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Proper conduct of licensing appeals

In the light of recent cases, consulting editor Roy Light considers procedure and costs in appeals to the magistrates' court under the 2003 Act

Section 181(1) and schedule 5 of the Act make provision for appeals to magistrates' courts against licensing authority decisions. The approach to be adopted by the court has been considered in the *Hope & Glory* case. Opinion differed on the effect of the decision, with a minority view going so far as to suggest that *Hope & Glory* makes a licensing authority's decision effectively appeal proof. Fortunately, the High Court has provided guidance on the application of *Hope & Glory*.

The statutory Guidance states that 'the court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law' (paragraph 12.6). The appeal is not limited to a review of the licensing authority's decision as this would mean that the court would have to look at the matter *as it was* before the licensing authority. It would require the court to ignore any additional evidence put forward by either the Appellant or Respondent and also to ignore any change of position by the Appellant, interested parties or responsible authorities.

In any event, it is settled law that the appeal is not a review but a rehearing (*R (Chief Constable of Lancashire v Preston CC* [2001] EWHC Admin 928). This was accepted by the parties in that case and in *R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2009] EWHC 1996 (Admin) (para.29). Yet while it is settled law that the Appeal is by way of a rehearing that:

… does not mean that the court of appeal, in this case the metropolitan magistrates, ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter and ought not lightly, of course, to reverse their opinion. It is constantly said (although I am not sure that it is always sufficiently remembered) that the function of a court of appeal is to exercise its powers when it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment is right': Per Lord Goddard in *Stepney Borough Council v Joffe* [1949] 1KB 599; quoted with approval in *Sagnata Investments Ltd v Norwich Corporation* [1971] 2QB 614 at 637.

Advocates for respondent licensing authorities have regularly referred to the principle in *Sagnata,* with appellants countering that a slavish adherence to an

examination of the licensing authority's decision would amount not to a rehearing but to a review.

Case management

Hope & Glory considered the conduct of appeals in the magistrates' court under the 2003 Act. The Court rejected the Appellant's argument that the district judge in the magistrates' court was wrong to require the Appellant to put its case first - this is a matter of discretion and case management for the court and, secondly, the Court confirmed that the magistrates should take account of the decision of the licensing sub-committee and before departing from that decision must be satisfied that the judgment below was wrong. Per Burton J:

> I conclude that the words of Lord Goddard [in *Joffe*] approved by Edmund Davies LJ [in *Sagnata*] are very carefully chosen. What the appellate court will have to do is to be satisfied that the judgment below "is wrong", that is to reach its conclusions on the basis of the evidence before it and then to conclude that the judgment below is wrong, even if it was not wrong at the time (para.43) (emphasis in the original).

The matter reached the Court of Appeal where Burton J's decision was upheld (*R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31). In 'very general terms' the Court of Appeal held that 'the magistrates' court should pay careful attention to the reasons given by the licensing authority' but that 'the weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on appeal' (paragraph 45). 'The fuller and clearer the reasons, the more force they are likely to carry' (paragraph 43).

Which starting point?

It has been argued that post *Hope & Glory* the starting point for the magistrates' court is the licensing committee's decision, but the majority view seems to be that the committee's decision is simply evidence that will be weighed by the court together with the other evidence before it. The latter view has now been judicially approved in *R (on the application of Townlink Limited) v Thames Magistrates' Court* [2011] EWCH 898. The Appellant argued that the District Judge, who pointed out in his judgment that 'I start with having to consider if the decision of the committee was wrong', had not adopted the correct approach. The correct approach the Appellant argued, and to which Lindblom J agreed, was that 'the District Judge ought to have … come to his own

conclusions on the merits of the appeal, applying the relevant principles of the Act' (paragraph 35).

Lindblom J held that 'what the District Judge had to do was to consider the evidence before him with the relevant principles in mind. Those principles included the necessity that the licensing objectives be promoted, and proportionality. Bearing in mind the decision of the Council's licensing sub-committee and the significance of that decision as the result of the democratically elected members having applied their minds to the issue, the District Judge nevertheless had to adopt the approach approved by the court in *Joffe, Sagnata* and *Hope and Glory.* He had to do this by considering "whether, because he [disagreed] with the decision below in the light of the evidence before him, it [was] therefore wrong"' (paragraph 36). Lindblom J distinguished a 'wrong' decision from an 'illegal' decision and held that 'what the [magistrates' court] had to do was to consider on the merits [not simply on the law] whether the decision of the licensing sub-committee ought to be upheld' (paragraph 37).

Townlink was attended by only one party, the Appellant, and therefore comes within the 2001 practice direction which limits its citation as an authority in subsequent courts. However, counsel for the Appellant doggedly tempted Lindblom J into accepting that the law had been developed by *Townlink* so that the decision fell outside the practice direction and could be cited as an authority (paragraphs 72-93 make for interesting reading).

R (on the application of Developing Retail Limited) v East Hampshire Magistrates' Court [2011] EWCH 618 (Admin) found that 'the magistrates' court must … consider whether, having taken the decision of the licensing authority into account, it is "wrong on the basis of the evidence put before the magistrates' court"' (paragraph 29). There is no need for Wednesbury unreasonableness as the appeal is a fresh evidential hearing rather than a judicial review of the licensing authority's decision. 'The magistrates therefore have power to review the decision on the grounds of error of law and also on its merits' (paragraph 30).

The possibilities for a successful appeal therefore are: that the licensing committee got it wrong either in law or on the merits or that while the decision of the licensing committee was not wrong when it was made, on the basis of the case before the magistrates at the appeal it was wrong. It is an appeal, and while the magistrates' court must give appropriate weight to the decision of the licensing committee and not reverse it unless they consider it wrong, if on a consideration of the decision and the evidence before it (including the licensing

authority's decision) the court comes to the view that the decision is wrong it should allow the appeal.

Licensing authorities should fully formulate their reasons, the burden is on the appellant to prove the case (which suggests that the appellant goes first) and the weight attached to the reasons will depend on their quality and the evidence before the appeal (for example, a person making unchallenged representations before the licensing sub-committee may have their evidence undermined in cross-examination before the magistrates).

Approach to costs

The 2003 Act provides that a magistrates' court 'may make such order for costs as it thinks fit' (s.181(2)). As the appeal is by way of complaint, this effectively duplicates the provisions under s.64(1) Magistrates' Courts Act 1980 which provides that the court has 'a power in its discretion to make such order as to costs … as it thinks just and reasonable'.

The leading authority, *City of Bradford Metropolitan District Council v Booth* [2000] LLR 151, considered the 'proper approach' to costs under the Magistrates' Courts Act was threefold. First, the court could make such order as to costs as it considered just and reasonable; secondly, what was just and reasonable 'will depend on all the relevant facts and circumstances of the case' and the 'court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection'; and thirdly, 'where a complainant has successfully challenged before the justices an administrative decision made by a police or regulatory authority acting honestly, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (1) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (2) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged' (paragraphs 24-26).

Important factor

It is important to note that while the absence of bad faith and unreasonableness on the part of the authority is an important factor for the court to take into account there is no requirement to be satisfied that the local authority had acted unreasonably or in bad faith before a court could make an order for costs against a local authority (paragraphs 9(b) and 27). *Booth* has been applied by the higher courts to appeals under the 2003 Act on a number of occasions (no distinction has sought to be made between applications under s.181 of the 2003 Act and s.64 Magistrates' Courts Act).

R (on application of Cambridge City Council) v Alex Nestling Limited [2006] EWHC 1374 (Admin) - Mr Justice Toulson quashed the award of costs against the respondent, holding that 'the fact that the Local Authority has acted reasonably and in good faith in the discharge of its public function is plainly a most important factor' (paragraph 11). The *Crawley* case, decided eight days previously, was not cited to the court.

Wide discretion

In *Crawley Borough Council v Attenborough* [2006] EWHC 1278, decided eight days before *Nestling,* Lord Justice Scott Baker (sitting with Openshaw J) noted that in licensing appeals 'the justices have a very wide discretion in what costs order they seek fit to make' (paragraph 12) and rejected the proposal that before ordering the local authority to pay all of the appellant's costs it was necessary to make 'a finding that the local authority had behaved unreasonably' (paragraph 13) but 'if the magistrates had all material matters in mind and it was within the ambit of their discretion to make the order' (paragraph 15) – which would include the principles in the *Bradford* case - that order would not be interfered with.

Refusal to negotiate

Uttlesford District Council v English Heritage [2007] EWHC 816 (Admin), considered *Bradford, Crawley* and *Cambridge*. Pitchford J stressed that Lord Bingham's guidance in *Bradford* identified the public role of the authority as a factor which must be weighed in the balance when considering the issue of costs. The facts of each case were to be looked at individually and it was open to the magistrates to make an order for costs. Here Pitchford J said 'having considered [the Justices'] reasons, I do not take the view that they fell into error. They were plainly concerned that a fully contested hearing was unnecessary. It had been made necessary by the refusal of the District Council to engage in useful negotiation on the main issue which was resolved in favour of English

Heritage. They were perfectly entitled to form that view' (paragraph 17). Here then, the unreasonable behaviour by the authority was not in the making of its decision, but in its refusal to negotiate with the appellant with a view to reaching an agreement and obviating the need for a hearing.

An authority may be at risk of costs if it refused to attempt to settle the appeal or rejected an offer of settlement where the appeal was decided on those same terms. (Some authorities agree with appellants that whatever the outcome of the appeal each side will bear its own costs.) It is within the spirit of the Act and in the interests of all parties to avoid a hearing where possible; providing, of course, that the authority can feel confident that it is fulfilling its duty to promote the licensing objectives.

Respondent licensing authorities are understandably sensitive to costs in licensing appeals. Yet respondent they sometimes find themselves in the difficult situation of being at risk of costs although it is the police or interested parties who are pressing for the matter to go to a contested hearing – at which the authority and not the interested party/responsible authority may be at risk of a costs order made against them.

Significant amounts

The costs can be significant, as illustrated recently in Denbighshire. Costs of £24,600 were awarded against the authority which admitted at the appeal hearing that its decision to revoke the appellant's licence could not be supported. The authority was found by the district judge to have failed properly to assess the police evidence which was found to be selective (*Licensing Review* [84] 3). Similarly, in a recent appeal against the decision of an authority in the west of England, costs of £19,000 were awarded against the authority which insisted on taking an appeal to a hearing despite the police view that circumstances had changed and the police, who had brought the review, could no longer support the original authority decision. Conversely, a successful appellant whose conduct dramatically escalated the appeal costs found herself with an order to pay the authorities costs of £26,000 - an order with which the High Court refused to interfere (*Prasannan v Royal Borough of Kensington & Chelsea* [2010] EWHC 319 (Admin)).

Word of caution

Finally, a word of caution for those who lodge an appeal in the hope of a negotiated settlement, intending to abandon the appeal should such a result not emerge - some authorities, quite legitimately, are claiming the costs so far incurred in responding to the appeal. Section 52 Courts Act 1971 provides that where 'a complaint is made to a justice of the peace acting for any area but the complaint is not proceeded with, a magistrates' court for that area may make such order as to costs to be paid by the complainant to the defendant as it thinks just and reasonable'. The order must specify the amount of costs to be paid.

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