

Judgments

QBD, ADMINISTRATIVE COURT

CO/4757/2012

Neutral Citation Number: [2012] EWHC 3834 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT SITTING AT CARDIFF

Cardiff Civil Justice Centre

2 Park Street

Cardiff CF10 1ET

Tuesday, 20th November 2012

B e f o r e:

MR JUSTICE BEATSON

B e t w e e n:

RERTROBARS WALES LTD

Claimant

v

BRIDGEND COUNTY BOROUGH COUNCIL

Defendant

Digital Audio Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street London EC4A 2AG

Tel No: 020 7404 1400 Fax No: 020 7831 8838

(Official Shorthand Writers to the Court)

Mr J Wilcox appeared on behalf of the **Claimant**

Mr S Hughes appeared on behalf of the **Defendant**

J U D G M E N T

(As Approved by the Court)

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1. MR JUSTICE BEATSON: This is an appeal by way of Case Stated from the decision of the Newcastle and Omore Magistrates sitting at Bridgend Magistrates' Court on 7 October 2011. On that day the magistrates dismissed the appeal of Rertrobars Wales Ltd against the decision of the Bridgend County Borough Council refusing it a licence for a nightclub in Porthcawl for a club in respect of premises known as

The Blue Lounge at Porthcawl. The appeal was lodged on 8th May and was originally listed for hearing on 20th July 2012.

2. On that day I adjourned the hearing because, in the skeleton argument prepared for that hearing and at the hearing for the first time, counsel for the appellant, Mr Wilcox, raised a point on section 18(9) of the Licensing Act 2003, which had not been addressed in the Case Stated and which the appellant had not sought to have included after a draft Case Stated was circulated.

3. In order to ensure that that the questions put before the court should be the ones raised in the appeal. Mr Hughes, on behalf of the Council, ultimately did not resist the adjournment. The matter was remitted to magistrates on the basis that the appellants were to pay the costs.

4. I first deal with the factual background. I will then set out or summarise the relevant statutory provisions, and then deal with the Case Stated.

5. Rertrobars Wales applied to Bridgend County Borough Council for a premises' licence for what was to be a new venture called The Blue Lounge. The premises had previously been called The Apollo.

6. It is clear from the statement from the summary of the licencing authority's decision in the Case Stated that from the outset the parties agreed that the key issue was whether Miss Amanda Lloyd, who is the or one of the controllers of the appellant company would have management and control over The Blue Lounge. At the outset of the application (see the agreed facts in paragraph 3 of the Case Stated), Miss Lloyd was the proposed designated premises supervisor. On the first day of the hearing before the Licensing Authority's Panel she was replaced by Miss Erica Edwards as the proposed designated premises supervisor. On the second day of that hearing Miss Edwards withdrew and was replaced by Mr Nathan Lidster as the proposed designated premises supervisor.

7. Both Trading Standards officers and the South Wales Police objected to Miss Lloyd. In paragraph 1G of the Case Stated it is stated that the South Wales Police suggested that any designated premises supervisor at The Blue Lounge would merely be a front and that Miss Lloyd would in fact be the controlling mind of the business.

8. The reason for the objections that emerge in the summary of the proceedings before the Licensing Authority and in the Magistrates' Court were that Miss Lloyd had been involved in the management of the Commercial Hotel in Pontypridd and that its premises licence had been revoked by the Licensing Panel for Rhondda Cynon Taff Council. There are also references in the Case Stated to a conviction by the Miskin Magistrates on 25th February 2008 for offences under the Licensing Act 2003. There are 13 offences listed, and substantive penalties of them in the form of fines, totalling £750, together with costs, were imposed.

9. It appears - see the summary of the proceedings before the Licencing Authority in paragraphs 1(i) and (j) of the Case Stated that after Miss Edwards withdrew and Mr Lidster was put forward, a document was prepared which is exhibited at annex 1 to the Case Stated, setting out conditions that would be acceptable to all parties should the licence be granted with Mr Lidster as the designated premises supervisor. It was common ground at the hearing before me that the police and Trading Standards Officers objected to the granting of the licence. The conditions at annex 1 reflected a fallback position should their primary position be rejected by the Licensing Authority.

10. Although not in the Case Stated, it was also common ground at the hearing before me that, when Mr Lidster was identified on day 2, there was an adjournment so that the police could consider his suitability. When the hearing resumed on the third day, the police stated - see paragraph 1(g) that:

"In theory they would have no objection to Mr Nathan Lidster being the designated premises supervisor of another venue that was not under the control of Miss Amanda Lloyd."

They did object to him being the supervisor of premises under her control, for the reasons I have already quoted from paragraph 1(g).

11. When the Licensing Authority refused to grant Retrobars a premises licence, it gave numerous reasons for refusal. These appeared to centre around the Council's belief that Miss Lloyd would be an unfit premises supervisor and that, despite Mr Lidster being nominated, he was of insufficient experience to effectively be the supervisor. Consequently, it was likely that Miss Lloyd would have de facto control.

12. The grounds of appeal are set out in paragraph 2 of the Case Stated. It is only necessary for me to set out the following sounds:

"(e) Having found that with Amanda Lloyd maintained strong managerial control at the Commercial Hotel it was not logical or reasonable for the Panel to find that she would or could maintain any real control over day - to - day management over The Blue Lounge from her home some 1 hour's drive away.

(f) The police confirmed they had no objection to Mr Nathan Lidster being the designated premises supervisor of The Blue Lounge but for Miss Amanda Lloyd being the owner of the premises via the applicant company."

It was submitted on behalf of Retrobars that:

"There was no proper basis for inferring that Miss Amanda Lloyd would be controlling and running the business or that Mr Nathan Lidster was some form of 'front' given their finding that she was managing the Commercial Hotel in Pontypridd".

13. The Case Stated sets out the agreed facts including the way the designated premises supervisor had changed at the hearing before the Panel. The agreed facts also included (k):

"Mr Nathan Lidster had no formal training for the position of designated premises supervisor. He did have 4 weeks' experience as a relief bar manager being two separate two- week placements in local premises, one being that the Cilfynydd Arms in Pontypridd."

14. The remainder of the evidence is contained in paragraphs 4 to 10 of the Case Stated. It is only necessary to refer to three. In paragraph 7 it is stated that Mr Lidster had said he had not undertaken a designated premises supervisor course, stating that there was no point in obtaining the qualification if he was not going to need it. It is also stated that, when asked, he had been unable, adequately, to detail the responsibilities of a designated premises supervisor.

15. In paragraph 9 it is stated that PC Ellis gave evidence that on at least one occasion when Mr Lidster was present at the Commercial Hotel, underage customers were served alcohol.

16. In paragraph 10 it is stated that the magistrates heard the evidence of PC Rowlett who stated that she had been told by Miss Lloyd that Miss Lloyd had never been a designated premises supervisor before. Her evidence was also that she had been present at the Committee hearing before the Panel when Mr Lid-

ster was asked to change seats during his evidence because the Committee said that Miss Lloyd was passing papers to him and whispering comments.

17. The Magistrates' findings of fact are set out in paragraph 14. They are:

(a) Miss Lloyd had leased the Bar to TGR Commercial Ltd of whom she was a director to an employee on the same day, 1 March 2011, as the Commercial Hotel lost its licence. Miss Lloyd knew that the licence for her premises was in jeopardy when this lease came into effect.

(b) the Commercial Hotel lost its licence due to a number of public order incidents outside its premises and underage drinking within the building. There was no evidence of a witch hunt on the part of the licensing authorities.

(c) Following the revocation of the Commercial Hotel's licence, Miss Amanda Lloyd signed a notice of appeal when she had no legal standing to do so.

(d) At a meeting with a PC Rowlett at the premises of the proposed The Blue Lounge on 9 March 2011 Miss Amanda Lloyd answered two questions untruthfully, namely Miss Amanda Lloyd had not been involved in previous licensing hearings before and Miss Amanda Lloyd had not previously been a designated premises supervisor.

(e) Miss Lloyd still runs the bed and breakfast operation at the Commercial Hotel. She has worked behind the bar at the Commercial Hotel after she stated she ceased being involved in running the licensable side of business.

18. The contents of the letter prepared by Miss Amanda Lloyd's husband contradicted the earlier testimony that she had given. As Miss Amanda Lloyd had told the court she was still running the bed and breakfast operation and Mr Gardner was still nominally running the restaurant operation and would be doing so now, save for his sickness.

(f) Mr Nathan Lidster was unable to readily outline the four licensing objectives and the responsibilities of a designated premises supervisor.

(g) We accept the evidence of PC Ellis that Mr Nathan Lidster was present when underage customers were served alcohol.

(h) Mr Nathan Lidster was present at but not working at the Commercial Hotel's bar after midnight on an occasion when an underage drinker was vomiting in the bar area and the only member of staff on duty was unable to deal with this situation because she was undertaking other duties.

(j) There was nobody on duty at this time to deal with the underage drinker who was vomiting.

(k) Mr Lidster was on bail for assaulting two minors within the premises.

19. The conclusion of the magistrates was that they were satisfied that the decision taken by the Borough Council in refusing application had been correct. Their reasons are contained in paragraph 15 of the Case Stated:

"(a) BCBC was correct to consider the history and experience of Rertrobars Ltd and its director within the licensing trade and specifically the incidents of underage drinking and public disorder inside and outside the Commercial Hotel in Cilfynydd and Ms Amanda Lloyd's convictions under the Licensing Act. (b) These incidents had all occurred under the management of Rertrobars Ltd and should be factors taken into account in deciding whether the company constituted a fit and proper person to hold a premises licence.

(c) DGR Commercial Ltd, of which Ms Lloyd was a director, took over the lease of the Commercial Hotel the same day that the Commercial Hotel lost its licence leading us to the conclusion that Ms Amanda Lloyd retains a controlling influence in the Commercial Hotel.

(d) Mr Lidster at 21 years of age showed neither the experience nor competence to act as designated premises supervisor of the Blue Lounge, lacking a clear understanding of the four licensing objectives, the duties of a designated premises supervisor and showed himself ignorant of understanding good practice in the management of licensed premises, such as the risks of not having more than one member of staff on duty in licensed premises in the early hours.

(e) Ms Lloyd gave the impression of having an attitude averse to accepting advice on various licensing RCT Cynon Taff licensing staff, making unsubstantiated claims of a 'witch-hunt' against her.

(f) We found Ms Amanda Lloyd to be a dishonest and a belligerent person having answered questions untruthfully.

Accordingly we announced:

That we were satisfied that the decision taken by BCBC in refusing the application had been correct."

Paragraph 15 of the Case Stated sets out the opinion of the magistrates and that reasons for their decision. The four questions stated for this court (see pages 14 and 15 of the the bundle) are:

"1. 'Were the Justices entitled to consider the suitability of Nathan Lidster to act as the designated premises supervisor in light of the requirements of Section 18(9) Licensing Act 2003 not having been met?'

2. 'If the answer to question 1 is 'no', is the question of Amanda Lloyd's suitability a relevant consideration insofar as any relevant representations are concerned for the promotion of the licensing objectives under Section 18(3)(b) Licensing Act 2003 and the determination to reject the application?'

3. 'If the answer to question 2 is 'yes', were the findings of fact sufficient to entitle the justices to reject the application in light of the requirements of Section 18(3)(b) and the steps available under Section 18(4)?'

4. 'Were the justices entitled to refuse to entertain a factual investigation into the circumstances in which the Commercial Hotel's licence was revoked given the reliance that they placed on that decision when refusing the instant premises licence application?'"

20. The relevant law is contained in the Licensing Act 2003. Mr Wilcox, on behalf of the appellant, relied on section 18 of that Act and the procedure and policy in the Act. He described the framework set out in section 18 for the determination of applications for premises licences as a default framework. By that he meant that, if an application satisfied the primary conditions, the applicant is entitled, as of right, to receive a licence absent one of the exceptions.

21. Section 18 provides:

"(1) This section applies where the relevant licensing authority--

(a) receives an application for a premises licence made in accordance with section 17, and .

(b) is satisfied that the applicant has complied with any requirement imposed on him under subsection (5) of that section [which concerns advertising].

(2) Subject to subsection (3), the authority must grant the licence in accordance with the application subject only to--

(a) such conditions as are consistent with the operating schedule accompanying the application, and

(b) any conditions which must under section 19, 20 or 21 be included in the licence.

(3) Where relevant representations are made, the authority must--

(a) hold a hearing to consider them, unless the authority, the applicant and each person who has made such representations agree that a hearing is unnecessary, and

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

Subsection (4) can be summarised. The steps are to grant the licence subject to the conditions mentioned in (2)(a) to exclude from the scope of the licence any of the licence that the activities to which the application relates, to refuse to specify a person in the licence as the premise's supervisor or to reject the application.

22. Section 18(6) provides:

"(6) For the purposes of this section, 'relevant representations' means representations which--

(a) are about the likely effect of the grant of the premises licence on the promotion of the licensing objectives,

(b) meet the requirements of subsection (7),

(c) if they relate to the identity of the person named in the application as the proposed premises supervisor, meet the requirements of subsection (9), and

(d) are not excluded representations by virtue of section 32 (restriction on making representations following issue of provisional statement)."

23. For the purpose of these proceedings it is only (a) and (c) which are relevant. Accordingly the requirements of subsection (7) and (8) are not relevant.

24. Section 18(9) provides:

"(9)The requirements of this subsection are that the representations--

(a)were made by a chief officer of police for a police area in which the premises are situated, and

(b)include a statement that, due to the exceptional circumstances of the case, he is satisfied that the designation of the person concerned as the premises supervisor under the premises licence would undermine the crime prevention objective."

25. Mr Wilcox's primary submission is that when Mr Lidster was proposed as the premises supervisor and there was an adjournment, there was no representation which satisfied section 18(9) in relation to him made by the police and that therefore there were no relevant representations concerning his identity. He argued that therefore the mandatory requirement that the licence be granted applied. It was an error of law for the Panel and then the magistrates to consider making investigations as to the suitability of Mr Lidster as a supervisor, absent representations under section 18(9). His argument was that the purpose of a premises licence is to see that licensed premises, the proposed licensed premises are properly run. The purpose of requiring a supervisor is to ensure that that will happen. Mr Wilcox submitted that absent relevant representations as to Mr Lidster's suitability as a designated supervisor, the court ought not to have made any enquiries as to his suitability. He also argued they ought not to have looked into the question of control because if managerial control by the appointment of a qualified supervisor ensured the achievement of the licensing objectives, it does not matter who stands behind the operator as the licensee.

26. Mr Wilcox submitted that if the designated supervisor is doing his job properly, he has fulfilled his licensing objectives and the person standing behind the operation and their position is not relevant. He relied on the fact that it was the position of the South Wales police that there was no objection in principle to Mr Lidster being a designated supervisor. Their objection was to him doing it on premises controlled by Amanda Lloyd. Mr Wilcox's his secondary submission was that if the magistrates were entitled to take account of Mr Lidster's suitability, the findings of fact which they made were not sufficient to justify the rejection of the application.

27. This application for a premises licence was marked by two changes of the proposed premises supervisor. One, change was made after a full day of the hearing before the Panel.

28. The section 18(9) point was not taken by the appellant at the appeal before the magistrate. That proceeded upon the basis set out in paragraph 1(g) of the summary of the Licensing Panel's decision. Mr Wilcox submitted that the reason for thus was that there was no need to refer to section 18(9) because the police had always agreed that Mr Lidster was a suitable person. The problem related to whether he would be a front for Miss Lloyd. Nevertheless, the magistrates were entitled to consider that the request to replace the original questions with the new questions which are now before this court was unusual and inappropriate: the Deputy Clerk to the Justices stated, in a letter dated 14 September 2012 which accompanied the amended Case Stated, that question 1 was a matter of law not raised as a ground either in the notice appeal, or in the hearing itself and that:

"It would require a retrospective and hypothetical consideration of the matter, played no plainly part in the hearing or their deliberations finding and conclusions of the case on 7 October 2011."

They also stated that they considered that the exercise would be something of a fiction and inappropriate.

29. They magistrates invited the Administrative Court Office to draw my attention to this letter so I could express any concerns over how they dealt with the matter or issue further directions. I consider that their

response to the request for an amended statement was entirely appropriate. Proceedings in these courts remained adversarial. Courts are required to deal with matters put before them. Where there is a jurisdictional question, of course an inferior court cannot give itself a jurisdiction which it does not have, by making an erroneous finding of fact or failing to make a finding of fact which goes to jurisdiction. But, in this case the question of Mr Lidster's suitability was not a question which went to the jurisdiction of the magistrates. The question is whether the proper procedure had been followed by the police in making the "relevant representations". That is a matter which does not go to jurisdiction. No objection was taken at the time and there was no suggestion when the Case Stated was being prepared that this enquiry into his suitability was inappropriate.

30. I consider that this in itself is a ground for dismissing the principal submission advanced by Mr Wilcox. However, I have heard full argument on the point and so I will consider the substance of the point.

31. It is true that the Case Stated and the documents before me do not expressly use the language of section 18(9). In particular, there is no reference to "the exceptional circumstances of the case" or a statement that "the designation of the person concerned would undermine the crime prevention objective".

32. However, the objection put forward before the Panel and again before the magistrates made clear the nature of the objection to Mr Lidster. I accept Mr Hughes' submission that the way Mr Wilcox put the requirements of section 18(9) was too formalistic. Mr Wilcox accepted that there can be delegation but rejected that it is possible to deduce a section 18(9) representation from paragraph 1(g) of the Case Stated.

33. The nature of the objection was clear from that. I do not consider that the failure to track the statutory language precluded the magistrates from considering Mr Lidster's qualifications. I also accept Mr Hughes' secondary submission that, even if they should not have considered Mr Lidster's qualification for the purposes of section 18(6) (c), they were entitled to take into account the way that Mr Lidster and Miss Lloyd would work together in considering whether the grant of a licence would have an effect on the promotion the licensing objective, the requirements of section 18(6)(a).

34. That answers the first question: "yes" and means that the second and third questions do not arise. To the extent that Mr Wilcox also challenges the findings of the magistrates as to the position of Miss Lloyd and Mr Lidster and their refusal to entertain a factual investigation into the circumstances in which the Commercial Hotel's licence was revoked, I add that I do not consider that their findings are challengeable in an appeal of this nature.

35. It is clear from cases such as Oladineji v DPP [2006] EWHC 1199 (Admin) that an appellant who wishes to challenge findings of fact must show that the findings were perverse, outside the scope of findings which a body of justices reasonably advised could reach and therefore amounted to an error of law.

36. The conclusions in this case that Miss Lloyd retains a controlling influence in the Commercial Hotel, that the Commercial Hotel was subject to incidents of underage drinking and public disorder and that Miss Lloyd herself had convictions under the Licensing Act are all conclusions to which the magistrates were entitled to make. It is not seriously challenged that Rertrobars Wales Ltd was the owner of the Commercial Hotel and that Miss Lloyd was a Director of the company. Since Rertrobars could only act through its directors, it was clearly relevant for the magistrates to have regard to Miss Lloyd's track record in running the Commercial Hotel and the impression she gave while giving evidence.

37. Similarly, they heard evidence about Mr Lidster's experience. They were entitled to have regard to what had transpired between Mr Lidster and Miss Lloyd while he was giving evidence to the Panel. There is no criticism of Mr Lidster. As Mr Wilcox has submitted, he was a young man giving evidence. Nevertheless at the hearing, the main issue was whether Miss Lloyd would exercise effective management and con-

trol over The Blue Lounge. Her attempts to communicate with him and to pass him notes were matters which the Magistrates' Court were entitled to take into account in assessing whether he would operate The Blue Lounge independently of her and in compliance with the licensing requirements and the terms in the annex that had been agreed.

38. In those circumstances, the magistrates having heard the evidence and assessed Mr Lidster's demeanour when giving evidence, I reject the submission that it was not open to them to come to the conclusion that he showed neither the experience nor the competence to act as a designated premises supervisor.

39. For those reasons this appeal is dismissed.

40. I am grateful to all of you.

41. MR HUGHES: My Lord, the only outstanding matter is the costs of the appeal, it is an appeal that has failed.

42. MR JUSTICE BEATSON: Mr Wilcox?

43. MR WILCOX: Costs follow the event. I have no breakup.

44. MR JUSTICE BEATSON: I have had no summary.

45. MR HUGHES: I do not have a summary.

46. MR JUSTICE BEATSON: Well then, what I am going to say is the costs. It is just a shame there is no summary for a 1 day hearing when I would normally summarily assess them, but the consequence is going to be the costs, the respondent to have the costs, the costs will have to be subject to a detailed assessment if not agreed. It is just a shame to subject everybody to the costs of the detailed assessment. Thank you.