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

No. CO/3352/00;CO/2905/00

Royal Courts of Justice
Strand
London WC2

Friday 15th December, 2000

B e f o r e:

MR JUSTICE DYSON

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THE QUEEN ON THE APPLICATION OF AIRCRAFT RESEARCH ASSOCIATION LTD

– v –

BEDFORD BOROUGH COUNCIL

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Computer−Aided Transcript of the stenograph notes of
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MR JOHN BATES (instructed by Beachcroft Wansborough, 30 Eastcheap, London EC3M) appeared on behalf of the Claimant

MR TIMOTHY STRAKER QC and MR ANDREW SHARLAND (instructed by Bedford Borough Council, Town Hall, St Paul's Square, Bedford, MK40 ISJ) appeared on behalf of the Defendant

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

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1. MR JUSTICE DYSON: There are before me a number of applications by Aircraft Research Association Ltd ("ARA") and an appeal by case stated arising from a decision by the Bedford Justices in relation to a Noise Abatement Notice issued pursuant to section 80 of the Environmental Protection Act 1990 by Bedford Borough Council ("the Council"). ARA operates a transonic wind tunnel at Manton Lane, Bedford. The tunnel is used for the aerodynamic testing of aircraft models. There is residential land nearby. Complaints were made by the residents about the noise generated by the testing operations conducted by ARA.

2. On 19th February 1999, the Council served an abatement notice on the basis that the noise amounted to a statutory nuisance within the meaning of section 79(1)(g) of the Act. The notice required ARA to abate the nuisance within two years, and to carry out the works specified in the Schedule to the notice. The Schedule required ARA to construct an enclosing structure around the tunnel. It stated that:

> All access doors shall be kept closed when the tunnel is operational save to the extent that any door can be left open without affecting the performance of the enclosing structure set out above."

3. ARA appealed against the notice on a number of grounds, which included that the requirements of the abatement notice were unreasonable in character, extent and were otherwise unnecessary. By the time the appeal was heard, ARA had admitted the statutory nuisance alleged in the notice. The appeal was heard over a period of eight days. Both ARA and the Council were represented by counsel. There was a good deal of evidence, much of it from expert witnesses. The hearing took place between 6th and 10th March and 2nd and 4th May 2000.

4. Much of the argument centred on the precise scope of the works that were to be required to be carried out in order to abate the nuisance. Various versions of the Schedule to the notice were put forward. One of the problems was that there had to be access doors to the proposed enclosure. These would have to be opened from time to time. If they were opened while the tunnel was in operation, the noise levels experienced by the residents would obviously be much greater than if they were closed. It was not in dispute that the noise levels should not exceed 48dB(A). But noise levels are measured by taking average readings over a period of time. It is therefore of some importance to determine over what period the average readings are to be taken.

5. If the doors were kept open for up to 5 minutes while the tunnel was in operation, it would be more difficult for ARA to satisfy the 48dB(A) requirement if the levels were measured on the basis of the average over a five minute period, than if they were measured on the basis of the average over a one hour period. The LeqT is the average level of noise measured over a period of time. Accordingly, Leq 5 minutes is the average level of noise over a period of five minutes; and Leq 1 hour is the average level of noise over a period of one hour. It is clear, therefore, that the shorter the Leq period, the more difficult it will tend to be to meet the specified average maximum noise level. Whatever the position may have been earlier on, by the time Mr Bates (who appeared

for ARA on the appeal) made his final submissions to the justices, ARA were contending for Leq 1 hour.

6. On 4th May, the justices announced their decision. They allowed the appeal principally on the ground that the requirements specified in the notice of 19th February 1999 were unclear. A written note of their decision records:

> In conclusion the court requires the notice to be amended so that it includes a schedule requiring works to be carried out on the Wind Tunnel and associated plant to achieve a rating level of 48dBA−leq 5 mins− at 51−81 Curlew Crescent. (Odd) The completion date is to be March 2002."

7. It will be seen, therefore, that they opted for Leq 5 minutes.

8. It is the aim of ARA in the various applications and the appeal to seek to obtain an order whereby Leq 1 hour is substituted for Leq 5 minutes.

The History from 4th May 2000

9. On 24th May, ARA applied for a case to be stated on the following question:

> Was our decision on a regime for a sound enclosure for the wind tunnel unreasonable in relation to an allowance for opening and closing of doors in that we specified noise measurements should be taken every 5 minutes (Leq 5 mins) when both experts agreed that measurements taken every hour (Leq 1 hour) would solve the problem of doors without detriment to residents?"

10. On 12th June, a draft case was sent to ARA's solicitors, Messrs Beachcroft Wansboroughs. They were invited to make comments on the draft. The solicitors responded on 5th July. They sent detailed representations and various extracts of what had been said at the hearing by various witnesses and by Mr Bates. The representations requested the justices to make a number of alterations to the draft case. On 21st July, the justices issued their final case. It was sent to ARA's solicitors under cover of a letter of that date from the clerk to the justices in which it was described as "the final case stated". But it seems that the case was not signed, and that the signed version of the case was not received by ARA's solicitors until 7th August. The justices had refused to incorporate the principal alterations that had been sought by ARA.

11. On 14th September, ARA lodged with the Administrative Court an application for permission to commence judicial review proceedings to challenge the decision of the justices not to amend the draft case stated so as to include the alterations that had been requested. It is now conceded by Mr Bates that this application was misconceived, and that the correct route to challenge the refusal to amend the draft case was by an application pursuant to section 28A(2) of the Supreme Court Act 1981. Accordingly, I dismiss this application for permission to apply for judicial review without more ado.

12. In fact, ARA did issue an application under section 28A(2) on 30th November. It is to that

application that I now turn.

13. Application under Section 28A(2) of the Supreme Court Act 1981

14. As I indicated at the conclusion of the argument on this application, I refuse to exercise the discretion conferred by section 28A(2) to send the case back for amendment on the grounds that the application is made too late. Mr Bates contends that time started to run on about 7th August when ARA's solicitor received the final signed version of the case stated. He says (and I accept) that the solicitor who was dealing with the case was on holiday for two weeks in August. He submits that the substantive application challenging the refusal to amend the draft case was made on 14th September when the judicial review proceedings were lodged with the court. He says that I should treat the section 28A(2) application that was made on 30th November as having, in effect, been made on 14th September. Finally, and in any event, he submits that no prejudice has been caused by the fact that the section 28A(2) application was not made until 30th November.

15. I do not accept that the starting point was 7th August. It was obvious to ARA on 21st July that the justices had decided not to amend the draft case. The final case stated was sent to them on that date. Tellingly, the notice of application in the misconceived judicial review proceedings identified the decision to be challenged as a decision "on 21.07.00 not to amend their draft case stated to include certain matters requested by the Applicants." The starting point, therefore, was 21st July. No explanation has been given as to why it took more than six weeks before ARA issued the application of 14th September. It is true that this was a reasonably complicated case, but all the arguments relied on by ARA as to why the case should be amended had been marshalled in the comprehensive material that had been submitted to the justices on 5th July. It is striking that all of that material had been assembled and sent to the justices in the period of 23 days between 12th June and 5th July. Little more had to be done in order to prepare the documentation to mount a challenge to the justices' refusal to amend the case.

16. Even if it were appropriate to treat section the 28A(2) application as having been made on 14th September, I would have considered that the application was too late. It is important that applications of this kind be made promptly. Although Spicer v Warbey [1953] 1 All ER 284 predates the 1981 Act, Mr Bates did not suggest that it is no longer relevant. Lord Goddard LCJ said that if a party considers that certain facts have been omitted from a case, then he can apply to the court for a restatement of the case, but it is the duty of a party who wishes to take this course to "act promptly in the matter". It is true that Parliament has not set a time limit for applications under section 28A(2). That is no doubt because cases vary, and it was thought preferable to leave the matter to the discretion of the court. But it is clear that Parliament considered that appeals by way of case stated from the decisions of justices must be made expeditiously. Thus section 111(2) of the Magistrates' Court Act 1980 requires an application for a case to be stated to be made within 21 days after the day on which the decision is given. In my view, it would only be in a rare case that the court ought to allow an application under section 28A(2) six weeks after the case stated had been issued. There may occasionally be circumstances in which it is not reasonably practicable for

an applicant to formulate his proceedings promptly. But there are no such circumstances in the present case.

17. I do not in any event accept that I should treat the application of 14th September as if it were an application made under section 28A(2). In certain circumstances, the court will cure procedural error. My attention has been drawn to CPR 3.10. But even if I had been willing today to correct the application for permission to apply for judicial review and amend it to an application under section 28A(2), that would not mean that the application under section 28A(2) was made on 14th September. Nothing can change the fact that the procedurally correct application was not made until 30th November, more than four months after the date of the refusal to make the amendments to the case was first communicated to ARA.

18. Finally, I must deal with Mr Bates' submission that no prejudice had been caused by the delay. It is not possible to say what would have happened if an application under section 28A(2) had been made, say, by the beginning of August. It is not certain that events would have taken the course that they have taken. But there is a more fundamental point. In my view, permission may be refused on the grounds of delay even where it cannot be demonstrated that any actual prejudice has been suffered.

19. There is a public interest in ensuring that, if the decisions of magistrates are to be challenged, they should be challenged promptly. It is for this reason that an application for a case to be stated must be made in 21 days. It is equally important that, once a case has been stated, all relevant steps to enable the court to determine the question or questions of law that have been raised are taken as soon as possible. If a party considers that the case requires amendment, then, as Lord Goddard said, it is incumbent on him or her to apply to the court promptly. Another way of putting the same point is to say that it is detrimental to good administration to allow a party to make an application many weeks after the case has been issued. The longer the delay, the more onerous it is for the justices to revisit the case, particularly where, as here, the case is a complex one.

20. For all these reasons, I refuse to exercise my discretion to make an order under section 28A(2) on the grounds of delay. I do not, therefore, find it necessary to deal with the other grounds of objection advanced by Mr Straker QC.

Appeal by Case Stated

21. The case stated

22. At paragraph 5 the justices found the following facts:

> We found the following facts:
>
> a) There is a defect or error in the abatement notice in that:
>
> (i) The way in which compliance will be tested is not clear.

ii) The 6dB(A) tolerance, which has been included, is not made clear in the notice.

iii) It fails to include the associated plant.

b) It is possible to amend the notice in favour of the appellants.

c) The statutory nuisance could only be stopped by achieving a noise rating level of 48 dB(A) at 51−81 Curlew Crescent. (As shown on the attached map at appendix A)

d) Even short periods of noise being caused by the site would cause a nuisance to the residents.

e) The only way to ensure that the noise does not exceed a rating level of over 48 dB(A) for any significant period of time is to assess it over short intervals.

f) To assess the noise over a period of one hour would mean that there is a possibility that the tunnel is running for 20 minutes during that hour and yet the rating level is still below 48dB(A) − Leq 60 minutes − despite being over the level for the 20 minutes during the operation of the tunnel.

g) It is accepted that doors would be necessary, however even when these are open the noise emitted from the wind tunnel and associated plant should not be more than 48dB(A) − Leq 5 minutes."

23. At paragraph 6 they recorded that it was "contended by the appellant that Leq 1 hour would not be of detriment to the residents and would be the preferred period of measurement." At paragraph 7, they recorded that "it was contended by the respondent that Leq 5 minutes would be of greater benefit to the residents and would be the preferred period of measurement." They then referred to the various witnesses who had given evidence, and summarised the relevant evidence at paragraph 13 as follows:

The following is a summary of the evidence relevant to this application:

a. Mr Herbert exhibited a glossary of terms to the court to help them with the technical nature of some of the evidence. This is appendix 1 to his written statement of evidence, which he read out in court. Mr Corkill also exhibited a written explanation of the terms. (These are appended to this case as appendix B)

b. Mr Corkill also gave evidence on oath of the meaning of Leq T. He stated that LeqT was an average level of noise measured over a period of time e.g. Leq 5 minutes is the average level of noise over a period of 5 minutes. Leq 1 hour would be an average of the noise level measured over an hour.

c. Mrs Hill gave oral evidence in relation to various noise level measurements, which were taken. We have provided an example of these measurements taken on 5th February 1998. This is to show by way of example that measurements can be and were taken at Leq 5 minutes. (Appendix C)

d. Mr Corkill exhibited an alternative schedule to the court entitled Alternative Schedule 1. Stating that the noise level should be reduced to 48 dB(A) Leq 5 minutes. (Appendix D). He also gave evidence that due to the fact that any enclosure

would need to have doors and that these doors would on occasion need to be opened, then the problem of noise increase due to the opening of the doors could be eased by measuring the noise levels over a period of one hour i.e. Leq 1 hour.

e. Mr Herbert stated in cross examination that it is his opinion that if the measurements were taken over a period of 5 minutes (Leq 5), then this would be of most benefit for the residents. He stated that under the majority of cases 1 hour could well be adequate for removing a statutory nuisance without detriment to residents. Leq 5 minutes was the rating level suggested in the most recent proposal from ARA.

f. Letters relating to alternative schedules, which were proposed following the serving of the notice were also presented to the court; the relevant proposal in relation to this application being contained in a letter from Mr Forsyth (solicitor for the Complainants) to Mr Ledran (solicitor for the Respondents) and in the subsequent reply. (Both letters are appended to this statement of case) (Appendices E and F)."

24. At paragraph 14, they said that they found in favour of the ARA on the first ground only in that the notice was defective. At paragraph 15 they said that they therefore decided to amend the notice and ordered the notice to be amended:

> ...so that it includes a schedule requiring works to be carried out on the Wind Tunnel and associated plant to achieve a rating level of 48dBA−leq 5 mins− at 51−81 Curlew Crescent. (Odd) The completion date to be March 2002."

25. Finally, at paragraph 16 they stated the question for the opinion of the court in the following terms:

> Based on the evidence we heard, was our decision on a replacement schedule for a sound enclosure for the wind tunnel, knowing such an enclosure would need doors, unreasonable in that the noise assessment should be made on the basis of measurements taken over any period of 5 minutes (Leq 5 minutes) not over one hour (Leq 1 hour)?"

Analysis of the Question of Law

26. The question is whether "based on the evidence we heard" the decision to opt for Leq 5 minutes rather than Leq 1 hour was "reasonable". Since this is a question of law, it must be understood as asking whether the decision was reasonable in the Wednesbury sense. Although the question asked whether the decision was reasonable on the basis of the evidence that the justices heard, it is clear that it is not open to me to consider the evidence that was heard save to the extent that it is referred to in the case itself. I shall come back to this point later.

The Issues

27. Mr Bates submits that the appeal should be allowed for a number of reasons:

(a) the justices took into account irrelevant matters in reaching their decision, namely

(i) the pre−hearing proposals made by ARA, and

(ii) the fact that Leq 5 minutes would be of greater benefit to the residents than Leq 1 hour;

(b) the justices failed to take a relevant matter into account, namely the provisions of paragraph 6.2 of BS 4142;

(c) there was no evidence to support the findings of fact in paragraphs 5(d)(e) and (f) of the case.

28. I shall deal with these in turn.

The Pre−hearing Proposals

29. The justices clearly did take into account letters that were exchanged between the parties before the hearing which included references to Leq. On 23rd February 2000, ARA's solicitors wrote to the Council proposing a form of words for the revised schedule in these terms:

> The noise from the wind tunnel and associated plant (i.e. cooling tower, powerhouse and auxiliary compressor house) at nearby residential properties, shall be reduced to a Rating Level of 48dB (Leq 5 min) when measured and corrected in accordance with BS4142:1997 ‘Method for Rating Industrial Noise Affecting Mixed Residential and Industrial Areas.'"

30. On 3rd March, the Council replied with a counter−proposal for the Schedule, including the words that the works should "produce a result such that the noise...shall be reduced to a rating level of 48dB(A) (Leq 5 minutes) when measured at any two properties between 51 and 81 Curlew Crescent (odd) and at the public footpath at Clapham Park Farm and corrected in accordance with BS4142 (1997)." Thus it can be seen that shortly before the hearing of the appeal, the parties were apparently in agreement that Leq 5 minutes should be used rather than Leq 1 hour.

31. Mr Bates submits that, since ARA changed its position on this issue during the course of the hearing, the justices should have disregarded its previous position. A party to litigation is entitled to change its mind, and the fact that it has previously adopted a different position may not be taken into account by the adjudicating tribunal.

32. In my view, this is a hopeless submission. Whether or not the earlier proposals had been put forward on a without−prejudice basis, they were in evidence before the justices. In deciding which Leq number to choose, the justices were entitled to take into account all relevant material. It is obvious that it was relevant that as recently as 23rd February, ARA were suggesting Leq 5 minutes. That figure was based on the expert advice that was being given to ARA by Mr Corkill. Mr Corkill had proposed a Schedule of Works as early as March 1999. This proposal is referred to at paragraph 13(d) of the case and exhibited as Appendix D. In that Schedule too, Mr Corkill had proposed Leq 5 minutes. The weight that was to be given to the fact that these earlier proposals had

advocated Leq 5 minutes was a matter for the justices to determine. No doubt evidence was led and/or submissions made on behalf of ARA to explain why, on reflection, they now thought that the appropriate number was Leq 1 hour. Mr Corkill was one of the witnesses called on behalf of ARA. In my judgment, it is plain that it was open to the justices to take these earlier proposals into account.

Greater benefit to the residents

33. Mr Bates submits that the justices took into account an irrelevant consideration, namely that Leq 5 minutes would be of greater benefit to the residents than Leq 1 hour. In relation to the Leq issue, the only question for the justices was whether Leq 1 hour was sufficient to abate the nuisance, or whether it was necessary to adopt Leq 5 minutes to achieve that objective. Mr Bates relies on paragraphs 7 and 13(e) of the case as indicating that the justices, in effect, asked themselves the wrong question.

34. I accept the submissions of Mr Straker that this submission ignores the findings at paragraph 5(c) to (f). That is where one finds the justices' relevant findings. They include the crucial finding that "even short periods of noise being caused by the site would cause a nuisance to the residents" (emphasis supplied). The justices clearly had in mind that they were amending the Schedule so as to specify works that would abate the admitted nuisance. At paragraph 5(c) to (f) they explained why Leq 1 hour would not suffice to abate the nuisance. Mr Bates has separate criticisms of these findings to which I shall come shortly. But on the assumption that those finding are unimpeachable, they show, in my judgment, that the justices did not opt for Leq 5 minutes merely because they thought that this would be of greater benefit to the residents.

35. They opted for Leq 5 minutes because they considered that this was necessary in order to abate the nuisance. It is true that the case stated refers, in the passages relied on by Mr Bates, to "greater benefit to the residents" and "most benefit for the residents". But these quotations, from what was being said on behalf of the Council, should be contrasted with the contention of ARA that Leq 1 hour "would not be detrimental to the residents." These passages must be read in the context of the issues that were before the justices. A nuisance is a "condition or activity which unduly interferes with the use or enjoyment of land": see Clerk and Lindsell on Torts 18th edition paragraph 19−01. Inevitably, therefore, the question of whether an activity amounts to a nuisance involves considering whether occupiers of adjoining land will suffer detriment in the enjoyment of their land. Questions of judgment come into play.

36. When the parties were referring to "benefit" and "detriment" to the residents, they were using these words in the context of what was required to abate a statutory nuisance. When ARA said that Leq 1 hour would not be of detriment to the residents, they did not mean that the residents would not suffer any detriment at all by reason of the operating of the tunnel. They meant that there would be no detriment in the sense that the nuisance would be abated. Similarly, when it was contended by the Council that Leq 5 minutes would be of greater benefit to the residents, they

meant that it would be of greater benefit and would be sufficient to abate the nuisance.

37. I do not, therefore, accept that the two passages relied on show that the justices took into account an irrelevant consideration. The various references in the case to "nuisance" indicate that they did what one would have expected them to do, namely decide what work was required to abate the nuisance. I reject Mr Bates' second submission.

Paragraph 6.2 of BS 4142

38. As its foreword indicates, BS 4142 is a British Standard which "describes a method of determining the level of a noise of an industrial nature, together with procedures for assessing whether the noise in question is likely to give rise to complaints from persons living in the vicinity." The foreword also states that response to noise is "subjective", and that the standard is

39. "necessarily general in character and may not cover all situations", adding:

> In general, the likelihood of complaint in response to a noise depends on factors including the margin by which it exceeds the background noise level, its absolute level, time of day, change in the noise environment etc. as well as local attitudes to the premises and the nature of the neighbourhood."

40. Finally it states:

> Compliance with a British Standard does not of itself confer immunity from legal obligations."

41. The relevant provision of BS 4142 is paragraph 6.2 which provides:

> Reference time interval
>
> Evaluate the specific noise, in all cases, over the appropriate time interval which is as follows:
>
> − 1 h during the day;
>
> − 5 min during the night.
>
> NOTE: The shorter reference time interval at night means that short duration noises with an on time of less than 1 h lead to a greater specific noise level when determined over the reference time interval during the night rather than during the day. The choice of day and night periods will depend on normal local circumstances. It is intended that the night period should cover the times when the general adult population are preparing for sleep or are actually sleeping."

42. Mr Bates submits that in view of the fact that paragraph 6.2 of BS 4142 stated that the appropriate time interval during the day was 1 hour, the justices were obliged to take that into account in reaching their decision. He contends that either (a) they failed to take it into account, or (b) if they did take it into account, but decided not to follow it, they should have given ARA the opportunity to make further representations before they decided to opt for Leq 5 minutes.

43. There is no dispute between the parties that BS 4142 was referred to during the evidence. So what is the basis for saying that it was not taken into account by the justices? It is true that the case does not expressly refer to paragraph 6.2 and explain why they had decided not to follow it. But, in my judgment, they were not under any obligation to do so. The British Standard describes a method for evaluating specific noise. It does not purport to lay down rules which must be complied with in all circumstances. Quite the contrary. The foreword emphasises that the document is not prescriptive, and that the standard may not apply in all situations. The warning that compliance with the Standard does not confer immunity from legal obligations is of particular importance. Even paragraph 6.2 itself makes it clear that the choice of day and night periods will depend on "normal local circumstances".

44. In my view, the justices were entitled if they thought fit not to follow paragraph 6.2. The freedom to choose not to adopt the reference time intervals stated in paragraph 6.2 is implicit in the terms of the British Standard itself. It would also be consistent with the discretion that the justices had in deciding how to vary the abatement notice. Once a magistrates' court decides to allow the appeal, it has a discretion to vary the abatement notice in favour of the appellant "in such manner as it thinks fit": see Regulation 2(5) of the Statutory Nuisance (Appeals) Regulations 1995.

45. I accept that, since BS 4142 was before the justices, they were obliged to consider paragraph 6.2 just as they were obliged to have regard to all the other relevant evidence. But what is the basis for believing that they did not have regard to paragraph 6.2? In my judgment there is none. They were under no obligation to include in the case a reference to any particular parts of the evidence. ARA did not specify in their application to state a case any particular finding of fact which it was claimed could not be supported by the evidence: see Rule 76(2) of the Magistrates' Court Rules 1981. Accordingly, the case should not have contained a statement of evidence at all: Rule 81(3). It is true that the justices did summarise some of the evidence, but they were not obliged to do so, and I do not think that it can be inferred from the fact that they did not refer to BS 4142 that they did not have regard to it.

46. It may be said (and I think that Mr Bates does now say) that 6.2 lent such powerful support to ARA's case that it was a point that had to be expressly dealt with in the case. He would contend that the failure to deal with it shows that it must have been left out of account. But, the very nature of the BS, as summarised in the foreword, shows that it clearly was not such a powerful point in the armoury of ARA. Nor was it so considered by ARA. It is highly significant that it was only during the hearing that ARA switched from Leq 5 minutes to Leq 1 hour. It is to be noted that, even at that stage, it was contended by ARA that Leq 1 hour would be the "preferred" period of measurement. That is hardly a powerful way of putting the point. It is also of significance that the suggestion that the justices must have overlooked paragraph 6.2 has come so late in the day. If this was such an overwhelmingly strong point, that a failure to mention it in the case stated permits the inference that it was not taken into consideration, then it is most surprising that the point did not appear in Mr Bates' skeleton argument of 30th November.

47. I reject the submission that the justices failed to take account of paragraph 6.2 of BS 4142. Nor do I accept that the justices were under any obligation to give ARA notice that they were minded not to follow paragraph 6.2 before they made their decision. There was an eight day hearing during which the justices heard a great deal of expert and other evidence. They clearly preferred the evidence of the Council to that of ARA on the Leq point. They were entitled to do so. There are cases where a tribunal goes off on a frolic of its own, and acting almost as an expert, makes findings not based on the evidence that it has heard. In those cases, the decision may be struck down as flawed by procedural unfairness. But that is not this case.

No Evidence to Support Findings of Fact

48. Mr Bates faces an immediate difficulty here, because the application to state a case did not specify any of the findings which Mr Bates now seeks to impugn as ones in respect of which there was no evidence to support them. Accordingly, the case stated does not contain a statement of the evidence relied on in support of these findings. In the result, Mr Bates is driven to make his submissions on the limited material contained in the case stated. I shall take the findings in turn.

49. Paragraph 5(d): This illustrates Mr Bates' difficulty. In his skeleton argument, he says that the only evidence in support of this finding was that of Mr Herbert, the Council's acoustics expert, whose evidence, it is said, was "...would allow one horrendous din and rest to cover up. But as I know goings on, not a real concern." Without a statement by the justices of the evidence on which they relied in support of this finding, it is impossible to determine whether there was evidence on which they could rationally base the finding. Mr Straker says in his skeleton argument that there was ample material on which the justices could base this finding. I am in no position to judge. In my view, it is not open to Mr Bates to seek to challenge this finding without going through the correct procedures and obtaining from the justices their statement of their evidence on which their finding was based. It is plainly now too late to do this.

50. Paragraph 5(e): Mr Bates submits that there was no evidence to support this finding, and that it is contrary to the evidence given by experts on both sides. It is not accepted by the Council that this was contrary to the evidence of both sides' experts. But once again, ARA have not laid the ground to advance this argument. The justices could have been, but were not, asked to state the evidence on which this finding was based. It seems to me, in any event, that paragraph 5(e) is not so much a finding of fact as a statement of what inevitably follows from the finding in paragraph 5(d).

51. Paragraph 5(f): What I have said in relation to paragraph (e) applies with equal force here. Mr Bates submits that the reference to the tunnel running for 20 minutes is a finding of fact. I disagree. But insofar as it is a finding of fact, the failure to seek a statement of the evidence on which it is based makes it impossible for me to deal with. In my view, the justices were not finding as a fact that the tunnel would be running above 48dB(A) for 20 minutes. They were merely stating what the implications of adopting Leq 1 hour would be on the footing that there was a possibility

that the tunnel would be running above that level for 20 minutes during a one hour period. It illustrates the implications of Leq 1 hour. In my view, the critical finding of fact is that contained in paragraph 5(d), and that cannot be challenged. The finding in paragraph 5(c) is not challenged. In my view, paragraph 5(e) follows inevitably from the earlier findings, and paragraph 5(f) is merely illustrative.

Conclusion

52. In the result, this appeal must be dismissed.

53. That is my decision on the appeal and I have given my reasons for refusing the application under section 28A(2). What I have not done yet is to deal with the other application for permission to seek judicial review on the functus officio point, although I have reached a very clear view about it. I have not done that for this reason. You both agreed when we adjourned that I could and should deal with it as a table application. It seems to me I can do that, and I make no secret of the fact that I am proposing not to grant you permission, so you know where you stand. If I do that then of course you can renew, but you would have to renew to the single judge. It seems to me that is procedurally very unsatisfactory, because if you wished to take anything that I have said so far further, you would have to go to the Court of Appeal. It would be most unsatisfactory if you were to seek to challenge what I have said so far in the Court of Appeal but to have another shot at the functus officio application before the single judge.

54. It would be far better if any further steps that you want to take, in relation to any of these matters, went to the Court of Appeal. I think that must be right?

55. MR BATES: Well, my Lord, obviously there are three steps: we have to apply to your Lordship for leave.

56. MR JUSTICE DYSON: Yes.

57. MR BATES: If that is refused we then have to apply to the Court of Appeal for leave. If leave is refused in both cases then that, in effect, is the end of the matter.

58. MR JUSTICE DYSON: You still have your functus officio point, that is my concern. I would much prefer to give a ruling on the functus officio point which you could challenge in the Court of Appeal rather than go to another single judge. After all, Gibbs J looked at it and he adjourned it to be dealt with by me. It is not really satisfactory if I then say, ‘I am going to deal with it as a table application.'

59. What I am going to do is to invite you to agree that I should deal with it not as a table application but by giving a short reasoned judgment, without oral argument, as to why I would refuse leave on the functus officio point. You can then take everything to the Court of Appeal. But I do not think I can do that without your consent because I think you have the right to make oral

submissions in amplification of your written skeleton argument. I cannot stop you from doing that, but I am afraid I have a very heavy case about to start and I simply cannot trespass further into court time.

60. It seems to me that your client would not really be prejudiced.

61. MR BATES: Could I have leave to take instructions?

62. MR JUSTICE DYSON: Yes, of course.

63. MR BATES: My Lord, we would consent to that. Does your Lordship intend to give a short judgment at this stage?

64. MR JUSTICE DYSON: It would really be better if I did, would it not?

65. MR BATES: My Lord, could I also ask on the 28A(2) point − your Lordship said that your Lordship would not deal with the other aspect apart from the delay − to give one or two sentences on the merits of that?

66. MR JUSTICE DYSON: No, I am not prepared to do that. If you want to take the matter further all the arguments can be taken. The Court of Appeal does not need the benefit of my views on those.

67. MR BATES: Very well, my Lord.

68. MR JUSTICE DYSON: There is nothing you want to say is there, Mr Sharland?

69. MR SHARLAND: Very briefly, my Lord. I think we would like a very short judgment on that and then the case can be wrapped up.

70. MR JUSTICE DYSON: Then I will endeavour to give a short judgment.

71. There remains for me to deal with an application by ARA for permission to apply for judicial review to challenge the decision of the justices on 11th August of this year not to state a case pursuant to the applicant's request that had been made on 27th June.

72. I need briefly to set out the relevant facts. As I have indicated in the judgment already given, the justices gave their decision on 4th May. The matter was then adjourned to enable the parties to agree the final version of the form of order. On 4th May, Mr Bates sought to persuade the justices to hear further argument on the Leq issue. The justices refused, saying that they were functus officio having reached a final decision on the point.

73. There was a hearing on 6th June for the purpose of finalising the form of order. On that occasion yet again Mr Bates sought to raise the question whether the justices were indeed functus officio in relation to the Leq issue. The justices refused to entertain the matter saying that they had

already ruled that they were functus officio on 4th May. Thus it was that on 27th June ARA's solicitors wrote to the justices requesting a case to be stated on two matters:

> (1) Was our decision that we were functus officio in relation to the determination made on 4th May that the noise levels should be measured in Leq 5 minutes correct in law?
>
> (2) Having required in the notice that the sound levels be measured and corrected in accordance with BS 4142 should we also have inquired or determined whether or not our requirement of Leq 5 minutes was in accordance with that standard?"

74. On 3rd July, the clerk to the justice responded indicating his view that the justices should refuse to state a case. In relation to the first question he pointed out that the question of functus officio had been raised on 4th May. Accordingly he said that any requests for a case to be stated in relation to that point should have been received by the court by 25th May, and the request was therefore out of time. In relation to the second question he said quite simply that on 6th June the magistrates had not made any ruling in relation to BS 4142. The formal refusal to state a case was sent on 11th August.

75. It is not appropriate that I should give a full judgment, since this is merely an application for permission. But put very shortly, I see no answer to the points made by the clerk to the justices in the letter of 3rd July. Those points have been amplified by Mr Straker in his skeleton argument at pages 18 to 21 and I find his reasoning compelling and unanswerable.

76. I would, therefore, refuse this application on the grounds that it has no arguable prospect of succeeding.

77. MR BATES: My Lord, I would apply for leave to appeal to the Court of Appeal.

78. MR JUSTICE DYSON: On the appeal case stated?

79. MR BATES: My Lord, yes.

80. MR JUSTICE DYSON: Do you want to say anything more about that, Mr Bates?

81. MR BATES: My Lord, no.

82. MR JUSTICE DYSON: I do not give you permission to appeal.

83. MR SHARLAND: My Lord, can I pursue two points. Firstly, leave to appeal.

84. MR JUSTICE DYSON: Appeal?

85. MR SHARLAND: Yes, it is our understanding that there is no right of appeal from the decision−−−−

86. MR JUSTICE DYSON: Well, if there is no right of appeal it does not matter. But if there

were a right of appeal I refuse it.

87. MR SHARLAND: No−−−−

88. MR JUSTICE DYSON: You do not need to trouble me because I cannot rule on whether there is or is not a right of appeal. All I am saying is that if you are right then that is the end of it. If you are wrong then I refuse.

89. MR SHARLAND: I am very grateful. The only issue for me to raise is the issue of costs.

90. MR JUSTICE DYSON: Do you oppose that, Mr Bates?

91. MR BATES: My Lord, we do oppose. We do not oppose the principles, but we do oppose the amount.

92. MR JUSTICE DYSON: Why, is there an assessment for me to do here?

93. MR SHARLAND: Yes, a schedule has been prepared and has been served on the other side. It includes the costs of today's hearing. The total is £22,000 approximately, that is considerably less than the total of ARA's costs which we calculated to be about £27,000 or £28,000.

94. MR JUSTICE DYSON: I cannot go into this in any detail. Mr Bates, what do you say is the right figure?

95. MR BATES: My Lord, it is really the attendance of solicitors and Mrs Hill, the senior pollution control officer. My Lord, the figure there, 52.8 hours, for a solicitor in a case stated where, in my submission, the documents in front of your Lordship, particularly for a respondent, are just the work done by counsel.

96. MR JUSTICE DYSON: How many hours have your solicitor attended?

97. MR BATES: My Lord, that is slightly different because we put together the bundles; we do, as it were, the donkey work.

98. MR JUSTICE DYSON: Let me see your schedule.

99. MR SHARLAND: My Lord, just to clarify the statement of costs there that is for all six applications. My learned friend has got three separate summary costs in relation to the various applications but it is important to total all of them.

100. MR JUSTICE DYSON: I have to look at this in the round, have I not, Mr Bates? The hourly rate charged is £120, you are very fortunate that you are dealing with a local authority and not with a private organisation.

101. MR BATES: My Lord, indeed, but in my submission 52 hours on something where the

local authority's solicitor has very little work to do.

102. MR JUSTICE DYSON: Have you any other points?

103. MR BATES: The senior pollution control officer again, I know it is only 18.5 hours, my Lord again−−−−

104. MR JUSTICE DYSON: It is only £500.

105. MR BATES: My Lord, yes.

106. MR JUSTICE DYSON: What do say is the figure that I should assess it at?

107. MR BATES: My Lord, first of all, we ask you to disallow entirely the figure for the senior pollution control officer because, my Lord, if this is a matter of law then why is there an expert involved in any event. Certainly ARA have not done that.

108. My Lord, as far as the solicitor is concerned − given, we would say, the solicitor is effectively in a supporting role − we would say the correct figure is something roundabout ten hours.

109. MR JUSTICE DYSON: You say about ten hours?

110. MR BATES: My Lord, yes.

111. MR JUSTICE DYSON: Mr Sharland, do you want to say anything?

112. MR SHARLAND: My Lord, I would say that 52 hours in relation to the solicitor is considerably less than I think the hours billed by the applicant.

113. MR JUSTICE DYSON: Yes, but they say they had to put it all together.

114. MR SHARLAND: My solicitor has had to deal with six different applications been fired at him at different times in rather strange ways. A huge amount of documentation has gone between the solicitors. You were give a considerable bundle. Obviously you are allowed to take into account the conduct of the parties when looking at costs. I would note, firstly, that Mr Bates abandoned the amended judicial review on the date of the hearing after we had gone to considerable time and expense of preparing a skeleton to address the point raised there. That could and should have been abandoned earlier. I would also rely on your numerous comments in your decision as to delay and criticism of their general conduct in bringing this matter. Not only are the hours less, the rates charged are considerably less. Mr Ledran was only £120 an hour, while those partners and associates working on behalf of ARA were £198 and £220 respectfully. So we have provided very good value.

115. In relation to Mrs Hill the amount is very small, but her input was necessary to aid the

understanding of the technical issues in the six cases. It has been quite a hard matter for the Council to deal with given they have been bombarded with what you have found to be a completely inappropriate application.

116. MR JUSTICE DYSON: Yes. I am going to assess them at £22,000.