C3/2003/1517

Neutral Citation Number: [2004] EWCA Civ 927
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMINISTRATIVE COURT LIST
(MR JUSTICE MOSES)

Royal Courts of Justice
Strand
London, WC2

Wednesday, 30 June 2004

B E F O R E:

LORD JUSTICE AULD

LORD JUSTICE TUCKEY

LORD JUSTICE CLARKE

- - - - - - -

MR AND MRS T

Claimants/Appellants

-v-

(1) HERTFORDSHIRE COUNTY COUNCIL

and

(2) SPECIAL EDUCATIONAL NEEDS TRIBUNAL

Defendants/Respondents

- - - - - - -

(Computer-Aided Transcript of the Stenograph Notes of
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MR J FRIEL (instructed by Felix Moss) appeared on behalf of the Appellants
MS E LAING (instructed by Hertfordshire County Council) appeared on behalf of the 1st Respondent

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J U D G M E N T

LORD JUSTICE CLARKE:

Introduction

1. This is an appeal from an order of Moses J, dated 26 June 2003, dismissing the appellants' appeal under section 11 of the Tribunals and Inquiries Act 1992 ("the 1992 Act") against a decision of a Special Educational Needs and Disability Tribunal ("the Tribunal") dated 17 December 2002.

Appeal to the Tribunal

2. The appellants are the parents of a boy, whom I will call "O", who was born on 12 April 1991 and is therefore now 13 years of age. He has an Autistic Spectrum Disorder ("ASD") and Moderate Learning Difficulties ("MLD"). He thus has special educational needs. A statement of special educational needs was first made in his case in January 1997. A further such statement, dated 30 May 2002, was made by the first respondent, the Hertfordshire County Council, ("the LEA"). The appellants appealed against the contents of that statement to the Tribunal under section 326(1) of the Education Act 1996 ("the 1996 Act").

3. The hearing of the appeal took place on two days, namely 28 November and 17 December 2002. The Tribunal issued its decision on 13 January 2003, and on 14 February 2003, the LEA issued an amended statement to reflect the decision. As I read the decision, the appeal was, at least in part, successful, but in large part unsuccessful. The statement contains six parts described as follows:

> "PART 1: INTRODUCTION;
>
> PART 2: SPECIAL EDUCATIONAL NEEDS;
>
> PART 3: SPECIAL EDUCATIONAL PROVISION;
>
> PART 4: APPROPRIATE SCHOOL OR OTHER ARRANGEMENTS;
>
> PART 5: ADDITIONAL NON-EDUCATIONAL NEEDS;
>
> PART 6: ADDITIONAL NON-EDUCATIONAL PROVISION."

4. The Tribunal ordered the LEA to amend Parts 2 and 3 of statement. In Part 2 it ordered the deletion of one sentence and the inclusion of two further paragraphs. In Part 3 it ordered the addition of two further objectives in section 1, and of three further matters under the heading of "Provision". As I see it, the amendments to Parts 2 and 3 reflected a measure of success for the appellants as a result of their appeal to the Tribunal. On the other hand, the Tribunal dismissed the appellants' appeal with respect to Part 4, which identified the "appropriate school or other arrangement" and provided for "attendance at St Luke's School with support from the Autism Base".

5. A central issue before the Tribunal had been whether O should be sent not as a day boy to St Luke's, which was the maintained special secondary school for pupils with MLD named in Part 4, but as a termly border to Purbeck View School in Swanage, which is an independent specialist school for pupils with autism and associated learning difficulties. The Tribunal resolved that issue in favour of St Luke's, with the result that the appeal to the judge failed in that regard.

Appeal to the High Court.

6. The judge described the essential question in the appeal as whether O's needs could be met by provision of the LEA's non-residential school, St Luke's, or whether those needs could only be met by means of a structured curriculum and programme during the whole of the waking day. He correctly said that it was accepted that that could not be delivered at St Luke's but could be delivered at Purbeck View, which was the private residential school preferred by the parents.

7. The judge set out sub-paragraphs a to k of the Tribunal's conclusions, to which I will return in a moment, and identified the changes directed by the Tribunal in order to reflect its conclusions. He said that the central ground of the appeal was that the Tribunal erred in law in failing to identify provision for out of school hours during the waking day, both before and after school. It was submitted, he said, that the Tribunal accepted that there was need for such a provision, alternatively that it ought to have done, but that it failed to specify how such a provision should be met. The judge set out the relevant provisions of sections 324 and 326 of the 1996 Act, which provide for the making of the statement and its contents, and for an appeal to the Tribunal, respectively. He then identified the principle stated by Pitchford J in R(FJ) v Cambridgeshire County Council [2002] EWHC 2391 Admin at paragraph 60, that an LEA would not be performing its statutory duty if, when specifying educational provision under section 324(3) of the 1996 Act, it directly or indirectly imposed upon the parents an obligation to meet part or all of that provision themselves. The judge rejected Mr Friel's submissions on behalf of the appellants and dismissed the appeal.

This appeal

8. The judge refused an application for permission to appeal. An application for permission was subsequently made to this court on a number of grounds, which were considered by Sedley LJ on paper. He said that he was not satisfied that the grounds advanced were viable, but was concerned at what he called the potential for doubt highlighted by paragraph 9 of the judge's judgment, to which I will return. He accordingly invited submissions from the LEA, which very helpfully responded in writing. He then reconsidered the application and refused it on paper. However, the application was renewed orally, and this time was granted by Brooke LJ and Sedley LJ on 18 December 2003.

9. As I read the reasons given for granting permission, it was essentially granted on two narrow (and I think probably related) grounds. The first ground is that the reasoning of the Tribunal was not sufficiently clear, and the second is that the Tribunal erred by failing to reflect the terms of an agreement between the parties without giving the appellants notice that it might be considering taking such a step.

10. In order to evaluate these grounds, I agree with Ms Laing that it is necessary to give some consideration to the essential issues before the Tribunal. She submits that the documents make it clear that the appellants were appealing against the statement essentially for two reasons: first, they wanted the educational programmes necessary to meet O's needs, as they saw them, to be provided throughout his waking day and not just when he was at a day school; secondly, they wanted O to be educated in a residential school. It is plain that those two grounds are closely related.

11. I do not think that it is in dispute that the appellants had both those ends in view. In any event, the appellants made their position clear in a letter dated 2 April 2002 to the Tribunal, which included the following:

> "In particular, [O]'s Special Educational needs are such that all the educational programmes necessary to meet them must be provided for him throughout his waking day, and we will be seeking a recognition as to the essential need for

specialist residential provision. In relation to Part 4 of [O]'s statement we will accordingly be seeking placement for [O] at a specialist school on a residential boarding basis."

12. The LEA's case statement for the appeal before the Tribunal shows that it did not accept either of those points. Those issues are reflected in the written decision issued by the Tribunal. In paragraphs 1 to 15 of its decision, the Tribunal set out the facts and evidence before it in some detail. The Tribunal recorded the appellants' case at paragraphs 3 and 11. Thus, in paragraph 11 it said:

> "[The appellants] do not consider that St Luke's can meet [O]'s needs. They consider it is an extension of the provision that he had in Southfield which failed him. They believe he requires intensive specialist provision in an environment that can provide consistency throughout the waking day."

13. The Tribunal observed that, in the course of the appeal, the appellants and the LEA agreed amendments to Parts 2 and 3 which satisfied many of their concerns, although issues remained relating to O's behaviour. The Tribunal also summarised the LEA's case. In short, its case was that it had specialist provision for children with MLD and considered that the appellants' choice would not provide an appropriate peer group or opportunities to function within the community and that St Luke's could meet O's needs.

14. As I read the decision, it is plain that those issues remained live between the parties throughout. The problem from the appellants' point of view is that, having considered all the evidence, the Tribunal essentially preferred the LEA's case.

15. I turn to the particular grounds now advanced. As indicated earlier, the first day of the hearing of the appeal to the Tribunal was 28 November 2002. On 4 December 2002, which was some time before the second day of the hearing on 17 December, the Tribunal wrote to the parties asking them, among other things, to exchange copies of their proposed amendments to the statement and to try and agree what issues remained between them. On 6 December the appellants' solicitor, Mr Felix Moss, who is very experienced in matters of this kind, wrote to the Tribunal setting out the appellants' proposed amendments to the statement.

16. They were as follows:

> "[The appellants] are seeking the following amendments to [O]'s statement:
>
> 1. The deletion of the reference in the third paragraph of Part 2 to [O] no longer being aggressive towards his peers.
>
> 2. The addition of the following two paragraphs to Part 2.
>
> (a) [O] is very dependent upon carers for all aspects of self-help skills. He has difficulty at meal times and requires supervision to prevent choking. Dressing skills are immature and [O] requires high levels of support to ensure that he dresses appropriately. He will go to the toilet on his own (with prompts) but he is incontinent at night. He has significant sleeping difficulties, he is hyperactive and disruptive during the evening and early hours of the morning. [O] shows very inappropriate sexualised behaviour both within the home and community. Self-help skills on the Vineland scales are at the 3 years 9 months level.
>
> (b) [O] is very impulsive and acts without thought for the safety of himself and others. He becomes very frustrated when he cannot get what he wants and this

can lead to aggressive or abusive behaviour. He has a need to control all situations and becomes very frustrated when he thinks he is not in control. He can become very abusive or violent towards adults or children if they are in his way. He acts without any thought for the appropriateness of his actions.

3. In relation to the objectives in Part 3 there should be added;

(a) To improve [O]'s self-help and independence skills.

(b) To improve [O]'s obsessional and challenging behaviour.

(c) To allow [O] to develop his cognitive potential.

(d) To provide [O] with a safe and secure environment.

4. In relation to Part 3 there should be included;

(a) '[O] will need consistency of approach throughout the day and across all settings in relation to all his educational programmes.'

(b) [O] needs adult oversight all the time because of his behaviours and for health and safety reasons.

(c) The teacher ratio should be no more than 1-6 with additional classroom support to ensure delivery of individual and small group programmes on a daily basis.

(d) All staff will need to have significant training and expertise in meeting the needs of children with autism.

(e) All programmes in connection with [O]'s self-help and independence skills, communication, reduction of his aggressive challenging behaviours and obsessional behaviours, socialisation, imaginative and imitative play and cognitive [development] to be delivered throughout his waking day within a consistent and structured environment.

We hope that this information is of assistance."

17. The LEA wrote to the Tribunal on 11 December but did not reply to Mr Moss' letter of 6 December. However, Miss Ann Storey prepared some notes on its behalf which were handed to Mr Moss on 17 December when the hearing of the appeal resumed. The notes contained the LEA's response to the amendments to the statement proposed in the letter of 6 December. The LEA did not agree to the first paragraph unless there was some indication that the change had occurred since O had last attended school. As to paragraph 2(a), for reasons set out in the notes, the LEA suggested the following wording:

> "At school [O] needs some reminding and encouragement with his dressing, toileting and eating skills. He has little concept of himself, very limited social awareness and at times can be over-affectionate. This can be construed by some people who do not know him well as sexualised behaviour. Self-help skills were assessed by Albert Reid, Independent Educational Psychologist, in November 2001, as being the 3 years 9 months level at chronological age 10 years 7 months.

> [The appellants] report that [O] is incontinent at night. He has significant sleeping difficulties and is disruptive during the evening and early hours of the morning. They feel that [O] shows very inappropriate sexualised behaviour within the home and community."

18. As to paragraph 2(b), the LEA agreed the proposed wording but suggested the following addition:

> "However, with an appropriate behavioural programme, as was implemented at Southfields School, much of this behaviour can be managed successfully."

19. As to paragraph 3, the notes said:

> "(a) agreed
>
> (b) I suggest: To develop an awareness of appropriate behaviours and responses.
>
> (c) would be the aim of [O]'s attendance at school, as for all children. This is an outcome not an objective and would result from the other educational objectives and IEP being in place.
>
> (d) is not an objective but a statement about provision. Both these I cannot agree to."

20. As to paragraph 4, the LEA suggested the following to replace sub-paragraphs (a) to (e) of paragraph 4 in the letter of 6 December:

> "[O] will need consistency of approach throughout the day and across settings ie home/school/respite care/social activities. The school will liaise frequently with home to ensure this consistency. The frequency of these discussions should be carefully planned by both parents, school and other agencies involved. There will be planned opportunities for all involved with [O] to share their experiences of him in order to continually develop further strategies for his management.
>
> [O] will be a member of a small class group (8 pupils), where there will be additional staff (2) trained in meeting the needs of pupils with autism. Oversight of his programme of study, learning and social needs will be by a teacher who has expertise and training in meeting the needs of children with autism.
>
> [O] will have the opportunity to attend the Play Station Club weekly. This is an after school activity for pupils with Special Needs."

21. It can thus be seen that, on the basis of the materials exchanged between the parties at the beginning of the second day of the hearing, there was some agreement between the parties but some disagreement. It is important to note for present purposes that the LEA's note did not include the substance of paragraph 4(e) of Mr Moss' suggested amendments, which referred explicitly to the need for "all programmes ... to be delivered throughout his waking day within a consistent and structured environment", or of section 4(b) which stated that "[O] needs adult oversight all the time because of his behaviour and for health and safety reasons". Nor did it include the substance of paragraph 4(a).

22. The essential difference between the parties at that time was the same as it had been throughout. The appellants were saying in paragraph 4 of the letter of 6 December, especially in paragraphs 4(a) and (e), that O needed educational programmes throughout the waking day, and not just while he was at a day school, viz St Luke's, whereas the LEA was saying, as it was put in the first sentence of paragraph 4 (quoted above), that he needed "consistency of approach throughout the day and across settings in homes/schools/respite care/social activities". The LEA's case was, as it was put in a later statement by Miss Storey, that what was contemplated was an assumption of partnership between parents, schools and other agencies in the adoption of a constructive and compatible approach outside of the school day, but not the delivery or implementation of an educational curriculum outside school hours.

What then happened at the hearing?

23. This question can be answered by a consideration of a number of sources, but not unnaturally Mr Friel and Ms Laing both focused in particular on the decision of the Tribunal. The Tribunal expressed its conclusions as follows:

> "a. From the reports and assessments submitted by the parties and the information given at the hearing we conclude that the amendments agreed by the parties to Part 2 of the statement are appropriate to describe [O]'s special educational needs.
>
> b. Although stated in Part 2, the parties dispute whether [O]'s aggressive behaviour to his peers was eradicated at Southfield. We consider that this is of little current relevance. He has been out of school since July 2002. We conclude that disputed reference is unhelpful and will not reliably inform his teachers. It should not be contained in the current statement.
>
> c. From the reports and assessments submitted by the parties and the information given at the hearing we conclude that the amendments agreed by the parties to Part 3 of the statement are appropriate to specify provision necessary to meet [O]'s needs. The further specification of provision suggested by each party appears to describe the school they have proposed. In reaching our conclusions we have borne in mind the provisions of paragraph 8:37 of the Code of Practice, this states 'LEAs must make decisions about which actions and provisions are appropriate for which pupils on an individual basis. This can only be done by a careful assessment of the pupil's difficulties and consideration of the educational setting in which they may be educated.'
>
> d. From the description of St Luke's within the papers and the information given by Mrs Storey, Mrs Gainsborough and Mrs Stocks we conclude that St Luke's has ben resourced appropriately for pupils with ASD, understands their needs and can provide the expertise and specialist programmes to meet them. This includes the consistency of the same LSA throughout each daily session. We note that there is input from a SALT who will assess and devise a programme.
>
> e. We note from Mrs Goulding that the programme and methods utilised are similar in both schools. We conclude that during the school day St Luke's can make the provision [O] needs.
>
> f. All parties accept that [O] should have consistency of programmes and approach throughout the waking day. They have agreed amendments to Part 3 of the statement to that effect. We have considered whether this necessarily

requires that he is in the same setting throughout his waking day and needs residential curriculum within a boarding school. We note that neither [the appellants] nor their specialist advisers stated that this consistency should extend across holidays.

g. [O] is an individual considered by the parties and specifically stated by Mr Reid to have potential to gain a degree of independence and functioning inside the wider community. From the information available we do not consider that he requires to be within the same environment throughout his waking day. Providing the arrangements for liaison and consistency between those responsible for him are sufficiently strong, we consider his needs can be met and his progress will not be at risk; indeed, opportunities for generalisation may be enhanced.

h. We have considered the arrangements for liaison with others by St Luke's. We accept that Mrs Stocks has facilitated good communication with parents, agencies and others concerned and that any reservations regarding [O]'s management and wellbeing can be quickly identified and discussed.

i. Following e and h we conclude that St Luke's can meet [O]'s needs.

j. As the cost of [O]'s provision at St Luke's combined with any likely Social Services package is significantly less than the cost of published fees for attendance at Purbeck, we conclude that the naming of Purbeck in [O]'s statement will involve unreasonable public expenditure and that [the appellants'] preference cannot prevail.

k. In reaching our conclusions, we have had regard to the Code of Practice, in particular paragraphs 8:32 to 8:90."

24. The Tribunal then set out its order in these terms:

"Order

Hertfordshire County Council is to amend the statement:

In Part 2:

i. By deletion of the reference in the third paragraph to [O] no longer being aggressive towards his peers.

ii. By inclusion of 'At school [O] needs some reminding and encouragement with his dressing, toileting and eating skills. He has little concept of himself, very limited social awareness and at times can be over-affectionate. This can be construed by people who do not know him well as sexualised behaviour. Self-help skills were assessed by Mr Albert Reid, Independent Educational Psychologist in November 2001, as being at the 3 years 9 months level at chronological age 10 years 7 months.

'[The appellants] report that [O] is incontinent at night. He has significant sleeping difficulties and is disruptive during the evening and early hours of the morning. They feel that [O] shows very inappropriate sexualised behaviour within the home and community.'

iii. By inclusion of '[O] is very impulsive and acts without thought for the safety of himself and others. He becomes very frustrated when he cannot get what he wants and this can lead to aggressive or abusive behaviour. He has a need to control all situations and becomes very frustrated when he thinks he is not in control. He can become very abusive or violent towards adults or children if they are in his way. He acts without any thought for the appropriateness of his actions.'

25. In Part 3:

i. Objectives.

To include:

• To improve [O]'s self-help and independence skills.

• To develop an awareness of appropriate behaviours and responses and reduce obsessional and challenging behaviour.

ii. Provision

To include:

• Consistency of approach throughout the day and across all settings ie home/school/respite/care/social activities with regard to programmes. The school will liaise frequently with home to ensure this consistency. The frequency of these discussions should be carefully planned by both parents, school and other agencies involved. There will be planned opportunities for all involved with [O] to share their experiences of him in order to continually develop further strategies for his management.

• A small class group (not exceeding eight pupils), with additional staff (not less than two) trained in meeting the needs of pupils with autism. Oversight of his programmes of study, learning and social needs by a teacher who has expertise and training in meeting the needs of children with autism.

• Opportunities for after school activities for pupils with Special Needs."

26. Mr Friel submits that it is far from clear what conclusions were reached by the Tribunal, both with regard to what it was saying had been agreed and with regard to what it was in effect directing the LEA to provide.

27. The correct approach for the Tribunal to adopt is not in dispute. In London Borough of Bromley v SENT [1999] ELR 260 this court held that part of an order made by SENT was, as Sedley LJ put it at page 297, too imprecise to be reliably translated into an amended statement free from further dispute. The court approved the following statement of Laws J (as he then was) in L v Clarke and Somerset County Council [1998] ELR 129 at 137:

> "The real question, as it seems to me, in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case."

In the Bromley case, this court held that the same must logically apply to SENT decisions. The question is whether the Tribunal's decision and order are sufficiently clear to justify Laws

J's test.

28. Conclusion a refers to "amendments agreed by the parties to Part 2" and states that those amendments are appropriate to describe O's special educational needs. There is, in my opinion, no doubt what the Tribunal was holding had been agreed because, having held that the agreed amendments were appropriate, the Tribunal included them in its order. Thus, sub-paragraph ii in the order in relation to Part 2 set out what the Tribunal concluded were agreed amendments in relation to Part 2. It can be seen from the passages quoted above that paragraph ii is almost word-for-word the same as the wording proposed by the LEA to replace paragraph 2(a) of Mr Moss' letter of 6 December. Paragraph 3 is in the same terms as paragraph 2(b) of Mr Moss' letter. In these circumstances, there is no doubt what the Tribunal was deciding in this regard.

29. I should note here in parenthesis that Mr Moss says in one of his statements that the LEA's notes were not handed to the Tribunal. That may be so but it is to my mind relevant, because it is quite plain from a comparison between the substance of the LEA's case set out in the notes, and the order or orders made by the Tribunal, which used much of the same phraseology as the notes, that the Tribunal was aware of the detailed points contained in the notes. I can see no basis for holding that the Tribunal erred in law insofar as conclusion a or indeed conclusion b is concerned. It is clear what it decided, and the resulting alteration to the statement made on 14 February 2003 is also clear.

30. Mr Friel submits that the parties did not make the agreement found by the Tribunal. If that was so, it would not amount to an error of law but to an error of fact. But I do not think that the allegation is made out. The evidence of Mr Moss nowhere states that the parties agreed the amendments proposed in paragraph 2 of the letter of 6 December and the manuscript note of the hearing prepared by the Chairman of the hearing is far from clear. In any event, the Tribunal's conclusions with regard to Part 2 do not, as I see it, impinge upon the Tribunal's resolution of the key questions identified above, to which I now turn.

31. The Tribunal's conclusions which are relevant here are principally conclusions c, f and g, which I have already quoted. They must, of course, be considered in their context. To my mind, so considered, they are clear. It will be recalled that conclusion e was in these terms:

> "We note from Mrs Goulding that the programmes and methods utilised are similar in both schools. We conclude that during the school day St Luke's can make the provision [O] needs."

32. Mr Friel submits that it is far from clear what amendments to Part 3 the Tribunal was holding had been agreed by the parties. I see the force of that submission if focus is confined to the first sentence of conclusion c. However, it is plain that there was a good deal of common ground between the parties and that what remained for the Tribunal to do was to determine the essential dispute between them which, as I have explained, existed from the outset and, in my judgment, remained to be resolved by the Tribunal.

33. It is clear from conclusions c, d and e that the Tribunal recognised that it must form a judgment about the suitability of St Luke's. As I have indicated, it did so and concluded in e that, during the school day, St Luke's could make the provision [O] needed.

34. Conclusion f has played a central part in the debate and indeed gave rise to paragraph 9 of the judge's judgment. It will be recalled that conclusion f is in these terms:

> "All parties accept that [O] should have consistency of programmes and

> approach throughout the waking day. They have agreed amendments to Part 3 of the statement to that effect. We have considered whether this necessarily requires that he is in the same setting throughout his waking day and needs a residential curriculum within a boarding school. We note that neither [the appellants] nor their specialist advisers stated that this consistency should extend across holidays."

35. Although the Tribunal says that the parties' agreed amendments to the effect stated in the first sentence, that is not quite correct if the first sentence is viewed in isolation. The first sentence is not in the same terms either as the letter of 6 December or as the LEA's notes; it must be read together with the Tribunal's directions to amend Part 3 of the statement, which I have already quoted.

36. The objectives set out in the order are derived in part, but not wholly, from the LEA's notes. More importantly, so too are the three sub-paragraphs to be included in the provision. In particular, the first of those reads:

> "Consistency of approach throughout the day and across all settings ie home/school/respite care/social activities with regard to programmes. The school liaise frequently with home to ensure there is consistency. The frequency of these discussions should be carefully planned by both parents, school and other agencies involved. There will be planned opportunities for all involved with [O] to share their experiences of him in order to continually develop further strategies for his management."

37. It can immediately be seen that that paragraph is not in the same terms as either paragraph 4 of the letter of 6 December or paragraph 4 of the LEA's notes, although it is much closer to the latter. In my opinion, the Tribunal was not obliged to choose between the two alternatives but was both entitled, and indeed bound, to apply its own mind to the question. That would, I think, be so even if the parties had reached an agreement, provided of course that it had afforded each party a fair opportunity to adduce evidence and to be heard. However, as I read the available material, here the parties did not reach complete agreement in relation to paragraph 4. It is common ground that no agreement was reached with regard to paragraph 4(e), because Mr Moss, entirely properly, expressly says so in his third witness statement. That is important because a statement along the lines of paragraph 4(e) seems to me to be central to the appellants' case.

38. Moreover, in paragraph 7 of Mr Moss' first witness statement made in relation to the appeal against the Tribunal's decision, Mr Moss said this in paragraph 7:

> "I turn firstly in relation to the waking day curriculum. As a result of my letter of 6 December, the authority's assessment by Amanda Pillinger, combined I believe with Angela Dyer's expert report, the authority gave in notes handed to me and exhibited above in which [LEA] agreed that they now accepted that there should be a waking day curriculum in all settings. Paragraph 4 of their draft is accepted by the Tribunal [by] the insertion of one word. The Tribunal had before them Mr Reid's expert report, Ms Dyer's report, the evidence of the situation at home both orally from the parent, the report from social services and in the medical record, which led the Tribunal to accurately record the agreement that a waking day curriculum was required."

39. As I read it, the point being made by Mr Moss in paragraph 7 is that the Tribunal changed the wording in paragraph 4 of the LEA's note from "[O] will need consistency of approach

throughout the day and across settings in home/school/respite care/social activities", to "consistency of approach throughout the day and across all settings in home/school/respite care/social activities with regard to programmes". The point being made by Mr Moss is not that the Tribunal was entitled to reach that conclusion because of some supposed agreement or otherwise, but that the Tribunal had reached a conclusion favourable to the appellants' case because of the addition of the words "with regard to programmes", hence the reference to the material that "led the Tribunal to accurately record the agreement that a waking day curriculum was required".

40. The problem with that approach is that there was (and is) no evidence that the LEA agreed that "a waking day curriculum was required". If the LEA had reached an agreement to that effect, it would have followed that St Luke's would not have been suitable and that a residential school would have had to be found. In that event, the appeal to the Tribunal would have succeeded and not failed. There is no evidence that a final agreement was reached as to paragraph 4. Mr Moss certainly does not say in paragraph 7 of the statement just quoted that an agreement was made in the terms of paragraph 4 of the statement of 6 December. He nowhere clearly states what agreement he says was reached with any representative of the LEA. As I read his later evidence, it is to the effect that it can be inferred from the note of the hearing taken by the Chairman of the trial, that agreement is reached. However, as the judge observed, the manuscript note is cryptic. It is particularly cryptic with regard to paragraphs 4(a), 4(b) and 4(e) It does not seem to me to support an agreement in the terms of paragraph 4(a) or 4(b), and, as already stated, it does not support an agreement to paragraph 4(e) since it is accepted that no such agreement was reached.

41. On the LEA's side, although it is said that some measure of agreement was reached, there is again to evidence that complete agreement on the key issues was ever reached. In short, there was no agreement that a waking day curriculum was required. As the judge put it in paragraph 13 of his judgment, there was obviously no agreement, since had there been, there would have been no need for the Tribunal hearing to proceed to a conclusion, it being agreed that the provision identified in paragraph 4(e) of the letter could not be made at St Luke's.

42. It was thus left to the Tribunal to decide the crucial issue in dispute on the evidence, which was extensive and included the evidence of Amanda Pillinger, whose report dated 9 December 2002 contained a detailed care re-assessment of those needs. She put him in eligibility band C, which was the lowest level of those adjudged to be eligible for services and support, although that is in no way to minimise the care and support required by O's hard pressed parents and family. I detect no unfairness in the way in which the Tribunal approached its duties and I am satisfied that all parties had a full opportunity to adduce whatever evidence they wished and to put their case howsoever they wished to the Tribunal.

What conclusion did the Tribunal reach and is it expressed with sufficient clarity to meet Moses J's test?

43. The judge said this in paragraph 9 of his judgment:

> "It is clear that, notwithstanding the description of the difficulties faced by [O], the Tribunal rejected the view that he had a need for programmes of special education to be provided throughout the waking day. In consequence of that rejection, they made no provision for such programmes to be provided throughout the waking day. On the contrary, they stated that what was required was consistency throughout the waking day, not programmes of special education. There is no other way that the decision can be read when read as a whole. The provision in Part 3 refers to: 'consistency of approach throughout the

day and across all settings, ie home/school/respite care/social activities with regard to programmes.' This found its way in that form in the amended statement. Beside being ungrammatical, it is near to incomprehensible, and I accept that it is ambiguous. But it is plain to me reading the decision as a whole, and in particular the conclusions set out at (d), (f), (g) and (h), in the context of the evidence earlier recorded, that the Tribunal was not stating that the provision should be made for programmes throughout the waking day."

44. Mr Friel submits that the judge's view that the provision in the order is ungrammatical and near to incomprehensible shows that the reasoning of the Tribunal does not satisfy the test. However, although I agree that the conclusion could have been expressed differently, I am unable to accept that submission. It is common ground that the decision must be read as a whole and the judge concluded that, so read, the Tribunal was not stating that provision should be made for programmes throughout the waking day. I agree. As the judge observed, the Tribunal stated that what was required was consistency throughout the waking day, not programmes of special education.

45. In the provision section of Part 3 of the letter of 14 May 2002, which was the letter under appeal, the LEA set out the programmes which would be provided for O. As I read the letter, it is clear that the programmes referred to were all to be provided for O during the school day and were properly regarded as programmes of special education. I would accept Ms Laing's submission that they were not all exclusively educational, but they were to be provided within the school in order to help O to survive and function as well as possible in a school setting, and were thus properly regarded as programmes of special education.

46. In his judgment, the judge referred to the judgment of Sedley LJ in the Bromley case, which contains a valuable analysis of the position at pages 296 to 297, where Sedley LJ pointed to the fact that section 324 of the 1996 Act requires the LEA, in preparing the statement, to distinguish between special educational provision and non-educational provision, and observed that:

> "There is between the unequivocally educational and the unequivocally non-educational a shared territory of provision which can be intelligibly allocated to either."

47. Sedley LJ then spelled out the roles of the LEA and of the Tribunal in this regard:

> "The potentially large intermediate area of provision which is capable of ranking as educational or non-educational is not made the subject of any statutory prescription precisely because it is for the local education authority, and if necessary the SENT, to exercise a case-by-case judgment which no prescriptive legislation could ever hope to anticipate. The potential breadth of what can legitimately be regarded as educational is illustrated by section 322, permitting as it does the enlistment by the LEA of other statutory providers to 'help in the exercise of any of their functions under this Part'. It is true that the LEA's functions (which include both powers and duties: see section 579(1)) will include the elective making of arrangements for non-educational provision as well as the mandatory making of arrangements for educational provision pursuant to section 324(5)(a); but it is the fact that health, social services and other authorities can be enlisted to help in the making of special educational provision which gives some indication of possible breadth of the duty.
>
> For these reasons I prefer Mr Gordon's approach to the meaning of 'special

educational provision' in Part IV of the Act. Whether a form of help needed by the child falls within this description is a question primarily for the LEA and secondarily for the SENT's expert judgment. If, but only if, the SENT has gone wrong in law will the High Court overset its judgment.

Mr Gordon has not gone so far as to assert - for he had no need to - that the Tribunal's decision was the only one open to it. So to contend would have placed him in exactly the same difficulties as Mr Straker has encountered in making the opposite submission. It follows, no doubt, that there will be in cases like this a potentially large area of judgment in which LEAs and SENTs can legitimately come to opposite conclusions on the same or similar facts. Such a situation is less than ideal, but it is an intelligible choice on Parliament's part where the alternative is a rigid categorisation productive of far more doubt, dispute and litigation than what I would hold to be the method of Parliament's choice.

The Tribunal's reasoned decision can be seen, in this light, to have proceeded without legal or logical error from findings to conclusions. The Tribunal's conclusion that physiotherapy, occupational therapy and speech therapy were all measures which related directly to S's learning difficulties, and therefore amounted to a special educational provision, was a conclusion properly open to it, provided that it is not read as meaning that these therapies were exclusively educational."

48. We were also referred to some general considerations set out by this court in paragraph 64 of its judgment, given by Schiemann LJ, in E v London Borough of Newham and SENT [2003] EWCA Civ 09; [2003] ELR 286:

"64. The following general considerations have weighed with us:-

i) At one extreme, a tribunal plainly cannot delegate its statutory duty to some other person or body, however well-qualified. Equally, the statutory duty will not be discharged if the description of the special educational provision which is to be made is framed in terms so vague and uncertain that one cannot discern from it what (if anything) the tribunal has decided in that respect.

ii) At the other extreme, the statutory duty plainly cannot extend to requiring a tribunal to 'specify' (in the sense of identify or particularise) every last detail of the special educational provision to be made (indeed, Mr Wolfe accepted that in an appropriate case a tribunal may lay down minimum requirements).

iii) Between those two extremes, the degree of flexibility which is appropriate in 'specifying' the special educational provision to be made in any particular case is essentially a matter for the tribunal, taking into account all relevant factors. In some cases, a high degree of flexibility may be appropriate, in others not.

iv) In the particular circumstances of the instant case the tribunal was, in our judgment, fully entitled to conclude that the individual education plan referred to in part 3 of the statement be determined not by it but by the designated special school in conjunction with the therapists."

49. Both those cases stress the flexible role of the Tribunal and the large area of judgment afforded to it. In paragraph 64(iii) of E the court emphasised that the degree of flexibility

which is appropriate in specifying the special educational provision in any particular case is essentially a matter for the Tribunal. In short, all will depend upon the circumstances.

50. In the present case, all the programmes set out in the statement dated 14 May 2002 could properly be regarded as programmes of special education. As I read conclusion f, and the expression "consistency of approach throughout the day and across all settings in home/school/respite care/social activities with regard to programmes", the Tribunal was accepting that there should be consistency of approach both when O was at school and when he was at home or receiving respite care, so that as far as possible when not at school he would be treated in a way which was consistent with the programmes developed at school, so that, as one witness put it, all key adults handled O in a similar way, providing the same response to inappropriate behaviour and the same prompting of appropriate behaviour.

51. The emphasis throughout was on consistency of approach, but the Tribunal was not saying that the LEA must provide programmes for O other than at school. For the reasons already given, it seems to me that, if it had been, it would have had to reach a different conclusion on the suitability of St Luke's and to hold that a residential placement was required, as to my mind the Tribunal was well aware. Thus, the Tribunal was not saying that the LEA must provide programmes at home pursuant to its duty under section 324. The judge expressed his conclusions in this regard in paragraphs 10 and 11 of his judgment thus:

> "10. The decision of the Tribunal has been challenged by Mr Friel, on behalf of the parents, for its failure to specify what should be done outside the school working day. The Tribunal had no obligation to do so once it had found that the special educational needs of [O], as opposed to his others needs, could be met at St Luke's school. There is a distinction between special educational needs and other needs. It is inherent in the statute, but it is not always easy to draw. There will often be considerable overlap."

52. The judge then referred to part of the judgment of Sedley LJ in the Bromley case which I have already quoted and continued in paragraph 11:

> "Part of the provision to meet [O]'s special educational needs was liaison and consistency in approach. But it was quite impossible, and indeed dangerous for the Tribunal to make any more particular or specific provision in relation to consistency and liaison. The need for liaison was bound to vary perhaps from day-to-day or week-to-week. The need could not be rigid, or rigidly identified. What was important was that it should take place regularly and when needed."

53. I entirely agree. To my mind, no proper criticism can be directed at the Tribunal in this regard.

Conclusion

54. I recognise that the appellants are often under great strain and that they are anxious to do their very best for their son, O. However, they will I am sure recognise that the only question that this court has jurisdiction to decide is whether the judge was wrong in not concluding that the Tribunal made an error of law.

55. For the reasons I have given, I have reached the conclusion that the Tribunal made no error of law, that it acted fairly throughout and that its decisions were well within the ambit of its powers. It follows that the judge was right and I would dismiss this appeal.

Postscript

56. In her skeleton argument, Ms Laing submits that an appeal of this kind is a second appeal such that, by section 55(1) of the Access to Justice Act 1999 ("the 1999 Act"), no appeal may be made to the Court of Appeal unless the Court of Appeal considers that:

> "(a) the appeal would raise an important point of principle or practice, or
>
> (b) there is some other compelling reason for the Court of Appeal to hear it."

57. In Clark (HM Inspector of Taxes) v Perks [2001] 1 WLR 17, it was held that appeals to the Court of Appeal from appeals to the High Court under section 11(1) of the 1992 Act are appeals to which section 55(1) of the 1999 Act applies.

58. While we have not heard any detailed argument on this point, it seems to me on the face of it to follow that this is such a case. I am somewhat concerned whether this was appreciated in this case. That concern has not, however, affected the conduct, hearing or determination of this appeal because permission was granted. It may be that the court concluded that one or other of the criteria in section 55(1) was satisfied.

59. The purpose of adding this postscript is simply to clarify the position for the future, subject of course to any permissible further argument as to the principle, and to underline the position as I see it.

60. It is the responsibility of applicants for permission to appeal to draw the attention of this court to the fact that this type of appeal is a second appeal and to state the basis upon which it is said that the statutory criteria are satisfied.

LORD JUSTICE TUCKEY: I agree.
LORD JUSTICE AULD: I also agree. The appeal is therefore dismissed.
Order: appeal dismissed