



Neutral Citation Number: [2014] EWHC 4334 (Admin)

Case No: CO5135/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2014

Before :

MR JUSTICE WILKIE

Between :

Essence Bars (London) Limited T/as Essence

Claimant

- and -

Defendant

Wimbledon Magistrates Court

-and-

Royal Borough of Kingston upon Thames

Interested Party

Michael Bromley-Martin QC (instructed by LT Law) for the Claimant
Gary Grant (instructed by Royal Borough of Kingston upon Thames) for the Interested Party

Wimbledon Magistrates Court, the Defendant, was unrepresented

Hearing date: 16th December 2014

Approved Judgment

Mr Justice Wilkie :

1. This is a "rolled up" hearing of an application by the Claimant for permission and, if granted, the hearing of the application for judicial review of a decision made on 3rd November 2014 by the Defendant (acting by District Judge (Magistrates Court) Henderson) (the DJMC) by which the DJMC decided that he had no jurisdiction to hear the appeal, then listed before him, and, accordingly, dismissed it.
2. As a Court, and in accordance with convention, the Defendant does not participate in this application for judicial review. The Interested Party, who was the respondent to the appeal which the DJMC dismissed is the Royal Borough of Kingston upon Thames (Kingston) and has appeared to oppose this application.

The facts

3. The Claimant, Essence Bars (London) Limited, (Essence) is a registered company (number 05799146), the sole director of which is Mr Franco Lumba. Only one share has been issued and it has, at all material times, been held by another company FL Trading Limited (FL).
4. FL is a registered company (number 06768433). Its sole director is Mr Franco Lumba. It has one share issued, which is held by Mr Lumba.
5. Essence is the premises licence holder for the licensed premises called "Essence" at Bucklands Wharf, Thameside in Kingston upon Thames. The Royal Borough of Kingston upon Thames is the licensing authority.
6. The Metropolitan Police applied to Kingston for a summary review of the licence for those premises. The review hearing took place before the licensing subcommittee of Kingston on 6th January 2014. On 10th January 2014 Kingston wrote to the Claimant informing it that the licensing subcommittee had resolved that the premises' licence for "Essence" be revoked in accordance with section 53C(3)(e) of the Licensing Act 2003. That decision did not take effect until the end of the 21 day period given for appeals against the decision. The letter informed the Claimant that there was a right of appeal against that decision, to be commenced by lodging a notice of appeal with Southwest Administration Centre within 21 days. The grounds upon which such an appeal may be made and the procedure was said to be contained in Schedule 5 of the 2003 Act. In the event of an appeal, the decision of the subcommittee would not take effect until the appeal was disposed of.
7. On 22nd January 2014 LT Law, who acted as solicitors for both Essence and FL, sent to the Clerk of the Justices and to Kingston a document entitled "Appeal by way of complaint Licensing Act 2003". That document contained the following:

"Complainant - FL Trading Limited C/-Lana Tricker, LT Law,
18 Soho Square, London, W1D 3QL."
8. Beneath that, under the heading "Notice of Appeal", the following appears:

"Take notice that the complainant, the premises licence holder
of the premises licence for the premises "Essence," ... intends

to appeal to the Lavender Hill Magistrates' Court ... against the decision of [Kingston] ... (received on 13th January 2013) revoking the premises licence following an application for summary review under the Licensing Act 2003 in respect of the premises."

9. In separate proceedings, on 3rd April 2014, FL commenced proceedings seeking a judicial review of Kingston's review decision on procedural grounds.
10. On 7th April 2014, the statutory appeal to the Magistrates' court was adjourned pending resolution of that claim for judicial review.
11. On 6th May 2014, permission was refused, on paper, by the Single Judge and on 18th June 2014, at an oral renewed application for permission, another single Judge refused permission.
12. The judicial review having been resolved, on 4th August 2014 there was a case management hearing in relation to the statutory appeal before the Magistrates' Court.
13. Throughout these preliminary stages of the statutory appeal and throughout the entirety of the claim for judicial review the party initiating the appeal and seeking judicial review was FL. No one realised that FL was not, and never had been, the premises licence holder of "Essence". In fact, at all material times, the premises licence holder of "Essence" had been the Claimant.
14. By the time it was realised by Kingston that the complainant, FL, was not the premises licence holder, the 21 days time limit for the premises licence holder to have launched an appeal against Kingston's review decision had long expired.
15. Accordingly, on 3rd November 2014, Kingston argued before the Magistrates' Court, as a preliminary legal point, that the court had no jurisdiction to hear the substantive appeal because the complainant, FL, had no standing to bring an appeal as it was not the premises licence holder and the party which was the premises licence holder, the Claimant, had not appealed and it was now out of time to appeal.
16. The DJMC, by his decision, refused an application that the complaint be amended by substituting Claimant for FL. The DJMC, having considered the relevant authorities cited to him, concluded that, applying those authorities, he had no power to accede to that application and, accordingly, had no jurisdiction to hear an appeal brought by FL. He, therefore, dismissed the appeal.

The law

17. A premises licence is granted by the licensing authority under part 3 of the Licensing Act 2003. Sections 53A-C of that Act provide for summary review of a premises licence upon application by the police in various circumstances. The licensing authority must convene a hearing within 48 hours of receipt of a summary review application to consider whether to impose one or more interim steps, including suspending the licence pending the determination of the application. The licensing authority must determine the application for summary review within 28 days after its receipt. The measures available to it include the power to revoke the licence.

18. Section 181 of the 2003 Act provides for appeals against decisions of licensing authorities and refers to Schedule 5, which makes provision for appeals against decision of licensing authorities.
19. Schedule 5, paragraph 8A, concerns summary review of a premises' licence and provides:
 - (1) "This paragraph applies where a review of a premises licence is decided under Section 53A(2)(b) (review of premises licence following review notice)
 - (2) An appeal may be made against that decision by –

...

(b) the holder of the premises licence ..."
20. Paragraph 9 of Schedule 5 makes general provision about appeals under this part and provides, in so far as relevant, as follows:
 - (1) "An appeal under this part must be made to a Magistrates' court.
 - (2) An appeal under this part must be commenced by notice of appeal given by the Appellant to the [designated officer] for the Magistrates' court within the period of 21 days beginning with the day on which the Appellant was notified by the licensing authority of the decision appealed against."
21. Appeals brought under the Licensing Act 2003 are dealt with pursuant to provisions in the Magistrates' Courts Act 1980 Sections 51-75 which concern "civil jurisdiction and procedure".
22. Section 51 concerns the issue of summons on complaint and reads as follows:

"Where a complaint relating to a person is made to a Justice of the Peace, the Justice of the Peace may issue a summons to the person requiring him to appear before a Magistrates' Court to answer to the complaint."
23. Rule 34 of the Magistrates' Court Rules 1981 provides:

"34. Appeal to be by way of complaint

Where under any enactment an appeal lies to a Magistrates' Court against the decision or order of a local authority or other body or person the appeal shall be by way of complaint for an order."
24. Sections 121-155 of the Magistrates' Courts Act 1980 are headed "Miscellaneous and supplementary". Section 123 of that Act provides as follows:

"123. Defect in process

- (1) No objection shall be allowed to any information or complaint ... for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the ... complainant at the hearing of the ... complaint
 - (2) If it appears to a Magistrates' Court that any variance between a summons or warrant and the evidence adduced on behalf of the ... complainant is such that the Defendant has been misled by the variance, the court shall, on the application of the Defendant, adjourn the hearing."
25. Section 123 is the only provision under which it is possible to seek to amend a complaint or notice of appeal or summons. It is that section which the DJMC was invited to invoke in order to permit the appeal to proceed with the Claimant substituted for FL, the Claimant being the premises licence holder.
26. The Interested Party relied, before the Magistrate and before this court, on 3 authorities concerning the operation of Section 123. In addition it relies on the Divisional Court decision in *New Southgate Metals Limited v Islington LBC [1996] Criminal Law Review 334* in which the Divisional Court identified 3 types of error which can occur in a criminal information, and summons based on it, before a Magistrates' Court, namely:
 - i) An error so fundamental, that it cannot be rescued by any appropriate and reasonable amendment, will cause the prosecution to fail without more.
 - ii) Where the defect is substantial enough to require amendment, then Magistrates have power to allow amendment provided that an adjournment should be granted if the defence are placed at any disadvantage by the adjournment. If the prosecution fail to detect such an error, any conviction obtained upon the defective information is a risk of being quashed by the Divisional Court.
 - iii) If the error is so trivial that no amendment is required then the conviction may be upheld even on an unamended information.
27. *New Southgate Metals* did not explicitly concern Section 123 as it concerned proceedings in the Crown Court.
28. The three cases relied on by the Interested Party in the Magistrates' Court each concerned the application of Section 123 in circumstances where a prosecution had been commenced against a particular company arising out of facts where that company had an absolute defence to the criminal charge, whereas a different company within the same group would have been an appropriate Defendant to meet the charge, based on the facts alleged.
29. In each case the error of the prosecutor was not discovered until after the expiration of the statutory time limit for bringing such criminal proceedings and the court had to determine whether, in those circumstances, the prosecutor could invoke Section 123

in order to amend the form of process to substitute the "wrong" company with the "correct" company.

30. In *Marco Croydon Limited (TA A&J Bull Containers) v Metropolitan Police [1984] RTR 24* the company prosecuted was not the owner of the skip in question and so could not be guilty of the offence charged, whereas another company within the group could have been charged appropriately. The prosecutor applied under Section 123, after the 6 month time limit had expired, to amend the name of the Defendant Company to that of the correct one. The Justices allowed the amendment. The High Court had to determine whether that was correct.
31. Mr Justice Glidewell in his judgment, with which Mr Justice Nolan agreed, recorded that, in the case stated, the Justices had said as follows:

"We were of the opinion that where the wrong person has been summoned amendments should not be allowed but where the prosecutor has correctly identified the Defendant but merely misstated the name, amendments should be allowed. Applying these principles to the present case we were of the opinion that the prosecutor clearly intended to summon the corporation which supplied the skip and whose name was wrongly copied from the delivery note. We therefore allowed amendment."
32. Mr Justice Glidewell agreed that the Magistrates had accurately stated the law. The question was whether they were right in applying it. He concluded that they were not correct. He expressed himself in the following terms:

"Accordingly, with very considerable reluctance, as I regard this as a point of pure technicality which has no merit, I take the view that the Justices were wrong to allow the amendment. The prosecution – no doubt misled by the name on the skip – issued the information and the summons in the name of the wrong company that is to say the wrong person. Therefore, initially the wrong person was before the court."
33. The second case is *R v Greater Manchester Justices ex parte Aldi GMBH and co KG [1994] 159 JP 717*. In that case the "wrong" company which was summonsed was a wholesaler, whereas it should have been a different company in the same group, which was a retailer. The Justices had permitted amendments under Section 123 to substitute the wholesaler defendant with the retailer defendant, at a time when the time limit for prosecution had expired and no new summons could be issued.
34. Lady Justice Butler-Sloss in her judgment emphasised that Sections 123(1) and (2) had to be read together and, having done so, it assumed that either the Defendant or, in the case of a company, their legal advisors were present in the court. She regarded herself as bound by *Marco*. She said at 722(b):

"... throughout the time the trading standards officers believed the company to be the wholesaler and not the retailer and did not appreciate the distinction but they are separate companies with separate functions. It is not just a cloak since they are

different corporate personae. Consequently, the Defendant company, before the Justices, had a complete defence to the summonses that were taken out against it. The company who would have to meet those allegations contained in the summonses was not before the court. It was not just a question of mis-description of the same person they were separate companies with separate functions. Therefore, in relying on section 123 the Defendant company was not before the court, it could not ask for an adjournment because it had not been brought to court ... It is an entirely technical point but nonetheless the answer to the Magistrates' question was that they were not correct in allowing an amendment of the information."

35. Mr Justice Latham in his judgment said at 728H:

"I agree in particular with her analysis of Section 123 ... which is the only power which was available to the Magistrates' ... for amendment of the information. What is quite plain from Section 123 is that it is a restricted power. It is the only statutory power available to the Magistrates by which form of process can be amended and applies where a Defendant makes objection to the form of an information or complaint or summons ... the consequence was to have an amended information charging out of time an offence against a different Defendant. There is no power to do that. Section 123 gives no such power. It is only directed to dealing with problems relating to the Defendant before the court. It follows that there could be no question of the power under Section 123 being used in the way suggested unless it could be said that the Defendant before the court was, in truth, one and the same person as the retailer but everybody accepted that that was not the case ... "

36. The third case is *Sainsbury's Supermarkets Ltd v HMCS and Plymouth City Council [2006] EWHC 1749 Admin*. The summonses were issued against "J Sainsburys PLC (trading as Sainsbury's Supermarket Ltd)". There was, in fact, no company in existence which was thus named. Companies which did exist had names similar, or broadly similar. They were "Sainsbury's Supermarkets Ltd" and "J Sainsbury PLC". The Magistrate had allowed the summons to be amended to substitute Sainsbury's Supermarkets Ltd as the Defendant. The Court in the judgment of Mr Justice McCombe, having referred to *Aldi* and *Marco*, said at paragraph 15:

"In my opinion the simple question here is whether the effect of the amendment allowed was to permit a charge to be brought out of time against a new Defendant, namely SSL ... Regrettably ... [the Magistrate fell] into the same error as was made in *Marco* ... namely to hold that it was sufficient that the prosecutor clearly intended in that case to summon the corporation which supplied the skip ... as in the two earlier cases ... the proper Defendant was not before the court, the

effect of the District Judge's decision was, in my view, to prefer a charge against a new Defendant outside the statutory time limit."

37. The Claimant relies, as it did before the DJMC, on *Fernandez v Broad* [1996] CLY 2759. That was a complaint brought by Mr Fernandez against Ms Broad for an alleged statutory nuisance. It was commenced by way of information laid before the Magistrates' Court. On that basis the Magistrate had authorised the issuing of a summons addressed to Ms Broad. Within the summons and reciting the information, it was said that the owners of the premises were "the said council" whereas it should have said "Ms Broad". This, textually defective, summons was sent to Mr Fernandez' solicitors who caused it to be served on Ms Broad. When the complaint came on for hearing a point was taken on her behalf that, as the summons did not name her as being responsible for the alleged statutory nuisance, it was fundamentally flawed and should be dismissed. The Magistrate acceded to that submission. The Divisional Court concluded that the Magistrate should have interfered to amend, of his own motion, if the information was such as to confer jurisdiction on the court. The court should seek to clarify any defects of form or substance in the summons and should direct clarification by way of amendment or by giving particulars or by mere oral explanation. Mrs Justice Smith, in her judgment, said:

"It is, in my judgment, highly undesirable that summary proceedings should be complicated and frustrated by the taking of technical points such as this ... Section 123 of the 1980 Act makes plain the intention of Parliament that technical points should not be taken in summary proceedings. Only in cases in where the information is substantively defective in that it either discloses no offence known to law, or is duplex, or is so unclear that the allegation cannot be understood should it be dismissed in limine."

38. Lord Justice Beldam agreed on the basis that to dismiss an information merely because three words of no meaning in the context have found their way into the summons is an unreasonable exercise, by the Magistrate, of his discretion, to amend the summons when the error was brought to his attention.
39. The Claimant also relies on a line of cases concerning the application of, amongst other provisions CPR 19.5 which make special provision about adding or substituting parties after the end of relevant limitation period and, in particular, the power given under sub rule 2 that the court may add or substitute a party only if: "a) the relevant limitation period was current when the proceedings were started and b) the addition or substitution is necessary and:

(3) the addition or substitution of a party is necessary only if the court is satisfied that a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party ..."

40. In *Adelson and another v Associated Newspapers Ltd* [2007] EWCA Civ 701 Lord Phillips handed down the judgment of the court. He reviewed a series of cases in which a clear line of distinction was made between circumstances in which the

mistake has been as to the name of the party and those where the mistake was as to the identity of the party. Lord Phillips at paragraph 43 summarised the effect of those authorities, which referred to Order 20, said as follows:

“These authorities have led us to the following conclusions about the principles applicable to Order 20 Rule 5 [which empowers the court to give leave to amend after any relevant period of limitation has expired to correct the name of the party if the court is satisfied the mistake sought to be corrected was genuine]...i) the mistake must be as to the name of the party in question and not as to the identity of the party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party but gives the party the wrong name. In such circumstances a mistake as to name is given a generous interpretation.”

The Claimant's contentions

41. The Claimant does not contest the effect of the three authorities which deal with the powers given under Section 123 where the “wrong” party is before the court and where, by an amendment out of time, it is sought to bring the “correct” party, a different legal persona, before the court. The Claimant's contention is that the Interested Party, in argument before this court and the DJMC, and the DJMC, in acceding to that argument, fundamentally misconceived the factual matrix. It is said that the complaint, and notice of appeal, correctly identify the Appellant as “the premises licence holder” and that the error of the Claimant's solicitor was in misstating the name of the premises licence holder. Accordingly, the DJMC was wrong in law to refuse to amend the complaint to reflect the mistake in nomenclature, and was wrong in law to determine that he had no jurisdiction to determine the appeal. The Claimant argues that in *Fernandez v Broad* the Divisional Court was critical of an overly technical approach to procedures in courts of summary jurisdiction and that the approach of the High Court, as reflected in the current version of the CPR and reflected in the line of authorities culminating in *Adelson*, reflects a distinction between a party being mistakenly identified, with the result that the court has no jurisdiction, and the correct party, having been identified so as to give the court jurisdiction, the court acting to permit the correction of an erroneous naming of that party.
42. The Claimant contends that the latter is the present case. The Appellant was always identified correctly as the premises licence holder, but was erroneously misnamed as FL rather than the Claimant
43. The Claimant contends that paragraph 8A(2) of Schedule 5 provides that an appeal may be made against the decision by the holder of the premises' licence. It contends that the notice of appeal made it clear that the appeal was being brought by the premises licence holder. The mistake of the Claimant's solicitor was in erroneously naming the premises licence holder, the complainant, as FL whereas the correct name of the premises licence holder, and hence the complainant, was that of the Claimant.
44. Accordingly, it is contended, this is not a case where the “wrong” party was before the court. The Appellant being the premises licence holder, and the Claimant being

the premises licence holder, then the Claimant was, in effect, before the court, albeit mis-described as FL. The effect of the amendment sought was not to bring a new party before the court, at a time when the time limit for an appeal brought by that new party would have been out of time.

The IP's contentions

45. The IP contends that this analysis is wrong. The appeal had to be brought by a legal person, the complainant or Appellant. In order to have standing to bring such an appeal, that legal person had, in this case and in addition, to be the premises licence holder. In this case, the legal person seeking to bring the appeal was unequivocally stated to be FL, a separate legal person from the Claimant. In fact, that legal person did not have standing to bring an appeal because it was not the premises licence holder. In that sense, the case is no different from the three, s. 123, cases to which reference has been made.
46. The IP contends that the Claimant, by its application for an amendment, sought to substitute itself, a different legal person which was not before the court as it was not the Appellant or complainant, for the legal person which had sought to bring the appeal, at a time when the time limit had expired for the Claimant to commence an appeal against the review decision of Kingston.

My Conclusion

47. In my judgment, an appeal pursuant to Schedule 5 has to be brought by way of a complaint by a legal person. That legal person, however, has to have standing to bring the appeal as identified in paragraph 8A(2) a, b and c of Schedule 5. One of those characteristics, giving standing, is that the Appellant is the holder of the premises' licence.
48. The notice of appeal reflects this scheme. It states that the complainant is the premises licence holder and intends to appeal. However the complainant is said to be FL, which is a separate legal person to the Claimant.
49. As the notice of appeal stood on 3rd November 2014, a legal person, FL, was "before the court" in the sense that it was the party intending to appeal, but had no standing to do so. The appeal, accordingly, was fundamentally flawed. The court had no jurisdiction to entertain an appeal against the decision sought to be appealed brought by the legal person which was "before the court," in that sense, having given notice of intending to bring it.
50. At that stage, the only legal person "before the court" in that sense was FL. The only way that the Claimant, which satisfied the requirement giving standing to bring the appeal, of being the premises licence holder, could be "before the court," to bring the appeal, was for the notice of appeal to be amended to substitute one legal entity, FL, with another, the Claimant. That would have amounted to a new Appellant being permitted to bring an appeal at a time when the strict time limit of 21 days for bringing such an appeal had expired.
51. In my judgment, the Claimant is wrong when it contends that the premises licence holder, the Claimant, was "before the court" as a valid Appellant, but had been

misnamed as FL. Of course, naming FL as the complainant was an error. But FL is an existing legal personality, separate from the Claimant and, in my judgment, was mistakenly identified, by the solicitor, as the complainant because the solicitor did not realise that the premises licence holder was the claimant and not FL. In my judgment, that cannot be construed as the Claimant always having been the Appellant, but misnamed as such. Rather, it was a misidentification of the person entitled to appeal. This resulted in the Appellant, or complainant, being identified as FL

52. In my judgment, this court is bound by the three s. 123 authorities to conclude that the DJMC was correct to conclude that he had no jurisdiction to hear the appeal brought by FL, because it was not the premises licence holder and had no standing. He was also bound to refuse to permit the notice of appeal to be amended to permit a different legal personality, the Claimant, to bring the appeal when the time for it to have done so had expired.
53. I refuse the Claimant permission to bring this judicial review.