IN THE HIGH COURT OF JUSTICE
IN THE ADMINISTRATIVE COURT

B E T W E E N

JOHN HEMMING MP

Appellant

-and-

BIRMINGHAM CITY COUNCIL

Defendant

CASE STATED

Case stated by District Judge Zara, sitting at Birmingham Magistrates' Court on 10 October 2014

CASE

1. These proceedings were brought by the Appellant, who is the Member of Parliament for the Birmingham Yardley constituency, under s.91 Environmental Protection Act 1990. He claimed to be aggrieved by the defacement by litter or refuse of areas of his constituency and sought a litter abatement order against the Defendant council under s.91(6). The terms of the order which the Appellant sought extended to the whole of the area of the constituency.
2. I heard no evidence, made no findings of fact, and determined the application on submissions. There was an ambiguity on the face of the papers about the extent of the area to be covered by the proposed order: the Appellant claimed that he had always sought an order to cover the whole of the constituency, the Defendant claimed that it should be limited to a specific number of identified sites. I resolved that issue in favour of the Appellant.
3. I then turned to the second issue raised by the Defendant in argument. It submitted that an order in the terms sought was too wide and outside the scope of the section. The Defendant drew the court's attention to the nature and extent of the duty imposed on it by virtue of s.89. It is a defence under s.91(7) if the Defendant can satisfy the court that it has complied with its duty under s.89. I found, as a matter of law, taking into account the words of section 89 to the effect that the duty is "to ensure, that the land is, so far as practicable, kept clear of litter and refuse" that the duty thus imposed was a qualified one and not an absolute one. I also took account of the words of s.89(3) to the effect that "in determining what standard is required…for compliance with subsections (1) and (2) above, regard shall be had to… the measures which are practicable in the circumstances".
4. I therefore upheld the Defendant's submission and ruled that a breach of such a qualified duty could only be proved by evidence of litter deposited at a particular place, with an order correspondingly limited to those specific places. The Appellant however sought an order covering the whole of his constituency. I further took the view that the wording of the section, with its references to "any

relevant highway" and "any relevant land" could not be interpreted so as to cover an area as large and diverse as a Parliamentary constituency.

5. There was further discussion about a number of specific sites where refuse had been deposited which had been specifically identified at a directions hearing on 4 July. The Appellant had accepted in a witness statement filed by him that refuse had subsequently been cleared from those particular sites but claimed that he had now identified several other sites where refuse had not yet been cleared. I ruled that the court could not consider those sites; the Appellant had first to give notice to the City Council and then issue a fresh application for an order in respect of those specific sites.
6. It is my understanding that the Appellant then accepted the court's ruling and withdrew his application for a litter abatement order. I then proceeded to consider cross-applications for costs. The Appellant applied for costs pursuant to s.91(12). I was satisfied that at the time the complaint was made the land in question was defaced by litter or refuse, and accordingly the Appellant met the first test under the subsection. However, I was referred to correspondence between the Appellant and Defendant in which the City Council offered to meet him to discuss its policy of not removing garden refuse. The Appellant chose not to avail himself of that offer and instead issued proceedings. I took the view that that was unreasonable. I therefore refused to make an order for costs in his favour.
7. I then turned to the application by the Defendant for its costs under s.64 Magistrates' Courts Act. I noted that the City Council had offered, in an open letter to the Appellant, to make no claim for costs if the proceedings were withdrawn before the hearing on 4 July. That offer had been ignored; the Appellant had proceeded in the full knowledge that he was at risk as to costs. The normal principle is that costs should follow the event and that even where a complainant had successfully challenged a decision by a public authority, the court should be slow to penalise a public authority making honest, reasonable and apparently sound decisions in the public interest. Here, of course, there had been no such successful challenge. I therefore awarded the Defendant the costs which it claimed.
8. The Appellant has purported to challenge the substantive decision not to make an order by way of appeal to the Crown Court. No such right of appeal exists but I am prepared to treat the purported appeal as an application to state a case in respect of the rulings which I made.

QUESTIONS

1. Was I right to determine that the duty on a litter authority under s.89 is qualified and not absolute?
2. Was I right to determine that the power to make an order under s.91 is limited to specific identified sites and cannot extend to an area as large as a Parliamentary constituency?
3. Was I right to refuse to make an order for costs in favour of the Appellant?
4. Was I right to make an order for costs in favour of the Defendant?

November 2014

District Judge Zara