Case Commentary

Statutory Nuisance: Tenant's Claim to Compensation for Expenses

Taylor v Burton [2021] EWHC 1454 (Admin)

In concluding that a magistrates' court had been entitled to order a landlord to compensate a tenant for expenses properly incurred in pursuing proceedings under s.79 of the Environmental Protection Act 1990, the High Court provided useful guidance on the landlord's defence to compensation under s.82(6), the assessment of compensation under s.82(12), and the extent of the magistrates' duty to give reasons.

Facts

The tenant, Ms Burton, brought an action in the North Staffordshire Magistrates' Court against her landlords claiming that the damp state of the house was prejudicial to her health and a statutory nuisance under s.79 of the Environmental Protection Act 1990. Shortly before the hearing concluded, the landlords undertook repairs which eradicated the damp and abated the nuisance. Ms Burton subsequently applied for compensation for her expenses in bringing the case under s.82(12) of the 1990 Act, which provides:

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

The magistrates concluded that a statutory nuisance had existed when the information was laid and ordered the landlord, Mrs Taylor, and her letting/managing agents to pay £14,539.90 each to compensate the tenant for expenses properly incurred in pursuing the proceedings. They rejected an argument by the landlords that it was the tenant, and not they, who were responsible for the nuisance by failing to properly heat the house and denying them access to effect repairs. The landlords brought an appeal by way of case stated claiming that that the magistrates had made various errors of law and jurisdiction and were not entitled to make the orders in favour of Ms Burton. The questions stated were whether the magistrates had: (1) erred in finding that they had jurisdiction to order compensation on the basis that the landlords were responsible for

the nuisance; (2) erred in determining the proper quantum of compensation; and (3) failed to give adequate reasons for their decision.

Tenant's right to compensation

In *Jones v Walsall MBC* [2003] Env LR 5 (QB), it was confirmed that a landlord may have a complete defence to an application for compensation if, at the time proceedings were commenced, and in the period since notice was given under s.82(6), the landlord "has done all that was reasonable to gain entry to the premises" and abate the nuisance and was, therefore, no longer the cause of, or the person responsible for, the nuisance.

In terms of the amount of compensation to be awarded, the court is entitled to take a broad brush approach. In *Taylor v Walsall and District Property and Investment Co Ltd* [1998] Env LR 600, the Divisional Court held that proper steps had to be taken to investigate how the claim is arrived at and the detailed grounds upon which it is sought to challenge it and, if items of expenditure result from unreasonable conduct of any sort on the complainant's part, those items must properly be deducted from the bill. In *R oao Notting Hill Genesis v Camberwell Green Magistrates' Court* [2019] EWHC 1423 (Admin), the Divisional Court was also stressed that proportionality was a proper consideration in the assessment of quantum in s.82(12) cases and that an analogy might be drawn with the provision made in respect of costs in civil proceedings by CPR 44.3. In this connection, subsection (5) of CPR 44.3 states that costs incurred are proportionate if they bear a reasonable relationship to: (1) the sums in issue in the proceedings; (2) the value of any non-monetary relief in issue in the proceedings; (3) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party, (4) any wider factors involved in the proceedings, such as reputation or public importance; and (5) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness. It was also emphasised that not only must the magistrates consider these factors, but they must properly explain their reasons for the decision they reach.

Moreover, since proceedings under s.82 of the 1990 Act are criminal in nature, analogous guidance was to be had by reference to Crim PR 45.2(5) and (7) on the duty, in making costs decisions, to give reasons on particularly relevant factors. Further guidance was to be found in paragraphs 7.2.4 and 7.2.5 of the associated Practice Direction: see also, the guidance given in *R v Northallerton Magistrates' Court, ex p Dove* [2000] 1 Cr App R (S) 136, at 142-3.

The jurisdictional issue

Although it was apparent that the landlords had satisfied the descriptions in s.82(4), in the sense that those descriptions corresponded to the allegations Ms Burton was making, it was argued that it had not been properly proved that they, rather than Ms Burton herself, were responsible for the existence of the statutory nuisance at the date on which proceedings commenced. That depended on whether the landlords had done all that was reasonable to gain entry to the

premises during the relevant period. In other words, were they "not responsible" for the continuation of the nuisance at the relevant date? On this point, Collins Rice J stated, at [36]:

> "[The] test of 'all that is reasonable' is evaluative and fact-based: it has to be considered by reference to all the circumstances of the individual case. On the face of it, therefore, this question can be 'jurisdictional' only to the extent that it raises a point about whether there was no evidence that the landlords had failed to do all that was reasonable, or no reasonable Bench could have reached such a view on the evidence they did have."

In her Ladyship's view, therefore, the jurisdictional question came down to whether there was evidence before the magistrates on which they could properly conclude that the landlords had not done "all that is reasonable" within the meaning of s82(6). On this question, it was apparent that the magistrates had evaluated all the witnesses and come to the conclusion that: (1) the state of the premises was not attributable to Ms Burton's conduct by failing to heat it or otherwise; (2) the landlords did not respond to the notice with particular speed in the first place; (3) they bore at least some responsibility for the failures of communication with Ms Burton; (4) they made insufficient allowance for Ms Burton's inability for health and family reasons to comply with all their requests; (5) she did not prevent access; and (6) the landlords had a key, had used it to enter the premises in her absence, and were able to effect repairs without relying on Ms Burton being present to let them in: see, at [41]. In so doing, the magistrates had performed their task properly and acted within their jurisdiction. This ground of appeal was, therefore, dismissed.

Quantum of compensation

The challenge made by the landlords on the assessment of compensation was that the magistrates had failed to have regard to the proportionality of the costs incurred and to the specific matters challenged by the landlords. It was apparent, however, that the magistrates had Ms Burton's schedule of costs before them, that submissions on proportionality were made with particular reference to the *Notting Hill Genesis* decision, specific objections were raised and replied to on a number of particular items, and the financial means of both defendants were raised.

The decision made by the magistrates rejected Ms Burton's submissions on joint and several liability and recorded a reduction of over £5,000, or 15% on the amount claimed. They also decided to reduce the travel and "waiting at court" expenses on the grounds that they were excessive. However, the magistrates had, clearly, erred at least to the extent of insufficiently articulating their decision, and there was at least potential injustice in their too summary approach to the issue of assessment. In this connection, it was important that the parties should have a basic understanding of how a sum is arrived at and some reassurance that they have been heard on the key issues. On the particular issue of proportionality, her Ladyship stated, at [55]:

> "This is a summary process and it is not proper for parties to go to significant lengths and expense in litigating quantum. Nor is it at all incumbent on magistrates to deliver reasoned judgments on compensation or to be subjected to unrealistic, oppressive and needless standards of point-by-point analysis. I am making the decision I am in this case because there are limits to what can be inferred from a brief reference to excessive travel and waiting expenses, and because I do not have enough information before me fairly to do anything else."

And at [56]:

> "Section 82(12) has received a degree of judicial scrutiny, and the s.82 regime as a whole is now a developed and mature system, well understood by practitioners. The analogies drawn in the decided authorities, and recommended to me, with rules of court for assessing costs in both civil and criminal proceedings, are, however, just that: analogies. Section 82(12) is drafted in terms which mandate magistrates to order the payment of an amount of compensation, which in their view is reasonably sufficient in view of expenses properly incurred. While assistance may be gained from analogous concepts such as proportionality, and from the approach courts are familiar in taking to ensure that awards of costs are fair, it is important not to lose sight of the words of the statute. The magistrates are properly engaged on an exercise in assessing reasonably sufficient compensation for expenses properly incurred. What 'expenses' have been 'properly incurred in the proceedings' is one aspect. But s.82(12) creates a distinctive entitlement, and the assessment of 'reasonably sufficient compensation' is a distinctive statutory duty, in a scheme in which procedural provision is made to help minimise the need for complainants to litigate at all. The wider statutory context remains important."

In view of the uncertainties regarding the decision on quantum arrived at by the magistrates, her Ladyship ordered that the matter be looked at afresh and a new decision made and articulated. However, this was not intended to give rise to an expectation of anything more than a brief indication of reasons, sufficient to show that the magistrates had duly considered the main headings of submission by the parties. The landlords' appeal on this aspect of the case was, therefore, allowed.

Commentary

The case provides useful guidance on what is required to establish a defence to an application for compensation under the 1990 Act based on evidence that, at the relevant time, the landlord had done all that was reasonable to gain entry to the premises and abate the nuisance and was, therefore, no longer the cause of, or the person responsible for, the nuisance. It is apparent that the question of reasonableness in this context is a factual assessment determined by reference to all the circumstances of the case. In the words of Collins Rice J, at [62]:

> "The magistrates do not have to give a commentary on the evaluative exercise. The explanation of verdict in proceedings of a criminal nature may be discharged by a demonstration that the magistrates have satisfied themselves as to the ingredients of liability . . . Where a disappointed litigant 'cannot understand why they lost', care is needed: that may signal uncertainty or obscurity as to basis, or it may signal vehement disagreement as to merits. Only the former is a proper symptom of legal error. The landlords may not find themselves able to acknowledge why the magistrates preferred the evidence contrary to their defence, but that they did so is plain enough."

On the issue of the quantum of compensation, it was apparent that the magistrates had erred in not sufficiently indicating their approach to the assessment of the amount to which Ms Burton was entitled. It was, perhaps, unfortunate, given the substantial amount of compensation which was claimed, that the magistrates had declined to adjourn for written submissions, deciding instead to deal with quantum summarily. While that was not necessarily wrong, it increased the risk of the broad brush approach missing something that needed covering, and it was not possible to tell if they had made a fair assessment of the proportionality of the costs claimed by the tenant. Consequently, her Ladyship was bound to conclude that magistrates had erred and that there was at least potential injustice in their summary approach. Although, therefore, the quantum of compensation had to be considered afresh, this simply required a brief indication of reasons sufficient to show that the main heads of submission had been considered.

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