CONDITIONS & THE DUPLICATION OF BURDENS

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In this section of the day's proceedings I propose to talk about the important question of the conditions that can be attached to a premises licence. Important because conditions now (predictably) hold such a central position in the new licensing regime - unlike the '64 Act where conditions could *not* (to all intents and purposes) be changed other than at the time of a new application - and consequently were not a significant element of the regulatory framework for the vast majority of premises.

The 2005 Act changed all that. Applicants were invited to outline in their 'Operating Schedules' the way in which they would control the premises and licensing authorities were able, in the particular circumstances to be outlined by Tom Cross, to translate those measures into enforceable conditions. They were not slow to appreciate the value of this power. In fact the first battle which was joined over the Act concerned the extent to which authorities might (unlawfully, it was held) 'encourage' applicants to tender full operating schedules (which could subsequently form the basis of conditions on the licence) - *R (on the application of the British Beer and Pub Association) v Canterbury City Council* [2005] EWHC 1318 (Admin), 169 JP 521, Times, 11 July, [2005] All ER (D) 285 (Jun), DC.
A further example of the importance attaching to conditions in the new Act may be seen in the fact that, where problems arise during the currency of a licence, committees are empowered upon review to impose conditions to address those issues. This is a critical power which enables a committee to focus precisely upon the cause of the difficulty and impose conditions which address that issue with equal precision (and arguably, penalise the licence holder – see *R (Bassetlaw District Council) v Worksop Magistrates' Court* [2008] WLR (D) 350 QBD).

There are several points to note concerning the imposition of conditions in such circumstances.

(1) First, of course, any condition imposed must be *intra vires.* The original and eponymous authority for the concept of a particular degree of unreasonableness in a decision making body is, of course, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 (CA) in which the Master of the Rolls, Lord Greene (Somerville LJ and Singleton J concurring), held that under the Sunday Entertainments Act, 1932 it was not *ultra vires* a licensing authority when allowing[1] a cinematograph theatre in their area to be opened on Sundays, to take into consideration matters concerning the well-being and the physical and moral health of children and to impose a condition that children under the age of 15 years (whether accompanied by an adult or not) should be excluded from the theatre;

[1] Under s.1(1) of the Sunday Entertainments Act 1932

(2) Second, (and slightly strangely, in my view) whilst a committee (or court) may impose conditions having permanent effect following the review of a licence, if the authority decide that such conditions are to be of limited duration, then such period may not exceed 3 months;[2] and

(3) Lastly, remember of course that a committee may not, by the imposition of conditions, prevent the holder of the licence from making any application that would otherwise be lawful (see e.g. *R (on the application of Ashton) v Bolton Combined Court* [2001] All ER (D) 26 (Sep), Admin Ct).

Crawley and Movida - practical examples of conditions imposed

In *Crawley Borough Council v Stuart Attenborough* [2006] EWHC 1278 QBD (Admin) Mr Attenborough was the holder of a justices' licence for the Royal Oak, a cosy family-run pub backing on to playing fields in Ifield, just outside the town centre. During the period of transition between the old and the new Acts he had applied for a modest extension of his hours. Despite the fact that there had been minimal complaints over the years in relation to the house, Mr Attenborough soon found himself at the centre of a vociferous objection from the EHO (who was in fact the only formal objector to the application). The subsequent decision of the committee was difficult to rationalise in that:

1. Evidence was admitted by the chairman concerning previous hearings conducted under the LG(MP)A '82;
2. Live & recorded music was refused – but *dancing* was not; and
3. The hours for sale of alcohol was restricted – although no objection had been raised to this activity;

After a number of attempts to negotiate the problem away, the matter finally came before the magistrates. Following a lengthy hearing they did not hesitate to grant Mr Attenborough the hours he sought.

The licensing authority were not to be beaten. They invited the justices to state a case in respect of both the costs which had been ordered against them and the conditions which had been imposed, including:

- "New Year's eve – 38 hour rule"
- "Recorded music only after 24.00 will be jukebox and background music"
- "Noise level checks at the boundaries to be carried out between 23.00 and 24.00 when live music is being provided"

One only has to consider how an authority might prosecute for breach of these conditions to realise that they were hopelessly inadequate as far as enforceability was concerned. A celebrated example of just such a difficulty might be found in *R v London Borough of Hammersmith and Fulham, ex p Earls Court Ltd* (1993) Times, 15 July, in which the owners of the venue succeeded in quashing a condition requiring the organisers of events to: *'encourage visitors to travel by public transport and discourage their use of private cars'*. Kennedy L J held that the offending condition *'.. was so phrased as to require the applicants to secure a result, which they could not reasonably be expected to secure* **…'.** He regarded it

> *'.. as unreasonable because it imposes obligations backed by the criminal law without enabling the applicants to know with a reasonable degree of certainty what they must do to comply.'*

[2] See e.g. s.52(6), 53C(6) and 167(8).

The learned judge also said in passing that he had ‘no hesitation in saying that a condition **…** the meaning of which is so obscure that it necessitates the issue of a construction summons is unreasonable in a *Wednesbury* sense’.

In *Crawley,* noting that the parties had agreed to modify the offending conditions Scott Baker LJ (sitting with Openshaw J) (following a long line of authority stressing the importance of precision where penal sanctions could arise) recorded:

> *‘6. Let me say a brief word in general terms. It is important that the terms of a premises licence and any conditions attached to it should be clear; not just clear to those having specialised knowledge of licensing, such as the local authority or the manager of the premises, but also to the independent bystander such as neighbours, who may have no knowledge of licensing at all.*

He went on to say:

> *7. The terms of a licence and its conditions may of course be the subject of enforcement. Breach carries criminal sanctions. Everyone must know where they stand from the terms of the document. It must be apparent from reading the document what the license and its conditions mean.’*

Pausing here for a moment, one should recognise that it is not always easy for a decision-maker, whether at first instance or upon appeal, to get it right. This was brought home to me recently when, during a particularly contentious dispute between wealthy residents and the organisers of a national sporting event, the precise conditions to be attached to the 165 acre licence were not established during the planned 5-day appeal (which had to be abandoned for lack of time), but rather during one late-night mediation, hurriedly pulled together as a quicker, cheaper and (in the end) far more effective alternative.

One has to recognise, however, that mediation is still rarely used in the licensing context. This may change. In the meantime committees and courts will continue to impose conditions during the course of hearings. Where they do so, best practice is now to canvas any suggested draft conditions with the parties during a ‘discussion’ session, much as occurs at the conclusion of any planning inquiry. This was the view expressed by Mitting J in *R (on the application of The Lord Mayor and The Citizens Of Westminster City Council v Metropolitan Stipendiary Magistrate and Marc Merran [2008] EWHC 1202 (Admin)*, when he considered the extent to which the proper formulation of conditions should be determined by a dialogue with the relevant tribunal, saying:

> *‘Applying the tests which I have indicated, this is not a case in which the decision of the district judge should be quashed with the consequence that the hours for licensable activities would revert to their previous levels, but one in which by reason of the shortcomings in the wording of the conditions which I have identified* **…** *should be remitted to the district judge for her to determine finally what conditions should attach to the modified licence. In short, her conclusion that the licensing objectives would be promoted by conditions very similar to those which she imposed is unassailable but the conditions themselves require to be re-examined’.*

Considering the precise terms of the conditions the learned judge stated:

> *‘As Mr Gouriet for Mr Merran concedes, many of the conditions which are criticised can readily be improved and made clearer and more coherent by*

redrafting. I will indicate in the course of this judgment suggestions for redrafting that may ultimately find favour with the parties and with the district judge, but before I do that it is necessary to analyse the underlying principles upon which this application must proceed.

The principles were identified as follows:

1. .. before the decision of the district judge to allow the appeal on the basis of conditions can be quashed and the matter remitted to her for reconsideration afresh as a whole, I must be persuaded that the excision or redrafting of the conditions is so fundamental that I would be satisfied that the decision of the district judge to allow the appeal might have been different.

2. I draw that proposition from the words of Mann J in R v North Hertfordshire District Council ex parte Cobbold [1985] 3 All ER 486, as cited by Steyn LJ in R v Inner London Crown Court ex parte Sitki, 20th October 1993 page 9:

> *"If that which is excised is fundamental … then it would seem to me to follow that the character of the rest of it would be altered by excision. If excision would alter the substance … then excision is not permissible."*

As Lord Justice Steyn had noted, '*cases will be found on both sides of the line'*. The question for Mr Justice Mitting was *'on which side of the line do these conditions fall?'* the learned judge analysed the position thus:

> *The thrust of her [i.e. the District Judge's] decision was that with the imposition of the conditions that she proposed, the licensing objectives would be promoted. She did not in terms identify, nor can her decision be read so as to identify, that any one condition, or any group of conditions, would be relied on principally to promote licensing objectives. They were an interlocking set. Some of them are clearly more important than others. Some are either more precisely identified, or capable of being more precisely defined, than others. But it would be a mistake in my judgment to read the district judge's decision so that the striking down or drastic alteration of any one condition would result in the undermining of her reasoning. She clearly thought, and decided, that the extension of the hours requested, together with conditions of the kind that she proposed, would promote the licensing objectives. In those circumstances, a careful textual analysis of each condition, calculated to result in a conclusion that at a minimum it could be better worded and at a maximum it is not capable of enforcement, would not give fair effect to her decision. On the contrary, it seems to me that to give fair effect to her decision and to uphold the proper concerns of Westminster and the need for conditions to be certain so that the licensee knows what he must and must not do, the conditions should be scrutinised with care and, where necessary, redrafted, but not struck down.*

The learned judge noted that Westminster challenged the decision of the district judge not only on the ground that, for a variety of reasons, they were unenforceable and so ineffective or void. In addition, the council argued that the District Judge had not given Westminster adequate opportunity to address the details of the conditions before she spelt them out. Addressing that issue, the learned judge held (in an useful and important judgement for practitioners) that:

> *'it should be stated that where a district judge or Magistrates' Court is considering imposing conditions on the grant or variation of a licence it will almost always be good practice for the conditions under consideration to be outlined for debate by the parties. In that way errors of drafting can be identified, as can improvements, as can,*

most important, consideration of the underlying propositions behind the conditions themselves. It is unfortunate that that course was not adopted in this case…'

Implications of the decision in Bristol

Of course, it is not only important that conditions be precise and capable of enforcement. They should also, in the words of the Act and Guidance, be 'necessary for the promotion of the licensing objectives'[3] and 'proportionate'[4]. This was the other issue that arose in *R (on the application of Bristol City Council) v Bristol Magistrates Court* [2009] EWHC 625 (Admin). Ever since the conception of the new legislation there was a fear in the licensed trade and amongst those who represented it, that the new licensing authorities would replicate their traditional approach in relation to public entertainment and impose reams of conditions upon the new premises licences. In many cases they were not disappointed. Certain authorities simply adopted the 'model conditions' that they had previously developed and attached them to the new licences where the opportunity arose.

In *Bristol*, John Howell QC (sitting as a Deputy Judge of the High Court) considered an application by Bristol City Council, as licensing authority, for judicial review of a decision Bristol magistrates holding that five conditions imposed by the council at first instance had not been necessary (contrary to the council's contention) 'to promote the licensing objectives', as the matters covered were adequately dealt with by other existing legislation. The 'offending conditions' dealt with, briefly, matters such as noise from equipment on site, keeping passageways clear, securing floor coverings, the use of suitable floor surfaces and, finally, a prohibition upon the accumulation of rubbish etc. The council contended, inter alia, that a licensing authority could properly seek to 'strengthen' other legislation governing the operation of the premises without specific reasons relating to the premises in question.

Since Tom will address the issue of the Operating Schedule I will talk only about the character of the conditions themselves. In that regard, the learned Deputy Judge held that:

- if the steps suggested in the schedule were proposed in language which was general or opaque, the licensing authority might impose a condition *describing more specifically what was proposed* if that was necessary to promote the licensing objectives;
- there was no legal *obligation* to impose a condition in order to promote the licensing objectives, if the authority considered that *compliance with other legislation was sufficient for that purpose*; and
- whether additional conditions were ones which were 'necessary to promote the licensing objectives', or were adequately dealt with by existing legislation, *was a matter of law and fact for the decision maker to determine*.

Crucially, in *Bristol* the Administrative Court held that in the case of each condition, the conclusion of the magistrates had been one that they were reasonably entitled to reach. The court felt that it was not necessary to determine the further issue, raised in argument, whether it was necessary for an applicant to state specifically in his operating schedule that (quoting para 8.32 of the Secretary of State's statutory guidance) 'no measures will be needed to promote one or more of the licensing objectives, for example, because they are adequately dealt with by other existing legislation', because the local authority had accepted that 'the application was valid given what it did state'.

[3] S.18(4)(a)(i)
[4] Para 10.15 - Guidance of the Secretary of State published under s.182

The effect of *Bristol*, therefore, is not to say that there will be no circumstances where decision makers cannot impose conditions which appear to duplicate obligations arising under other regimes. It will be a question of fact for them in each case as to whether those alternative measures are sufficient, or are capable of more effective enforcement if embodied in a condition. What is certainly the case, however, is that committees and courts will have to direct their minds to the issue in each case.

Mandatory Conditions / Code of Conduct (Sch 4 Policing and Crime Bill)

A common thread running through the *Canterbury, Crawley, Movida* and *Bristol* decisions – in line with the Act and its supporting Guidance – is that that it was parliament's intention that the legislation should be essentially de-regulatory, freeing up (particularly) late night venues from a raft of standard conditions previously imposed by councils upon public entertainment licences. It was to represent 'light touch' government, with licences being largely subject only to bespoke conditions, imposed following representations made on specified grounds. Of course the reality (inevitably perhaps) has proved rather different, with many councils simply carrying over the standard conditions that they previously attached to late night venues. For the average operator such practices have proved difficult to resist, few licensees having the wherewithal to challenge such an approach. As previously suggested, *Bristol*, in particular, which broadly found such an approach to be unlawful, has been seen by many to be a very welcome development and has already been cited on numerous occasions in England & Wales as well as, apparently, north of the border.

In the shorter term, however, the Government appears to be intent upon moving in the opposite direction, increasing the spread of standard 'blanket' conditions as it proposes a new 'mandatory code' of nine standard conditions upon all licences authorising the sale of alcohol (Clause32 & Schedule 4). Those which were the subject of the current consultation included:

- a ban on 'irresponsible promotions' such as 'all you can drink for £10' and other activities that encourage excessive drinking;
- customers to be given the choice to buy the smallest measure available (e.g. a 125ml glass of wine) and offered free tap water;
- proposals making it more difficult for under 18s to buy alcohol online; and
- others to make sure that customers are given information at the point of sale concerning the effect of alcohol on health.

A further 'discretionary code' setting out a range of specified conditions which local authorities could adopt, might now, it seems, be made unnecessary by a very recent proposal for amendment to the Bill entitling licensing authorities themselves to initiate a review of a premises licence and thereby impose conditions upon the offending premises direct. Assuming that transpires, I think we can expect to see the issue of licence conditions becoming more important still, in years to come.

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