TAKE NOTE: THEY MAY *be* NEEDED

How long should a note of a hearing be? Which parts of the proceedings can be left out? Do other people have to be able to read them? **NUALA BRICE** *addresses some common concerns.*

Note-taking is one of those judicial skills that everyone is expected to know without being taught. But it gives rise to many questions, some of which are considered below. Although the answers are based on the practice in the VAT and Duties Tribunals, they could be of more general application.

Is there a legal necessity to take notes?

A tribunal chairman is acting in a judicial capacity and has a judicial duty to make notes of the proceedings, including the evidence, for the assistance of any appellate court.

If you are lucky enough to be provided with a transcript of the proceedings, then there is no need to take a note, although most chairmen do. If the proceedings are recorded, then the need to make notes of the evidence may not be so pressing. But there will be a need to record other events occurring during the proceedings. (In the VAT and Duties Tribunals, whether a transcript is to be provided is for the parties to decide as they have to pay for it, not the tribunal. Nor are proceedings recorded.)

What help are they?

Even if an onward appeal from the decision of a tribunal only lies on a point of law, the notes of evidence before the tribunal can be relevant if the findings of fact are questioned. Permissible grounds for questioning the findings of fact are where a party alleges: either that there was no evidence to support a particular finding of fact; or that the tribunal failed to make some relevant finding of fact; or that the tribunal misunderstood the evidence; or that a finding of fact by the tribunal was perverse in the sense that no tribunal, properly directed, could have made that finding on the evidence before it.

The requirements

Where an onward appeal lies to the High Court, the requirements about notes of evidence will be found in the Civil Procedure Rules. Part 52 contains a Practice Direction. Paragraph 5.6 of the Practice Direction describes the documents that must accompany a notice of appeal to the High Court. Paragraph 5.6(7) refers to 'other documents which the appellant reasonably considers *necessary* to enable the appeal court to reach its decision on the hearing of the appeal'. The documents mentioned under heading 5.6(7) include at (c): 'any relevant transcript or note of evidence'. Paragraph 5.15 provides that, when the evidence is relevant to the appeal, an official transcript of the relevant evidence must be obtained. Paragraph 5.16 provides that, if evidence relevant to the appeal was not officially recorded, a typed version of the judge's notes of evidence must be obtained.

Thus, on the occasion of an appeal to the High Court from the decision of a tribunal, there is an obligation on the person appealing to provide the chairman's notes of evidence. However, the obligation is restricted to notes of evidence relevant to the appeal – in other words, notes of evidence that may be reasonably *necessary* to enable the High Court to reach its decision. Notes of evidence will thus be required if the appeal to the High Court involves one of the permissible grounds for challenging the findings of facts.

The purpose

What about the overall purpose of note-taking? Are notes merely an aide-memoire for the chairman's private purpose? The main purpose of note-taking is to

provide notes of the evidence that will be available to the appellate court if required. However, other important purposes are: to provide a comprehensive account of the hearing in case it is needed in the future (for example if an appellant claims not to have had a fair hearing); and to assist the chairman in writing his decision. Note-taking also aids concentration. A note that, say, a chairman informed an unrepresented appellant of the need for evidence rather than relying on simple assertions might be the only record that such a statement was made during the hearing.

How much?

As to whether the notes should be confined to the evidence or include all the proceedings, although the notes of evidence must be available for an onward appeal, the notebook should ideally record all the proceedings. For example, if there is a short adjournment to enable a party to consider late evidence, the fact of the adjournment and the length of it could be noted. Again, if there is an application during the course of the proceedings, the notebook may be the only record of the application being made and of the direction given.

It is most useful for the chairman to make a note of the legal arguments of the parties and the authorities cited.

Notes can be taken in shorthand or on computer or, indeed, in any other convenient way. They do not have to be taken in longhand in a blue notebook.

Who should take notes?

Should tribunal members as well as the chairman take notes? Paragraph 5.16 of the Practice Direction in the Civil Procedure Rules only refers to the 'judge's notes of evidence'. Although, therefore, it appears that there is no requirement for the notes of evidence made by a lay or wing tribunal member to be produced on appeal, it is highly advisable for all tribunal members to take notes. Some appellants to the High Court have asked for the notebooks of tribunal members as well as that of the chairman. If a specific direction is given, the notes should be produced. In one case an appellant asked the High Court to direct production of the notebook of the tribunal member as well as that of the chairman. The High Court gave such a direction and so the member's notebook was produced. Apart from being a good aid to concentration and a record for the member to refer to when considering the draft written decision, the member's notes may complement those of the chairman especially when, for example, the chairman is himself asking questions or dealing with procedural points and cannot conveniently make a full note as well.

Recording timings

It is not obligatory to record timings (of, for example, the start and end of a witness's evidence) but it is regarded as good practice. Timings could record, say, a late start and the reasons for it. Also, in long appeals of, say, five days, some advocates when commenting on the evidence given earlier in the hearing refer to it by reference to the date and time it was given. So, if times have been recorded, it is easier to locate the notes of the evidence referred to.

Similarly, although it is not obligatory to record breaks in the proceedings – for example, short adjournments to consider applications made during the hearing or before giving a decision – it is best practice to do so. The notebook can also record the reasons for allowing or dismissing the application or appeal.

Legal argument

It is most useful for the chairman to make a note of the legal arguments of the parties and the authorities cited. In many cases there will be skeleton arguments and so the notebook need only refer to numbered paragraphs in the skeleton. Frequently, however, skeleton arguments are either not referred to at all or are departed from quite considerably and so the definitive record of the arguments should be in the notebook with appropriate references to the skeleton arguments where necessary.

It is also useful to record in the notebook those authorities actually cited at the hearing – frequently the skeleton argument will refer to many authorities that are not mentioned orally at all. Finally, when referring in your notebook to documents, this can most easily be done by cross-referencing to pages in the bundles of documents as the bundles are kept by the tribunal centre (at least until the time for appeal has passed).

Questions and answers

When taking notes of evidence, it is not necessary to record both the questions and the answers, so long as the evidence of the witness is fully recorded. Some chairmen find it helpful to record both as this maintains the flow of the proceedings. Others keep a very good note of what the witness says without the questions.

The notes of evidence do not need to record every word that is said. It is also useful to make a note when evidence in chief ends and cross-examination begins and when cross-examination ends and re-examination begins.

Legibility

Because notes can be recorded in shorthand or in a computer, they do not have to be legible to all but you must be able to read them and to provide a typed version of any notes of evidence that may be necessary for an onward appeal. Some chairmen write legal shorthand, which is, of course, acceptable.

Tense

It does not matter whether notes are in the past or present tense, as long as they adequately record the proceedings.

Interrupting the flow

Many chairman feel concerned about what they should do when they are asking questions of the witnesses, and who should then take a note of the answers. The answer is that it is most helpful if the tribunal member or members could take a full note of questions asked of a witness by the chairman and the answers. Also, it is helpful if members could take a full note of any procedural matters or applications dealt with orally by the chairman during the proceedings. If there is no member, then the chairman should make his own note even though this may slightly delay the proceedings. As to what is more important – to take a full and accurate note but to delay the proceedings or to take a note that does not interrupt the flow of the proceedings unduly, it is desirable to find a method of note-taking that is both full and accurate but that does not unduly interrupt the flow of the proceedings.

At the end of the hearing

If you are a part-time chairman and you have written your decision, it is good practice to return all the papers and your notebook to the tribunal centre. However, some chairmen prefer to keep their notebooks. The important thing is that the notebook should be available if there is any onward appeal.

Appeals

Do you have to produce your notebook to the parties before they appeal? The standing arrangements of the VAT and Duties Tribunals are that notebooks are not released until the notice of appeal to the High Court has been lodged. It is only then that a decision can be made as to whether the notes of evidence are relevant to that appeal in the light of the grounds of appeal and whether the notes will be necessary to enable the High Court to reach its decision.

And if you are asked to produce your notes, are you required to turn them into a typed version or at least into a form intelligible to others? There is no requirement to turn long-hand notes of the whole appeal into a typed version, or to verify a typed version of the notes of the whole appeal prepared by an appellant, if either of these would by unduly burdensome. However, it would be usual, if the appellant indicated specific passages that were both reasonably short and relevant to his appeal, either to have these passages typed or to offer to verify a typed version prepared by the appellant.

DR NUALA BRICE is a full-time chairman at the VAT and Duties Tribunals.