Noise nuisance in the licensing arena

Jeremy Phillips considers the concept of public safety in licensing reviews, the relevance of representations against a grant, and a proposal to hold extra concerts at the Emirates Stadium

Jeremy Phillips is a licensing barrister practising from Francis Taylor Building and the editor-in-chief of Paterson's Licensing Acts
@FTB_law
www.ftb.eu.com

We all know that 'public safety' is one of the four objectives dictating every licensing authority decision under the Licensing Act 2003, but exactly how far does that concept extend? A case presently before the courts may yet provide some guidance.

Briefly, in review proceedings before a licensing sub-committee, it was conceded that the premises in question had in the past experienced serious issues in relation to food safety, including suffering from a rat infestation. A number of other issues arose in relation to food hygiene. Despite the protestations of the licensees, the committee held that the concept of public safety could include matters such as food safety, even though it might more usually be invoked in relation to matters such as fire escapes, or addressing the consequences of excessive intoxication. The licence was revoked.

At a preliminary appeal hearing before a district judge, leading counsel for the licensee attempted to further develop the argument below, suggesting that both guidance issued under section 182 of the Act and non-statutory guidance, such as that issued by the coalition government to health authorities in February 2015, uniformly emphasised the importance of not confusing the concept of public safety with that of public health. In particular, the latter outlined that in their role as a 'responsible authority', health bodies were entitled to:

- Make relevant representations to the licensing authority relating to new licence applications and major licence variations;
- Request that the licensing authority review an existing licence; and
- Make representations to the licensing authority regarding the potential cumulative impact of an application in an area where there is a special policy in place regarding cumulative impact.

On that basis, it was suggested, food safety per se fell outside the remit of a licence review.

For the local authority, it was argued that unsanitary food premises could self-evidently pose a risk to public safety. The advice from the government for licensing authorities to steer clear of public health issues was given in the context of the widespread suggestion that there should be a 'fifth licensing objective' promoting the goal of improved public health. Until such time (if ever) as parliament approved such reform, authorities needed to be clear that they were only permitted to address current actual (and potential) harms and impacts, not some perceived wider social ill.

In that context, an immediate possibility of food poisoning was quite clearly a proper application of the public safety objective. The case (as they say) continues.

Relevant representations

When is a representation 'relevant'? That was the question arising in another recent case coming before a licensing authority. On the face of it, no issue arose. An application had been made to extend a bar in a nightclub. It clearly required an application for variation. The authorities were all content, but one day before the expiry of the time for making representations, two were received from local residents. The effect of that would be to delay the opening of a significant West End nightclub (assuming, of course, that the variation was ultimately approved).

However, the eagle-eyed solicitor acting for the club questioned whether the representations lodged were really valid representations at all. The first simply suggested that the grant of the >>

>> licence would give rise to crime and disorder, but gave no indication whatsoever as to how that might occur. The second made a similar assertion, adding that the previous record of the club made this inevitable. Again, however, no indication was given as to how or why this would be the case 'having regard to the variations sought'.

Section 35 of the Act provides that variation applications must be granted unless 'relevant representations' are lodged by the due date. For such representations to be deemed relevant in law, subsection 5 provides that they must be 'about the likely effect of the grant of the application on the promotion of the licensing objectives'. Further, licensing authorities have the power to determine representations in the absence of the party who made them, under regulation 20 of the Licensing Act 2003 (Hearings) Regulations 2005.

It is strongly arguable, therefore, that representations, which, in fact, disclose nothing to suggest the 'likely effect' of 'the grant of the application', but merely assert some generalised and non-specific adverse effect, should not properly be considered to be relevant or, therefore, a valid obstacle to an immediate grant. The lesson? When making representations either for or against a grant, do make sure they have at least some nexus with the actual application that is being made.

Major entertainment events

While artists complain of ever-decreasing returns for the music that they record and broadcast in the public arena, the same does not seem to be true of concerts and festivals, if the outgoings of my children are any kind of judge. The past decade has seen an explosion (an apt metaphor, many residents' groups would undoubtedly say) of open-air concerts and festivals. At the same time, the penalties for providing licensable activities outside the terms of any licence have increased, with unlimited fines being available in the magistrates' courts since 12 March 2015 for offences committed after that date.

It was in this general context that an inspector appointed by the secretary of state heard a planning appeal relating to the ground of Arsenal FC at the Emirates Stadium, Ashburton Grove, for permission to allow six music concerts to be held at the stadium each year instead of the three that were permitted in 2002. In addition, it was proposed that the number of major events to be held on a Sunday would increase from one to three. Finally, it was also proposed that the wording of the key protective condition be adjusted to include reference to the façade of 'representative' as opposed to 'any' noise-sensitive premises.

For those interested in the evidence and issues commonly arising in relation to these major entertainment events, the decision is particularly interesting for the balancing exercise carried out in paragraphs 48 to 50.

Against a grant, the proposal would not accord with the policies in the development plan that sought to protect amenity and to prevent noise nuisance. Extra concerts would have a 'significant adverse impact on the living conditions of nearby residents in terms of noise and disturbance'. The inspector also found that 'the likelihood of anti-social behaviour also weighs against the proposal'.

Against those factors, 'there would be economic benefits to Islington, although these would largely favour the food and drink sector and a minor strengthening of London's economy and cultural role. The proposal would adhere to the policies that support economic growth and cultural facilities.'

In the event the decisive issue, it seems, was the Noise Council's code of practice on environmental noise control at concerts. The code provides that beyond three events per annum, sound levels should be lower. This would require on-site sound levels being reduced by about 15 A-weighted decibels over a 15-minute period, which would not provide any 'audience enjoyment'.

This was not, therefore, a viable option. Allowing up to six concerts annually would clearly be in breach of the guidance in the code. Acoustic screens to fill the gaps between the glazing and the roof structure at the top of the upper tier had been rejected on technical, economic, efficiency, and health and safety grounds. No other mitigation measures were put forward.

Despite the outcome, the decision offers a comprehensive summary and analysis of the issues that generally arise in these increasingly common applications, both in the planning and licensing arena (sorry, no pun intended).

Outsourcing

A final brief word, if I may, on outsourcing. In these competitive times it is very natural that professionals should endeavour, wherever they can, to provide their clients with a 'one-stop shop' service.

Such a desire may, however, need to be tempered with a healthy degree of caution when straying too far beyond one's traditional areas of expertise. Insolvency practitioners, for example, have always understood that their particular specialist role in rescuing or liquidating businesses frequently involves embracing the entire sweep of commercial law, from employment to health and safety, from retention of title to licensing. They are not slow (in my experience) to engage specialists where the need arises.

The daily lists of the High Court demonstrate that the consequences of failing to do so can sometimes be painful indeed. SJ

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