Neutral Citation Number: [2009] EWHC 422 (Admin)

CO/5633/2008

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

> Royal Courts of Justice Strand London WC2A 2LL

Thursday, 5th February 2009

Before:

LORD JUSTICE SCOTT BAKER MR JUSTICE SILBER

Between: WEST BERKSHIRE DISTRICT COUNCIL_

Claimant

SIMON PAINE_

Defendant

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Mr R Banwell (instructed by West Berkshire Council) appeared on behalf of the Claimant Mr T Boswell (instructed by Messrs Gardner Leader) appeared on behalf of the **Defendant**

> _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ JUDGMENT

- 1. LORD JUSTICE SCOTT BAKER: This is an appeal by way of case stated from a decision of the Berkshire Justices sitting at Newbury on 18th February 2008.
- 2. It was alleged that the respondent Simon Paine had engaged in street trading from a vehicle contrary to paragraph 10(1)(b) of schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982 without being authorised to do so. It was alleged that the street from which he did so was a "consent street", that is a place for which he required authority to trade under that Act. The Justices dismissed the information.
- 3. It was common ground that the respondent had a business by way of a franchise selling tea, coffee and snacks from a van adapted for the purpose. He was appropriately registered with the appellant's Environmental Team in respect of his provision of food and drink.
- 4. On 14th March of 2007, he drove to Thatcham Business Village, Calthrop Way, Near Thatcham in Berkshire and parked in a position which is shown by a cross on the plan attached to the case stated. His van is shown in one of two photographs that are likewise attached to the case. Those photographs were provided at trial by the respondent. They were taken by him for the purpose of the proceedings on a day subsequent to the alleged offence.
- 5. He intended to make sales to customers from and employed at the surrounding offices in the business village. His visits were welcomed by the businesses concerned and he had many regular customers. He did not, however, have street trading consent.
- 6. Investigators employed by the appellant local authority approached him and told him that he required a licence for such activity. The respondent replied to the effect that he did not because he was on private property. The respondent had previously been informed of the appellant's opinion on this issue and the prosecution followed in due course.
- 7. The Justices found the following facts:

"The 'business village' is an office development occupied by the companies shown on the key annexed to the plan ... The car park areas are used by the employees of those companies and their visitors and the usual delivery personnel.

There was no direct evidence of any use of the parking areas by the public. Further, there was no inference of public use - the office area itself is self contained and sufficiently away from domestic or retail sales areas for it to be unlikely that members of the public would use - or misuse - the parking area. There was no evidence that any member of the public was present on 14th March 2007.

In summary the 'business village' is an example of a multiple office development forming an office community on private land and solely for the use of office personnel. There is no reason why a member of the public who does not work there would venture on to the site unless he had a prearranged business appointment or was a contractor or deliveryman of some kind. The site is quite different from, for example, a retail park where goods are sold over the counter to members of the public."

The Justices noted that there was no evidence of parking bays for the public; they were all designated for office staff or business visitors:

"The Appellant's investigators had chosen to assume that the area was one 'to which the public have access without payment' (schedule 4 para 1(1) of the Act, defining 'street') on the basis that no physical barrier prevented such access and without any further enquiry or observation."

- 8. The question with which this court is concerned is whether the place at which the respondent was trading was a street within the meaning of paragraph 1(1)(a) of Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982 ("the 1982 Act"). "Street" is defined in that subparagraph as including:
 - "(a) any road, footway, beach or other area to which the public have access without payment; and
 - (b) a service area as defined in section 329 of the Highways Act 1980,

and also includes any part of a street."

- 9. There were other issues at the trial. The respondent contended he was a roundsman" for the purposes of schedule 4 paragraph 1(2)(f) of the 1982 Act. This would have been an answer to the information but the Justices found against the respondent and that is no longer an issue.
- 10. Also, the respondent put the appellants to proof that the provisions of Schedule 4 of the Act had been adopted locally by the appropriate procedures set out in section 3 of the 1982 Act and that the relevant "consent streets" for the purposes of the Act had been designated for the purposes of paragraphs 2(1)(c), (3) and (9). The appellants had been unable to produce some relevant notices. The Justices left the point unresolved because they dismissed the information for reasons which are now the subject of this appeal. However, if my Lord agrees that we should remit the case to the Justices, it will have to be resolved by them.
- 11. Mr Banwell for the appellants submits that the Justices misunderstood the meaning of street in paragraph 1(1)(a) of Schedule 4. The authorities to which the Justices were referred by their legal adviser did not, he submits, assist because they were concerned with the meaning of "public place" under the road traffic legislation and not street under the 1982 Act.
- 12. His argument is summarised thus. First, the Road Traffic Act 1988 refers to "other public place" whereas the 1982 Act refers to an area "to which the public have access without payment", a different formation altogether. In the absence of the words "other public place" the cases relied on by the Magistrates' Court are of limited, if any, relevance.

- 13. Secondly, the notion within the 1982 Act that the area must be one to which the "public have access" necessarily enables the definition to include situations where the public have potential access rather than actual access. The lack of any physical barrier is evidence tending to support the potential for access. If Parliament had intended to require evidence, either direct or by a reasonable inference of actual use by the public, then it would have been expressly stated.
- 14. Thirdly, the words "without payment" within the 1982 Act are not superfluous to the definition, they are in fact determinative. In relying upon authorities decided under the Road Traffic Act 1988, those words were given no regard by the Justices. The words "without payment" contain the only express qualification to definition within the 1982 Act, one which was not considered by the Justices.
- 15. Mr Banwell submits that there were two simple questions for the Justices to decide: (1) whether the public could potentially access the area in question and (2), in the event that they sought to do so, whether they would be charged a fee. In the light of the findings of fact that they made, if they had asked themselves these questions, it is inevitable, he submits, that they would have been answered respectively "yes" and "no".
- 16. The Justices were referred by their legal adviser to <u>Havell v Director of Public Prosecutions</u> [1993] Crim LR 621 and <u>R v Spence</u> [1999] RTR 353. They relied on these authorities to interpret the meaning of "street" in paragraph 1(1)(a) of Schedule 4 to the 1982 Act notwithstanding that both cases were concerned with the Road Traffic Acts.
- 17. They were also referred by the appellant's counsel to O'Gorman v London Borough of Brent [1993] Crim LR 960 (and we have also been provided with the more detailed report in 91 LGR 555) and, having been referred to this authority, they simply observed that it concerned the different definition of street under section 21(1)(b) of the London Local Authorities Act 1990.
- 18. Mr Boswell, who has appeared for the respondent, submits that the Justices were right. He argues that they were entitled to look at the Road Traffic Act cases and he in particular relies on <u>Spence</u>. Secondly, he submits that the case of <u>O'Gorman</u> does not assist and thirdly that the Justices were entitled on the evidence to reach the conclusion that they did.
- 19. Turning to paragraph 1(1)(a) of Schedule 4, the first point to note is that it provides that "street" includes any road, footway, beach or other area to which the public have access.
- 20. The second point is that the words "access without payment" qualify not only "other areas" but also roads, footways and beaches.
- 21. The third point is that, on the natural meaning of the words "to which the public have access", this includes potential access, that is the right to access, rather than just actual use. The Oxford English Dictionary defines access as "The habit or power of getting

- near or into contact with". As Mr Banwell points out, the lack of any physical barrier supports the potential for access and the Justices found that there was no physical barrier.
- 22. Fourthly, the concluding words "access without payment" are important. They are an integral part of the definition of what is included in street, and yet the Justices did not refer to them. Absence of payment, it is to be observed, plays no part in the description of road or other public place in the Road Traffic Act.
- 23. In my judgment, it is important not to confuse the description of public place in the Road Traffic Acts with "other area to which the public have access without payment" in the provision presently under consideration.
- 24. Mr Boswell submits that the legal adviser was right to refer the Road Traffic Act cases to the Justices and in particular he relies strongly on the case of <u>Spence</u>.
- 25. Section 2 of the Road Traffic Act 1988 as amended provides that a person who drives a vehicle dangerously on a road or other public place is guilty of an offence. Section 192(1) provides that a road means any highway and any other road to which the public has access. The court proceeded in Spence on the basis, and it was a Divisional Court, that public place should be construed ejusdem generis with road as representing a place to which the public has access. The court said the correct test for "to which the public has access" was not whether they could have access but whether they actually utilised if
- 26. Mr Boswell points out that the definition of street in the present case includes "any road to which the public have access". Accordingly, he submits, with some force, that Spence is strong persuasive authority for the proposition in this case on which he relies. Access, he submits, means utilised access rather than potential access.
- 27. Assuming that <u>Spence</u> was correctly decided, it is only persuasive authority. It was dealing with a different statute whose purpose was different from the statute in the present case. This statute is concerned with the regulation of *inter alia* street trading. The present provision is not concerned with public places as such but with a variety of different places to which the public have access critically, in my judgment without payment.
- 28. As Mr Banwell points out, the Road Traffic Acts assume vehicular access. The present statute is different and is concerned also with pedestrians. The street might, for example, be an alleyway or a courtyard.
- 29. For my part, I do not find <u>Spence</u> helpful in construing paragraph 1(1) of Schedule 4. Nor do I find help from any of the Road Traffic Act authorities on the meaning of public place, which words do not appear in paragraph 1(1) of Schedule 4.
- 30. We were also referred, as were the Justices, to <u>O'Gorman</u>. The Justices put that case on one side, saying, no doubt on the advice of their clerk, that it referred to a different definition of street under section 21(1)(b) of the London Local Authorities Act 1990, as indeed it does. But, importantly in my judgment, the core words were the same. It is

- true that O'Gorman was concerned with the London Local Authorities Act 1990 but section 21(1)(b) of that Act defines street as including, subject to exceptions, which it seems to me are irrelevant for present purposes, any area to which the public have access without payment. The words and the concept are the same as in the present case, not public place, but an area to which the public have access without payment.
- 31. The facts of O'Gorman were as follows. The applicant had set up tressel tables on the forecourt of Kwik-Fit's premises adjacent to Wembley High Road. On the tables was a display of T-shirts for sale to the crowds returning from a football match. The forecourt had a boundary marking of bricks, one layer high, between the payment and the forecourt. A dropped kerb gave vehicular access to the premises. The sides of the forecourt had a brick wall about a foot high. The Justices found as a fact that the public did not have to pay to enter the premises and that the street in question had not been designated as a licensed street.
- 32. The appellant argued (1) that he was trading in an area excluded from section 21(1)(b) because it was permanently enclosed; (2) the property was private; and (3) he was the occupier of the area in question.
- 33. It was held, dismissing the appeal, that (1) the premises were not permanently enclosed; (2) whether the premises were private property was not a material consideration; and (3) a person who occupied premises for the purposes of trading in connection with particular events was not an occupier of the premises within the meaning of section 21(2)(j).
- 34. As Morland J made clear at 561 of the Local Government Report, the area with which the court was concerned was clearly an area to which the public had access without payment and no question therefore arose about that part of section 21(1)(b). To that extent, therefore, the case is of no assistance one way or the other to determining the present case. However, it does seem to me to be of some assistance that the court in O'Gorman concluded that whether the premises were private property was not a material consideration. I mention that in the light of some of the findings of the Justices to which I have referred.
- 35. The court in the present case is not concerned with private property or public places. It is concerned with areas to which the public have access without payment. For my part, I accept the submission of Mr Banwell that on examination the Road Traffic Act authorities are of no assistance and nor is it relevant whether there was any evidence that members of the public, other than those connected with the business village, were using the place in question.
- 36. It is in my judgment necessary to keep in mind the purpose of the legislation. The 1982 Act provided *inter alia* the first codified statutory scheme for the control of street trading. Its purpose is to ensure that district councils are able properly to regulate those who sell without the use of ordinary business premises. It is obviously more difficult, absent regulation, to keep track of itinerant traders and to ensure they are complying with the consumer protection legislation.

- 37. Local authorities are concerned not only with consumer protection but also with the suitability of those who are street traders, what they sell and also any nuisance and inconvenience or obstruction that they may occasion to those using the streets in question. It is therefore in my judgment not surprising to find that wide consideration can be given to various matters when considering an application for a licence or for permission to trade in a particular place.
- 38. It is accordingly in my judgment not surprising, indeed it is to be expected, that a locality in respect of which a consent to trade is required is widely defined. Any area to which the public have access without payment is on its face a wide definition. There is, in my judgment, no reason to narrow it down by introducing the concept of public place from other legislation.
- 39. It is also to be noted that the words in the definition are "to which the public has access without payment". What is relevant, in my judgment, is the ability of the public to go there without payment. It is not necessary to establish that the public actually go there. That seems to me to be a distinction between a public place and an area to which the public has access without payment. It is to be noted that the Justices appear to have given no consideration in the case to the critical words at the tail of the provision "without payment".
- 40. In my judgment, the Justices were wrong to conclude that the place where the respondent was trading was not a street as defined by paragraph 1(1) of Schedule
 4. There was ample evidence for them to reach the conclusion that it was and on the facts found they should have reached such a conclusion.
- 41. I would therefore answer the question posed in the negative and, if my Lord takes the same view, it seems to me that this case should be remitted to the Justices for resolution of the outstanding issue.
- 42. MR JUSTICE SILBER: I agree.
- 43. LORD JUSTICE SCOTT BAKER: Very grateful to you both for your helpful arguments. Thank you.
- 44. MR BANWELL: My Lord, there is provision, as your Lordship is aware, from the Divisional Court to order costs inter partes on an appeal by way of case stated.
- 45. LORD JUSTICE SCOTT BAKER: Yes.
- 46. MR BANWELL: My learned friend and Mr Paine are assisted by the Legal Services Commission and under the Access to Justice Act, as it was, nearly ten years old, such a decision as to whether to order costs for an unassisted party against the Legal Services Commission should be assigned to the costs judge. My Lord, I wonder if I could ask for an order that that be done. I can say in this case, perhaps as your Lordship considers that, that we understand the difficulties that Mr Paine has been in and we understand that he is no longer likely to be in the business that your Lordship has heard about today and it is unlikely that the Council will ever enforce that, but they are duty bound to ask for it.

- 47. LORD JUSTICE SCOTT BAKER: Yes. Now, what do you say, Mr Boswell?
- 48. MR BOSWELL: My Lord, so far as Mr Paine is concerned, my learned friend is right that Mr Paine is no longer concerned in this business. He is in the process, with the aid of my instructing solicitors, of effectively having his franchise pulled down, so he is not street trading as of the sort of time in this area. The issue is essentially, so far as Mr Paine is concerned, a dead one. The purpose of this case, primarily, as I understand it, from the appellant's point of view, was to establish a precedent for future--
- 49. LORD JUSTICE SCOTT BAKER: Well, he had his warning, did he not?
- 50. MR BOSWELL: Yes, he did, my Lord, yes. He took a different view of the law and it is one that the Magistrates initially agreed with, albeit that your Lordships have seen fit to find against Mr Paine.
- 51. My simple submission is that this is a matter that is stale and, so far as the appellant's motivations are concerned, is concerned with establishing a precedent and a future practice of street trading within the West Berkshire area, rather than to get Mr Paine, as it were. In those circumstances, it may be --
- 52. LORD JUSTICE SCOTT BAKER: Well, you are told that the order may not be enforced anyway, but --
- 53. MR BOSWELL: Yes. It may be that in those circumstances it is not necessary for costs
- 54. LORD JUSTICE SCOTT BAKER: You say his franchise has just been bought out, but you do not know how much for.
- 55. MR BOSWELL: I do not. I can turn my back to see if those behind me can assist.
- 56. LORD JUSTICE SCOTT BAKER: I do not think the amount is relevant, at the moment particularly, but that will be a matter for the costs judge, would it not?
- 57. MR BOSWELL: Yes, I think it would, my Lord. It seems to me that this is a matter that is no longer of practical relevance, so far as Mr Paine is concerned. If your Lordships see fit to remit it to the Magistrates' Court and conclude that the matter should be litigated there, from here on in --
- 58. LORD JUSTICE SCOTT BAKER: Well, the short point is you do not want a costs order against your client.
- 59. MR BOSWELL: No. (pause)
- 60. LORD JUSTICE SCOTT BAKER: I am afraid we are against you.
- 61. MR BOSWELL: I am grateful.

- 62. MR BANWELL: Thank you, my Lord. I do not think there is anything else. If the decision of the court is to remit the matter to the Justices, so the matter can be reconsidered in accordance with the judgment of the court, I think that is all else that is required.
- 63. LORD JUSTICE SCOTT BAKER: Yes. Well, the problem is, of course, this decision is not determinative of the case, because there is this outstanding issue, and it may be that that can be resolved one way or another without it going back.
- 64. MR BANWELL: Yes, my Lord.
- 65. LORD JUSTICE SCOTT BAKER: Thank you very much.