

## PREMISES

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1. The three cases discussed in this paper are all concerned with the operation of licensed premises, though each is about a different aspect of operation. Operators and licensing authorities alike will benefit from the clear judgment in *Bristol*, so far as it goes, on the role of the Operating Schedule under ss.17 and 18 of the Licensing Act 2003. All concerned with the orderly conduct of drinkers in licensed premises, and in particular the police, will do well to consider the implications of *Boyle* (and recent legislation) on exclusions. And both those who seek increased capacity on their premises licence, and their commercial rivals, can learn from the way that the case stated was dealt with in *Luminar Leisure*. Taken together these cases remind us of the many if not increasing number of challenges being faced by those responsible for the operation, licensing, and policing of premises.

#### The role of the Operating Schedule: the *Bristol* case

2. Perhaps the greatest significance of the judgment in *R (on the application of Bristol City Council) v Bristol Magistrates Court* [2009] EWHC 625 (Admin) (“*Bristol*”) lies in its treatment of an issue which had previously caused a divergence of views and in respect of which further litigation can be expected: what is the legal significance of the “Operating Schedule” (“OS”) forming part of an application to the determination of that application?
3. The factual background to the case was not unusual. Somerfield Stores Limited (“Somerfield”) applied to Bristol City Council (“the Council”) for a premises licence to permit it, in respect of one of its stores, to sell alcohol for consumption off the premises and to provide late night refreshment indoors. As relevant representations were received, the Council’s licensing sub-committee held a hearing into the application, at which it decided to grant a licence subject to a number of conditions. Somerfield appealed to the Bristol Magistrates Court (“the Magistrates”). The Magistrates decided to allow Somerfield’s appeal in relation to five of the conditions imposed, removing them from the licence. Bristol City Council brought judicial review proceedings against the decision of the Bristol Magistrates Court to remove those conditions.
4. It is convenient to divide the Council’s challenge into two broad lines of argument.
5. The first line of argument centred on the Council’s contention that the OS submitted with Somerfield’s application was deficient. It was submitted that the Magistrates had failed to recognise that the conditions in question had to be imposed to deal with that purported deficiency. It is necessary briefly to rehearse the relevant legislation to put the Court’s treatment of this issue in context.

6. It will be recalled that under s.18(2)(a) of the 2003 Act, where relevant representations are not made, a licensing authority “must grant the licence in accordance with the application subject only to – such conditions as are consistent with the operating schedule accompanying the application”. According to s.18(3), where relevant representations are made, the authority must hold a hearing (unless it considers one unnecessary), and, having regard to the representations, take such of the steps mentioned in subsection (4) (if any) as it considers “necessary for the promotion of the licensing objectives”. Under s.18(4)(a)(i), one of the “steps” is: “to grant the licence subject to – the conditions mentioned in subsection (2)(a) modified to such extent as the authority considers necessary for the promotion of the licensing objectives...”.
7. Against that background the Council argued that a licensing authority is under a duty to compose conditions consistent with an OS under section 18(2)(a), regardless of whether they will be required to promote the licensing objectives, and under section 18(4)(a), albeit in such a case with modifications for that purpose. It claimed that, as a result, an applicant’s statement of the steps proposed to promote the licensing objectives which an OS has to contain must be expressed in language capable of being enforced as a condition. It was submitted that Somerfield’s OS in the case was too general or vague to be converted into conditions, and that accordingly conditions such as those which were the subject of the appeal were required whether or not they were necessary to promote the licensing objectives. The Magistrates’ failure to grapple with this point was, it was said, fatal to their decision.
8. John Howell QC dealt both with the validity of an application for a premises licence and how a valid application was to be dealt with. The judge held that, providing an application is made in accordance with section 17 of the 2003 Act, which sets out those matters which an application must contain, the authority’s duty is triggered. If it is not so made, then the authority lacks power to determine the application. In this case, the application was plainly made in accordance with section 17 and the Council had rightly accepted it as having been so made. Further, the Court held, it was wrong to suggest that, in order to be validly made, the steps proposed by an applicant must be expressed in language which makes them capable of being enforced as a condition; there being no statutory provision which incorporates an OS into a premises licence granted automatically, it is a licence *itself* (and any conditions imposed on that licence), rather than an OS, which is required to be sufficiently certain to be enforceable.
9. Thus, said the judge: “...if the steps are proposed in language which is general or opaque, the licensing authority may impose a condition describing more specifically and concretely what is proposed if that is necessary to promote the licensing objectives. Such a condition would be consistent with the operating schedule, it would just be more specific” (see para [21]). But he emphasised that the threshold for the *validity* of an application nevertheless remains low: “while the possibility cannot be excluded that an application may be so deficient in information that it cannot be said to comply with the requirements of section 17, the fact that it does not address all the matters which a licensing authority considers it should do does not invalidate the application. The operating schedule is only required to include a statement of such

steps as the applicant proposes to take to promote the licensing objectives, not those which the authority thinks he should take” (see para [23]).

10. The Council’s challenge to the Magistrates’ approach to the OS was, in the judge’s view, misconceived. It was held that, apart from the mandatory conditions which must be included under sections 19, 20 or 21 of the 2003 Act, there is no obligation imposed by section 18(2) or 18(4) to impose any condition. The power to impose conditions under those provisions is to be exercised in accordance with an authority’s general duty to promote the licensing objectives. Even under section 18(2), where the authority is under a duty to impose conditions “consistent with” the OS, there was held to be no obligation to impose a condition to give effect to the OS if that condition is not necessary to promote the licensing objectives. Important implications flow from this which future litigation will no doubt explore. In particular, what would be the position in a given case where an authority considered that matters contained in an OS would in fact harm the licensing objectives?
11. The second broad line of argument advanced by the Council concerned the relationship between the conditions imposed by its sub-committee and other legislation. In the appeal to the Magistrates, it was argued on behalf of Somerfield that the impugned conditions were not necessary to promote the licensing objectives since the protection they sought to achieve was adequately covered by other statutory regimes. So, for instance, it was argued that a condition dealing with noise nuisance was unnecessary because such noise nuisance emitted from the premises as would fail to promote the licensing objectives would be adequately dealt with by the statutory nuisance provisions in the Environmental Protection Act 1990; there was no need or reason in this case for greater protection than afforded by that legislative regime. In essence the Magistrates accepted that argument. In the High Court, the Council sought to argue that the Magistrates had erred in so doing.
12. John Howell QC accepted that the Magistrates may have gone too far in saying, in one part of their decision, that the Council could not “lawfully strengthen Parliament’s clearly stated statutory provision without specific reasons which relate to the premises in question”. The judge commented that other legislation might in a given case be relevant but insufficient generally to achieve what is necessary to promote the licensing objectives. In the Court’s view, however, the basis for the Magistrates’ decision was not to be found in that rather infelicitous phrase: it was plain, on reading their decision overall, that the Magistrates did not consider that the conditions in issue were ones which were necessary to promote the licensing objectives as the matters in questions were, in their view, adequately dealt with by existing legislation.
13. Accordingly the Council’s claim, insofar as it impugned the decision of the Magistrates on Somerfield’s appeal, was dismissed. It should be mentioned for completeness that the Council succeeded on a subsidiary aspect of the challenge concerning the Magistrates’ award of costs against the Council at the appeal; but the Court’s reasoning on that point does not affect the law on that subject. What *Bristol* says about the proper understanding of sections 17 and 18 of the 2003 Act, by contrast, will no doubt remain critical for many years to come.

Exclusions: the Pubwatch case

14. Although *R (on the application of Boyle) v Haverhill Pubwatch* [2009] EWHC 2441 (Admin) is of most direct interest to those seeking to reduce crime and disorder in and around public houses, the principle at stake in the case goes much wider. It raises the broad question as to whether the decisions of local community schemes which require, for their effective operation, the participation of both private individuals and public bodies, are above the law altogether, even where those decisions have a potentially significant adverse impact on someone's private life. This is a question which may well be with us for some time given the increasing prevalence of such schemes and the perceived inadequacy of legislative regimes to deal with the problem of crime and disorder. It is an issue to which all those concerned with the operation of premises open to the public (albeit that they remain, at law, *private* premises) should be alive.
15. There have long existed tools available to public authorities (principally the police and licensing authorities) to deal with crime and disorder resulting from drinking in licensed premises. Drinking byelaws used to provide the principal means for controlling drinking activity in a specified area. Replacing those byelaws, the Criminal Justice and Police Act 2001 introduced Designated Public Place Orders ("DPPOs"), giving local authorities the power to designate *public* areas in which it is an offence to drink alcohol after being required by a police officer not to do so.
16. On 31 August this year the Government took the decision to implement Drinking Banning Orders ("DBOs") on application. It is worth pausing to consider that legislation to put the Pubwatch case in context. DBOs are civil orders that can be sought by the police or local authorities. They can be made against an individual only if two conditions are satisfied: (1) that they have engaged in criminal or disorderly conduct while under the influence of alcohol; and (2) the court considers that a DBO is necessary to protect persons and/or their property from further conduct by that person of that kind while under the influence of alcohol. If a DBO is imposed, the court must include such prohibitions as it considers necessary for the purpose of protecting persons or their property from the subject's alcohol-related disorderly or criminal conduct, on the subject's entering licensed premises. Thus, in contrast to DPPOs, the individual may be banned from specified *private* premises, as well as or instead of public streets or areas.
17. The Home Office has published guidance on DBOs<sup>1</sup>, which at page 9 exhorts a proportionate approach to the making of Orders:

"... It should be noted that a prohibition on entering all licensed premises within a specific area would result in the individual being banned from entering all premises that hold a premises licence. This will include supermarkets, convenience stores, cinemas and other outlets that have a licence to sell alcohol. The

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<sup>1</sup> *Guidance on Drinking Banning Orders on Application for Local Authorities, Police Forces, Magistrates and Course Providers within England and Wales* (Home Office, August 2009)

relevant authority applying for the DBO may wish to consider instead banning the individual from named licensed premises, banning them from specific streets or, should the circumstances warrant it, banning them from purchasing alcohol within a specific area.

Prohibitions should not be sought to ban individuals completely from entering supermarkets that sell alcohol (or other food outlets that sell alcohol), or garages that have a licence to sell alcohol, unless this proves to be absolutely necessary given the circumstances of a particular case ...”.

18. The making of a DBO is subject to full judicial safeguard as one would expect. An application is made to the magistrates or county court on notice. The individual knows the case against him and can mount a defence. There is a right of appeal by way of rehearing to the Crown Court.
19. But a DBO is not the only means through which an individual may be banned from a group of licensed premises. Another is by decision of so-called Pubwatch schemes – in some respects the replacement for the old victuallers associations – and which have grown in prevalence across the country in recent years. Increasing numbers of individuals have been told that by the decision of local schemes they are not to enter named licensed premises. In cases where all members of the local pubwatch are all or most of the licensed premises in an area, this can have far-reaching implications for an individual’s social life.
20. Such was the complaint of Francis Boyle. In December 2006 he received a letter from a PC Richard Baker - later confirmed in a subsequent letter from a Mr Gordon Mussett, the Chairman of the Pubwatch - informing him that he was banned for a period of 1 year from entering all premises (largely though not exclusively public houses) which were members of the scheme. The ban had been imposed by decision of the Pubwatch banning committee, composed of representatives of a certain quorum of member premises of the scheme. The reason given for the ban was Mr Boyle’s “involvement” in an incident of fighting in one pub on one evening. It was never alleged that Mr Boyle had committed an assault or other criminal act, and it was Mr Boyle’s evidence that he acted in self-defence throughout. Mr Boyle was never told the nature of the information on the basis of which the committee made its decision, nor the source of that information. In April 2008 he received a further letter alleging that he had persistently breached that ban and that it would be renewed for a further two years as a result. No details were provided of the alleged breaches. Mr Boyle was given no effective opportunity to challenge the renewed ban through any procedure of the Pubwatch itself. He sought therefore to challenge the decision in the High Court by way of judicial review on the basis (among other grounds) of procedural irregularity and breach of natural justice.
21. He was faced with two arguments.

22. The first was that the banning decision was not amenable to judicial review (and therefore, by implication, outside the reach of the law altogether) because it was not carried out in exercise of a “public function”. Only such functions, and not private ones, are reviewable by the court. Thus the argument ran: the banning decisions of the Pubwatch amount to decisions made by licensees and licensees alone in respect of something which any licensee has always been entitled to do individually, namely, to decide who comes onto their own private premises. The fact that, in the case of a Pubwatch scheme, that decision is taken collectively does not change the nature of the decision – it was and remains private. Mr Boyle’s argument pointed to the role of public authorities, and in particular the police, in the operation of the scheme and the banning decision at its heart. It was submitted that, such was the extent of the involvement of those authorities in the scheme, the scheme would not be able to function effectively or at all without it. Mr Boyle pointed to the fact that the scheme was run pursuant to a police policy and procedure document; that it was the police, not licensees, who undertook the recruitment of new members; that it was the police, not licensees, who undertook most of the administrative tasks allowing the scheme to operate; that it was the police, not licensees, who funded the scheme’s subscription to an on-line database containing the details of banned individuals and who were, to all intents and purposes, the “eyes and ears” of the scheme; and that, also the relevant licensing authority for the area had imposed conditions, in one evidenced case at the request of the police and not a licensee, requiring premises to be members of the scheme (the Constitution of which required adherence to the scheme’s decisions). All this, it was said, pointed to the predominantly public – rather than private – nature of the banning function in the particular circumstances of this case. It was submitted to be a case in which the State, more than merely *supporting* the exercise of a private function, *sustained* the exercise of a function which thereby assumed a predominantly public flavour or character.
23. The second, rather more technical line of defence to Mr Boyle’s claim was that, because of the “loose” structure of the Haverhill Pubwatch which did not have a fixed membership, and in which membership was held by relevant *premises* (and not legal persons as such), he was unable to identify any suitable defendant to the proceedings on which any quashing order could bite. The implication behind this second line of defence appeared to be (as the Judge accepted in his decision) that *even if* the function being exercised by the banning committee was public rather than private, and therefore reviewable, Mr Boyle could obtain no relief because there was no one to sue.
24. It is important to emphasise that what HHJ Mackie QC held in this case was predicated on certain findings of fact which would not necessarily pertain in all cases. In this case, the key finding, which was controversial as between the parties and keenly disputed by Mr Boyle, was that the Haverhill Scheme was run by the licensees and supported by the Police. Mr Boyle alleged that the police’s role extended beyond support and into control. This was principally because the scheme was operated pursuant to a police procedure and because police attended and presented information relating to individuals at banning meetings (albeit that there was no evidence of their active participation in the discussion preceding a banning vote). Evidence before the Court suggested that a controlling or dominant role by the police did pertain in other schemes in the country. For instance, it is the practice in a number of Pubwatch schemes for the police to issue banning letters to individuals on their own initiative

and without consulting the licensees (at least at the initial stage). The question of the reviewability of banning decisions made in this way would necessarily proceed on a different factual footing.

25. The Judge held that the technical issue of capacity was “something of a distraction because the Courts will almost always find a way of bringing an entity into proceedings if it is just and practicable to do so” [47]. Neither the fluctuating nature of the scheme’s membership nor the fact that members were not identified as legal persons would prevent a claimant suing in judicial review *providing that* a public function was being exercised. The proper course in such a case would either be to seek an interlocutory order (under CPR r.19.6) that an individual be sued on behalf of the unincorporated association or to sue each of the participating member “premises” individually through their corporate or individual owners [ibid]. The lesson for operators is that it is difficult or impossible to hide behind the capacity argument if a Pubwatch is sued. Once on the membership list (or, in the absence of a list, a member by express or implied agreement or conduct), joint and several liability *potentially* accrues.

26. As to the key issue of public function, the Judge held as follows. He reiterated (as the Claimant always accepted) that licensees had an unrestricted right to exclude anyone, particularly those who they see as troublemakers, from their premises. Similarly individual licensees had the right to exclude those whom *others* perceived to be troublemakers. Furthermore licensees were entitled to form groups or associations to pool information and discuss matters of common interest and to make the exclusion of troublemakers more organised and systematic. Having noted that, in the case of a Pubwatch ban, the source of the power lies in the licensees’ right at common law to exclude whomsoever they please, the Judge said:

“the only basis for an argument that these banning decisions are amenable to judicial review lies in the degree of involvement of the public authority and the police” [54].

27. On the facts of the case, the imposition of a condition by the licensing authority on certain licensed premises to be a member of Pubwatch did not convert the exercise of the private function into a public one.

28. As to the role of the police, the Judge observed that

“legitimate schemes run by sections of the public to discourage crime should not have to run the risk of their decisions being subject to the threat of judicial review simply because their work receives assistance and support from the Police or other public agencies ... It is entirely understandable that the Police should help and encourage membership and participation in Pubwatch just as they would in Neighbourhood Watch and other schemes. Most law abiding pub customers would think it very odd if the Police did not provide this encouragement and support” [55]

29. He concluded that the Haverhill scheme before him lacked the sufficient public element, flavour or character to bring it within the purview of public law [56]. Then, in a paragraph to which reference will no doubt be made in future cases, he added:

“I have been asked by counsel [for one of the Interested Parties] to make more general observations about Pub Watch schemes throughout the country. I do not consider that it is desirable or possible for me to do that. I would not however expect that the operations of a particular pub watch scheme would be open to judicial review if the role of the police and other public bodies was limited to that of the advice and support recommended by the Good Practice Guide of National Pubwatch [which had been] referred to above” [57].

30. The decision in *Boyle* has not been the subject of appeal. A number of observations can therefore be made about the state of the law:

- (1) It is implicit from the judgment (as those defending Mr Boyle’s claim themselves accepted) that the banning decisions of *certain* Pub Watch schemes may well be reviewable in the courts. All will depend on the way in which any given scheme operates. Apart from the single observation made in paragraph 57, the decision in *Boyle* was expressly limited to a consideration of the Haverhill scheme;
- (2) As to the way in which a given scheme operates, there appear to be two broad circumstances in which it is more likely (though by no means certain) that a banning decision may be held to be the exercise of a public function:
  - (i) First, if the role of the police (and / or any public body or individual acting in a public capacity) exceeds a “support and advisory role”. Exactly what this means may well be the subject of future decision. It was not enough in *Boyle* that the police actively marketed Haverhill Pubwatch and sought to extend its membership; nor that the police was present at banning meetings. Equally there was no evidence in *Boyle* (where there might be in another case) that it was solely the police who initiated the scheme or that the police acted as primary advocate for the banning of a particular individual. Plainly if there is evidence that a police officer, or other public official, has had a substantive input into the banning of an individual, it becomes more difficult to argue that the function exercised was purely private;
  - (ii) Secondly, if a licensing authority were to impose Pubwatch conditions on premises licences as a matter of course, whether

or not proposed by an operator in an Operating Schedule. If this were so, the position could eventuate whereby a person's being banned from premises X is entirely attributable to the fact that premises X is being compelled by the State to comply with Pubwatch bans (on pain of criminal penalty). That is to say, the person's ban would on proper analysis be by decision of the State, not by decision of the licensee (or licensee community).

- (3) The National Pubwatch Good Practice Guide is likely to assume a greater significance than previously in promoting acceptable practice. However, I do not understand Judge Mackie QC to be saying that the reviewability of a particular Pubwatch scheme will be referable to the contents of the recommended practice in that guide *whatever it says* (which may, of course, change over time). The key test (insofar as a "test" emerges at all from *Boyle*) is whether the State exceeds a role of advice and support. Those are the key words, though perhaps they do not unlock many doors.

31. From an operator's point of view, it will be encouraging to note that, providing that licensees and not public officials remain firmly in control of them, Pubwatch schemes can constitute an effective and unimpeachable means of banning disruptive individuals from one's licensed premises. The issue remains what role they will now play in the era of DBOs. It may be, especially if DBOs are perceived as ineffectual, that the police and licensing authorities will continue to take great interest (and perhaps great part) in the operation of the schemes. It seems likely that they will do so whether or not the DBOs are successful, not least because the non-availability of review by a court in the general case means there need not be a sound basis, or any basis at all, for imposing a Pubwatch ban. It can be a quick, cheap and – its critics might suggest – unaccountable means of achieving the same objective.

Remote disturbance: *Luminar Leisure*

32. The facts giving rise to *Luminar Leisure Ltd v Wakefield Magistrates Court and others* [2008] EWHC 1002 (Admin) were these. Luminar Leisure Ltd ("Luminar") operated a nightclub called Buzz Bar in the city centre of Wakefield with a licensed capacity of 1,380 patrons. Wakefield Metropolitan District Council granted a new premises licence (under the Licensing Act 2003) for the Buzz Bar with an increased capacity of 2000 patrons. At the time the application was made, and at least partly because of the fact of the application and the associated commercial consequences, Buzz Bar was operating at about 300–400 patrons. The operators of rival venues in Westgate appealed to the Magistrates' Court against the grant of that new licence. A District Judge allowed their appeal because of the effect which the increase in the number of people attending such a venue in Westgate would have, generally, on crime and disorder in the area. Luminar appealed by case stated (which is limited, of course, to points of law) against his decision. The questions posed in the case stated were:
- (i) whether it was open to the court to take into account evidence of crime and disorder in areas which were beyond Luminar's control;

- (ii) if so, whether it was reasonable to conclude that Luminar's premises would give rise to such problems and thereby undermine the licensing objectives;
  - (iii) whether it was a proportionate response to refuse the licence rather than impose conditions on it.
33. At the heart of Luminar's argument were certain passages from Wakefield's Statement of Licensing Policy. At its paragraph 3.10 the policy said:
- “The [Licensing Act 2003](#) is not a way to control anti-social or violent behaviour away from premises and beyond the direct control of licensees. There are other controls to deal with these matters, but licensees have a duty to be aware of these measures and support the strategies. It does, however, have measures intended to prevent and control these problem areas inside and in the vicinity of licensed premises and to make the licence holders, both personal and from premises, responsible for meeting the Licensing Objectives.”
34. The policy also discussed circumstances which might lead to the refusal of a licence even though, by itself, the grant would be acceptable, because of the cumulative impact of such licences on an area. It said:
- “If there are serious problems of nuisance and disorder arising, or beginning to arise outside, or some distance from premises licensed to serve alcohol, because of the number of premises in the area increasing the number of individuals in that area, then this could be seen as a cumulative impact. This would usually be more than the impact of all the individual premises put together and may make the area a focal point for large groups to gather and circulate away from individual licensed premises.”
35. After considering the potential for dealing with the problem by the imposition of conditions, the policy concluded that if conditions would be ineffective to achieve the licensing objectives, applications would still have to be viewed on their individual merits, but it would be for the applicant to show that the additional premises or capacity would not effect the cumulative impact and licensing objectives. In other words, the effect of a special cumulative impact policy would be to impose on the applicant the burden of showing that the licensing objectives would not be undermined rather than the other way round.
36. In that policy document Westgate Wakefield is now identified as a problem area. But there was not at the time any cumulative impact policy. Such a policy was being proposed but it had not been finalised or adopted. The policy was proposed with the support of the police. The district judge ignored the draft policy but took note of the circumstances which had led to, as well as the fact of, its being proposed.
37. It is important to understand, in relation to the first question on the case stated, that the appellant did not in fact contend that it was unlawful under the [Licensing Act 2003](#) for

such factors to be taken into account in deciding a premises licence application. Nor did it argue appellant contend that such evidence could only be taken into account if a specific cumulative impact policy had been adopted. Nor was it argued that the district judge had misinterpreted the local authority policy or indeed government guidance in some way. It was that the district judge had attached overmuch weight to events remote from, or at least not in the immediate vicinity of the premises. On the basis that the weight to be attached to factors such as these was a matter for the decision-maker on ordinary *Tesco* principles, Ouseley J answered the first question “yes”. He nevertheless commented:

“It may be that the passage in paragraph 3.10 of the Wakefield MDC guidance is too rigid, given the admitted relevance of those factors”.

38. There were a number of strands to Luminar’s argument on the second question. The first was that the district judge, in reality, had ignored the fact that the existing licence was for 1380, and so the increase involved in the new application was only 600. It was argued that the decision read as though the district judge was dealing with the full 2000 capacity increase. Ouseley J thought it clear, on a sensible reading of the decision, that the district judge understood that it was an increase of 600 and had properly concluded that persons other than those currently attending similar venues in Wakefield might be attracted to Buzz Bar in light of the variety of attractions at the venue.
39. The second strand to Luminar’s argument on the second question was as follows. The district judge had found that the appellant would engage in irresponsible drink promotion if it were found not to be attracting extra people into its premises in Westgate, or that it would do so in response to price cutting by rivals, which they might undertake in order to maintain their own levels of patronage. That conclusion, he said, was not supported by evidence and, in any event, had the district judge been of that view, he ought also to have considered the extent to which irresponsible drink promotion was capable of control through the effect of the policy of the local authority against it, enforcement via review of licences or their revocation under [section 52](#) and possible conditions in relation to consulting the police on certain aspects of promotion. Ouseley J said that he did not read the district judge's judgment as involving any finding at all that the appellant would engage in irresponsible pricing or promotion, though others might do so. Rather, it was a finding that, in an area where drink promotion is already a problem, competitive and promotional pricing could be used to attract people, without being irresponsible, if the appellant's aimed for patronage levels were not being met. There was no error of law in that approach.
40. The third aspect to Luminar’s argument was that it was not rational for the district judge to have put weight on the fact that the premises the subject matter of the licence application were only 50 metres away from rival premises because there was no problem currently identified resulting directly from that proximity, and it was accepted that there would be appropriate controls in relation to queueing for entry, so there was no basis for concern over some disorderly interaction there either. Ouseley J said that what the district judge had actually been saying (as he was entitled to do) was that the 50 metre area was where the increase in the numbers of itself, in a small and quite

confined area, with limited means of dispersal, was relevant. He was entitled to give that some weight.

41. The fourth line of attack was that the judge had erred in relation to a crime report which, it was said, was older and less up-to-date than oral evidence given of crime levels. Rejecting this argument also, Ouseley J held that the judge's approach was perfectly legitimate in the circumstances given that he found the report fuller and more reliable than the oral evidence. Question 2 was answered in the affirmative.
42. The third question concerned the proportionality of a refusal of a licence as opposed to one in which conditions were imposed. The conditions that were raised concerned the operation of a private hire car system within the premises. Ouseley J had little difficulty in finding that the district judge had rejected such a condition as an alternative to refusing the licence on the basis that it would not go far enough. So the answer to question 3 was "yes" and the appeal was dismissed.
43. While the *Luminar* case creates no new principle of law, it is worth pausing on the significance of its first aspect in particular. The judge held that it would (unless there were truly no evidence at all to sustain such a conclusion) be legitimate for a decision-maker to take into account prospective crime and disorder problems caused by the cumulative impact of increased capacity in the applicant's premises and the existing capacity of other proximate premises. Even in the absence (at the time of the district judge's decision) of a cumulative impact "designation" in Wakefield's policies relating to the premises in question, it was legitimate to take cumulative impact into account as a relevant consideration. In truth, Luminar Leisure would have been hard pressed to argue (as indeed they did not), that some principle of law precluded that approach. In addition to the references to cumulative impact in the authority's licensing statement mentioned above, the Secretary of State's s.182 guidance makes clear that:

13.32 The absence of a special policy does not prevent any responsible authority or interested party making representations on a new application for the grant, or variation, of a licence on the grounds that the premises will give rise to a negative cumulative impact on one or more of the licensing objectives.

44. That is to say, there is no need for a specific cumulative impact policy for cumulative impact to be a relevant consideration. Whether it is so in a given case will depend on the circumstances and the nature of the objections advanced, and the existence of at least some evidence to support it. Where it is relevant, the fact that the disturbance relied upon as a reason for refusal may be outside of the applicant's control provides, in itself, no basis for challenge.
45. The decision also reminds us, if reminder were needed, that complete *refusal* (in this case of increased capacity) on the basis of cumulative impact can be perfectly lawful. The decision-maker is entitled to conclude that, in principle, even with the imposition of conditions offered by the applicant, the licensing objectives would not be promoted in allowing the application.

46. Had the premises the subject of the application in the case fallen to be considered under a specific cumulative impact policy (which they did not, because none had at that time been adopted), there could have been even less doubt about the relevance of remote disturbance. But the effect of there being a specific policy would have meant a different approach at the hearing. As para 13.29 of the s.182 Guidance reminds us:

13.29 The effect of adopting a special policy of this kind is to create a rebuttable presumption that applications for new premises licences or club premises certificates or variations that are likely to add to the existing cumulative impact will normally be refused, following relevant representations, unless the applicant can demonstrate in their operating schedule that there will be no negative cumulative impact on one or more of the licensing objectives.

47. Thus, where a special cumulative impact policy exists, an application for increased capacity should only normally be allowed, as matter of policy, where the applicant, on whom a burden rests for this purpose, has demonstrated that such cumulative impact as results from the increased capacity nevertheless does not harm the licensing objectives.

48. However, cumulative impact policies involving *quotas* are susceptible to challenge.

13.38 Special policies must not impose quotas – based on either the number of premises or the capacity of those premises – that restrict the consideration of any application on its individual merits or which seek to impose limitations on trading hours in particular areas. Quotas that indirectly have the effect of predetermining the outcome of any application should not be used because they have no regard to the individual characteristics of the premises concerned. Public houses, nightclubs, restaurants, hotels, theatres, concert halls and cinemas all could sell alcohol, serve food and provide entertainment but with contrasting styles and characteristics. Proper regard should be given to those differences and the differing impact they will have on the promotion of the licensing objectives.

49. There is a difficult balance to be struck here. Clearly, in order to justify its own existence and to be usefully applicable in practice, cumulative impact policies need to address the question of appropriate capacity but avoid setting quotas. Cumulative impact policies have to be based on sound evidence in the first place, as a matter of policy; but they must not advocate predetermination of capacity issues on the basis of that evidence. The important focus therefore, for operators, authorities and objectors alike, is on the individual characteristics of the premises the subject of the application. If those characteristics are such that even a large increased capacity does no harm to the licensing objectives, an application can still be allowed even though a restraining cumulative impact policy relates to it. If, on the other hand, the increased capacity sought is only small, but the nature of the premises is such that even a small increase may exacerbate crime and disorder generally, this may legitimately form the basis for absolute refusal.



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