CO/2876/2007

**Neutral Citation Number: [2008] EWHC 1002 (Admin)**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 18th April 2008

**B e f o r e:**

**MR JUSTICE OUSELEY**

**Between:**
**LUMINAR LEISURE LTD**

**Appellant**

v

**WAKEFIELD MAGISTRATES' COURT**

**Respondent**

and

**(1) BROOKE LEISURE LIMITED**
**(2) CLASSIC PROPERTIES LIMITED**
**(3) WAKEFIELD METROPOLITAN DISTRICT COUNCIL**

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(Official Shorthand Writers to the Court)

**Mr K De Haan QC** (instructed by Poppleston Allen) appeared on behalf of the **Claimant**
**The Respondent did not attend and was not represented**
**Mr S Walsh** (instructed by Gosschalks Solicitors) appeared on behalf of the **First Interested Party**

**Mr B Williams** (instructed by Wakefield BC) appeared on behalf of the **Third Interested Party**

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE OUSELEY: Luminar Leisure Limited, the appellant, operate a nightclub known as Buzz Bar in part of 75 – 81 Westgate in Wakefield. It has a licence capacity of 1380 patrons.

2. On 23rd May 2006 Wakefield Metropolitan District Council granted a new premises licence for the whole of 75 – 81 Westgate, under the Licensing Act 2003, with a capacity of 2000 patrons. Buzz Bar at the time, and at least partly because of the application and the associated commercial consequences, was operating at about 300 – 400 patrons. The operators of rival venues in Westgate appealed to the Magistrates' Court against the grant of that new licence.

3. District Judge Bennett allowed their appeal on 5th November 2006. Luminar Leisure Limited now appeals by case stated against his decision. I can only allow its appeal if the district judge made an error of law.

4. The trade rivals have appeared in opposition to that appeal. The local authority has adopted a neutral stance, although making helpful short written submissions. I say at the outset that the judgment and case stated are careful and thorough documents.

5. It is clear from the district judge's judgment that he was satisfied that the venue, as proposed to be operated, would be attractive, different from the current entertainment venues in Westgate, that it would be well designed for safety and internal order, and that queueing for entry and any other activities in the immediate vicinity of the venue, for which the operator would be responsible and which could be controlled by condition, would not lead to the refusal of the licence.

6. Put shortly, the district judge allowed the appeal because of the effect which the increase in the number of people attending such a venue in Westgate would have, generally, on crime and disorder in the area.

7. The issues raised in the appeal are encapsulated in the three questions posed in the case stated. These questions are:

> "i) Was it open to the court to take into account issues relating to crime and disorder away from the proposed premises and beyond the direct control of the licensee?
>
> ii) If it was open to the court, was there any evidence upon which a reasonable tribunal could have drawn the conclusion that the proposed premises would give rise to such problems of public disorder as to undermine the licensing objectives?
>
> iii) Was it a proportionate response to refuse the licence rather than to impose conditions on any licence?"

8. To understand the issues it is necessary to examine briefly the relevant statutory provisions. Section 4 of the Licensing Act 2003 provides:

**"General duties of licensing authorities**

(1) A licensing authority must carry out its functions under this Act ('licensing functions') with a view to promoting the licensing objectives.

(2) The licensing objectives are–

(a) the prevention of crime and disorder;

(b) public safety;

(c) the prevention of public nuisance; and

(d) the protection of children from harm

(3) In carrying out its licensing functions, a licensing authority must also have regard to–

(a) its licensing statement published under section 5, and.

(b) any guidance issued by the Secretary of state under section 182."

The same provisions apply to the district judge when deciding an appeal.

9. Wakefield Metropolitan District Council had produced a statement of its licensing policy under section 5. This included certain passages on which Mr De Haan QC, for the appellant, put some weight. At paragraph 3.10 the policy document says:

> "The Licensing Act 2003 is not a way to control anti–social or violent behaviour away from premises and beyond the direct control of licensees. There are other controls to deal with these matters, but licensees have a duty to be aware of these measures and support the strategies. It does, however, have measures intended to prevent and control these problem areas inside and in the vicinity of licensed premises and to make the licence holders, both personal and from premises, responsible for meeting the Licensing Objectives."

10. In paragraph 37 the purposes of the capacity limit where one is imposed are to avoid internal disorder and to ensure safe evacuation in an emergency. The policy document also discusses circumstances which might lead to the refusal of a licence even though, by itself, the grant would be acceptable, because of the cumulative impact of such licences on an area. Paragraphs 5.4 to 5.7 deal with this in these terms:

> "If there are serious problems of nuisance and disorder arising, or beginning to arise outside, or some distance from premises licensed to serve alcohol, because of the number of premises in the area increasing the number of individuals in that area, then this could be seen as a cumulative impact. This would usually be more than the impact of all the individual premises put together and may make the area a focal point for large groups to gather and circulate away from individual licensed

premises."

11. After considering the potential for dealing with the problem by the imposition of conditions, the policy concludes that if conditions would be ineffective to achieve the licensing objectives, applications would still have to be viewed on their individual merits, but it would be for the applicant to show that the additional premises or capacity would not effect the cumulative impact and licensing objectives. In other words, the effect of a special cumulative impact policy would be to impose on the applicant the burden of showing that the licensing objectives would not be undermined rather than the other way round.

12. In that policy document Westgate Wakefield is identified as a problem area. But there was not at the time any cumulative impact policy. Such a policy was being proposed but it had not been finalised or adopted. The policy was proposed with the support of the police. The district judge rightly ignored the draft policy but took note of the circumstances which had led to its being proposed. The fact that one was being proposed of itself is relevant as well. Government guidance, under section 182 of the Licensing Act, is to similar effect as the local authority licensing statement.

13. With that background, I now turn to the first question in the case stated: is evidence of crime and disorder away from the immediate vicinity of the premises relevant?

14. The appellant did not in fact contend that the Licensing Act 2003 made it unlawful for such factors to be taken into account in deciding a premises licence application. Nor did the appellant contend that such evidence could only be taken into account if a specific cumulative impact policy had been adopted. It may be that the passage in paragraph 3.10 of the Wakefield MDC guidance is too rigid, given the admitted relevance of those factors. However, I do not think that Mr Walsh is right in saying that that passage was only intended to deal with a limit on the imposition of conditions.

15. It was not contended by the appellant either that the district judge had misinterpreted the local authority policy or indeed government guidance in some way. In substance, Mr De Haan's argument was that the district judge had attached overmuch weight to events remote from, or at least not in the immediate vicinity of the premises. That, with respect to Mr De Haan, is not an argument capable of showing that an error of law has been made. The answer to question 1 is "yes".

16. The second question raises the issue of whether various conclusions, in relation to evidence about events remote from the premises, were rational and evidence based. A number of separate points were raised under this head. I deal, first of all, with the question of additional numbers. Mr De Haan submitted that the district judge, in reality, had ignored the fact that the existing licence was for 1380, and so the increase involved in the new application was only 600. He submitted that the decision reads as though the district judge was dealing with the full 2000 capacity increase.

17. There was some debate about how the issue had been put by the appellant to the district judge, given the fact that the current actual level at Buzz Bar was only about 300 to 400. But it was clear that it had not been suggested that the district judge should compare that actual figure of attendance with the 2000 capacity. Nor was it suggested

that the district judge should compare that figure of 300 to 400 with some commercial estimate of the likely usage of the new premises. Nor had the district judge been invited to assess a base case of Westgate Wakefield, as it was, together with a further 1000 supposed people in attendance, in order to reflect full usage of the existing capacity, and then use that to measure the impact of a further 600 to represent the proposed increase in capacity represented by the new premises licence application.

18. It is clear that the common approach by all parties was that there would be an increase of 600, and no separate base case was put forward for comparison. This is a fairly simple approach which was urged upon the district judge. The district judge, in my judgment, makes it perfectly clear in what he says that he understood that it was an increase of 600 and understood the way in which the parties were putting their case. In his discussion of the extra numbers he is entirely consistent in relation to that understanding of the appellant's case. Nothing in his findings in the case stated suggest otherwise either.

19. The district judge was entitled also to conclude that although some of the additional customers to the premises would come from other venues in Westgate and so would not add to existing problems, the appellant's own evidence supported his view that the different and more attractive style and variety of attractions at the venue, would bring in people not currently attending similar venues in Westgate or anywhere in Wakefield at all. These would therefore add to the numbers of those late at night in Westgate. There is no error in his approach to additional numbers.

20. Secondly, irresponsible drinking promotion. Mr De Haan submitted that the district judge had found that the appellant would engage in irresponsible drink promotion if it were found not to be attracting extra people into its premises in Westgate, or that it would do so in response to price cutting by rivals, which they might undertake in order to maintain their own levels of patronage. That conclusion, he said, was not supported by evidence and, in any event, had the district judge been of that view, he ought also to have considered the extent to which irresponsible drink promotion was capable of control through the effect of the policy of the local authority against it, enforcement via review of licences or their revocation under section 52 and possible conditions in relation to consulting the police on certain aspects of promotion.

21. The relevant passage in the case stated is 10(h). The district judge says this:

> "If I was wrong and additional numbers were not attracted then I was concerned as to the possibility of a marketing and price war. This was a problem in Wakefield. I accepted this was not the intention of the appellants. However discounts have been offered at Buzz. The appellant's could not rule out having to do so again if competitors began to offer discounts."

This is a summary of a larger passage in his judgment, which refers to a concern in the Government Office that there had been irresponsible drinks offers in Wakefield, though not by the appellant.

22. I do not read the district judge's judgment as involving any finding at all that the appellant would engage in irresponsible pricing or promotion, though others might do so. Rather, it is a finding that, in an area where drink promotion is already a problem, competitive and promotional pricing could be used to attract people, without being irresponsible, if the appellant's aimed for patronage levels were not being met. That conclusion, and the way in which it was deployed in the judgment of the district judge, is both evidence based and rational.

50 Metres From the Rivals: Mr De Haan's third point was that it was not rational for the district judge to put weight on the fact that the premises the subject matter of the licence application were only 50 metres away from rival premises. He said, obviously correctly, that that was the situation at the moment in relation to Buzz Bar. He submitted, and he is supported by the evidence that there was no problem currently identified, resulting directly from that proximity, and it was accepted that there would be appropriate controls in relation to queueing for entry, so there was no basis for concern over some disorderly interaction there either.

23. What the district judge said in relation to this proximity was this at paragraph 10(f):

> "I was concerned as to the proximity of these premises to those of the respondents. They were within 50 metres. As well as the crime and disorder issue I had concern about the infra structure, or lack of it. The government office report had already commented upon the issue and dangers of the alleyways leading off the main thoroughfare."

But, in my judgment, what the district judge is saying, and he is entitled to say it, is that this is where the increase in the numbers of itself, in a small and quite confined area, with limited means of dispersal, is relevant. He was entitled, in my judgment, to give that some weight.

24. The appellant suggested that if the concern was about taxis, a condition should have been imposed preventing the use of the premises until a scheme had been agreed with the local authority, building on tentative negotiations with a private hire company which were underway, for a private car hire office in the club, waiting and pick up arrangements. Such a condition was not suggested and there is difficulty in suggesting one, without more information as to how the scheme might operate in such a way as to demonstrate that it might be effective in overcoming the problem. But it goes beyond that, because the district judge's concerns were not simply about queueing for taxis. He said at paragraph 10(d) that those arrangements would not be able to address the identified problem of an insufficient number of taxis and private hire vehicles and that it might even lead to fewer being available to those queueing on the streets. The problem of those queueing on the streets, for an insufficient number of taxis and private hire vehicles, had already been referred to by him in the evidence as a "significant disorder" problem. The district judge said that he did not think the arrangements proposed would be a resolution of a much deeper problem that required a co-ordinated response. So neither in his approach to proximity, nor in his approach to taxis do I consider that the district judge has reached a conclusion that was irrational or wanting for evidence.

25. The fourth point raised by Mr De Haan under this head related to crime statistics. Mr De Haan criticised the district judge's approach to these statistics. He first suggested that the district judge should not have relied on them at all because they could not prove that there had been any recent increase in crime in the area. However, the reality is that the district judge used the figures to show that there had been no recent decline in violence or disorder, as had been suggested by one of the officers who gave evidence. This was because there had been a change in charging policy, so the offences which had been treated as public order offences, and hence categorised as violent, were now charged as drunk and disorderly, which were not. That led, obviously, to a reduction in statistically recorded crimes of violence without altering the picture of disorder.

26. Mr De Haan's second's submission was that it was irrational for the district judge to prefer a report from the Government Office for West Yorkshire and Humberside, which was a year old, to more up–to–date material presented in oral evidence to the judge. But the position was not quite as simple as that. The district judge clearly thought that the report was fuller, more objective and reliable, whereas the later evidence created statistical confusion and was more impressionistic. He sets these points out in full in paragraphs 10(a)–c). I do not need to read them out. There is nothing irrational in his approach to the figures. The conclusions he has reached were entirely open to him on that evidence. So the answer to question 2 is "yes".

27. The third question concerns the proportionality of a refusal of a licence as opposed to one in which conditions were imposed. The conditions that were raised concerned the operation of a private hire car system within the premises. I have already dealt with that proposed condition. No condition was sought limiting the use of the premises to 1380, which would have been difficult to refuse; but it was not sought on commercial grounds. It was suggested by Mr De Haan that such a limitation in the interests of cumulative impact might have been a misuse of the power to impose such conditions, according to the policy which appears to confine the use of such condition to the interests of safety and internal order. I am not sure that the powers to impose such a condition can properly be limited to those factors, if it is accepted that the cumulative impact is legally relevant. To put a limit on the extent to which cumulative impact is legally relevant is something which seems to me not to be permitted by the statute. But with all that this condition was not sought. So the answer to question 3 is "yes".

28. Accordingly I take the three questions which I set out at the beginning of the judgment:

> "i) Was it open to the court to take into account issues relating to crime and disorder away from the proposed premises and beyond the direct control of the licensee?"
>
> "Yes"
>
> "ii) If it was open to the court, was there any evidence upon which a reasonable tribunal could have drawn the conclusion that the proposed premises would be give rise to such problems of public disorder as to undermine the licensing objectives?"

"Yes"

"iii) Was it a proportionate response to refuse the licence rather than to impose conditions on any licence?"

"Yes"

This appeal is therefore dismissed.

29. MR JUSTICE OUSELEY: Mr Walsh?

30. MR WALSH: On behalf of Brooke Leisure there is an application for costs. I have a schedule here.

31. MR JUSTICE OUSELEY: Yes, Mr De Haan has a copy? (Same Handed).

32. MR JUSTICE OUSELEY: Do you want to say anything about that?

33. MR DE HAAN: They have been examined.

34. MR JUSTICE OUSELEY: I make an order for costs in the sum of £24,889.12.

35. MR WALSH: Thank you, my Lord.

36. MR JUSTICE OUSELEY: Thank you very much.