Licensing Appeals –

How to Avoid Them; How to Handle Them

The most valuable information for any party involved in a licensing Committee hearing must surely be how to emerge from it without the need for an appeal to the Magistrates' court. Sadly, this is not an outcome that can be definitively taught or learned – the factors involved are variable and endless. There are, however, certain things that can help. Appeals are expensive for all concerned. There are clear principles for good quality administrative decision-making, and key procedural elements that would make any Committee decision less vulnerable to an appeal. If an appeal becomes inevitable, there are ways of managing it which enhance the case being advanced before the magistrates, and which minimise the risk of costs for unreasonable behaviour.

The hearing.

At the hearing, the Committee is in control of its own procedure, subject to the Regulations under the Licensing Act 2003.

Procedural errors at Committee stage are still relevant upon an appeal to the Magistrates, despite appeals being by way of rehearing:

Hope & Glory Public House Ltd v City of Westminster Magistrates' Court & Lord Mayor and Citizens of Westminster City [2011] EWCA Civ 31 (Court of Appeal)

where it was stated:

" 51. Although the point is academic in the present case, we doubt the correctness of part of the district judge's ruling where he said:

> " I am not concerned with the way in which the licensing subcommittee approached their decision or the process by which it was made. The correct appeal against such issues lies by way of judicial review."

" 52. Judicial review may be a proper way of mounting a challenge to a decision of the licensing authority on a point of law, but it does not follow that it is the only way. There is no such express limitation in the Act, and the power given to the magistrates' court under s181(2) to "remit the case to the licensing authority to dispose of it in accordance with the direction of the court" is a natural remedy in the case of an error of law by the authority. We note also that the guidance issued by the government under s182 and laid before Parliament on 28 June 2007 states in para 12.6:

> "The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both."

However, this point was not the subject of any argument before us."

So it is plain that the Magistrates will consider points of procedure concerning the way in which the Committee went about their decision-making.

It should be possible to achieve a consistently high standard of procedural decision making since the principles are well established and universal: they are far less subject to the individual circumstances and merits of the case.

Fairness.

The guiding principle is that of fairness. This principle can be derived from a number of legal sources, but it is also a matter of common sense.

In a Scottish case, [***Catscratch Ltd & Lettuce Holdings Ltd v Glasgow City Licensing Board (2001), Scottish Outer House, Court of Session***], the Court looked at the issue of fairness in licensing hearings and, in particular, whether Article 6 of the European Convention on Human Rights applied.

Article 6 states:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in

a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Article 6(3) makes reference to criminal proceedings, but the Judge in ***Catscratch*** said this about it:

" I am prepared to accept that Article 6 applies generally in the context of a hearing of this type, ie: a licensing board, albeit it is administrative and it is not, in my opinion correct to regard the Board as exercising the functions of a tribunal. Having said that, however, I do not consider the test to be required under the Convention raises any different issues, certainly in this case, on the question of fairness and the equality of arms from those required by the law of Scotland."

This would certainly be equally applicable to England and Wales as to Scotland.

Further guidance can be gleaned from ***Catscratch****:*

" I do not doubt that the licence holder should have a fair opportunity of correcting or contradicting information which is put before the Board by an objector, but I do not accept this means he has the right to insist that he do so by leading evidence".

" The essential ingredients to my mind of fairness are a general equality of arms as between the parties, and the elimination of any notion of ambush when it comes to the emergence of material. The objections that were successful in this case had been maintained in writing in a number of letters and the respondents had ample notice to respond to them, which they did by way of the submission of their solicitor."

The Judge said that what mattered was whether both sides were given an opportunity to contradict assertions made against them and fairly state their position.

Human rights law applies to licences and licensees in another key particular. Licences that have been granted are capable of being possessions, and constituting a property right; interference with which could constitute an infringement of

Protocol 1 of Article 1: Protection of property:

" (1) Every natural or legal person is entitled to peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law, and by the general principles of international law.

(2) The preceding provisions shall not however in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interests of to secure the payment of taxes or other contributions or penalties."

These principles apply to licensing decisions.[1]

What is probably most important for Committees and their advisers to remember at all times is the need to be fair. This is at the heart of the Licensing Act 2003 and the

[1]Tre Traktorer Aktiebolag v Sweden (1989) 13 EHRR 309

s.182 Guidance in any event. The Guidance contains ample exhortations to decision-makers to make decisions that are necessary, reasonable and proportionate.

One particular point on procedural matters – Committees will wish to be very careful in how they limit the case that the parties wish to put, and how long parties are given. It is perfectly reasonable to exercise control over proceedings; to ask for representations to be concise and to the point, and to exercise some limitation over repetition. On the other hand, Committees should be extremely cautious about imposing arbitrary time limits on representations. This is common in planning committees, where a literal stopwatch may be used. This is inappropriate for a licensing committee hearing, which may involve the human rights aspects outlined above. Practices such as limiting each speaker to a precise 10 minute representation is very much to be discouraged, as this may be challenged as unreasonable. Different cases will require different considerations – some will involve detailed legal submissions; some will have voluminous evidential material. Some may have interested parties and responsible authorities making lengthy representations, which the licensee would need a reasonable opportunity to respond to.

Evidence.

Moving on from procedural considerations, another general area in which Committees will want to take great care is the consideration of evidence being placed before them. This is an aspect on which Committees may hear a great deal of argument, and some well defined "positions" have made themselves apparent in recent years, based upon the interpretation, (and some would say, the misinterpretation) of caselaw.

"Evidence" is a fundamental plank of the hearing. Precisely what it means is harder to define. We are assisted by understanding exactly what it is that a Committee is supposed to be doing in a licensing hearing.

Hope & Glory C/A made it clear that:

" 41. … the licensing function of a licensing authority is an administrative function. By contrast, the function of the district judge is a judicial function. The licensing authority has a duty, in accordance with the rule of law, to behave fairly in the decision-making procedure, but the decision itself is not a judicial or quasi-judicial act. It is the

exercise of a power delegated by the people as a whole to decide what the public interest requires. (See the judgment of Lord Hoffmann in *Alconbury* at para 74.)

" 42. Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on. Sometimes a licensing decision may involve narrower questions, such as whether noise, noxious smells or litter coming from premises amount to a public nuisance. Although such questions are in a sense questions of fact, they are not questions of the "heads or tails" variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. In any case, deciding what (if any) conditions should be attached to a licence as necessary and proportionate to the promotion of the statutory licensing objectives is essentially a matter of judgment rather than a matter of pure fact."

Thus we see that a licensing Committee is attempting a complex and multi-faceted task What are the guiding principles?

There are no formal limitations or rules of evidence which apply before Committees, or indeed, before Magistrates on a licensing appeal. The nature of evidence which may be admitted is very far ranging indeed, and this has been established through a long line of cases which predate the Licensing Act 2003 regime. In principle, hearsay is permissible; circumstantial evidence; logical inference; projections into the future - all sorts of "evidence" that would not necessarily pass muster in a court of law operating to formal rules of evidence. This again, however, does not constitute a "free-for-all", and once again, fairness will be paramount.

The "evidence" being presented needs to be capable of assisting the Committee to reach an objective conclusion on an issue; it needs to be capable of proving something. It should not be a representation of bias; prejudice; hypothesis; insinuation; unfounded allegation; malice or the like. This may weed out "evidence" such as hearsay, rumour and mere assertion. The limitations on what Committees may receive to inform their decision is not so much a label given to any particular type of

evidence, but rather a careful and dispassionate assessment of how reliable it is and what it proves.

This is effectively what Black J was saying in the seminal High Court case of:
Daniel Thwaites plc v Wirral Borough Magistrates' Court **[2008] EWHC 838 (Admin).**

She said:

" 47: "To judge by the Reasons (given by the magistrates) therefore, what led the magistrates to impose restricted hours of operation was their forecast as to what would occur in the future in association with the premises, notwithstanding the absence of reliable evidence of past problems."

" 55: "It is clear from the Guidance that drawing on local knowledge, at least the local knowledge of local licensing authorities is an important feature of the Act's approach. There can be little doubt that local magistrates are also entitled to take into account their own knowledge, but, in my judgement, they must measure their own views against the evidence presented to them. In some cases, the evidence will require them to adjust their own impression. This is particularly likely to be so when it is given by a responsible authority such as the police. They must also scrutinise their own anxieties about matters such as noise and other types of public nuisance particularly carefully if the responsible authorities raise no objections on these grounds."

This is clear. The quality and reliability of evidence is what matters. In ***Thwaites,*** the Magistrates had a personal view which they had arrived at based on their own local knowledge and impressions. That view was contradicted by the evidence presented to them, and by the position of the responsible authorities, yet they still chose to rely on their own views. This was irrational.

Although this analysis makes it sound very simple, it is in fact a very subtle exercise to undertake. We are all informed by our own views, perceptions, prejudices and impressions. This is where the challenge lies for Committees – in receiving evidence, which is likely in most cases to be contradictory, and handling it fairly, impartially

and objectively, without preconceived ideas, and treating each case on its merits. This is the heart of the challenge. A failure to achieve it, however, is the fastest route to the Magistrates' court.

Licensing Authorities and Committees can help themselves by being careful as to how evidence is received. In this regard, they should be informed in particular by

Regulation 18, (Hearings Regulations):

" 18: In considering any representations or notice made by a party the authority may take into account documentary or other information produced by a party in support of their application, representations or notice (as applicable) either before the hearing or, with the consent of all the other parties, at the hearing."

"Before the hearing" is usually interpreted as meaning before the day of the hearing. Any other interpretation fails to achieve the purpose of the regulation, which is clearly to prevent an ambush - a clear tenet of the requirement for fairness. Exactly how long before the hearing may be a decision that is based upon the facts and circumstances of the case – specifically, how much time would reasonably be required to read and understand the material sought to be submitted.

Another element to consider when receiving evidence is how the opposing parties may be expected to challenge it. This will be a particularly pertinent consideration when presented with evidence such as hearsay, or statistics, or "intelligence". Intelligence may be persuasive, depending on its nature and its source, or it may be a fancy word for rumour. It is far from uncommon for interested parties, and even responsible authorities to use words in their representations such as "probably", "suspected", "allegedly", "anecdotally" and so forth. Committees should ask themselves seriously how they are helped in reaching reasonable and reliable conclusions based on such material, and also how fair it is to expect licensees to defend themselves against it.

This question raises itself in situations which arise commonly, for example where parties wish to present their evidence in summary form or in graphical and pictorial representations of statistical evidence. There are good reasons as to why parties, and

particularly the police and responsible authorities would wish to save their own time, and that of Committees by relying on summaries rather than the often voluminous source material on which it is based. The summaries and graphical representations are, however, it must be recognised, only as accurate and valuable, as evidence, as the source material upon which they are based. A bar graph which purports to demonstrate that particular premises give rise to more crime and disorder than any other premises in the county is only valuable, evidentially, if it is accurate. It is not unreasonable to question its accuracy, if the premises do not accept the conclusion which it purports to represent. It would be pleasing to be able always to assume that all material presented on behalf of responsible authorities was always 100% reliable and accurate, because of the public nature of the organisation presenting it. Unfortunately, experience shows that this cannot always be assumed, because of a variety of reasons, ranging from human error, to technical error, to the subjective nature of the raw material.

The courts have made it plain, on analysis of problems of this nature, that the responsibility lies with the Committee, to satisfy themselves as to the accuracy and reliability of the material that they choose to rely upon. It remains their responsibility on appeal, and not that of the responsible authority, or interested party who presented the information. The extent to which the Committee will wish to go behind what they are being presented with, and ask for more information or confirmation will be a matter for them in all the circumstances of the case, but this situation can pose a particular problem when parties are asked, and decline to disclose the source material upon which they have based their evidence. See ***Murco*** for another example of the problem, in which the party declined to cooperate with the Committee's request.

In one appeal, a revelation, very late in the day, that summaries presented to the Committee were not accurate, or faithful to the raw data upon which they had purportedly been based, cost the Council a significant amount of money in costs upon the appeal being allowed[2]. In this particular case, the problem could have been averted earlier by the Council calling for a relatively manageable amount of original

[2] Birch House Business Centre v Denbighshire County Council 2010 (V2)

material in order to verify specific areas of challenge. The Council declined to do so, and the party holding the material refused.
Each case will turn on its own facts; there is no one right solution.

Reasons.

The final area to discuss in relation to Committees' duties is the presentation of reasons. The expression of the Committee's reasons in their notice of decision should only be the outward manifestation of the reasonable and proportionate decision-making exercise that has just been undertaken throughout the entire hearing. Firstly, fairness requires that people should be left in no doubt as to why the decision has been taken either for them, or against them. Secondly, the requirement to give reasons concentrates the mind and a resulting decision is likely to be more soundly based. [3]

The requirement for licensing Committees to give reasons was confirmed in ***Hope & Glory C/A:***

" 43. The statutory duty of the licensing authority to give reasons for its decision serves a number of purposes. It informs the public, who can make their views known to their elected representatives if they do not like the licensing sub-committee's approach. It enables a party aggrieved by the decision to know why it has lost and to consider the prospects of a successful appeal. If an appeal is brought, it enables the magistrates' court to know the reasons which led to the decision. The fuller and clearer the reasons, the more force they are likely to carry."

This is an exhortation that should be observed by Committees at all times. The reasons, while they do not have to be lengthy, should give a clear indication as to what evidence the Committee have relied upon, and what rejected, and why. Reasons should indicate what it was that persuaded the Committee to the decision that they have just taken. The quality of the reasons themselves can be influential as to whether there is an appeal or not. The decision of the Committee has to be rational and reasonable - they have to be able to demonstrate that the steps that they have determined upon are necessary reasonable and proportionate, and this should be clearly seen in the reasons. Licensing decisions are not punishments, or intended to

[3] Lord Justice Henry C/A Flannery and Halifax Estate Agencies Ltd (2000)

teach a lesson, although that is often how they will be received. The reasons for the decision can help in dispelling this perception.

Standard conditions and standard steps on a "one-size-fits-all" basis are inappropriate, because each case will be required to be considered on its individual facts and merits. The reasons can help in addressing all of these concerns, and can make it plain that every decision is bespoke. It is inadvisable, although still occasionally seen, to have a standard "template" for a licensing determination letter. This makes it much more difficult to reassure those on the receiving end of decisions, and, in due course, the Magistrates, that the decision and reasons were truly bespoke to the situation.

Appeal.

If there is to be an appeal, then it should be approached on the basis that it will be a rehearing, in which the Magistrates will undertake the exercise of reconsidering the case, on all the evidence, on its merits, and coming to their own view. They will then consider whether their assessment means that the Licensing Committee is wrong. This may involve receiving fresh evidence, whether or not it was available at the time of the original Committee hearing. It will also involve an assessment of the situation at the time that the Magistrates are considering it, as opposed to how matters stood at the time that the Committee considered it. It may well be that so much has transpired between the original hearing and the Magistrates' appeal, that the Committee could not be said to have been misguided or "wrong" in doing what they did at the time, but that the decision, in all fairness can no longer stand. This will result in an appeal being allowed, even though the Committee could not reasonably have been expected to have done anything else themselves.

Powers of the magistrates

Magistrates may either dismiss the appeal; substitute their own decision for the decision being appealed or remit the matter back to the licensing authority for redetermination. The Magistrates may also make such order as to costs as they think fit. ***City of Bradford Metropolitan District Council v Booth [2001] LLR 151***

It is also important to note that any legal or procedural errors made in Committee can be the subject of a costs application on appeal. This is the case, even if the Magistrates find that the appeal should be dismissed – it is possible for them to award

costs regardless of the substantive outcome of the appeal: ***Sheeja Prasannan v Kensington & Chelsea Royal London Borough Council*** ***[2010]***

Hope & Glory I and II are now the definitive authorities on how a magistrates' appeal is to be conducted. An Appellant brings the case before the magistrates, and therefore begins the proceedings.

Parties.

When objectors (interested parties or responsible authorities) appeal, then the licensing authority is the respondent, and the Act makes specific provision for the premises licence holder to be a respondent as well. When a licence applicant / premises licence holder appeals, there is no provision within the Act or regulations for anyone other than the licensing authority to be the respondent. Unless the authority calls objectors as witnesses, there is no provision for them to be notified or present at the appeal, and there is no provision for their representations to be put before the magistrates.

This issue, of who is entitled to be a party to an appeal was the subject of much controversy, before the High Court case of ***Chief Constable of Nottinghamshire v Nottingham Magistrates' Court [2009] EWHC 3182***.

This case established that there was no express or implied right for a responsible authority, such as the police, to be joined as a respondent.

Tribunals and magistrates have power to control and regulate their own procedure, and they may permit a responsible authority or interested party to be a party to the appeal if it will assist them. The Court gave certain guidance in this regard, and this case repays careful reading.

High Court Appeals.

Judicial review and cases stated to the High Court.

These are beyond the scope of this talk, and are the subject of a different talk at this year's IOL National Training Event.

Conclusion.

Appeals cause great concern to licensing authorities, and to parties alike. They may at times be inevitable, but there is much that licensing authorities can do to enhance the quality of their procedure and decision-making, and to avoid appeals wherever possible.

****

Sarah Clover
Barrister
Email: sclover@kingschambers.com
Clerked by: Gary Smith
Email: gsmith@kingschambers.com
©Sarah Clover 2013

Birmingham
Embassy House,
60 Church Street,
Birmingham B3 2DJ
DX:13023(BIRMINGHAM)