LICENSING APPEALS – A COSTLY BUSINESS.

In these current straitened times, one particular anxiety for all parties in a licensing appeal is whether, if they lose the appeal, the magistrates will make a costs award against them.

There are particular parameters within which costs awards in regulatory cases in the Magistrates' court will be made. Different considerations apply to public bodies and statutory regulators than to private individuals. Generally speaking, public bodies and regulators enjoy a certain amount of protection from costs in cases where they are merely carrying out one of their public functions, as they are required to do by law. Even if the appeal court disagrees with the decision that the public body made, and overturns it on appeal, this will not automatically result in a costs order against the body in question. These principles usually operate in favour of local authorities and the police.

In the seminal case of: ***(City of Bradford Metropolitan District Council v Booth [2000] EWHC Admin 444)*** the point was put in this way:

"There is a need to encourage public authorities to make and stand by honest reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

This means that the default position is that public bodies will not be made to pay costs just because they lose on appeal: costs clearly do not follow the event in licensing appeals. The successful Appellant will also have to go on and demonstrate that the authority did not behave honestly, or reasonably, or did not make a sound administrative decision in the public interest before the Court is likely to accede to an application to award costs against the authority.

Looking at this question in the specific context of licensing appeals, it is clear, however, that the magistrates do have a wide discretion in licensing matters to award costs generally, and there are few restrictions upon it.

Section 181(2) of the Licensing Act 2003 provides as follows:-

"On an appeal in accordance with that Schedule [5] against a

decision of a licensing authority, a magistrates' court may,

(a) dismiss the appeal,

(b) substitute for the decision appealed against any other

decision which could have been made by the licencing

authority; or

(c) remit the cast to the licensing authority to dispose of it

in accordance with the directions of the court,

and may make such order as to costs as it thinks fit."

A small collection of cases which have considered the matter since the inception of the Licensing Act 2003 has reaffirmed the unfettered nature of this discretion, even to the extent that it appears that the Magistrates are entitled to award costs in favour of the losing party against the winning party.1

City of Bradford Metropolitan District Council -v- Booth [2000] EWHC Admin 444

Lord Bingham of Cornhill

" I would accordingly hold that the proper approach to questions of this kind can for

convenience be summarised as three propositions:

[1] Sheeja Prasannan v Kensington & Chelsea Royal London Borough Council [2010] EWHC 319 (Admin)

1. Section 64(1) confers a discretion upon a magistrates' court to make such order as to costs as it thinks just and reasonable. That provision applies both to the quantum of the costs (if any) to be paid, but also as to the party (if any) which should pay them.

2. What the court will think just and reasonable will depend on all the relevant facts and

Circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection.

3. Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

(Emphasis added).

The point was revisited in a case concerning a different type of regulator, – this time, the Law Society, in a case unrelated to licensing, but still authoritative on the point:

Baxendale-Walker v The Law Society [2007] EWCA Civ ,

The case related to disciplinary proceedings brought by the Law Society against a solicitor. Moses LJ, giving judgment of the Divisional Court, said:

"Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party had succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against

the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged."

That statement of the law was approved on appeal in the judgment of the Court of Appeal at paragraph 39.

In 2010, the issue was reconsidered by the Court of Appeal, in a case concerning the Police:

R. (on the application of Perinpanathan) v City of Westminster Magistrates' Court

Court of Appeal (Civil Division) 04 February 2010

The applicant was refused her costs by the magistrates in circumstances in which she successfully defended proceedings brought by the Police against her. The police seized cash belonging to the applicant on the basis that there were reasonable grounds to suspect that it was intended for a terrorist organisation. Forfeiture proceedings were brought under the Proceeds of Crime Act 2002. The magistrates found no evidence of a link between the applicant and the terrorist organisation, however, they found that the police had reasonable grounds to suspect that the money had been intended for use in unlawful conduct. The magistrates refused to order the Police to pay costs on the basis that it had been reasonable for the police to make the application. The only option to the police had been to make the forfeiture application and they should not have been deterred from doing so because of concerns about their liability for her costs.

The Applicant applied to have the magistrates' decision judicially reviewed, and when her claim was refused, she appealed to the Divisional Court. The Applicant argued that, as the successful party to the litigation, she should not be deprived of her costs without sufficient reason. The Police argued that, as they had acted in accordance with their public duty, the magistrates had been entitled, if not bound, to refuse to make the costs order. The Divisional Court held that it was an appropriate exercise of the magistrates' powers under the Magistrates' Courts Act 1980 s.64 to make no order for costs.

The matter was further appealed to the Court of Appeal, where it was dismissed. The Court of Appeal applied the Bradford v Booth principle, and noted that Bradford v Booth had been approved already by the Court of Appeal in ***Baxendale-Walker v Law Society***, and was binding authority.

The Court further stated that whether the principle should be applied in contexts other than disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest and in licensing proceedings in the magistrates' court and the Crown court, as had arisen in ***Bradford v Booth*** and ***Baxendale-Walker***, depended on the substantive legislative framework and the applicable procedural provisions. The ***Bradford v Booth*** principle did not apply in proceedings to which the CPR applied, but where it did apply, and a public authority's action had been properly made, the starting point and default position in relation to costs was that no order should be made. The guidelines were not all one way, however, and the Court also held that a successful private party to proceedings might nonetheless be awarded all or part of his costs if the conduct of the public authority justified it. The duty of a magistrates' court was to make such order as to costs as was just and reasonable. The wide nature of the discretion was therefore also confirmed.

In ***Peripanathan,*** it was relevant that the police had effectively had no choice but to institute the proceedings. They could not have detained the cash indefinitely and it would have been irresponsible and a breach of their duty to the public to deliver up the cash to P. The only alternative was to make the application for its forfeiture as they had. They should not have been deterred from making that application by concerns as to their liability for costs. It was also not suggested that the police had acted unreasonably or irresponsibly once the proceedings had begun or that they had any reason to discontinue the application, and these were all relevant considerations.

Examples of cases where costs have been awarded against local authorities are also instructive in the appropriate application of the general principles.

Leigh Powell v Chief Executive of Swansea [2003] EWHC 2185 (Admin)

The Council had purported to apply a policy against an applicant which it could not apply. There was nothing more that the applicant could have done in this situation, and the error was entirely that of the Council. The magistrates purported to find that the council had acted reasonably in refusing the applications on procedural grounds, but the appeal Court found that this conclusion could not be supported. The appeal Court held that the magistrates had erred in making the finding that the Council's decision had been made on grounds that reasonably appeared to be sound. This was plainly a case for an award of costs in favour of the Applicant.

It appears, therefore, that a significant mistake; a misapplication of policy or a wrong approach to a legal principle are all likely to result in a finding that the public body should pay costs, at least to some extent.

Two key cases shortly after the commencement of the Licensing Act 2003 added clarification to the application of the principles in licensing appeals.

In ***Crawley Borough Council v Attenborough [2006] EWHC 1278 (Admin)***

the Court observed that there was no practical distinction between s.181 and the Magistrates' Courts Act 1980 s.64(1), (although this point was further examined in ***Sheeja Prasannan v Kensington & Chelsea Royal London Borough Council [2010]).***

The wide nature of the discretion was again emphasised, and the Court stated that what was important was that the magistrates made it clear that they appreciated the principle under which they were operating; (namely, that in ***Bradford v Booth***). The magistrates' court were under no obligation to provide detailed reasons for a decision on costs, as long as it was clear that they applied the relevant principles. The Court further observed that it was undesirable to see satellite litigation on costs issues. This latter point does not appear to have stemmed the flow very greatly.

In R (oao) Cambridge City Council v Alex Nestling Ltd [2006] EWHC 1374 (Admin)

the Court disapproved a decision of the magistrates to order a licensing authority to pay half an appellant's costs of an appeal where that appellant had been only partially successful and the licensing authority had acted correctly and in good faith. (Emphasis added). The latter was a specific finding of the magistrates, who had gone on to award costs against the Council notwithstanding that finding.

In a case involving two bodies acting in the public interest, the magistrates awarded costs to one against the other. The appeal court found that this was within the ambit of their discretion, and refused to disturb the order.

Uttlesford District Council v English Heritage [2007] EWHC 816 (Admin)

Other considerations are also relevant in arriving at the correct decision on costs, and the means of the private party is one of those issues.

Leslie Ware v Hackney London Borough Council [2009] EWHC 1698 (Admin)

The magistrates withheld a costs order from a winning appellant, but their reason for doing so . did no more than speculate that the appellant might not have won if a series of hypothetical facts were assumed to have occurred. The Council had taken a fundamentally mistaken view of the the statutory provision that it needed to apply, and there had clearly been confusion from the outset. Whilst there was no suggestion of bad faith on the part of the Council, they had clearly been in error.

The Court placed emphasis on the fact that the Appellant was a small businessman, and was therefore not in the same position as a large concern which might be able to regard licensing difficulties as part of the usual cost of running the business and be expected to absorb attendant legal costs as a necessary overhead. The Court found that, in those circumstances, it was therefore right that an order for costs should be made.

This was not a departure from ***Bradford v Booth***, but was clearly stated to be an application of it.

In ***Sheeja Prasannan v Kensington & Chelsea Royal Borough Council [2010] EWHC 319 (Admin),*** the Judge confirmed that the court has an unfettered power in relation to the costs. The court's discretion is subject only to the usual requirement that, in deciding what order is just, it must take into account all relevant matters and must not take into account irrelevantmatters. In this case, in circumstances where the winning appellant had behaved manifestly unreasonably, and had brought the entire proceedings upon herself, the magistrates' court had been entirely justified in making her pay the costs of the losing party; the Council.

In 2011/ 12 a trilogy of costs cases ignited gossip that principles on costs had in some way changed, and that costs against Councils would no longer be awarded. There was no foundation for such rumours, and these three cases turn largely on their own facts, and are firmly based on the classic ***Bradford v Booth*** principles. Each appeal was brought by a licensing authority challenging a costs award made against them.

The first in time was

Mayor & Burgesses of London Borough of Tower Hamlets v Ashburn Estates Ltd (Trading as the Troxy) [2011] EWHC 3504 (Admin)

An appeal to the magistrates arose out of a review application.

The licensing subcommittee decided to reduce the operational hours of The Troxy on five nights a week.

At the beginning of the magistrates' appeal, the appellant indicated that they would be willing to compromise. The District Judge allowed time at court for a negotiation, but the proposals were

not acceptable to the Council. The Appellant decided nevertheless to limit the scope of their appeal to the terms of the compromise they had offered.

The District Judge indicated to the Council that the Appellants' compromise did not appear unreasonable and asked whether the Council had considered the question of costs if the appeal was won on that basis. The Council said they had, and still wished to resist the compromise, and the appeal, on the basis that the residents' views were important. It was pointed out that the residents could always apply to become interested parties in their own right.

The Court specifically found that there was nothing wrong with the District Judge canvassing these matters in this way, as long as care was shown not to say anything that might suggest that the issues in the appeal had been prejudged.

After hearing evidence, it became apparent that on some occasions when residents were complaining about the premises, they were either closed, or not in a position to be causing a problem. Furthermore, she formed the view that 24-hour parking restrictions would probably solve the problems, and invited Counsel for the licensing authority to call the person responsible for parking control in the area. That gentleman was called on 9 June who said that his hands were tied on the parking issue, and nothing could be advanced in that regard in the context of the appeal.

The District Judge went on to find for the Appellant, in the same terms as their offered compromised, and found as a result that it could not be said that the decision made by the authority was reasonably and properly made, particularly where the proper compromise had been offered, and, in her view, the Council " had had ample time to consider it". She observed that "the remedy [to the problems of the residents] lay in the hands of the authority."

The Appeal Court confirmed that a court can take into account the conduct of the parties, including any offers to resolve or settle the proceedings in advance, but it was relevant here that the offer had only been made on the morning of the first day in Court. The Council had hardly had "ample time" to consider or consult on the offer, in those circumstances. The Court noted that it was the committee of the local authority that took the decision, and that whilst it is not impossible for arrangements to be made to delegate responsibility for agreeing to a different view on behalf of the committee within the local authority structure, it is probably necessary for

the committee to consider some alternative suggestions put to it rather than some delegated individual to do so. This may well be, the Court stated, the way local democracy works. By requiring the negotiation to be conducted whilst at Court, the Appeal Court found that it was difficult to believe that there would be someone at the end of the telephone who would have had sufficient authority to agree to something less than that which the committee had decided. The question of the consideration of the wider community interests was a highly relevant consideration.

The Court also disagreed with the District Judge in her finding that the remedy lay with the licensing authority by means of a revised parking scheme. This, the Court found, was a confusion of two separate statutory schemes, and it was not reasonable for the District Judge to have found, therefore, that the Council's licensing decision was administratively flawed by a failure to consider or amend the parking scheme.

It was clear that this was no blanket prohibition on awarding costs against a local authority, but was closely tailored to what had happened specifically in this case, and the factual circumstances upon which the appeal turned.

Tower Hamlets LBC v Thames Magistrates Court & Lovebox Festivals Ltd [2012] EWHC 961 (Admin)

The same District Judge in the same magistrates' court later awarded costs of £18,138.60 to Lovebox Festivals Ltd at the conclusion of their successful appeal against a decision of the licensing sub-committee of the London Borough of Tower Hamlets.
This time, her decision was confirmed as correct.

The sub-committee granted a licence to Lovebox for a festival at Victoria Park similar to ones it had run in the preceding two years, but curtailed the hours to 2200 hours, which was not viable. Lovebox Festivals appealed. The appeal was concerned with only one issue, which was whether significant disturbance was likely to be caused in the locality by people leaving the festival. The

District Judge allowed the appeal, granting Lovebox the hours they had sought in their application and which they had been granted in the previous two years, and made the award of costs.

The District Judge determined that the licensing sub-committee had acted unreasonably in reaching its material conclusions and awarded the successful appellant their costs.
The festival organisers had robust policies and protocols. The objections and representations from a small number of residents had not been very pertinent or persuasive. The police and other relevant authorities had no concerns.

The District Judge directed herself correctly on ***Bradford v Booth*** and costs principles.

The sub-committee had made a specific factual finding in relation to disturbance caused by the Festival in a previous year, which the District Judge specifically ruled was unfounded. She said:

> "I therefore decided that it was unreasonable of the licensing sub-committee to find that there was 'significant disturbance' caused by reason of the event in 2010. There was no basis in fact for that finding, only the representations and evidence of three residents. It was therefore unreasonable to reduce the hours they had allowed in the past. I therefore concluded that the complainant was entitled to costs in full."

There was no question of bad faith; the issue was whether the sub-committee's decision was "unreasonable", justifying a costs award. The District Judge concluded that it was unreasonable for the sub-committee to find that "it was clear from the residents that there that was significant disturbance caused by this event last year from patrons leaving." The District Judge found that the evidence in the representations of the three residents did not establish that fact. The Appeal Court agreed.
The Judge commented:

> "…an analysis of the evidence of the objectors shows that it was generic in nature, without linking specific adverse events or incidents to the 2010 Lovebox evidence."

This is a criticism that may very frequently be applied to objector evidence.
As a result of the paucity of evidence, there was scant support for the conclusion reached by the sub-committee, and it could not be justified.

The Court also made comment on the procedure of a costs application. It was submitted that the costs claimed should have been particularised in writing. The Court ruled that, by contrast with the provisions of the Civil Procedure Rules, there are no formalities prescribed in connection with summary costs applications in the Magistrates' Court. However, the paying party is entitled as a matter of fairness to have an explanation of the claim, with a breakdown of rates, time spent and the nature of the work done, to enable a challenge to be made to any aspect of the claim. Routinely, such applications are made orally. Complex matters in the Magistrates' Court where substantial costs orders are sought would justify a detailed breakdown of costs. A failure to do so might found a reason why an application for costs should fail in whole or in part, if the court concluded that it could not satisfactorily explore the detail or the paying party were disadvantaged in challenging the quantum. The absence of a costs schedule in this case was no justification for overturning the Judge's award.

The Court also revisited the general principles when considering the question of costs applications as regards quantum:

1. The indemnity principle means that the sum claimed cannot be more than the client is liable to pay his solicitor.

2. Guideline rates for solicitors practising in different locations are published in the White Book for the purposes of assisting summary assessments in civil proceedings (see CPR 48.49). Whilst not directly applicable to complex matters in the Magistrates' Court, it would be rare for a higher hourly rate to be allowed. It might assist magistrates and District Judges if their attention were drawn to those guideline rates.

3. When deciding the amount of costs to be awarded, the court will take account of all of the circumstances of the case but they include the following:

(a) What was at stake in the proceedings?
(b) What was the importance of the issue to the parties before the court?
(c) What was the complexity of the appeal?
(d) What skill, specialist knowledge and responsibility did the lawyers concerned require or assume?
(e) How much time was actually spent?

In the round, the court will be concerned to check that the expenditure actually incurred was reasonable, and ensure that any award of costs is proportionate.

In this case, the costs sum awarded was not overturned.

The Queen on the Application of Mayor & Burgesses of the London Borough of Newham v Stratford Magistrates' Court [2012] EWHC 325 (Admin)

The London Borough of Newham challenged a decision of a District Judge on a hearing of a licensing appeal in the Stratford Magistrates' Court to make an order for costs against the council.

The premises licence holder for a supermarket in Romford was granted a licence to sell alcohol subject to certain conditions. The licence holder did not like the conditions, but
Instead of appealing against them, he applied for another licence for the same premises, which was granted on more favourable terms.

The Police later sought to review the licence. The outcome was that the licence was curtailed, and conditions added until it resembled the first licence that the licensee had been granted.

The licensee appealed. The District Judge concluded that the council's licensing committee was wrong to impose the conditions that it had. However, she did not accept licensee's contention that he ought to be granted a 24-hour licence with no further conditions except as to CCTV. Instead she adopted an intermediate position and added different conditions; more favourable to the licensee than what the Council had imposed; but less than he had sought in the appeal.

The appellant sought costs, and submitted that he had virtually succeeded, and also that the court should conclude that the decision of the licensing committee had been made in bad faith. The council submitted that costs should not be ordered against it and further submitted that the licensee's conduct in applying for two concurrent licences had unnecessarily complicated proceedings and added to their costs.

The District Judge reminded herself of the correct ***Bradford v Booth*** principles, and awarded costs to the licensee in a sum which represented the difference between the amount of costs claimed by him, and the amount of costs claimed by the council.

Part of her reasoning was that the appellant had unnecessarily complicated the proceedings. She said:

> "In light of the above, I am satisfied that unnecessary work has been incurred due to the complicated way that these proceedings have evolved. I do not accept that the Appellant has virtually succeeded. I reject the submission on behalf of the Appellant that the Licensing Committee acted in bad faith but I do accept that the original decisions were wrong. As a consequence, I have taken the figure put forward on behalf of the Appellant and rather than make and award to the Respondents (in the figure I consider to be proportionate) in light of the unnecessary costs incurred and justification in respect of the conditions that have been imposed, I have made a reduction from the Appellant's costs. I therefore order costs in the sum of £5,350 to be paid by the Respondents to the Appellant."

The council challenged this decision on the basis that the Distrcit Judge erred in law in her approach to costs. They issued an application to the justices to state a case for the opinion of the High Court, but the District Judge refused to do so on the basis that the application was frivolous. The Council therefore proceeded by way of a claim for judicial review. The Court addressed the substantive issue.

The Court determined that the starting point is section 181(2) of the Licencing Act 2003, which gives the Magistrates' Court a discretion which is not unfettered, and which must be exercised in a principled manner., in accordance with ***Bradford v Booth***. So much is now familiar.

The Court found that the ***Bradford v Booth*** principles had been reaffirmed in their formulation in the most recent authorities, " which make it clear in particular that the starting point and default position where a party opposing a decision of a public authority has been successful is that no order for costs should be made and, secondly, that when Lord Bingham referred to financial prejudice to the successful private party as potentially justifying a departure from that position, what is required is evidence that that party would suffer exceptional and substantial financial hardship."

In this case, the District Judge misunderstood, or mis-stated, the position of the council on the question of costs. She proceeded as if the Council was submitting that a proportion of its costs should be deducted from any costs order made in favour of the appellant, whereas the Council was in fact submitting that there should not be any order for costs against it at all; and that, on the contrary, it should be awarded part of its own costs.

Secondly, and significantly, the District Judge in her judgment expressly rejected the submission made on Mr Saron's behalf that he had "virtually succeeded". She had not acceded to his claims and contentions in the appeal. By no means could the outcome of the appeal be described as a complete success for the licensee; but only an intermediate one between the contentions of the parties. In those circumstances, as the Appeal court observed, even if the proceedings had been between two private parties, it is doubtful whether it would have been appropriate to award the

appellant the whole of his costs subject only to a deduction for costs which he was found to have caused to be unnecessarily incurred.

Thirdly, the District Judge also expressly rejected a submission made on behalf of the licensee that the licensing committee had acted in bad faith; and she made no finding that the committee had acted unreasonably or improperly in taking the decision that it did. This, therefore did not accord with Bradford v Booth principles.

Fourthly, the District Judge made no finding that the appellant would suffer financial prejudice or hardship if no order for costs were made in his favour, nor that there were any other particular circumstances which would make it just and reasonable to make an order for costs in his favour. The only particular circumstances relevant to the exercise of her discretion which the District Judge identified in her judgment were facts which satisfied her that unnecessary work had been incurred due to the complicated way in which the proceedings had evolved. That was a matter for which, on her findings, Mr Saron was responsible. It therefore could not justify an award of costs in his favour; if anything, the reverse.

The Court found therefore that, if the District Judge had correctly applied the legal principles established by the ***Bradford v Booth***, and the later authorities, she would have been bound to conclude that there was no justification for making an order for costs in favour of the appellant. She adopted a wrong legal approach. Having referred to various factors, all of which were matters in favour of the council, she said:

> "But I do accept that the original decisions were wrong. As a consequence, I have taken the figure put forward on behalf of the appellant."

This, the Court found, was in effect to treat the default position as being that costs should follow the event, when all the authorities make it quite clear that, as a matter of law, that is not the correct approach.

This was a case where the District Judge simply took a different view about the appropriate licensing conditions from the council and therefore concluded that in her view the council was wrong on the basis of the evidence heard on the appeal. That is not likely to be enough for an award of costs.

The ***Bradford v Booth*** case clearly envisages that there may be a range of judgments which a local authority can properly make without its decision being capable of being characterised as unreasonable. In this case, the District Judge did not begin to categorise the Council's decision as being unreasonable in ***Bradford v Booth*** terms, and simply made the mistake of making costs follow the event. This was clearly wrong.

It is clear, however, that this case establishes no new principles, and simply reaffirms the old.

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