Neutral Citation Number: [2019] EWHC 2125 (Admin)

Case No: CO/3566/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

MRS JUSTICE CUTTS DBE

- -

Between :

FRANCIS XAVIER GREGORY	**Claimant**
- and -	
THAMES MAGISTRATES COURT	**Defendant**
- and -	
TOWER HAMLETS LONDON BOROUGH COUNCIL	**Interested Party**

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- -

Mr Martin Young (instructed by **Harrison Carter**) for the **Claimant**
Mr Jon Holbrook (instructed by **JE Baring & Co**) for the **Interested Party**

Hearing dates: 25/07/19

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Approved Judgment

MRS JUSTICE CUTTS DBE :

1. In this case the claimant applies to set aside the order of Sir Ross Cranston of 13th April 2019 in which he dismissed the claimant's application to set aside the order of Mr Justice Walker dated 2nd November 2018 refusing the claimant permission to apply for judicial review.

2. Should that fail there is an application by the interested party, the London Borough of Tower Hamlets, (the "local authority") for an extended civil restraint order.

3. There had been an application by the claimant to adjourn this hearing on the basis that his counsel was unavailable. That is no longer pursued as the claimant has been able to obtain legal representation. The claimant is not present today.

4. During the hearing on 25th July 2019 there was some confusion over applications to set aside DJ Clarke's judgments of 20th October 2016 and 23rd March 2018 made by the claimant to the Magistrates' Court in January and May 2019. [See paragraph 34 below]. I acknowledged that the Claimant had not had a chance to consider the paperwork and that I would consider any documents upon which he sought to rely on this matter if they were sent to me after the hearing. I have been sent a further bundle of documents by the Claimant which arrived at the court on 26th July. These documents are not confined to the issue of applications before the Magistrates' Court. I have considered them but make it abundantly clear that the time for evidence and further submissions is now closed.

Facts

5. This matter has a long and protracted history which it is necessary to set out in some detail.
   The root of the case lies in the claimant's ownership of 8 residential dwellings, 25-32 Fieldgate Mansions in the London Borough of Tower Hamlets and his liability for council tax thereon.

6. Between 1997 and 2014 liability orders were made in 28 separate hearings in respect of unpaid council tax at Thames Magistrates Court.

7. In March 2011 correspondence was sent to the then legal representatives of the claimant regarding outstanding liability orders and the council threatened service of a bankruptcy

petition. On 26th July 2014 a statutory demand was served in respect of the liability orders in the total sum of £21,242.86.

8. On 29th July 2014 the claimant lodged an appeal with the Valuation Tribunal. He claimed that he was not liable for the council tax for these properties as they were let. The tenants were therefore responsible.

9. On 8th May 2015 he applied to the Thames Magistrates Court to have 25 of the 28 liability orders set aside. He claimed that he did not receive the demands for payment. This was resisted by the local authority.

10. On 9th July 2015 there was a hearing at the Magistrates Court at which the claimant was represented by counsel. Mr Holbrook, counsel for the interested party in this matter, also acted for the local authority in those proceedings. In a skeleton argument of the same date he submitted that the claimant had failed to satisfy any of the criteria set out in *R (Brighton and Hove CC) v Brighton and Hove Justices (Hamdan) [2004] EWHC 1800 (Admin).* In this case the Administrative Court held that the Magistrates Court retains a power to set aside a liability order that may be exercised cautiously and exceptionally and only if the applicant can establish all of the following 3 issues:

    a. Merits – there is a genuine and arguable dispute as to his liability;

    b. Procedural error, defect or mishap by the court – the order was made as a result of a substantial procedural error, defect or mishap;

    c. Delay in applying to set aside – the application to the justices for the order to be set aside is made promptly after the defendant learns that an order has or may have been made. Promptness normally requires action within days or at most a very few weeks, not months.

The court's legal adviser had set these criteria out for the claimant in a letter of 11th May. The local authority claimed that the claimant had failed to provide any evidence in support of his application or any basis upon which the three criteria could be satisfied. In particular Mr Holbrook drew attention to the service provisions of the A & E Regulations (reg 2) and section 233 of the Local Government Act 1972 which state that personal service of the demands is not required. Service is deemed effective providing a document is posted to a

person's last known address. That is what happened in this case in addition to it being sent to those understood to be the claimant's solicitors. These had been corresponding with the Local Authority since March 2011. The last liability order had been served on 26th July 2014. The application had been made nine months later. This was not a prompt application. At the magistrates' court hearing the claimant was ordered to file and serve any evidence in support of the application. The proceedings were adjourned to follow the Valuation Tribunal hearing.

11. On 12th July 2016, following a hearing on 26th May, the Valuation Tribunal found that, absent evidence of a tenancy on any property, the claimant had failed to discharge the burden upon him.

12. On 9th August 2016 the claimant requested a review of these findings on the grounds of procedural irregularity. On 27th October the Vice-President of the Valuation Tribunal concluded that there was no such irregularity.

13. The adjourned application at Thames Magistrates Court to set aside the liability orders resumed. Following a hearing on 22nd September 2016 the court set down directions. It was noted in the order that the claimant had failed to comply with the direction of 9th July 2015 to file evidence in support of his application in that he had failed to address the 3 criteria set out in *Hamdan.* It was additionally noted that the court had amended its file to record the claimant's address as Flat 3, 85 Weston Road, Romford. RM1 3LS. The claimant was ordered to "file and serve evidence in support of his applications having regard to the three criteria set out in *Hamdan*" by 6th October 2016. Those criteria were again set out in the order. The parties were ordered to exchange skeleton arguments not already served by 13th October 2016. A case management hearing was set down for 20th October. The court sent the claimant notice of the date which said that the hearing on 20th was to be a case management hearing to "discuss and identify the issues in the case and then fix a trial date." The notice went on to say that if the claimant failed to attend the hearing the court could still decide to deal with his case in his absence.

14. On 7th October 2016 the local authority wrote to the court and sent copies of the letter to the claimant at the address noted in the order of September 2016 and to a company named Norseman Property Services with which he was known to be connected. The claimant had failed to comply with the orders of 9th July 2015 and 22nd September 2016 to file and serve the required evidence in support of his application. The letter expressed

the local authority's view that the application was hopeless and, given the failure to comply with directions and that the liability orders in question dated back to 1999, asked that a District Judge consider treating the hearing on 20th October not as a case management hearing but as a hearing to finally determine the application to set aside the orders with a time estimate of 1½ hours.

15. The claimant was not present at the hearing on 20th October 2016 and unrepresented. He had still not filed and served any evidence in support of his application. District Judge Clarke acceded to the local authority's request to treat the hearing as one to determine the application to set aside the liability orders. This was dismissed with costs of £11,600. The application was dismissed on the basis that the claimant had failed to support his own application and was in default of directions given.

16. On 10th November 2016 the claimant applied to DJ Clarke to set aside his first dismissal order on the basis that he did not attend because he thought the hearing was only to be one of case management.

17. On 24th November 2016 the claimant lodged an appeal against the decision of the Valuation Tribunal. The appeal was heard by His Honour Judge Curran QC sitting as a judge of the High Court on 14th June 2017. The claimant did not appear but was represented. His son, Kevin Gregory, was present. Counsel for the claimant asked that the proceedings be adjourned and stayed for three months. This was on the basis that there had been and continued to be material non-disclosure from the local authority. The claimant wished the local authority to disclose the unedited electoral roll for the years running up to the proceedings in order that his father could establish that the flats in question were let to tenants at the material time. HHJ Curran in his judgment said that this was the purpose of the application for disclosure. It was made because the claimant had no evidence to support his assertion, and the tribunal declined to draw the inference, that he would not let flats remain untenanted, the burden of proof being on him. The application was said to be so late in the day as it had not occurred to anybody to make such enquiries before. The judge refused to adjourn the hearing. He dismissed the appeal with costs in the sum of £7,910. In reaching his conclusion the judge said this:

"The burden was upon Mr Gregory to establish lettings of the properties to show that the tenants – and not he – were responsible for the council tax. He was found by the Tribunal to have failed to discharge that burden upon him. The Tribunal was perfectly entitled to decline to draw the inference

which Mr Gregory invited it to draw, that the relevant premises must have been tenanted."

18. The claimant applied for leave to appeal HHJ Curran's decision. That was dismissed with costs by Master Bancroft-Rimmer on 23rd November 2018 due to a failure of the claimant to comply with the court's direction to rectify a bundle defect. The claimant sought to challenge this order. It would appear that in error the bundle that he served has been destroyed and the case has not been progressed. It is proposed to place the application to set aside the order for dismissal before a Lord or Lady Justice of Appeal within the next few days.

19. By judgment of 23rd March 2018 DJ Clarke decided that he did not have jurisdiction to reopen his determination of 16th October 2016 but that, even if he did, he would refrain from exercising that in the claimant's favour. It was not in the interests of justice or of finality that he should do so. The claimant did not attend the hearing but was represented. The judge noted that the claimant was still in default of directions given for the hearing. He had sought an adjournment of the hearing in January 2018 in order to file evidence in reply. The judge was of the view that "it is high time that this case was decided once and for all at this level." He found that the principle of finality applied and that litigation must have an end point. The judge said that by 20th October 2016 the claimant had not complied with earlier directions made. Even if he thought the hearing on that date was to be a directions hearing he should nonetheless have attended. At the very least he must have known that the court needed his co-operation to deal with the issues in the case. The letter informing the claimant of the date made it perfectly clear the sort of information which it required him to provide. None of this was forthcoming. In taking a risk and choosing not to attend the claimant could not have been surprised that he dealt with the case in his absence bearing in mind that he was now "doubly non-compliant". The claimant had not been dealt with unfairly. The judge went on to say:

"In looking at the history of this litigation as a whole I believe I am justified now in concluding that the defendant's failure to assist the court is a deliberate ploy to extend this issue for no good reason other than to avoid paying the money he owes. He is playing with the justice system rather than affording the required compliance with court directions."

The application was dismissed with costs of £16,855.

20. The claimant applied to District Judge Clarke to state a case. By letter of 9th May 2018 the judge refused to do so on the basis that his judgment of 23rd March 2018 contained his reasons for his finding and that he had nothing to add. He nonetheless answered a series of written questions posed to him by the claimant.

Application for judicial review

21. On 11th September 2018 the claimant applied for permission to bring judicial review proceedings in relation to DJ Clarke's decisions of 20th October 2016, 23rd March 2018 and his refusal to state a case. This was refused by Mr Justice Walker on 2nd November 2018. He found the claim to be totally without merit. As he was bound to do under CPR 54.12(7) and CPR 23.12 and in compliance with Practice Direction 3C he considered whether to make a civil restraint order against the applicant. He did not do so but warned the claimant that such an order was likely if he continued with this litigation. Walker J said:

"You need to stop focussing on the past. Nothing can be done about decisions which you seek to re-open so late in the day. If you continue to bring proceedings that have no merit you will almost certainly be the subject of a civil restraint order. Instead of bringing proceedings it is time to devote your energy and sense of purpose to moving on with life."

22. On 14th November 2018 the claimant applied to set aside Walker J's decision of 2nd November. On 27th November 2018 the local authority applied for immediate dismissal of this application.

23. On 25th January 2019 Walker J refused to dismiss the application to set aside and made directions. He ordered the claimant to at first instance put into writing "all such submissions as the claimant may wish to make in support of the November 2018 application on its merits and in support of the assertions that the November 2018 application should be determined at a hearing." (These he termed the "merits and procedure submissions."). This should be served on the court and interested party no later than 35 days after service of the order. This would have been by 6th March 2019. Walker J also raised concerns about whether the claimant's legal representatives were registered with the SRA and authorised to act. He directed the claimant to file and serve written submissions as to representation ("the representation submissions") within 7 days

of service of the order.

24. On 6th February 2019 the claimant filed representation submissions. He did not file any merits and procedure submissions. The interested party responded by letter on 12th February. The correspondence was referred to Walker J who made a further direction emailed to the parties on 13th February 2019 that as the submissions served on 6th February raised questions of fact the reply to the local authority's observations must be accompanied by a witness statement verifying any facts relied upon and exhibiting copies of all relevant documents in relation to those facts.

25. On 22nd February 2019 the local authority applied for an extended civil restraint order ("ECRO"). On 13th March 2019 Walker J directed that this would be considered after the application to set aside his order. The directions of the 25th January 2019 were varied and made clear that the local authority could respond to any merits and procedure submissions. Walker J noted that the status of the claimant's legal representatives had still not been resolved. The claimant had failed to comply with his order of 13th February as no witness statement or documents had been filed with the court.

26. On 15th March 2019 the claimant wrote to the court asking for an extension of time to serve the merits and procedure submissions. He requested until 26th March 2019. He was advised by the court by e mail of 20th March 2019 that any application for an extension of time must be made on an application notice with a draft order attached and with the appropriate fee. If the parties were in agreement that a variation of Walker J's directions ought to be allowed this could be achieved by filing a consent order for approval with the appropriate fee.

27. Also on 20th March 2019 the local authority advised the claimant by e mail that they would not object to the requested extension of time to enable him to make his merits and procedure submissions. They pointed out that in the event of the judge granting the said extension their time for responding would have to be extended accordingly.

28. On 21st March 2019 the claimant sent a proposed draft consent order to the local authority. This was different in its terms from what had been suggested before. It suggested instead that the time for filing the merits and procedure submissions be extended to 21 days after service of the local authority's application for an ECRO and

statement of case.

29. A number of e mails passed between the parties on 22nd March 2019.

    a. The local authority pointed out to the claimant that the proposed consent order was different from the request made to the court. They concluded that they were waiting to hear from him with a revised consent order to consider.

    b. In response the claimant explained that the request for an extension of time was to enable the claimant to obtain advice from counsel.

    c. In an e mail timed at 14.53 the local authority made the point in response that Walker J's order of 25th January predated any application for an ECRO. They then said this:

    "The Administrative Courts e mail dated 20.3.19 makes it perfectly clear that the extension is to the 26.03.2019. This is the period we have invited our client to consider. You are now seeking to move the goal posts."

    d. In response, in an e mail timed at 15.31, the claimant refuted that accusation. He relied on an e mail from the court office to the effect that if the parties are in agreement that a variation of Walker J's directions ought to be allowed this could be achieved by filing a consent order for approval with the appropriate fee. He re-sent the same proposed consent form and invited the local authority to sign it.

    In the event no agreement was reached or application notice filed.

30. On 26th March 2019 the claimant wrote an email to the Court Office enclosing "the attached documents which included the letter of 14 January 2019 to the Thames Magistrates Court…to form Part 1 of the merits and procedure submissions that the court indicated would be initially extended to 26 March 2019." He went on to say that he would serve "part 2 of the full merits and procedure submission" 21 days after receipt of the local authority's application for an ECRO and statement of case. The claimant also intended to attach the witness statement of Christine Harper in compliance with the order of 26th February that a statement should be filed in relation to issues of fact on the representation submissions. In the event the wrong document was attached. Ms Harper's

statement was only served on 23rd July 2019 in the context of agreeing an index for the hearing and when the claimant realised his error.

31. On 13th April 2019 Sir Ross Cranston, sitting as a judge of the High Court, refused the claimant's application to set aside the order of Walker J dated 2nd November 2018. The judge said this:

"It is high time that this matter is drawn to a close. The claimant has not complied with the order of Walker J of 13th February 2019. No application has been filed for an extension of time. The suggestion that compliance with Walker J's order should follow service of the ECRO has no basis in any of the court's orders and is contrary to what Walker J contemplated."

He went on to say that the application to set aside and its context have "all the hallmarks justifying the making of an ECRO" and the claimant had 21 days to show cause as to why one should not be made. The matter of the ECRO would then be considered by a judge.

32. On 2nd May 2019 the claimant filed an application to set aside the order of Sir Ross Cranston dated 13th April 2019 on the basis that the judge had not had sight of the correspondence regarding the claimant's application for an extension of time or his e mail of 26th March 2019 purporting to attach "part 1" of the merits and procedure submissions.

33. Further correspondence between the court and the parties took place in July 2019 concerning an application for an adjournment of the hearing set down for the 25th July. Such application has not been pursued.

Further outstanding applications

34. The claimant has sought again to reopen the enforcement proceedings at the Magistrates Court. On 15th January 2019 the claimant applied to the Manager to the Customer Unit, HMCTS, Thames Magistrates Court to do so on the basis of fresh evidence. On the 10th May he made a formal application which was processed at Westminster Magistrates Court. The picture in relation to this application is somewhat confusing as it appears that at one time both Thames and Westminster Magistrates Courts believed they were to hear the application. This has now been resolved. On dates in May and July the claimant was

sent a copy of the same letter confirming that his application to have the liability orders set aside will be listed on 8th August 2019 at Thames. On enquiry by the office of this court the legal team manager at Thames has indicated that the matter has been listed in error as a result of the confusion. I indicated in the hearing that I would not hold this confusion against the claimant in any way. The status of his application is yet to be resolved. The fact remains however that the claimant has sought for a third time to set aside the same liability orders. This third application is notwithstanding the decision of DJ Clarke following the second application that he had no jurisdiction to reopen the matter. Mr Young confirms that the "fresh evidence" sought to be relied upon is a land registry document. He concedes that this would have been available if sought for earlier hearings.

35. On 28th February 2019 the President of the Valuation Tribunal dismissed the claimant's application to set aside the review of the Vice-President of 27th October 2016 on the grounds of fresh evidence. The President considered a copy of a land registry document produced in support of the application. In his view such document must have been in existence at the time of the claimant's original appeal. He found nothing in his submissions that persuaded him of its relevance. A review decision is final and there is no entitlement to a further review. On 28th June 2019 the claimant sought leave to appeal this decision.

Application to set aside order of Sir Ross Cranston dated 13.4.19

Claimant's submissions

36. The jurisdiction to set aside the order comes from CPR r.3.1(7) which states that "a power of the court under these Rules to make an order includes a power to vary or revoke the order." Mr Young accepted that the interests of justice, and of litigants generally, requires that final orders remain such unless there are proper grounds for an appeal or unless there are exceptional grounds for varying it or revoking it without an appeal. He has drawn the court's attention to the guidance given by the Court of Appeal as to the court's power to vary or revoke an order under r3.1(7) in *Roult v North West Strategic Health Authority [2009] EWCA Civ 444.* The Court of Appeal held that the grounds

for involving the power generally fall into one or other of two categories:

a. The original order was made on the basis of erroneous information (whether accidentally or deliberately given) and

b. Subsequent events, unforeseen at the time the order was made, have destroyed the basis upon which it was made.

In the context of case management decisions, further developments as to information or events may well justify variations in any orders previously given. However, proof of facts establishing either category may not justify any variation or revocation of a final order.

37. Mr Young accepts that the claimant's merits and procedure submissions were served out of time. "Part 1" of them was served with the email of the 26th March. This was because there had been no application for an extension of time and no consent order was made. He submits that this was a genuine error on the part of the claimant's representatives who relied on the email of 22nd March from the local authority set out at paragraph 29(c) above. A witness statement of Johan Van Huyssteen, a litigation assistant with Harrison Carter, dated 24th July 2019 was produced for the first time at the hearing before me. I agreed to consider it. Mr Van Huyssteen states that this email led them into erroneously thinking that the extension of time had been granted.

38. Mr Young submits that the delay in serving "part 1 of the merits and procedure submissions" was 20 days after the deadline set down by Walker J. This might have been serious were it not for the order of Walker J dated 13th March 2019 in which he directed that the January 2019 order should be varied so that the interested party within 14 days of service of the claimant's merits and procedure submissions should file a response. Mr Young submits that Walker J must have been aware at this time that these had not been served by 6th March. He could have dismissed the application to set aside his order of 2nd November but he did not.

39. Sir Ross Cranston was not appraised of the correspondence regarding the claimant's request for an extension of time. Mr Young accepts that neither the judge nor the court office could be criticised and accepts that the claimant's representatives should have been more alive to the need to make an express application for an extension of time. What

was described as part 1 of the merits and procedure submissions were however served on 26th March, a date which those representing the claimant genuinely believed to be the extended date for service. In all the circumstances the order should be set aside.

Submissions of the interested party

40. In his order of 2nd November 2018 Walker J certified the case as totally without merit. That certification remains in place. As a result the claimant has no right to an oral renewal hearing. This is an application to set aside an order, not an oral renewal hearing.

41. The jurisdiction to set aside an order is limited. Mr Holbrook submits the power is not to be found in CPR r3.1(7) as r3.1(2) provides a general power except where the Rules provide otherwise. CPR r54 governs applications for judicial review. In *R (Harkins) v Secretary of State for the Home Department [2014] EWHC 3609 (Admin)* a Divisional Court accepted that the Administrative Court must have an inherent jurisdiction to reconsider a matter "that it has already decided on a judicial review" although only in exceptional circumstances. However, there was a public interest in the finality of litigation. In determining the test to be applied the court said it was analogous to the then CPR r52.7 which governed the reopening of final appeals. That is that it is necessary in order to avoid real injustice; the circumstances are exceptional and make it appropriate to reopen the appeal; and there is no other effective remedy.

42. Mr Holbrook submits that this test is not met in this case. No exceptional circumstances have been shown. Even if the test set out in *Roult* is to be applied it has not been met.

Ruling on application to set aside the order of Sir Ross Cranston

43. The order of Sir Ross Cranston is a final order insofar as the claimant's application for judicial review is concerned. It is clear from the decision in *Harkins* above, which I consider sets down the appropriate test in this application, that this court has inherent jurisdiction to reconsider a matter that has been decided on judicial review but only in exceptional circumstances and where it is necessary to avoid real injustice. The questions are whether such circumstances exist and whether there is such a necessity in this case.

44. In my view there are no exceptional circumstances in this case, nor would there be a real injustice if Sir Ross Cranston's application were not set aside. In January 2019 Walker J set down directions for the case management of the claimant's application to set aside his order of 2nd November 2018. In so doing he made no finding as to the merits of such an application. The order was clear in its terms that the merits and procedure submissions should be served and filed by 6th March 2019.

45. The claimant failed to comply. By the time he requested an extension of time on 15th March he was already out of time. Whilst the local authority's email of the 22nd March might have been more clearly drafted, I cannot accept that the claimant believed from it that his application for an extension of time to 26th March had been granted. He was aware from the court's email that he needed to file an application or signed consent order and pay an appropriate fee if he wished an extension of time. In the response sent to the local authority's email, set out at paragraph 29(d) above, the claimant re-sent the proposed draft and quoted the court as saying that a variation of Walker J's order could be achieved by filing a consent order with the appropriate fee. This was never done. In my view the claimant would not have sent this email nor re-sent the order if he thought the adjournment had been granted.

46. Even on 26th March the claimant had sent only part of his submissions on "the merits and procedure" in his application to set aside the order of Walker J. He had suggested his own timetable in relation to what he described as "part 2" which would be 21 days after service of the local authority's application for an ECRO and statement of case. This was never agreed and bore no resemblance to any order made by the court. Although Walker J was at one stage concerned about Harrison Carter's authority to act on the claimant's behalf it was common ground at the hearing before me that they were in fact entitled so to do. It follows that the claimant was legally represented. The claimant knew only too well the importance of court directions and the importance of complying with them. Time and again in his many proceedings before different courts he has failed to comply with orders. In my view the 20-day delay in serving any submissions, even then not serving the entirety of the document upon which he sought to rely, was a serious failure to comply with the Rules.

47. I am unpersuaded that Walker J's order of 13th March has any bearing on the question of an extension of time. In this order he was expressly authorising the interested party to make representations on the claimant's merits and procedure submissions as it was

previously thought they had no such right. The order is entirely silent on the filing and service of the claimant's submissions.

48. The claimant has submitted that Sir Ross Cranston was unaware of correspondence relating to the request for an extension of time in March when he made his order. That is plainly not the case. It is apparent from the terms of the order itself that Sir Ross Cranston was aware that the claimant had written to the court requesting an extension of time to file submissions but was advised to file an Application Notice or a Consent Order. He was aware that no such notice or order had been filed. He was aware that in a draft order the claimant proposed that his submissions be filed 21 days after service of the proposed ECRO and statement of case. All this information came from the correspondence. There is no basis for any suggestion, if it is made, that the judge would have been shown some of the correspondence when he made the order but not the rest. I am unpersuaded that Sir Ross Cranston was unaware of the relevant email traffic regarding the request for an extension of time before making his order.

49. If the appropriate test is that set down in *Roult* I would nonetheless refuse this application. The decision of Sir Ross Cranston cannot be said to have been made on the basis of erroneous information. Subsequent events have not destroyed the basis upon which it was made. This is not an exceptional case.

50. This case is far from falling within the exceptional circumstances in which a court can properly set aside a final order. I agree with the observations of both Walker J and Sir Ross Cranston that there must be some finality to this matter. I consider this application to be totally without merit and it is refused.

Application for an extended civil restraint order

51. On 19th February 2019 the interested party applied for an extended civil restraint order against the claimant. That application was stayed by Walker J on the 13th March 2019 pending determination of the claimant's application to set aside his order of 2nd November 2018. On the 13th April 2019 Sir Ross Cranston refused the application to set aside that order and directed that the claimant should within 21 days of the issue if his order show cause as to why such an order should not be made. I have heard submissions

on this issue.

The legal framework

52. The court has an inherent power to make a civil restraint order confined to the self-contained code set out in Practice Direction 3C (Civil Restraint Orders) save for exceptional circumstances. Paragraph 3.1 related to extended civil restraint orders (ECRO) and provides

3.1 An extended civil restraint order may be made by -

(1) a judge of the Court of Appeal;

(2) a judge of the High Court; or

(3) a designated Civil Judge or their appointed deputy in the County Court

where a party has persistently issued claims or made applications which are totally without merit.

Paragraph 3.2 provides that if the order has been made by a judge of the High Court the party against whom the order is made will be restrained from making applications in the High Court or the County Court. By paragraph 3.9 such order can be made for a maximum of two years.

53. The test is therefore one of persistence in the issuing of claims or making of applications which are totally without merit. What is meant by persistence? As two such applications are necessary before the making of a limited civil restraint order, by a process of logic at least three must be required for an ECRO. Mr Bartley-Jones QC, sitting as a judge of the High Court, so held in *Ludlam (a bankrupt) [2009] EWHC 2067*.

54. CPR rules 3.3(7), 3.4(6) and 23.12 provide that where a statement of case or application is stuck out or dismissed and is totally without merit the court must specify that fact and must consider whether to make a civil restraint order. In this case only the order of Walker J on the 2nd November 2018 specifies on its face that the application was totally without merit. Nevertheless, as the Court of Appeal in *R (Kumar) v Secretary of State for Constitutional Affairs [2006] EWCA Civ 990* made clear in paragraph 67 of the judgment:

"It is of course correct that paragraph 1 of Practice Direction C imposes an obligation on courts to ensure that their orders record that a statement of case or application was totally without merit, but the absence of this mantra on the face of an order does not oblige a later court, when convinced that a statement of case or application must have been treated as being totally without merit, to correct the earlier order under the slip rule or to send it back to the original court for correction under that rule. This would be to elevate form over substance in a very undesirable way."

The court went on to say that if the earlier order does not speak for itself a rather more detailed examination of the earlier litigation history must be undertaken if a court is to be satisfied that it possesses the requisite jurisdiction.

55. What is the meaning of "totally without merit"? In *R (Grace) v Secretary of State for the Home Department [2014] EWCA Civ 1091* it was argued that a finding of totally without merit should not be made unless the claim is so hopeless and misconceived that a civil restraint order would be justified if such applications were persistently made. The Court of Appeal rejected that approach. In paragraph 13 of the judgment Maurice Kay LJ held that it would defeat the purpose of CPR r54.12(7) if totally without merit were to be given that limited reach and not produce the benefits which it was intended to produce. The purpose of this Rule was to confront the fact that the exponential growth in judicial review applications in recent years had given rise to a significant number of hopeless applications which caused trouble to public authorities who had to acknowledge service and file written grounds of resistance prior to the first judicial consideration of the application, and placed an unjustified burden on the resources of the Administrative Court and the Upper Tribunal. He concluded that "totally without merit" means "no more and no less than 'bound to fail'".

56. Assuming that the pre-conditions for the making of an ECRO are satisfied it does not necessarily follow that one should be made. The court has a discretion in this respect which must be exercised in a proportionate manner. A party subject to a civil restraint order is not absolutely prohibited from making a claim or application but, unlike other litigants, has to obtain permission from a specified judge before he can do so. It seems to me that I should therefore consider the matter in a graduated way, considering first if a civil restraint order is required whether a limited order would suffice before considering the need for an extended order. In *Ludlam* the judge considered that the most important question in the exercise of his discretion was the "threat level" of the continued use of

wholly unmeritorious applications or claims. The question to be asked is will the litigant, now, continue with an irrational refusal to take "no" for an answer?

Submissions of the interested party

Mr Holbrook relies on the following seven claims and applications as being totally without merit:

Magistrates' Court proceedings to set aside 25 Liability Orders

i. The application of 8th May 2015 which was dismissed by DJ Clarke on 20th October 2016 with costs of £11,600. [Paragraphs 9, 11, 13, 14 and 15 above]. He submits that this was bound to fail in light of the accepted delay of over 9 months between the claimant becoming aware of the liability orders being made (26th July 2014) and his application to set aside (8th May 2015). There was no procedural error or mishap by the court. The *Hamdan* criteria could not be and were not met.

ii. The application of 10th November 2016 to set aside the above dismissal which was dismissed by DJ Clarke on 23rd March 2018 with costs of £16,855. [Paragraphs 16 and 19 above]. This too was bound to fail. The claimant had served no evidence in support of his claim. The fact that he believed the hearing on 20th October 2016 to be a case management hearing was immaterial. He was on written notice that the proceedings would continue in his absence and that the local authority had asked the District Judge to treat the hearing as a final determination of the matter. Yet he did not comply with court directions and did not attend the hearing. If an application is made the burden is on the applicant to satisfy the court that he has a case. No evidence had been put in by the claimant at all. That remained the case as at 23rd March 2018.

iii. The application to state a case that was dismissed by DJ Clarke on 9th May 2018. [Paragraph 20 above.]

Second application for permission to apply for judicial review (CO/3566/2018) arising from the above.

iv. The application itself was dismissed as totally without merit by Walker J on 2nd November 2018 with costs to be assessed. [Paragraph 21 above];

v. The set aside application of 14th November 2018 was dismissed by Sir Ross Cranston on 13th April 2019. [Paragraphs 22-31 above]. There was no evidential or legal basis to set aside Walker J's order. Sir Ross Cranston said that the Application to set aside and its context have all the hallmarks justifying the making of an ECRO. Although not expressly stated, those words alone demonstrate that the judge considered the application to set aside Walker J's order was totally without merit.

First application for permission to apply for judicial review (CO/5962/2016) arising from Valuation Tribunal decision of 12th July 2016.

vi. The application was dismissed by HHJ Curran QC on 14th July 2017 with costs of £7,910. [Paragraph 17 above]. Although not expressly stated, the judgment makes it plain that the judge considered the appeal was bound to fail.

vii. The application for permission to appeal was dismissed by Master Bancroft-Rimmer with costs on 23rd November 2018. This was on the basis of breach of a procedural direction. If an applicant wants to persuade a court to grant permission to appeal he must put the relevant information before the judge. If he does not the application is bound to fail.

57. Mr Holbrook submits that it is immaterial that some of the applications and claims that he relies upon were made in the Magistrates' Court. He submits that there is no authority to the effect that there is a different statutory framework for that court. The civil restraint jurisdiction allows for a judge of the Court of Appeal to impose a general restraining order on applications to all courts, which would include the Magistrates Court. It is not excluded from the jurisdiction.

58. Mr Holbrook submits that the litigation history in this case shows that the claimant will continue to make unmeritorious applications unless he is restrained from doing so. He has made further application to reopen the application to set-aside the Liability Orders in the Magistrates' Court; he has recently lodged a third case in the Administrative Court

(CO/2518/2019) which would appear to be a repeat of the first application for judicial review that was dismissed by HHJ Curran QC on 14th June 2017 and the application for permission to appeal was dismissed by Master Bancroft-Rimmer on 23rd November 2018. In the course of the hearing, in answer to a question of mine, Mr Young said the claimant would continue to make applications until he had his liability for the council tax considered.

59. Due process has happened. On each occasion the claimant has either failed to attend or to provide evidence or documents in support of his claim. There has to be finality in litigation and public authorities in particular have to be protected. The local authority has spent a very large sum of money dealing with the many applications. This jurisdiction exists to protect those in this position. Mr Holbrook submits that I should therefore exercise my discretion in favour of an ECRO in this case. He submits it needs to be of two years' duration as there is no justification for allowing further claims of the type the claimant is bringing and there is no evidence that an ECRO of a lesser duration will succeed in stopping the claims. It is always open to the claimant with the permission of the named judge to apply for amendment or discharge of it.

Claimant's submissions

60. Mr Young submits that the interested party has not been able to show that the claimant has persistently made claims or applications which are totally without merit. He submits that the claims in the Magistrates' Court are outside the scope of the civil restraint order jurisdiction. The wording of paragraph 3 in PD 3C would have included Magistrates' Courts if it was intended that they fell within the jurisdiction. In any event the applications in the Magistrates' Court should not be seen as totally without merit:

    a. The first application in 2015 to set aside the Liability Orders should not be counted against the claimant. There has never been any hearing of the merits of this application and no decision of DJ Clarke that he found the application to be totally without merit. The claimant did not attend the hearing of 20th October 2016 as he believed it only to be a case management hearing.

    b. The application to set aside the judgment of the 20th October 2016 should not be counted against the claimant. DJ Clarke did not say that he found the application, which was made by counsel, to be totally without merit. His ruling

concerned the question of jurisdiction, not merit.

c. The application to the district judge to state a case was not an application within the civil restraint order jurisdiction. The judge can simply refuse to state a case if the request is frivolous. Alternatively, there is no decision of the district judge that the application was totally without merit.

61. Mr Young submits that the finding of Walker J that the application for permission to seek judicial review was totally without merit should be tempered by the fact that he was prepared to entertain the application to set it aside.

62. He submits that the order of Sir Ross Cranston dismissing the application to set aside Walker J's order was without any consideration of the merits but on the basis of sanction for breach of case management orders. This is why he did not state in terms that the November 2018 was totally without merit. This should not count against the claimant.

63. HHJ Curran QC did not find the appeal against the decision of the Valuation Tribunal to be totally without merit. If he had done so it would have been stated in the order pursuant to CPR r52.20(6).

64. Master Bancroft-Rimmer dismissed the appeal against the order of HHJ Curran QC without any consideration of the merits but in the basis of sanction for breach of case management orders. The order was capable of review and is still live.

65. Mr Young submits that there is no need for an ECRO as such cannot restrict applications to the Magistrates Court. The second statutory appeal is against a decision of the President of the Valuation Tribunal not to re-open the review so not obviously a repeat of the first.

Ruling on the application for an ECRO

66. There can be no doubt that the claimant has made persistent applications in the proceedings which arise from the local authority's claim for council tax on the properties at Fieldgate Mansions.

67. In relation to his liability for council tax he has appealed to the Valuation Tribunal which, after a hearing, found against him in 2016. He has appealed that decision, such being heard and dismissed by HHJ Curran QC in 2017. He has sought to appeal that decision which was dismissed by Master Bancroft-Rimmer in 2018. He has sought to review that decision. At the same time he applied for a review of the Tribunal decision by the Vice-President in October 2016 which was refused. In February 2019 his application to re-open the review was refused by the President. He has sought leave to appeal that decision.

68. In relation to the enforcement of the payment of council tax he applied to set aside the liability orders made in 2015 which failed in October 2016. He has applied to the Magistrates' Court to set aside that decision which failed in 2018. He applied to the district judge to state a case which was refused. He has sought permission to judicially review the decisions of DJ Clarke which has been refused and certified totally without merit. He has sought to set aside that decision which was refused in April 2019 and applied to set aside that refusal to set aside Walker J's order before me in these proceedings which has again been refused and certified totally without merit.

69. The question is whether at least three of these applications have been totally without merit. I have no hesitation in finding that there are three such applications:

    a. The decision of Walker J dated 2nd November certified that the application for permission to seek judicial review was such;

    b. In my view although not specifically stated, Sir Ross Cranston, by his order of 13th April 2019 refusing the application to set aside Walker J's order above, also found that application to be totally without merit. He would not have stated that "the application to set aside and its context have all the hallmarks justifying the making of an ECRO" were it otherwise. The submission of the claimant that the application could not be said to be totally without merit because Sir Ross Cranston did not consider the merits of the application to set aside but dismissed it by way of sanction for breach of case management orders is misconceived. As was made clear by Lord Justice Dyson in *Kumar* at paragraph 19 the word "merit" in this phrase does not have the usual meaning that a claim is just or "in accordance with the merits". It means "bound to fail". The application to set aside Walker J's order, in the absence of any evidence or supporting submissions,

was bound to fail.

c. I have refused the claimant's application to set aside the order of Sir Ross Cranston above and have stated it to be totally without merit.

70. In my view there is no basis to treat applications to a Magistrates' Court as outside the civil restraint jurisdiction. I consider that, although not specifically stated, both the application to set aside the liability orders made in 2015 and the application to set aside the refusal so to do made in November 2016 were bound to fail. The first application was not supported by any evidence or documentation in breach of court orders. In addition, it was made nine months after the last order was made. The claimant had not shown that his claim satisfied the *Hamdan* criteria and it was therefore bound to fail. His second application to set the first aside was also bound to fail. He had still not produced any evidence in support of his application. I recognise that he was represented by counsel at the hearing of that application. However in his judgment the judge concluded that, in looking at the history of this litigation as a whole, the defendant's failure to assist the court was a deliberate ploy to extend the issue for no good reason other than to avoid paying the money he owed and that he was playing with the justice system rather than affording the required compliance with court directions. This is a clear indication that he considered the application as totally without merit and bound to fail.

71. Even if applications to the Magistrates' Court fall outside the civil restraint jurisdiction, the applications to that court in my view provide important context to this litigation as a whole. The same can be said of the proceedings before the Valuation Tribunal. The fact is that the claimant has had due process. He had his opportunity to place evidence that the flats in question were tenanted at the material time before that Tribunal. He failed to discharge his burden so to do. He has appealed the decision of the Tribunal and failed to have it overturned. He has thereafter sought constantly to re-open the issue both in terms of his liability and in terms of enforcement. He continues to seek to set aside and appeal determinations. He has shown himself utterly unable to take "no" for an answer. I am satisfied that the "threat level" of further unmeritorious applications is extremely high and that he will issue proceedings regardless of their merits.

72. I am reinforced in that view by the fact that he has continued to behave in this way even after Walker J's advice in November 2018 to desist from bringing proceedings that have no merit and his warning that if the claimant continues to do so he would almost

certainly be the subject of a civil restraint order.

73. I consider in those circumstances that a limited civil restraint order would not suffice and that I should exercise my discretion by making an extended civil restraint order against him. I recognise that in so doing I cannot restrain the claimant from seeking to make further applications in the Magistrates' Court. However, should that court determine that it has no further jurisdiction in relation to the liability orders in question, any application for a review of such a decision will require the permission of the judge named in the order before it can be made. That ECRO:

    a. Will be for a period of 2 years from 31st July 2019;

    b. Will identify the courts in which Mr Francis Gregory is restrained from issuing claims or making applications as the High Court and any County Court;

    c. Will identify the judge or judges to whom an application for permission under paragraphs 3.2(1), 3.2(2) or 3.8 of the PD should be made as being Supperstone J or, if he is unavailable, any other judge authorised to sit in the Administrative Court.

Costs

1. I did not hear submissions as to costs in the course of the hearing although I have seen a costs schedule prepared by the local authority.

2. I have considered written submissions from the interested party on the issue. I invited the views of the claimant. Mr Young advised that whilst he had settled submissions in relation to costs those instructing him wished to ask an internal costs lawyer to consider the statement of costs from the interested party. He sensibly saw no good reason to submit two sets of submissions on costs. The claimant has elected to pursue the second course. I was advised I would receive submissions by 9.30 on 31st July. Such have not been forthcoming. At 11.40, in the absence of submissions from the solicitors acting for the claimant, Mr Young sent his submissions on costs for my consideration.

3. I do not see any need in this case, which lasted for just short of a day in the Administrative Court, for costs to be the subject of detailed assessment.

4. I have considered Mr Young's submissions but I do not accept them. I consider that the local authority should recover their costs in full. They have done no more than perform their public function in the collection of council tax; they did not bring this case but are an interested party; and I am satisfied that the claimant has prosecuted this judicial review in such a way as to cause the costs to escalate by making applications that resulted in three totally without merit conclusions and failed to comply with court directions. I conclude that the local authority's costs of £17,500 were reasonably and properly incurred and make a costs order against the claimant in that sum.