Neutral Citation Number: [2007] EWHC 624 (Admin)

Case No: CO/2213/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

23 March 2007

Before :

MR JUSTICE WILKIE

- -

Between :

STEPHEN AND SUZANNE ROPER	**Appellants**
- and -	
TUSSAUDS THEME PARKS LIMITED	**Defendant**

- -

(Transcript of the Handed Down Judgment of
WordWave International Ltd
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Stephen Hockman QC and William Upton (instructed by **Richard Buxton**) for the **Claimant**
Jonathan Caplan QC, James Eadie and Gregory Jones (instructed by **Travers Smith**) for the **Defendant**

Hearing dates: 19-20 March 2007

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Judgment

MR JUSTICE WILKIE :

1. This is an appeal by way of case stated by Mr and Mrs Roper against the terms of an abatement notice made by Stoke on Trent Crown Court on 14 October 2005. The brief chronology of events leading up to the making of that order is as follows. On 28 October 2002 Mr and Mrs Roper served a notice under section 82 of the Environmental Protection Act 1990 on the respondent on the ground that they were aggrieved by the existence of a statutory nuisance in the form of noise emanating from the theme park at Alton Towers operated by the respondent. Nothing happened in relation to that notice but on 23 October 2003 a second notice under that section was served accompanied by an expert report of Mr Stigwood. On 8 July 2004 Magistrates Court proceedings were commenced on that second notice and on 2 August 2004 Deputy District Judge Gascoigne made a finding that there was a statutory nuisance and adjourned the matter until 1 November to enable discussions to take place between the parties.

2. On 1 November 2004 Deputy District Judge Gascoigne made an abatement order and fined the respondents the maximum £5000. On 11 November 2004 the respondents appealed against both conviction and the abatement notice and the fine. The appeal

hearing took place in July 2005 initially for 9 days between 11 and 15 and 18 and 21 July on the appeal against conviction. On 21 July 2005 HH Judge Everard, sitting with justices, dismissed the appeal against conviction. On 22 July the appeal in respect of the sentence and terms of the abatement order was adjourned. On 13/14 September and again on 14 October 2005 the Crown Court heard the appeal in respect of the fine and the abatement order. On 14 October 2005 the appeal in respect of the fine was upheld and a lower fine of £3500 was substituted. The appeal against the abatement order similarly was upheld and a new abatement order was made. It is against the terms of that order that this appeal by way of case stated proceeds.

3. On 4 July 2006, before Mr Justice Collins, the respondent to the appeal sought an order that the case stated drafted by the appellant, but ultimately signed by the Crown Court judge, should be remitted to him for further consideration and amendment. This was on both procedural and substantive grounds. Mr Justice Collins refused this order. He said as follows:

> "24. While I accept as I have indicated the judge did not follow the rules as perhaps he should have done, I am far from persuaded that the upshot was unfairness in the way that has been suggested…It seems to me that the fundamental point being made by the solicitors was a bad point, namely that the case could not include matters which were inferences, as it were, rather than specific findings in the judgment. It is perfectly proper for the case to include such findings as the judge considers appropriate….Although it is submitted that these are inconsistent with the findings made, I am afraid that I have not been persuaded that such inconsistency exists. Of course they are additional, but they are not, in my view, inconsistent…It shows that he accepted, with the minor amendments, that what was set out on behalf of the Ropers was an accurate record of findings of fact that the court had made. …In those circumstances,...I am not in the least persuaded that there was unfairness or that the findings were not findings which could properly be made.
>
> 25. I did express in the course of argument my concern that this case was somewhat over lengthy and I was not happy with a number of the questions that had been posed and the terms of those questions. On the other hand, this is a somewhat curious situation because the case has annexed to it a large number of documents….The fact is that the judge has annexed the expert reports and a transcript of the evidence of the experts and various other witness statements. Accordingly, the parties will be able, and in particular Mr Caplan will be able, to refer to any matters of materiality which he submits must be taken into account in approaching the findings of fact that have been set out in the case. That is unusual because normally, of course, the argument has to be limited to the facts as set out in the case, but having regard to the history of this, it seems to me that it would be permissible, because the case annexes these documents, for reference to be made to them. But it seems to me that it is essential to assist the court, and indeed the parties, that in advance of the hearing Mr Caplan's side should set out the matters which he particularly would wish to rely on by reference to the material which is annexed to the case so that

> both Mr Hoffman and the Court will appreciate what the issues may be, if there are issues. It may be that it will be accepted that it is appropriate to qualify any findings, but one must bear in mind, and it is necessary to say this, that of course any reference to the documents in the form of evidence, whether statements or transcripts, would have to be on the basis that any qualification cannot be inconsistent with the findings made by the judge; it can only be explanatory of and giving the context of such findings, because obviously the findings of fact have to stand as findings of fact and it is not at this stage possible to go behind them, although it is possible, by reference to the material, to explain their context and, if necessary, to expand upon them provided, as I say, that what is done is not inconsistent with a finding that was made."

That is an approach which I shall adopt in the particular circumstances of this case.

The Crown Court's decisions and findings of fact

4. On 21 July 2005 the Crown Court delivered a reasoned ruling rejecting the defendant's appeal against the finding of statutory nuisance. Insofar as is relevant for this appeal that ruling contained the following statements:

At page 3 F to G:

> "I deal next with the character of the area. Alton Towers, since 1979, has been a theme park. It is one of the largest if not the largest in the country. Prior to 1979 it has a long history of being open to the public as a place of recreation enjoyed by many thousands of people and we have heard evidence about the history, interesting as it was. In the circumstances, in our judgment, it is unrealistic to expect that there will never be any noise emanating from the site. The local inhabitants must expect some inconvenience from noise from the site."

At page 4G to 5A:

> "The fact that planning permission has been granted is relevant to what Mr Caplan has referred to – and we have adopted his phrase – as the "character of the area". However, the fact that planning permission has been granted does not, of course, give Alton Towers licence to make such noise as amounts to an unreasonable interference with the use and/or enjoyment of land…"

At page 6B to 7G:

> "In our judgment Mr Stigwood has adopted what we believe to be a more balanced approach in this particular case than Mr Sharps. That is to say, given that there are no statutory or other specific guidelines for the assessment of noise from theme parks, he has compared and contrasted a number of guidelines and, we stress, he has long experience as an environmental health officer, 19 years in total, from 1975 to 1994 which we consider to be important in this case. In

> relation to machinery noise, tannoys and screams, Mr Stigwood has not simply restricted himself to the British Standard 4142, he has also considered the World Health Organisation guidelines, and he refers to that in his December 2003 report at page 35 and he has also considered the British Standard 7445 and he refers to that in his December report at page 38. By contrast, in our judgment, Mr Sharps has assessed the noise levels almost exclusively from the World Health Organisation guideline values…In our judgment that approach is too restrictive. The actual decibel levels are, of course, not unimportant, but Mr Stigwood has concentrated not just on decibel levels but on what he has called "the character of the noise" for example, the daily clattering of machinery accompanied by tannoy noises and screams,…in any event, Mr Sharps concedes that a statutory nuisance may exist where the levels – that is the measured levels – are less than the WHO guideline levels with his caveat about the character of the noise. On any basis, the extent of measurements actually taken in this case is very limited. Concerning levels of noise from rides, machinery and screaming, Mr Stigwood took measurements in April 2003 and September 2003. He had earlier taken measurements on 30 March 2003 before Alton Towers opened and we do not think it is helpful to compare noise levels from when the park is closed to noise level when it is opened. We have already said that, given the character of the area and the existence of Alton Towers as a recreational site for many many years, that it is unrealistic that there will never be any noise emanating from the theme park and we have already said, and I repeat, that the local inhabitants must expect some inconvenience from this type of noise from the site."

5. In its decision on abatement dated 14 October 2005 the Court said, insofar as is relevant, as follows: at page 1F to 2F:

> "As to the noise abatement order, we confess that drafting the proper and fair order has not been an easy task. We should add, perhaps the obvious, that the experts on either side were at times at complete loggerheads as to, for example, whether certain measurements could be accurately made at Farley House or not. In our judgment concerning the appeal against conviction we made it plain that "local inhabitants must expect some inconvenience from noise from Alton Towers". The order which we pass must be one, first of all, which will abate the nuisance but equally it must not be so draconian that its effect would be to close Alton Towers or seriously affect its ability to function as a commercial concern and also it must be clear and enforceable. It is right to say that we were initially attracted by Mr Stigwood's proposed draft order, although we were of the view that the levels he suggested concerning specific areas of noise were too low…Having heard from Mr Stigwood and from Mr Sharps on behalf of the appellant, our judgment is that Mr Sharps' draft order is in principle to be preferred. It is our judgment that it is to be commended for its clarity, it abates the nuisance and it is an order with which Alton Towers should have no difficulty in complying.

> However, there is one caveat to that. The level which he sets out at paragraph 1, under the heading of "Daily Operation of the Site" at the second page of his proposed abatement order we believe is too high. The appropriate level, in our judgment, is 40 decibels, the same measure, as it were, he sets out there with a lower limit of 40. We haven't just plucked that out of the hat. We have taken that level from Mr Stigwood's what I refer to as blue chart which is annexed to in tab 3 of the bundle and we think that is the appropriate level in this case and we think also, to avoid any doubt, that it is perfectly achievable by Alton Towers and is a level which is not only achievable but which will abate the noise as well."

6. Insofar as the abatement order concerned concerts, the relevant passage the relevant passage is as follows at page 2F to 3B:

> "As to concerts, we agree with the appellant's argument that the proper and fair way for the abatement of concert noise to be achieved is to ensure that they comply with the Noise Council's Code of Practice on Environmental Noise. We do not think it reasonable or fair to restrict Alton Towers in the number of concerts they are able to hold or to impose any higher burden than that imposed by the Code of Practice. Plainly, the argument put forward on behalf of the respondents is they won't know in advance how noisy, as it were, the concerts were going to be because they wouldn't know in advance how many there were going to be in any given year. In reality, the practicality of this, they will, one would have thought. In any event, if they end up having four and the noise is exceeded in the fourth then Alton Towers would be in breach of the order"

7. The statement of case includes a number of findings of fact which amplify the reasons given by the Crown Court. These are set out at paragraphs 19 to 39. Each of these findings of fact is of relevance but in the context of this appeal the following have been given particular prominence:

> "21. We accepted that the level of 43dbA for all the relevant noises from Alton Towers reflected the circumstances that we found constituted a statutory nuisance at Farley House, and that this was the level used by both noise experts..as a basis upon which to assess the noise at Farley House.
>
> 22. We accepted the "Alton Towers noise level comparison chart" set out in Appendix 2 of Mr Stigwood's August 2005 report…on the terms of the order. This showed that:
>
> a. At 40dbA "BS 4142 complaints are predicted"
>
> b. At 35dbA "BS 4142 marginal complaints are predicted"
>
> c. 35dbA was marked as the summertime background noise level…
>
> 23. We accepted the recommendation made in BS 4142 that, in assessing the impact of noise, a correction of plus 5db should be made for noise which contains distinguishable, discrete,

continuous notes (such as screams), distinct impulses (bangs, clatters) and/or whose character is irregular enough to attract attention. We found that the noises from Alton Towers mentioned in the order were of this type, and that such a character correction should be made in assessing the impact of the noise and in setting the noise level or levels in the order.

24. We accepted that the greater difference between the background level and the assessed noise rating level (after the noise character correction), the greater the likelihood of complaints. We accepted that, as stated in the guidance in BS 4142, a difference of 10db or more indicates that complaints are likely, and a difference of 5db is of marginal significance, and that one can only be assured that there will not be complaints where the noise levels are 10db below the background noise level.

25. We accepted that the noise levels stated in the WHO guidelines of 50 to 55db represent the total noise from all sources in the community and would not just be restricted to parts of the noise from one source (such as the relevant noise sources from Alton Towers.

26. We rejected the level of 45dbA put forward by Mr Sharps is his proposed order. We accepted Mr Sharps' evidence that some of the levels set out in Mr Stigwood's draft were incapable of measurement or calculation at Farley House. We found that several of the individual levels set out in Mr Stigwood's draft were too low to be reasonably achievable.

27. We accepted the evidence of both noise experts (Stigwood and Sharps) that a change in noise level of around 3db is just perceptible, whereas a change of around 10db is about a doubling (or halving) of loudness.

28. We found that the noise from the operation of the rides and screaming each constituted a nuisance on their own, given the frequency and regularity of such noise which we had heard during the evidence.

29. We accepted that the different noise sources identified in the 2003 complaint could be distinguished and assessed separately.

30. We accepted that noise energy aggregates, so that the noise from the operation of the rides and the screaming could constitute a nuisance at levels below 43db on their own.

31. We found that the noises found at Farley House from Alton Towers can be of short duration, and that these types of noise events could be nuisances in themselves if they continued to occur on a frequent and regular basis.

32. We accepted that the use of an hourly average in assessing the level of noise..will not assess the effect of short duration

> noises from the site of higher levels which in themselves may cause a nuisance…
>
> 33. We accepted that there may be some commercial impact on Alton Towers from the order, but we had no evidence before us on the level of that impact…or the effect that would have on its viability.
>
> 34. We found that the financial constraints that Mr Barnes relied upon were only those which might be imposed by the parent company on his company, Tussauds Theme Park Ltd, in distributing finance and capital investment within the group of theme park companies. There was a substantial risk that this might happen. We found that Mr Barnes' real concern was not anything affecting the Alton Towers company itself but the decisions that might be made by the parent company in terms of how it evaluates the profitability of the various arms of its operation….
>
> 37. We found that it will not be possible for the Ropers to check to see if the general steps required by the order have been carried out or maintained or to what standard.

Concerts

> 38. We found that the Code of Practice on environmental noise at concerts…
>
> > d. sets no music noise levels (NMLs) for locations which are rural venues "normally used for major organised events" and the guidance in table 1 of the Code of Practice for 1 to 3 events does not apply and..
>
> 39. We found that Alton Towers is a rural location "normally used for major organised events" as defined in the Code of Practice."

8. As I have indicated above, annexed to the statement of case were a large number of documents and reports. As Mr Justice Collins indicated in his judgment already referred to I am able to contextualise or elaborate those findings of fact by reference to those documents, though the findings of facts themselves are fixed and such contextualisation or elaboration cannot be inconsistent with them.

9. In connection with fact number 27 the evidence of Mr Stigwood in his report dated 5 August 2005 at paragraph 3.2 was as follows:

> "As stated, acoustics is not an exact science and any levels set in the order cannot form a definitive measure or point between acceptable and unacceptable. A change of just a few decibels, 3 or 4db can mean the difference between acceptable and unacceptable.."

Mr Sharps' evidence on this issue was :

> "A change in noise level of around 3 db is not normally perceptible whereas a change of around 10db is about a doubling (or halving) of loudness."

And

> " the following "doze response" scale is often employed in environmental assessments: increase in noise level less than 3 db - imperceptible/none-; 3-5 db – perceptible/slight."

I refer below to certain passages in, respectively, the BS 4142 document and the WHO document referred to in the findings of fact and in the reasoned decision and in argument before me.

The appellants' submissions

10. Mr Hockman has focussed on three issues. First the noise level actually set, second the abatement order in respect of concerts and third, an issue of the exclusion of certain evidence.

The noise level set

11. Mr Hockman's main criticism concerns the order made in respect of the daily operation of the park which was intended to abate the nuisance deriving from a cumulation of sources namely: amplified music; amplified commentaries; screaming and shouting; and the operation of rides and, in particular, insofar as those sources produced noise as part of the daily operation of the park excluding concerts and firework displays. The terms of the order criticised are as follows:

"1. From 31 May 2007 you shall ensure that noise emission levels from the park from the sources named above do not exceed, individually or cumulatively, a level of 40db when determined in "free field" in, or at the boundary of, the garden of Farley House."

12. Mr Hockman submits that the court erred in law in imposing an order setting the maximum noise level as high as 40db. He says that it is irreconcilable with the facts found and was illegitimately influenced by commercial considerations.

13. He argues that, having found, by reference both to expert and lay evidence, a statutory nuisance where the noise level measured was 43dbA, it is irrational to suppose that the statutory nuisance will be abated by permitting a noise level of up to 40dbA. He says so for three inter linked reasons. First he says that the Crown Court was aware, or should have been aware, of the fact that the BS 4142 standard upon which they based their decision, when applied to this case, led to a conclusion that a level of 40dbA would be likely to result in complaints. Second, he says that the evidence of the experts, and the findings of fact based upon it, that the difference between 43db and 40db is barely perceptible makes irrational the conclusion that a reduction from 43 to 40db would be sufficient to abate the statutory nuisance. Third, he says that commercial considerations are inappropriate at the stage at which the Court is performing its statutory duty to make an abatement order and are only relevant where there has been a breach of an abatement order and a defendant has a statutory defence to a prosecution for such a breach where it proves that "the best practicable means" were used to prevent the effects of the nuisance. In that context "best practicable means" is defined, having regard, amongst other things, to local conditions and circumstances, to the current state of technical knowledge and to the financial implications (see section 79(9)(a) and section 82(9) of the Environmental Protection Act 1990).

Mr Caplan's submissions on this issue

14. Mr Caplan's response to each of these three points is as follows:

First he contends that Mr Stigwood himself, in his evidence, said that a difference of only 3db can mark the difference between what is acceptable and what is unacceptable. From that he contends that the difference of 3dbA, between 43dbA, and 40dbA, is not, of itself, evidence of irrationality where the Court concluded that requiring a reduction in noise level from 43dbA to 40 dbA would suffice to abate the statutory nuisance found. He contends that this is particularly so where 43dbA was the lowest level of measured noise found consistent with statutory nuisance but where the measured noise level went up to 52 dbA .

Second he points out that, as the court itself made plain in its statement of facts found, it was very well aware of the fact that at 40db the BS 4142 predicted that complaints would arise. He points out that BS 4142, whatever its use by way of analogy, specifically eschews being directly relevant as to the assessment of nuisance (see foreword of BS 4142). He also points out that, as the court was well aware, the WHO guidelines were also in play and provide that, in relation to annoyance "the capacity of a noise to induce annoyance depends upon its physical characteristics, …during day time few people are highly annoyed at LA levels below 55db and few are moderately annoyed at LA levels below 50db…" Furthermore he emphasises that, consistently, the Crown Court approached this case on the basis that "local inhabitants must expect some inconvenience from noise from Alton Towers". He therefore argues that it was by no means irrational of the Crown Court to fix a maximum level of 40dbA which it knew would be likely to generate complaints because the generation of complaints is not synonymous with the existence of a statutory nuisance. The Crown Court had determined that a statutory nuisance arose where measured noise levels were in the range between 43db and 52db. The level of 40db was below that bracket and it was not irrational, he argues, for the Crown Court to conclude that it could abate the statutory nuisance by fixing the maximum permitted noise level at 40db.

Third he argues that the Crown Court, whilst obliged to make an order which would abate the statutory nuisance, was obliged to have regard to all relevant circumstances so that it did not, by an order which was penal in its nature, require of the persons subject to it more than was reasonably necessary or proportionate in order to achieve the statutory requirement of abating the nuisance. He cites long standing authority *Nottingham Corporation v Newton* [1974] 2AER 760 (Divisional Court) as approved in *Salford City Council v McNally* [1976] AC 379 in support of this contention.

My conclusions on the general noise level point

15. In my judgment Mr Hockman is wrong to characterise the Crown Court as taking a decision which was irreconcilable with their findings of fact or illegitimate having regard to commercial considerations. On the contrary, I find that their conclusion on the 40dbA limit was specifically informed by Mr Stigwood's blue chart which was explicit that, at that level, BS 4142 predicted that complaints about noise would be made. They were intent on abating the statutory nuisance which they found existed on the basis of measured noise at the level of 43dbA. The deliberately chose a level which was 3dbA less than that against a background whereby Mr Stigwood had indicated that such a marginal difference could prove the difference between what was acceptable and what was not acceptable. They also had well in mind the fact that, in broad terms, according to WHO guidelines they were dealing with noise levels well below that at which those guidelines indicated that few people would be moderately annoyed and they specifically reminded themselves of their conclusion that the character of the area was such that local residents inevitably must expect some inconvenience from noise from Alton Towers. Far from being precluded from having regard to commercial considerations, in my judgment they were obliged to have regard to all relevant circumstances in ensuring that the discharge by them of

their obligation to make an abatement order, having potential penal consequences, was proportionate and no more than was reasonably necessary in order to achieve the statutory requirement. In fact, in connection with that part of the order, the court rightly found that the evidence of any adverse commercial impact was exiguous and indirect and that the respondent would have no difficulty in complying with its terms.

16. I have no doubt that the conclusion of the court was a surprise to the appellants who had, no doubt, hoped for a more exacting standard to be set. No doubt such a decision would have been open to the court as a rational exercise of its judgment. Mr Hockman accepted that, given the findings of fact set out in the statement of case, this is not a case where the court failed to take into account a relevant factor or, save for his complaint about commercial factors, took into account an irrelevant factor. On the contrary, this court was well aware of all the factors and knew what it was doing. In these circumstances the test on a case stated is, as Mr Hockman accepts, a high one. It is equivalent to saying that the court must have taken leave of its senses in making such an order having found those facts. In my judgment, the order which the Crown Court made was consistent with its approach throughout, including its repeatedly stated view that "local inhabitants must expect some inconvenience from noise from Alton Towers", had regard to the range of guidance available to it and cannot be characterised as irreconcilable with abatement of the nuisance, or irrational or the decision of a tribunal which must have taken leave of its senses. It follows that in my judgment the decision of the court in this regard was not erroneous in law.

The four subsidiary points made by Mr Hockman on the level of noise issue

17. The first is that the order paid inadequate attention to the individual components in the noise. In my judgment there is no error of law exhibited by the terms of the abatement order. It makes it clear that the maximum level of 40dbA applies both "individually or cumulatively". This was the subject of specific discussion at the Crown Court out of which this formulation emerged in the order. In my judgment, those compendious words are apt to impose an obligation couched in a single maximum level of 40dbA but applied to individual noise sources and/or the accumulation of those noise sources with other noise sources emanating from the theme park.

18. The second point is whether the Crown Court erred in law in taking, as the measure to be used in the abatement order, an hourly average rather than an average taken over a much shorter period such as 5 minutes. In my judgment there is no error of law in this approach being adopted. It was one of a number of ways in which the abatement order might be framed so as to abate the statutory nuisance and it cannot be said to be an error of law to choose one rather than the other.

19. The third discrete subsidiary point is that the order imposed three obligations upon the defendant to perform certain specific works with a view to reducing noise levels emanating from the theme park and to maintain the effectiveness of those works. It is said that the appellants have no means in the order of monitoring whether this work has been done, if so to what standard, and whether or not the maintenance works required are being complied with. In my judgment there is no error of law in the order that was made. Mr Hockman does not suggest that the requirements set out in paragraphs 3,4 and 5 are unhelpful to the appellants. He is happy that such specific requirements have been imposed upon the defendant. What he says is that there should also have been some provision in the order entitling them to access for the purposes of inspection. Whilst, no doubt, that would have been an improvement in the order it cannot, in my judgment, be said to be an error of law to exclude it. The main thrust of the order is the imposition of the maximum noise level at 40dbA.

Whether or not the defendant is complying with that will be capable of being monitored by the appellants. If there is a breach of that main requirement the whole question of compliance by the respondent with the terms of the order will come into play and the onus will be on the respondent to demonstrate, if they can, that the best practicable means have been used to prevent the continuance of the nuisance. That will necessarily involve them demonstrating, at least, that they have complied with the terms of the abatement order but, of course, if that were not, of itself, sufficient to satisfy the main noise level requirement then even that may not avail them. In my judgment, the effective and practical enforceability of the order is not diminished by the absence of any monitoring or inspection regime concerning the performance of or maintenance of the works required under paragraphs 3, 4 and 5 to the point that its absence makes the order without it erroneous in law.

20. The fourth discrete point concerns the construction of the order. It is said that it is not clear whether the abatement order concerning daily operation of the site would still operate at times when the specific provisions of the order concerning concerts and firework displays are in play. In my judgment it is clear from the terms of the order that these matters are cumulative. Accordingly, even when concerts or firework displays are occurring, the requirements in respect of the daily operations of the site will continue to operate. In any event the defendant accepts, through Mr Caplan, that that must be the correct position and, if need be, I would make a declaration to that effect.

Concerts

21. The criticism of this part of the abatement order focuses on the suitability of the Code of Practice for inclusion in an abatement order. It has to be clear and enforceable. The problem is said to arise from the terms of the Code of Practice itself. There is a table of noise level standards which vary according to the number of events per calendar year and the nature of the venue. The Crown Court, by its finding of fact, characterised Alton Towers as a type of venue where there is no noise level standard except where there are at least four events per calendar year. Further, if there are, the noise level recommended is not a specific noise level but is measured as 15dbA above the background noise level, as to the establishment of which there is also guidance in the Code of Practice. It is clear from the terms of the court's ruling on the abatement hearing that this uncertainty was a matter which concerned the appellant. The court attempted to deal with it as best it could by indicating that it was in reality likely that the appellants would know how many events were likely to take place in a calendar year and, in any event, if there were four they would then be aware of the standards which had to apply.

22. As things stand I have concluded that there is an inbuilt element of uncertainty. Mr Caplan, for the respondent, has made it clear that the evidence before the Crown Court was that there always were in excess of three such events a year, of the order of eight or nine he says. It was on this basis that it made finding of fact number 39 "that Alton Towers is a rural location 'normally used for major organised events' as defined in the Code of Practice." In my judgment, on that basis, the court erred in law in failing to make the order clear and should have removed the unnecessary element of uncertainty in a manner which accorded with the evidence of the historical use of the site of the site by providing, in the abatement order, that, when concerts are held the musical noise levels should not exceed that defined by Table I of the Noise Council's Code of Practice as it applies to all venues where concert days per calendar year number 4-12, and that this should apply regardless of the number of concerts which are in fact held during a calendar year. In my judgment, with that clarification the abatement order can be made effective. In my judgment, and subject to that

clarification, the Court was entitled to adopt, as the standard, the Noise Council's Code of Practice. Whilst it is true that it does not identify a specific maximum noise level, it does provide the means by which such maximum noise level may be calculated. This, coupled with what I have already indicated, that the abatement order will also operate on the same occasions in respect of the daily operations at a maximum of 40dbA makes the order both workable and sensible. I will make an appropriate declaration if so required.

Refusal to admit evidence

23. This is a discrete point. On 14 October 2003 Mr Hockman sought to recall Mr Stigwood in relation to two matters which, it was said, had been raised in evidence by Mr Sharps. Those two matters were: whether maximum noise level can be calculated with accuracy; and whether noise below the ambient level adds to the measured level and can thus be predicted. Mr Caplan resisted that application. He pointed out that the original case management order had envisaged each side putting in a single report for the abatement hearing. On the evening before one of those hearings, and without any leave of the court, Mr Stigwood produced a second very lengthy report which was put in and which raised new issues which responded to the report which Mr Sharps had put in. Mr Sharps himself had then been permitted to put in a report in answer to that. The document then sought to be adduced, dated 7 October but received by Mr Caplan's clients on 13 October, was an 8 to 9 page report with 60 pages of appendices dealing with points which Mr Sharps had raised primarily in response to Mr Stigwood's second report. Mr Caplan argued that there had to be finality in relation to experts' evidence. The judge acceded to Mr Caplan's objection and refused permission to recall Mr Stigwood.

24. It is said that he was wrong to do so, particularly because, as is apparent from one of the stated facts, one matter which informed the Court's decision was that they accepted Mr Sharps' evidence that some of the levels set out in Mr Stigwood's draft were incapable of measurement or calculation at Farley House. It is said that this was an issue to which Mr Stigwood's final report went and the Crown Court denied themselves information pertinent to that issue.

25. In my judgment the Crown Court was entitled to call a halt to the process of repeatedly adducing further tranches of expert evidence. It was entitled to do so on case management grounds and it was also entitled to do so in the interests of fairness. It preferred the evidence of Mr Sharps as contained in his two reports on this issue Mr Stigwood, had two opportunities to do the best he could to assist the Court in respect of the technical issues relevant to its decision. In any event it is far from clear that the issue was a crucial one as the decision, ultimately, to adopt the general approach of Mr Sharps was not determinative of the actual abatement order made because the abatement order specified a maximum noise level less than that for which Mr Sharps had argued in his reports.

Summary

26. It follows that I am prepared to make a declaration clarifying the position in respect of concerts in two respects: that the abatement order shall be read on the assumption that there are at least four events per calendar year; and that, on the days when there are concerts and firework displays, the daily operation abatement order provisions shall also apply. Save for those two matters I do not uphold the appeal. I set out below my answers to the questions posed in the case stated reflecting these conclusions.

The answers to the questions contained in the statement of case

27. 1. This question is not satisfactory. It assumes as a fact that the order on its face did not abate the nuisance. That does not follow from an analysis of the evidence. The court was not irrational in concluding that it could make an order such as it did having the effect of abating the nuisance. Accordingly, insofar as it can sustain a single word answer, the answer to the question is Yes.

2. The court was not irrational in setting the level of 40dbA in all the circumstances and, in particular, given its consistent view that "local inhabitants must expect some inconvenience from noise from Alton Towers." Accordingly, insofar as it can be given a single word answer, the answer to question 2 is Yes.

3. The court was obliged to have to regard to all relevant circumstances which included commercial considerations provided it performed its statutory duty of making an order which abated the statutory nuisance. In my judgment it was not irrational in concluding that the order that it made did abate the statutory nuisance. Accordingly the answer to this question is Yes.

4. First sentence. Save in respect of fireworks there was no evidence upon which the court could, or did, conclude that a more severe order than that which it made would close Alton Towers or stop it functioning as a commercial concern. The court did not fix the noise level in the order on that basis. The remainder of this question has not been pursued and does not call for an answer.

5. This is no longer a live issue and I am not required to answer this question.

6. The court was not irrational in making an order containing certain requirements for the respondent to perform certain works and maintain those works but not to provide any direct means for the appellants to monitor whether those specific requirements had been met. It was not irrational in concluding that the making of a general noise level order which could be monitored was sufficient to abate the statutory nuisance underpinned by the positive requirement to perform these additional works. The answer to the question therefore is Yes.

7. On the basis that it is now clarified that the Noise Council's Code of Practice, as referred to in the abatement order, will operate on the footing that there will always be at least four events per calendar year so as to attract the maximum music noise level set out in the table in that order, and that the terms of the abatement order relating to daily operation will continue to be of effect on occasions when, in addition, the provisions of the order relating to concerts and fireworks also operate the answer to question 7 is Yes.

8. On the same basis of clarification as is referred to in 7 the answer to 8 is Yes.

9. The answer to the first limb of this question is Yes. The answer to the second limb of this question is also Yes. The decision in relation to the exclusion of the evidence of Mr Stigwood was a case management decision and within the discretion of the crown court having regard to the evidence which had already admitted from both Mr Stigwood and Mr Sharps.

10. The answer to this question is No. The court was not perverse in concluding that the order which it made did abate the statutory nuisance.