

MAKING AND RESISTING TECHNICAL OBJECTIONS
RECENT DEVELOPMENTS

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1. Abuse of Process – Harper’s Leisure

1.1 Although this is not on the agenda I want to flag up an area where the Act has gone more than a bit wrong. It is a serious defect in the 2003 Act (and presumably in the Gambling Act 2005) that no power is given to the licensing authority to filter applications or representations by responsible authorities. In the recent case of **The Queen on the Application of Harper’s Leisure International Ltd v Guildford Borough Council** [2009] EWHC 2160 (Admin) the Administrative Court decided that the licensing authority has no power to stay proceedings on general grounds of abuse of process.

1.2 This is unfortunate. One of the primary reasons why it is permissible to mount a collateral attack e.g. on the validity of a bylaw in civil or criminal proceedings for breach is that it makes justice more accessible to ordinary members of the public. That principle seems not to apply in the case of licensing.

1.3 It means that however oppressive and unfair police action may be, the respondent to an application for review must seek his remedy in the High Court by way of judicial review, with all the attendant trouble and expense. He cannot raise the matter before the licensing authority.

1.4 The power to apply for a review of a licence should be used a last resort, to be deployed only after attempts to resolve issues informally have failed. Unfortunately in some instances review is being used as a blunt instrument by the police without proper attempts being made to achieve informal resolution.

Many police forces and local authorities and have published enforcement protocols which provide for consultation before enforcement action is taken. They may also lay down the criteria that must be satisfied before particular types of action will be taken.

1.5 In any case involving licensing enforcement two documents must normally be considered

- i. The Enforcement Policy of the body seeking to take action
- ii. The Enforcement Concordat (if expressly adopted or incorporated by reference).

1.6 One should always explore carefully whether the enforcement protocols specified in those documents have been followed.

1.7 Most specific enforcement policies will be informed by the Concordat, which had its genesis in section 5 and Schedule 1 of the De-Regulation and Contracting Out Act 1994. The Government of the day chose to implement them in the form of the Enforcement Concordat. The De-Regulation Task Force Report in 1995 stated

*“Enforcers should place greater emphasis on assisting business to comply **by providing user-friendly advice rather than moving straight to prosecution.** We want to see the widespread adoption of the new principles in the De-Regulation and Contracting Out Act 1994 to give business the right to fair and transparent enforcement.”*

1.8 The Good Enforcement Model Appeals Mechanism Consultation Paper in 1995 stated in its introduction, “Improving the fairness, transparency and consistency of enforcement are key objectives of the Government’s deregulation initiative. The aim is to continue developing the **cultural shift among enforcement** bodies towards clearer guidance, more dialogue and wider co-operation and advice in order to support business and improve compliance.”

1.9 Thus on 4th March 1998 the Enforcement Concordat was promulgated, thereby implementing S.5 of the 1994 Act. On 11th March 1998 LACOTS issued a circular which stated “*Local authorities will be expected to implement its provisions.*”

1.10 The Concordat emphasises the partnership between business, individuals and the regulators. It applies to all enforcement action both criminal and civil/administrative. In a preamble it states that:

This document sets out what business and others being regulated can expect from enforcement officers. It commits us to good enforcement policies and procedures. It may be supplemented by additional statements of enforcement policy.

1.11 In that vein it goes on to set out a number of principles of good enforcement that subscribers undertake to follow.

The Concordat’s Principle of Openness states (my emphasis):

*We will provide information and advice in plain language on the rules that we apply and will disseminate this as widely as possible. We will be open about how we set about our work, including any charges that we set, consulting business, voluntary organisations, charities, consumers and workforce representatives. **We will discuss general issues, specific compliance failures or problems with anyone experiencing difficulties.***

1.12 The Concordat’s Principle of Helpfulness states:

“We believe that prevention is better than cure and that our role therefore involves actively working with business to advise on and assist with compliance.”

1.13 The Concordat’s Principle of Proportionality states:

*“We will minimise the costs of compliance for business by ensuring that any action we require is proportionate to the risks. **As far as the law allows, we will take account of the circumstances of the case and the attitude of the operator when considering action.**”*

1.14 Under the heading Principles of Good Enforcement: Procedures the Concordat states:

Before formal enforcement action is taken, officers will provide an opportunity to discuss the circumstances of the case, and, if possible, resolve points of difference,

unless immediate action is required (for example, in the interests of health and safety or environmental protection or to prevent evidence being destroyed).

Where immediate action is considered necessary, an explanation of why such action was required will be given at the time and confirmed in writing in most cases within 5 working days and, in all cases, within 10 working days.

1.15 The Enforcement Concordat is, therefore, a form of social contract between subscribing authorities and those who might be affected by enforcement action. Its provisions are capable of giving rise to legitimate expectations on the part of the latter.

1.16 The principle of proportionality requires that enforcement action must not only be proportionate to the gravity of the alleged offence, but also no more than is required to achieve its desired objective. In the context of enforcement action, this means that review should be neither a first nor an intermediate option, but always the procedure of last resort.

Failure to Follow Published Enforcement Protocols

1.17 A breach of a legitimate expectation is capable of amounting to an abuse of process. Thus if a regulatory authority takes enforcement action without carefully following its published enforcement policy the action may be regarded as oppressive and any proceedings may be stayed on grounds of abuse of process.

R v Adaway [2004] EWCA Crim 2831; (2004) 168 JP 645.

1.18 Although this was a criminal case involving alleged breaches of the Trade Descriptions Act 1968 its principles are equally applicable to administrative enforcement action such as review of a licence.

1.19 Likewise, a broken promise or undertaking not to take formal action is capable of amounting to an abuse of process if a prosecution is subsequently brought even if the promise was made by a party other than the authority responsible for bringing the prosecution.

R v Croydon JJ ex parte Dean [1993] QB 769

1.20 The promise, if broken, could form the basis of an estoppel. In **Johnson v Gore Wood & Co** [2002] 2 AC 1, 31 Lord Bingham said that the courts should not attempt to define or categorise what may be an abuse of process. Essentially the courts are concerned with protecting a party on the receiving end of proceedings from unfairness or oppression. It is an abuse of process to bring proceedings without first taking those procedural steps that a party has a legitimate expectation will be taken, since to do so is unfair and oppressive. Likewise, to bring proceedings which are disproportionate to the objective to be achieved is arguably an abuse of process.

1.21 In the **Johnson** case Lord Bingham cited with approval Lord Denning M.R.'s statement in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84 at p. 22 at page 122 where he said:

"The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through

them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

The Concordat and the Protocol are capable of giving rise to assumptions similar to those referred to by Lord Denning.

1.22 In both **Adaway** and **Dean** the applications to stay criminal proceedings on grounds of abuse of process were collateral public law challenges to decisions to prosecute that could have been made by way of judicial review. **Adaway** is unusual as the courts have historically shown themselves to be reluctant to interfere with the exercise of prosecutorial discretion. In **Adaway** the Court said:

“We cannot emphasise too strongly that before criminal proceedings are instituted by a local authority, acting in relation to the strict liability offences created by the Trade Descriptions Act, they must consider with care the terms of their own prosecution policy. If they fail to do so, or if they reach a conclusion which is wholly unsupported, as the conclusion to prosecute in this case was, by material establishing the criteria for prosecution, it is unlikely that the courts will be sympathetic, in the face of other demands upon their time at the Crown court and appellate level, to attempts to justify such prosecutions.”

1.23 An example of how the decision in **Dean** might be applied in a licensing context would be where the police told a licensee that if he took a particular course of action such as installing a new CCTV system or employing additional door staff etc the police would not apply to review the premises licence. If they later reneged on that undertaking, it would be open to the licence holder to argue that the institution of the review proceedings was unfair, oppressive and an abuse of the licensing process.

1.24 Unless the Court of Appeal reverses the decision of the Administrative Court the licence holder would have to raise the abuse argument before the High Court on an application for judicial review – if he can fund the application!

2. **Notice Points**

2.0 Sadly the fun that we all had taking unmeritorious notice points under the old betting and gaming legislation has been consigned to the dustbin of history not by the Gambling Act 2005 but almost simultaneously by the decision of the Administrative Court in **R v Newcastle Justices ex p TC Projects Ltd [2006] EWHC 1018 (Admin)**

2.1 The “complete code/ mandatory/directory” mantra has disappeared from the liturgy to be replaced by the “intended consequences of non-compliance” analysis.

2.2 Thus if there are any notice points waiting to be taken under the new regime it is doubtful that they will receive the same treatment as was meted out in **R v Leicester Gaming Licensing Committee ex p Shine** [1971] 1 WLR 1216. The line of authority of which that case formed part has to be regarded as a product of its time. It is not hard to detect a strong anti-gambling sentiment underpinning the policy behind those decisions. Once public policy towards gambling relaxed, it was only a matter of time before the courts began to apply mainstream public law principles to challenges to the validity of notices of application for betting and gaming licences. There was rarely any merit in the points and one was usually rendered speechless if challenged to show prejudice to anyone. Basically, TC Projects was a party-pooper waiting to happen.

3. **Time Limits for Appeal**

3.0 Are the time limits prescribed for appealing from the decision of a licensing Authority to the magistrates’ court e.g. in para 9 (2) of Schedule 5 of the Licensing Act 2003 immutable?

3.1 Although concerned with taxi licensing, the principles established in **Stockton-On-Tees Borough Council v Orangzabe Latif** [2009] EWHC 228 (Admin) might apply by analogy to similar provisions regarding time limits for appeal in the 2003 Act and the Gambling Act 2005. The 21 day time limit for appealing to the magistrates’ court in respect of licensing and other administrative decisions of local authorities is fairly standard.

3.2 Mr Latif was unfortunate. His combined Hackney Carriage and PHV licence was revoked by the Council because he had been cautioned for the simple possession of a class C drug, cannabis. Although the precise circumstances that led to the decision to revoke are not set out in the judgement, absent some suggestion that it impacted on his driving, it seems a bit harsh. Had it been lodged timeously, the appeal might well have had some prospect of success on the merits praying in aid e.g. **R v Barnsley MBC ex p Hook** [1976] 1 WLR 1052

3.3 The reasoning for the decision is relatively peremptory. Interestingly the judge was not referred to TC Projects from which he might have derived some assistance. Also no argument was raised that construing the time limit to be immutable would be a breach of the right to a fair hearing under Art 6 of the convention.

3.4 The fact that it was open to Mr Latif to re-apply for his licence is not a particularly compelling argument for shutting him out from pursuing his appeal. In an “application” case, for example, the requirements of procedural fairness would not be as great as in a “revocation” case. The Court was not referred to the authorities on this point.

3.5 It seems harsh in the extreme that in the context of a relatively short time limit, a person whose livelihood is at stake should be shut out from appealing e.g. if the notice is given a day late through no fault of his own. It may well not be valid to suggest that the time limit should be immutable in the interest of good administration. In Mr Latif’s case there was a further avenue of appeal to the Crown Court. Under the Crown Court Rules, the latter had a full discretion to extend the time limit for appeal but only in respect of its own jurisdiction. It had no power to extend the time limit for the initial appeal from the local authority to the magistrate’s court.

3.6 It seems incongruous that the Crown Court should have a power to extend a time limit but not the magistrates' court.

3.7 I would certainly not role over on this issue were it to arise in a licensing context. It may be that **Latif** is not the last word on this topic.

4. **Non-Appearance By A Party Proceeding in Absence**

4.0 In **The Queen on the Application of London Borough of Hammersmith and Fulham v Food City Express Ltd** [2008] EWHC 3520 (Admin) an applicant for the variation of a premises licence to extent hours to permit 24 hour trading was late for a hearing in respect of which he had notified an intention to attend. The licensing authority waited 10 minutes before proceeding in his absence. It then granted the application but with hours significantly less than those applied for. On appeal to the magistrates' court the District Judge considered that the authority had acted lawfully in commencing the hearing after 10 minutes but remitted the matter without hearing the appeal on its merits in the purported exercise of his powers to do so under s 181 of the 2003 Act on the basis that the first "proper" inter partes hearing of the matter should be before the elected local authority rather than himself. He did express the view that 10 minutes was not long enough to wait. The High court held that he was, in principle, entitled to remit without hearing the matter on its merits but did so for the wrong reasons. Stadlen J took the view that there was no real injustice to a person who had a hearing possibly taking away his livelihood commence in his absence because he was through no fault of his own 10 minutes late; after all he could appeal and have a full re-hearing on the merits.

4.1 Unfortunately, Food City Express were not represented on the appeal to the High Court and Stadlen J was not referred to **The Queen On The Application Of Hope And Glory Public House Ltd v City of Westminster Magistrates' Court** [2009] EWHC 1996 (Admin). The re-hearing may not be so "complete" as the judge envisaged. The applicant will face a Council represented by a solicitor or counsel that may have put together a better case against the application than could have been mounted at first instance.

5. **Human Rights in Licensing Cases – a Sliding Scale?**

5.1 The Recent decision of the Judicial Committee House of Lords (RIP) in **Belfast City Council v Miss Behavin Ltd** [2007] UKHL 19 The freedom to sell pornography as an aspect of freedom of expression under Art 10 of the ECHR apparently ranks pretty low in the hierarchy of rights and freedoms. Where does that leave the freedom to sell booze or make a book on the horses? A little higher than the pornographers? The power of a local authority to throw a moral cordon sanitaire around an area has been held not to be a breach of human rights nor indeed to engage them in any meaningful way. The margin of appreciation to Member States in this area of activity is about as wide as it gets.

5.2 The case was concerned with the substantive right to freedom of expression rather than procedural rights e.g. to a fair hearing. It will be interesting to see how the decision is applied to procedural rights in the context of sex establishment licensing. Is a sex-shop operator facing loss of livelihood any less entitled to a fair hearing than a bookmaker or public house selling discounted alcohol?



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