDGE: I think I would, please. (same- handed)

85. MR CANNON: What it does not include is the costs of my solicitor attending today, because they were unknown at the time of the schedule.

86. THE DEPUTY JUDGE: Thank you. Mr Phillips?

87. MR PHILLIPS: If I can respond very briefly? The proposal is Mr Cannon would remit to the Justices. I would submit that in all the circumstances it is very unsatisfactory.

88. THE DEPUTY JUDGE: I do not think I need to trouble you on that.

89. MR PHILLIPS: I am grateful. In relation to the question of costs and costs below, and so fourth, the leading authority which guides all the other authorities in this area remains the decision of Booth (?) from Bingham LJ, as he then was, and what it said about orders against local authorities is there needs to be a balancing act. I am sure your Lordship is familiar with that judgment, but in particular he referred to the need to encourage public authorities to make a stand by honest, reasonable and apparently sound administrative decisions made in the public interest, and so forth.

90. We say certainly as at the time that Mr Dadds was making the submissions before the Justices on the lack of reasons, certainly as of last June when we served our skeleton argument highlighting the absence of reasons and the failure to comply with the Act, that was never an apparently sound administrative decision. On that basis we say that the magistrates should have remitted it and they would, or should reasonably, have succeeded to a request of costs against the local authority. Unless there is anything further?

91. THE DEPUTY JUDGE: Thank you.

Ruling

92. THE DEPUTY JUDGE: I will deal first with the costs of the appeal before the magistrates. As I have indicated in my judgment, the magistrates acted in a Wednesbury unreasonable sense by failing to take into account in making their award of costs the fact that the decision under appeal was wholly unreasoned, and the claimant needed to bring the appeal in order to secure any reasons for it. I indicated in the course of argument that I thought, in the circumstances, the appropriate allowance for that on the claimant's side of the equation was £500. I therefore will make an order that in relation to the costs before the magistrates the order may be amended so as to require the claimant to pay the defendant's costs in the sum of £2,500.

93. So far as concerns the costs of today, it seems to me that in the circumstances of this case it would be reasonable for the appellant to have its costs against the respondent. I note what Mr Cannon says about the difficulty that a local authority has in defending a decision for which it was not responsible, but the starting point of the present difficulties was a decision of the licensing authority, which was on its face, and indeed appeared to be recognised in the course of correspondence subsequently, bad and must be recognised as bad from the time it was made. The difficulties that have arisen in dealing with that decision are therefore largely the responsibility of the licensing authority, and for that reason I shall make the award I have indicated, which is that the defendant be ordered to pay the appellant's costs summarily assessed at £7,072 plus Value Added Tax.

94. So far as concerns the proper outcome of today's proceedings, I note what Mr Cannon says about the general position being that if a decision of the magistrates has been quashed the appropriate way forward is for the magistrates to have the case back with a direction to decide it according to the law. In my judgment that would pose some difficulties in the course of the present case in particular, because it is made perfectly clear by the decision of the Court of Appeal in Hope and Glory that the magistrates, in deciding a case such as this, are required to take appropriate account of the reasons given by the democratically elected members of the Council (the local authority) in making a licensing decision.

95. If the matter were to go back to the magistrates they would be faced still with a decision in which there were no reasons given by the licensing authority for its decision. Therefore, whatever the outcome of the appeal to the magistrates there might be said to be a democratic deficit, which would not exist if reasons had been given by the licensing authority.

96. It therefore seems to me in the context of this case, which is different from other cases, in particular Townlink, that the appropriate order of this court will be for the decision of the magistrates to be varied to the extent that the appeal is allowed, and the matter is remitted to the licensing authority with directions that it makes a decision according to the law.

97. THE DEPUTY JUDGE: Mr Phillips, if you would not mind drawing something up so it can be dealt with?

98. MR PHILLIPS: I can certainly do that. I am grateful.