NEXUS WITH LICENSING OBJECTIVES

BRIGHTCREW, BAPU & MILES FROM NOWHERE

The Scottish Courts have examined an issue that has not yet made it to the Admin Court: the proper relationship between licensing objectives, licensing conditions and licensable activities. Some interesting parallels can be drawn which are informative for cases determined under the Licensing Act 2003.

This is not the first time that this issue has been examined. In 2008, the Derby Magistrates[1] considered whether the four licensing objectives under the Licensing Act 2003 could be applied to problems that were not arising as a result of licensable activities at licensed premises.

The case concerned a review initiated by a local resident as an interested party. The licensing sub-committee rejected this review application because they said it was not related to any licensable activity being conducted by the premises in question. The resident appealed to the Magistrates' Court.

The complaints about the licensed premises from the Appellant related to noise and activities arising from motor vehicles, especially motor bikes. She complained of activities from such vehicles during "Biker Events" held on a field next to the premises, and organised by the premises licence holder. These events were nothing to do with the premises licence, and were not in any way controlled under the premises licence. The field was within the ownership of the licensee, but was not within the red line of the premises plan.

[1] Derby Magistrates Miles From Nowhere Peck SC 2008

The arguments put forward on behalf of the Appellant were that her application for review was relevant on the basis that it related to the licensing objectives. It was further submitted that nowhere in the Act was it stated that relevant representations on review (or, by implication, on first grant or variation) had to relate specifically to the licensable activities authorised by the licence. As long as the representation related to one or more licensing objectives, and could be related in some way to licensed premises, then that, she argued, was sufficient. Here, the argument went, the problems experienced by her infringed the licensing objectives of prevention of crime and disorder; prevention of public nuisance, and the protection of children, and the problems related to the pub on the basis that the licence holder of the public house was also the organiser of the events that were giving rise to the alleged nuisance, which were taking place in the wider grounds of the public house.

In response, it was argued on behalf of the licensee, and adopted by the Council, that it was inherent and implicit in the Licensing Act 2003 that representations had to relate to licensable activities, because it was legislation specifically aimed at licensable activities. Activities other than licensable ones were covered by other legislation, and the s182 Guidance made it clear that the LA 2003 was never meant to be a global panacea for all issues of crime, nuisance, disorder and so forth, that could not be specifically related to particular activities at particular licensed premises. If the Appellant's argument were correct, then it would be possible for the police, for example, to seek to add conditions to any licence on the basis that events of crime and disorder happened nearby, whether they had anything specific to do with the premises or not.

The Magistrates summarised the Respondents' arguments that the events in the grounds of the public house were not regulated by the Licensing Act just because the premises happened to be licensed premises, and that if the public house in question were any other sort of premises, it would not be possible to regulate the events in the grounds by means of the Licensing Act. The Magistrates agreed with this proposition, and they therefore dismissed the resident's appeal.

The First Respondent Licensing Authority was therefore quite correct to reject the original application for review by the Appellant, on the basis that her representation was not a relevant representation under the Licensing Act 2003.

Brightcrew.

There has now, arguably, been a confirmation of the application of these principles from the Court of Session in Scotland, in relation to a lapdancing club in Glasgow[2].

This was an appeal by way of case stated brought by the Appellants against a decision of the City of Glasgow Licensing Board to refuse an application for a premises licence made in respect of premises known as Spearmint Rhino in Glasgow. Although the regime in Scotland is not the same as that for England and Wales, the principle established can be argued to be of universal application.

The City of Glasgow Licensing Board, (the equivalent of a Licensing Committee), refused Spearmint Rhino's application for a premises licence under the 2005 Act[3]. The Board did so because it accused the operators of Spearmint Rhino of failing to comply with the Board's Code of Practice, in a number of particulars. Two examples may be given, to illustrate the judgment. Firstly; members of staff were unable to locate copies of the risk assessments to provide to licensing officers during a compliance visit, even though risk assessments had been completed. Secondly, flyers (advertisements) had been distributed for the Club which depicted images of women who were not suitably clothed in accordance with the Board's Code.

The argument made to the High Court on behalf of the Club was that the single function of the Licensing Board under the 2005 Act was that of licensing the sale of alcohol. In that respect, of course, the LA 2003 regime differs; conferring upon Licensing Authorities the function of regulating the sale of alcohol and regulated entertainments. With that addition, however, the rest of the judgment is still relevant to Licensing Authority decisions.

[2] Brightcrew Ltd v City of Glasgow Licensing Board 12 July 2011
[3] Licensing (Scotland) Act 2005

The Appellant argued, and the Court accepted that the Licensing Board's powers to licence the sale of alcohol could not be deployed to effect objectives not related to the sale of alcohol but which the Licensing Board might yet find desirable. The generality of the objectives described in the 2005 Act as licensing objectives, such as "protecting and improving public health" did not give to a Licensing Board, properly exercising its function under the 2005 Act, power to lay down conditions, however desirable those conditions might be seen, which were not linked to the selling of alcohol. It was stressed that the objectives were *licensing objectives* which thus related back to the core function of the Licensing Board which was the licensing of the sale of alcohol. The requirement in the Act for the Licensing Board to publish a Statement of Policy concerned the publication of a policy about the licensing of the sale of alcohol, and the existence of that requirement did not empower a Licensing Board to lay down policies on other matters not properly related to the licensing of the sale of alcohol.

Thus, the Court found, the Board's attempt to regulate a risk assessment respecting the work performed by dancers, (a matter for other authorities, such as the Health and Safety Executve) went beyond their powers. Similarly, other matters in the Policy Statement or Code of Practice relating to the provision of chilled drinking water for the dancers or the provision of changing facilities were provisions which took the Board outside their proper ambit, unless possibly, in very particular factual circumstances, such matters could be demonstrated to be properly related in the individual case to the sale of alcohol. The requirements might all be very desirable objectives, but they were not "licensing objectives".

The Licensing Board in this case had adopted an approach that it was unacceptable per se for the Club to have infringed the Board's Code of Practice[4]. The Board took the view that this was a blatant disregard, and a lack of respect for the Authority. The Board said that this gave rise to concerns that there may be future general disregard for the Code, and/or the Licensing Policy, and that this was relevant as to whether the granting of the application would be inconsistent with one or more of the Licensing Objectives.

[4] ["Code of Practice relative to the provision of dance entertainment in licensed premises" March 2005].

The submission was made to the Court, and the Court accepted that the Board had therefore proceeded on the basis that, having established a Code of practice or Policy on some issue not itself to do with the sale of alcohol, (such as nudity depicted on a flyer), then any breach of that Code or Policy could be automatically translated into inconsistency with the Licensing Objectives themselves, without any consideration of any meaningful link between the particular breach of the Code and the sale of alcohol. In other words, the Board took the view that any infraction of its Code or Policy on various aspects of adult entertainment could be visited by the deprivation of a licence to sell alcohol, notwithstanding the absence of any objective relationship between that infraction and an effect on the sale of alcohol.

It is important to bear in mind in considering this Scottish case that the Licensing Act 2003 goes further in terms of what a Licensing Authority is empowered to regulate. It is interesting to observe, however, that adult entertainment, per se, is not regulated entertainment, and is now, of course, separately regulated as well under the SEV regime.

There is, it is argued, a clear parallel between ***Brightwater*** and the conclusions of the Magistrates in the Derby case.

In Scottish law, it is express in the 2005 Act (s 27(7)) that a Licensing Board may not impose a condition which "relates to a matter (such as planning, building control or food hygiene) which is regulated by another enactment.
There is no such direct equivalent in the LA 2003, but the s182 Guidance contains parallel provisions about the duplication of legislation.

The Scottish Court found that the Board could not indirectly impose conditions, restrictions or requirements upon a licensee which it would not be empowered to impose directly under section 27 in an individual case. Accordingly, the inclusion in a published Policy Statement of provisions purporting to regulate activities on and off licensed premises does not give those provisions any status going beyond the proper exercise by a Licensing Board of its function of licensing the sale of alcohol.

In looking at the Licensing Objectives, the Court said that although the objectives are couched in very general terms, such as "preventing crime and disorder", it is important to note that these objectives are not, so to speak, "freestanding". They are qualified by the introductory reference to their being "*licensing*" objectives. Since the licensing with which the (Scottish) statute is concerned is the licensing of the sale of alcohol, it followed in the view of the Court, that inconsistency with a licensing objective is inconsistency flowing from the permitting of the sale of alcohol on the premises in question. The fact that the four licensing objectives are all desirable in a general sense does not empower a licensing board to insist on matters which, while perhaps unquestionably desirable in that sense, are nevertheless not linked to the sale of alcohol. For a Licensing Board so to insist would be to divert a power from its proper purpose – to use the terminology of French administrative law – a "detournement de pouvoir".

The Glasgow Board had recorded breaches by the Club of the Board's Code, none of which arose from or were related to the sale of alcohol, and from those breaches had concluded that the licence application should be refused. This, the Court found, was the wrong test.

The Court said this:
"In an endeavour to illustrate what we mean by what we have just said, we take the first of the breaches – the employee being unaware of the location in the nightclub of the risk assessment of the work activity of a lap dancer. It may possibly be advantageous that, as the Board purports to insist, all employees have access to all risk assessment reports prepared by or on behalf of the employer. But that plainly does not mean that, on that account, the sale of alcohol in Spearmint Rhino is inconsistent with a licensing objective."

There is no doubt that caution must be used in seeking to apply this case to a decision made under the Licensing Act 2003, but it is clear to see that there are some applications for the general principle that the Scottish Court enunciated. One such application has previously been seen in the Derby case, and it is informative to study these cases to assist in identifying where Licensing Committees and Magistrates on appeal may be going too far.

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Sarah Clover 2011©

Sarah Clover
Barrister
Email: sclover@kingschambers.com
Clerked by: Gary Smith
Email: gsmith@kingschambers.com
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Birmingham
Embassy House,
60 Church Street,
Birmingham B3 2DJ
DX:13023(BIRMINGHAM)