Neutral Citation Number: [2013] EWHC 2174 (Admin)

Case No: CO/10284/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2013

Before :

MR JUSTICE TURNER

- -

Between :

EXTREME OYSTER	**1st Claimant**
STAR OYSTER LTD	**2nd Claimant**
- and -	
GUILDFORD BOROUGH COUNCIL	**Defendant**

- -

- -

James Rankin for the **1st and 2nd Claimants**
James Findlay QC (instructed by **Bridget Peplow of Guildford BC**) for the **Defendant**

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Judgment

Mr Justice Turner :

Introduction

1. The second claimant, Star Oyster Ltd ("Star"), is the freehold owner of two nightclub premises in Guildford: the "Casino and Players Lounge" and "Bar Mambo". Both premises are covered by licences granted in respect of "licensable activities" under the Licensing Act 2003. The tenant of the clubs, and holder of these licences, is Luminar Leisure Limited ("Luminar"). The two club premises, although presently run as distinct undertakings, are housed within the same building.

2. The first claimant, Extreme Oyster Ltd ("Extreme") is the trading company of Star. Extreme ran Bar Mambo prior to Luminar taking over on 13th May 2012. Extreme continues to be an active trading company employing staff and receiving income from the rental of the premises from Star. It pays all of Star's running costs and expenses.

3. On 2 May 2012, the claimants applied to the defendant, Guildford Borough Council ("Guildford") for "shadow" licences in respect of these two premises and areas within them. The term shadow licence is not defined in either statute or regulations but is a convenient shorthand way of describing a licence which has been obtained by one party in respect of premises in relation to which another licence (to which I propose to refer as the "primary licence") has already been granted to someone else. In short, the claimants wished, for commercial reasons, to have the benefit of licences operating in parallel to those held by Luminar.

4. Guildford refused the claimant's applications on the basis that they had failed to satisfy the terms of Section 16 of the 2003 Act compliance with which is a pre-condition of the consideration of any application for a premises licence. The claimants now seek to challenge the legality of this decision by way of judicial review.

The disputes

5. Guildford accepts that circumstances may arise in which a shadow licence can lawfully be granted but contends that such circumstances do not arise on the facts of this case. Of more generic importance is the question as to just how wide is the category of applicants which the law permits to apply for such a licence. The claimants advocate a broad approach; Guildford a narrow one.

6. Further issues fall to be addressed. The first pertains to the lawfulness of the process by which Guildford purported to reject the application. The decision had been purportedly delegated to Mr Curtis-Botting, the defendant's Licensing Services Manager. The claimants contend that this delegation was unlawful and that any decision should have been taken by the licensing sub-committee. The second issue relates to Guildford's refusal to return to the claimants the fees which they had paid in respect of the failed applications.

7. An unhappy aspect of this case is what could be described, perhaps euphemistically, as a lack of empathy between Mr Michael Harper, the owner of Star, and Mr Curtis-Botting. This case is not, however, about personalities and, although I have read with care the evidence relating to the background history, I must remind myself that there are no express allegations of bias, in the legal sense, against Mr Curtis-Botting and that his decisions must stand or fall on their own merits.

Shadow licences – the legal background

8. Under betting legislation, it was (and still is) only ever permissible for there to one licence at any one time in respect of any given set of premises. Section 152(1)(b) of the Gambling Act 2005 provides:

> "152 (1) A premises licence—
>
> … (b) may not be issued in respect of premises if a premises licence already has effect in relation to the premises…"

9. The position under the Licensing Act 2003 is, however, less strict and allows for the existence of more than one licence in respect of the same premises. Section 2 of the Act provides:

> "**Authorisation for licensable activities and qualifying club activities**
>
> (1)A licensable activity may be carried on—
>
> (a) under and in accordance with a premises licence (see Part 3), or

(b) in circumstances where the activity is a permitted temporary activity by virtue of Part 5.

(2)A qualifying club activity may be carried on under and in accordance with a club premises certificate (see Part 4).

(3)Nothing in this Act prevents two or more authorisations having effect concurrently in respect of the whole or a part of the same premises or in respect of the same person."

10. The Department of Culture Media and Sport ("DCMS") is required by section 182 of the 2003 Act to publish guidance indicating how the Act will be administered by the licensing sub-committees of the local authorities who now exercise the relevant jurisdiction over the grant, refusal, variation and review of licences for premises that offer regulated entertainment and licensable activities.

11. Section 4 (3) of the 2003 Act provides:

> "4 General duties of licensing authorities Th
>
> (3) In carrying out its licensing functions, a licensing authority must also have regard to
>
> … (b) any guidance issued by the Secretary of State under section 182."

12. The applicable DCMS guidance provides at paragraph 8.19:

> *"…There is nothing in the 2003 Act which prevents an application being made for a premises licence at premises where a premises licence is already held".*

13. Nevertheless, an applicant for a licence must qualify under one or more of the gateway criteria imposed by section 16 of the 2003 Act (of which there are ten). Only the first of these is directly material to this application:

> "16 Applicant for premises licence
>
> (1)The following persons may apply for a premises licence—
>
> (a) a person who carries on, or proposes to carry on, a business which involves the use of the premises for the licensable activities to which the application relates…"

The explanatory notes refer to this as the "principal category" in this section. However, they provide no further guidance as to its interpretation.

14. Paterson's Licensing Acts provides the following commentary on section 16 at paragraph 1.321:

> **"Who may apply?**

> Whereas a justices' licence could be granted to any person whom the justices thought fit and proper, under the new legislation section 16 specifies a restricted list of persons who may apply for a premises licence. The most common applicant will be *'a person who carries on, or proposes to carry on, a business which involves the use of the premises for the licensable activities ...'* It is suggested that the use of the term *'involves'* might denote a broad range of businesses including that of a landlord receiving a rent from a premises being used for such a purpose (this interpretation cited and approved by the district judge and subsequently Richards L.J. at para 24 of his judgment in Hall & Woodhouse Ltd v Poole Borough Council) as well as an owner of such a business, a local authority, the holder of a franchise or a tenant…"

And at paragraph 1.3515 footnote 3:

> "…Quaere whether e.g. a developer of a site who intends to construct premises to be used for the sale of alcohol would be able to apply. It could be argued the business involvement in the use of the licensed premises is too remote. This could be an issue for developers who have historically put licences in place at an early stage in a project, albeit often only on an outline basis under s 6(5) of the Licensing Act 1964. For those persons the procedure afforded by the Licensing Act 2003 (which also presents difficulties) might be the more appropriate route. For a case which raised similar issues arising under the Gambling Act 2005 see Betting Shop Services Ltd v Southend-on-Sea Borough Council [2007] EWHC 105 (Admin)...In that instance it was held that Guidance published by the Gambling Commission dealing with the point was inconsistent with the true construction of the Act. Where the applicant fulfilled the other statutory criteria, an application for a premises licence might be granted in respect of premises not yet ready for gambling (in that they had not been fully constructed or were to be altered). The claimant had met the relevant statutory criteria for its application and the authority was therefore obliged to consider it."

15. The case of Hall, to which Paterson refers, involved a criminal prosecution under section 136(1)(a) of the 2003 Act. The appellant, Hall & Woodhouse Limited ("Hall"), was the owner of the Stepping Stones public house in Poole. It let the premises to one Cartlidge under a tenancy agreement. He, in turn, employed one Ferguson to be the manager and designated premises supervisor. Hall had obtained the relevant premises licence.

16. In the early months of 2007, it became clear that those responsible for running the Stepping Stones were ignoring the terms of the licence in a number of respects. In particular, they were serving drinks after hours and failing to maintain adequate protection against the risk of fire.

17. Charges were brought against Cartlidge and Ferguson under section 136 (1) of the 2003 Act alleging that they had knowingly allowed a licensable activity to be carried on at the public house otherwise than under and in accordance with an authorisation. They duly pleaded guilty.

18. Hall was also prosecuted on the basis that, in the words of the section, it "had carried on…a licensable activity on…premises otherwise than under and in accordance with an authorisation…".

19. When the matter came before the District Judge, he applied the following reasoning:

> "(1) Section 16 of the Licensing Act specifies a restricted list of persons who may apply for a premises licence. The only basis on which the appellant could apply was as a person who carries on or proposes to carry on a business which involves use of a premises for licensable activities to which the application relates; (2) I am satisfied that use of the term "involves" denotes a broad range of business including that of a landlord receiving rent from premises being used for such purpose as in this case; (3) In making the application for the licence, the appellant must have considered itself to be carrying on a business which involves use of premises for licensable activities; (4) The grant of premises licences and enforcement of any conditions in them are fundamental to the licensing system and enforcement of it. To find otherwise would be to undermine the whole basis of the licensing regime and to negate the effect of the offences in section 136(1) ."

20. There is a due diligence defence under section 139 upon which Hall did not rely. In consequence, the District Judge convicted. Hall appealed to the Divisional Court.

21. The Divisional Court held that section 136 (1)(a) is directed at persons who *as a matter of fact* actually carry on or attempt to carry on a licensable activity on or from premises. Being a licence holder does not make a person automatically liable in respect of licensable activities carried on or from the premises.

22. One of the arguments rejected by the Divisional Court was that the language of section 136 should be equated with that of section 16. The prosecution had contended that a licence holder who applies for a premises licence will only qualify under the relevant part of section 16(1)(a) if he is a person carrying on a licensable activity. From this, it would have followed that passing through this section 16 gateway would automatically mean that the successful applicant was to be taken, for the purposes of section 136, to be carrying on the activity thereafter. Richards L.J. considered this argument to be fundamentally misconceived. He held:

> "24 Under section 16(1)(a) an application for a premises licence may be made by "a person who carries on, or proposes to carry on, *a business which involves the use of the premises for the licensable activities* to which the application relates" (emphasis added). Carrying on such a business is self-evidently different from carrying on the licensable activities themselves,

and the fact that a person's actual or proposed business involves the use of the premises for licensable activities does not mean that he necessarily carries on the licensable activities themselves at the premises for which the licence is granted. The commentary on section 16 in *Paterson's Licensing Acts*, 117th ed (2009), para 1.3515 states, at note 3:

> "It is suggested that the use of the term 'involves' might denote a broad range of businesses including that of a landlord receiving a rent from a premises being used for such a purpose, an owner of such a business, a local authority, the holder of a franchise or a tenant."

"I agree that the statutory expression is broad enough to cover the case where a freehold owner carries on the business of letting premises to tenants on the basis that the tenant will carry on licensable activities at the premises. But the landlord's business in such a case is, in principle, distinct from the activities carried on by the tenant, and I regard it as a complete fallacy to merge the two elements together and to treat the landlord as automatically carrying on the licensable activities at the premises.

25 I should note that the June 2007 revised guidance issued by the Secretary of State for Culture, Media and Sport under section 182 of the Licensing Act 2003 states, at para 8.20, that in the case of public houses it would be easier for a tenant to demonstrate that it has carried on a business within section 16(1)(a) than it would be for a pub-owning company that does not itself carry on licensable activities. That may or may not be so. The language used in that paragraph might be thought to support my construction of section 136(1)(a) , but in any event what is said in the guidance does not affect the view I have expressed about the meaning and effect of section 16(1)(a) or the distinction to be drawn between that provision and section 136(1)(a) . I expressly reject Mr Light's submission that the premise of the legislation is that the person granted a premises licence is himself necessarily carrying on such licensable activities as are carried on on or from the premises to which the licence relates.

26 It is, of course, possible for a landlord to carry on a licensable activity at premises notwithstanding that the premises have been let and notwithstanding the existence of the landlord/tenant relationship, but whether he does so or whether, as an alternative possibility, he knowingly allows a licensable activity to be carried on at the premises has to be determined as a question of fact. Nor do I see how the mere inclusion in the tenancy agreement of obligations aimed at ensuring that the premises are managed properly and in compliance with the Act

> could *of itself* warrant the finding that licensable activities carried on there are carried on by the landlord."

The factual background

23. The licence applications to which this claim relates are eight in number. Four were made by Star and four by Extreme. Between them they covered different permutations of the physical extent of the premises to which they were intended to apply. Those numbered 92057 and 105889 were, for reasons which will be examined later in this judgment, to assume particular prominence during the course of oral submissions.

24. Three of the eight applications were listed to be heard by the licensing sub-committee. The first of these hearings was to take place at 2pm on Tuesday 24 July 2012.

25. However, by email sent at about 5pm on Thursday 19 July 2012, one Sophie Butcher, Committee Member for Legal and Democratic Services, wrote to Star's solicitors to say that the hearings had been "cancelled" on the basis that the applications did not comply with section 16 of the Licensing Act 2003. In addition no further arrangements were to be made to convene hearings in respect of the other outstanding applications. Full and detailed reasoning was promised for the following Monday. During the course of submissions, I elicited from counsel for the defendant that the decision upon which this mail was based had earlier been reached, but not contemporaneously recorded, by Mr Curtis-Botting.

26. This mail prompted a response from Star's solicitors expressing surprise and dismay at the decision and pointing out that, since the decision had not been taken by the sub committee, there was no statutory right of appeal and thus the only route of legal challenge would be by way of judicial review.

27. On 23 July, the promised letter containing the defendant's reasons was sent by one Mr Gerrard, Interim Head of Legal and Democratic Services. With respect to the legal position, having set out the terms of section 16(1)(a), it said:

> "The Licensing Authority's view is that none of the above companies now fall within this definition. Luminar Group Limited are carrying on the licensable activities. Whilst the case of [Hall] indicated that a landlord could fall within the definition by virtue of carrying on a business of collecting rent, this only applies if the landlord applies for a licence in respect of the licensable activities carried on by the tenant. In the case of the above applications, they are in respect of a business which would be carried on by the companies themselves and do not relate to Luminar Group Ltd's licensable activities."

28. The letter went on to say :

> "The Licensing Authority have (sic.) considered whether the above companies can fall within the definition of proposing to carry on a business. On the facts of this case, it is not considered that they can. It will be 5 years before the lease comes to an end. If the 3 year break clause is invoked the

> premises will have to be redeveloped, in which case further licence applications would be required in any event. Counsel's view is that any plans that the companies may have to carry out licensable activities in the future are at most a consideration of a proposal and do not fall within section 16(1)(a)."

Terminology

29. The defendant takes issue with the use of the term "shadow" licence and challenges the claimant's assertion that such arrangements are and were commonplace. Ultimately, however, so long as the term shadow licence is treated as being no more than a convenient label, and not one to be accorded any special legal status, then I see no harm in using it. This is particularly so in the light of the fact that the claimants do not contend that every shadow licence application will automatically comply with section 16(1)(a) and the defendants do not contend that every shadow licence will automatically fall foul of it. Each case will fall to be decided on its own facts.

Interpretation of section 16(1)(a)

30. In the Hall case, the court was not dealing with circumstances in which it was proposed that two premises licences would be held by two persons in respect of the same premises. In the instant case, there was disagreement between counsel as to whether or not applications for shadow licences had now become standard practice within the industry. In the event, I do not find that this is an issue which it is necessary to resolve. Orthodoxy is no more proof of legality than novelty is of illegality.

31. Despite the strongly opposed position of the parties on a number of issues, there were, nevertheless, some areas of agreement between the parties. In particular, counsel for the defendant, Mr Findlay Q.C. conceded, importantly, that the defendant could not legitimately have found that Star, as landlord, was precluded by section 16(1)(a) from making an application for, what he described as, a "mirror" licence. Such a licence, he explained, is a licence in identical terms to the primary licence insofar as it relates to the "licensable activities" covered by the latter. His concession was based on the approach of Richards L.J. in Hall.

32. Of the eight applications which are the subject matter of this case, it is applications 92057 and 105889 made by Star (to which I have already made passing reference) which were the most closely equivalent in scope and content to the existing licences held by Luminar. They related to the "Mambo" and "Casino and Players Lounge" premises respectively. Counsel for the defendant conceded that, if the claimants' applications had related to exactly the same activities in scope and form in respect of premises exactly as delineated in the Luminar licences, then the section 16 gateway would have been open to the claimants and Guildford could have had no legitimate basis upon which to refuse to proceed to determine the applications on their substantive merits.

33. However, Mr Findlay went on to assert that the defendant was entitled to reject the applications because of differences between the activities to which the shadow applications related and those covered by the primary licences.

34. When, in response to these submissions, I enquired just what these differences actually were, Mr Findlay was unable to provide me with a full answer. I, therefore, permitted him a short adjournment to find out the answer from Mr Curtis-Botting who was in attendance at the hearing. Copies of the Luminar licences for comparison were not immediately to hand, not having been included in the trial bundle.

35. After the adjournment, Mr Findlay identified the following differences between the terms of the primary licence and the proposed terms of the shadow licences:

    i) Application 92057 provided for the showing of films not suitable for children and for tableside and show dancing. The corresponding Luminar licence did not. Star's application also purported to cover a small and roughly square area which, although falling within the footprint of both premises as a whole, had not been included in the equivalent Luminar licence. In all other particulars the activities were identical as, indeed, were the operating times.

    ii) Star's application 105889 was different to its Luminar counterpart to the extent that there was no specific provision for door supervisors and there were differences in relation to the permitted scope of lap dancing activities and the provision of CCTV surveillance. Upon enquiry as to the actual nature and extent of the differences relating to lap dancing and CCTV, Mr Findlay was unable to offer further assistance and said that he would be prepared to base his case on this issue with reference to the provision of doormen alone.

36. Of the differences relied upon, it must be said that none of them had ever been referred to in any communication written or oral from the defendant to the claimants. None of them was mentioned in Mr Curtis-Botting's witness statement, a document not otherwise short on detail. Furthermore each and every one of them could have been addressed at the sub-committee hearings which had been listed and the sub-committee would have been able (had it considered it to be necessary for the promotion of the licensing objectives in the light of material representations) to impose conditions which would have removed or mitigated these differences.

37. Mr Findlay assured me that, despite all of the above, Mr Curtis-Botting had, indeed, considered these very factors in reaching his decision. I accepted this assurance.

38. I then enquired of Mr Findlay whether his case was that an application for a shadow licence must fail under section 16(1)(a) unless the licensable activities identified therein were identical in every single respect to those contained in the primary licence. This was the stance which he initially adopted but, thereafter, he conceded that not every difference no matter how small would have this effect and argued that the differences had to be "material". Even accepting that Mr Curtis-Botting had applied his mind to these differences, there was no evidence as to which of them he had considered to be "material" or upon what basis.

39. I was and remain concerned that Mr Curtis-Botting made a mere mental note of these limited discrepancies and, thereafter, peremptorily cancelled (or refused any further consideration of) these applications without ever volunteering which discrepancies he had identified. I am not persuaded by the argument that the nature of the discrepancies was not communicated to the claimants because their challenge by way of judicial review was insufficiently focussed and that this justified Guildford's silence on the

point. It will be recalled that the letter of 23 July 2012, which Guildford had said in the earlier email would contain "full and detailed reasoning", dealt with the point in the following way:

> [The case of Hall] "…only applies if the landlord applies for a licence in respect of the licensable activities carried on by the tenant. In the case of the above applications, they are in respect of a business which would be carried on by the companies themselves and do not relate to Luminar Group Ltd's licensable activities."

40. A reasonable interpretation of this passage would, in my view, have been that Guildford's objection was not that there was a material difference between the licensable activities referred to in the claimant's applications and those contained in the primary licence but that the shadow licence applications related to free standing activities which were within the claimants' contemplation to carry out themselves and not through mere involvement in a business carried out by Luminar. In other words, the objectionable factor was that, in order to comply with section 16(1)(a), the claimants' applications should have been entirely parasitic upon the activities of Luminar and should not have reflected any future contemplated activities of the claimants themselves. However, this objection, if valid, would have applied equally to an application drafted in terms identical to those of the primary licence and thus is inconsistent with the concession made by Mr Findlay in his submissions. Nevertheless, despite any perceived contrast between the wording of the letter and the submissions now relied upon by Guildford, I approach the determination of the issue *de bene esse* as if the letter articulated unambiguously the same analysis as that upon which it now relies.

41. Ultimately, the resolution of this issue depends upon the interpretation of the words "the licensable activities to which the application relates" in section 16(1)(a) of the Act. The narrow interpretation favoured by Guildford is that such licensable activities should be materially identical in content to the primary licence with specific reference to the scope of the plan and operating schedule which must accompany the shadow application.

42. Guildford advances three specific policy bases in support of its approach. It contends:

(a) Section 16 does not provide for a free for all. In restricting the pool of possible applicants Parliament clearly considered there was benefit in so doing.
(b) Numerous licences make enforcement more difficult. Clarity of responsibility is important as noted by the current Guidance at paragraph 8.17.
(c) Unrestricted applications place an undue burden on licensing authorities.

43. Contention (a) does not, in my view, advance Guildford's case. No one suggests that section 16 provides a "free for all". It is self-evident that Parliament would not have imposed the section 16 gateways unless it considered that some benefit would thereby be achieved. This, however, begs the question as to where the line is to be drawn. The existence of the line cannot, of itself, determine its position.

44. Contentions (b) and (c), on the other hand, relating to difficulties in enforcing multiple licences and the burden of dealing with them, are not without some weight. Nevertheless, this weight is not sufficient, in my view, to preclude a broad interpretation of section 16(1). The potential deleterious consequences must be balanced against the following factors:

    i) The holder of a premises licence is under duties imposed by section 57 of the Licensing Act 2003 (breach of any one of which is an offence) in respect of keeping, displaying and producing such a licence. These obligations apply equally to holders of a shadow licence. There is, therefore, a level of well defined statutory control over the risk of confusion arising over the existence and parameters of any given licence. I accept that this does not remove all risk that, in any given case, the position may be less clear than if only one licence holder were permitted but the position is, at least, mitigated by the formalities of section 57 and, if the risk of confusion were to be prioritised as a factor in the threshold test, Parliament could have made express provision for this in the wording of the statute. It did not.

    ii) The broader interpretation of section 16(1) continues to preserve the important control measure that any given applicant must demonstrate a sufficient nexus between its business and the relevant licensable activities. Accordingly, those operating businesses with a more tenuous link, such as developers, may well be excluded from using this gateway. Borderline cases will have to be decided on their own facts.

    iii) A further disincentive to the making of multiple applications is that a fee is payable in respect of each of them. In this case the level of fee was £625 per application.

    iv) Situations may arise, in any event, in which one set of premises is covered by a number of licences. Even on a narrow approach, a multiplicity of licences is not precluded in respect of any given premises. Simply by limiting applications in relation to existing businesses where the licensable activities are virtually identical to those already carried on will not obviously achieve a substantial reduction in the number of multiple applications made.

45. On the other hand, there are a number of factors which provide support for a broader interpretative approach.

46. Firstly, the Licensing Act 2003 was not intended to support a regime based on a narrow and restrictive approach to licensing. As Black J. observed in R (Daniel Thwaites plc) v Wirral Borough Magistrates' Court and Others [2008] EWHC 838 (Admin) at para. 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."

And at para. 42:

> "… the Act anticipates that a 'light touch bureaucracy' (a phrase used in para 5.99 of the Guidance) will be applied to the grant and variation of premises licences."

A wider approach to the interpretation of section 16(1)(a) facilitates these policy aims. The narrow one advocated by the defendant does not.

47. Secondly, the applicant for a shadow licence may have very good and perfectly legitimate business, or other, reasons to include some details of the relevant licensable activity not included in the original primary licence. The automatic exclusion of such applications from further consideration under section 16(1)(a) would celebrate the triumph of bureaucracy over common sense.

48. Thirdly, if, in any given case, there were sound policy reasons for taking issue with any differences between the terms of the shadow application and those contained in the primary application, then these could be considered at the hearing and dealt with on their merits based upon an assessment of what would be necessary for the promotion of the licensing objectives in the light of representations made. It is far better that the proper control mechanism for such applications should involve the considered application of policy rather than the operation of a mechanistically applied threshold condition. Any frivolous, vexatious or repetitious applications could always be dealt with by way of delegation to a single officer and, in obvious cases, be disposed of in a proportionately summary fashion.

49. Fourthly, if Parliament had wished to preclude the making of second or subsequent licence applications on anything but identical or near identical bases to those contained in first licences, then this could have been made clear in the Guidance. It was not.

50. Fifthly, section 17 of the 2003 Act treats the "relevant licensable activities" as enjoying a separate conceptual existence from, for example, "the times during which it is proposed that the relevant licensable activities are to take place". It follows that "a business which involves the use of the premises for the licensable activities to which the application relates" does not cease to be such a business merely because the application relates, for example, to operating hours which are different from those covered by the primary licence. The licensable activities remain the same even when the times over which they are permitted do not.

51. There are provisions in the 2003 Act upon which Guildford rely which allow an owner to apply for the transfer of the original licence back from the tenant in the event of insolvency or surrender or because the tenant had given up occupation but these are circumscribed by time restraints and depend in part upon the cooperation of the tenant which may not always be forthcoming.

52. Having concluded that a narrow test is not appropriate, it is necessary to consider the parameters of a broader interpretation. In my view, the answer lies in the legislation itself. Section 1(1) of the 2003 Act categorises licensable activities thus:

> "**Licensable activities and qualifying club activities**

> 1. For the purposes of this Act the following are licensable activities—
>
> (a) the sale by retail of alcohol,
>
> (b) the supply of alcohol by or on behalf of a club to, or to the order of, a member of the club,
>
> (c) the provision of regulated entertainment, and
>
> (d) the provision of late night refreshment.

This categorisation provides a logical and straightforward basis upon which to apply section 16(1)(a).

53. Where the shadow application is limited to actual (as opposed to proposed) use, a sequential analysis would involve the following steps:

i) Is the applicant a person who carries on a business? If not, he does not satisfy 16(1)(a) and the application must fail. If he does, then go to (ii).

ii) Does that business involve the use of the premises to which the application relates for licensed activities? If not, it does not satisfy 16(1)(a) and the application must fail. If it does, then go to (iii)

iii) Identify the categories of licensable activities as listed under section 1 of the 2003 Act for which the premises are used. Go on to (iv).

iv) Does the application relate to any category or categories of licensable activity not identified under (iii) above? If so, the applicant does not satisfy 16(1)(a) and the application must fail in so far as it purports to apply to those activities. If not, 16(1)(a) is satisfied.

54. It would follow that the landlord of a public house (the tenant of which held the primary licence to sell alcohol) would not be precluded from applying for a shadow licence also for the retail sale of alcohol even if, for example, the standard days and timings in the shadow application differed from those permitted under the primary licence. The category of licensable activity would remain the same. By way of contrary example, the shadow application could not, however, satisfy the requirements of sub-section 16(1)(a) if it were made in respect of regulated entertainment where the primary licence did not include provision for regulated entertainment. In such a case the applicant, in order to bring itself within the subsection, would have to demonstrate that it actually proposed to carry on a business at the premises which involved regulated entertainment.

55. Applying this approach to the circumstances of this case, it follows that the defendant was wrong to decide that section 16(1)(a) applied so as to exclude Application 105889 from further consideration. The differences relied upon did not relate to the categories of licensable activity but merely to details such as the provision of doormen and the like.

56. Application 92057 is different to the extent that the area covered in the shadow application is not co-terminous with that to which the primary licence relates. However, the discrepant area still falls within premises used by Star as landlord but is merely covered by a different primary licence held by Luminar.

57. In my view, it matters not for the purposes of the application of section 16(1)(a) whether the shadow licence application covers an area entirely co-incident with any given primary licence. So long as the extent of the shadow licence application does not stray beyond the parameters of the premises used by the applicant as a business and that the matching categories of licensable activities are carried out under the primary licences relating thereto then the threshold of section 16(1)(a) is surmounted.

58. Again, in the event that there were any legitimate policy concern over the proposed physical area of the premises covered by the shadow application, this could be addressed at the substantive hearing.

59. It therefore follows that the defendant was wrong to conclude that section 16(1)(a) precluded application 92057 from further consideration.

60. I would therefore order Guildford to proceed with these two applications on the basis that they pass through the section 16(1)(a) gateway.

61. With respect to the remaining Star applications, I quash Guildford's decisions and require it to approach the issue as to whether they qualify under section 16 afresh applying the law as I have ruled it to be.

Proposed carrying on of business

62. In case I am wrong about my interpretation of section 16 in so far as it relates to existing (rather than proposed) use, it is necessary to consider whether, even if Star could not bring itself into the category of carrying on a business within the scope of section 16(1)(a) it could still rely upon the assertion that it *proposed to carry on* a business which involved the use of the premises for the licensable activities to which the application related (to which, for ease of reference, I will refer as "the alternative limb").

63. Star contends that its intentions in respect of the future of its business at the premises were sufficient to comply with the alternative limb. These intentions were:

    i) To protect Star in the event that its tenants went into liquidation or surrendered its licence, or was the subject of review proceedings.

    ii) To protect Star in the event that its tenants failed to pay/were late paying their rent.

    iii) In the event that Star gave its tenants notice to quit and retake possession pending redevelopment of the premises, to enable it to run the premises in the meantime.

    iv) To enable Star to market the premises or parts of the premises should the tenants stay in possession for the full term.

64. Guildford rejects this approach and submits that "proposes" is a normal English word which should be given its normal meaning, subject to any special meaning that may be attributable to its particular statutory context.

65. Guildford contends that the approach of the Court of Appeal in Mainwaring v Trustees of Henry Smith's Charity [1998] QB 1 at 18E, a case determined under the Landlord and Tenant Act 1987, is equally applicable to the Licensing Act 2003. Sir Thomas Bingham MR held:

> "It is in our view clear that the expression "proposes" describes a state of mind somewhere between mere consideration of a possible course of action at one extreme and a fixed and irrevocable determination to pursue that course of action at the other. As Lord Denning MR observed in Trustees of the Magdalen and Lasher Charity, Hastings and Others v Shelower (1968) 19 P & CR 389 at 392, contrasting different expressions to be found in the Landlord and Tenant Act 1954,"The word "proposes" is different from the word "intends". A man may propose to do a thing without having formed a fixed and settled intention to do it. "A "proposal" under the Act means that a project must have moved out of "the zone of contemplation ... into the valley of decision": Cunliffe v Goodman [1950] 2KB 237 at 254 per Asquith LJ."

66. Star cautions against the suggestion that the interpretation of "proposes" in the policy context of the provisions of the Landlord and Tenant Act 1987 should be translated directly into the context of the Licensing Act 2003.

67. For my own part, I do not consider that there is anything in the quoted passage from Sir Thomas Bingham's judgment in Mainwaring which could, in any event, be interpreted as giving the word "proposes" anything other than its ordinary English meaning. He certainly did not consider that it was necessary to give the word any purposive (let alone strained) interpretation to achieve a just determination of the cause before him. On the contrary, he concluded that, in the circumstances of that case, "it is impossible to feel any doubt". He acknowledged, however, that "Cases could well arise in which it might be very doubtful whether a landlord's plans had hardened sufficiently to be regarded as a proposal…"

68. I resist the temptation to provide any further judicial gloss on the proper interpretation of the word "proposes".

69. In this case, however, regardless of the proper interpretation of the word "proposes", Mr Curtis-Botting made a mistake. When deciding whether Star was able to bring itself within the alternative limb he was under the mistaken impression that the lease contained a three year break clause when, in fact, it was a one year break clause. This, in my view, amounted to a material misdirection.

70. On this basis, I would have quashed his decision on the alternative limb in any event. I do not, however, find that a decision adverse to the claimants on this issue, had it been based on accurate primary facts, would automatically have been Wednesbury unreasonable. This is a court of review and not of appeal.

Extreme Oyster

71. The role of Extreme is referred to in paragraph 2 of this judgment. In summary, it receives income from the rental of the premises from Star. It pays all of Star's running costs and expenses.

72. Extreme is not, however, the landlord of the premises or any part of them and arguably operates at a further stage removed from the business which actually uses the premises for the licensable activities to which the application relates. This does not mean that Extreme's applications must automatically be excluded from consideration by the operation of section 16(1)(a) of the 2003 Act but it does mean that this is an issue upon which the decision maker and not the court should be the final arbiter (acting, of course, within the constraints of public law).

73. The reasons given in the decision letter for finding that Extreme did not satisfy the threshold criteria of section 16(1)(a) are flawed. The decision with respect to whether Extreme was carrying on a business which involved the use of the premises for the licensable activities to which the application relates (as articulated in Guildford's submissions to me) was wrongly based on the assumption that there had to be virtual equivalence between the scope of the activities actually carried out and those in respect of which the application was made. The decision on the alternative limb was also flawed by Mr Curtis-Botting's error relating to the timing of the break clause. The decisions relating to the Extreme applications are, therefore, quashed and must be considered afresh applying the law as I have held it to be.

Delegation

74. The decision to rule against all of the Claimants' applications was taken by Mr Curtis-Botting alone and not by the sub-committee. The powers of sub-delegation under the 2003 Act are contained within section 10 which provides:

> "10 **Sub-delegation of functions by licensing committee etc.**
>
> (1)A licensing committee may arrange for the discharge of any functions exercisable by it—
>
> (a)by a sub-committee established by it, or
>
> (b)subject to subsection (4), by an officer of the licensing authority.
>
> (2)Where arrangements are made under subsection (1)(a), then, subject to subsections (4) and (5), the sub-committee may in turn arrange for the discharge of the function concerned by an officer of the licensing authority.
>
> (3)Arrangements under subsection (1) or (2) may provide for more than one sub-committee or officer to discharge the same function concurrently.
>
> (4)Arrangements may not be made under subsection (1) or (2) for the discharge by an officer of—

(a)any function under—

(i)section 18(3) (determination of application for premises licence where representations have been made),

(ii)section 31(3) (determination of application for provisional statement where representations have been made),

(iii)section 35(3) (determination of application for variation of premises licence where representations have been made),

(iv)section 39(3) (determination of application to vary designated premises supervisor following police objection),

(v)section 44(5) (determination of application for transfer of premises licence following police objection),

(vi)section 48(3) (consideration of police objection made to interim authority notice),

(via)section 53A(2)(a) or 53B (determination of interim steps pending summary review),

(vii)section 72(3) (determination of application for club premises certificate where representations have been made),

(viii)section 85(3)(determination of application to vary club premises certificate where representations have been made),

(ix)section 105(2) (decision to give counter notice following police objection to temporary event notice),

(x)section 120(7) (determination of application for grant of personal licence following police objection),

(xi)section 121(6) (determination of application for renewal of personal licence following police objection), or

(xii)section 124(4) (revocation of licence where convictions come to light after grant etc.),

> (b)any function under section 52(2) or (3) (determination of application for review of premises licence) in a case where relevant representations (within the meaning of section 52(7)) have been made,
>
> > (ba) any function under section 53C (review following review notice), in a case where relevant representations (within the meaning of section 53C(7)) have been made,
> >
> > (c)any function under section 88(2) or (3) (determination of application for review of club premises certificate) in a case where relevant representations (within the meaning of section 88(7)) have been made, or
> >
> > (d)any function under section 167(5) (review following closure order), in a case where relevant representations (within the meaning of section 167(9)) have been made.
>
> (5)The power exercisable under subsection (2) by a sub-committee established by a licensing committee is also subject to any direction given by that committee to the sub-committee

75. The Amended Guidance contains a table of "Recommended Delegation of Functions" but this takes the issue no further to the extent that it does not state whether or not it is generally appropriate for a decision under section 16 to be delegated to an officer.

76. I am satisfied that Guildford would not have acted in breach of the provisions of section 10 if it had actually authorised the Licensing Committee to arrange for the relevant function (i.e. to determine whether or not a prospective applicant falls within the scope of section 16) to be delegated to an officer of the licensing authority such as Mr Curtis-Botting. However, to examine whether such delegation actually took place or was compliant with Guildford's policy on the matter, it is necessary to have regard to Guildford's "Delegation to Officers" document which is accessible on its website.

77. This document, rather than listing, as does the Act, those decisions which are *not* to be delegated to officers, lists those decisions which *are* to be so delegated. Guildford relies upon category 8 in the list in the Delegation document which, it contends, empowered Mt Curtis-Botting to make the decision. It provides that such a delegation is permitted:

> "To determine all applications for a premises licence…where no representations have been made."

78. During submissions, I was first informed on behalf of Guildford that in respect of some of the eight relevant applications no representations had been made but in respect of others representations had been made. Further enquiry revealed, however,

that this was wrong and that representations had, in fact, been made in respect of all eight applications.

79. When pressed on this issue, Guildford's argument was to the effect that I should treat the case as if no representations had been made (even though they had) on the basis that the issue under section 16 was to be looked at sequentially before the determination of an application because, if the proposed applicant fell outside the terms of section 16, then the issue of whether or not representations had been made would fall out of the equation.

80. I disagree with this analysis. Section 10 of the 2003 Act prohibits the delegation of any function under…section 18(3) (determination of application for premises licence where representations have been made). Thus the Committee was entitled to permit a determination under section 18(3) where no representations had been made. However, it simply did not go on, as it could have done, to authorise the single officer to determine issues arising under section 16(1).

81. There was no justification for Guildford to act in breach of its Delegation Policy. The public and the claimants had a legitimate expectation that this Policy would be followed. I am, therefore, satisfied that the decision on section 16 is one that ought not to have been determined by Mr Curtis-Botting alone and would quash his decisions on this basis also. I would add that the answer to the question whether, in any given case, there is a sufficient nexus between an existing business and the licensable activities to which an application is made may not always be straightforward and that it would not be generically inappropriate for policies to provide for licensing sub-committees to make the relevant determination rather than to delegate it to an individual officer.

Fees

82. A subsidiary issue arose relating to the fees paid by the claimants in respect of their applications. In summary they contended that it was unlawful for Guildford to retain fees paid in respect of applications which had been rejected without any substantive consideration of the merits. In the light of my findings with respect to the status of Guildford decisions relating to such fees I find it unnecessary to adjudicate on this issue.

Consequences

83. In summary, therefore, this court makes a declaration that Star's applications 92057 and 105889 are compliant with section 16(1)(a) and must be allowed to proceed to substantive determination and that Guildford's decisions on the remaining applications from Star and Extreme are quashed and are to be re-visited on the legal basis I have ruled upon.