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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2020] EWHC 3872 (Admin)

No. CO/1041/2020

Royal Courts of Justice

Monday, 16 November 2020

Before:

MRS JUSTICE FOSTER DBE

B E T W E E N :

(1) ALBANY LIONS HOTEL LTD
(2) LIONS PIER HOTEL LIMITED — Appellants

- and -

OPAL BUSINESS GAS — Respondent

MS MULLER (instructed by Berkeley Rowe International Lawyers) appeared on behalf of the Appellants.

MR W. BORDELL (instructed by Haddletons) appeared on behalf of the Respondent.

J U D G M E N T

(<u>Transcript prepared from remote hearing recording and without access to documentation</u>)

MRS JUSTICE FOSTER DBE:

1 This an appeal by way of case stated from a decision of the Hastings Magistrates' Court dated 9 September 2019 by which the justices granted two warrants ("the Warrants") giving rights of entry to the respondent's agents at two premises, a pier, known as Lion's Pier Limited, Eastbourne Pier, Grand Parade, Eastbourne, East Sussex, BN21 3EL, and a hotel known as Albany Lions Hotel, 42-43 Grand Parade, Eastbourne, East Sussex, BN21 4DJ ("the Pier" and "the Hotel").

2 The first and second appellants are the legal entities who occupy the Pier and the Hotel and in respect of whom Opal Gas Limited ("Opal") were granted rights of entry essentially in order to enable them to cut off the supplies of gas they were making to the Pier and the Hotel.

3 There had, for some time, been contracts between the parties for the supply of gas. The entitlement to entry was asserted to be the appellants' failures to pay their gas bills. On 9 September 2019 Mr Carl Hammond, an agent of Opal, and another employee of Opal, had appeared personally before the Hastings Magistrates to invite the issue of entry warrants. The appellants were represented by their solicitor who addressed the magistrates and submitted a bundle of documents. In essence, he stated that conditions for the exercise of the jurisdiction to issue a warrant were not made out. There was a genuine dispute about the amounts claimed to be due. Proper notice to the appellants had not been given, and vulnerable persons were likely resident at one of the premises. All of these matters indicated that the magistrates could not issue the Warrants.

4 The Warrant in respect of the Hotel was in the following terms.

> "*Whereas in pursuance of the Rights of Entry (Gas and Electricity Boards) Act 1954, it has been shown to the satisfaction of me, the undersigned, on sworn information in writing, by Carl Hammond, an agent duly authorised by Opal Gas Limited, that admission to certain premises at Albany Lions Hotel Limited/Albany Lions Hotel or the current owner/occupier, 42-43 Grand Parade Eastbourne, East Sussex BN21 4DJ, is reasonably required by the agent authorised by Opal Gas Limited for the purpose of disconnecting the meter and works for the supply of gas to the said premises for non-payment of charges due in respect of the supply of gas by Opal Gas Limited, and that Opal Gas would, apart from section 1 of the said Act of 1954, be entitled to exercise for that purpose in respect of the said premises a right of entry by virtue of paragraph 7 and 24 of Schedule 2D to the Gas Act 1986 (as amended 1995). Opal Gas Limited by any authorised agent thereof is hereby authorised, in company of such other persons as may be necessary, to enter the aforementioned premises if need be by force in accordance with section 2 of the Rights of Entry (Gas and Electricity Board) Act 1954.*"

5 The Warrant for the Pier was in similar terms and addressed to "Lions Pier Limited/Lions Pier/or the current owner/occupier" at the premises address.

6 On 19 September 2019, in connection with a dispute between the appellants and the respondents regarding the disputed charges for gas, the appellants obtained an *ex parte* injunction from the High Court from Bryan J staying the effects of the Warrants. The injunction was continued after an *inter partes* hearing before HHJ Pelling QC (sitting as a Deputy Judge of the High Court) on 1 October 2020, it is expressed to continue until resolution of the issue contained in the claim - which will be heard in the Brighton County Court.

7 The appellants asked the magistrates to state a case under section 111 of the Magistrates' Courts Act 1980. The case was finally completed by the Sussex Eastern magistrates on 24 January 2020. As the papers before this court illustrate, there was an amount of to-ing and fro-ing and the detailed drafted case requested by the appellants was amended by the justices to the short document whose contents are set out below.

The issues

8 The appellants before this court state the magistrates could not lawfully issue the Warrants. They assert a number of issues going to the jurisdiction of the magistrates and argue the case stated as drafted reveals that the decisions to issue the Warrants were not lawfully made.

9 The essence of their complaint before this court is (1) there was a genuine dispute as to the alleged debt; (2) there was no evidence before the court of lawful notice having been given to the applicants; (3) that payments had been made by the applicants under the invoices on which reliance was placed by Opal at the hearing; and (4) that a warrant to enter and disconnect the supply should only be used as a mechanism of last resort, and which did not apply here.

10 Mr William Bordell for Opal defended the Warrants submitting that the justices' decision should not be disturbed. The case stated showed a lawful consideration of the issues which they understood arose, and the appellants' arguments were in truth a disagreement with the fact decision of the magistrates, this court being required, it is well accepted, to consider the matter within the confines of the case as stated.

Legislative framework

11 Rights of entry and the mechanism for effecting a discontinuance of a supply of gas in various circumstances are contained in the Rights of Entry (Gas and Electricity Board) Act 1954 ("the 1954 Act") and the Gas Act 1986 ("the 1986 Act"). The relevant parts of the material provisions are as follows.

The 1954 Act

> "*1. Restriction on exercise of rights of entry".*
>
> *"1(1) No right of entry to which this Act applies shall be exercisable in respect of any premises except -*
>
> > *"(a) with consent given by or on behalf of the occupier of the premises, or*

> *"(b) under the authority of a warrant granted under the next following section: Provided that this subsection shall not apply where entry is required in a case of emergency.*

"(2) This Act applies to all rights of entry conferred by - (a) the Gas Act 1986, regulations made under it or any other enactment relating to gas...

"in so far as those rights are exercisable for the purpose of a gas operator..."

"2. Warrant to authorise entry

"2(1) Where it is shown to the satisfaction of a justice of the peace, on sworn information in writing,

> *"(a) that admission to premises specified in the information is reasonably required by a gas operator or an electricity operator or by an employee of a gas operator or an electricity operator.*
>
> *"(b) that the operator or any employee of the operator, as the case may be, would, apart from the preceding section, be entitled for that purpose to exercise in respect of the premises a right of entry to which this Act applies; and*
>
> *"(c) that the requirements (if any) of the relevant enactment have been complied with,*

"then subject to the provisions of this section the justice may by warrant under his hand authorise the operator or any employee of the operator, as the case may be, to enter the premises, if need be by force."

"3. Interpretation

"... 'employee' means - (a) in relation to a gas operator, an officer, servant or agent of the operator and any servant or officer of such agent...

"(2) In this Act -

...

> *"(b) references to the relevant enactment, in relation to a right of entry, are references to the enactment conferring that right, and references to the requirements of the relevant enactment are references to any requirements of that enactment as to the giving of notices or the taking of any other step before, or at the time of, the exercise of the right."*

The 1986 Act

12 Section 8B of the 1986 Act provides:

"*The gas code*

"*The provision of Schedule 2B to this Act (which relate to rights and obligations of licence holders and consumers and related matters) shall have effect.*"

13 In respect of payments not made and consequent disconnection of the gas supply, para.7(1) to (5) and paras.24 and 28 of Schedule 2B to the Gas Act provides as follows:

"*Recovery of gas charges etc*

"7(1) Sub-paragraphs (3) and (4) below apply where (a) a demand in writing is made by a gas supplier for any of the relevant payments to be made by a consumer; and ...

"(b) the consumer does not make those payments within 28 days after the making of the demand.

"(1A) payment is a relevant payment for the purposes of sub-paragraph (1) if it is due to the gas supplier from the consumer -

"(a) in respect of the supply of gas to any premises of the consumer (in this paragraph referred to as "the premises"); or

...

"(3) If the supplier is a relevant supplier, he may, after giving not less than 7 days' notice of his intention -

...

"(b) cut off the supply to the premises by disconnecting the service pipe at the meter or by such other means as he thinks fit;

And the supplier may recover any expenses incurred in so doing from the consumer.

...

"(5) The powers conferred by sub-paragraphs (3) and (4) above shall not be exercisable as respects any payments ... the amount of which is genuinely in dispute.

"Entry on discontinuance of supply

"24(1) This paragraph applies where -

"(a) a gas supplier is authorised by any provision of this Act to disconnect any premises, or, as the case may be, to cut off or discontinue the supply of gas to any premises;

"(2) Any officer authorised by the ... gas supplier, after 24 hours' notice to the occupier, or to the owner of the premises if they are unoccupied, may at all reasonable times, on production of some duly authenticated document showing his authority, enter the premises for the purpose of -

"(a) disconnecting the premises, or cutting off or discontinuing the supply of gas to the premises; or

...

"(3) The notice required to be given by sub-paragraph (2) above may, in the case of unoccupied premises the owner of which is unknown to the ... gas supplier and cannot be ascertained after diligent inquiry, be given by affixing it upon a conspicuous part of the premises not less than 48 hours before the premises are entered.

"Provisions as to powers of entry

"28 ... (5) The Rights of Entry (Gas and Electricity Boards) Act 1954 (entry under a justice's warrant) shall apply in relation to any powers of entry conferred by this Schedule."

14 It will be seen that where, after a demand for unpaid charges, a person fails to pay the demand within 28 days a power is conferred by the 1986 Act upon a supplier to disconnect the supply of a person's gas on giving at least seven days' warning of so doing. There is also a power to enter after giving 24 hours to the occupier, or if unoccupied, to the owner in order to effect the disconnection. The power to cut off the supply is expressly not exercisable in respect of payments about which there is a genuine dispute.

15 Power of entry is itself not exercisable, however, without the support of a warrant issued by a magistrate. For that warrant to issue, the magistrates must be satisfied of a number of matters: (a) That sworn information is before them to the effect that admission to premises specified in the information is reasonably required by a gas operator under the Act and contains certain details; and (b) that the gas operator is entitled under the Act to exercise a right of entry to the premises in question, (i.e. that there had been proper notice to the occupier of the premises in question, demand, and failure to pay in the absence of a genuine dispute). These are jurisdictional facts of which the magistrates must be satisfied before granting what is the draconian remedy of non-consensual entry to premises and disconnection of a gas supply.

Before the magistrates and the case stated

16 On behalf of the appellants Ms Muller, whose instructing solicitor appeared before the magistrates, explained that the final form of case stated by the magistrates admitted much of what had been canvassed by the appellants when inviting them to state a case. She explained that in the course of the hearing the jurisdiction of the magistrates to issue the Warrants had been challenged on a number of essential points by her instructing solicitor, and his objections had been substantiated by a bundle of documentation showing the sums said to be outstanding, were either the subject of a genuine dispute or had been paid, and that the claimed notices were not properly issued in respect of the hearing before the Hastings Magistrates. Further, he had submitted that there was an

indication that vulnerable persons were living at the premises for which the Warrants were sought, and that discontinuation of supply was in any event unreasonable.

17 The case stated by the justices, after setting out identification of the premises and Opal's representation, was a succinct document in the following terms:

> "*Appeal by way of case stated, in respect of their adjudication as a Magistrates' Court sitting at Hastings Magistrates' Court on 9 September 2019.*
>
> ***APPLICATION AND DECISION***
>
> 1. *On 9 September 2019, Opal Gas Limited ("the Applicant") made applications under section 2(1) Rights of Entry (Gas and Electricity Boards) Act 1984 and Paragraph 7, Schedule 2B Gas Act 1986 for two Right of Entry Warrants ("the Warrants") in relation to premises referred to as Albany Lions Hotels, 42-43 Grand Parade, Eastbourne, BN21 4DJ ("the Hotel") and an amusement pier known as Lions Pier Limited, Eastbourne Pier, Grand Parade, Eastbourne, BN21 3EL ("the Pier").*
> 2. *The Applicant was represented by Mr Karl Hammond (an agent of Blackthorne Utilities, the company to which enforcement was delegated by the Applicant). Also in attendance for the Applicant was Graham Wright (Operations and Accounts Manager of Opal Gas Limited). Other than the information contained in the notice of hearing, neither the appellants nor court had been given notice, in advance of the hearing, of the evidence to be presented at the hearing.*
> 3. *The application of the Warrants was opposed by (1) Albany Lions Hotel ("The First Appellant") and (2) Lions Pier Limited ("The Second Appellant"), collectively ("the Appellants") represented by a solicitor, Mr Leonard Scudder. In contesting the applications the appellants served a bundle of documents on the applicant in advance of the hearing and referred the court to the bundle of documents during the hearing. The court does not recollect looking at the individual documents contained within the bundle of documents and the bundle was not placed on the court file.*
> 4. *Having heard evidence from Mr Hammond and representations from both parties we determined that the application was justified and granted the warrants authorising entry and disconnection of the energy supply at Albany Lions Hotel, 42-43 Grand Parade, Eastbourne, East Sussex, BN21 4DJ, and 'Lions Pier Limited', Eastbourne Pier, Grand Parade, Eastbourne, East Sussex, BN21 3EL.*
>
> ***REPRESENTATIONS***
>
> 5. *The parties made representations to the court.*
>   *The applicant contended that:*
>   - *(i) The debt alleged was properly outstanding, notwithstanding a dispute about over-charging and liability given the differing names used in various notices.*
>   - *(ii) The appellants had been provided with sufficient notice of the debt and hearing.*
>   - *(iii) There were no vulnerable occupants in the hotel preventing the issue of the warrant.*
>
>   *The appellants contended that:*

(i) The applicant had not provided the appellants with proper notification of the intention to apply to the Court for a warrant to disconnect the supply to the premises as a result of the above alleged debts.

(ii) Notification had been provided for the amounts of £18,511.05 (First Appellant), and £1,450.12 (Second Appellant), but that these amounts had been paid and satisfied by the Appellants; that though notice had been provided for the first appellant for the current hearing there had not, in any event been notice for the second appellant.

(iii) There had been other notices prior to those before the Court (in his bundle of evidence) but that those debts had been paid, or were expired notices for hearings at different courts which had not gone ahead following dispute with the location of the hearing raised by the Appellants.

(iv) No proper notice had been received by the appellants for the current alleged outstanding debt, the debt stated at the hearing not having been requested before by the applicant.

(v) Documentation in the appellants bundle showed payments had been made since the date of the notices which were relied on and those payments were in a greater sum that the debt which was stated in the Notices.

(vi) Any alleged debt was substantially disputed between the parties, there being an ongoing dispute of alleged overcharging between the Applicant and the Appellants which had been well documented in correspondence.

(vii) There was a live issue as to whether there were vulnerable occupants residing with Albany Lions Hotel.

(viii) Although two companies may share a director it does not make one liable for the other's debts. Documentation presented by the appellants confirmed that different legal entities, with significantly different names, had resided at the premises in question.

(ix) There was a genuine dispute as to the debts outstanding on the basis of over-charging and legal responsibility such that warrants should not be granted.

(x) Warrants and the disconnection of gas supply should only be used as a matter of last resort and in circumstances where 1) no proper notice had been given, 2) the alleged debt was disputed, 3) the status of any persons permanently residing at the hotel was unknown a warrant should not be granted, particularly where there were other contractual and civil remedies available which had not been first attempted.

SUMMARY OF EVIDENCE

6. Karl Hammond gave evidence that:

(i) The debt outstanding for the first appellant, Albany Lion Hotel, was in the sum of £30,727.70 and for the second appellant, Lions Pier Limited, £5,152.99.

(ii) On the 26th August 2019 the applicant had by letter given the appellants notice of the hearing scheduled for the 9th September 2019.

(iii) Over a period of time more than one notice had been served in relation to both premises setting out details of the debt owed and that those notices had been served in relation to the premises on differing company names including Albany Lions Hotel Limited, Albany Lions Hotel, Lions Pier Limited and Lions Pier. He believed that the premises used a number of different company names but there was no difference as to ownership, directorship or the manner of business of each entity.

(iv) There was an amount outstanding in relation to each of the two premises for energy being supplied by the applicant and that the notices showed the correct amounts owed.

(v) He did not believe that there were any permanent and vulnerable individuals residing in Albany Lions Hotel.

LEGISLATION AND CASE LAW

7. *As part of the application we were referred to:*
   (i) Section 2(1) of Rights of Entry (Gas and Electricity Boards) Act 1984
   (ii) Paragraph 7, Schedule 2B of Gas Act 1986
8. *We were not referred to any case law.*

Advice from the Legal Adviser:

9. *The Court was advised that if it was satisfied that the notice had been correctly served on those owing the debt, and that there was an amount outstanding then the warrants should be issued.*

FINDINGS AND DECISION

10. *Having heard evidence from Mr Hammond and considered the representations from the parties the court found the following:*
    (i) That, consistent with the expectations of the Human Rights Act 1988, proper notice had been given by the notice served on 26 August 2019 by Opal Business Gas.
    (ii) That although differing company names including Albany Lions Hotel Limited / Albany Lions Hotel / Lions Pier Limited and Lions Pier had been used, we were satisfied that Lions Pier Limited and Albany Lions Hotel Limited would have been in no doubt that the notices related to Lions Pier Limited and Albany Lions Hotel Limited and the premises referred to in the notice.
    (iii) That there was no genuine substantial dispute as to the amounts owed, and the evidence presented by Mr Hammond was clear as to the amounts outstanding.
11. *Accordingly, that the warrants should be properly granted under Section 2(1) of Rights of Entry (Gas and Electricity Boards) Act 1984 and Paragraph 7, Schedule 2B of Gas Act 1986.*

QUESTIONS

12. *The questions for the opinion of the High Court are as follows:*

(i) On the information provided were we entitled to find there was sufficient notice given to the appellants for the purpose of the hearing?

(ii) On the information provided were we entitled to find there was no genuine and sufficient dispute as to the amount outstanding such that a warrant could be properly granted?

(iii) On the information provided were we entitle to find that the appellants were liable for the amounts outstanding and a warrant should be issued when it was contended by the appellant that other companies were liable for some or all of any debt outstanding?

(iv) On the information before the court was our decision to grant the warrants reasonable, when it was contended that the grant of a warrant should be one of last resort where other civil remedies were available, given Section 2 91) of the Rights of Entry (Gas and Electricity Boards) Act 1954 specifies that a warrant may be granted by the Magistrate in circumstances that admission to the premises is 'reasonably required' by the Applicant?

(v) In the absence of direct evidence from the first appellant to suggest that vulnerable persons would be affected by disconnection of the energy supply did we act reasonably in issuing the warrant?

Signed on behalf of Justices for the County of Sussex
Janet Moon
24 January 2020"

<u>Consideration</u>

18 A number of observations are necessary. Turning first to the end of the case, it will be noted that the questions isolate matters of which the justices were required to be satisfied in order to find jurisdiction. The magistrates admit in paragraph 3 of the case that a bundle of documents was presented by the appellants but say they have no recollection of the contents of it at all, and that they did not put it on the court file. They make no mention of the material it contained relevant to the points in issue, such as notices, although questions were raised, as seen from the case, about those and other matters.

19 The advice received from the Clerk to the Justices (paragraph 9) is exiguous in the extreme, and fails to mention the requirement that the sum is not to be the subject of a genuine dispute. The mention made by the magistrates of that statutory requirement (set out in schedule 2B to the Gas Act 1986) misstates the test in law as being the existence of a "genuine and sufficient dispute". "Sufficient" does not appear in the statute.

20 It is also unclear in their findings what is meant by the magistrates with the phrase "consistent with the expectations of the Human Rights Act 1988 proper notice had been given by the notices served on 26 August 2019 by Opal Business Gas". Aside from the obvious mistake as to date, which is not relevant, assuming the magistrates are referring to notice obligations that fall upon Opal in respect of cutting off supply, the requirements of notice derive from the statutory provision set out above, not the Human Rights Act.

21 Whilst it is the case that with regard to the existence of primary facts there will be no error of law unless it can be said there was no evidence to support the magistrates' findings and primary fact is a matter for the magistrates. However, the question as to whether found facts fall within the statutory requirements, is a different issue. The statute provides that the magistrates have jurisdiction where they are "satisfied as set out above". The question as to whether the magistrates could in the facts of this case be satisfied is a question of whether the conclusion reached by the magistrates, that they had jurisdiction, must be whether such a conclusion is one which a reasonable bench of magistrates properly directed as to the question to be determined could have come. I do not understand Opal to dissent from those propositions.

22 It is impossible here to see on the face of the case, however, the nature of the materials analysed by the magistrates which were advanced by the appellants in support of their case that the magistrates could not be satisfied of the statutory criteria.

23 The elements taken into account and those disregarded in reaching the necessary statutory conclusions are therefore, with respect, opaque. The magistrates asked the question whether they were entitled to make certain findings on the evidence; in other words, whether or not their conclusions were perverse or evinced some other error of law, but without providing materials for the court to judge the conclusions to which they came.

24 Opal sought to persuade me that the magistrates must have taken the materials proffered by the appellants properly into account and they must have discharged their obligation to be satisfied as to the issue of the Warrants. Opal emphasized the established restrictions upon an appeal by case stated. The appellants, it was submitted, are not entitled to refer to evidence that was not set out in the case. Had the appellants wished the court to see the evidence which they say should have been set out, it was up to them to seek to have the case remitted for amendment or addition by the magistrates and it is not legitimate to consider evidence not included in the case, even had that evidence been the subject of agreement below, and there is force in that submission.

25 In any event, Opal say this is a case where the magistrates can be seen simply preferring the evidence of Opal over whatever was shown to them or said on the part of the appellants. For reasons I go into, that is, in my judgement, somewhat of an over-simplification in the present case.

26 Section 111 of the Magistrates Court Act 1980 provides:

> "(1) *Any person who was a party to any proceedings before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceedings on the ground that it is wrong in law or is an excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved; but a person shall not make an application under this section in respect of a decision against which he has a right of appeal to the High Court or which by virtue of any enactment passed after 31st December 1879 is final.*
>
> *"(2) An application under subsection (1) above shall be made within 21 days after the day on which the decision of the magistrates' court was given.*"

27 It is well established this court is not in an appeal by way of case stated concerned with a pure appeal on the facts. This was set out in *R v North West Suffolk (Mildenhall Magistrates' Court Ex parte Forest Heath District Council* [1998] Env LR 9, CA, per Lord Bingham. He cites an earlier expression of the position in *Bracegirdle v Oxley & Cobley*, which said the following:

> "*In this court we only sit to review the magistrates' decisions on points of law, being bound by the facts which they have found, provided always that there is evidence on which they could come to the conclusions of fact at which they have arrived. Mr Parker, who has intervened in this case as amicus curiae to enable the court to have the benefit of a full argument on each side, concedes that if magistrates come to a decision to which no reasonable bench of magistrates, applying their minds to proper considerations and giving themselves proper directions, could come, then this court can interfere, because the position is exactly the same as if the magistrates had come to a decision of fact without evidence to support it. Sometimes it has been said of the verdict of a jury given in those circumstances, that it is perverse, and I should have no hesitation in applying that term to the decisions of magistrates which are arrived at without evidence to support them.*"

28 To the same effect Bingham MR then said:

> "*I respectfully agree with those observations. It is obviously perverse and an error of law to make a finding of fact for which there is no evidential foundation. It is also perverse to say that black is white, which is essentially what the justices did in Bracegirdle v Oxley and Cobley. But it is not perverse, even if it may be mistaken, to prefer the evidence of A to that of B where they are in conflict. That gives rise, in the absence of special and unusual circumstances ... to no error of law challengeable by case stated in the High Court. It gives rise to an error of fact properly to be pursued in the Crown Court.*"

29 That was a case where the primary facts were found which included high speed inappropriate driving, but the obvious inference of fact, namely that it was dangerous, was not drawn; hence the observation it was perverse to say that black was white and that was an error of law.

30 A reference was also made to *Wealdon v Crown Prosecution Service* [2018] EWHC 249 per Males J and Holroyd LJ to like effect.

31 Part 35 of the Criminal Procedure Rules contains provisions governing the procedure to be followed when an appeal by way of case stated is brought under section 111. By the provisions contained in Rule 35, the party who applies must specify the proposed questions of law on which the opinion of the High Court will be sought and indicate the proposed grounds of appeal. The rules and the case law indeed have always been clear that facts are to be set out, not evidence. Rule 35 does set out that a case must include a succinct summary of the nature and history of the proceedings, but it also states that this must include the court's relevant findings of fact and the relevant contentions of the parties. In the present case where the issue is whether there was an error of law in the conclusion that the statutory criteria was satisfied, this court would have been helped by

the factual analysis that produced the conclusion. However, I do not need to go into further detail here on these questions as to the characterisation of the matters in issue for the purpose of the disposal of this appeal because in my judgement the answer to the present case is plain.

Conclusion

32 I have come to the clear conclusion that the magistrates have erred in discharging their functions under the relevant act and the Warrants should be quashed. The case itself reveals, critically in my estimation, that the magistrates asked themselves the wrong question in respect of the issue at the heart of the defence mounted by the appellants, namely the existence of a genuine dispute.

33 As was correctly submitted to me on behalf of Opal, the phrase "a genuine dispute" cannot mean that it is open to a customer against whom a warrant is sought to raise a spurious or fabricated dispute in order merely to resist entry into his property against his will to cut off the gas. But in this case, quite aside from the meaning of "a genuine dispute" which they did not explore, the magistrates asked themselves the wrong question. It is not the case under the Act that the absence of a "substantial dispute" must be shown, yet the justices held in terms on the face of the case that:

> "*...there was no genuine substantial dispute as to the amounts owed and the evidence presented by Mr Hammond was clear as to the amounts outstanding.*"

34 This amounts to a misdirection and must vitiate the issue of the Warrants. It may be that the incomplete advice as to the application of the provisions helped to lead them into error. The advice contained no reference at all to this requirement. I reject the submission of Mr Bordell, elegantly as it was expressed, that I may deduce from the mere fact that the magistrates state they accepted the evidence of Mr Hammond for Opal that they had well in mind the correct test. He suggests the addition of the word "substantial" adds or subtracts nothing from what was a proper exercise of their discretion; I disagree.

35 The case shows that there was a dispute as to the amounts owed. The fact is that evidence was advanced and yet the case does not indicate how or why that dispute was determined not to be genuine, nor what the magistrates understood by the phrase in its statutory context of "genuine dispute". In my judgement, that phrase must mean a dispute that is not shown to be a sham. In other words, the magistrates must be satisfied that any dispute to which a respondent makes reference has not been concocted or is a mere evasion tactic. If the respondent raises the existence of a genuine dispute, the magistrates must grapple with the question and decide it. Only if their view that it is not genuine is not a view reasonably open to a properly directed bench of magistrates would it be successfully appealable by way of case stated. Here they asked themselves the wrong question. It is not relevant also to ask, as they did, is it also "substantial".

36 The magistrates were asked to state a case within the usual strict timetable. The fact that in the case they say the following:

> "*In contesting the applications the appellant served a bundle of documents on the applicant in advance of the hearing and referred the court to the bundle of documents during the hearing. The court does*

> *not recollect looking at the individual documents contained within the bundle of documents and the bundle was not placed in the court file.*"

- suggests, regrettably, that this question, together with those other matters advanced on the facts by the appellants below was not explored as fully as it ought to have been.

37 Likewise, the statement by the magistrates in the case stated:

> "*…that although differing companies' names, including Albany Lions Hotel Limited, Albany Lions Hotel, Lions Pier Limited and Lions Pier had been used, we were satisfied that Lions Pier Limited and Albany Lions Hotel Limited would have been in no doubt that the notices related to Lions Pier Limited and Albany Lions Hotel Limited as the premises referred to in the notice...*"

- is concerning. A number of arguments on behalf of the appellants were recorded by the magistrates. These were to the effect that no proper notice had been received by the appellants for the current alleged outstanding debt, the debt stated at the hearing had not been requested before by the applicant, and notification had been provided for the amounts that had been paid and satisfied by the appellants already. Although notice had been provided for the first appellant for the current hearing, there had not in any event been notice for the second appellant; and there had been other prior notices, but those debts had been paid or, were for hearings at different courts which had not gone ahead following disputes as to location.

38 This represents, in my judgement, an inadequate approach to the requirements of service and notification which should reflect a careful marrying of alleged indebtedness to notification and to the appropriate debtor. On this basis the magistrates could not have been satisfied of the statutory criteria of either.

39 It also suggests again that the very documentation giving support to the appellants' contentions may not have been carefully considered by the magistrates, who could not remember looking at the individual pages and did not see fit to ensure it became part of the file.

40 In my judgement, the granting of a Warrant of Entry is a serious matter. Such warrants should not issue as a matter of course without careful consideration of the statutory questions. For that reason, the magistrates are required by statute to satisfy themselves of a number of particular criteria. Even when satisfied, they retain an obligation to consider whether it is reasonable to issue. Process is hedged around by safeguards. For example, sworn information founds the application.

41 In the present case it is striking that although stated "there was a live issue as to whether there were vulnerable occupants residing at Albany Lions Hotel" a consideration of the issue as expressed did not find its way into the magistrates' decision. It is not necessary to go into this and the other issue where questions have been asked in light of my answer to the important questions of disputed debt and sufficient notice.

42 I was invited by Opal to read the case stated as demonstrating succinctly but, sufficiently comprehensively, that the statutory analysis had taken place and the magistrates had not erred in law. They submit that such challenges as were made by the appellants were merely factual disagreements, unsubstantiated by the facts set out in the case; more and or different material was required to be included to make out their claim. I disagree. As

set out above, the magistrates have erred in law in their consideration of a number of the central questions that arise.

43 As a general observation, in my judgement, in order properly to consider a contested application, it will generally be necessary to take evidence in opposition on oath and to consider any documentation presented in some detail. Where the jurisdictional facts are in issue, the justices must show, in their case stated, what evidence they have taken into account and what evidence they have rejected in order to expose the reasoning process that produced the answers which they give.

44 These observations are made recognising the enormous burden of work that falls upon magistrates. I am conscious that time pressures are considerable. It is not every case that will produce complexities. I should say, furthermore, the relevant part of the Magistrates' Court Guide is not of great assistance to the Bench or their hard-pressed clerks. The wording relating to guidance on warrants that I have been shown does not reflect accurately the obligation to consider each of the requirements under statute of which they must be satisfied, before a Warrant may be issued.

45 Accordingly, in the present case I am constrained to allow this appeal and to quash the Warrants. The case reveals on its face, without recourse to extraneous materials, errors of law in the approach to the issue of a genuine dispute and to the particularities of service and notice. There is also a failure to consider whether the exercise of the power to grant the warrant was, in the circumstances, reasonable. Accordingly, in considering how the questions are to be answered, the major questions, namely question 1:

> "*On the information provided were we entitled to find there was sufficient notice given to the appellants for the purposes of the hearing?*"

46 In light of my findings as to the questions they asked themselves, the answer must be "No". As to question 2:

> "*On the information provided, were we entitled to find there was 'no genuine and sufficient dispute' as to the amount outstanding such that a warrant could be properly granted?*"

47 The answer must be "No" and as set out above, this is in any event, the wrong question.

48 In those circumstances this appeal is allowed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.