MATIN 2140139666 - Application for review by Hounslow Council

This is an application by the enforcement authority for a review of a decision of my learned colleague Carl Teper refusing an application for review of a decision of my learned colleague Mamta Parekh allowing the Appellant's appeal. Essentially the facts were that the Appellant, who was heavily pregnant, parked in the loading bay to collect some medication; and the initial Adjudicator took the view that in the circumstances this could amount to "loading". The Council's contention is in summary that the Adjudicator could not reasonably have found on the evidence that this was so.

As this is a question of fact the Council might have some difficulty in overturning the decision this basis alone. However the Council's submission went rather further in that it submitted before me that the Adjudicator misdirected herself in law. It is submitted that she erroneously applied an interpretation of "loading" which is applicable only to the loading/unloading and *collecting/delivering* exemption for restricted streets etc; and that any extended meaning there might be that applies in exemption cases does not, or should not, apply in the case of a loading bay where loading in the strict sense , and nothing but loading will do The Council is clearly concerned that the Adjudicator's decision could be interpreted to extend the meaning of the term "loading" in the context of loading bays well beyond what has hitherto been understood. It has quite rightly given an undertaking that whatever the result of these proceedings it would not seek to enforce the penalty and is effectively looking for a decision on a point of principle

I note that in further written submissions the Council has now abandoned that particular point (which was the main plank in its original application for review as put to Mr Teper) It seems to me it is right to do so, but it also seems to me appropriate that I should give full reasons for my provisional view expressed at the hearing and in the light of which the Council has modified its position, not least in the event that the issue should arise in some future case..

The issue is effectively whether "loading" should bear the same meaning in the context of a loading bay as it does in the context of a loading exemption in restricted streets and designated parking places where it is not only loading/unloading" but "delivery /collection" that is exempted.

As a matter of principle it seems to me highly undesirable that the meaning of the term "loading" should bear two different meanings depending on where a vehicle is parked. This is not a conclusion I would arrive at unless there were clear authority to the contrary. There is quite enough confusion among the motoring public as it is as to the meaning and extent of the term; and it seems to me most unsatisfactory if the reasonable motorist, the man in the white van, should have to understand that loading means one thing on a yellow line and something else in the loading bay next door. The prescribed signage relating to loading restrictions and loading bays uses the same word "loading", and motorists ought to be able to assume that the same word means the same thing.

The Council referred me to the cases, particularly my decision in 1997 in *Westminster v Jane Packer Flowers PATAS.* That decision is of course no more than one Adjudicator's view of the law. However it was a decision made following the hearing of full and detailed submissions from Counsel for three parties, none of whom applied for review; and it has since been widely applied by Adjudicators and enforcement authorities. It decided (inter alia), in bare summary, that loading was to be viewed as a process which could include paperwork etc., and that in the case of commercial deliveries it was not necessary to demonstrate that the goods in question were of such weight or bulk as to require the use of a vehicle to transport them (which is otherwise the test to be applied) – See *Richards v McKnight [1977] RTR 289.* It also decided that the process of shopping for goods is not loading goods.

It also refers me to a High Court decision not cited to me in *Jane Packer* of which I, and, to the best of my knowledge, other Adjudicators, were unaware: *Marsh v Thompson [1985} QBD Unreported* (so

far as I am aware). However on considering these cases I can find no basis for the drawing of the distinction originally relied on by the Council.

None of these cases concern loading bays. All of them are cases where motorists parked where they would otherwise not be permitted to do so unless a loading exemption applied. Whilst in some cases including *Richards v McKnight* the exemption was in the form of loading or unloading or delivery or collection, in others (including *Sprake v Tester (1955) 53 LGR 194* and the Scottish case of *Macleod v Majowska* (*1963) SLT (Notes) 51* was simply a loading exemption). *Sprake v Tester* has been widely applied and quoted in subsequent cases including *Richards v McKnight*, where it seems to me clear the majority of the Court at least had no difficulty in considering the principles set out in that case to be applicable and relevant to a loading/delivery exemption. Forbes J certainly drew the distinction originally argued for by the Council in the present case *("On the ordinary principles of construction the process of delivering or collecting must , under the Order, be intended to be something other than loading or unloading… ").* However this was a dissenting judgement and the majority of the Court does not appear to have agreed with him.

Has the position been affected by *Marsh v Thompson*? This was an appeal by way of case stated from a decision of the St Austell Justices. The facts were that the motorist, a sales rep, parked in a restricted street in St Austell whilst delivering to a pub "a small pack", later described as a "sample" of Schweppes drinks and hoping to obtain a further order. He took 11 minutes. The exemption in the TRO enabled the vehicle to park for "as long as may be necessary to enable goods to be loaded onto and unloaded from the vehicle". The Justices (unassisted by argument or cases cited) found that "*the respondent was delivering goods in the course of his employment as a sales representative and that in the light of the lack of any definition of the size or weight of goods in the relevant Order produced to us the size of the parcel was irrelevant*". They then found that in the light of their local knowledge of the area the time taken was not unreasonable and therefore found the Appellant was within the exemption. The High Court was unable to go so far as to say that the Justices finding was actually perverse, and therefore dismissed the appeal. However it clearly doubted that it was correct.

The Court referred to *Sprake - v - Tester (1955) 53 LGR 194* and *Richard v McKnight* and said this:

"It does not seem to me that inevitably the size of the pack which is carried is crucial to the decision. It may be that in most cases it is. Further it does not seem to me that it is always crucial to the decision that what is being engaged in at a relevant time is or is not a commercial transaction by way of trade. It is quite conceivable that a person who goes into a shop and buys something, having parked his car outside for the purpose of taking it away is nevertheless lawfully parked for that purpose if what is bought cannot conveniently be carried away by hand. The observations of Lord Goddard appear to contemplate the order covering a situation of that kind"

And later:

"where a small parcel is involved, that is to say a parcel which can conveniently be carried by hand, then whether or not there is a place close by where the vehicle can lawfully park it might very well be perverse of justices to come to the conclusion that a defendant who has parked in a no parking area has brought himself within the exemption. Even in the case of a commercial transaction.

These observations clearly have some bearing on the *Jane Packer* principles (which I consider below). However *Marsh v Thompson* is, again, a case where the exemption under consideration was purely a loading exemption, not a loading/delivery exemption. The Court in *Marsh v Thompson* referred to *Richards v McKnight* and clearly had no difficulty in applying the principles of the cases involving a loading/delivery exemption to a case where the exemption was expressed purely in terms of loading.

My conclusion is therefore that the High Court has not drawn the distinction originally contended for by the Council in the present case. I would only add that in my view such a distinction could lead to a

potentially peculiar result. If collection /delivery is to be distinguished from loading/unloading, (and hence all the case law on the meaning of loading/unloading to be restricted to cases where there is also a delivery /collection exemption), a Traffic Management Order which allowed a vehicle to park only whilst loading/unloading would not allow it to deliver or collect. The delivery driver would, under the terms of the order be allowed only to unload his goods but not to deliver them. This is self-evidently absurd.

The Council made one other submission with which I should deal – that the Adjudicator incorrectly dealt with the case as if it were a case of *exemption*. The Council is certainly strictly correct on this point; however it is it seems to me in the present case as, in many others, that it is a distinction without much practical difference. Insofar as there is any difference it is not likely to be one that will operate to the Council's advantage. The position is that in the case of an exemption the onus of proving (on the balance of probability) that exemption applies lies on the motorist. In the case of a loading bay the *legal* burden of proof is on the Council to demonstrate that loading was *not* taking place. However once a reasonable observation period shows the vehicle parked with no sign of loading in progress the *evidential* burden of proof shifts inexorably to the motorist to produce persuasive evidence to show that, despite the lack of observed activity, loading was in progress. This is, as no doubt the Council itself would agree, a somewhat arcane point; and the *practical* reality is that in all loading cases where loading is not seen to be in progress after a reasonable observation period, evidence from the motorist is normally required to prove that it was. I would therefore not regard the fact that an Adjudicator has used the language of exemption as meaning that he or she had misunderstood where the legal burden of proof lay. (If there were any error or misunderstanding in this regard it would in any event operate in the Council's favour by imposing on the motorist the legal burden of proof which lay on the Council).

Marsh v Thompson

In the light of *Marsh v Thompson* some modification of the principles set out in *Jane Packer* is required but in my view the basic principles of that decision remain unaffected. It seems to me the key points to be drawn from this case are:-

1) Just because the transaction is not by way of trade it may still be loading. This is consistent with *Jane Packer* (and *Sprake v Tester*)

2) Going into a shop to *buy* something heavy may still be loading. This is also consistent with *Jane Packer,* to the extent that it was always the case that merely because an item was paid for did not automatically remove it from the loading process, viewed as a whole. The decision does not amount to saying that every shopping expedition is "loading". It all depends on what is meant by "buying". If all that takes place is the paying for of a selected heavy item it is probably loading. If it is wandering round the store making ones' mind up what to buy then, in my view, it is probably not. As always there will inevitably be cases close to the borderline on the facts. The borderline however has shifted a little and a person, for example, in Argos going through the process of ordering up and purchasing a heavy item may now fall on the right side of that line where previously that might not have been so.

3) The fact that it is a commercial transaction may not *always* mean it must count as loading. In my view it is still the case that couriers and professional deliverers on their rounds are covered, even if any given delivery is a small item *Cf*. the milkman. It would in my view be wholly unrealistic to expect for example a DHL courier to ask himself on parking whether his next parcel is big enough to qualify. However the greengrocer taking, say, a bag of lemons to his shop as a one-off may now find himself in difficulty if the item is small. The prescient decision of my learned colleague Mr McFarlane in the case *of Kenny (2013) PATAS 2130636755*, referred to by the Council in its written submissions, (a gas engineer collecting paperwork held not to be loading) is good example of the application of this principle.

Conclusion

Mr Teper clearly considered the original decision to be "generous", as do I, but found it was open to the original Adjudicator to form that view and that it was not in the interests of justice to review the case on its particular facts, clearly a reference to what are on any view compelling mitigating circumstances.

The question of whether the use of a vehicle is necessary to transport goods is a question of fact, and in principle the physical condition of the person doing the transporting may be a relevant factor in deciding whether a vehicle is required to transport them as opposed to their being transportable by hand. I would also accept that the fact that there was another able bodied person in the vehicle could be a relevant factor. Personally I would not have reached the decision reached by the original Adjudicator.

However the narrow issue before me is whether Mr Teper's decision to reject the application for review is so plainly wrong in law or unsupportable on the facts that the interests of justice require a review of that decision. I am unable to say that it was. Mr Teper clearly applied his mind to the basic point which was that the decision was essentially a finding of fact and whether it was open to the original Adjudicator to come to the finding she did. No doubt for that reason he did not feel it necessary to deal with the issue of the absence of a delivery/collection exemption; and as that point has in any event now been conceded by the Council it seems to me that the Adjudicator's failing to give detailed reasons for rejecting it should not form grounds for review. I have only done so myself in this decision to avoid any possible doubt in the future. He also clearly took into account, as he was entitled to do , whether it would be in the interests of justice to set aside a decision where on any view the facts amounted to compelling mitigation, and where, in my view, any Adjudicator would have made a strong recommendation for the exercise of discretion when refusing the Appeal.

It is only in exceptional circumstances that a party having been unsuccessful in an application for review can renew it. There has to be finality in these proceedings. Councils must always bear in mind that the decision of one Adjudicator is in any event not binding on another, and if they feel they have been hard done by on a point it does not prevent them from arguing it again in a subsequent case. Alternatively their remedy is to apply for Judicial Review in the High Court. I am not persuaded that the interests of justice in this case require a review of Mr Teper's decision.

The Council, however, will clearly understand from this decision that the Adjudicator's decision in the present case is one that may be confined to its own particular facts, and is not to be understood as one which turns their loading bays into shoppers' car parks. The principles I set out in *Jane Packer* as modified by *Marsh v Thompson* remain in my view good law, and properly and fairly applied, should be perfectly adequate to ensure that loading bays are only used for the purpose for which they are clearly intended i.e., in general terms, movements of commercial or heavy goods.

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