R. (on the application of Daniel Thwaites Plc) v Wirral Borough Magistrates' Court

Queen's Bench Division | May 6, 2008 | [2009] P.T.S.R. 51

*51 Regina (Daniel Thwaites plc) v Wirral Borough Magistrates' Court

Positive/Neutral Judicial Consideration

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Licensing—Licensed premises—Variation of existing licence—Application by claimant for conversion and variation of existing licence to extend operating hours—Licensing authority granting application despite local objections—Appeal to magistrates' court by local residents against licensing authority's decision—Correct approach under new legislation when imposing limitations upon licence— Licensing Act 2003 (c 17), ss 4, 182

The claimant owned a hotel and operated it as licensed premises. In June 2005 the claimant applied for the existing licence granted under the Licensing Act 1964 to be converted to a premises licence under the Licensing Act 2003 and for the hours of operation to be extended. Initial opposition by the police to the extended hours was withdrawn when the proposals were modified. Despite continued opposition from the local conservation society and local residents, the licensing authority granted the licence in the modified terms requested. Those still opposed to the grant of the licence appealed to the magistrates' court on the ground that the licensing authority's decision was not made with a view to promoting the four licensing objectives set out in section 4(2) of the Licensing Act 2003 [1] , which included the prevention of public nuisance, and crime and disorder. The justices, allowing the appeal, accepted that there had been no formal or recorded complaints against the hotel and that the extended hours had been in operation for several months without incident, but stated that they felt that public nuisance and crime and disorder would be inevitable because of the migration to the hotel of customers from other premises with reduced licensing hours. The claimant claimed in judicial review proceedings that the decision was unlawful in that the justices had imposed restrictions which were not necessary to promote the licensing objectives in the Act, that their decision was based on impermissible speculation rather than evidence, and that they had failed to have regard to ministerial guidance issued in July 2004 under section 182 of the 2003 Act.

On the claimant's claim for judicial review—

Held , allowing the claim and quashing the decision, (1) that in exercising its licensing functions a licensing authority or a magistrates' court was not entitled to ignore or fail to give any weight to the ministerial guidance issued in July 2004 under section 182 of the Licensing Act 2003 and had to give proper reasons for departing from it; that both the 2003 Act and the guidance made it clear that licensable activities were to be restricted only where such restriction was necessary to

promote the four licensing objectives set out in section 4(2) ; that the starting point was that a limitation on a licence ought not to be imposed unless it was necessary to promote those objectives; that to be necessary a regulatory provision had to be proportionate; and that although justices were entitled to take into account their own local knowledge, they should measure those views against the evidence presented to them and adjust their own impression in the light of that evidence (post, paras 38, 40, 41, 55, 59).

(2) That the justices' approach to what was "necessary" was coloured by a failure to take proper account of the changed approach to licensing introduced by the 2003 Act, which called for a greater reluctance to impose regulation; that they ***52** proceeded without proper evidence and gave their own views excessive weight, and their resulting decision limited the hours of operation of the premises without it having been established that it was necessary to do so to promote the licensing objectives; and that in all the circumstances their decision was unlawful and must be quashed (post, paras 63, 68).

Per curiam. It is important to keep in mind that the role of the licensing authority and the court on appeal has two dimensions: the fundamental task is to license activities which require a licence and the associated task is to consider what, if any, conditions are imposed on the applicant to ensure the promotion of the licensing objectives. A requirement that the premises close at a particular time seems to be a condition just like any other, such as keeping doors and windows closed to prevent noise. There is no reason why a condition of closing up the premises at a particular time should not therefore be imposed where controlling the hours of the licensable activities on the premises (and such other conditions as may be imposed) is not sufficient to promote the licensing objectives (post, para 67).

The following cases are referred to in the judgment:

R v Westminster City Council, Ex p Ermakov [1996] 2 All ER 302; 95 LGR 119, CA
R (JD Wetherspoon plc) v Guildford Borough Council [2006] EWHC 815 (Admin); [2007] 1 All ER 400; [2006] LGR 767

The following additional cases were cited in argument:

Bradford Metropolitan District Council v Booth [2000] COD 338; 164 JP 485, DC
R (Cambridge City Council) v Alex Nestling Ltd [2006] EWHC 1374 (Admin); 170 JP 975, DC
R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2) [2001] Env LR 406; 81 P & CR 365

The following additional cases, although not cited, were referred to in the skeleton arguments:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680; 45 LGR 635, CA
Cranage Parish Council v First Secretary of State for Scotland [2004] EWHC 2949 (Admin); [2005] 2 P & CR 390
R v Licensing Justices for Gloucester, Ex p Warner [2001] LLR 687

CLAIM for judicial review

On 23 August 2005, pursuant to the introduction of the Licensing Act 2003 , the licensing sub-committee of the Wirral Metropolitan Borough Council granted the claimant, Daniel Thwaites plc, a conversion of its justices' on licence, previously held under the Licensing Act 1964 , together with a variation of the new licence to enable licensable activities and general operation to be continued beyond the hours previously applicable.

By notice dated 23 November 2005 the Saughall Massie Conservation Society and other Saughall Massie residents, the first interested party, appealed against the licensing decision on the ground that it was not in accordance with the licensing objectives as set out in section 4 of the 2003 Act.

On 5 April 2006 justices sitting at Wirral Borough Magistrates' Court allowed the appeal, reduced the hours of operation permitted under the new licence and, on 21 April 2006, made a costs order against the claimant.

Pursuant to permission granted by Pitchford J on 2 November 2006, the claimant claimed judicial review of those decisions on the grounds that the *53 decision of 5 April 2006 was wrong in law since the justices had determined the appeal not on the evidence but on their own speculation as to the likely future effect of the opening hours granted by the licensing authority, had taken into account irrelevant considerations, deliberately ignored relevant matters and issues, failed to have regard to the "Guidance under section 182 of the Licensing Act 2003 " issued in July 2004 by the Secretary of State for Culture, Media and Sport, and failed to give adequate reasons. The claimant served notices of claim for judicial review on the justices, the first interested party, and upon the Wirral Metropolitan Borough Council, the second interested party, seeking the quashing of that order and the order for costs against them.

David Pickup (instructed by *Napthens LLP* , *Blackburn*) for the claimant.

David Flood (instructed by *Kirwans* , *Wirral*) for the first interested party.

Matthew Copeland (instructed by *Legal and Member Services* , *Wirral Metropolitan Borough Council* , *Wirral*) for the second interested party.

The justices did not appear and were not represented.

The court took time for consideration.

6 May 2008. BLACK J

handed down the following judgment.

1. This is an application by the claimant, Daniel Thwaites plc, for judicial review of a licensing decision made by justices sitting at Wirral Borough Magistrates' Court on 5 April 2006 and that court's decision on 21 April 2006 concerning the costs of the proceedings. The claimant seeks an order quashing both decisions. Permission to apply for judicial review was granted by Pitchford J on 2 November 2006.

The factual background

2. The claimant owns the Saughall Hotel in Saughall Massie, Wirral which it operates as licensed premises. It originally held a licence under the Licensing Act 1964 . In June 2005 it commenced an application to the licensing sub-committee of the Metropolitan Borough of Wirral for the existing licence to be converted to a premises licence under the Licensing Act 2003 and for the licence to be varied simultaneously.

3. In essence, the claimant was seeking to conduct business at the premises for longer hours than were permitted under the original licence. The police did not support the extension of the hours to the extent that the claimant initially proposed. The claimant agreed to restrict the hours to those that were acceptable to the police. Accordingly, the licensing authority was asked to grant a licence that would permit music and dancing to 11 pm and alcohol sales until midnight on all nights except Friday and Saturday and, on Friday and Saturday nights, music and dancing to midnight and alcohol sales until 1 p m, with the doors closing one hour after the last alcohol sale every night.

4. The police withdrew their representations against the modified proposals and did not appear before the licensing authority when the matter was heard on 23 August 2005. No representations were made by the Wirral environmental health services either. However, there was opposition to the proposals at the hearing from the first interested party, the Saughall Massie Conservation Society and other Saughall Massie residents.
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5. The claimant told the licensing authority at the hearing that the hours of operation at the premises would not vary significantly from the existing hours of operation and that the application for extended hours was to allow flexibility to open later "on special occasions". This was a matter of which the licensing authority took note, as is recorded in the minutes of their determination.

6. The licence was granted in the modified terms requested, together with an additional hour for licensable activities and an extra 30 minutes for the hours the premises were to be open to the public over Christmas and at the major bank holidays. Special arrangements were also permitted for New Year's Eve. The licensing authority removed certain conditions that had been

imposed on the old licence (requiring all alcohol to be consumed within 20 minutes of the last alcohol sale and banning children under 14 from the bar) and imposed other conditions which were obviously aimed at controlling noise, namely that the area outside must be cleared by 11 p m, that the premises must promote the use of taxi firms which use a call-back system, that all doors and windows must be kept closed when regulated entertainment was provided, and that prominent notices should be placed on the premises requiring customers to leave quietly.

7. The Saughall Massie Conservation Society and others appealed against the licensing decision to the magistrates' court on the ground that the licensing authority's decision "was not made with a view to promotion of and in accordance with the licensing objectives pursuant to section 4, Part 2 of the Licensing Act 2003 ".

8. The appeal occupied the justices from 3 to 5 April 2006. The respondents to the appeal were the licensing authority and the claimant, which both defended the licensing authority's decision. Witnesses were called including Saughall Massie residents, Police Sergeant Yehya who dealt with the stance of the Merseyside police, and Mr Miller, the manager of the premises.

9. The justices granted the appeal. Their reasons run to three pages of typescript, one page of which is entirely taken up with setting out the new hours of operation they imposed. These permitted entertainment until 11 pm and alcohol sales until 11.30 pm on all nights except Friday and Saturday, when entertainment would be permitted until 11.30 pm and alcohol sales until midnight. The premises could remain open to the public until midnight on all nights except Friday and Saturday, when they could close at 1 a m. Similar provisions were imposed to those imposed by the licensing authority in relation to later opening at Christmas and major bank holidays, and the provisions relating to New Year's Eve and the conditions of the licence remained unaltered.

10. The new licence had come into effect on 24 November 2005, so the new arrangements had been running for several months by the time of the hearing before the magistrates' court. There had been no formal or recorded complaints against the premises under the old or the new regime as the justices acknowledged in their reasons. The residents who gave evidence were fearful of problems if the extended hours were allowed in the summer. The chairman of the Conservation Society, who gave oral evidence, spoke of people urinating in the gardens and a problem with litter. It appears from the statement filed by the chairman of the bench for these judicial review proceedings that evidence was also given of interference with machinery on ***55** nearby Diamond Farm. The justices' reasons make no reference at all to these matters. As to the statements of the "witnesses of the appellant", they say simply that they have read and considered them but attached little or no weight to them.

11. The justices and their legal adviser have filed a considerable amount of material in response to the judicial review proceedings, in all 31 closely typed pages. These comprise their response to the claim, statements from Alistair Beere (who was the chairman of the bench), Mary Woodhouse (another of the bench) and Stephen Pickstock (the legal adviser), and what is said in the index to be a document by Mr Beere from which he prepared his statement. There was limited argument before me as to the status of these documents and the weight that I should give to them. It was not submitted that I should decline to have *any* regard to them although I think it is fair to say that it was common ground between the parties, rightly in my view, that I should concentrate principally on the reasons. It is established by authorities such as *R v Westminster City Council, Ex p Ermakov [1996] 2 All ER 302* that the court can admit evidence to elucidate or, exceptionally, correct or add to the reasons given by the decision-maker at the time of the decision but that it should be very cautious about doing so. The function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. In the circumstances, I have read carefully what the justices have provided but approached its role in the judicial review proceedings cautiously.

The broad nature of the claim in relation to the licensing decision

12. The claimant argues that the justices' decision is unlawful for a number of reasons. It is argued that the decision was not in line with the philosophy of the Licensing Act 2003 and imposed restrictions on the claimant's operation which were not necessary to promote the licensing objectives set out in that Act, that it was based on speculation rather than evidence, that it took into account irrelevant considerations and failed to take into account proper considerations, and that it was a decision to which no properly directed justices could have come on the evidence. In so far as the court imposed conditions as to the time at which the premises must close, it is submitted that this was not a matter which can be regulated under the Act. It is further argued that the justices failed to give adequate reasons for their decision.

The legal background

13. The Licensing Act 2003 was intended to provide a "more efficient", "more responsive" and "flexible" system of licensing which did not interfere unnecessarily. It aimed to give business greater freedom and flexibility to meet the expectations of customers and to provide greater choice for consumers whilst protecting local residents from disturbance and anti-social behaviour.

14. Note 12 of the Explanatory Notes to the 2003 Act, prepared 25 July 2003, gives an indication of the approach to be taken under the Act. It reads:

> "In contrast to the existing law, the Act does not prescribe the days or the opening hours when alcohol may be sold by retail for consumption on *56 or off premises. Nor does it specify when other licensable activities may be carried on. Instead, the applicant for a premises licence or a club premises certificate will be able to choose the days and the hours during which they wish to be authorised to carry on licensable activities at the premises for which a licence is sought. The licence will be granted on those terms unless, following the making of representations to the licensing authority, the authority considers it necessary to reject the application or vary those terms for the purpose of promoting the licensing objectives."

15. Section 1 of the 2003 Act provides:

> "(1) For the purposes of this Act the following are licensable activities—(a) the sale by retail of alcohol, (b) [clubs] (c) the provision of regulated entertainment, and (d) the provision of late night refreshment."

16. To carry on a licensable activity, a premises licence granted under Part 3 of the Act is generally required: section 2 . Application for a premises licence must be made to the relevant licensing authority: section 17(1) .

17. By virtue of section 4 , the licensing authority must carry out all its functions under the Act, including its functions in relation to determining an application for a premises licence or an application for a variation of a premises licence, with a view to promoting the "licensing objectives". These are set out in section 4 :

> "(2) The licensing objectives are—(a) the prevention of crime and disorder; (b) public safety; (c) the prevention of public nuisance; and (d) the protection of children from harm."

18. In carrying out its licensing functions, by virtue of section 4(3) the licensing authority must also have regard to its licensing statement published under section 5 and any guidance issued by the Secretary of State under section 182 .

19. Section 182 obliges the Secretary of State to issue guidance to licensing authorities on the discharge of their functions under the Act. Guidance was issued in July 2004. It was updated in June 2007 but it is the original guidance that is relevant in this case. In any event, none of the changes made are material to the issues I have to determine.

20. The foreword says that the guidance:

> "is intended to aid licensing authorities in carrying out their functions under the 2003 Act and to ensure the spread of best practice and greater consistency of approach. This does not mean we are intent on eroding local discretion. On the contrary, the legislation is fundamentally based on local decision-making informed by local knowledge and local people. Our intention is to encourage and improve good operating practice, promote partnership and to drive out unjustified inconsistencies and poor practice."

21. As the guidance says in para 1.7, it does not replace the statutory provisions of the 2003 Act or add to its scope. Para 2.3 says:

> "Among other things, section 4 of the 2003 Act provides that in carrying out its functions a licensing authority must have regard to guidance issued by the Secretary of State under section 182. The *57 requirement is therefore binding on all licensing authorities to that extent. However, it is recognised that the guidance cannot anticipate every possible scenario or

set of circumstances that may arise and so long as the guidance has been properly and carefully understood and considered, licensing authorities may depart from it if they have reason to do so. When doing so, licensing authorities will need to give full reasons for their actions. Departure from the guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken."

22. An application to the licensing authority for a premises licence must be accompanied by an operating schedule in the prescribed form including a statement of the matters set out in section 17(4) of the 2003 Act, which are:

"(a) the relevant licensable activities, (b) the times during which it is proposed that the relevant licensable activities are to take place, (c) any other times during which it is proposed that the premises are to be open to the public, (d) where the applicant wishes the licence to have effect for a limited period, that period, (e) where the relevant licensable activities include the supply of alcohol, prescribed information in respect of the individual whom the applicant wishes to have specified in the premises licence as the premises supervisor, (f) where the relevant licensable activities include the supply of alcohol, whether the supplies are proposed to be for consumption on the premises or off the premises, or both, (g) the steps which it is proposed to take to promote the licensing objectives, (h) such other matters as may be prescribed."

23. Section 18 deals with the determination of an application for a premises licence. Section 35 deals in very similar terms with the determination of an application to vary a premises licence. It will be sufficient only to set out here the provisions of section 18 .

24. Section 18(2) provides that, subject to subsection (3) , the authority must grant the licence in accordance with the application subject only to: "(a) such conditions as are consistent with the operating schedule accompanying the application, and (b) any conditions which must under section 19, 20 or 21 be included in the licence."

25. Section 19 deals with premises licences which authorise the supply of alcohol. Such licences must include certain conditions ensuring that every supply of alcohol is made or authorised by a person who holds a personal licence and that no supply of alcohol is made when there is no properly licensed designated premises supervisor. Sections 20 and 21 are not relevant to this claim.

26. Section 18(3) provides that where relevant representations are made the authority has certain specified obligations. In so far as is relevant to this appeal "relevant representations" are defined in section 18(6) :

"(6) For the purposes of this section, 'relevant representations' means representations which—(a) are about the likely effect of the grant of the premises licence on the promotion of the licensing objectives, (b) meet the requirements of subsection (7) …"

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27. Subsection (7) provides:

"(7) The requirements of this subsection are—(a) that the representations were made by an interested party or responsible authority within the period prescribed under section 17(5)(c), (b) that they have not been withdrawn, and (c) in the case of representations made by an interested party (who is not also a responsible authority), that they are not, in the opinion of the relevant licensing authority, frivolous or vexatious."

28. Where relevant representations are made the authority must hold a hearing to consider them unless the authority, the applicant and each person who has made representations agrees that a hearing is unnecessary. By virtue of section 18(3)(b) the authority must also:

"(b) having regard to the representations, take such of the steps mentioned in subsection (4) (if any) as it considers necessary for the promotion of the licensing objectives."

29. Section 18(4) provides:

> "The steps are—(a) to grant the licence subject to—(i) the conditions mentioned in subsection (2)(a) modified to such extent as the authority considers necessary for the promotion of the licensing objectives, and (ii) any condition which must under section 19, 20 or 21 be included in the licence; (b) to exclude from the scope of the licence any of the licensable activities to which the application relates; (c) to refuse to specify a person in the licence as the premises supervisor; (d) to reject the application."

30. Conditions are modified for the purposes of subsection (4)(a)(i) if any of them is altered or omitted or any new condition is added.

31. During the currency of a premises licence, by virtue of section 51 , an interested party (broadly speaking, a local resident or business) or a responsible authority (police, fire, environmental health etc) may apply to the relevant licensing authority for a review of the licence on a ground which is relevant to one or more of the licensing objectives. By virtue of section 52 a hearing must be held to consider the application and any relevant representations, and the authority must take such steps from a specified list as it considers necessary for the promotion of the licensing objective. The steps range from modifying the conditions of the licence to suspending it or revoking it completely.

32. The 2003 Act makes provision in Part 5 for "Permitted temporary activities" which, loosely speaking, is a form of ad hoc licensing to cover licensable activities which are not covered by a more general licence. The system involves proper notification of an event to the licensing authority and the police. Provided the applicable number of temporary event notices has not been exceeded and the police do not intervene, the event is automatically permitted. Temporary event notices can only be given in respect of any particular premises 12 times in a calendar year and the period for which each event lasts must not exceed 96 hours.

33. Section 181 provides for appeals to be made against decisions of the licensing authority to a magistrates' court which is, of course, how the decisions in relation to which judicial review is sought in this case came to be made.

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The detail of the claim

34. The claimant submits that, in making their decision to allow the appeal in relation to the premises licence, the justices failed in a number of respects to take account of the changes that the new licensing regime has made and failed to adopt the approach required by the Act. It is further submitted that the justices failed properly to consider and take into account the guidance.

35. There is no doubt that the guidance is relevant in the justices' decision-making. As I have set out above, section 4(3) requires the licensing authority to "have regard" to the guidance. By extension, so must a magistrates' court dealing with an appeal from a decision of the licensing authority. The guidance says:

> "10.8. In hearing an appeal against any decision made by a licensing authority, the magistrates' court concerned will have regard to that licensing authority's statement of licensing policy and this guidance. However, the court would be entitled to depart from either the statement of licensing policy or this guidance if it considered it is justified to do so because of the individual circumstances of any case."

36. Mr Pickup submits that, although the guidance is not binding and local variation is expressly permitted, it should not be departed from unless there is good reason to do so.

37. Mr Flood for the first interested party submits that the guidance simply serves to provide information for the justices and, provided that they have had regard to it, that is sufficient. He also points out that in some respects, as is clear from the wording of the guidance, the guidance is a statement of government belief rather than proved fact. Inviting attention to the judgment of Beatson J in *R (JD Wetherspoon plc) v Guildford Borough Council [2007] 1 All ER 400* , he identifies that different

policy elements in the guidance may pull in different directions in a particular case, flexibility and customer choice potentially conflicting with the need to prevent crime and disorder. He submits that, provided that the justices consult the guidance, they do not need to use it as "a decision-making matrix that the deciding court has to sequentially address in making its decision in the manner it would if considering a section of a statute".

38. There is no doubt that regard must be had to the guidance by the justices but that its force is less than that of a statute. That is common ground between the parties. The guidance contains advice of varying degrees of specificity. At one end of the spectrum it reinforces the general philosophy and approach of the 2003 Act. However, it also provides firm advice on particular issues, an example being what could almost be described as a prohibition on local authorities seeking to engineer staggered closing times by setting quotas for particular closing times. I accept that any individual licensing decision may give rise to a need to balance conflicting factors which are included in the guidance and that in resolving this conflict, a licensing authority or magistrates' court may justifiably give less weight to some parts of the guidance and more to others. As the guidance itself says, it may also depart from the guidance if particular features of the individual case require that. What a licensing authority or magistrates' court is not entitled to do is simply to *ignore* the guidance or fail to give it any weight, whether because it does not agree with the Government's policy or its ***60*** methods of regulating licensable activities or for any other reason. Furthermore, when a magistrates' court is entitled to depart from the guidance and justifiably does so, it must, in my view, give proper reasons for so doing. As para 2.3 of the guidance says in relation to the need for licensing authorities to give reasons:

> "When [departing from the guidance], licensing authorities will need to give full reasons for their actions. Departure from the guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken."

This is a theme to which the guidance returns repeatedly and is a principle which must be applicable to a magistrates' court hearing an appeal as it is to a licensing authority dealing with an application in the first instance. I agree with Mr Flood for the first interested party that the justices did not need to work slavishly through the guidance in articulating their decision but they did need to give full reasons for their decision overall and full reasons for departing from the guidance if they considered it proper so to do.

39. In this case, Mr Pickup submits that proper attention to the guidance would have helped the justices to come to a correct and reasonable decision and that they have failed to adhere to it without proper reason and failed to carry out their licensing function in accordance with the 2003 Act.

40. The foundation of the claimant's argument is that the 2003 Act expects licensable activities to be restricted only where that is *necessary* to promote the four licensing objectives set out in section 4(2) . There can be no debate about that. It is clearly established by the Act and confirmed in the guidance. For example, in the Act, section 18(3)(b) , dealing with the determination of an application for a premises licence, provides that where relevant representations are made the licensing authority must "take such of the steps mentioned in subsection (4) (if any) it considers necessary for the promotion of the licensing objectives"—the steps in subsection (4) include the grant of the licence subject to conditions. Section 35(3)(b) , dealing with the determination of an application to vary a premises licence, is in similar terms. The guidance repeatedly refers, in a number of different contexts, to the principle that regulatory action should only be taken where it is *necessary* to promote the licensing objectives. In particular, it clearly indicates that conditions should not be attached to premises licences unless they are necessary to promote the licensing objectives. See for example para 7.5 and also para 7.17 which includes this passage:

> "Licensing authorities should therefore ensure that any conditions they impose are only those which are necessary for the promotion of the licensing objectives, which means that they must not go further than what is needed for that purpose."

41. The guidance also refers a number of times to the need for regulation to be "proportionate". This is not a term contained in the Act but if a regulatory provision is to satisfy the hurdle of being "necessary" it must in my view be confined to that which is "proportionate" and one can understand why the guidance spells this out.

42. Mr Pickup submits, and I accept, that the 2003 Act anticipates that a "light touch bureaucracy"—a phrase used in para 5.99 of the guidance—will ***61*** be applied to the grant and variation of premises licences. He submits that this means that, unless there is evidence that extended hours will adversely affect one of the licensing objectives, the hours should be granted. A prime example of this arises when an application for a premises licence is made and there are no relevant representations

made about it. In those circumstances, section 18(2) obliges the licensing authority to grant the licence and it can only impose conditions which are consistent with the operating schedule submitted by the applicant. Mr Pickup says that such a light touch is made possible, as the guidance itself says, by providing a review mechanism under the Act by which to deal with concerns relating to the licensing objectives which arise following the grant of a licence in respect of individual premises. He invites attention also to the existence of other provisions outside the ambit of the Act which provide remedies for noise, for example the issue of a noise abatement notice or the closure of noisy premises under the Anti-Social Behaviour Act 2003 . The guidance makes clear that the existence of other legislative provisions is relevant and may, in some cases, obviate the need for any further conditions to be imposed on a licence. Para 7.18, from the section of the guidance dealing with attaching conditions to licences, is an illustration of this approach:

> "It is perfectly possible that in certain cases, because the test is one of necessity, where there are other legislative provisions which are relevant and must be observed by the applicant, no additional conditions at all are needed to promote the licensing objectives."

43. The guidance includes a section dealing with hours of trading which the claimant submits further exemplifies the philosophy of the 2003 Act. It begins with para 6.1 which reads: "This chapter provides guidance on good practice in respect of any condition imposed on a premises licence or club premises certificate in respect of hours of trading or supply."

44. It continues, at paras 6.5–6.6:

> "6.5. The Government strongly believes that fixed and artificially early closing times promote, in the case of the sale or supply of alcohol for consumption on the premises, rapid binge drinking close to closing times; and are a key cause of disorder and disturbance when large numbers of customers are required to leave premises simultaneously. This creates excessive pressures at places where fast food is sold or public or private transport is provided. This in turn produces friction and gives rise to disorder and peaks of noise and other nuisance behaviour. It is therefore important that licensing authorities recognise these problems when addressing issues such as the hours at which premises should be used to carry on the provision of licensable activities to the public.
>
> "6.6. The aim through the promotion of the licensing objectives should be to reduce the potential for concentrations and achieve a slower dispersal of people from licensed premises through longer opening times. Arbitrary restrictions that would undermine the principle of flexibility should therefore be avoided. We will monitor the impact of the 2003 Act on crime and disorder and the other licensing objectives. If necessary in the light of these findings, we will introduce further legislation with the consent of Parliament to strengthen or alter any provisions."

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45. The claimant submits that, in imposing shorter hours than it requested for the supply of alcohol and for entertainment, the justices went beyond that which was necessary for these premises and failed to take into account that, as the guidance explains, longer opening times would in fact reduce the potential for problems arising from licensed premises whereas curtailing operations could run counter to the licensing objectives.

46. The justices' reasons record their acceptance that there had been no reported complaint in regard to public nuisance and that the extended hours had operated without any incidents. The justices also record in the reasons, as I have already said, that they had attached little or no weight to the statements from witnesses of the first interested party. Nothing is said about difficulties mentioned in evidence by the witnesses. As it was clearly incumbent on the justices at least to advert in broad terms to those matters that they took into account, it is fair to conclude in the circumstances that they proceeded upon the basis that there was no reliable evidence of actual problems linked to the premises either under the old licence or under the new revised licence. This was in line with the oral evidence of Police Sergeant Yehya, as recorded in the rather truncated notes of the legal adviser:

> "One reported incident for the site. No other incidents or complaints have been received. There are none in my file. There are no incidents we can directly link to the Saughall Hotel since previously open. There have been incidents locally but not linked to these premises."

47. To judge by the reasons therefore, what led the justices 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. The first interested party observes that the manager of the premises had given evidence that he intended in the summer to "make hay while the sun shines" and submits, correctly in my view, that the justices were entitled to take this apparent change of emphasis into account. However, Mr Flood further submits that the evidence of what had happened in the winter months was therefore of "little evidential value" in determining what was likely to happen in the future and I cannot wholly agree with him about this. Undoubtedly the fact that the claimant intended in future to make more use of the extended hours reduced the value of the premises' past record as a predictor of the future but it could not, in my view, be completely discarded by the justices. They still had to take into account that there had been extended hours for some months without apparent problems.

48. It is plain that the justices' particular concern was "migration" rather than problems generated by those coming directly to the premises for their evening out. Under the heading "The four licensing objectives", they say that they accept that there have been no formal or recorded complaints against the premises "but feel that because of the concept of migration that public nuisance and crime and disorder would be an inevitable consequence of leaving the hours as granted by the local authority". Under the heading "Migration/zoning" they begin:

> "The Saughall Hotel due to its location and the fact that a number of licensed premises in the surrounding area have reduced hours to that of the Saughall Hotel we believe that as [sic] a consequence of this would ***63** be that customers would migrate from these premises to the Saughall Hotel."

And they end:

> "We appreciate that the extended hours have been in operation for several months without any incidents but have taken into consideration this was during the winter months and inevitable numbers will increase in the summer causing nuisance/ criminality."

49. They reiterate their concern under the heading "Nuisance (existing/anticipated)" saying that they "feel that public nuisance will be inevitable".

50. The claimant complains that the justices' treatment of the issue of "migration" was fundamentally flawed on a number of grounds.

51. Firstly, it submits that there was no evidence on which the justices could find that customers *would* come to the premises when other premises in the vicinity closed or cause trouble and their concerns were no more than inappropriate speculation. The claimant's position was that there was no evidence of migration to its premises. There were no recorded complaints of any kind about the premises let alone specifically about migration. Mr Leslie Spencer, who lives opposite the premises and is the secretary of the Saughall Massie Conservation Society, gave evidence of his fear that customers would migrate but said that he did not think there had been any migration.

52. Apart from their own local knowledge, the only material on which the justices could possibly have formed their views about migration was what PS Yehya said in evidence. According to the legal adviser's notes, whilst being cross-examined by Mr Kirwan, the sergeant gave evidence about the other licensed premises operating in the vicinity—which I have seen marked on a local map and which were within walking distance of the premises—and their closing hours and said that there were three assaults each week at one of the premises. The legal adviser records that he also said:

> "We have staggered closing. This could cause problems it has the potential to cause difficulties in the area. I have a list of considerations but none would rank as high as crime, not even noise. No complaints have been made to me even regarding noise. One concern was dispersal. We gave people one hour to disperse and therefore reduced from 2.00 a m to 1.00 a m, 1.00 a m closing at 2 a m. 280 people leaving premises. Other premises subject to high levels of crime *migration not an issue* ." (Emphasis added.)

53. I appreciate that this evidence acknowledged that staggered closing *could* cause problems but, had migration been a significant issue as opposed to a mere possibility, one can I think assume that the police would have made representations on that score, particularly given that they had plainly considered the impact of trading hours specifically and *had* initially objected to the even longer hours originally proposed by the claimant. It is noteworthy that even when they were in opposition to the plans, it was never on the basis of migration of disruptive characters from other licensed premises and always simply on the basis of late noise from ordinary customers of the premises dispersing. Absence of police objections before either the licensing authority or the magistrates' court seems to have ***64*** surprised the justices who said so in their reasons, commenting: "We were surprised that the police originally objected to the application but withdrew that objection after a slight variation of the terms." In so saying, they convey, in my view, not only their surprise about the police approach but also their disagreement with it.

54. It was not open to the justices, in my view, to elevate what PS Yehya said in the witness box to evidence that a problem with migration could reasonably be expected, nor do they say anything in their reasons which suggests that they did rely on his evidence in this way. The only concerns about migration were therefore the justices' own, with perhaps some fears expressed by local residents though not on the basis of firm historical examples of migration to the premises.

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 2003 Act's approach. There can be little doubt that local justices are also entitled to take into account their own knowledge but, in my judgment, 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 where 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. These justices did recognise the absence of police objections which caused them surprise and they chose to differ from the police in reliance on their own views. The claimant submits that in so doing they departed into the realms of impermissible speculation not only in concluding that there would be migration but also in concluding that in this case it would generate nuisance and disorder. The first interested party is correct in submitting that the guidance accepts a link between migration and a potential breach of the licensing objectives; but it is also clear from the guidance that each case must be decided on its individual facts, so the justices could not simply assume that if people came from other premises there would be trouble.

56. The claimant complains that the justices' treatment of the migration issue also flies in the face of the guidance because firstly it was an improper attempt to implement zoning and secondly it ignored the general principle of longer opening hours.

57. Zoning is the setting of fixed trading hours within a designated area so that all the pubs in a given area have similar trading hours. The problem created by it, as demonstrated by experience in Scotland, is that people move across zoning boundaries in search of pubs opening later and that causes disorder and disturbance. The guidance says, at para 6.8:

> "The licensing authority should consider restricting the hours of trading only where this is necessary because of the potential impact on the promotion of the licensing objectives from fixed and artificially early closing times."

It stresses that, above all, licensing authorities should not fix predetermined closing times for particular areas.

58. I am not convinced that the justices' limiting of the claimant's operational hours can properly be described as implementing zoning, which ***65*** in my view is a term that is more appropriate to describe a general policy imposed by a licensing authority for a defined area than an individual decision of this type, albeit made with reference to the opening hours of other premises in the vicinity and having the effect of imposing the same hours as those premises.

59. What has more weight, however, is the claimant's submission that the justices failed to give proper weight to the general principle of later opening hours and to the intention that the approach to licensing under the 2003 Act would be to grant the hours sought for the premises unless it was necessary to modify them in pursuit of the licensing objectives. The reasons include a heading "Flexibility" under which the justices say simply: "We have considered the concept of flexibility." In so saying, they may be referring to the sort of flexibility to which reference is made, for example, in para 6.6 of the guidance (see para 44 above) but their shorthand does not enable one to know to what conclusions their consideration of the concept led them in this case, nor whether they had reliably in mind that the starting point should be that limitations should not be imposed upon the licence sought unless necessary to promote the licensing objectives rather than that the licensing authority or the court should form its own view of what was necessary for the premises and only grant that.

60. The claimant was seeking to have the freedom to open later on certain occasions when the trade justified it or, as the justices put it, "the application for extended hours was to allow *flexibility* to open later on certain occasions". As the first interested party would submit, the justices may have inferred from Mr Miller's comment about making hay that the premises would *often* be open late rather than this happening only infrequently in accordance with the picture presented to the licensing authority. If this was their inference, however, it is odd that they considered that the claimant could deal with the position by applying for a temporary certificate because this would have allowed the premises to open later on only a limited number of occasions. They make no express finding in their reasons as to the frequency on which they considered the claimant intended to keep the premises open late. This was material not only to the degree of disturbance that might be caused generally by late opening but also specifically to the issue of whether there would be migration. It would seem unlikely that customers from nearby pubs would bother to walk or even drive to the Saughall Hotel in search of another drink at the end of their evenings unless the Saughall Hotel was open late sufficiently frequently to lead them to a reasonable expectation that their journey would be worthwhile.

61. The justices' comment about the temporary certificate also seems to me to be an example of a failure by them to adopt the lighter approach that the 2003 Act dictated and to allow flexibility to those operating licensed premises unless the licensing objectives required otherwise. Temporary certificates would be a cumbersome and restricted means of achieving flexibility, not responsive to the day to day fluctuations in business, only available a limited number of times, and not in line with the philosophy of the 2003 Act.

62. There is no consideration in the justices' decision of whether the imposition of conditions to control noise or other nuisance, which were going to be imposed, would be sufficient to promote the licensing objectives ***66*** without reducing the operating hours of the premises. Given that the 2003 Act dictates that only such steps as are necessary should be taken with regard to the variation of the terms of operation sought, such consideration was required.

My overall conclusions

63. It would be wrong, in my judgment, to say that the justices failed to take account of the licensing objectives. At the outset of their reasons, they correctly identify those which are relevant. Similarly, as the first interested party submits, whilst they did not *articulate* that the curtailment of the hours sought was "necessary" to promote those objectives, it is implied in their decision that they did take this view; and it can also be inferred from their comment that because of the concept of migration, public nuisance and crime and disorder would be "an inevitable consequence" of leaving the hours as granted by the local authority. However, in my view their approach to what was "necessary" was coloured by a failure to take proper account of the changed approach to licensing introduced by the Act. Had they had proper regard to the 2003 Act and the guidance they would have approached the matter with a greater reluctance to impose regulation and would have looked for real evidence that it was required in the circumstances of the case. Their conclusion that it was so required on the basis of a risk of migration from other premises in the vicinity was not one to which a properly directed bench could have come. The fact that the police did not oppose the hours sought on this basis should have weighed very heavily with them, whereas in fact they appear to have dismissed the police view because it did not agree with their own. They should also have considered specifically the question of precisely how frequently the premises would be likely to be open late and made findings about it. They would then have been able to compare this to the winter opening pattern in relation to which they accepted there had been no complaints and draw proper conclusions as to the extent to which the summer months would be likely to differ from the winter picture. Having formed a clear view of how frequently late opening could be anticipated, they would also have been able to draw more reliable conclusions about the willingness of customers from further afield to migrate to Saughall Massie. They proceeded without proper evidence and gave their own views excessive weight and their resulting decision limited the hours of operation of the premises without it having been established that it was necessary to do so to promote the licensing objectives. In all the circumstances their decision was unlawful and it must be quashed.

64. I have said little so far about what appears in the justices' response for the judicial review proceedings. The various documents comprising the response did nothing to allay my concerns about the justices' decision. Indeed quite a lot of what was said reinforced my view that the justices had largely ignored the evidence and imposed their own views. They refer in their response to incidents about which the residents had given evidence and to the residents not having complained formally for various reasons, for example because it was Christmas or because there was thought to be no point. If the justices considered these matters to be relevant it was incumbent on them to say so clearly in their reasons, whereas they there recorded their acceptance that there had been no formal or recorded complaints, that the extended hours had been in operation for several ***67*** months without incidents and that they had attached little or no weight to the statements of the witnesses of the appellants. They also refer extensively in their response to their thoughts on migration, including that people may come from further afield than the pubs in the vicinity in cars. Particularly concerning is that they refer repeatedly to a perceived issue over police resources

which is not something that, as far as I can see, had been raised by PS Yehya or explored with him in evidence. Mr Beere says in his statement for example, "there is also the question of police resources and their ability to effectively police this area especially at weekends with already stretched resources being deployed in Hoylake".

65. Reference is made in the response documents to the court feeling that the brewery's proposed opening hours contradicted the acceptable activities of a family pub and that the Saughall Hotel is "a village pub and not a night spot in the centre of town". For the court to take matters such as this into account seems to me to be an interference with the commercial freedom of the premises of a type that was not permissible under the 2003 Act unless it was necessary to promote the licensing objectives. I appreciate that the justices' response seems to suggest that they feared that a different type of customer was being courted or would invite themselves once it got too late for families but this does not seem to have been founded on anything that was given in evidence so was really not much more than speculation.

66. Mr Beere's statement ends with a reference to the brewery wanting to make hay while the sun shines, of which he says, "I believe that this statement was indicative of the brewery's attitude to local residents and to the general management of the premises". Given that problems with or in the vicinity of the premises had been almost non-existent and that the justices had not seen fit to make reference in their reasons to any difficulties caused by the hotel, it is hard to see how this belief could be justified but it does perhaps exemplify the approach of the justices.

67. I have considered quite separately the argument as to whether the hours of opening can be regulated as part of the licensing of premises as opposed to the hours during which licensable activities take place. It was suggested during argument that there was no power to regulate the time by which people must leave the premises. I cannot agree with this. Clearly keeping premises open—as opposed to providing entertainment or supplying alcohol there—is not a licensable activity as such. However, the operating schedule which must be supplied with an application for a premises licence must include a statement of the matters set out in section 17(4) and these include not only the times when it is proposed that the licensable activities are to take place but also "(c) any other times during which it is proposed that the premises are to be open to the public". On a new grant of a premises licence, where there are no representations the licensing authority has to grant the application subject only to such conditions as are consistent with the operating schedule. I see no reason why, if it is necessary to promote the licensing objectives, these conditions should not include a provision requiring the premises to be shut by the time that is specified in the operating schedule. If representations are made and the licensing authority ultimately grants the application, it can depart from the terms set out in the operating schedule when imposing conditions in so far as this is necessary for the promotion of the licensing objectives. It must follow that it can impose an earlier time for the premises to be locked up ***68** than the applicant wished and specified in its operating schedule. It is important to keep in mind in this regard that the role of the licensing authority and, if there is an appeal, the court, has two dimensions: the fundamental task is to license activities which require a licence and the associated task is to consider what, if any, conditions are imposed on the applicant to ensure the promotion of the licensing objectives. A requirement that the premises close at a particular time seems to me to be a condition just like any other, such as keeping doors and windows closed to prevent noise. I see no reason why a condition of closing up the premises at a particular time should not therefore be imposed where controlling the hours of the licensable activities on the premises (and such other conditions as may be imposed) is not sufficient to promote the licensing objectives.

The costs argument

68. In the light of my conclusion that the justices' decision is unlawful and therefore must be quashed, it is not appropriate for me to consider the arguments in relation to their costs order further. The first interested party had given an undertaking to the licensing authority that they would not seek costs against the licensing authority and they sought the entirety of their costs of the appeal from the claimant. The justices granted that order and the claimant submits that that was not an order that was open to them. Whatever the merits of that argument, the justices' order in relation to costs cannot now stand. The basic foundation for the order for costs was that the appeal had succeeded and the claimant had lost. That position has now been overturned and the costs order must go along with the justices' main decision. The justices would have had no reason to grant costs against the claimant if the appeal had been dismissed.

Claim allowed .

Decision and costs order quashed .

J C B ***69***

Footnotes

1 Licensing Act 2003, ss 4, 182 :
see post, paras 17–19.