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The Guide to Setting Aside

Alex Worthington
Barrister | Associate Director

What is an Application to Set Aside a Liability Order?

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- Practically: A request for the Magistrates' Court to set aside, or "cancel", a liability order for Council Tax or NNDR.
- Procedurally: A complaint by the ratepayer against the Council.
- Form: No specified form, it can be a letter or email.
- Jurisdiction: An exceptional jurisdiction at common law*, to be exercised cautiously.

** there is a limited jurisdiction under Regulation 36A of the 1992 Regulations for Council Tax only, which enables the billing authority itself to apply to quash Liability Orders.*

Initial Steps - Procedure

- The application is a complaint (per R. (on the application of Khan) v Feltham Magistrates' Court [2017] EWHC 3042 (Admin)) and so should be dealt with like any other:
  - Identify the issues.
  - Give directions for evidence on disputed issues.
  - Fix a final hearing.
- Where the Parties don't agree, Courts cannot just deal with applications to set aside summarily.
- Practically, where on analysis the application is one the Council wish to concede, allowing the application to be granted summarily be consent has advantages.

The Legal Test

- The test is set out in R. (on the Application of Brighton and Hove City Council) v Brighton and Hove Justices v Michael Hamdan [2004] EWHC 1800 (Admin).
  i. A genuine and arguable dispute as to the ratepayer's liability for the rates in question;
  ii. The liability order was made as a result of a substantial procedural error, defect or mishap; and,
  iii. The application to set aside the liability order was made promptly.
- ALL three limbs must be satisfied, and even then the Court retains a discretion as to whether to set aside - Chuckwu v London Borough of Redbridge [2015] EWHC 2683 (Ch), per Nugee J. at [25]

Genuine and Arguable Dispute

- Concerned with whether the underlying liability can be successfully defended – there is no point setting aside where a liability order would inevitably be made again at the next hearing.
- Anami Holdings Limited v Sandwell Metropolitan Borough Council [2018] EWHC 1913 (Admin) at [27];

  > "Assuming in favour of AHL that the bar to relief on the application was to show a good, arguable case by analogy to similar applications under the Civil Procedure Rules that there was a true lease intended by the apparent parties to it, it seems to me that the judge was fully entitled to say that it was necessary to find evidence upon which one would "hang the hat of a truly arguable case". Mere assertion by AHL that the property was let to GFL clearly would not do."

- As with a trial on summons, the burden of proof must be on the ratepayer following Ratford and Another v Northavon District Council [1987] Q.B. 357, albeit to that lower standard.

“Disputes” in Council Tax Cases

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- Regulation 57(1) of the 1992 Regulations excludes the raising of anything which could be appealed under:
  - Section 24 of the 1992 Act (any challenge based on banding or the dwelling’s valuation).
  - Section 16 of the 1992 Act (determining whether or not a particular person was liable for Council Tax).
- These things, properly to be raised before the VTE, cannot therefore form the basis of a genuine and arguable dispute.
- This limits set aside applications, realistically, to cases where there is alleged to have been an error in the demand process.

“Disputes” in NNDR Cases

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- The usual concepts of ownership or occupation apply.
- Equally permissible to defend on the basis of procedural failings, such as *Encon* type defences.
- Keep in mind Regulation 23(1) of the 1989 C&E Regulations which provides that anything which could form the basis of an appeal under Section 55 of the 1988 Act cannot be raised in proceedings before the Magistrates’ Court.
- The effect of this is that any challenge to the list which could be the subject of a “Check and Challenge” or proceedings before the Valuation Tribunal cannot be a defence to a summons and therefore cannot found a genuine and arguable dispute.

Promptness

- The clock starts to run from the moment that the Applicant became aware that a Liability Order had been or may have been made against them.
- Rule of thumb: 3 months.
- *Hamdan* itself refers to the need to avoid circumvention of the time limit for Judicial Review, making it extremely difficult to argue that something beyond 3 months can be prompt.
- The fact that an Applicant is corresponding about the Liability Order does not negate the need to apply promptly: Andrew Finn-Kelcey v Milton Keynes Council v MK Windfarm Limited [2008] EWCA Civ 1067.

Procedural Mishap

- It must be a procedural error, defect or mishap between the summons and Liability Order;
  - Earlier and it is part of the C&E Regs enforcement process, and so goes to dispute.
  - Later and it cannot have impacted on the making of the Liability Order.
- What counts is touched upon in *Hamdan* at [32];

> *"32. The authority for condition (a) is paragraph 10 of the judgment of Maurice Kay J in Pleroma. In most cases, it must be shown that the liability order was unlawful or made in excess of jurisdiction or in ignorance of a significant fact concerning their procedure (such as an application for an adjournment) of which the justices should have been aware. However, the procedural mishap may not be the fault of the court or of the local authority …"*

Procedural Mishap

- *Hamdan* at [32] also goes on to deal with what will not count;

> *"… a failure of the defendant to attend when he knows that there will be a hearing will not of itself satisfy this requirement. Thus a failure of the defendant to attend the hearing because he assumes, without good reason, that the local authority will not seek an order, or because he is absent abroad, will not of itself satisfy this requirement. A defendant who will be unable to attend a hearing because of his absence abroad may request an adjournment in writing, or instruct a solicitor to appear on his behalf; but if he does nothing, he is not entitled to an order of the magistrates to set aside a liability order made against him."*

Analysing the Application & Evidence

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- Analysis should take place at two key points:
  - Following receipt of the application (or, where that is unclear, a position statement); and,
  - Following receipt of the Applicant's evidence.
- At each point of analysis, consider the evidence available or likely to be available to the Council.
- Take each limb still in issue separately.
- Where one limb is clearly in the Applicant's favour, concede it as soon as reasonably practicable.

Analysis – Genuine Dispute

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- Can the “dispute” be ruled out on jurisdictional grounds?
  - *If so, oppose on this limb.*
- Does the Applicant’s assertion, if proven, amount to a defence?
  - *If not, oppose on this limb.*
- Has the Applicant produced evidence to support their assertion?
  - *If not, oppose on this limb.*
- Can the Council clearly disprove the veracity of the Applicant’s evidence?
  - *If so, oppose on this limb.*
- If you haven’t found one of the above as a basis to oppose, concede this limb.

Analysis – Promptness

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- When the Applicant knew of the Liability Order (or the hearing, based on which they ought to have known an order may have been made against them) is an issue of fact determined by the Court on the balance of probabilities.
- Determine the earliest point you can show that the Applicant was aware of the hearing or the Liability Order:
  - Did they respond to the Summons?
  - Did they correspond with the Council or Court regarding the hearing date?
  - Did they respond to the notice of the Liability Order or enforcement action?
  - Did an Enforcement agent attend on them with notice of the Liability Order?
- If you can show this date was more than 3 months before the application was made, oppose on this limb.
- If between 2 and 3 months, consider opposing on this limb where you also have other limbs on which you could succeed.
- If less than 2 months, or less than 3 months with no other limb, concede this limb.

Analysis – Procedural Mishap

- The usual focus here is on a lack of notice of the hearing or something which impeded the Applicant's attendance at the hearing.
- Can it be shown that the summons was <u>received</u> by the Applicant?
  - *If so, oppose on this limb unless something unforeseen prevented the Applicant's attendance and the Applicant could not have otherwise arranged representation.*
- Is there at least evidence that the summons was validly served?
  - *Where service can be evidenced but receipt not proven, it is usually only worth opposing on this limb in cases where the Council can succeed on at least one other limb.*

Getting to a Final Hearing

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- Seek directions from the Court to fit the case and ensure they're adhered to:
  - The starting point is for the Parties to understand each other's position. If the Applicant's initial application doesn't deal with each of the three limbs of the test, seek a direction that they file a position statement setting out their position on each limb.
  - The Council should file a position statement in reply.
  - The Applicant should then file evidence in support of the application, followed by the Council's evidence in reply.
  - Periods of 14 or 28 days should usually be permitted between each stage.
- It is also sensible to have the Court direct one party file a bundle before the hearing, though the contents should be agreed. If this is not directed, the Council may still wish to do this.
- Where parties are to be legally represented at the final hearing, directions should be given for skeleton arguments.

The Hearing

- Think of this as a Liability Order hearing with roles reversed.
- The Applicant is the complainant and so should present their submissions and evidence first.
- The Council then presents its submissions and evidence.
- If the Council wishes to address the Court again after its evidence, the Court can permit it, but must then give the Applicant the final word.
- The order of submissions and evidence can be varied so should be established at the outset, so no party inadvertently misses the opportunity to address the Court.
- Witnesses should still attend to confirm the content of witness statements and be cross examined.

Costs – When Successful

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- If successful at a final hearing, the Court's usual jurisdiction pursuant to section 64(1)(b) of the Magistrates' Courts Act 1980 applies.
- The power is discretionary, based on what the Court deems "just and reasonable".
- A common occurrence is that the Applicant realises they're bound to fail before the hearing and withdraws the application – this does not remove the entitlement to costs which can still be claimed under s.52 of the Courts Act 1971.
- In such circumstances, the Court can be asked to list a hearing solely to determine the issue of costs.

Costs – When Unsuccessful

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- If the Applicant succeeds, s.64(1)(a) of the Magistrates' Courts Act 1980 permits the Court to order the Council to pay the Applicant's costs.
- Not only is this a discretionary power on a "just and reasonable" test, it is subject to the costs protections afforded to public bodies pursuant to Bradford MDC v Booth (2000) 164 J.P. 485.
- In demonstrating reasonableness, think back to the analysis of the application:
  - Was there an early concession when it was clear the application would succeed?
  - Were those elements of the 3-stage test which could not sensibly be opposed conceded, leaving the Court only to determine disputed issues?
  - Was there anything in the conduct of the Applicant which caused the matter to continue?

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Questions?

Alex.Worthington@greenhalghkerr.com | 0333 200 5216