CO/8467/2006

Neutral Citation Number: [2007] EWHC 816 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 22nd March 2007

B E F O R E:

MR JUSTICE PITCHFORD

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THE QUEEN ON THE APPLICATION OF UTTLESFORD DISTRICT COUNCIL
(CLAIMANT)

-v-

ENGLISH HERITAGE
(DEFENDANT)

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190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

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MR STEPHEN WHALE (instructed by Uttlesford District Council) appeared on behalf of the CLAIMANT
THE DEFENDANT DID NOT APPEAR AND WAS NOT REPRESENTED

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

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1. MR JUSTICE PITCHFORD: This is an appeal by way of case stated from an order for costs made by the Essex Justices sitting at Epping in favour of the respondent, English Heritage, in the sum of £16,802.50. The case concerns the grant of a premises licence under the Licensing Act 2003 to English Heritage at Audley End House just outside Saffron Walden in Essex. English Heritage do not appear and are not represented.

2. Among other activities, the licence permitted Audley End to play live music at private functions. The licensing authority, the appellant district council, granted the licence subject to one particular condition among several in the following terms:

> "Amplified sound from the premises shall not be clearly audible at the boundary of any noise sensitive premises."

3. Mr Whale, counsel for the appellant, has taken me to the minutes of the meeting before the Licensing Committee held at Saffron Walden on 22nd December 2005. There were, I am told, in all some 150 objectors, several, if not all, of whom made written submissions. About three of them had made reference in writing to the need for some measured level to be provided for in a condition of the grant of any licence given.

4. The District Environmental Health Officer dealt with the proposed noise condition in these terms at the meeting:

> "The District Environmental Health Officer therefore strongly recommended the imposition of a condition to prevent public nuisance that amplified sound not be clearly audible at the boundary of any noise sensitive premises. Such a condition did not need equipment to assess the noise, nor would be it be affected by weather conditions. Alternatively she suggested limits on the hours when amplified music could be played outdoors, the number of events per annum, the duration of each event and the decibel level of the music above background. She listed the relative disadvantages of this alternative and pointed out that English Heritage might well be able to contain noise within its site by appropriate siting and layout of the amplifiers."

5. Mr Graham, solicitor for English Heritage, was asked how it was proposed noise levels should be monitored by his client for the benefit of any residents who may be affected. He answered:

> "...that it would be done with a noise measuring device. One of these had been bought but training was necessary about its use. He had advised the Applicant that readings should be taken regularly and a record kept as a defence tactic in the case of any complaints or reviews of the licence.
>
> In answer to a question the District Environmental Health Officer confirmed that no decibel limits would need to be specified if the licence contained the suggested condition that sound from the licensed premises should not be clearly audible at the boundary of any noise sensitive

premises."

Mr Graham went on that he had considered the condition recommended by the District Environmental Health Officer and had taken the view that it was not in accordance:

> "... with public guidelines and questioned how anyone could prove what would be audible at the edge of the Estate. Mr Graham added that guidelines could be registered by the Applicant once the noise survey had been carried out."

Thus, at the licensing meeting English Heritage proposed no specific maximum and conceded that, if consideration was to be given to a measured noise maximum, then a noise survey would be required first.

6. Following grant of the licence with its nonspecific condition, English Heritage proceeded to carry out that noise survey by means of experts, Capita Symonds. In consequence of the tests carried out by Capita, English Heritage wrote to the appellant council on 16th May 2006 proposing the imposition of a condition specifying the noise level beyond which the breach would occur. The level proposed was 55 decibels over a 15-minute period measured at 1 metre from any residential premises. When, however, a noise test was carried out by Capita Symonds on 27th March 2006, they found and expressed the opinion that a music level of between 50 and 55 decibels equated with the District Council's perception of the term "clearly audible".

7. The appellants rejected the proposal to fix the maximum level at 55 decibels or at any other specific level and made no counter proposal. The contest therefore proceeded to a complaint heard before the Justices on 3rd July 2006. The Justices heard evidence from English Heritage's expert and accepted the submissions made on its behalf.

8. The decision is recorded at paragraph 2(j) of the case stated as follows:

> "... we found that the term 'clearly audible' was not a sufficiently precise condition because it was not a scientific measurement and left too much open to interpretation. It was important that any conditions, as stated in the DCM Guidance, should be expressed in unequivocal and unambiguous terms; clarity and simplicity are required- see paragraph 7.15 of the Guidance.
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> We varied condition 2(b) to read
>
> "Music levels should not exceed LA eq 52 dB over any 15 minute period at a distance of 1 metre from any residential premises."

A consequential variation to condition 2(c) was made in the following terms:

> '"The licence holder or representative shall conduct regular assessments of the noise coming from all premises on every occasion the premises are used for regulated entertainment and shall take steps to ensure that the level of noise does not exceed LA eq 52 dB over any 15 minute period at

> a distance of 1 metre from any residential premises. A written record shall be made of those checks in a log and made available to the Licensing Authority.'"

9. Having made their decision in favour of the principle being advanced on behalf of English Heritage, if not precisely in the same maximum figure as advanced on their behalf, English Heritage made an application for their costs. Ms Christine Oliva, who appeared for the District Council, did not resist the principle award of costs to English Heritage but addressed the bench on its unusual size and composition, to which I shall come later. The Justices concluded as follows:

> "c. The costs application had to be considered with reference to section 181 of the Licensing Act 2003.
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> d. Costs had been incurred by English Heritage. Solicitors acting on behalf of English Heritage had tried to resolve the issue prior to the hearing and there was authority for a condition being imposed in the terms requested as shown by the licence granted at Walmer Castle. Some of the letters from residents living near to Audley End asked for the sound to be monitored by reference to measuring of decibel levels.
>
> e. There was opportunity for Uttlesford District Council to resolve the appeal prior to the hearing; it was in the interest of the Respondents and the local residents that the condition was expressed in terms which were specifically measurable. There was clear authority for the imposition of such a condition as shown by the licence granted at Walmer Castle.
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> f. English Heritage is a publicly funded organisation. We had to balance the interests of English Heritage as an organisation funded by the public and Uttlesford District Council. Taking into account the above considerations and balancing the interests of the parties, we were of the opinion that the costs of English Heritage should be paid by Uttlesford District Council."

10. The terms of section 181, so far as relevant to the issue of costs, are these:

> [The court may]
>
> "(2)(b) substitute for the decision appealed against any other decision which could have been made by the licensing authority ... and may make such order as to costs as it thinks fit."

11. Mr Whale submits that, insofar as the Justices were relying upon a similar condition imposed on a previous occasion at Walmer Castle to describe that condition as authority, was at best inappropriate. He submits that it amounts to an error in the Justices' approach to the question of costs. I disagree. The use of the word "authority" is unfortunate in its context but nevertheless, in its context, it is plain what the Justices meant. There was a precedent for precisely the kind of condition which they decided was appropriate in the case of Audley End. They were dealing in context with the issue

of whether costs of a contested hearing before the Justices should reasonably have been saved.

12. The question posed by the Justices for the consideration of the High Court is:

> "Was the decision of the Justices to award costs one which reasonable justices properly advised could have come to?"

It is submitted on behalf of the appellant that the justices erred in the exercise of their discretion which, it is averred and conceded, is very wide; see, for example, Crawley Borough Council v Attenborough [2006] All ER(D) 104. In exercising that discretion, the Justices should bear in mind that the costs do not necessarily follow the event, particularly where the local authority has acted reasonably and in good faith in the discharge of its public function. I shall come back to that description of principle in a moment.

13. It is submitted on behalf of the appellant that the costs issue was not sufficiently argued and the decision was not reached upon an understanding of the correct legal principles. It is argued that, despite the concession made below, costs should not have followed the event, it was a matter for judgment whether or not an order for costs was just and reasonable and, if so, whether the sum sought was just and reasonable.

14. Mr Whale submits that, even in the presence of that concession, the Justices should have proceeded to consider the principles identified by Lord Bingham CJ in City of Bradford Metropolitan District Council v Booth [2000] 164 JP 485: costs ordered under section 181 should be just and reasonable. The neutral citation for R (Cambridge City Council) v Alex Nesting Ltd in which those principles were applied is [2006] EWHC 1374 (Admin), a decision of the Divisional Court on 17th May 2006 comprising Richards LJ and Toulson J. Lord Bingham, in identifying the relevant considerations proceeded in the Bradford case as follows:

> "2. What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection.
>
> 3. Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

15. In Alex Nesting, Toulson J said at paragraph 11 of the judgment:

> "Although as a matter of strict law the power of the court in such circumstances to award costs is not confined to cases where the Local Authority acted unreasonably and in bad faith, the fact that the Local Authority has acted reasonably and in good faith in the discharge of its public function is plainly a most important factor."

16. Mr Whale points out that in another constitution of the court comprising Scott Baker LJ and Openshaw J on 9th May 2006, Crawley Borough Council v Stuart Attenborough [2006] EWHC 1278 (Admin), the court, while referring to Lord Bingham's advice, did not in similar terms give particular prominence to the position of a public regulatory authority. He suggests there may be some tension between the two decisions. For my own part, I do not see the tension for which Mr Whale contends. The whole purpose of Lord Bingham's guidance was to the draw to the attention of practitioners and justices the public role reposed in certain authorities whose position required careful consideration. On some occasions, depending upon the particular facts of the case, the public nature of the authority's role may be critical in the balancing exercise where the test identified in Lord Bingham's paragraph 3 is met. In others, those considerations may not be critical. It depends upon the particular facts of the case, as considerations of costs almost always do. Here, for example, English Heritage was itself in part a publicly funded body carrying out a quasi-public function.

17. The Justices' legal adviser concedes that, contrary to the appearance given by the case stated, the authorities to which I have just referred were not brought to the attention of the Justices before they made their decision. However, having considered their reasons, I do not take the view that they fell into error. They were plainly concerned that a fully contested hearing was unnecessary. It had been made necessary by the refusal of the District Council to engage in useful negotiation on the main issue which was resolved in favour of English Heritage. They were perfectly entitled to form that view, particularly in the light of the concession made on behalf of the District Council at the time. Ms Oliva has not deposed to any ignorance of the well-known principles and did not contest the making of an award. As Mr Whale, rightly in my view, conceded, the principles to which I have just referred are well-known, particularly to benches of Justices whose responsibility it is to adjudicate upon administrative decisions such as that made by a licensing authority.

18. It would not in these circumstances, in my view, now be appropriate to reopen the principle whether English Heritage should have been granted its costs. Had I been persuaded that the Justices had fallen into error, I would have reached the same view on the same material.

19. Mr Whale also addressed me as to quantum and in my judgment his submissions in this area have force. An expert's report in which a mutually agreeable maximum level was sought was not commissioned by English Heritage until after the meeting of the licensing committee. English Heritage came to the committee with no specific proposal nor any evidence by which to support any specific proposal. Had they attended the meeting armed with their report, and had the committee, as the Justices found they

should, imposed a measured condition, the cost of that report and any expert opinion expressed at the meeting would not have been recoverable. It would have been in those circumstances a commercial cost notwithstanding the publicly funded nature of English Heritage's status.

20. It seems to me that, in awarding the costs of the report in a sum exceeding £5,000, the Justices went wrong in principle. English Heritage's solicitor claimed 61 hours work in preparation for the Magistrates hearing and for his appearance at the Magistrates hearing. Mr Whale does not challenge that that degree of work was undertaken. He submits the amount of waste claimed is manifestly excessive. I, however, cannot avoid the suspicion that Mr Graham was claiming not only for his time preparing for and conducting the Magistrates hearing but, as in the case of the report, claiming for work properly to be treated as preparation for and conduct of the licensing committee meeting. Whether my suspicion is accurate or not is besides the point. It is my view that the claim was plainly excessive. In my judgment, the quantum of the award made by the Justices should be set aside. The principal sum was awarded was £14,300. The cost of the report, net of VAT, was £4,800, leaving a balance of £9,500. The solicitors and witness costs should be reduced by half. That figure is £4,750, leaving a balance of £4,750, to which VAT should be added in the sum of £831, making a total of £5,581. Subject to any further submissions from Mr whale on the mathematics, that is the order for costs which will be substituted.

21. Are there any further submissions, Mr Whale?

22. MR WHALE: Can I just try and do the maths?

23. MR JUSTICE PITCHFORD: Of course. I have taken from Ms Oliva's witness statement the principal sum of 14,300. I have deducted what she said was the cost of the report, leaving nine and-a-half. That leaves solicitors and witness costs. I have deducted half of that figure, leaving 4,750, and added to that VAT at 17 and-a-half per cent, which I think is £831.

24. MR WHALE: Can I just check that, the very last aspect of it?

25. MR JUSTICE PITCHFORD: Please do. **(Pause)**

26. MR WHALE: No, my Lord, no submissions on 5,581 as the substituted sum --

27. MR JUSTICE PITCHFORD: I have rounded it down.

28. MR WHALE: -- which I do not challenge.

29. MR JUSTICE PITCHFORD: Well, you would not, would you.

30. MR WHALE: My Lord, those are our costs -- in view of our costs --

31. THE ASSOCIATE: The other matter would be the report, which would have to have VAT added.

32. MR JUSTICE PITCHFORD: I have disallowed that cost, so we do not need to add it. The method of calculation is satisfactory, Mr Whale, is it not?

33. MR WHALE: It is. I do not quibble with the bottom line. Then, my Lord, there are the costs of this appeal, which I would describe as a success. There is an appropriate way of treating my application for costs in relation to this appeal. This approach was actually canvassed in the Nestling decision, where the same circumstances applied, that is to say the respondent did not appear, and, my Lord, I know it is not formally part of the judgment but can we just go to the discussion about the costs of the appeal hearing at page 267.

34. MR JUSTICE PITCHFORD: Yes.

35. MR WHALE: I am grateful. In short, what happened, my Lord, is that the application for costs of the appeal succeeded. They were summarily assessed in the sum of £3,000. The order was that the respondent was to pay that but, because of their non-appearance, they were given liberty to apply within 21 days. Now, I invite my Lord to order in precisely the same terms, or perhaps I should say using precisely the same approach, on this occasion. My Lord does, I hope, have a statement of costs for summary assessment in the sum of £7,423.75?

36. MR JUSTICE PITCHFORD: I do.

37. MR WHALE: Perhaps my Lord might want me to address him on features of it, I know not?

38. MR JUSTICE PITCHFORD: How does the rate compare with the rate conceded by Ms Oliva in the court below?

39. MR WHALE: Yes, before the Justices, Ms Oliva's rate was £173. She was then a grade B.

40. MR JUSTICE PITCHFORD: I am sorry, I did not make myself clear: Ms Oliva, I think, conceded Mr Graham's figure in the court below and it was her opponent's rate per-hour that I was asking about.

41. MR WHALE: I do beg your pardon. I calculated that myself at £186 per-hour because we can deduce from the witness statement that part of English Heritage's costs referable to Mr Graham's 61 hours and I have done the calculation to arrive at 183.

42. MR JUSTICE PITCHFORD: I am not minded to seek any further explanation from you, having viewed the figures for myself, Mr Whale, but I agree that the appropriate order is that the appellant should receive costs in the sum of £7,423.75 inclusive but the respondent shall have liberty to apply in writing upon the question of costs and its summary assessment within 21 days.

43. MR WHALE: I am obliged.

44. MR JUSTICE PITCHFORD: May I return to you your -- I think it is the original of the letter?

45. MR WHALE: Yes, thank you.