Licensing

Licensing authorities, not objectors, must defend appeals against refusal

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Summary

The High Court has ruled that interested parties, responsible authorities, etc., who have made relevant representations on a licensing application under the Licensing Act 2003, do not have the right to appear as respondents to any appeal.

Key points for clients

The licensing authority is the only respondent to an appeal to the magistrates’ court by an aggrieved applicant against a decision not to grant or vary the licence, or to impose conditions.

- Licensing authorities must carry the principal burden (preparation, representation, costs) of defending their decisions on appeal. This is a significant departure from the regime under the licensing Act 1964.

- The magistrates’ court has a discretionary power to allow an interested party to appear on an appeal, but such a person may not get his costs. (It is probably only in exceptional cases that he will.) Early signs are that the inability to recover costs is a deterrent to interested parties applying to be separately represented on appeals.

- Local authorities are now saddled with a significant potential financial liability if they are to defend appeals responsibly and effectively. It may be that this was not fully appreciated by Parliament when the 2003 Act was passed.

Background

Under the now repealed Licensing Act 1964 a person who objected to an application for a liquor licence and who attended the hearing to pursue his objection was specifically made a respondent to any appeal, in addition to the licensing justices. (Similar statutory provisions applied to betting and gaming licensing.) The four decades in which the 1964 Act was in force, however, saw a slow shift of responsibility for the conduct of appeals, from the justices to the parties themselves. When I began to be instructed in licensing appeals back in the 80’s, it was often on behalf of the licensing justices; but by the time the 1964 Act was coming to the end of its life in the early 2000’s it was almost unheard of for licensing justices to be represented on appeals, and the task of defending their decisions was left to the parties who had originally appeared before them.
The position was otherwise with regard to entertainment licensing. There, local authorities have long had jurisdiction; and appeals from their decisions were brought by complaint, the defendant being the local authority and no-one else.

When it consolidated the licensing of liquor and entertainment into one regime, the 2003 Licensing Act had to make up its mind which of these different procedural routes to follow – and it chose the ‘entertainment’ procedure: save for an exception in one class of appeal, the only respondent to an appeal under the 2003 Act is the licensing authority. The exception arises where there is an appeal against the grant or variation of a licence, or a refusal to impose requested conditions: in those appeals the licensee, whose licensing entitlements are under attack, is a respondent in addition to the licensing authority.

The Chief Constable of Nottinghamshire Police v Nottingham Magistrates’ Court

In the Nottingham case, the police asked for certain conditions to be imposed on a licence sought by Tesco in respect of a new supermarket. Nottingham Council accepted the police’s representations and imposed the conditions. Tesco appealed. The police wanted to be separately represented on the appeal: at a preliminary hearing they applied to be joined as additional respondents. The district judge ruled that the 2003 Act only provided for the licensing authority to be respondent.

The police brought a judicial review, arguing that the 2003 Act gave them a right (express or implied) to appear on the appeal. The High Court disagreed. Moses LJ held that the plain words of the 2003 Act could not be read as giving an express right; and that the repeal of those provisions in the 1964 Act that did give a right to objectors to be parties to appeals demonstrated that Parliament did not intend any such right to be implied in the 2003 Act.

Practical points arising

1. Licensing authorities should not expect appeals against their decisions to be answered principally by those whose adverse representations were accepted by them. For example, where on a review the police successfully achieve the revocation of a licence, on an appeal by the licensee it is the licensing authority (and not the police) who is the sole respondent and who must defend its decision to revoke.

2. The level of representation selected by the licensing authority is likely to be influenced not merely by the complexity or otherwise of the case, but by the level of representation adopted by the licensee, which may be (and frequently is) of the highest.

3. The magistrates’ court has a discretionary power to allow an interested party to appear on an appeal, separately represented, where it is necessary to do so in order to achieve a just resolution of the appeal in accordance with the licensing objectives of the 2003 Act. Because it is by no means certain that an interested party so admitted to an appeal will be awarded his costs, however, there is a distinct reticence on the part of interested parties to apply to be heard separately.
4. As has been mentioned above, when an interested party, responsible authority, etc., appeals the grant or variation of a licence, or a refusal to impose requested conditions, then the licensee is a respondent in addition to the licensing authority. In these circumstances only may it reasonably be expected that the principal work on the appeal will be undertaken by the licensee in the protection of what has been granted to him.

5. In failing to carry-through the entitlement of ‘objectors’ to appear on appeals the 2003 Act has burdened local authorities with a significant potential financial liability if they are to defend appeals responsibly and effectively.