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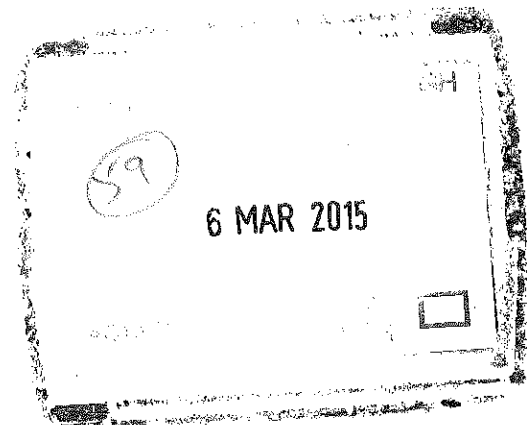
Dear Sir / Madam,

Re TORFAEN COUNTY BROUGH COUNCIL v STUBBS

Please find enclosed a copy of the final approved judgment in this matter.

Yours faithfully

Miss Beth Weaver
Administrative Court Office Manager for Wales



Co/3903/2014

Neutral Citation Number: [2014] EWHC 4702 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff
South Wales
CF10 1ET

Thursday, 11th December 2014

B e f o r e:

LORD JUSTICE LLOYD JONES

MR JUSTICE WILKIE

Between:

TORFAEN COUNTY BOROUGH COUNCIL

Claimant

v

BRIAN STUBBS

Defendant

Digital Audio Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr B Williams (instructed by Borough Council) appeared on behalf of the **Claimant**
The Defendant appeared in Person

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE LLOYD JONES: This is an appeal by Case Stated by the Torfaen Borough Council against the decision of the Gwent Justices in respect of their adjudication at Newport Magistrates' Court on 30th May 2014, acquitting the respondent, Mr Brian Stubbs, of three offences contrary to paragraph 10(1)(b) and 10(4) of Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982.
2. Paragraph 10(1) and 10(4) of Schedule 4 to the Act make it an offence to engage in street trading in a consent street without being authorised to do so by the council under the Schedule. Paragraph 1(1) defines "consent street" as a street in which street trading is prohibited without the consent of the district council and it also defines "street trading" as follows:

"Street trading' means subject to subparagraph (2) below the selling or exposing or offering for sale of any article (including a living thing) in a street."
3. Paragraph 1(2) sets out a number of matters which do not constitute street trading for the purposes of the Schedule. The only one which is relevant in the present case is paragraph 1(2)(f) which describes the activity of "selling things or offering or exposing them for sale as a roundsman". So paragraph 1(2)(f) provides that that activity is not street trading.
4. The informations preferred were as follows.
 - (i) On 27 September 2013, at Cwmbran in the county of Torfaen, Brian John Stubbs engaged in street trading in a consent street, namely William Brown Close, Llantarnam Park Industrial Estate, without being authorised to do so, contrary to section 10(1)(b) and (4) of Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1992.
 - (ii) On 1st November 2013, at Pontypool in the county of Torfaen, Brian Stubbs engaged in street trading in a consent street, namely Clarence Road, without being authorised to do so contrary to section 10(1)(b) and (iv) of Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982.
 - (iii) On 11th November 2013, at Cwmbran, in the county of Torfaen, Brian Stubbs engaged in street trading in a consent street namely William Brown Close, Llantarnam Park Industrial Estate without being authorised to do so, contrary to section 10 (1)(b) and (4) of Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982.
5. The Case Stated states that the following facts were agreed. However we approach the matter on the basis they were actually the findings of the magistrates:
 - (1) William Brown Close and Clarence Road were on the relevant dates consent streets within the meaning of the Local Government (Miscellaneous Provisions) Act 1982.
 - (2) Brian Stubbs did not have a licence authorising street trading.

(3) Brian Stubbs visited various offices, garages and factories on a daily basis.

(4) Brian Stubbs was selling sandwiches, drinks and confectionery from his motor vehicle on William Brown Close on 27th September 2013 and 11th November 2013 and on Clarence Road on 11th November 2013.

(5) Customers would choose from the selection of goods on display and a price list was displaced on the side of the motor vehicle.

(6) Brian Stubbs did not offer the facility for customers to pre order goods in advance.

(7) Brian Stubbs had no order book.

(8) Officers posing as customers conducted several 'test purchases' from Brian Stubbs' van. They had not pre ordered any items but selected random items on display and paid the amount requested by Brian Stubbs. Customers before the officers in the queue acted in same way."

6. The Case Stated also recites that it was contended by the appellant that the respondent was not selling things or offering or exposing them for sale as a roundsman within paragraph 1(2)(f) of Schedule 4 to the Act and that it was contended by the respondent that he was operating as a roundsman and therefore was not street trading.

The magistrates record in the Case Stated that the appellant referred the court to case of Kempin (Trading as British Bulldog Ice Cream) v Brighton and Hove Council [2001] EWHC 140 (Admin). The magistrates then record their decision as follows in paragraph 6 of the Case Stated:

"We were of the opinion that the respondent was operating as a roundsman for the following reasons: (1) The respondent follows a set route Monday to Friday with prearranged set slots and exact mileage. (2) The respondent has set customers in the form of staff from identifiable companies.

(3) The respondent provides orders of food in a selection he knows staff regularly purchase.

(4) Although we received advice from the legal adviser that upon the facts that we found it was open to us to lead to the decision that the respondent should be convicted, we nonetheless found that in our opinion the appellant was not guilty of the offences alleged and we duly acquitted him."

The magistrates have identified the following question for the opinion of this court:

"The question for the opinion of the High Court is: whether on the basis of our findings we were entitled as a matter of law to acquit the respondent of the offences alleged."

Mr Williams, who appears on behalf of Torfaen Borough Council, submits that it was not open to the magistrates to come to their conclusion that the respondent was carrying on business as a roundsman within the meaning of the statute, having regard to the findings of fact which they made.

Mr Stubbs has appeared in person before us today. We are grateful to him for his helpful and concise submissions which have been very ably advanced.

7. The magistrates have indicated that they do not oppose the appeal before the court today.

The decision to which we have been referred is that of the Divisional Court (Latham LJ and Potts J) in Kempin v Brighton and Hove Council. In that case the Divisional Court was concerned with the activities of two ice cream vans. There the District Judge, hearing the case in the Magistrates' Court, had referred to the definition of a roundsman in the Oxford English dictionary: "a person... employed by a tradesman to go the round of his customers for orders and the delivery of goods."

8. The Divisional Court upheld the decision of the District Judge, that in that case the appellant was not acting as a roundsman. Potts J, with whom Latham LJ agreed, stated:

"In my judgment, the district judge correctly defined 'roundsman' when she held that the word meant 'one who goes the round of his customers for orders and the delivery of goods.'"

Potts J then went on to say this:

"In my opinion, the word denotes a person who follows a set route to attend on specific/identifiable customers for the purpose of either taking orders or for the delivery of goods. This is consistent with the Oxford Dictionary definition of 'order' and 'delivery'. 'Order' in this context means:

'A direction to tradesmen to supply something.'

32. 'Delivery' means: 'Distribute ordered goods.'"

Potts J then continued at paragraph 33:

"I accept the submission made on behalf of the Respondent that the Act allows for, and clearly envisages, a situation where in the course of delivering and taking orders, (i.e. provided the tradesman is on a 'round') 'immediate sales' might be made. A coal man may be asked for a sack of coal. A milkman might be asked for a pint of milk. Further, the exemption envisages that additional purchases might be made by customers over and above that which has been ordered. This is the correct interpretation of the exemption. However, it is ancillary to the 'round'."

The court then went on to conclude that the activities of the appellant's operators did not fall within the exemption created by paragraph 1(2)(f). They considered the

District Judge had been correct in her conclusions and had not erred in law.

9. I find myself in total agreement with the reasoning of the Divisional Court in Kempin which is any event binding on this court. In particular, I consider that the extension of the activity of a roundsman, acknowledged in paragraph 33 of the judgment of Potts J, is necessary. Paragraph 1(2)(f) clearly contemplates that a roundsman may in the course of acting as such sell things or offer or expose them for sale. Nevertheless, this activity is intended to be distinguished from the prohibited activity of street trading. I agree with the Divisional Court that the intention was that there should be no prohibition on such selling or offering or exposing things for sale provided that this was ancillary or incidental to the activity of a roundsman.
10. Against that background I turn to consider whether it was, as a matter of law, open to the magistrates to acquit the respondent on these charges. They found that the respondent was selling food and drinks from his vehicle which customers would choose from the selection of goods on display. Was it open to the magistrates to conclude that such sale or offering or exposing goods for sale was ancillary or incidental to the activity of a roundsman? In my judgement it was not. The activity of street selling was the entirety of the activity carried out by Mr Stubbs. Mr Stubbs submitted to us that on occasion somebody might ask him to put something aside for the next day, but it was clear that that would be exceptional. The main thrust of the activity is the activity of street trading. There was no finding of fact which could support the view that the respondent was performing the functions which could be considered those of a roundsman. On the contrary, there were findings that the respondent did not offer the facility for customers to pre-order goods in advance and that the respondent had no order book. As Mr Williams submits, these findings are totally inconsistent with the view that he was acting as a roundsman.
11. Mr Stubbs submitted to us and that:

"I was delivering pre-ordered goods because they are making a selection from goods available on the day."
12. It seems to me that this is self-contradictory. It is clear from this statement that he was not delivering pre-ordered goods and that was a finding of fact which the magistrates made. Moreover, the reasons given by the magistrates for concluding that the respondent was acting as a roundsman are, in my judgement, not capable of supporting that conclusion. The facts that he follows every week day a set route with prearranged stops, that he has set customers in the form of staff from identifiable companies and that he provides orders of food in a selection he knows staff regularly purchase, matters on which Mr Stubbs placed particular reliance in his submissions to us today, do not, without more, establish that he was acting as a roundsman within the meaning of this provision. I note that these features were all present also in Kempin. They do not serve to distinguish this activity from street selling. Accordingly I conclude that the decision of the magistrates is plainly wrong in law.
13. I should say that I have some sympathy for Mr Stubbs because, as he explained it to us, his business is not viable if he has to purchase a licence to trade as a street trader from

all of the local authority areas in which he trades. However, I am clear that his business as presently organised does constitute street trading as a matter of law. Accordingly I would answer the question posed by the magistrates, namely whether on the basis of their findings they were entitled as a matter of law to acquit the respondent of the offences alleged in the negative.

14. THE RESPONDENT: I agree that for the reasons given by Lloyd Jones LJ the answer to the question posed by the magistrates is "no".
15. MR WILLIAMS: I am grateful. Your Lordships question as to what to do next. It would be my respectful submission that given the findings that the Magistrates' Court should be directed to convict Mr Stubbs but of course they will have to go on to consider the sentence which is a fine of up to £1000 on each offence - I certainly would resist any suggestion by Mr Stubbs, which I sense he might be building to given his submissions today - this matter should be reheard by the Justices. There are very clear findings of fact and there is no discernible basis on which to conclude he was a roundsman and should have convicted and gone on to consider sentence that day.
16. I am unclear, I know that the powers of this court extend to reversing that decision. If this court is able to go on to consider it through to conclusion, that course would be preferable. If this course is not then a direction to convict a freshly constituted Bench and thereafter sentence would be what I would request.
17. LORD JUSTICE LLOYD JONES: Are we empowered to make such a direction?
18. MR WILLIAMS: You are empowered to reverse the decision by definition the reversal of the acquittal is a conviction. If that is the decision then - I suppose it is terminology. We go back before a freshly constituted Court to consider sentence alone. So the powers do extend to a reversal of that decision the opportunity basic of findings. I suppose it gets me to the same place. I do not think your powers extend to completing and concluding the matter in this court and so that will be what I would respectfully requesting: that the decision is expressly reversed by this court and a freshly constituted Bench considers the sentence.
19. LORD JUSTICE LLOYD JONES: You are hoping to shut the door on Mr Stubbs arguing other matters when the matter goes back. Now, the one which strikes us, as a result of what we have heard is this issue as to whether he was trading in the street or not. That was a matter that was argued and decided below, was it not?
20. MR WILLIAMS: It was. That is why I say beforehand I thought that is where he was building to. It was certainly determined that the relevant streets were consent streets within the meaning of the Act. That is clearly recorded at paragraph 2(1) of the stated case. So, again, I am seeking to shut the door on Mr Stubbs having a second bite of that before a freshly constituted bench. In my respectful submission that would be unjust given the circumstances that are effectively these. The magistrates on the findings of fact should have have convicted on that date and that is where we should have been back in May. Those would be my submissions at this stage. There is a further application that I will come to.

21. LORD JUSTICE LLOYD JONES: We will come to that.
 22. Mr Stubbs you have heard what is said there. It is said that it follows from our decision that we should direct the magistrates now to convict because it is our view that on their findings of fact that was the only verdict that was open to them. Is there anything you want to say about that?
 23. THE RESPONDENT: I understand on my take on the conversation is that the barrister would like you to pass judgment on me today.
 24. LORD JUSTICE LLOYD JONES: We are not going to do that.
 25. THE RESPONDENT: It has to be referred back to.
 26. LORD JUSTICE LLOYD JONES: -- has to go back to the Magistrates' Court.
 27. THE RESPONDENT: Effectively you're not shutting the door on me?
 28. LORD JUSTICE LLOYD JONES: Well, we are asked to shut the door to extend that it would follow that you would not be able to argue anything further before the magistrates in relation to whether the offence had been committed or not. What would be left would be the question of sentence. The only matter outstanding and before the magistrates. Is there anything you want to say to us as to why we should not follow that course?
 29. THE RESPONDENT: The only thing I would say I wish I had legal representation but unfortunately, you know, I just don't have the funds the council have to follow the case through.
 30. LORD JUSTICE LLOYD JONES: I understand that. You have done awfully well, presented the case very well and very fairly.
 31. THE RESPONDENT: Thank you my Lord.
- (The Bench Conferred)
32. LORD JUSTICE LLOYD JONES: Mr Williams, if we follow that course there would then be a conviction entered. Time would then presumably start running for an appeal on fact to the Crown Court.
 33. MR WILLIAMS: It would, yes, it starts afresh. The door is not shut firmly and that is a matter... I do not want to encourage where encouragement is not due, but, yes, that is a matter that can properly.
 34. LORD JUSTICE LLOYD JONES: I do not want Mr Stubbs to get a false impression from my use of the expression "shutting the door" that he should appreciate that - it is a matter for him - if he should wish to appeal in those circumstances he would not be out of time. Thank you.

35. We will quash the acquittal and we will direct the magistrates to enter a conviction on all three of the charges in the indictment.
36. MR WILLIAMS: There remains just a costs application. I hope this would be deemed a sensitive application because my instructions are as follows. You see the amount. I have handed --
37. LORD JUSTICE LLOYD JONES: Mr Stubbs has seen this. You have seen it Mr Stubbs?
38. THE RESPONDENT: Just seen it now my Lord.
39. MR WILLIAMS: What I am instructed to ask, which I think is very fair, that the appellant seeks a reasonable contribution. I am not going to extend sympathy in the same way the court did, but we understand the context, we understand that the conclusion of this will be fines, three fines and so that is why I make it very clear we ask for a reasonable contribution which is entirely matter for the court, which I hope you will consider is fair in the circumstances.
40. LORD JUSTICE LLOYD JONES: What we have here is the total costs which you say have been incurred as a result of your having to bring this appeal.
41. MR WILLIAMS: This appeal solely. They are separate from the costs in the Magistrates' Court which is subject to a separate schedule which is a matter which will have to be revisited once the magistrates pass sentence.
42. MR JUSTICE WILKIE: You are including the costs of the lay members as well as the legal costs; is that right?
43. MR WILLIAMS: Yes, that is right.
44. LORD JUSTICE LLOYD JONES: We are going to rise for a moment. Perhaps we should hear Mr Stubbs before we rise.
45. THE RESPONDENT: Obviously I dispute the costs. In my opinion I attended the Magistrates' Court and it's the first time I've ever gone to court for anything in my life. This is the second time. I don't see why I should have to foot the bill for something that Newport Magistrates Court obviously got wrong.
46. LORD JUSTICE LLOYD JONES: Thank you we will rise.
- (Short Adjournment)
47. LORD JUSTICE LLOYD JONES: We are going to order Mr Stubbs to pay a contribution to the costs of this hearing today in the sum of £500. We are mindful of what he says about the fact that it was an error on the part of the magistrates which made this appeal necessary. On the other hand, Mr Stubbs did not have to resist the appeal and the hearing today has been necessary as a result. So we order a contribution of £500 to the council's costs. Are there any further matters?

48. MR WILLIAMS: Not for my part.

49. LORD JUSTICE LLOYD JONES: Mr Stubbs thank you very much.
