Neutral Citation Number: [2023] EWHC 200 (KB)

Case No: QA/2022/MAN/000002

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM MANCHESTER MAGISTRATES' COURT
IN THE MATTER OF PROCEEDINGS UNDER
S. 82 OF THE ENVIRONMENTAL PROTECTION ACT 1990

Royal Courts of Justice
Nottingham Crown Court
60 Canal Street, Nottingham, NG1 7EL

Date: 07/02/2023

Before :

THE HONOURABLE MR JUSTICE TURNER

- -

Between :

MERREN JONES, STEPHEN COVEY-CRUMP, DAVID HOWE	**Appellants**
- and -	
CHAPEL-EN-LE-FRITH COUNCIL	**Respondent**

- -
- -

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Appellants**
Philip Byrne (instructed by **Rradar**) for the **Respondent**

Hearing date: 8 July 2022
Written Representations Received: 5 September 2022 and 5 December 2022

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Approved Judgment

This judgment was handed down remotely at 10:30am on Tuesday 7 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. The appellants all live close to a Multi Use Games Area ("MUGA") and Skate Park both of which are located in the Chapel-en-le-Frith Memorial Skate Park in Derbyshire and responsibility for which lies with the respondent.

2. They alleged that the noise emanating from the activities carried out on the MUGA and the Skate Park was such as to amount to a statutory nuisance.

3. The appellants applied for an abatement order but that application was dismissed by District Judge (Magistrates' Courts) McGarva on 4 November 2021. He held that there was a sharp legal distinction to be drawn between, on the one hand, noise which was generated as a result of the "intended use" of the MUGA and Skate Park and, on the other, "anti-social use" (such as the playing of loud music and the continued use of the facilities after they were intended to be closed). He concluded that the latter did not fall to be taken into account in his assessment as to whether the allegation of nuisance had been made out.

4. He also found that the appellants had been rendered hypersensitive by the anti-social behaviour elements of what had been going on at the MUGA and the Skate Park but for which they would not have been so adversely affected by the noise arising from their intended use.

5. The appellants challenged these findings by way of an appeal to this court by way of case stated on the basis that they were founded upon a misunderstanding of the law. In a judgment dated 25 July 2022, I answered the three questions raised by the District Judge as follows:

   "**1. Was I wrong not to deal with the issue of whether the noise was injurious to health given that I found that it was the antisocial behaviour rather than the intended use of the MUGA and the skate park which led to sleeplessness?**

   Yes. Consideration should have been given to the impact upon health of all noise emanating from the MUGA and the Skate Park regardless as to whether it fell to be as a result of intended use or anti-social behaviour.

   2. Was I wrong to distinguish between noise generated by the intended use of the premises and noise emanating from antisocial behaviour associated with the premises?

Yes. This is not a distinction which falls to be made under the statutory regime.

3. Can antisocial behaviour which includes noise that derives from the nuisance causing premises prevent a finding of statutory nuisance on the basis that such antisocial behaviour has resulted in the complainants being found to be hypersensitive due to the antisocial behaviour?

Not in the circumstances of this case. Since it was impermissible to distinguish between intended and anti-social noise, it was also impermissible to treat anti-social noise, in part, as a cause of hypersensitivity such as to negate a finding of nuisance. In any event, the existence of hypersensitivity is not a defence where even a person of normal resilience would have found the noise to be unreasonable."

6. The reasons upon which my findings were based are to be found at [2022] EWHC 1909 and no purpose would be served by rehearsing them here.

7. The parties were thereafter unable to agree on the appropriate remedy consequent upon my order. I concluded that the appropriate remedy lay in a general abatement order. The steps to be taken would be such as to follow the factual findings of the District Judge but so as to incorporate the extent to which noise from the MUGA and Skate Park constituted a noise nuisance regardless as to whether such noise fell within their intended use. My reasons are to be found [2022] EWHC 2709.

8. I invited the parties to come to terms on the issue of costs. They were unable to. Accordingly the matter comes back to me once more.

COSTS

9. The powers of the High Court in relation to costs on an appeal by way of case stated are set out in s.28A(3) **Senior Courts Act 1981**:

> *"(3) The High Court shall hear and determine the question arising on the case (or the case as amended) and…*
>
> *…may make such other order in relation to the matter (including as to costs) as it thinks fit."*

10. This formulation gives rise to a very wide discretion. However, in cases where the underlying proceedings are criminal in nature, the courts have

been understandably reluctant to approach the exercise of this discretion in a way which is inconsistent with the regime which would otherwise generally apply to criminal cases. It is in this context that the Divisional Court in ***R. (on the application of Bahbahani) v Ealing Magistrates' Court*** [2020] Q.B. 478 drew attention to "the anomaly which would arise if proceedings properly characterised as a criminal cause or matter for the purposes of an appeal were differently categorised for the purposes of an issue as to costs".

11. The application of the criminal regime will very often give rise to a different and more tightly circumscribed approach to the issue of costs than that which would be adopted in a civil context and so the choice will frequently have practical rather than purely academic consequences.

PROCEEDINGS UNDER THE ENVIRONMENTAL PROTECTION ACT 1990

12. In this case, the proceedings below fell within the scope of section 82 of the **Environmental Protection Act 1990** ("the 1990 Act"). They are, in character, criminal. However, they are subject to a costs regime which is sui generis.

13. Section 82(12) of the 1990 Act provides:

> *"Where on the hearing of proceedings for an order under subsection (2) above it is proved that the alleged nuisance existed at the date of the making of the complaint or summary application, then, whether or not at the date of the hearing it still exists or is likely to recur, the court ... shall order the defendant... (or defendants ... in such proportions as appears fair and reasonable) to pay to the person bringing the proceedings such amount as the court ... considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings."*

14. The significant practical implications of the application of this regime are helpfully set out in the judgment of Fordham J in ***R. (on the application of Parker) v Magistrates Court at Teesside*** [2022] EWHC 358 (Admin) with which I respectfully agree. No purpose would be served in rehearsing these consequences in this judgment. Suffice it to say that the results would be more generous to the appellants in this case than if the general rules as to costs in criminal cases were to be applied.

15. In my view, the arguments in favour of maintaining consistency of approach to the issue of costs below and by way of case stated lead to the

conclusion that normally the costs discretion of the appeal court, in so far as it relates to proceedings under section 82 of the 1990 Act, will also be exercised with reference to the regime provided for under section 82(12). There are no features of this case which would justify a departure from this approach.

16. The respondent does not appear to demur from the proposition that section 82(12) should provide the appropriate basis for assessment but invites the court summarily to assess the appellants' costs in the sum of £35,000. This I decline to do. It is to be noted that the original hearing took place over three days and the subsequent appeal took up over half a day.

17. The order of the court is that:

> "The respondent do pay the appellants' costs on appeal and in the court below on the basis of section 82(12) of the **Environmental Protection Act 1990** subject to detailed assessment if not agreed."