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

Royal Courts of Justice
Strand
London WC2
Wednesday, 1 December 2004

B E F O R E:

MR JUSTICE COLLINS

MR JUSTICE STANLEY BURNTON

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THE VERDERERS OF THE NEW FOREST

(CLAIMANT)

-v-

ANDREW YOUNG (1)
AUSTIN WALTER YOUNG (2)
COLIN JOHN BARNES (3)
PETER ROBERT BURGESS (4)
JOHN KILFORD (5)
ROLAND BESSANT (6)
MALCOLM HORSBURGH (7)
THOMAS PENNY (8)
JAMES PENNY (9)

(DEFENDANTS)

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MR MOTT QC and **MR C PARRY** (instructed by Moore & Blatch) appeared on behalf of the CLAIMANT
MR M GIBNEY (instructed by Jasper & Vincent) appeared on behalf of the DEFENDANTS

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

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1. MR JUSTICE COLLINS: This is an appeal by way of case stated by the Verderers of the New Forest who issued informations in 2002 against a total of nine commoners who were alleged to have breached byelaws which governed their right to pasture animals in the New Forest. Those byelaws are contained in the New Forest (Confirmation of the Byelaws of the Verderers of the New Forest) Order 1999 which is made in pursuance of the New Forest Act 1877. The relevant byelaws are numbers 6 and 7. I need only read 6, which applies to horses, because 7 is in identical terms, save that it applies to sheep or cattle. 6 reads as follows:

> "(1) No commoner shall in any calendar year cause or allow any horse to which this byelaw applies to roam at large or be depastured in the Forest unless --
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> (a) in the case of a horse which has been continuously depastured in the Forest since before the beginning of that year, and in respect of which the appropriate payment was made in the previous calendar year, the appropriate payment in respect thereof is made to the Verderers before the first day of May in that year; or
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> (b) in the case of a horse which has not been so depastured as aforesaid, it has been marked by, and the appropriate payment in respect thereof is made to, the Verderers before it is depastured in the Forest.
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> (2) This byelaw applies to, as respects any calendar year, any horse except a horse born after the beginning of that year."

2. The purpose behind that byelaw is obvious. It is that any commoner who wishes to make use of his rights to depasture or allow his animals to roam in the New Forest must pay an annual fee, and if he is one whose animals are continuously depastured in the Forest, year in year out, then he has a dispensation which enables him, instead of making a payment immediately before he depastures any such animal, to pay it on or before 30th April in any particular year.

3. I am told that the Verderers keep a register which should indicate those who continuously depasture. However, in respect of individual animals, that may not always be entirely accurate, nor will it normally be certain whether that is or is not the position.

4. What happened in this case was that on various dates during the summer and autumn of 2002 checks were made by the agisters on horses, sheep and cattle which were found in the Forest. Most of the dates that the relevant animals were seen depastured were in June or July, but there was one at the beginning of May and one or two later on in the year. Unfortunately, the informations laid were not laid in a satisfactory form. I take, because it happens to be first in the bundle, that relating to the respondent Mr Andrew Young. That was dated 31st October 2002 and what it alleged was as follows:

> "On or before the 30th day of April 2002 at the New Forest, Hampshire did allow horses owned by you to be depastured without making appropriate payment to the Verderers of the New Forest on or before the 30th day of April 2002 contrary to Bye-Law 6 of the Byelaws of the Verderers of the New Forest 1999 made by the Verderers of the New Forest, in exercise of powers conferred on them by Section 25 New Forest Act 1877 and confirmed by the Minister of Agriculture, Fisheries and Food on 28 July 1999."

5. In respect of six of the nine respondents identical informations were preferred. In the case of three, for some reason, the wording was somewhat different, as was the date on which they were laid. Although the informations themselves bear no date, it was common ground before the Magistrates' Court that they were laid on 8th November 2002. The wording of those, and I refer to the case of Mr Horsburgh, was that: "On or before the 30th day of April 2002 at the New Forest, Hampshire did and continue to allow horses ..." et cetera. Otherwise it was in identical terms to the one I have already read.

6. Together with the informations, there were served statements from the agisters which indicated the dates upon which the relevant animals had been seen in the Forest. I say the relevant animals because all the animals were marked and the marks could therefore be traced back to establish the relevant owners. I have already indicated what those dates were.

7. These prosecutions have something of a history to them, so far as the courts are concerned, because there was an argument initially raised that went to jurisdiction. The issue was whether the Magistrates had jurisdiction to deal with the matter rather than the Court of Swainmote, which was the relevant court relating to the Verderers of the New Forest, certainly as at 1877 and no doubt long before that. Indeed it apparently still exists.

8. The Court of Swainmote, apart from anything else, had some difficulties in complying with the European Convention on Human Rights since the Verderers constituted prosecutors, judges and recipients of any penalty which was imposed, and one can see that perhaps that does not measure up to modern requirements in relation to courts. In any event the matter came before this court on 17th December 2003, when it was decided that the Magistrates did indeed have jurisdiction. In commencing his judgment, Rose LJ stated:

> "This is a unique case redolent with history. It concerns the control of animal numbers and grazing by horses, sheep and cattle in the New Forest, by way of the imposition of marking fees."

9. Following that decision, the matter came back to the Magistrates and was then considered by the Deputy District Judge. The point was taken, and it would appear was taken largely at her instigation, that these informations were out of time. Reliance was placed upon section 127 of the Magistrates' Courts Act 1980 which provides by subsection (1):

> "Except as otherwise expressly provided by any enactment and subject to subsection (2) below [which relates to indictable offences] a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose."

10. It was said that in relation to Mr Horsburgh the information, having been laid on 8th November, was more than six months after the alleged date of the offence, namely on or before 30th April, and was therefore out of time.

11. Mr Gibney, who appeared for the respondents before the Deputy District Judge, did not submit that the informations which had been laid on 31st October were out of time. He, it would seem, appreciated that time did not begin to run until the day after the date of the alleged offence. That that is indeed the case is clear from a decision of this court in Marren v Dawson Bentley & Co Ltd [1961] 2 AER 270.

12. However, the Deputy District Judge was not aware of that authority when she made the decision which we have to consider, and accordingly she took the view that all the informations were out of time. She did not spot that one of them was clearly in time because one, for some reason, alleged that the offence was committed on or before 1st May rather than 30th April. That one on any view was in time. If I may go to the Case, in fact there were more than nine informations. I do not think it is necessary to go into the details of all of them. In some there were alleged breaches of byelaws 6 and 7 in that they had both horses and cattle or sheep, and that explains why there were more summonses than individuals. In any event, what she records in the Case is as follows:

> "I heard the said informations on the 16th July 2004 and determined the following
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> (i) Applying section 127 of the Magistrates' Court Act 1980, each information against each of the respondents had been laid out of time.
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> (ii) In the light of this determination, the Court had no jurisdiction to try the informations against any of the respondents.
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> (iii) No evidence was adduced by either the appellants or the respondents, the determination being reached following legal submission."

13. She then goes into a discussion of the law which is applicable. She points out that the informations alleged 30th April was the date, save one which was the case of Mr Bessant, which was 1st May, and she continues as follows in paragraph 3D:

> "It was calculated that the six month time limit during which these informations could be laid before the Court had expired on the 30th October 2002. This calculation was accepted as accurate by the respondents, although the appellants made no concession in this regard, arguing instead that the offences were 'continuing' offences. The

summonses in respect of the respondents therefore appeared to offend the provisions of section 127, those informations laid on 31st October, 2002 being one day out of time and the remaining informations being more substantially out of time.

4. It was contended by the appellants that the offences disclosed in the informations were continuing offences and therefore the time limit for the laying of informations as provided by section 127 should not be applied strictly from the date of the alleged offences as detailed in each information. Instead, the limitation period for a continuing offence should be counted not from the first discovery of an alleged offence, but from the day of each offence charged, as if it were a separate allegation."

14. That last sentence reflects what is set out in Stone's Justices' Manual in relation to the provisions of section 123 of the Magistrates' Courts Act, which provides by subsection (1):

> "No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint."

15. That section is in very wide terms indeed, but it has been somewhat narrowed in its application by a number of decisions of this court. The notes record, so far as material, as follows:

> "In practice the prosecutor may be required to amend the information to remedy an error in certain circumstances and the court has a wide discretion to amend an information which will ordinarily be exercised in favour of an amendment unless that would result in injustice."

16. Then it records three types of error: (1) an error so fundamental that it cannot be rescued; (2) an error substantial enough to require amendment, in which case the court should allow an amendment and grant an adjournment if that is needed; and (3) an error so trivial that no amendment is required. As I understand it, the submission that was being made was that (3) applied. But where the offence was said to be a continuing offence, then the position would be that the date when the offence was discovered, when the evidence established that it was being committed, was to be treated as the relevant date for the purpose of laying the information and time would begin to run from that date.

17. Going back to the Case, the Deputy District Judge in paragraph 7 said this, so far as material:

> "(i) I did not accept the contention advanced on behalf of the appellants and applying section 127 of the Magistrates' Court Act 1980, I ruled that the informations had been laid before the Court out of time and that the

Court had no jurisdiction to proceed to try any of the informations.

(ii) Subsequent to this ruling, my attention was drawn to the case of Marren v Dawson Bentley and Co Ltd [1961] 2 All ER 270. Following consideration of this case I formed the opinion that the calculation of the time limit provided by section 127 which had been accepted by all parties may have been incorrect. [It is clear that it was incorrect.] The case of Marren v Dawson Bentley and Co Ltd, indicates that, when calculating the applicable time limit pursuant to Section 127, the day of the offence is not to be counted."

18. She goes on to point out that other than Horsburgh and in fact the two Pennys, who were in the same situation, the allegations in the informations showed that they were not out of time. She goes on:

"(iv) I caused the parties to be recalled to court on the 19th July 2004. The potential miscalculation of the six month time limit under section 127 was explained. I accepted that, if the determination to reject jurisdiction pursuant to section 127 had been incorrect, the provisions of section 142(1) of the Magistrates' Court Act 1980 could apparently not be utilised to rectify the mistake.

"Section 142(1) of the 1980 Act enables a Magistrates' Court to vary or rescind a sentence or other order imposed in circumstances where the Court is 'dealing with an offender'. As the respondents had not been convicted by the Court at the time of the Court's decision regarding jurisdiction under section 127, despite the fact that the Court wished only to replace an apparently invalid determination, section 142(1) could not be invoked."

19. That is undoubtedly correct and if authority is needed it is to be found in a decision of this court, R v Gravesend Justices ex parte Dexter [1977] Crim LR at page 298, where the court stated that the word "offender" in the predecessor to section 142 clearly indicated that the justices only had power to reopen a case for the purpose of rectifying their own mistake where the defendant was found guilty. Subsequent authorities establish that it extends to cases where, in relation to a defendant with mental problems, it is established that he did the act albeit a conviction is not recorded. But it clearly does not extend to a situation such as this where the court is concerned with a situation before any finding is made.

20. She then goes on:

"(v) Notwithstanding the fact that section 142(1) was unfortunately not available to me, I proposed to proceed on the basis that as my original determination had been based on a mistake, the case of Marren v Dawson Bentley and Co Ltd not having been drawn to my attention at the relevant time, that determination must be construed as a nullity and in accordance with common law powers the Court should set aside the earlier

determination and proceed to hear the informations laid on 31st October 2002."

21. She then poses these questions for the court. First, were the informations against the various respondents laid before the court on 31st October 2002 out of time pursuant to section 127 of the Magistrates' Courts Act? The answer to that is clearly no, they were not. Indeed, she has answered her own question by referring to Marren v Dawson Bentley Co Ltd. No argument to the contrary has been put before us.

22. Secondly, she asks, were the informations against the respondents Horsburgh and the Pennys laid before the court on 8th November out of time pursuant to section 127 of the Magistrates' Courts Act? The answer to that is that they certainly appeared to be in relation to the unamended informations, and if it had properly been decided that it was impossible to amend those informations because the defect was so fundamental that amendment should not be permitted, then they would have been out of time.

23. Thirdly, if a Magistrates' Court acknowledges that a mistake has been made in rejecting jurisdiction, and that mistake is incapable of rectification pursuant to section 142(1) of the Magistrates' Courts Act 1980 as the court is not dealing with an offender, is the court nevertheless entitled to rule that the mistaken determination was a nullity, to set that determination aside, and to proceed to try the informations? That question is posed in general terms and it is not appropriate to give it a general answer. The answer to it must depend upon the circumstances of the particular case. There is some authority which suggests that if, but only if, it can be said that the decision was a nullity, then the magistrates can properly reconsider.

24. An example of that occurred in a case where there was an obligation to serve notice of the resumption of a hearing. That obligation was not met. Accordingly, the defendant failed to appear because he did not know that the hearing was taking place and he was in due course convicted. He then established that there had been a defect and this court indicated that in the circumstances the magistrates had had no jurisdiction to try the matter at all and their purporting to do so had been a nullity and in those circumstances they were entitled to reconsider.

25. That is a very different situation from this. There is a decision of this court, R (on the application of Steward) v Director of Public Prosecutions [2003] EWHC 2251 Admin, the court consisting of Maurice Kay J and Crane J. What had happened in that case, which was a breathalyser prosecution, was that at the end of the prosecution case the clerk to the justices indicated to them that certain evidence in relation to the intoximeter had not been produced and this rendered the evidence of the reading inadmissible. The magistrates accepted that ruling, but it was very quickly appreciated by everyone that the clerk had made a mistake and in those circumstances, everyone agreeing that the error was manifest, the magistrates revoked their decision to say that there was no case to answer and went on to convict the defendant. He appealed by way of case stated and one point he took was that once the magistrates had announced that there was no case to answer they were functus and they were not entitled to reopen the matter. Maurice Kay J, having referred to section 142 and indicated that that section did not and could not apply, went on to say this in paragraph 9 of his judgment:

"In my judgment, the position for which Mr Lofthouse contends is highly schematic and artificially so. As my Lord observed in the course of submissions, it is a matter of chance as to whether magistrates begin a ruling with references to the evidence with the intention of only making clear their finding of no case at the end, or whether, as here, the conclusion preceded the reasons.

10. In the former case, if the solicitor had spotted an error in the course of the review of the evidence it is a matter of chance as to whether he would have interrupted immediately or waited until the end. This is not a case like the Essex Justices case [that is a reference to R v Essex Justices ex parte Final [1963] 2 QB 816] where a Bench was persuaded to re-open the case and, in effect, hear further submissions as to the evidence. It is a case of an error having been identified, having been agreed by the defendant's solicitor and having been admitted to by the magistrates. I do not consider that that comes within the principles set out in the Essex Justices case, or in the case of S [that is a reference to S v Recorder of Manchester [1971] AC 481] in which Lord MacDermott referred at page 498 to the point where: '... the process of adjudication ... had been completed and was effective in point of law,' as the cut off point."

26. S was one of a number of cases in which there had been a plea of guilty and the question was whether the magistrates had power to allow that plea to be withdrawn. Maurice Kay J continued:

"11. In my judgment that point had not been reached in this case. In making that statement I also have in mind the fact that at the time of the Essex Justices case it was not usual for magistrates to give reasons at all and, therefore, the announcement of the decision one way or the other was laconic in the extreme. Now that the giving of reasons is common, the process of adjudication is extended. Mr Lofthouse suggests that there are also strong policy reasons for this court to adopt the approach taken in the Essex Justices case, the policy being one of discouragement of attempts at second bites at the cherry. However, there are also strong policy reasons for taking a broader view. Where, as here, magistrates make a mistake and both parties agree, and the magistrates agree that they have made such a mistake, policy and common sense favour its immediate rectification without the cost and delay of an appeal by case stated."

27. For my part I fully understand and have a very great deal of sympathy with the approach suggested by Maurice Kay J which will avoid in clear cases the need to come to this court. But this is a case which undoubtedly goes further than any other in indicating that magistrates have power to reconsider a mistaken decision once they have made it. It looks as if, from paragraph 9, what may be being said is that if reasons are given before a decision is announced, and it becomes apparent from those reasons that the decision is one which will be based on a mistake, then it is, or should be, open to a representative to jump up and seek to stop the magistrates from reaching that

conclusion and, because that is artificial and somewhat improbable, what can be done is, even if the decision is announced, if the reasons appear defective and everyone agrees that they are defective, the magistrates can then and there be persuaded to change their minds.

28. It may be that that is possible and nothing I say is intended to indicate that the case of Steward was in any way wrong on its facts, if, but only if, the matter can be put right immediately. That did not happen here and it is plain that the Deputy District Judge's decision was reached and announced and for the moment accepted. It was only later that she appreciated that an error had been made.

29. Furthermore, it was not a clear-cut case. There were still arguments which were to be raised, not least an argument based on continuing offence, and we were told by Mr Mott on instructions from Mr Parry that an amendment was not considered because the Deputy District Judge had made it plain that she took the view that no amendment could cure the informations that had in the circumstances been laid, and accordingly no application was made by Mr Parry for an amendment.

30. Indeed, although nothing is said in terms in the case, it seems to me that it is implicit in what the Deputy District Judge says in paragraph 4 that she had formed the view that an amendment could not be made, largely because she did not regard these as continuing offences. So the cut-off point was indeed 30th April of the relevant year, by when the offence would have been complete.

31. Accordingly, I have no doubt that the magistrate did not have the power to do what she purported to do, and I should say that neither Mr Mott, in whose interests of course it would have been to submit that she had the power if he took the view that she did, nor, of course, Mr Gibney, who perhaps not surprisingly would not have made that submission, suggested that the magistrate was indeed correct.

32. That answers the questions which have been specifically posed before us. But that is only a partial answer to what should happen to this case. The purpose, as I have said, behind the byelaw is obvious. It is to ensure that no commoner uses the Forest to depasture his animals unless he has paid the annual fee, and he commits an offence if he does so during the course of any calendar year. Whether or not he is doing it can only be ascertained by inspection by the agisters from time to time and such inspections normally take place not before May. There are a number of reasons for that, the most obvious being that the dispensation is given for those who continuously depasture their animals, but they do not have to pay until 1st May. So there is perhaps little point in identifying animals before that. Furthermore, there are difficulties in other ways because of the habits of the animals in question.

33. There is considerable learning and a number of cases which deal with the question as to what are and what are not continuing offences, and it is certainly difficult to establish any consistent principle which defines the nature of a continuing offence. That is a comment which was made by Professor Smith when considering a case, British Telecommunications PLC v Nottinghamshire County Council [1999] Crim LR at page 217.

34. One has to look at the circumstances of any particular case and, more importantly, to determine the true construction of any particular statutory provision. It seems to me quite plain that in the circumstances here the offence must be a continuing one in the sense that it is a contravention of the byelaw if at any time during the year a commoner depastures his animals without having paid the annual fee. But he is given until 30th April to make that payment and so the offence itself, if there is continuous depasturing, does not, as it were, crystallise until 30th April. But he continues to be guilty of allowing or causing his animal to be depastured on any date subsequent to that if the fee has not been paid. So it is that when the evidence is obtained that shows that the animal is indeed being depastured, that is the date which should be alleged and from which the relevant limitation applies.

35. The reality here is that the informations that were laid were themselves not as they should have been. There was in truth no evidence to support the assertion that on or before 30th April the offence had been committed. The only evidence was that the offence had been committed on the relevant date that the agisters identified the animal, and that is the date which was material. As it seems to me, the information ought to have alleged quite simply that on that date, if I may go back to the wording of the relevant information, the defendant allowed horses owned by him to be depastured without having made appropriate payment to the Verderers, contrary to paragraph 6 of the byelaw. That is the true nature of the offence; that is what the defendant needs to know; that accurately reflects the situation; and that accords with the law in relation to offences such as this.

36. As it seems to me, although of course the provisions may be different, this is akin, for example, to using a television without a licence. It may be that the previous licence expired on a particular date but every time it is used thereafter the offence is being committed and it is on the date that the detector van comes round that normally the information will be laid. As I say, I appreciate entirely that the wording of that particular statutory provision may well be different but the principle, as I see it, is the same where one has, as here, an obvious intention behind the byelaw which is to ensure that annual fees are paid before animals can be depastured.

37. One of the cases to which we have been referred is Rowley v TA Everton & Sons Ltd [1941] 1 KB at page 86. That was a case of an allegation of failing to fence a dangerous machine and the dates in respect of which evidence had been obtained were in October and December 1939. But the argument was: "we have been using this machine without a proper fence for months. That is when the offence was committed, months ago and we cannot now be touched." Not altogether surprisingly, the court would have none of that and it indicated that quite clearly it was a continuing offence. It was not statute-barred because the time in respect of any individual information would run from the date that the offence was committed as alleged in the information. Again, I appreciate that the details of the statutory provisions creating the offence are somewhat different but, as it seems to me, the principle is applicable where one has an offence such as this.

38. In what I think is perhaps the most recent, or certainly one of the more recent cases dealing with this problem, Thames Water Utilities Ltd v London Borough of Bromley,

which was a decision of this court on 4th March 2000, there were certain observations of Schiemann LJ which I regard as helpful. The case itself involved the prosecution of Thames Water for failing to reinstate a street properly, having dug it up, and the question was in essence whether the time ran from the date that they purported (or failed in that case) to have done the works or whether it was a continuing offence and time ran from when the local authority caught up with them.

39. Schiemann LJ indicated that there should be a distinction between non-compliance with, as he put it, a "do notice", which was complete once and for all when the period for compliance with the notice expired, and a "desist notice", when the initial offence as well as further offence, although it may take place over a period, is a single offence and not a series of separate offences. What he said was this:

> "Similarly, as respect to non-compliance with a 'Desist Notice', it is in my view clear that the initial offence (as well as the further offence) though it too may take place over a period, whether a continually or intermittently (eg holding a Sunday market), is a single offence and not a series of separate offences committed each day that the non-compliance prior to the first conviction for non-compliance continues. If it were otherwise it would have the bizarre consequence that upon summary conviction a fine of £400 per diem could be imposed for each separate offence committed before the offender received his first conviction, whereas for any further offence committed after the offender against a 'desist notice' had been convicted, a daily fine of only £50 could be inflicted. Uniquely a previous conviction would be a positive advantage to the offender. This can hardly have been in Parliament's intention."

40. That was a case where, as sometimes, Parliament had indicated that there is a separate penalty for every day on which the offence continued and it is easy in such cases to construe the offence as a continuing offence. But the absence of such a provision does not stop it being a continuing offence. As it seems to me, the approach indicated by Schiemann LJ is helpful in a case such as this which in my view has similarities again in principle to a desist case, that is to say: "you must not continue to pasture your animals when you have not paid the necessary fees". The situation is that. Any particular day can be chosen when the evidence exists and that will be the day on which the offence is effectively deemed to have been committed. That will deal with the commission of the offence for that year.

41. Of course, if there is a repasturing, different considerations apply, or if there is a pasturing of a different type of animal, or in different circumstances. But otherwise, as it seems to me, the problem which otherwise might arise, that in theory at least there can be continuing prosecutions, should not arise.

42. As the informations stand, as they charge an offence on or before 30th April, not only does time begin to run from that date for the purposes of section 127, but also on the facts the offences are incapable of being proved because there is no evidence in any of them that there was any depasturing prior to 30th April 2002.

43. In those circumstances, it would be, despite the errors made by the Deputy District Judge, pointless to send the matter back unless there were to be an amendment to indicate the true dates upon which the evidence shows that the offence was apparently committed. Of course there may be factual answers to the charges. We have, for obvious reasons, not gone into those at all; nor do we know what their nature is or may be.

44. Accordingly, I would, for the reasons that I have given, allow this appeal. I have already indicated how the questions should be answered but I would only send the matter back for the hearing to be continued on an undertaking by the appellants that they will seek leave to amend the informations to reflect the true position and, as I have indicated in my judgment, there could be no proper grounds for resisting those applications were that to be made. There is no prejudice to the respondents. They have known at all material times what the case is against them and they have not been misled and this seems to me to fall quite clearly within the second of the matters that I have referred to in the notes to section 123 of the Magistrates' Court Act 1980.

45. MR JUSTICE STANLEY BURNTON: I agree. Having regard to the arguments we have heard I would add just two matters. First, generally speaking, averments as to the date on which an offence is committed are not of the essence. It is no defence to an allegation of theft on 1st March of any year that the theft was in fact committed on 2nd March. However, when questions arise as to the application and effect of section 127 of the Magistrates' Court Act, a District Judge or bench of magistrates is entitled to consider the case before them on the basis of the information and to treat the allegation as to the dates when offences are committed as being accurate. If those dates are outside the six-month limit provided in section 127, the case cannot go forward. If, however, the prosecution's case is that its allegations and the evidence to support them justify different dates from those set out in the information, the remedy of the prosecution in those circumstances is to seek an amendment of the information or summons. That amendment will normally be permitted, provided no injustice results.

46. So far as the power of a Magistrates' Court to set aside its own decisions is concerned, it is important that it be appreciated that, save where express power is given by statute, as in section 142 of the Magistrates' Court Act, the power is very circumscribed. My Lord has referred to one line of authority. Another line of authority was considered by Maurice Kay J in Liverpool City Council v Pleroma Distribution Ltd [2002] EWHC 2467 Admin, to which I referred in R (on the application of Brighton and Hove City Council) v Brighton Justices & Michael Hamdan [2004] EWHC 1800 Admin.

47. There is no authority which could justify magistrates or a District Judge having power to set aside a decision made by him -- or, in the case of a bench of magistrates, them -- after the completion of a hearing on the basis of an error in the substantive law applied by the court. That essentially was the error in the present case. There is inherent power to set aside in those circumstances.

48. MR MOTT: My Lords, firstly the terms of the orders. In respect of the first seven respondents, that is other than the Pennys --

49. MR JUSTICE COLLINS: I should have said, and I omitted to say, that the Pennys have pleaded guilty and took no part in this appeal. Although they were named as respondents, that naming of them, I think, was probably an error, except that the magistrate presumably purported, because the informations in their case had been laid on 8th November, to set aside the penalty and the conviction. She does not say that in terms but it must have been her intended effect. Our allowing of the appeal will reverse that.

50. MR MOTT: Yes, so that order will be quashed and the convictions and sentences will be restored in respect of those two. In respect of the first seven respondents I have specific instructions from the verderer to offer the undertaking in the terms your Lordship has proposed, and those amendments will be sought. On that basis then the informations will be sent back to the Magistrates' Court to be heard, may I suggest, by a different District Judge?

51. MR JUSTICE COLLINS: Yes. I do not know what the arrangements are. She got it wrong but there is no reason to believe in those circumstances that she is unable to try the matter on its merits, is there?

52. MR MOTT: No, not specifically. She was a Deputy and it would be happier perhaps to have a different District Judge.

53. MR JUSTICE STANLEY BURNTON: Do you mean you would be happy to have a District Judge?

54. MR MOTT: I would be happy --

55. MR JUSTICE COLLINS: You prefer to have a District Judge. You do not want a lay bench on this.

56. MR MOTT: Not particularly.

57. MR JUSTICE STANLEY BURNTON: They do not want a Deputy. With the greatest of respect to the Deputy, you would prefer to have a District Judge rather than a Deputy District Judge.

58. MR MOTT: I know because I have now had a bit more time to read the legal issue that will arise of the validity of the byelaws.

59. MR JUSTICE COLLINS: In that case it obviously is desirable that there should be a legally qualified --

60. MR MOTT: It is a substantial matter.

61. MR JUSTICE COLLINS: I do not think we can say it must be a District Judge as opposed to a Deputy. That will depend upon what other arrangements can be made. We can say, if you want, that it should be another --

62. MR MOTT: May I ask for another District Judge?

63. MR JUSTICE COLLINS: -- but I do not really see why we should, to be quite honest.

64. MR JUSTICE STANLEY BURNTON: I think the Deputy District Judge in this case would look askance at an order that there be a hearing before a different judge when she has not made any decision on the merits, not expressed any prejudice or prejudgments.

65. MR JUSTICE COLLINS: The reality is, I suspect, that you probably will get a different one.

66. MR MOTT: It was the order on the last occasion.

67. MR JUSTICE COLLINS: Maybe, but -- what do you have to say, Mr Gibney?

68. MR GIBNEY: My Lord, I see no reason why there should be on order that there be another District Judge. As you rightly say, she made no observations or judgment at all on the merits of the case.

69. MR JUSTICE COLLINS: We certainly do not say it should be the same one. We leave it entirely to the --

70. MR GIBNEY: That I understand. I apprehend the Deputy Judge in question may run a mile if she hears this is coming back in any event, but that is another issue.

71. MR JUSTICE COLLINS: It can be any District Judge or Deputy District Judge who can be found to sit, but it is desirable, from what Mr Mott tells us -- that there may be argument about whether the byelaws are valid and so on -- to have a District Judge, whether deputy or full time, rather than a lay bench.

72. MR GIBNEY: I do not dissent from that. I am sure that will be passed on. As it appears, the verderers, obviously through their counsel, are inviting the court that this matter proceed as being a level 1 offence and we are now two years on.

73. MR JUSTICE COLLINS: Mr Gibney, that is a matter, I think, that you will have to --

74. MR GIBNEY: I do understand.

75. MR JUSTICE COLLINS: I do not think we should have any -- the reason it has been delayed is because of two journeys to this court.

76. MR GIBNEY: My learned friend may have another application on which I will wish to make observations.

77. MR MOTT: In relation to costs, it is the same application I made and set out the details at the end of the last divisional court hearing, an application for costs out of central funds under section 17 of the Prosecution of Offences Act 1985.

78. MR JUSTICE COLLINS: I do not see why you should not have them. You have no interest in that, Mr Gibney.

79. MR GIBNEY: I have no interest on behalf of the seven defendants that I represent. I simply make the observation that, as your Lordship rightly indicated, the summonses from the outset were appallingly drafted.

80. MR JUSTICE COLLINS: That is perfectly true, but that could have been sorted out.

81. MR GIBNEY: Had there been any application to do so.

82. MR JUSTICE COLLINS: Yes, but --

83. MR GIBNEY: I cannot say any more than that.

84. MR JUSTICE COLLINS: I do not think it is a case of punishing here. I think we are agreed that you can have your costs out of central funds.

85. MR MOTT: Thank you. That is all.

86. MR JUSTICE COLLINS: Get your informations right in future.

87. MR JUSTICE STANLEY BURNTON: Get your byelaws drafted.

88. MR JUSTICE COLLINS: That is another matter. They are not good. There is no question about that, but that I suspect is not the verderers' fault.

89. MR MOTT: No, certainly not this generation.

90. MR GIBNEY: Not the current generation.

91. MR MOTT: Not the Chief Verderer.

92. MR JUSTICE COLLINS: I am not sure who is responsible. It is probably DEFRA.