

## London Borough of Croydon v William Burdon

CO/2597/2002

High Court of Justice Queen's Bench Division (The Administrative Court)

6 August 2002

**Neutral Citation Number: [2002] EWHC 1961 Admin**

**2002 WL 31050323**

Before: His Honour Judge Wilkie

Tuesday 6th August, 2002

### Representation

- Mr S Taylor (instructed by London Borough of Croydon Legal Department) appeared on behalf of the Claimant.
- Mr P Noble (instructed by Wright Son & Pepper , London WC1R 5JF) appeared on behalf of the Defendant.

### JUDGMENT

1. This is an appeal by way of case stated by the London Borough of Croydon as prosecuting authority against the dismissal by the Croydon Magistrates' Court of five informations brought by the London Borough against Mr Burden, each of them to the effect that Mr Burden was street trading without a licence. The occasions were three dates in May 2001, one date in September and one in November and related to periods as short as 34 minutes and as long as two hours and 17 minutes when it was said that Mr Burden was engaged in street trading at a location known as North End, Croydon, but further particularised in the evidence as being outside the entrance to the Whitgift Centre.

2. The issue for the magistrates was whether Mr Burden was conducting himself pursuant to a pedlar's certificate granted under the [Pedlars Act 1871](#) which, if that were the case, would give him a defence to the statutory offence.

3. Section 38(1)(a) of the London Local Authorities Act 1990 states that a person who is not the holder of a street trading licence or a temporary licence and who engages in street trading shall be guilty of an offence. Section 21(1) of that Act defines street trading as, subject to subsection (2) , the "selling or offering for sale of any article ... in a street for gain or reward". A street is defined to include "any road or footway".

4. Section 21(2) of the Act lists the exclusions from street trading and includes:

"(a) trading by a person acting as a pedlar under the authority of a Pedlar's Certificate granted under the [Pedlars Act 1871](#) ..."

5. Thus, if a person is acting as a pedlar then he is not engaged in street trading for the purposes of the remaining sections of the legislation.

6. [Section 3 of the Pedlars Act 1871](#) defines a pedlar as follows:

"The term "pedlar" means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot and goes from town to town or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise immediately to be delivered, or selling or offering for sale his skill in handicraft."

7. It was common ground that on the relevant dates Mr Burden was the holder of a pedlar's certificate. The magistrates in their statement of case set out the following facts:

- “(a) The Respondent was at all material times the holder of a pedlar's certificate.
- (b) The Respondent's business took him, at different times to such places as Canterbury, Sittingbourne, Maidstone and Chatham. The Respondent would visit up to three towns per day.
- In relation to the 5th May 2001 the Respondent had visited Orpington in the morning, Croydon in the middle part of the day and Bromley in the late afternoon.
- (c) The Respondent at all material times sold various goods from, what was described in evidence alternatively as “a barrow on wheels” or “a stand” or “a trolley” which measured 7 feet in length and 7 feet in height. Although it had wheels the Respondent accepted that it could not practicably be moved from street to street, or for any distance considerably in excess of the distances referred to in paragraphs 2(d) and (h) inclusive. The Respondent transported this mobile fixture in a van when travelling between towns.
- (d) On 5th May 2001, outside the Whitgift Centre, in North End, Croydon, between 11.16 am and 12.58 pm the Respondent sold balloons. The Respondent moved on four occasions between seven and ten yards.
- (e) On 11th May 2001, outside the Whitgift Centre, in North End, Croydon between 1.45 pm and 3.35 pm the Respondent sold balloons. On this occasion the Respondent moved only once by a distance of five yards.
- (f) On 19th May 2001, outside the Whitgift Centre, in North End, Croydon, between 11.13 am and 1.30 pm the Respondent sold balloons. On this occasion he moved on three occasions between five and eight yards.
- (g) On 8th September 2001, outside the Whitgift Centre, in North End, Croydon, between 1.06 pm and 1.40 pm the Respondent sold scooters and pogo sticks on five occasions. On the three occasions that the Respondent moved his barrow this was for a distance of between five and eight yards.
- (h) On 17th November 2001, outside the Whitgift Centre, in North End, Croydon, between 10.25 am and 12.05 pm the Respondent sold scooters and pogo sticks. On the three occasions that the Respondent moved his barrow, this was for a distance of between two and fifteen yards.
- (i) North End, Croydon, has not been designated as a licensed street under Section 24 of the 1990 Act. Accordingly a licence is required to trade at all times except where a particular activity is specifically exempted from the provisions of street trading under the 1990 Act.”

8. The evidence before the magistrates comprised oral evidence from Michael Connell, a Highway Enforcement Officer, together with a video tape of each of the five occasions. Mr Connell had, for the assistance of the court, provided a commentary to each of those tapes indicating the length of time that Mr Burden was stationary, the number of sales that he made during those stationary periods and the distances that he moved when he moved from spot to spot. Suffice it to say that the periods of observation of Mr Burden being stationary ranged from about a quarter of an hour up to in excess of one and a half hours. On a number of occasions he was stationary for a period of half an hour or thereabouts, and during the various times that the video captured him trading he would make a number of sales during the period that he was stationary, but it would seem insufficient numbers of sales to be consistent with somebody who was simply stopping for the purpose of selling goods and then, immediately upon the sales being completed, moving on. In addition to that, there was one occasion on the video evidence of Mr Burden restocking his display from a small trolley.

9. The magistrates were referred to the statutory provisions, together with two decisions of the [Divisional Court in point, namely \*Watson v Malloy\* \[1988\] 3 All ER 459](#) and *Stevenage Borough Council v Wright*, the version referred to the magistrates was from *The Times Law Reports*, 10th April

1996.

10. The magistrates came to the following conclusions: first, that the respondent was the holder of a valid pedlar's certificate; second, once he had arrived at a town he traded from a barrow on wheels; third, on each occasion he did not engage in unlicensed street trading as, being the holder of a pedlar's certificate, he did not require a street trading licence or temporary licence to trade; fourth, the law did not appear to state how far and how often a person trading as a pedlar had to move to be said to be acting as a pedlar under the authority of a pedlar's certificate; finally, "the Respondent, upon the evidence that we heard, was trading as a pedlar at all material times". Accordingly, the informations were all dismissed against the respondent. The question of law for the High Court posed is:

"Were we [the magistrates] correct to decide on the evidence that the Respondent was at all material times acting as a pedlar under the authority of a pedlar's certificate granted under the Pedlars Act 1871?"

11. The two cases referred to have also been cited before me. In the first of those cases the Divisional Court of Hutchison J and Woolf LJ (as he then was) offered a description of what it was to be a pedlar and, in particular, a passage which is often cited in the judgment of Hutchison as follows:

"The popular conception of a pedlar is someone who goes around selling things or services, who sells on the move; he is an itinerant seller.

If the distinction is to be encapsulated in an aphorism, one might say that a pedlar is one who trades as he travels as distinct from one who merely travels to trade."

12. He went on to say:

"I do not mean that he must not stop. As Woolf LJ suggested during the argument, the chair mender stops in order to mend chairs, but the feature which makes him a pedlar is that he goes from place to place, mending a chair here and a chair there; he comes to the owners of the distressed chairs, rather than setting up his pitch and allowing them to come to him."

13. The case of Stevenage Borough Council v Wright was, as I have indicated, placed before the magistrates in the form of The Times Law Reports. I have the advantage of having the full transcript of the judgment of the Divisional Court given by Leggatt LJ with which Sir Iain Glidewell agreed and did not add anything to. Leggatt LJ posed the questions which were to be answered in the following terms, taking it from the submission of counsel:

"(i) What is the nature of the trading practice of the seller, and (ii) what is the nature of his 'conduct whilst he is stationary for the purpose of the selling?'

To answer those questions one must consider the length of time for which the person concerned is in one place and what he does whilst he is in that place."

14. He then went on to indicate that he did not derive much direct assistance from aphorisms such as that which had appealed to Hutchison J in the Watson v Malloy case, but he did take some comfort from the formulation of Hutchison J as describing a pedlar as "one who sells on the move", by which he obviously did not mean that he has to be in motion whilst he is effecting sales. He meant, as the judge said himself, that a pedlar is an itinerant seller or, as Mr Bird has put it, "he is peripatetic".

15. Leggatt LJ went on:

"Essentially, a pedlar, acting as such, is travelling when he is not trading. So the length is important of those periods during which he is stationary and not selling but is prepared to do so. The use of a stall or stand may indicate an intention to remain in one place or in a succession of different places for longer than is necessary to effect a particular sale or sales."

16. In the Stevenage Borough Council case the respondent was stationary at the entrance to a

particular shopping arcade, and whilst in that position for at least an hour he was selling wrapping paper from a large shopping bag which was at his feet. The bag had a sign on its side and the respondent called out to passersby to attract their attention. The conclusion of the Divisional Court was that that did constitute street trading and not within the exemption given to a pedlar. In that case the court also referred to a decision which went the other way, the case of Tunbridge Wells Borough Council v Dunn . In that case the respondent was not trading from a fixed position. He moved up and down the road in the course of selling and offering for sale his balloons. At no time did he have a stand whilst he was selling or exposing the balloons for sale. He did not have any articles on the ground around him. That was an example of a respondent who walked up and down whilst selling his wares. In those circumstances the Divisional Court had concluded that the respondent had been acting as a pedlar and the justices having acquitted him the local authority's appeal was dismissed against that decision.

17. Finally, in the case of Watson v Malloy Hutchison J painted a picture of a pedlar, namely of a man conducting his business from one position rather than of someone carrying and selling goods as he moves around. That passage distinguishing the street trader from the pedlar was also cited in the Stevenage Borough Council case.

18. It seems to me that the crucial point in this case is to look at the periods of time of which Mr Burden was stationary, the distances that he moved and the nature of his conduct whilst he was stationary for the purposes of selling. Looking at the evidence which was before the magistrates, it is my judgment that someone who is habitually stationary for periods of certainly at least 15 minutes, often in excess of half an hour, and on occasion in excess of an hour, who during those stationary periods sells intermittently to members of the public, but has not stopped for the purpose of selling to a specific member of the public, is properly to be described as someone who is engaged in street trading and not being a pedlar. In other words, he is not someone carrying and selling goods as he moves around, stopping for the limited purpose of conducting a sale and then moving on, rather he is someone who is stationary in a succession of different places for longer than is necessary to effect a particular sale or sales. The fact that the distances covered by Mr Burden, when he did move, were to be measured in terms of feet or single figure yards, rather than moving up and down a street or around a trading square, in my judgment underscores the impression of him as engaging in street trading from a series of different pitches rather than engaging in peddling; that is to say moving and selling as he moves, stopping for the purpose of conducting a particular sale.

19. In my judgment, therefore, the magistrates were not correct to decide on the evidence that the respondent was at all material times acting as a pedlar under the authority of a pedlar's certificate granted under the [Pedlars Act 1871](#) and, therefore, these appeals must be allowed.

MR NOBLE: Your Lordship, I will ask whether this matter could go further because I take issue with one matter and that is when a man stops according to the definition he does not actually have to stop solely for a sale or particular sales but the Act is quite clear he may stop to expose his goods for sale.

HIS HONOUR JUDGE WILKIE: So you are asking for permission to appeal to the Court of Appeal?

MR NOBLE: I am asking to certify a point, that as far as your finding is concerned you found basically because he stopped and all the time he was stopped he was either not effecting a particular sale, or a series of sales, those times when he was stopped, not selling. In fact on my understanding of the definition, if one looks at page 37, one sees that he may stop to expose for sale any goods or procuring for the purpose of procuring orders.

HIS HONOUR JUDGE WILKIE: Yes.

MR NOBLE: So the fact, in my submission, that he was not at every moment effecting his sale or a series of sales does not take him outside that definition. That is at page 37.

HIS HONOUR JUDGE WILKIE: Yes. I am not going to certify a point.

MR NOBLE: Your Lordship, the only question is whether this should be returned to the magistrates' court.

HIS HONOUR JUDGE WILKIE: Yes. I am not sure whether that is going asked for.

MR TAYLOR: It is asked for.

HIS HONOUR JUDGE WILKIE: I am sorry?

MR TAYLOR: I am sorry, my Lord, you are turning your ear to me, I thought you were turning to my learned friend. It was asked for, requested in, I think it is, page 5 of the bundle. That is the order that is requested.

HIS HONOUR JUDGE WILKIE: Yes. Well, it is somewhat unusual in these cases to seek permission, is it not, on the particular case? But if you succeed on the appeal, have I any option but to remit it?

MR NOBLE: You certainly have an option. You do not have to refer it back to the magistrates. You may think there was quite enough, the costs were enormous certainly for my client.

HIS HONOUR JUDGE WILKIE: Well, it seems to me that what has motivated Croydon is to establish a principle rather than to conduct a particular case and I just wonder whether the Council taxpayers of Croydon would want it to go any further when they have established the principle.

MR TAYLOR: I only have the officer here today, so I am not really in a position to take instructions, as such.

HIS HONOUR JUDGE WILKIE: Yes.

MR TAYLOR: But it is a matter for your Lordship. Your Lordship's powers, if I just draw those to your attention so you can then exercise—

HIS HONOUR JUDGE WILKIE: Yes.

MR TAYLOR: It is Volume 2 of the White Book at page 1544.

HIS HONOUR JUDGE WILKIE: Yes.

MR TAYLOR: Naturally, my Lord, I can see the points that are made in starting this all over again. It actually starts, I suppose, on 1543, it just confirms that this is the section for case stated by the magistrates' court or Crown Court.

HIS HONOUR JUDGE WILKIE: This is 28A?

MR TAYLOR: 28a yes, under subparagraph (3) that the High Court "shall" hearing the determination—

HIS HONOUR JUDGE WILKIE: Yes.

MR TAYLOR: And "shall", so it is mandatory, but two options, "reverse, affirm or amend the determination in respect of which the case has been stated" or "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 costs, as it thinks fit.

HIS HONOUR JUDGE WILKIE: Yes, so having upheld the appeal then I have the option of either reversing the determination or remitting it.

MR TAYLOR: Yes, and the difficulty with an acquittal — that is a somewhat different scenario, is it not? One would have thought, bearing in mind your Lordship's ruling, that further costs in the magistrates' court are likely to be fairly minimal, probably mostly on the London Borough of Croydon rather than on the respondent.

HIS HONOUR JUDGE WILKIE: Well, in the Stevenage case that was an appeal by the local authority against an acquittal and there was no remission. It was simply—

MR TAYLOR: The opinion was just given.

HIS HONOUR JUDGE WILKIE: Yes.

MR TAYLOR: I see that. When I saw that I went to the jurisdiction section and I just wanted to see what the powers were and it confused me a little bit because I could not really see — well, that was in the Stevenage case, in a case where there was a conviction, was there not there, I think?

HIS HONOUR JUDGE WILKIE: No, I think that there was an acquittal—

MR TAYLOR: Oh, was there? Yes, that must be right.

HIS HONOUR JUDGE WILKIE: —because they said that the absence of the stall meant that he was

a pedlar and the Divisional Court disagreed.

MR TAYLOR: That is right. Yes, so it is the same situation as here. Plainly it is a matter for your Lordship. I can only add that I draw your Lordship's attention to that, the fact that that is something that the London Borough of Croydon have asked for.

HIS HONOUR JUDGE WILKIE: No, that is very helpful. Mr Noble, it seems as though I have two options: either to reverse the determination, which then stands as a decision without any further consequences, I think, for your client—

MR TAYLOR: Yes.

MR NOBLE: Yes.

HIS HONOUR JUDGE WILKIE: —or remit it to the magistrates' court with the opinion from which a conviction would follow and the consequences.

MR NOBLE: Well.

HIS HONOUR JUDGE WILKIE: Is that—

MR NOBLE: That is absolutely correct, so you do not have to send it back.

HIS HONOUR JUDGE WILKIE: Yes. Well, I am not minded to expose Mr Burden to a conviction having ruled against him and established a principle. So I will limit myself to reversing the determination. Yes, thank you.

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