Cumulative Impact

This article relates to the issue of evidence in licensing hearings, specifically in relation to applications in a cumulative impact policy area.

Cumulative Impact is an important licensing concept which, unusually, arises entirely outside of primary legislation.

What is Cumulative Impact?

"Cumulative impact" is not mentioned specifically in the 2003 Act. It means the potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area. (Section 182 Guidance para 13.19)

Problems occurring as a result of cumulative impact are described as large numbers being concentrated in an area, for example when leaving premises at peak times or when queuing at fast food outlets or for public transport.
(Section 182 Guidance 13.20).

Large concentrations of people are of concern in Cumulative Impact Zones (CIZ) because they may also increase the incidence of disorder or criminal activities in the street. Local services such as public transport services, public toilet provision and street cleaning may not be able to meet the demand posed by such concentrations of people leading to issues such as street fouling, littering, traffic and public nuisance caused by concentrations of people who cannot be effectively dispersed quickly. (Section 182 Guidance 13.21).

These are the reasons for implementing Cumulative Impact Policies (CIP's) and these, therefore are the types of impacts that should be examined when considering new applications within CIP areas.
The s182 Guidance also makes it clear that there should be an evidential basis for the decision to include a 'special policy' within the statement of licensing policy. (Section 182 Guidance 13.23). This is confirmed in:

R (on the application of JD Wetherspoon) v Guildford Borough Council [2006] EWHC 815 (Admin)
in which Beatson J ruled that any application in a CIZ should be judged against the reasons and evidence for the CIP being introduced in the first place. For example, a CIP introduced on the basis of evidence of cumulative impact of vertical drinking establishments leading to violent disorder, or of takeaways leading to excessive littering would not be impacted by an extension of licensable activities at a restaurant. The cumulative impact identified must be pertinent to the evidence founding the policy, and this should be part of any representations to the Licensing Authority where there is an application in a CIZ.

CIPs in Statements of Licensing Policy

CIPs cannot be used to justify rejecting or modifying applications to vary an existing licence except where the rejection or modifications are directly relevant to the CIP and are strictly appropriate for the promotion of the licensing objectives. (Section 182 Guidance 13.36) It should be possible to tell, from the Statement of Licensing Policy where the CIP is set out, whether modifications are directly relevant to the Cumulative Impact policy or not.

It is instructive to look at the Cumulative Impact Policy of Guildford that was under consideration in ***Wetherspoon v Guildford:***

> Para 14. "The opening paragraph of the defendant's statement of its special policy on cumulative impact states the Bridge Street area "has been identified as being under stress because the cumulative impact of the concentration of late night and drink led premises in this area has led to serious problems of crime, disorder and/or public nuisance".
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> P. 23. …Bridge Street is an area designated by Guildford Borough Council as one of cumulative impact. ***The evidence for this has been previously submitted and is recorded at appendix 6 of the Guildford Borough Council Licensing Policy.***
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> P. 48. [Mr Kolvin] submitted that, since ***the rationale for the defendant's special policy was crime and disorder associated with a surfeit of late night drinking***, it was clearly not perverse for the defendant to find it was an application for a material variation. By "material variation", Mr Kolvin meant that ***the variation was directly relevant to the special policy*** in force for Bridge Street as opposed to the statutory licensing objectives**."**

P. 74: Beatson: "In the present case ***the Secretary of State's guidance expressly states that it applies to variations that are material to the reason for the adoption of the special cumulative impact policy".***

P. 83. Beatson: " For the reasons given in the sections of this judgment dealing with the guidance and the statement of policy, the words "material variation" are capable of including a variation of hours if such variation is directly relevant to the cumulative impact policy. ***A variation will be directly relevant to the special policy if, for instance, it would create further late hours drinking in a drink led establishment in an area suffering crime and disorder because of a concentration of licensed premises and late hours drinking in such establishments in the area***."
[All emphasis added].

These excerpts from ***Wetherspoon v Guildford*** make it very plain that the evidential reason for the Cumulative Impact Policy should be set out, in the Statement of Licensing Policy, for all to see. Only then can a determination be made as to whether an application is directly relevant to the CIP or not. Only then can applications be made, adopting the correct burden of proof, and the Applicant be enabled to rebut the presumption and show why the particular reasons for the Cumulative Impact Policy do not apply to him. Only in this way can it be seen whether a CIP has been imposed because of (i) problems of intoxicated people leaving drinking led establishments contributing to crime and disorder in key hotspots; or whether the problem is (ii) accumulations of people in certain areas at certain times leading to conflict in queues for taxis or fast food outlets; or whether the problem is (iii) the numbers of people leaving all kinds of licensing premises at the same time and causing noise in residential areas, or any of a vast number of other potential reasons as to why a Cumulative Impact Policy might be imposed. It is categorically not enough to say that CIPS are always imposed for the same reasons – they are not. A quick glance at the various Statements of Licensing Policy, and CIPS around the country quickly reveal that. It would, for example, be possible for a new application for a restaurant to argue that they did not contribute to the Cumulative Impact problem in scenario (i) above , but it would not be possible for them to argue that they did not contribute in scenario (iii). Without knowing and making explicit the evidential base, it is impossible to approach this application process, or decision making exercise correctly.

A CIP can never be absolute. Statements of licensing policy should always allow for the circumstances of each application to be considered properly and for applications that are unlikely to add to the cumulative impact on the licensing objectives to be granted. After receiving relevant representations in relation to the

variation of a licence, the licensing authority must consider whether it would be justified in departing from its CIP in the light of the individual circumstances of the case. The impact can be expected to be different for premises with different styles and characteristics. If the licensing authority decides that an application should be refused, it will still need to show that the grant of the application would undermine the promotion of one of the licensing objectives and that appropriate conditions would be ineffective in preventing the problems involved.

The effect of adopting a CIP is to create a rebuttable presumption that applications for the grant or variation of premises licences or club premises certificates which are likely to add to the existing cumulative impact will normally be refused or subject to certain limitations, following relevant representations, unless the applicant can demonstrate in the operating schedule that there will be no negative cumulative impact on one or more of the licensing objectives. However, a special policy must stress that this presumption does not relieve responsible authorities (or any other persons) of the need to make a relevant representation, referring to the evidence and information which had been before the licensing authority when it developed its statement of licensing policy, before a licensing authority may lawfully consider giving effect to its special policy.
If there are no representations, the licensing authority must grant the application in terms that are consistent with the operating schedule submitted. (Section 182 Guidance 13.29 and 13.30).

This means that there must be representations before a Sub-Committee could refuse an application in a CIZ, and it also means that there must be adequate information or evidence before the Licensing Authority on which the Sub-Committee could base any determination to refuse the application. Licensing authorities may not refuse any applications other than for good reason. In the case of a CIP, that good reason may well be that the applicant has failed to discharge their burden – the rebuttable presumption – that their proposal will not increase the impact on the cumulative impact zone. That is still evidence upon which the Sub-Committee can base their decision.

Where the Applicant puts forward a case, however, that they will not add to the cumulative impact, what is the position for objectors to the application? Must they too produce evidence, or it is enough simply for them to point out that the application is in a Cumulative Impact Zone and stay silent?

It is not uncommon in dealing with applications in the CIZ to find that a representation from the Police, or another, does nothing more than assert that the premises are in a CIZ and then insist, as a direct result of this fact, that the application ought to be refused.

Where the applicant produces evidence which, on the face of it, is persuasive that they will not add to cumulative impact, what approach should responsible authorities, and the Sub-Committee take then? What does "rebutting the presumption" actually mean?

This often arises in the context of an applicant adducing empirical evidence that the extension of hours would not be likely to have an adverse effect on the cumulative impact in the area, for example, by pointing to events which have been held in the recent past at the hours applied for, under the authorisation of TENs (Temporary Events Notices). This is often said to demonstrate empirically that trading to the later hour does not give rise to increased incidents or impact at the relevant times.

R (on the application of Portsmouth City Council) v 3D Entertainment Group (CRC) Ltd [2011] EWHC 507 (Admin).

This case concerns the nature and quality of evidence that should be adduced in a cumulative impact case, both by the applicant, in trying to rebut the presumption, and also by responsible authorities trying to resist the application.

It is not the most straightforward of cases to understand and to a certain extent, it turns on its own facts. On the face of it, this case could be read as meaning that the police and other objectors do not have to do anything at all in a cumulative impact case, other than point out the existence of the CIP. But can that be right?

The Council appealed to the High Court against the decision of the Magistrates' Court sitting in Portsmouth. The Magistrates had allowed the appeal of 3D Entertainment against the refusal by Portsmouth City Council's Licensing Committee to allow the Respondent to amend its premises licence in respect of a night club called Route 66, to extend its opening hours from 2am to 3am Monday to Saturday and from 12.30am to 3am on Sunday. The Club was in the Cumulative Impact zone.

In the first place, the Magistrates erred by directing themselves that they did not need to follow the approach set out by the Court of Appeal (Civil Division) in ***Sagnata Investments v Norwich Corporation [1971] 2 All ER 1441*** when dealing with appeals of this nature. This was clearly wrong.

The magistrates in their written reasons said as follows "Our view is that as an independent and impartial tribunal in the context of licensing applications, we should not be following the approach of Sagnata." They

went on to say that they were entitled to "look" at the decision-making process and "reasoning" adopted by the council but did not consider themselves in "any way" bound by it. In the final statement of the case the magistrates stated "Our view was that to be truly independent at re-hearing, which is de novo, we should not be influenced by decisions at an earlier hearing. Given those circumstances, the doctrine of precedent we felt should be abrogated."

This was the starting point of the High Court's decision to overturn the Magistrates' determination. It is highly likely that this coloured the High Court's approach to the whole case.

It appears that what the Magistrates actually did in their determination was to conclude that the Appellants had discharged the burden of proof, and had rebutted the presumption, simply by setting out some conditions in their Operating Schedule. The Magistrates found those conditions persuasive in concluding that there would be no additional cumulative impact, but, objectively, it was hard to see why they should reach such a conclusion.

Supperstone J:

"[13] The magistrates found that the conditions put forward by the Respondent on the appeal were sufficient to demonstrate that there would be no cumulative impact on any of licensing objectives. The three conditions were as follows: (1) no re-admission after 1 am; (2) an ID scanner would be used; (3) all drinks to be sold in polycarbonate glasses or PET bottles, and, when not available, they would be decanted into polycarbonate bottles.

[14] Mr Lucie submits, and I agree, that conditions (2) and (3) relate only to the premises themselves and will have no impact outside those premises. Condition (1) was said to be "a significant condition which will prevent any migrating customers". The magistrates do not state what this means. It may stop persons migrating to Route 66 after 1am but it cannot mean that it will prevent people migrating away from Route 66 after that time. Those migrating away from the premises will add to the cumulative impact."

The reality, therefore, was that the Magistrates had no cogent evidence before them from the Appellants that was capable of discharging their burden, and rebutting the presumption against the premises that there should be no grant in the Cumulative Impact Zone.

Having accepted those conditions as being sufficient to discharge the burden, however, the Magistrates then turned to the Police, as responsible authority, and placed the rest of the weight of the case on their shoulders. The Magistrates looked to the Police, and through them, the Council to persuade them, with "hard evidence" that there *would* be cumulative impact if the application were granted. They expected also that the Council

and Police would "investigate" the cumulative impact, and produce evidence accordingly. This, the High Court found, was the wrong approach, and it is not difficult to see why, in the context of this case. The Magistrates essentially had removed any burden upon the Appellant, other than to put forward an Operating Schedule, which did not really deal with cumulative impact at all, and to make an assertion that they would not add to cumulative impact. Evidentially, this is not of probative or persuasive value, and very clearly, this should not have been accepted as discharging the burden at all. In all the circumstances, what the Magistrates effectively did was to reverse the burden of proof, and put all the hard work onto the Police. This is clearly wrong.

What of the situation, though, where the Appellant goes much further than 3D Entertainment , and does produce quality evidence that is capable of discharging the burden of proof upon them, and rebutting the presumption against them. Is it sufficient in those circumstances for an objector, or a responsible authority simply to assert that the premises are situated in a CIZ, and that therefore the application should not be granted? Too often, in these situations, the objector or authority will claim, using 3D Entertainment as support, that they do not have to do any more, as they cannot be required to produce "hard evidence". This is to misread and misunderstand the case.

If the Applicant does indeed take strides in rebutting the presumption, then the responsible authorities have to step up to the plate if they wish to challenge that stance. It could be said that they have to "rebut the rebuttal", and they have to do it with evidence, not with bare assertion. There is nothing in 3D Entertainment to undermine such an approach.

P. 73. Wetherspoon v Guildford: Beatson J:

" A reversed burden of proof does not preclude consideration of the "merits" of an application."

It is also worth considering s182 Guidance para 9:12 concerning representations from the Police.

The problem often arises, in the perennial way, where responsible authorities assert that they have evidence of incidents and problems logged against the premises, which may or may not be produced, even in summary format, and any attempt to probe or substantiate that evidence is resisted on the basis of ***3D Entertainment***, with the assertion that hard evidence may not be demanded.

This is unreasonable. The maxim "he who asserts must prove" is well established. This maxim ought not to be departed from just because of a Cumulative Impact Policy.

3D Entertainment:

In stating a case for the High Court, the Magistrates did, it appeared possibly for the first time, accept that the burden was on the Applicants when they stated:

"It is in the Applicants' obligation to produce evidence given the special policy."

However they qualified this by stating:

"But that evidence must be effectively challenged and objectively assessed."

Supperstone J was suspicious:

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"They do not explain what this qualification means in terms of how they applied the policy and, in particular, the reverse burden."

If they had explained themselves – or if that had been possible – then all might have been well. As a basic proposition, this proposition does not seem objectionable. What appears to have happened, and the reason for the Learned Judge's disapproval was that, notwithstanding the correct identification of the appropriate approach in the Statement of Case, this was not the approach that the Magistrates had in fact adopted, and they could not argue that, somehow, they had, by rewriting history in the way that it ought to have been.

Supperstone J:

"[11] Mr Lucie *[Counsel for the Appellant, Portsmouth City Council],* submits, by reference to the matters he refers to in para 34 of his skeleton argument, that the magistrates adopted an approach that was not

consistent with the policy and, in particular, the reverse burden. In my judgment, ***the magistrates failed properly to apply the special policy in particular by requiring the police and the council to adduce evidence that there would be a negative cumulative impact. This amounted to an error of law.***

[18] For the reasons I have already given, the magistrates, in my judgment, erred in law in concluding that the Appellant [*Portsmouth Council]* had to have "hard evidence" from the police and that there was duty upon it to "investigate the cumulative impact". ***The burden was on the Respondent to persuade the Appellant that the operating schedule was such that there would be no cumulative impact.*** In applying the wrong test, the magistrates fell into error in finding that the Appellant had acted unreasonably. Further,

having found the conditions put forward by the Respondent on the appeal (one of which they described as "significant") were sufficient to demonstrate that there would be no negative cumulative impact on any of the licensing objectives, the magistrates were dealing with an application that was different to the one presented at the Committee."

All the highlighting in bold and italics is mine. It is implicit in what the Learned Judge was saying that the Magistrates did not apply the Special Policy (CIP), and looked to the Police and Council first and foremost to discharge the evidential burden concerning cumulative impact, which was entirely the wrong approach. Had the Applicants, 3D Entertainment, successfully discharged their burden first, in the proper way, it cannot then be objectionable to require the police or other objector to back their continued resistance to the application with some kind of cogent probative evidence, and not just bare assertion.

It can clearly be seen how a Cumulative Impact Policy is intended to work. Where there are relevant representations to the Licensing Authority, all the work thereafter falls on the Applicant to demonstrate to the committee's satisfaction that their application will not add to the cumulative impact. The Applicant must demonstrate this first and foremost in their Operating Schedule. Those making representations, including residents and responsible authorities, do not have to produce "hard evidence" that there will be an impact; they simply have to make representations that trigger a hearing. Of course, those making representations, whether individuals (no longer referred to as "interested parties"), or responsible authorities will no doubt give some explanation in their representations as to why there will be an effect on the Cumulative Impact zone, but they are not required to back it up with evidence. The burden of proof is on the Applicant.

Crucially, the Applicant faces a burden that relates to matters more extensive than simply the operation of his own premises and the compliance with the four licensing objectives. The Applicant must demonstrate that the licensable activities, and the behaviour of his clientele once they have left his premises will not contribute to the overall Cumulative Impact in the area. This is a wider consideration than a standard application, which would normally not consider the behaviour of patrons once they are away from the immediate vicinity and direct control of the licensee. A Cumulative Impact Policy is designed to be different, and this is an important consideration.

BREWDOG

A case in which the proper approach to evidence, and a Cumulative Impact Policy has been tested is ***Brewdog Bars Ltd v Leeds City Council in the Leeds Magistrates' Court. District Judge Anderson 6/9/12.***

The District Judge was assessing an application from an operation known as Brewdog. They are a Scottish company specialising in craft beers with a "devoted clientele". They do not operate large public houses selling cheap lager or cheap food. They have outlets in other cities including in cumulative impact areas where they operate well and without police objection. They made an application to come to Leeds.

Their customers, according to DJ Anderson, could be described as "alcohol geeks." He said: "They are not run of the mill or everyone's cup of tea, but there is a demand for outlets selling a good quality of beer".
And he called them : "an intelligent, well-run company, and in a short space of time they have shown themselves to be an effective operator".

He acknowledged that the application was in the Cumulative Impact Policy area in Leeds.

He noted the objection of the Police and the potential impact of another premises on the levels of crime in the area. But, he said:

"It cannot be the policy of the Cumulative Impact Policy to bring the iron curtain clanging down to allow [certain other clubs] to continue to trade while shutting out Brewdog which attracts more discerning customers who do not engage in binge drinking, though I do accept the requirement of the Cumulative Impact Policy is to ascertain specifically whether there will be impact.

If I accept, as I do, that the enterprise sells expensive beers in expensive measures, then I think I can conclude that the people likely to be attracted are not "get it down your neck" drinkers but rather better heeled customers. The type of clientele a premises attracts has a material part to the play in the decision, because if I am not worried about their clientele and am impressed by the running of their bars elsewhere, it follows that it is unlikely that their clientele will have any adverse impact on the area here."

The Police argued that customers may 'accidentally' cause impact. Their argument was that customers could get caught up in a melee caused by others, but the District Judge said that their argument was not a valid one. He said that a simple increase in footfall isn't a rational reason to refuse entry to Leeds by Brewdog.

He said he had heard nothing which caused him to believe that the application should not be granted, and that he was satisfied that the appellants had discharged the burden of proof placed on them.

He said: “I accept that the Committee and the Police did their best but their application of the Policy was too rigid. They seemed to take the view that man was made for the Policy, when the Policy should be made for man.”

The licence to Brewdog in the Cumulative Impact Zone was granted.

The exercise of weighing and evaluating this case is left entirely to the reader.

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