Summary Review and Interim Steps

DOES 93 FEET EAST PUT OATES 6 FEET UNDER?

On the 16th July 2013, a permission hearing for Judicial Review in the High Court tackled a difficult legal question that has troubled licensing practitioners for some time. Unfortunately, it did not resolve it.

The question of what happens to interim steps in the course of Summary Review proceedings was earlier examined in the case of Chief Constable of Cheshire v Gary Oates (Chambers, Runcorn) in the Halton Magistrates' Court on the 19th December 2011, where District Judge Knight determined, after hearing a fully reasoned argument by Philip Kolvin QC, that interim steps do not last beyond a review hearing in an application for summary review.

The practicality of that decision meant that any interim steps imposed prior to a full review hearing could not control the licensed premises if there was a decision to appeal the review. Steps taken on review are suspended for at least 21 days after the review hearing (the time for appealing), or until the conclusion of any appeal. This can have serious consequences for premises that are deemed to be seriously in breach of licensing objectives, and that should not be trading, in the view of Licensing Authorities. On the other hand, if, as is commonly the case, the view taken at interim steps stage (ie: to suspend) turns out to be an over-reaction for some reason, and the outcome on review is far less stringent, the Licensee is unable to appeal that decision without continuing the suspension and possibly putting themselves out of business. The extreme scenario at either end of the scale seems unsustainable, and the tension between them as yet unresolved.

The 93 Feet East case has been disseminated as the "answer" to this legal question, but on closer examination, it really is not. It is clearly an important step in this debate, and certainly supersedes the Gary Oates decision in terms of seniority, but it is

important to note that this was only a permission hearing in the High Court and not, as some have believed, a "judgment". Permission is an interim stage, and not a final hearing. It is not a precedent binding other Courts: [Practice Direction (Citation of Authorities) 2001 1 WLR 1001]. This has been widely misunderstood.

It is important, therefore, to consider the case carefully, and examine what it does, and even more importantly, what it does not say. In a number of respects, the transcript of the judgment reveals that it does not go as far as has been contended on its behalf. Some of the press releases concerning the case made some bold claims for it, such as:

> "Super-human" Judge Rules Interim Steps Remain in Force Pending Appeal"
>
> And
>
> "The case finally lays to rest any uncertainty that had been created by the ruling of the District Judge in the Oates case."

This last point might have been hoped for, but it is not, in fact, the case.

The Claimant in 93 Feet East wished to argue that the interim step (suspension) imposed on the premises did not last until magistrates' appeal. The complication in that case was that the magistrates' appeal had already been concluded, with an outcome favourable to the Claimant, by the time of the High Court permission stage. The Judge, Dingemans J, found that highly significant.

The arguments that were presented to him on behalf of the Claimant the Learned Judge described as "skilful"; ones that he was "attracted to as being arguable", which does not fit with a description of "unarguable" that has been publicised. His conclusion on whether he should send the case onward for full Judicial Review was that the case "did not *remain* arguable", for all the reasons that he gave:

> "I do not think, *in these circumstances*, that this remains an arguable proposition *on which to grant permission*". [Emphasis added].

This is a different matter from writing off the legal arguments as worthless and without merit, which he clearly did not do. He did not declare, as has been suggested, that the Oates decision was wrong on its own facts, although he clearly noted that earlier decision, and was aware at least of the reference to it at page 387 of Patersons.

In the 93 Feet East case, the decision of the Committee at full review was appealed to the Magistrates' Court, and, simultaneously, a claim for judicial review, relating to the interim steps element was lodged.

The Judge found that the Committee had reached two separate decisions at the full review hearing in 93 Feet East, ie: to revoke the licence as their final determination, and, separately, to continue the interim step of suspension pending the appeal. The Judge said this:

> "Miss Le Fevre, in skilful arguments on behalf of the Claimant, has identified that those are two separate decisions. There was then an appeal against the revocation, and the suspension of that decision pursuant to sections 53C(11)…"

The Learned Judge said:

> "This proposed claim for judicial review raises an issue of statutory construction of sections 54A, B and C of the Licensing Act 2003. Those were inserted by the Violent Crime Reduction Act 2006 and the statutory purpose, as Mr Clarke submits on behalf of the defendant and I accept, was so that problem premises, as they were perceived to be – I make no comment about whether the Claimant was rightly identified to be in that category – could be closed pending the revocation proceedings and final judicial determinations".

The problematic section in the 'new' legislation seems to be:

S53C(2)
"(c) secure that, from the coming into effect of the decision made on the determination of the review, any interim steps having effect pending that

determination cease to have effect (except so far as they are comprised in steps taken in accordance with paragraph (b)).”

This was the paragraph that DJ Knight considered was “beyond human understanding”.

S53C(2)(c) appears to relate to some step that needs to be taken “from the coming into effect of the ..determination of the review”, which would either be automatically after 21 days, or at the conclusion of the appeal. To date, we have no guidance at all on what it is that the Committee is supposed to do, to “secure” this, or by what procedure, at either of those two points in time.

The Learned Judge identified in the paragraph quoted above that he thought the purpose of sections 54A, B and C, as introduced by the VCRA 2006, was “to close problem premises”, “pending the revocation proceedings”. There is no explanation as to what he was referring to by “the revocation proceedings”. Presumably he meant the full review hearing, but there is some cause for concern that he understood those to be proceedings at which revocation was expected to be secured. Furthermore, it is concerning that he thought that there was only one statutory objective inherent in the three provisions; namely to “close” the premises. Given that the sections provide a wider range of interim steps than immediate closure, (and one option, of course, is to do nothing), it would appear inevitable that it cannot, in fact, be the only statutory objective.

It appears that here the Judge has caught – whether intentionally or incidentally – the whole interim steps dilemma in a nutshell. At an earlier stage of his judgment, he commented that:

> “I should note, out of fairness to the claimant, that that evidence, as to the extent [of their culpability] and cooperation, is challenged.”

In other words, the allegations which would have made the Club “problem premises” were not accepted by them, and it is instructive that the immediate closure was transmuted on appeal to allow immediate opening.

In identifying that the VCRA sections were intended to target "problem premises", the Judge simultaneously highlighted the problem inherent in identifying which premises are actually trouble, and which are not. Which ones are correctly identified at the outset of the interim steps procedure as problems which need urgent correction, and which ones are incorrectly identified, and therefore become the subjects of excessive and onerous steps, which cripple the business but are later agreed by all concerned to be unnecessary and inappropriate. It is easy to state what the statute was intended to achieve; it is much harder to apply it without error, and this is what the interim steps debate has always been all about. The wording of the statute operates to implement an absurdity and an injustice at both ends of its extremes – either when obviously miscreant premises are allowed to re-open and trade under the "Oates" approach, pending the outcome of their appeal, and also when falsely accused premises are forced to close, under the alleged "93 Feet East" principle, pending a full investigation, which highlights less culpability, entirely unworthy of the harmful impact on their business, which must, nevertheless, continue.

The Judge did not comment or deal at all with the analysis of the situation that DJ Knight had given:

> "When one considers other aspects of appeals in licensing and general law, the Police Solicitor says that it would be strange if the committee had considered the matter three times and had suspended three times and it would be strange that there would then be a lacuna in the coming into effect of a suspension on final review or even the ability for a licensee to take advantage of a three week hiatus if he did not appeal, before the review decision took effect…
>
> But ordinary reviews under section 52 can occur after a list of very serious matters, including section 18 assaults , and even if revocation results, it does not take effect for at least 21 days. Even if the licence is such a dangerous operation that the licence needs revoking, the operation of the statute is that the licence is not, in fact, revoked immediately. There is a calculated risk there that Parliament is prepared to take….

> There is an interim situation – that is how it works in this country: there is the benefit of the doubt. It may be putting off the evil day but the interim situation is that the benefit of the doubt is given to the appellant so that if the appeal is successful it is not frustrated by interim measures."

Dingemans J gave no indication as to why he thought that that analysis was wrong, or even whether he had taken it into account. In highlighting that he made no comment about whether these premises were culpable or not, the Judge nevertheless effectively appears to have nominated the more severe approach without apparently considering, and certainly not commenting on the full impact that that is capable of having. This is notwithstanding the fact that it had, apparently, had just such a detrimental effect on 93 Feet East itself, and had ultimately transpired to be unnecessary.

The Learned Judge stated as follows:

> "The argument on statutory construction on behalf of the claimant, which I should say I was attracted to as being arguable for a period of time before Mr Clarke's explanation, was this. If one looks at 53C and says that any interim steps having effect pending that determination cease to have effect, and at 53(11) that a decision doesn't take effect until the end of that period, one is left in a situation where the interim steps, as it were, should cease to have effect".

With great respect to the Learned Judge, this formulation itself does much to highlight the inherent difficulty in attempting to talk about these three sections with a high degree of clarity.

The Judge noted the argument advanced before him by the Defendant that:

> "the revocation of the interim suspension only comes into effect after the decision has been disposed of in the Magistrates Court".

This appears an interesting way of putting the matter. The "revocation" of the interim suspension presumably refers to the lapsing of the interim step at the conclusion of the appeal hearing – not obviously a "revocation" in the usual sense, nor, apparently, the

result of any overt determination by the Magistrates, nor needing to be. This would be a separate worry in itself, if it were considered that it was the Magistrates' responsibility in some way. No guidance is provided as to why or how that would come about, and it is to be assumed that this is not what the Judge meant.

It is clear from the 93 Feet East Judgment, that the Committee in that case did make a determination of some kind at the review hearing that was specific to the future of the interim steps. The Judge said that he thought that that was a determination that "secured that" the interim steps should *continue*, (not 'cease'), and that that was what s53C(2)(c) actually required. The Judge was plainly referring to this in his repeated reference to "two separate decisions"; one on the review outcome, and one on the interim steps. He also said, however, that he was only dealing with the circumstances of this case, and so no clue or guidance is provided as to how future Committees are to proceed to ensure that they too achieve the effect of "securing that" interim steps continue. The answer is not to be found in the wording of the section itself, notwithstanding the fact that the Judge went on to declare that:

> "That is a construction of 53C(2)(c) which is both consistent with the statutory objective that I referred to earlier and plain on the wording."

Having pronounced 53C(2)(c) "plain on its wording", the Judge simply observed that District Judge Knight had come to entirely the opposite view in finding that 53C(2)(c) "defied understanding by any human being". There can be no doubt that Dingemans J outranks District Judge Knight. Having disagreed with her, however, and stated that the 'construction', ie: the explanation of what the section was intended to mean, was "plain on its wording", he then immediately went on to comment that:

"I accept the wording could have been more happily and easily expressed",

which still appears to be a criticism of the statutory draftsman, although no doubt far more gently expressed. It appears that no one suggests that the wording itself is clear, although Dingemans J believed he could divine its intended meaning.

Having reached that position, the Judge went on to conclude that, in public law terms,

he did not think that that point was further arguable in order to grant permission for judicial review in that case. He put it like this:

"I do not think, *in these circumstances*, that *this remains* an arguable proposition on which to grant permission. I think *that is* a statutory scheme under which the review is suspended, pending the appeal." (Emphasis added)

It is not clear what the last phrase means, or what the words "that is a statutory scheme" are referring to. There is no doubt that the review determination itself is suspended pending the appeal – there has never been a debate about that, and that much, at least, is entirely clear in the statute. That has no bearing on what happens to the interim steps, and the eliding of the two separate concepts in this sentence is confusing.

The very next section of the judgment is apparently important – and wholly unreported to date:

> " The answer to that Ms Le Fevre gave was interesting. (sic). It was: well, in fact, properly analysed, what the magistrates did on this particular occasion, or the committee did on this particular occasion, was make two decisions: one to revoke the licence, and the other was to continue the interim steps in those circumstances. And that both were suspended under 53C(11). It does not seem to me that that is anything more than a construction of what went on in the particular circumstances of this case."

This clause of the judgment appears to be a reformulation of the first question that the Judge had already addressed: namely, "do interim steps last beyond the review hearing." Here, Ms Le Fevre's argument, (commended as "interesting", which implies persuasive and meritorious), was that interim steps did not last because the specific decision of the Committee to extend them beyond the review hearing was itself a "determination" of the Committee suspended by operation of 53C(11).

This is a different formulation of the problem – namely that interim steps end at review because the Committee are unable to make any determination about them that

survives the automatic appeal suspension built into 53C(11), which is a different approach from saying that interim steps automatically lapse on the day of review by automatic operation of the statute. It appears that the Judge ruled out the latter because he found that that would not serve the "statutory purpose" that he identified, but he did not rule out the former. On the contrary, what he said was:

> "That [argument] walks into the difficulty ….which is that this claim is now, in a general sense, academic, because on 17 May, compromise was reached in the Magistrates' Court."

It was clearly argued before him that it would be of general assistance to have this area of law clarified (as, indeed, it would have been), but the Judge declined. He said:

> "In my judgment, the argument that now remains is really a narrow construction of what was done on 7 January [the full review hearing], and that is not likely to be of general assistance to anyone."

It appears to this commentator at least that it was, on the contrary, at the heart of the matter in question. Can a Committee continue interim steps by a direct determination to do so? Do they have to make such a determination before interim steps continue, or does it happen automatically? If they make such a determination to continue the steps, does that determination somehow survive 53C(11), or is that decision itself suspended for 21 days or until the conclusion of appeal? These are not questions bespoke to the case he was considering, but very much of general application. They remain unanswered and entirely open – deliberately so: the Judge said this:

> "The other point that remains open is the claim, if it is right, for breach of rights protected under the Human Rights Act, in particular article 1 of protocol 1: the qualified right to property.
>
> It seems to me that if the claimant wished to pursue that claim for damages, it may do so without any restriction of having to go through the grant of

> permission. Nothing that I have said prevents the claimant bring a claim for damages if it chooses to do so."

This too would seem to be contrary to the suggestion that the Judge found the submissions before him "unarguable".

He stated the limitations of his own consideration:

> "This is because I have taken a decision on arguability on public law grounds, taking into account matters of whether this claim is academic, save in respect of the claim for damages".

It is a well-established principle of Administrative law that the Court will not make a determination on a purely academic point if there is no substantive value in it for the claimant: ***[Malloch v Aberdeen Corporation [1971] 1 WLR 1578 @1595*** and other cases].

It is clear, therefore, that the Learned Judge was saying that it was inappropriate to grant permission to argue this case further, not because there was nothing of merit in the arguments advanced, but because there could be no further advantage to the claimant in doing so; the Magistrates' appeal having already concluded in their favour, and there being no further prejudice by the application of the interim suspension. The Judge further decided that the question was not of general interest worthy of resolving for the guidance of others. That is why he determined that the case was "unarguable" in public law terms – because it failed the test of being more than an academic point; not because the arguments before him were worthless. From all his comments, that was clearly far from the case.

Another of the issues highlighted by District Judge Knight in the Gary Oates case remains entirely unresolved by this latest decision, which the Judge accepted was "shortly expressed". Indeed, there is no indication or reason to expect that he considered it at all. DJ Knight said:

> "If the interim steps persist until the end of the appeal, it would follow that the premises licence holder could expect to have the interim steps reviewed every 48 hours – there is no time limit for making representations on interim steps, so there is nothing to stop the premises licence holder from asking the committee to consider more representations within 48 hours, on an ongoing basis and they would be obliged to consider it. There would be no limit on the number of times he could do it.
>
> I cannot imagine that that is what Parliament intended, that every 48 hours the licensing committee is to be tied up, but without a right of appeal that is the only outlet available to the premises licence holder. It is quite nonsensical that Parliament should have meant that that was the only thing the premises licence holder could do, that that is the only recourse. Surely the interims steps are intended to deal with temporary, urgent situations in a cooling off, a settling down period."

It is to be assumed, then, that this is the remedy that Licensees who do not fall into the "problem premises" category, who are severely prejudiced by the continuation of crippling interim steps will seek. There is nothing to stop them from doing so, and Dingemans J did not deal with the issue.

DJ Knight commented drily on what this would mean in practice:

> "It should be a comfort to the police that my decision goes this way , or else this juggernaut goes on with the right to challenge interim steps every 48 hours, with repeated applications to wear down the Council."

Finally, it is worthy of comment that District Judge Knight's clear conclusion was that this matter required further attention by Parliament:

> "The remedy here is in Parliament's hands.
>
> It would have made more sense if Parliament, instead of following ordinary review procedure and the delay of the coming into effect of the determination

had made the final determination on review after summary review come into effect immediately. That would make far more sense – that the final decision was the one to take effect after the cooling off period of the interim steps. But one would also expect a right to apply to have the decision suspended pending appeal.

Interim steps cease on the determination of the review hearing because that is what the Act says rather than on the coming into effect of the review determination. Parliament could have said that, but it did not, and I resolve any doubt in favour of the Licensee."

Her final comment was in response to a detailed argument made before her as to why it was right that any doubt or ambiguity within the statute should be resolved in favour of the licensee, in upholding his human rights.

Whether this matter will now receive further attention and resolution, either in the Courts or in Parliament, to the point where it is of true and complete assistance to practitioners will remain to be seen. In the meantime, this case appears to raise as many questions as it resolves, and goes very little way indeed to quelling the debate concerning interim steps.

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