Case No. CO/5324/2009

Neutral Citation Number: [2009] EWHC 1996 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Tuesday, 21 July 2009

B e f o r e:

MR JUSTICE BURTON

- -

Between:

THE QUEEN ON THE APPLICATION OF HOPE AND GLORY PUBLIC HOUSE LTD

Claimant

v

CITY OF WESTMINSTER MAGISTRATES' COURT

Defendant

- -

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Mr Ian Glen QC and **Ms Saima Hanif**(instructed by Jeffrey Green Russell) appeared on behalf of the Claimant
Mr David Matthias QC (instructed by Legal Department, Westminster City Council) appeared on behalf of the Defendant

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J U D G M E N T

1. MR JUSTICE BURTON: This has been the hearing of an application for permission to apply for judicial review, in respect of decisions of District Judge Snow, sitting in the Westminster Magistrates' Court, on 7 May and 30 June 2009.

2. The way in which the application has come before me - in fact over two days - is as follows. There were two proposed Administrative Court actions. The first was the existing claim - CO/5324/2009 - which sought to challenge by way of judicial review a preliminary ruling on 7 May 2009 by the District Judge. I shall return to that later, but I call it the Sagnata point, for reasons that will become clear.

3. The District Judge proceeded to hear the case, in which he had given that preliminary ruling, between 11 and 25 June 2009, giving his reasoned decision on 30 June 2009. There was, subsequent to the issue of proceedings, an indication by the claimant, Hope and Glory Public House Ltd, of an intention to seek a case stated from the District Judge arising out of that substantive decision, on a number of grounds. With a view to the Court's dealing with the application for permission in the existing action, and in the light of the further intention to seek a case stated, the claimant brought an application for a stay of the order made by the Magistrates' Court. For that purpose, there needed to be consideration of the merits both of the existing application and the proposed case stated.

4. The case came on before me last Wednesday, in a list where there were also other cases, being renewed applications for permission, to be dealt with. At that stage, I indicated that if there were to be any hope of persuading me that there should be a stay, Mr Glen QC, for the claimant, would need to render his case as speedily triable as possible, because, if there were a stay, it would be wholly unlikely to be one other than accompanied by an order for an expedited hearing of any trial that was to go forward. More than enthusiastically he adopted that suggestion, by way of indicating that in any event the course that he suggested would short-circuit the need for any separate appeal by way of case stated, particularly at a time when it was far from certain that the District Judge would agree to state such a case, with all the complications that might follow if there were such a refusal. With the assistance of his junior, he reformulated the proposed case stated, in respect of the substantive decision on 30 June 2009, into additional paragraphs of the existing application.

5. Although therefore there is only one application before me, as amended pursuant to my permission last Wednesday, it has been presented by separate arguments, first by reference to the first claim (the Sagnata point), which was the original claim, and related to the preliminary ruling, and then the three, as it turns out, further grounds, now brought in by amendment, which were those which would originally have formed part of the proposed appeal by way of case stated.

6. When the matter came before me on the first occasion, last Wednesday, Mr Glen QC was asked by me whether he was willing to deal with the grant or refusal of permission in open court. On the one hand, it would mean that once again it would be more likely that the matter could be dealt with expeditiously if permission were granted, but, on the other hand, he would lose the opportunity of two bites of the cherry, by way of consideration on paper followed by the opportunity to renew in open court if so

advised. At that stage, he did not feel he had sufficiently fleshed out the application as he would have wished, and he did not then wish to seek permission, but simply to apply for a stay.

7. So far as the second set of grounds is concerned - the original case stated - Mr Matthias QC for the defendant Council was not then ready to deal with the permission in that regard, because the document containing the proposed new summary grounds was only formulated in the course of the hearing. In any event, by virtue of the fact that there been other matters in the list - and this case did not start until shortly before lunch - there was not time to complete the hearing last Wednesday, although the bulk of the argument on the Sagnata point was heard.

8. Having given leave to amend the application for permission and the judicial review application itself, in the way I described, I indicated that there would be time today - just under a week later - in which the whole matter could be dealt with. I invited both parties to agree that I could deal today with the oral application for permission with regard to the all issues, and with the question of stay if permission were granted. Both parties having been given those extra days to prepare to be ready, and having taken that opportunity each to serve further skeleton arguments, that is what they agreed to and that is what has occurred.

9. The claimant, Hope & Glory Public House Ltd, run, among other businesses, a pub called The Endurance, which is situated in Berwick Street, Soho. Both they and a predecessor owner have run The Endurance for some years. On 12 March 2007 the claimant was granted a premises licence permitting it to provide regulated entertainment and late night refreshment, and to supply and sell alcohol.

10. Problems ensued, which have been the basis of the hearing before me, resulting from the fact that the pub became an extremely popular place to drink and to hang out in the evening, particularly between the hours of 6pm and 11pm, outside. That would depend on clement weather, but fortunately over the last couple of years the weather has been kind, and that has become a very popular thing to do for the customers/clientele of The Endurance. No doubt, the business of the claimant has boomed as a result. But it has had a concomitant downside so far as the local residents are concerned.

11. The council has received - I think I am right in saying - more than 75 complaints in relation to noise caused by the outside drinking in the evenings. The bulk of those complaints have come from one person, Miss Schmidt, who lives at 17 Berwick Street (which has four floors of council tenants), just across the road. There is another tenant in those premises, Mr Rigby, who has previously complained, but who has subsequently fitted double glazing and no longer continues his opposition to the outside drinking.

12. As will appear, those two complainants were not alone in relation to their complaints about the claimant, even though Miss Schmidt was the most persistent, and her complaints did constitute the bulk of complaints.

13. The result of the events and of the council's investigation of the noise levels caused by outside drinking was a lengthy series of meetings, discussions and emails between the council and the claimant, in which the council attempted to achieve resolution of the difficulty. It seems that it was exacerbated by the introduction of the smoking ban in July 2007, which encouraged yet more people - who might otherwise have been willing to smoke and therefore drink inside the premises - to join the drinkers outside.

14. Mr Craddock, of the Licensing Inspectorate, was primarily in the vanguard of meetings and discussions with the claimant. Mr Marling on behalf of the claimant seems to have been the main person taking the brunt of the complaints, and dealing with Mr Craddock and others on behalf of the Licensing Inspectorate of the defendant. Mr Marling gave various promises and said that various measures would be taken. So far as the defendant council is concerned, those promises were not kept: insofar as efforts were made by the claimant - it is not suggested there was any bad faith on their part - any such efforts were unsuccessful.

15. There was thus an application brought by the defendant for review of the premises licence, in which the council was contending for the imposition of conditions. The most significant condition - the one which has caused the major problem for the claimant, now that it is in effect, since the dismissal of this appeal, to which I will refer - is that no customers were to be permitted to take drinks from the premises in an open container after 6 pm.

16. The application for review was heard before the Licensing Committee on 26 and 27 June 2008. On 4 July the decision was taken, in a decision letter communicated to the claimant, to impose inter alia the condition to which I have referred. The decision letter included the following paragraphs:

> "The application was made on the grounds of public nuisance, and we first considered whether it was established that a public nuisance for the purposes of the Act exists. The evidence we heard was that large numbers of customers of The Endurance congregate on a daily basis outside the public house in Kemp Court in the evening, the numbers involved ranging from very few, (5 to 10) to very many (180 or more). Those customers drinking and talking outside the premises make a noise. The noise is amplified by the configuration of buildings in the area. The noise causes public nuisance to surrounding residents, including, in particular, residents directly opposite the public house.
>
> The licensee argued that the noise was not so bad as to constitute a nuisance, and that the complaints in particular of Ms Schmidt were exaggerated. He called expert evidence in support of that proposition. We are completely satisfied that the noise is indeed a serious nuisance. We take into account in the light of that conclusion the evidence of Mr Cradock, Ms Schmidt, Mr Bradshaw, complaints made by other local residents and, in particular, the evidence of Mr Ken Agnew."

Mr Bradshaw and Mr Agnew - I interpose - are sound experts.

> "[Mr Agnew] had visited Ms Schmidt's flat at relevant times. His evidence was that the noise was intrusive, intolerable and prevented the normal use of the property for residential purposes. Some of the evidence called on behalf of the licensee, in particular that of Mr Rigby, only confirmed that a nuisance existed. For those reasons we reject the conclusions of the licensee's noise expert.
>
> It was also argued by the licensee that, even if a noise nuisance existed, outside drinking was a "fundamental civil liberty" that has gone on in Soho for many years and that the commercial effect of preventing outside drinking would be extremely serious. A number of local residents and other customers of the premises gave evidence about the way in which the premises were run, and we accept that the premises are valued by its customers and that a number of people enjoy being able to drink outside. We reject however the argument that a licensee has a fundamental right to, in effect, appropriate a part of the public realm for his own commercial purposes, if the effect of doing so causes serious and public nuisance to his neighbours."

17. The relevant statutory provision for permitting a review of the licence and the imposition of conditions is Section 51 of the Licensing Act 2003.

18. By Section 182 of the same Act, there is provision for the issuing of licensing guidance. The relevant Guidance issued in 2007 which has been considered for the purposes of this hearing is contained in paragraphs 2.32ff under the heading "Public Nuisance". At paragraph 2.33 the Guidance reads:

> "Public nuisance is given a statutory meaning in many pieces of legislation. It is however not narrowly defined in the 2003 Act and retains its broad common law meaning. It is important to remember that the prevention of public nuisance could therefore include low-level risk perhaps affecting a few people living locally as well as major disturbance affecting a whole community. It may also include in appropriate circumstances the reduction of the living and working community and environment, interested parties ... in the vicinity of licensed premises."

19. The claimant appealed to the Westminster Magistrates' Court, where District Judge Snow in the event heard the appeal, as I have described. On 7 May 2009 he was asked to - and did - resolve a preliminary issue with regard to the conduct of the case which was to start in the next couple of months. An agreed note of that judgment, delivered on 7 May, is before me. He said:

> "The question before me is to determine what is the correct approach to take in hearing this appeal."

20. The judge was referred to the relevant authorities, to which I shall return; the main one is Sagnata Investments Ltd v Norwich Corporation [1971] 2 QB 614, ("Sagnata") by which he considered himself to be bound, a decision of the Court of Appeal. He

referred also to Stepney Borough Council v Joffe [1949] 1 AER 256, in which the judgment of the Divisional Court, given by Lord Goddard CJ, was subsequently approved by the Court of Appeal in Sagnata.

21. The judge's rulings are summarised as follows: that he would –

> (1) note the decision of the Licensing Sub-committee;
>
> (2) not lightly reverse their decision;
>
> (3) only reverse the decision if he were satisfied it is wrong;
>
> (4) … hear evidence;
>
> (5) [conclude that] the correct approach is to consider the promotion of the Licensing Objectives, to look at the Licensing Act 2003, the Guidance made under s182 ..... Westminster's Statement of Licensing Policy and any legal authorities;
>
> (6) … not [be] concerned with the way in which the Licensing Sub-committee approached their decision or the process by which it was made. The correct appeal of such issues lies by way of judicial review.

22. The judge at the same time made two procedural decisions. One was that the claimant was to put forward its case first and, secondly, as far as the venue was concerned, arrangements would be made so that - whereas there were only two free days at one particular magistrates' court convenient for the parties - if the case was to take longer, other courts could be used to enable the full period of time necessary to be accommodated. I mention that, because a challenge was originally made by Mr Glen on behalf of the claimant, in the statement of grounds in support of the original application, to that last decision, but it has not been pursued before me.

23. The question of whether it was right to order that the claimant give its evidence first has remained an issue, but is not really, in my judgment, a separate question from that which has formed the basis of the Sagnata point, the central issue in the original application, for reasons I shall now explain. Mr Glen submits that it is normal, on an ordinary criminal appeal from the Magistrates' Court to the Crown Court, for the case to start over again in the Crown Court, with the prosecution going first, to prove its case against a defendant. In this case he submits that it was not right that his client should go first.

24. I am not satisfied that any prejudice in practice was caused by what took place. Mr Glen mentions one or two matters in relation to which he says that because he had called his evidence he was not able to deal with matters that came up in the course of the case for the council. I am not satisfied that it was not possible for him to apply to call evidence in rebuttal in such a situation. He told me that he concluded that he would not do so, and he did not do so. There is no example he has given of any case in which I am satisfied that any prejudice was caused which could not have been cured by an application to call evidence in rebuttal, which was not made.

25. Mr Glen also complains - it is again more in theory than practice - that, given that he had to go first, there was no possibility of any submission of no case to answer or of calling no evidence at the close of the defendant's case, which might otherwise have been available to him. In my judgment this is wholly theoretical, given that, as will be seen, there clearly was strong evidence that there was a public nuisance, with which he had to grapple.

26. I am satisfied that such decision, as to the 'order of play' was (a) a matter of discretion and of case management for the District Judge, in which it is wholly unlikely that any reviewing court would intervene and (b) in any event, given the District Judge's decision on what I am about to describe as the main Sagnata point, in fact the right course, given that in the light of his Sagnata decision (Paragraph (3) of his ruling), he had decided that his approach was to reverse the Licensing Committee's decision if he was satisfied it was wrong; and so he called on the claimant first to satisfy him that the decision was wrong.

27. I turn to whether the issue as to the correctness of the 'Paragraph (3) ruling' is arguable, such as to grant permission for that ground. It is clear that I do not consider that permission should be granted for judicial review in respect of the order of witnesses.

28. Mr Glen's challenge to the Paragraph (3) ruling - "only reverse the decision if he were satisfied it is wrong" - began, if I may say with respect, simplistically by reference to the commentary in Paterson at paragraph 1A.2 under the heading "Rehearing or Review", where Paterson states, at page 1555:

> "Under the licensing law in force before the 2003 Act came into effect it had always been accepted that appeals from local authority committees to the magistrates' court (typically in cases concerning public entertainment licenses) and those from the licensing justices to the Crown Court were not merely reviews of the decision reached at first instance but were rehearings de novo."

There is reference to a number of cases, Sagnata, and the decision of the Divisional Court in R (Chief Constable of Lancashire) v Preston CC; [2001] EWHC Admin 928 per Laws LJ and to the Licensing Guidance. The editors of Paterson conclude:

> "If this is meant to suggest that the appeal is by way of review rather than rehearing then we believe that to be wrong."

29. Mr Matthias, for the defendant, does not assert, nor did the District Judge decide, that the appeal to District Judge Snow was to be by way of review rather than re-hearing. It was common ground between the parties - and was before the District Judge - that what was to take place before him was to be a rehearing, ie, one in which the evidence would be called afresh, including the opportunity for both parties to adduce additional evidence, whether available before the Licensing Committee or not. That is in accord with the decision in Preston.

30. Mr Glen understandably points out that the hearing before the Licensing Committee - informal and to an extent certainly under much greater pressure of time than was the hearing before the District Judge, which took some five days' evidence to resolve, and therefore in a much shorter time -frame - merited, and rightly merited, much fuller consideration, which would include the bringing of fresh evidence, including expert evidence, on both sides.

31. Mr Matthias submitted before the District Judge successfully - and continued to submit before me - that the issue is not whether the appeal should be a rehearing, but as to the status of the decision of the Licensing Committee. He submits that the District Judge was - and indeed that I am - bound by the authority of the Court of Appeal in Sagnata, to which I will now turn.

32. Sagnata was a case in which there was a suggestion, on appeal, that the appeal body - in that case a recorder - should, first of all, not rehear the matter in full and, secondly, be free to depart from the conclusion of the local authority. It was, as Mr Glen pointed out, a policy case, the local authority having adopted in that case a general policy not to permit amusement arcades. It was therefore all the more significant that in that case it should be emphasised that the court should be slow to depart from a decision of a local authority, where that decision was based upon a settled policy locally negotiated and voted upon. This case - it is common ground - does not depend on policy; it was a decision of fact by the Licensing Committee, in deciding whether to impose conditions, that - as a matter of mixed fact and law - there was a public nuisance being caused and therefore that conditions had to be imposed. It is common ground that there is no policy in effect unsympathetic to outside drinking per se.

33. The decision of Edmund Davies LJ was quite firm, that the appeal was one which was a complete appeal, to include fresh evidence. At page 633 E-F, he recited a question which had been raised by Lord Denning MR in the course of argument. I interpose that in the event Lord Denning MR was in the minority, because Phillimore LJ agreed with Edmund Davies LJ.

34. "Lord Denning MR summarised the issue in this way:

> 'Is the hearing to be treated as a new trial to be determined on evidence de novo, without being influenced by what the local authority has done? Or is the hearing to be treated as an appeal proper in which the local authority's decision is to be regarded as of considerable weight and is not to be reversed unless their decision is technically wrong?'"

Edmund Davies LJ continued:

> "With profound respect, however, I do not think that this is the proper antithesis, and I shall seek to show that there is a half-way house between these two approaches."

35. It is quite plain to me, as submitted by Mr Matthias, that when Lord Denning referred to "an appeal proper" he meant an appeal in the ordinary sense of an appeal, as familiar

to the Court of Appeal, in which there would be no rehearing of evidence, but a reconsideration of fact and law by reference to evidence given below.

36. Neither of these two solutions appealed to Edmund Davies LJ, as will be seen. What he concluded, by approving at 636 a lengthy passage from the judgment of Lord Goddard CJ at 602 in the Stepney case, to which I have referred, was that the appeal in such a case from the decision of the local authority must be - and is - a complete rehearing de novo, not an 'appeal proper' and certainly not a judicial review, much more than that.

37. He then went on to deal with the basis upon which such a completely fresh appeal - based on fresh evidence if appropriate - was to be approached. Edmund Davies LJ approved in terms at 637B the passage in Stepney with which Lord Goddard, in the Divisional Court, concluded his views, as to there being a completely fresh appeal:

> "That does not mean to say that the court of appeal [in this case the District Judge] 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."

I interpose to say that if Goddard CJ, and consequently Edmund Davies LJ, had ended there, that would have supported, indeed constituted, the submission of Mr Glen before me, namely that the approach should be that due respect should be paid to the decision below.

38. However, Goddard CJ in the original Stepney judgment did not stop there, but took out what might be called "a wagging finger" in order, in my judgment, to lay down very firmly a guideline under which such appeals must be carried out and which, as I have indicated, was approved by the majority of the Court of Appeal in Sagnata. Lord Goddard said:

> "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 power when it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right."

39. It is those words which the District Judge in this case adopted, and which he included in his Paragraph (3) ruling, and accordingly by which he then operated the case before him, when it came on two months later.

40. I do not accept Mr Glen's submission that this means that, in effect, there was not an appeal de novo, or indeed that any words of Paterson have any bearing on it. It is a fresh appeal with fresh evidence. However there is this caveat, this stricture, this limitation, imposed by the Court of Appeal and the Divisional Court, both of which are binding upon me, that the conclusion of (in this case) the District Judge, having heard all the evidence, including fresh evidence, will be whether, in the exercise of considering the appeal, he is satisfied that the judgment below is wrong.

41. I do not conclude that this in any way offends against Article 6, as was submitted in writing - although not orally - by Mr Glen, nor that there is any contradiction between

that and this being an appeal on fresh evidence. Nor do I conclude that the words of Lord Goddard are in any way restricted to a case in which policy is at stake. His words are quite clear and quite general.

42. One submission that Mr Glen made which requires pause for thought is his pointing out that, because fresh evidence is to be allowed on both sides, there may be a situation in which the appellate court will come to a conclusion on the evidence which will be different from the conclusion of the lower court by virtue of that fresh evidence, and which might not mean that the lower court judgment was wrong. Of course it may often happen, when fresh evidence is given, that the appellate court will come to a conclusion, on information available to it which is different from that which was available to the court below, which differs from the court below but only because of the fresh evidence.

43. I conclude that the words of Lord Goddard approved by Edmund Davies LJ 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 conclusion 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. That is what this District Judge was prepared to do by allowing fresh evidence in, on both sides.

44. The onus still remains on the claimant, hence the correct decision that the claimant should start, one that cannot be challenged as I have indicated.

45. At the end of the day, the decision before the District Judge is whether the decision of the Licensing Committee is wrong. Mr Glen has submitted that the word "wrong" is difficult to understand or, at any rate, insufficiently clarified. What does it mean? It is plainly not 'Wednesbury unreasonable' because this is not a question of judicial review. It means that the task for the District Judge - having heard the evidence which is now before him, and specifically addressing the decision of the court below - is to give a decision whether, because he disagrees with the decision below in the light of the evidence before him, it is therefore wrong. What he is not doing is either, on the one hand, ignoring the decision below, or, on the other hand, simply paying regard to it. He is addressing whether it is wrong. I do not see any difficulty, nor did the District Judge, in following this course.

46. It does not, in my judgment, mean, as Mr Glen submits, that he effectively came into the Magistrates' Court at the outset of this hearing with one hand tied behind his back, with some kind of lack of independence on the part of the District Judge or, as at one stage seemed to be suggested, with the words of Dante's Inferno written over the court door 'Abandon hope all ye who enter here'.

47. In my judgment, the District Judge was carrying out his correct task in the light of the authorities. I do not find that it is arguable that his decision was wrong. In any event, the District Judge - as I shall further consider - carried out a very full exercise in considering the evidence and reaching conclusions about it. At the end of his judgment, he stated as follows:

> "On 7 May 2009 I set out that I would only interfere with the decision of the sub-committee if I was satisfied that it was wrong. In fact I am satisfied that it was right."

Indeed in addressing the conditions, he concluded:

> "The conditions imposed by the Licensing Sub-committee are necessary and proportionate to ensure the promotion of the Licensing Objectives."

It would in my judgment, given the detailed reasons with which he accompanied the judgment, have made no difference whatever if he had instead said, "The conditions proposed by the Westminster Council are necessary and proportionate to ensure the promotion of the Licensing Objectives".

48. Even if I were, therefore, persuaded - which I am not - that there was some inappropriate approach by the District Judge, I am satisfied that it makes no difference, that he gave full consideration to the evidence, and came to a conclusion agreeing with that of the Licensing Committee. Consequently I do not consider the application for judicial review from the District Judge's decision of 7 May to be arguable.

49. I turn to the additional points which were originally intended to be by way of case stated. The most significant point, so far as Mr Glen's argument is concerned, the one at the forefront, is that in his view paragraph 2.33 of the Guidance (which I read earlier in this judgment) is wrong in law. There is no doubt that the District Judge followed that guidance, because he expressly says so, in paragraph 3 of his fully reasoned judgment. He sets out the Guidance and then says: "I have adopted this Guidance."

He then turns to whether the nuisance amounts to a public nuisance:

> "I have already found that noise nuisance was caused, by the patrons of The Endurance gathered in Kemps Court to Miss Schmidt, at 17b Berwick Street, and to Miss Rhys-Jenkins Bailey and her students at Westminster College on Hopkins Street. In addition, I note that although they have not given evidence before me, complaints were made about noise caused by the customers of Kemps Court by Tamara Berton of 17 Berwick Street, Mr Estranero of Ingestre Court and at least one other person who has not been identified had made complaint. In addition Walter Rigby had made a complaint.
>
> I find, on the balance of probabilities, that given the number of residents, students and teachers affected and given the geographical spread, the nuisance clearly is a public nuisance."

50. The reason why Mr Glen submits that paragraph 2.33 of the Guidance is incorrect (and therefore submitted to be unlawful) seems from his complaint about one sentence in it. As will be recalled from the quotation above, paragraph 2.33 of the Guidance purports to point out that a public nuisance can vary between what one might call a colossal nuisance - ie, "a major disturbance affecting the public community" - down to a less significant nuisance "perhaps affecting a few people living locally". He says that it is

that sentence which drove the District Judge into error, and which should not be contained in the Guidance, not because it is not perfectly fair to explain that public nuisance can vary widely in effect, but because a nuisance which is only "low-level", "affecting a few people who live locally" is not, in law, he submits, a public nuisance.

51. Mr Matthias, first, supports the Guidance but, secondly, and in any event, submits that, on the findings of fact by the District Judge, this was not a low-level public nuisance, perhaps affecting a few people living locally, but a serious nuisance with a relatively wide area of effect.

52. Mr Glen submits that the guidance is wrong because it does not reflect the words of Denning LJ in Attorney-General v P.Y.A. Quarries Ltd. The words of Romer LJ in P.Y.A. Quarries are generally regarded as the locus classicus for the description of public nuisance. He said this, at page 184:

> "I do not propose to attempt a more precise definition of public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show the representative cross-section of the class has been so affected for an injunction to be issued."

53. In that case, in which Romer LJ gave the first judgment, Denning LJ and Parker LJ were also sitting. Parker LJ agreed with both judgments. Denning LJ began by agreeing with Romer LJ's judgment and saying that he had little to add. He continued at 190 that the classic difference between a public and private nuisance is that -

> "a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much. The question, "When do a number of individuals become Her Majesty's subjects generally?" is as difficult to answer as the question "When does a group of people become a crowd?" Everyone has his own views. Even the answer "Two's company, three's a crowd" will not command the assent of those present unless they first agree on "which two". So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large."

54. In the recent House of Lords' decision in R v Rimmington, R v Goldstein [2005] UKHL 63 there was considerable discussion of the tort of common nuisance. The facts of that case are a long way from the kind of nuisance that was being considered in P.Y.A. Quarries, and certainly in this case, because it related to one person sending packages to a large number of different individuals, each of which was subjected to embarrassment and upset by each separate package.

55. The conclusion was that it would not amount to a public nuisance, because the actions of Mr Rimington did not cause a common injury to a section of the public. Lord Bingham set out a very learned history of the tort of public nuisance. Inevitably, P.Y.A. Quarries featured in that history, at paragraph 18 of Lord Bingham's speech, where he said that it was the leading modern authority on public nuisance.

56. Lord Bingham cited Romer LJ's judgment, to which I have referred as the locus classicus, and plainly did so with approval, although, because he was carrying out an overview of the history of nuisance, it was not his purpose to go through and approve every single judgment that he mentioned in his speech. He certainly plainly regarded it as central in the history of public nuisance. He referred to Denning LJ and to what he called his "conventional differentiation" between public and private nuisance (at page 190, which I have cited). He said that Denning LJ went on (at page 191) to add the passage which I have also cited, and on which Mr Glen relies, with regard to the nuisance being “widespread” and “indiscriminate”. Lord Bingham recited that passage without any kind of disapproval.

57. Lord Rodger however did refer to the passage of Denning LJ without approval. He said (at paragraph 44):

> "I therefore doubt whether, in a criminal context at least, it is of much help to follow Denning LJ in the civil case of Attorney General v P.Y.A. Quarries Ltd ... and to seek to identify a public nuisance by asking whether the nuisance is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it."

He concluded that there were various ways to define the scope of public nuisance, and plainly did not think that Denning LJ's attempt was one of them.

58. Baroness Hale concentrated more on the issue that was actually before the House of Lords, and concluded (at paragraph 58) that public nuisance was the suffering of common injury by members of the public by interference with rights enjoyed by them as such.

59. Both Denning LJ and Romer LJ, in the two passages that I have read (at pages 184 and 190-1) quite plainly conclude at the end of the day that what is a public nuisance is a question of fact, namely and in particular whether, by reference to Romer LJ, there is effect on a sufficiently large number of members of the public by reference to one act or a series of acts, or, by reference to Denning LJ, such effect was sufficiently widespread or indiscriminate.

60. That decision of fact falls to be made by - in this case, on appeal from the Licensing Committee (which itself expressed views, which I have recited, in the decision letter) - the District Judge.

61. In the light of the words of Romer LJ, and the lack of approval of Denning LJ by Lord Rodger in the House of Lords, I do not read Denning LJ's words as meaning that the effect of the public nuisance must be very indiscriminate or very widespread. It simply needs to be sufficiently widespread and sufficiently indiscriminate to amount to something more than private nuisance.

62. Mr Glen submits that because the majority of complaints come from one set of premises - and indeed one tenant in those premises - in reality this was a private nuisance, even if one throws in for good measure Mr Rigby, who ceased to complain once the double glazing was put in and he became friendly with the claimant, and even if one also throws in the complainant in writing Mrs Berton, whose evidence was not accepted by the Licensing Committee; all coming from one set of premises where there were separate council tenants, such that in effect therefore this should be seen as a private nuisance rather than a public nuisance. Albeit, as Mr Matthias submits, late in the day (ie, towards the end of the hearing before the District Judge), this was an issue which was plainly raised by Mr Glen before the District Judge.

63. It is plain to me that the District Judge had the question in mind, as indeed did the Licensing Committee - albeit the authorities were not brought to its attention - in their conclusions as to the serious nature of the noise nuisance, not limited to the impact on Ms Schmidt. It may be for that reason that the evidence was adduced before the District Judge, much more extensively than before the Licensing Committee, from sound experts.

64. The conclusions of the District Judge I have already read. I am satisfied that the District Judge correctly applied the law. Insofar as he applied the Guidance, the Guidance itself is not unlawful, and in any event it is made quite plain that the nuisance could vary in its effect, and the District Judge concluded that this was a nuisance which was higher on the scale than something that fell within the category of simply a private nuisance, and that noise nuisance was caused not simply to Ms Schmidt, on the evidence before him.

65. I do not conclude that it is arguable that there was an error of law either by virtue of the District Judge's following of the Guidance or a misapplication of P.Y.A. Quarries so as to take account of Romer LJ but not the dicta of Denning LJ.

66. I turn to two supplementary and subsidiary arguments, which Mr Glen put forward to seek to support a case that he has an arguable application for judicial review. The first argument is that he submits that the District Judge did not apply the well known approach, which is best expressed in Sturges v Bridgman [1879] 11 Ch.D. 852 - where private nuisance was in question but, by virtue of the District Judge's conclusion that there was a public nuisance, the same principle applies – namely that before there can be a finding of nuisance the approach ought to be adopted which so felicitously captures the era, in the words of Thesiger LJ in Sturges v Bridgman when he said –

> "What might be a nuisance in Belgrave Square would not be a nuisance in Bermondsey."

67. Mr Glen submits that the case that he forcefully put before the District Judge did not get any or any proper consideration, namely that Soho is a very noisy place, full of entertainment centres, such as that of his client, and that an inappropriately high standard of expectation was applied to the noise outside his client's pub, which did not take into account the fact that Soho has a high ambient noise, and that residents of Soho ought to be expected to put up with such noise.

68. Mr Matthias does not accept that the District Judge failed to address this point. He submits that the District Judge quite plainly had it in mind by reference to a number of passages in the judgment, to which I shall return. But, in any event, he submits that such an approach to Sturges v Bridgman does not do the argument as to what nuisance is proper justice.

69. Mr Matthias referred to the subsequent Court of Appeal decision in Rushmer v Polsue & Alfieri Ltd [1906] 1 Ch 234, and in particular the judgment of Cozens-Hardy LJ at pages 249-250. After citing Thesiger LJ, Cozens-Hardy LJ continued:

> "But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and the defendant's machinery is of first-class character."

That must make sense.

70. Thesiger LJ was not saying that no one in Bermondsey could ever complain of nuisance. He was, no doubt, saying that the expectation of someone living in Bermondsey was of a higher degree of ambient noise than the residents of Belgravia. But if the noise in Bermondsey where the complainants live is way in excess of the ordinary ambient noise in Bermondsey, and amounts to something far greater than can be endured, then the Bermondsey residents will be entitled to claim that there is a private or public nuisance.

71. Before I consider the decision that was made by the District Judge, I must in this context consider a particular point that Mr Glen makes in relation to a ruling made by the District Judge, on the second day of the hearing. This was noted down by the solicitor for the Council in shorthand, and it was not similarly so recorded by the solicitor for the claimant who however, very diligently, did his best to get it down

although, in my judgment, not as fully, for obvious reasons, by tapping it into his blackberry. I had the privilege of being able to compare (for the first time in my experience) a note on the blackberry with the content of a note typed up from the shorthand notes to which I have referred. I am entirely satisfied - not least because of the close similarity between the two - that the shorthand note, which is much fuller, is the accurate record. It is that record which I adopt.

72. The District Judge's note is as follows:

> "The issue that I have to consider in this appeal is whether the decision of the Sub-Committee was wrong, in that it fails to promote the Licensing Objectives in relation to these premises. The question of equity in relation to other premises cannot form part, in my judgment, of my deliberations. I am solely concerned with the Licensing Objectives in relation to these premises. The Licensing Objectives take into account policy, guidance and case law. So I am afraid whether the other premises are badly run or well run cannot affect the decision that I have to take, and I am not prepared to hear evidence in relation to other premises except so far as is relevant to this appeal and I can see it may be relevant in relation to whether or not the noise complaint emanates from other premises. That is my decision."

73. It is quite plain that the context in which the ruling is being made was one in which Mr Glen, on behalf of his client, was wishing, perfectly understandably, to complain, on the basis of the evidence available to him, that other pubs were being allowed to get away with it - similar activity - without steps being taken against them. It was that which was dealt with by the District Judge in the first part of his ruling. He also made it clear however that it would leave open the fact that, if the noise which was said to come from this pub was in fact coming from another pub, such must be relevant.

74. There was nothing said specifically in this ruling about the issue of ambient noise in Soho. The fact is that experts' reports had been served on both sides, which included, and I have seen, evidence called by the defendant Council which plotted spots in the vicinity of the claimant's pub showing, as it happens, on the evidence of the defendant's expert, a considerably higher decibel level near and at the premises of the claimant than at other premises, including other pubs. Such expert evidence was served and exchanged many months before the hearing, and it is plain that some of that evidence is addressed by the District Judge in his judgment: and Mr Glen was also permitted to cross-examine the Council witness by reference to something called the Soho Noise Survey.

75. Mr Glen says he had a witness, Mr Watson, present whom he let go - although he was reminded that this was only after he had given evidence; but "let go", as was subsequently explained, without having dealt with a case as to ambient noise, in the light, as Mr Glen now submits, of the ruling to which I have referred. Once again I suspect however that the fact is that he did not perhaps make the point which was there available, namely that in the experts' reports and also in the evidence of the defendant's witnesses, the case was being made that this pub's outside customers were louder than

others', so that he was positively entitled to cross-examine on the Survey, and could have produced any further evidence if so desired. He says he did make a further submission at one stage to see if he could move the ruling on, but again I am not satisfied that was a submission, or a ruling out, of the simple point, namely whether ambient noise around this pub in the evening was very considerably higher than during the day, or than it was in local streets, including streets with other pubs in them, at the same time of the evening.

76. I do not conclude that there is an arguable case in any way that the claimant was inhibited by a ruling which was, in my judgment, in any event, correct in the terms in which it was given.

77. I return to whether, in the light of that ruling or otherwise, the District Judge did consider what one might call the Belgravia/Bermondsey point. Equally, Cozens-Hardy LJ in Rushmer would either have to consider whether the noise nuisance or noise effect of this pub did make a substantial addition to an albeit otherwise noisy neighbourhood. I am satisfied that there are substantial passages in the decision of the District Judge which make plain that that was well in his mind. The District Judge referred at the outset of the judgment to Berwick Street being undoubtedly "a vibrant part of Central London", including no doubt, on the evidence before him, 'vibrating' with noise outside pubs.

78. The District Judge referred to the evidence of the defendant's environmental health officer, that he could, from Ms Schmidt's flat, hear the noise and loud talking and laughter which was extremely intrusive even with the double glazing windows shut: with the windows open, it was unbearable.

79. The assessment by Mr Hepworth, the claimant's expert, was cited, including his description that the site location was in a busy entertainment area of Central London.

80. The evidence which the District Judge found persuasive was as to the increase in decibels over ambient noise during the hours of 6 pm and 11 pm in the evening. The judge records that the claimant's own expert accepted that there was a six decibel increase in noise around the time, which was a noticeable increase. Having said that he was satisfied that Miss Schmidt was not unusually sensitive, or a serial complainer, and suffered significant nuisance, he recorded the evidence of Miss Bailey, in which she accepted that Soho was a noisy area and that some degree of disturbance should be anticipated, but the conclusion was that the noise she suffered was not tolerable.

81. Mr Agnew, the environmental health officer, gave evidence: it was recorded that the noise diminished in both directions the further he moved away from the premises.

82. In order to challenge the decision of the District Judge on this ground the claimant must establish an arguable case either that he was Wednesbury unreasonable or erred in law in failing to address this issue, or that in some way he fettered himself in doing so by an unlawful ruling. I am not satisfied that such case is arguable. I am satisfied that the District Judge very carefully considered the real question in the case, namely whether the noise that there undoubtedly was from this pub exceeded by a very long way indeed

anything that can be called tolerable, and not just tolerable by one or two members of the public or local residents.

83. I turn finally to whether the last of Mr Glen's points is arguable. He submits that there is a requirement for proportionality in the consideration of the imposition of conditions. He referred to paragraph 2.35 of the Guidance and, by way of example, to R (Bristol Council) v Bristol Magistrates' Court [2009] EWHC 625 (Admin), a decision of Mr John Howell QC (sitting as a Deputy Judge of the High Court). It is always right that the court should consider whether the body in question which imposed, in this case, conditions, carefully considered what alternative steps there were, and the consequences of the course of action they were taking.

84. I am satisfied that the District Judge properly considered this issue. He referred in his judgment to the steps that had been taken prior to the issue of the original application for review by the defendant to seek to resolve matters short of issuing that application (to which I have referred). Consequently alternatives were plainly considered.

85. Mr Glen made submissions in writing that some steps ought to have been taken by the defendant rather than those that they did take, under the Environmental Protection Act 1990. But when challenged by Mr Matthias to say what precise steps he had in mind, given the absence of any power of the authority to take steps as he submitted, in relation to people on the highway, such as were gathering outside the pub, Mr Glen was unable to point to any power the defendant could have exercised, and effectively did not pursue the point.

86. The only argument which he put forward on this question of proportionality was to complain that the District Judge did not consider whether the condition which he imposed, and which is challenged, was one that could have been limited to something less than the hours of between 6 pm and 11 pm; Mr Glen submitted perhaps 7 pm to 11 pm.

87. The fact, in my judgment, is that it is quite plain from the judgment that the District Judge did consider the issues of proportionality, did appreciate the economic consequence for the claimant, and refers to it, but had before him evidence - in the light not only of the defendant's sound expert but the evidence of the claimant's sound expert also - that the high point of the noise was indeed between 6 pm and 11 pm. There was therefore justification for the imposition of a condition, once a condition was to be imposed, in respect of the entirety of the period which was causing the public nuisance which the District Judge found. I do not conclude that there is an arguable case on this either.

88. In those circumstances I dismiss the applications for permission. The question of stay does not therefore arise and that application is dismissed.

89. MR GLEN: My Lord, at this late hour would you consider leave to appeal?

90. MR JUSTICE BURTON: I do not think that you need it, Mr Glen, do you? I think the position is what you do is renew your application to the Court of Appeal. It is not for me.

91. MR GLEN: I thought that had been "Woolfed".

92. MR JUSTICE BURTON: No. I do not think it has changed. I think you go to the Court of Appeal. If they are interested, then they will grant you a stay.

93. MR GLEN: I understand.

94. MR JUSTICE BURTON: I am not proposing to grant a stay pending your application; you have not asked me.

95. MR GLEN: I did not expect that.

96. MR MATTHIAS: We are grateful to you for sitting late and concluding this matter today. I have an application for costs.

97. MR JUSTICE BURTON: I had been going to HM Garden Party this afternoon. I seem to have lost the opportunity.

98. MR MATTHIAS: I am very sorry. We are very grateful. There were two schedules of costs. I pass one to you and one to my friend.

99. MR JUSTICE BURTON: (To Mr Glen) If you are going to go to the Court of Appeal you will need a transcript.

100. MR GLEN: Yes.

101. MR JUSTICE BURTON: I am thinking of the pressure on the transcript writers.

102. MR GLEN: Yes, we will need a transcript.

103. MR JUSTICE BURTON: I am sorry to be a problem but I had better order an expedited transcript.

104. MR GLEN: Thank you.

105. MR JUSTICE BURTON: Quite apart from your own desire, I am sure, to get to the Court of Appeal soonish, I am facing the end of term and so if I am to approve the judgement it is going to have to be with me by next Tuesday.

106. MR GLEN: Next Tuesday is 23rd.

107. MR JUSTICE BURTON: If the transcript can be with me on Monday I can approve it in time for you to have it next week.

108. MR GLEN: Thank you.

109. MR MATTHIAS: The smaller of the two schedules relates to settling the grounds of opposition for the judicial review claim form. The larger of the two relates to the two hearings we have had before my Lord, last week and today.

110. MR JUSTICE BURTON: How do we differentiate between that? The fact is you are entitled to the costs of the acknowledgement of service and that is what you say is the smaller of the two.

111. MR MATTHIAS: Yes.

112. MR JUSTICE BURTON: What began as an application for a stay burgeoned because I needed to consider the merits in order to decide the say. Then it became additionally an application for permission. You are not supposed to get your costs when opposing permission over and above the acknowledgement of service.

113. MR MATTHIAS: That is on the basis - - this is analogous to the situation where the application for permission is renewed.

114. MR JUSTICE BURTON: Yes, exactly, yes, I follow.

115. MR MATTHIAS: on such an application if it is acceptable one is entitled to one's costs. Over and above that of course, the principal reason why we came to court last week and why we came back to court - the principal reason was our opposition to the stay.

116. MR JUSTICE BURTON: How are we doing on costs? You have 2,600 on acknowledgement of service and 10,000 for the various hearings.

117. MR MATTHIAS: It comes to 12,798.

118. MR JUSTICE BURTON: (To Mr Glen) Have you a schedule?

119. MR GLEN: Yes.

120. MR JUSTICE BURTON: How does it compare?

121. MR GLEN: I am here for next to nothing.

122. MR JUSTICE BURTON: I am sorry to hear that. Have you anything to say, first, on the substance of it? Do they get their costs?

123. MR GLEN: No. Last week we were keen to get a case stated and we have a right to a case stated.

124. MR JUSTICE BURTON: You would not necessarily have got a ruling. You say you have a right to it. If the District Judge had said no, which he could have done, and in the light of my judgment he might have formed the same view, then you would have difficulty. It does not stop you, but you have problems.

125. MR GLEN: There is an entitlement to a particular type of case stated, namely one which requires him to set out the evidence and say whether there was public nuisance. That is what we had in mind. And he would have been obliged to attach - - - - -

126. MR JUSTICE BURTON: You might have had to - - - - -

127. MR GLEN: In the spirit of getting on with things we gave that up. It grew into a permission application. It was not a renewal. We gave up the right to be considered on the papers at the same time. What this is effectively is the normal situation where if you are appear to oppose the first application for permission you do not get costs related to that. Therefore we would submit that although the first document covered the period last week - - - - -

128. MR JUSTICE BURTON: That is the acknowledgement of service. I do not think that is the hearing last week which is all right.

129. MR GLEN: It is not a renewed application. We were listed for an hour-and-a-half.

130. MR JUSTICE BURTON: Once you had your new ground we would not have finished.

131. MR GLEN: We had two days set aside in October. We had our eyes on those. We were hoping by agreement - - - - -

132. MR JUSTICE BURTON: I do not think that the permission application added much to the stay, because if I had decided - and had been invited to decide for the purposes of this stay that you had no arguable case, it would have come to the same effect. I would have delivered a judgment saying no arguable case and you would submit and still have your chance for permission, but no other judge would have been likely to give you permission if I decided that there was no arguable case.

133. MR GLEN: The only matter before you last Wednesday was whether there was anything in our appeal - the Sagnata point - and whether there was enough in it to hang a stay order upon until October.

134. MR JUSTICE BURTON: I have concluded there is not.

135. MR GLEN: Yes, you have. A lot of today's costs have arisen from the sudden acceleration of our very first - not renewed - application for permission which we think we are bringing in the interest of justice. This is a public authority. They are claiming £85,000 in costs for the District Judge hearing.

136. MR JUSTICE BURTON: I do not know about that. This is a different kettle of fish here.

137. MR GLEN: It is. But from our client's point of view, that should be borne in mind. It is not as if they have to find a solicitor. They have Haley Davis, who is one of their employees.

138. MR JUSTICE BURTON: Let us come to quantum. In terms of principle, unless there is anything more you want, I feel in principle these really are the costs of the stay application. I cannot see that there is anything extra which has been incurred. It was, sensibly, turning into the application for permission.

139. MR GLEN: It flows from where we were last week.

140. MR JUSTICE BURTON: One's gut feeling is that if you have an arguable case, by hook or by crook, one wants a stay for the opportunity, so long as it is not too long. Then because Mr Matthias said you did not have an arguable case, we had to resolve it. I concluded that you do not. All I am saying is I do not think that the fact that procedurally you turned this into a permission application actually added to the costs.

141. MR GLEN: Bringing it from the case stated to judicial review the extra grounds argued about nuisance and so on - - - - -

142. MR JUSTICE BURTON: That amendment cost you a few bob, but not a lot because it was done commendably quickly.

143. MR GLEN: We say it is excessive. There is no need to charge £189 per hour.

144. MR JUSTICE BURTON: Let us come to quantum. I am against you on the principle. On this, unless the two schedules are pretty identical, my normal practice is to make an interim order because I am always reluctant to give too much or too little. I find if one makes a substantial interim order it very rarely troubles the costs judge thereafter because solicitors can be very sensible. You are attacking the quantum of £189 per hour, not that that makes a great deal of difference to the sum. It can knock a £1,000.

145. MR GLEN: They are charging up their own solicitor.

146. MR JUSTICE BURTON: I think they are entitled to do that.

147. MR GLEN: It is £189. She is not qualified.

148. MR JUSTICE BURTON: She is not qualified.

149. MR MATTHIAS: The lady is not a qualified solicitor, but the job that she does, for all intents and purposes, amounts to the same and I am instructed that this is the appropriate rate for person of that - - - - -

150. MR JUSTICE BURTON: I am sure it may be. (To Mr Glen) You are attacking that. Even assuming I knock it in half, that is £300, £400. Let us assume we knock off £1,200 for interim purposes so you can argue about it somewhere else, is there anywhere else you can knock it down?

151. MR GLEN: There are two fees for drafting by Mr Matthias, £7,000 - - - - -

152. MR JUSTICE BURTON: One is a first brief fee.

153. MR GLEN: I am sorry, I am reading it too quickly.

154. MR JUSTICE BURTON: I am sure yours is much less in the light of what you told me, but it does not look a large bill. If I make an interim order for £8,500 you can argue about it.

155. MR GLEN: Yes.

156. MR MATTHIAS: It is entirely a matter for my Lord.

157. MR JUSTICE BURTON: I will make an interim order for £8,500, to be paid - within 21 days?

158. MR GLEN: I have no one here from whom I can take instructions.

159. MR JUSTICE BURTON: It is normally 14 days, I think.

160. MR MATTHIAS: Is that in respect of both bills?

161. MR JUSTICE BURTON: No, that is this one. This one, I did not think there was any challenge. Do you want to have a go? I suppose there is a similar challenge.

162. MR GLEN: Yes.

163. MR JUSTICE BURTON: If I say £8,500 on the one and £2,000 on the other makes £10,500 interim order and the balance to be assessed if not agreed.

164. MR MATTHIAS: I am obliged.

165. MR JUSTICE BURTON: £10,500. You have no instructions to agree to 21 days.

166. MR GLEN: I have not. As long as possible - 28 days?

167. MR MATTHIAS: Yes, 28 days.

168. MR JUSTICE BURTON: Thank you. I had better hand back the largest bundles.
