

## ***Judgement in Regina v. Fairoaks Airport Limited ex parte Richard Roads***

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### **J U D G E M E N T**

*Tuesday, 3rd November 1998.*

MR JUSTICE DYSON: The Respondent is responsible for the management of Fairoaks Airport, Surrey. The airport is designated for the purposes of section 35 of the Civil Aviation Act 1982 ("the 1982 Act") which, so far as material, provides:

"(2) The person having the management of any aerodrome to which this section applies shall provide-

(a) for users of the aerodrome,

(b) for any local authority ... in whose area the aerodrome or any part thereof is situated or whose area is in the neighbourhood of the aerodrome, and

(c) for any organisation representing the interests of persons concerned with the locality in which the aerodrome is situated,

adequate facilities for consultation with respect to any matter concerning the management or administration of the aerodrome which affects their interests."

The airport had previously been designated for the purposes of section 8 of the Civil Aviation Act 1968 which was in the same terms as section 35(2) of the 1982 Act.

The Applicant is a local resident who has lived about one-third of a mile from the boundary of Fairoaks Airport since 1967. He suffers interference with the enjoyment of his property due to the noise and vibration caused by aircraft using the airport. He has been actively involved in local amenity groups and is currently a member of the Chobham Society, an amenity society with about 300 members. He is also convenor of the Fairoaks Environment Consultative Committee.

In these proceedings he complains that by excluding representatives of any local residents' organisations from membership of its airport consultative committee, the Respondent has failed to provide adequate facilities for consultation for organisations representing the interests of persons concerned with the locality, and is in breach of the statutory duty imposed by section 35 of the 1982 Act. The Respondent does not dispute the existence of the statutory duty, but contends that it has provided adequate facilities for consultation with such organisations notwithstanding that their representatives are not members of the committee.

This is apparently the first case in which the court has had to consider the scope of the duty imposed by section 35(2) of the 1982 Act.

#### **The Consultative Committee**

The inaugural meeting of the committee took place on 1st February 1972. The terms of reference were to provide a means of consultation for the purposes of section 8 of the 1968 Act and to afford a channel of communication and discussion between the interests mentioned in section 8 whereby, inter alia, the local authorities and local residents could bring to the notice of the management any matters affecting their interests arising from activities at or from the aerodrome. There were to be 10 members of the committee: five from the managers and occupiers of the aerodrome and one each from the Surrey County Council, Bagshot Rural District Council, Chertsey Urban District Council, Woking District Council and Chobham Parish Council. Following local government reorganisation, the successor local authorities became members with effect from 1st January 1974.

The constitution provided inter alia:

"3. (3) The Committee is a corporate body on which each member is appointed not solely as a representative of the Council, company, body or other organisation but as an individual member exercising local or special knowledge and individual judgment. Whilst able to ensure that the views of the Council, company, body or other organisation by which the member is appointed are clearly understood he or she is entitled to speak and vote for or against those views.

...

(7) The Committee shall have power to co-opt additional members not exceeding two in number to serve for such period or periods as the Committee may determine."

No provision was made for representatives of organisations representing local interests to be members of the committee, and that has always been its position.

In the early 1970s the Fair Oaks Action Group ("FAG") pressed for representation on the committee. In refusing to accede to this application, the committee made it clear to FAG and other local organisations that it was willing to meet their representatives to discuss matters of mutual interest relating to the aerodrome at any time. In October 1970 the committee again decided not to amend its constitution, but that arrangements should be introduced to enable organisations to request the inclusion in the committee agenda of items for consideration, and jointly to appoint a representative to allow meetings of the committee to speak on any ideas they had put forward. Although dissatisfied with this proposal, FAG accepted it. They nominated Mr Alan Browne as their representative. In 1977 he was replaced by Dr Robert Evans, who served for about 11 years.

In 1978 FAG decided to disband itself. During the 1980s, Dr Evans attended committee meetings, although the Applicant contends that this representation was in practice ineffective primarily because Dr Evans was not a full member of the committee, being excluded from parts of the meetings. There seems to have been something of a lull in the complaints by the local interests.

The question of representation surfaced again in the late 1980s. In April 1989 the Chairman of the Chobham Society wrote to Councillor Bailey, the Surrey Heath Borough Council representative on the committee, objecting to the proposal that the County Council representative, who happened also to be a member of the Chobham Society, should represent both interests. On 16th December 1991 the Chairman of the Chobham Society again requested that the Society be represented on the committee. On 26th February 1992 the committee refused this request. It considered that it had the most appropriate membership, having members elected from local government bodies, and that the parish councillor for Chobham would be able to keep the Society informed of any relevant matters.

The arrangement for provision of the minutes of the committee meetings via the Parish Council began to break down in 1994. Sometimes the Chobham Society received no copy of the minutes at all; where minutes were received, they arrived very late.

In January 1995 the problem of night flying by helicopters, which had long been of concern to local residents, came to a head when an application was made by the Respondent for a hanger at the airport for the use of police helicopters. Moreover, from about January 1995, the police helicopters started to fly regularly up to 2 am. There were other developments or threatened developments which the residents viewed with alarm.

A new body, the Fair Oaks Environment Consultative, was formed on 8th April 1995. It comprises four amenity societies, two residents' associations and various individuals. The relationship between the local interest organisations and the consultative committee became more strained. Eventually, on 1st November 1986, a letter before action was sent to the committee in which proceedings were threatened unless representatives of the residents' groups were invited to join the committee.

## **Guidelines issued by the Department of Transport**

These were announced for airport consultative committees on 1st March 1988. They were expressed to provide a voluntary code and intended to assist those who have a responsibility to provide facilities for consultation pursuant to section 35 of the 1982 Act.

The following passages are material:

### **"2. The Purposes of Consultation**

Consultation is not intended to detract from the responsibility of management to manage aerodromes. The aim should be to provide an effective forum for the discussion of all matters concerning the development or operation of the aerodrome, which have an impact on users of the aerodrome and on "people living and working in the surrounding area. Consultation should be seen as a positive and interactive process through which the concerns of interested parties can be taken into account - aiming to allow the efficient operation of an airfield while moderating its impact on local communities. It should be seen as a means of keeping all interested parties adequately informed of matters affecting them, of providing an opportunity to try to reconcile any differences of view that may arise, and for resolving differences through agreed voluntary action.

### **3. The Form of Consultation**

Consultation is best carried out through a committee set up for this purpose, except where it can be demonstrated that the particular circumstances call for a different arrangement.

### **4. Composition of Consultative Committees.**

#### **4.1. Representation**

...

An appropriately representative committee is therefore likely to include members from all of these groups in balanced proportions. Local interests may be represented by parish councils and local residents' groups, community groups or groups formed to represent local interests in the environment or amenities. Committees should seek to achieve a comprehensive input to their deliberations by ensuring fair representation of the full range of users of the aerodrome and of local interests and by seeing that members are given an equal opportunity to express their views. In pursuing this, account may have to be taken of the need to secure a committee which is not so large that it is unable to function effectively."

### **Submissions on behalf of the Respondent**

Since the Respondent seeks to justify treating bodies referred to in section 35(2)(c) of the 1982 Act differently from the way it treats bodies referred to in paragraphs (a) and (b), it will be convenient to start with the submissions advanced by Mr Gordon QC. His starting point is that there is nothing in the statutory language which requires that a consultative committee be established by an airport operator, since section 35(2) does not prescribe any particular form of consultation. From there, he moves to the submission that if an operator chooses to establish a consultative committee, there is nothing in the language of the statute which requires that to be done in any particular form or manner. All that is required is that adequate facilities for consultation be provided, and this gives the operator a measure of discretion, subject to overall fairness.

He further contends that there is nothing in the language of section 35(2) which requires each of the three categories to be treated in the same way provided that they are all treated fairly. The question of fairness or adequacy involves the exercise of judgment on the part of the Respondent which will depend on local conditions and circumstances, and which is capable of being exercised properly in different ways; and the question for the court is to consider whether overall the Respondent has exercised its judgment in a manner which is manifestly unfair to the aggrieved group.

Turning to the facts of this case, Mr Gordon submits that the facilities for consultation afforded to the local residents' groups are not manifestly unfair. He points to a number of features of the arrangements that are in place which ensure that the facilities are adequate. These are: (i) paragraph 3(3) of the constitution was specifically included to enable representatives to ensure that local views could be articulated by the members both on behalf of the organisations that they represented and as individuals. Thus the representatives of the category (a) and category (b) groups can and should represent the interests of the category (c) group as well as their own; (ii) the complaints of individual residents about the manner in which the airport is operated are invariably dealt with by the Respondent and dealt with courteously; (iii) those complaints are made known to the consultative committee and taken into account by it; (iv) any development which requires planning permission will be subject to the usual requirements as to publicity so that local residents will have advance notice and be able to make representations to the consultative committee about them; (v) paragraph 3(7) of the constitution of the committee provides the right to co-opt up to two members: this is a valuable means whereby the views of category (c) bodies can be made known to the committee; (vi) Chobham Parish Council is a member; and (vii) the committee is always willing to meet representatives of local residents' organisations to discuss any matters of mutual interest.

Looking at the position overall, he submits that it is not manifestly unfair in these circumstances to exclude representatives of the category (c) bodies from the committee, since the mechanisms for consultation that are in place do afford to those bodies adequate facilities for consultation.

I should say that in his first affidavit sworn on 23rd December 1997 on behalf of the Respondent, Mr Mackay deposes at paragraph 10(v):

"There have been requests from a number of local interest organisations for direct representation on the Consultative Committee in recent years and the Respondent has had to balance representation for such organisations against other factors such as the likely pressure from other organisations for similar representation. On each occasion the issue of membership has been discussed by the Consultative Committee the Committee members have also taken the view that, in the light of the existing representation, the fact that individuals who are also members of local interest organisations may represent those interests (albeit ex officio), and the Respondent's constant readiness to discuss matters with organisations and individuals, the membership should remain unchanged at present. The Respondent has also agreed to circulate minutes via the Parish Council to the Chobham Society."

### **Submissions on behalf of the Applicant**

Mr Steel emphasises the fact that the categories specified in section 35(2) of the 1982 Act include residents' associations and action groups as a separate and distinct class in addition to aerodrome users and local authorities. He accepts that the statute does not oblige an operator to establish a consultative committee. He submits, however, that, where a committee is established, consultation

under the Act is inadequate in law if one of the section 35(2) categories is treated materially differently from the others in the consultation process.

To be treated materially differently in this context includes the exclusion of one of the categories from the committee. It is unfair to require one category to have its views expressed only through the agency of another category, or to prevent a category from being able to participate in discussion, thereby enabling it to seek to persuade others to see its point of view.

None of the features of the existing arrangements relied on by Mr Gordon cure this fundamental unfairness in the consultation facilities provided by the Respondent to the category (c) group.

The local authority members of the committee cannot adequately represent the interests of the category (c) group. They are obliged to represent the interests of all their constituents. These will include the people who work at the aerodrome and the people who use it. As Mr Mackay says at paragraph 14 of his first affidavit:

"... The approach taken by the Respondent is recognised by the local planning authorities who accept the role that business aviation has to play and work closely with the Airport to ensure that an appropriate balance between the interests of the airport and the surrounding locality is struck. ..."

Complaints, submits Mr Steel, are by definition always dealt with after the event. The real grievance of the residents is that the category (c) bodies are denied the opportunity of influencing decisions before they are made. The point about planning permission does not carry much weight, since it is only development on the largest scale which will require an application for planning permission to be made: see Part 18 of Schedule 2 to the General Permitted Development Order 1955 which prescribes the circumstances in which development is permitted at an airport without going through the hoops of the planning legislation.

The helicopter hanger and helicopter landing pad at Fairoaks aerodrome were both examples of development which was deemed to be permitted under the provisions of Part 18. As to paragraph 3(7) of the constitution, Mr Steel submits that this does not advance matters much, since there is a maximum of two in the number of possible co-optees, and persons may be co-opted from any of the three section 35(2) categories or indeed from outside those categories altogether. As for reliance on the fact that Chobham Parish Council is a member of the committee, Mr Steel submits that Parish Councils have the interests of other residents to consider, for example people employed at the aerodrome who may be unaffected by noise in their homes, and not only those of residents who are concerned about noise from the aerodrome. The affected areas of Ottershaw and Woking do not even have Parish Councils. The fact that the committee is always willing to meet representatives of local residents' organisations to discuss any matters of mutual interest does not meet the fundamental point that they are denied the opportunity to participate in the discussion at committee, and influence its decision.

## **Decision**

### *The approach*

The first matter that I have to decide is, what is the correct approach for the court to adopt in reviewing the procedures established by the Respondent for the discharge of its statutory duty. At one stage Mr Gordon submitted that I should determine this application in favour of the Applicant only if persuaded that no reasonable airport authority could consider that the facilities for consultation were adequate. He later modified this submission, but continued to maintain that the hurdle to be surmounted by the Applicant is a very high one, and that I should grant relief to the Applicant only if satisfied that there was manifest unfairness.

It is clear, in my view, that the test that I have to apply is not a *Wednesbury* test. The question for the court is whether the facilities for consultation are adequate. It is common ground that this imports or, at any rate, is analogous to the test of fairness that underpins the approach of the court to questions of procedural irregularity. That the test is not a *Wednesbury* test seems to me to emerge clearly from *R v Take-over Panel, ex parte Guinness* [1990] 1 QB 146, 178G-179A, 184C-185F. It is for the court to decide whether there has been unfairness in cases of procedural irregularity. It must follow that it is for me to decide in this case whether the facilities for consultation provided were adequate. The question arose in argument as to the extent to which I should give weight to the Respondent's own view as to the adequacy of the facilities provided. In *ex parte Guinness*, Lord Donaldson MR at page 178H said that fairness must depend in part on the tribunal's view of "... the general situation ..." and that a *Wednesbury* approach to that view might well be justified. Lloyd LJ said at page 184D:

"... Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so "distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. ..."

Again, at page 185C, he said:

"I would only comment at this stage that no amount of urgency in compensating former shareholders would justify depriving Guinness of a fair opportunity of presenting its case. It was said that the concept of fairness is flexible; and so in a sense it is. I would accept that what is required of a tribunal, if it is to be fair, must depend on the nature of the task in hand and the circumstances prevailing at the time in question. But it is certainly not flexible in the sense that once what is fair has been ascertained, the tribunal can be allowed to fall short of that standard by so much as an iota.

Secondly, if, by his emphasis on the panel's balancing task, Mr Buckley was hinting that the decision as to what was fair in the present case was really one for the panel rather than the court, then I would disagree. One can understand the view that the panel, with its great experience of City affairs, is well equipped to decide what is fair by City standards. The court does not seek to match the panel's experience in that regard. But it does have long experience of other tribunals of all sorts, high and low. It would be failing in its duty if it did not enforce those principles of fair procedure which it has developed over many years. As the court pointed out in *Reg v Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] QB 815, the unique character of the panel should not, and does not, exclude it from the court's purview in this or any other respect."

In this case I think it right to take account of the Respondent's views of "the general situation", to use the words of Lord Donaldson, and its opinion of what is practicable. I also consider that I must take into account the fact that the Respondent has clearly given much thought over the years to the question whether category (c) groups should be represented by membership of the committee. But I do not consider that I am enjoined by what Lloyd LJ said in *ex parte Guinness* to give great weight to the Respondent's opinion that the facilities that it has provided are adequate. It seems to me that that is essentially a matter for the court to decide. The Respondent is not a tribunal with specialist knowledge which is relevant to a judgment on what is fair. Nor do I accept Mr Gordon's submission that I should find in favour of the Applicant only if satisfied that the facilities provided are manifestly inadequate or that there is manifest unfairness.

#### *Application to the facts of the case*

The starting point is that Parliament has identified three discrete groups, each of which is entitled to adequate facilities for consultation with respect to any matter concerning the management or administration of the aerodrome which affect their interests. Broadly speaking, it is likely that the interests of the users of the aerodrome will not coincide with, and will usually be opposed to, the interests of the category (c) group. As is exemplified by the facts of this case, the interests of local authorities (category (b)) are likely to be neutral in the sense that they will seek to hold the ring between the two other groups. It is because the interests of the category (c) group are likely to be in conflict with those of the category (a) group, and the category (b) group are likely to adopt a neutral position that it is likely that, if an operator establishes a consultative committee, adequate facilities for consultation will require representatives of all three groups on it, and in reasonably balanced proportions.

That was the view of the Department of Transport expressed at paragraph 4.1 of the guidelines, and I agree with it. I cannot improve on the language of that paragraph. It does not follow that there has to be numerical equality of representation from the three groups, but there must be sufficient representation from each group to ensure that the views of that group are adequately expressed. As Mr Steel submits, the whole point of having a committee is that its members should have the opportunity to participate in discussion and influence its decision.

On the face of it, therefore, by excluding the category (c) group from the committee, the Respondent was failing to provide adequate facilities for consultation to that group. That is why I have summarised the submissions of Mr Gordon before turning to those of Mr Steel, since it seems to me that it is for the Respondent to justify the differential treatment according to the category (c) group, and satisfy the court that notwithstanding their exclusion from the committee members of that group are provided with adequate facilities for consultation within the meaning of section 35(2).

I am unpersuaded by Mr Gordon's submissions, and largely for the reasons advanced by Mr Steel. The Local Authority members cannot properly and effectively represent the interests of the category (c) group. No doubt that is why Parliament identified the category (c) group as a separate group. It is clear from paragraph 13(iv) of Mr Mackay's first affidavit that the Respondent has been considerably influenced in its views as to the adequacy of the facilities provided by the fact that all members on the committee are required to serve not only as representatives of their own organisations, but also as individual members exercising local or special knowledge and individual judgment. In my view, however, it is unrealistic to suppose that the users will represent the interests of the category (c) group unless those interests coincide with their own. I have already dealt with the position of the Local Authorities.

Conscientious attention to complaints is no substitute for allowing the group to make its views known on issues relating to the management or administration of the aerodrome, particularly issues relating to its development. Nor is it sufficient that members of the category (c) group are or may be sent copies of the minutes of the committee meetings several weeks or months after they have taken place. Once a decision has been taken, it may be too late for a category (c) person to have any influence. Thus a number of the features relied on by the Respondent as affording adequate facilities for consultation are no more than the giving of an opportunity to make views known after the event. This would matter less if there were members on the committee who could reasonably be relied on to represent the views of the category (c) group even if not actually drawn from it. But, as we have seen, the committee members are likely to be opposed to the interests of the category (c) group or, at best, neutral.

It seems to me that Mr Gordon's best point is that the committee has the power to co-opt. It is not clear whether the appointment of Mr Brown and later Dr Evans was as fully co-opted members pursuant to paragraph 3(7) of the constitution. At paragraph 12 of his first affidavit, Mr Mackay refers to them as "observers". At paragraph 5 of his second affidavit, the Applicant refers to "the experience of co-opted membership" as having been unsatisfactory. Mr Mackay was airport manager from 1972 to 1996. He ought to know whether the power to co-opt was exercised. I infer from his affidavit that it was not. In any event, for the reasons given by Mr Steel, the power to co-opt is an unsatisfactory substitute for full membership of the committee.

I accept Mr Gordon's submission that, in assessing whether the facilities for consultation provided by the Respondent are adequate, it is necessary to have regard to all the relevant circumstances, and to take into account all the features relied on by the Respondent.

Looking at the matter in the round, I have reached the clear conclusion that, unless there are any factors which make it impracticable to afford full membership on the committee to representatives of the category (c) group, the Respondent is in breach of section 35(2) of the 1982 Act in denying that membership.

It is conceded by Mr Gordon that it would be possible to devise a system whereby a reasonable number of representatives of the category (c) group became members of the committee, and that this would present no problems for the efficient working of the committee. Mr Mackay deposes that to include members of all the category (c) organisations on the committee would result in a committee that was so large as to be unmanageable. Mr Steel does not take issue with that. The manageability of a committee is a factor to which explicit reference is made in paragraph 4.1 of the DOT guidelines. The spectre of unmanageability vanishes once it is agreed (as it is) that a sensible system for representation, whether by rota or otherwise, can be devised.

In the end, no satisfactory reason has been advanced by the Respondent for discriminating against the category (c) group. Nor is it suggested on behalf of the Respondent that the category (c) interests would seek to wreck the committee. There is no reason to suppose that the Applicant and those he represents want anything other than the right to be consulted adequately and not to be treated materially differently from the other groups in the consultation process.

For the reasons that I have endeavoured to explain, this application succeeds. I should add, for completeness, that when applying for leave, the Applicant did not apply for an extension of time. At one stage of his submissions Mr Gordon submitted that the Applicant had showed no good reason for extending time, so that the application should fail on that ground. He did not, however, persist with those submissions and, in my judgment, he was right not to do so. The breach of statutory duty which I found is a continuing breach. If this application had been refused on grounds of delay, a fresh application would have been made on the same grounds. In these circumstances, it is unnecessary for me to deal with the question of delay.

MR STEEL QC: My Lord, there is the declaration which is sought and is found in the Form 86A. This is in the bundle at page 2. I wonder if I could ask that the Order be in the form of the relief sought there, and also that the costs of this application be payable by the Respondent?

MR GORDON QC: My Lord, in terms of costs, I clearly cannot resist the costs Order.

MR JUSTICE DYSON: What about the relief?

MR GORDON QC: In terms of the relief I do resist it. Certainly, my Lord, the decision itself can be quashed. I apprehend that your Lordship will not feel it necessary to order mandamus because the Respondent would clearly comply with that. However, so far as the declaration is concerned, there is an important point to make, and it is this: the declaration is expressed in the most general terms:

"... all representatives of local residents' groups from membership of the consultative committee is unlawful."

This is a particular case, and on the particular facts of the case your Lordship has reached a decision of unfairness. It is, in my submission, very dangerous to grant relief of this sort which does not inevitably flow from the rationale of your Lordship's approach to the case. It is for that reason that I do resist.

MR JUSTICE DYSON: Mr Steel, it is sufficient, is it not, if I simply quash -- I do not know whether you are pressing for mandamus.

MR STEEL QC: No, my Lord. In the light of what Mr Gordon has said, I do not press it, if that helps.

MR JUSTICE DYSON: I think he has a point about declaration. I do not think it is necessary. The judgment is there. It sets out the reasons. I am not determining how many members should be admitted to the committee or anything like that. I am merely saying that the decision they have taken is an unlawful decision.

MR STEEL QC: In the light of your Lordship's judgment, I do not press, if my Lord is not seeking to make a declaration in those terms, for a declaration to be made, as it is clear in terms, that the reasons for the unlawfulness are as set out in the declaration. I do not think one has to go any further.

Insofar as they are different, then, of course they can be taken into account in the light of my Lord's judgment, which gives further reasoning behind it, that a declaration cannot do.

#### RULING

MR JUSTICE DYSON: I will simply quash the decision evidenced in the letter of 11th March.

MR GORDON QC: My Lord, there is one further application: for leave to appeal?

MR JUSTICE DYSON: I have had quite a lot of those this morning, Mr Gordon.

MR GORDON QC: My Lord, I hope I should be more successful. The two points are these: (i) it is the first case, as your Lordship has noted in the judgment, on the constituent elements of the duty; (ii) there is an important and difficult point on the threshold approach to fairness. Your Lordship has rejected our submission that the test is a high one or, to put it another way, that there must be manifest unfairness, and that is an important point.

There are other points. A second point, for I have not had chance to digest your Lordship's judgment in full, would be, as it were, the prima facie approach and the justification that the Respondent has to show to the court. It is important. It has wider ramifications from this case, and the extent of involvement of residents' groups in planning decisions is certainly a very controversial sub-text to the case.

For all those reasons, I do respectfully invite your Lordship to grant leave to appeal?

MR STEEL QC: It is a matter for the court entirely, my Lord.

#### RULING AS REGARDS LEAVE TO APPEAL

MR JUSTICE DYSON: I think, Mr Gordon, that this is case where, if you want to take it further, I am not going to stand in your way.

MR GORDON QC: My Lord, I am grateful.