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MANCHESTER CITY COUNCIL

Licensing Sub Committee Hearing Panel

Date: Tuesday, 19 April 2022
Time: 10.00 am
Venue: Council Chamber, Level 2, Town Hall Extension

This is a **supplementary agenda** containing additional information about the business of the meeting that was not available when the agenda was published

Access to the Council Chamber

Public access to the Council Chamber is on Level 2 of the Town Hall Extension, using the lift or stairs in the lobby of the Mount Street entrance to the Extension.

There is no public access from any other entrance of the Extension.

Membership of the Licensing Sub Committee Hearing Panel

Councillors - Andrews, Hassan and Hughes

Supplementary Agenda

Further Information

For help, advice and information about this meeting please contact the Committee Officer:

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This supplementary agenda was issued on **Monday, 11 April 2022** by the Governance and Scrutiny Support Unit, Manchester City Council, Level 2, Town Hall Extension (Library Walk Elevation), Manchester M60 2LA

Tribeca, 50 Sackville Street, Manchester M1 3WF

Proposed Replacement Operating Schedule

Annex 2

Removal of all Conditions apart from those listed below. The majority of these Conditions formed part of the old Public Entertainment Licence and are no longer required.

Conditions 6, 10, 11, 12, 13, 23, 24, 27, 28, 42, 76, 79 and 82 are to be retained on the Premises Licence.

Condition 83 to be replaced by the following:-

The Challenge 25 Scheme will be operated at the premises to ensure that any person who appears to be under the age of 25 shall provide documented proof that they are over 18 years of age before being allowed to purchase alcohol. Proof of age shall only comprise a passport, photo card Driving Licence, HM Forces warrant card or a card bearing the PASS hologram.

The premises shall display prominent signage indicating that the Challenge 25 Scheme is in operation.

Annex 3

Conditions to remain the same unless indicated below:

1. 30 minutes before the premises closes to the public the volume of music will be lowered to encourage dispersal.

2. Management will liaise with local residents to resolve any problems associated with the carrying on of licensable activities. A direct telephone number for the Manager of the premises shall be available to residents in the vicinity.

3. No rubbish including bottles, shall be moved, removed or placed in outside area between 23:00 and 07:00 hours.

4. To remain.

5. To remain

6. The premises shall install and maintain a comprehensive CCTV system. All public areas of the licensed premises, including all public entry and exit points, and the street environment will be covered, enabling facial identification of every person entering in any light condition. The CCTV cameras shall continually record while the premises are open to the public and recording shall be kept available and unedited for a minimum of 28 days with the date and time stamping. A staff member who is conversant with the operation of the CCTV system shall be present on the premises at all times when they are open to the public and must be able to produce/download/burn CCTV images upon request by a Police Officer or an Authorised Officer of the Licensing Authority. Any footage must be in a format that can be played back on a standard personal computer or standard DVD player. Where the recording is on a removable medium (i.e. compact disc, flash card etc), a secure storage system to store those recordings mediums shall be provided.

7. To remain.

8. To remain.

9. To remain.

10. To remain.

11. Removed. No longer relevant.

12. To add a final sentence as follows:-

    "Only ACS-accredited companies will be employed in this respect".

13. To remain.

Further proposed additional Conditions to be offered:-

1. An Incident Log (which may be electronically recorded) shall be kept at the premises for at least 6 months, and made available upon request to Greater Manchester Police or an Authorised Officer of the Licensing Authority.

2. All staff shall be trained in recognising signs of drunkenness, how to refuse service, under-aged sales and the Conditions in force under the Premises licence. Documented records of training shall be kept for each member of staff. Training shall be regularly refreshed and records will be made available upon request by Greater Manchester Police or an Authorised Officer of the Licensing Authority.

3. The Designated Premises Supervisor shall ensure that tables are cleared of all bottles and glasses on a regular basis during trading hours to avoid an accumulation of glassware.

4. The premises and immediate surrounding area shall be kept clean and free from litter at all times the premises are open to the public.

5. All waste shall be properly presented and placed out for collection no earlier than 30 minutes before the scheduled collection times.

6. A log shall be kept at the premises to record all refused sales of alcohol for the reasons that the persons are, or appear to be, under-age. The log shall record the date and time of the refusal and the name of the member of staff who refused the sale. The log will be available on request by the Police or an Authorised Officer of Manchester City Council. The log shall be checked on a regular basis by the Designated Premises Supervisor to ensure that it is being used by staff and each check shall be recorded in the log.

7. A minimum of 7 days' notice shall be given to Greater Manchester Police and the Licensing & Out of Hours Team of any events held that are organised by an external promoter, including full details of the nature of the event and of the promoter.

8. All bar staff will be trained in the Award for Personal Licence Holders.

Licensing Act 2003

2003 CHAPTER 17

PART 7

OFFENCES

Unauthorised licensable activities

136 Unauthorised licensable activities

(1) A person commits an offence if—

(a) he carries on or attempts to carry on a licensable activity on or from any premises otherwise than under and in accordance with an authorisation, or

(b) he knowingly allows a licensable activity to be so carried on.

(2) Where the licensable activity in question is the provision of regulated entertainment, a person does not commit an offence under this section if his only involvement in the provision of the entertainment is that he—

(a) performs in a play,

(b) participates as a sportsman in an indoor sporting event,

(c) boxes or wrestles in a boxing or wrestling entertainment,

(d) performs live music,

(e) plays recorded music,

(f) performs dance, or

(g) does something coming within paragraph 2(1)(h) of Schedule 1 (entertainment similar to music, dance, etc.).

(3) Subsection (2) is to be construed in accordance with Part 3 of Schedule 1.

(4) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or to **[**[F1]a fine**]**, or to both.

(5) In this Part "authorisation" means—

(a) a premises licence,

(b) a club premises certificate, or

(c) a temporary event notice in respect of which the conditions of section 98(2) to (4) are satisfied.

Textual Amendments

F1 Words in s. 136(4) substituted (12.3.2015) by The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 (S.I. 2015/664), reg. 1(1), **Sch. 4 para. 33(2)** (with reg. 5(1))

Changes to legislation:
Licensing Act 2003, Section 136 is up to date with all changes known to be in force on or before 14 February 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to :

– s. 136(5) words inserted by 2015 c. 20 s. 67(3)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

– Pt. 5A inserted by 2015 c. 20 s. 67(2)Sch. 17
– s. 2(1A) inserted by 2015 c. 20 s. 67(1)
– s. 10(4)(e) and word inserted by 2011 c. 13 s. 121(3)(b)
– s. 140(2)(e) inserted by 2015 c. 20 s. 67(4)(b)
– s. 141(2)(e) inserted by 2015 c. 20 s. 67(5)(b)
– s. 143(2)(e) inserted by 2015 c. 20 s. 67(6)(b)
– s. 144(2)(e) inserted by 2015 c. 20 s. 67(7)(b)
– s. 147A(4)(c) inserted by 2015 c. 20 s. 67(8)(b)
– s. 153(4)(d) inserted by 2015 c. 20 s. 67(9)(b)
– s. 197(3)(cza) inserted by 2015 c. 20 s. 67(12)(a)
– s. 197A197B inserted by 2011 c. 13 s. 121(2)

Licensing Act 2003

2003 CHAPTER 17

PART 7

OFFENCES

Unauthorised licensable activities

139 Defence of due diligence

(1) In proceedings against a person for an offence to which subsection (2) applies, it is a defence that—

(a) his act was due to a mistake, or to reliance on information given to him, or to an act or omission by another person, or to some other cause beyond his control, and

(b) he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

(2) This subsection applies to an offence under—

(a) section 136(1)(a) (carrying on unauthorised licensable activity),

(b) section 137 (exposing alcohol for unauthorised sale), or

(c) section 138 (keeping alcohol on premises for unauthorised sale).

Changes to legislation:
Licensing Act 2003, Section 139 is up to date with all changes known to be in force on or before 07 April 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- Pt. 5A inserted by 2015 c. 20 s. 67(2)Sch. 17
- s. 2(1A) inserted by 2015 c. 20 s. 67(1)
- s. 10(4)(e) and word inserted by 2011 c. 13 s. 121(3)(b)
- s. 140(2)(e) inserted by 2015 c. 20 s. 67(4)(b)
- s. 141(2)(e) inserted by 2015 c. 20 s. 67(5)(b)
- s. 143(2)(e) inserted by 2015 c. 20 s. 67(6)(b)
- s. 144(2)(e) inserted by 2015 c. 20 s. 67(7)(b)
- s. 147A(4)(c) inserted by 2015 c. 20 s. 67(8)(b)
- s. 153(4)(d) inserted by 2015 c. 20 s. 67(9)(b)
- s. 197(3)(cza) inserted by 2015 c. 20 s. 67(12)(a)
- s. 197A197B inserted by 2011 c. 13 s. 121(2)

Status: Positive or Neutral Judicial Treatment

*123 R. v Secretary of State for Health

Before the Court of Appeal (Civil Division)

1 July 1999

[1999] 3 C.M.L.R. 123

(Presiding, Lord Bingham of Cornhill C.J., Otton and Robert Walker JJ.)

1 July 1999

Appeal against the decision of Moses J. in the matter of judicial review of the decision by the Secretary of State to make an emergency control order under s.13 of the Food Safety Act 1990.

Food—public health—E-coli poisoning caused by cheese—emergency control order prohibiting business with cheese producer—judicial review applied for—control order constituting restriction on free movement of goods as prohibited by Article 34 E.C.—whether justification of protection of public health under Article 36 E.C. applicable—correct proportionality test to be applied by the national court.

On 19 April 1998, a 12 year old boy was admitted to hospital suffering from Escherichia coli (E-coli) poisoning. The source of the infection was provisionally traced to D&Co's cheese and samples of the cheese were obtained from the shop where the boy's parents had bought it and tested. D&Co co-operated fully in the testing procedure and in recalling batches of cheeses which were thought to be infected. The tests showed that E-coli bacteria was present in cheese produced on different days, and it was considered that all cheese produced by D&Co was potentially unsafe and its sale should be banned. An order was therefore made under s.13 of the Food Safety Act 1990 prohibiting the carrying out of any commercial operation in relation to cheeses originating from D&Co. The effect of the order was to paralyse the cheese-making business which D&Co carried on, but also affected the business of cheese maturers and processors, including E, who depended on supplies of cheese obtained from D&Co. E therefore obtained leave to seek judicial review of the emergency control order and were supported by D&Co as an interested party. The judge made a number of findings including that it was reasonable that while the cause and period of contamination of the cheese were unknown, there was an imminent risk of injury to health and, in those circumstances, it was reasonable that reliance should no longer be placed on voluntary arrangements. However, the order was found to be unlawful on the ground that the Secretary of State had wrongly taken account of *124 considerations of administrative convenience, in particular that if no order was made, more extensive testing would have to be carried out on the cheese, which might involve becoming liable for compensation. In the course of the appeal brought by the Secretary of State against that decision, E and D&Co contended that the judge had wrongly applied the test of proportionality in deciding whether the exercise of powers under s.13, which constituted a restriction on the free movement of goods as prohibited by Article 34 E.C., could be justified under Article 36 E.C. on grounds of the health and life of humans.

The maintenance of public health must carry great weight in the balancing exercise The decision on proportionality had to be taken by the national court seised of an issue on Article 36 E.C., subject to any possible reference to the European Court of Justice. In making that decision, the maintenance of public health must be regarded as a very important objective and must carry great weight in the balancing exercise. However, on public health issues which required the evaluation of complex scientific evidence, the national court should be slow to interfere with a decision which a responsible decision-maker had reached after consultation with expert advisers. [42]–[46]

> R. v. Minister of Agriculture, Fisheries and Food, Ex parte Federation Europeene de la Sante Animale (FEDESA) and Others (C-331/88): [1990] E.C.R. I-4023; [1991] 1 C.M.L.R. 507, applied.

The Secretary of State was entitled to a narrower margin of appreciation In the instant case, the role of the national court, as far as the interpretation of Article 36 E.C. was concerned, was to see whether

the exercise of the Secretary of State's power under s.13 had been objectively justified and had not been shown to be disproportionate. That question should be approached on the basis that the Secretary of State was not entitled to the broad margin of appreciation which might be accorded to primary legislation enacted by a national legislature. Instead, he was entitled to the narrower margin of appreciation appropriate to a responsible decision-maker who was required, under the urgent pressure of events, to take decisions which called for the evaluation of scientific evidence and advice as to public risks, and which had serious implications both for the general public and for the manufacturers, processors and retailers of suspect cheese. Since the judge did perform the necessary balancing exercise, his decision could not be challenged as having applied the wrong test of proportionality. [49]–[51]

> R. v. Ministry of Agriculture, Fisheries and Food, Ex parte First City Trading Ltd: [1997] 1 C.M.L.R. 250, applied ***125** .

Representation

> Philip Havers Q.C. and Neil Garnham, instructed by the solicitor, the Department of Health, for the Secretary of State.
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> David Foskett Q.C. and Richard Booth, instructed by Laurie Moran Arthur, Wimbledon, for Eastside Cheese Co.
>
> Gerald Barling Q.C. and Hugh Mercer, instructed by Clarke Willmott & Clarke, Yeovil, for R. A. Duckett & Co. Ltd.

Cases referred to in the judgment:

Before the European Court:

> 1. R. v. Minister of Agriculture, Fisheries and Food, Ex parte National Federation of Fishermen's Organisations and Others (C-44/94), 17 October 1995 : [1995] E.C.R. I-3115.
>
> 2. R. v. Minister of Agriculture, Fisheries and Food, Ex parte Federation Europeene de la Sante Animale (FEDESA) and Others (C-331/88), 13 November 1990: [1990] E.C.R. I-4023; [1991] 1 C.M.L.R. 507.
>
> 3. Society for the Protection of Unborn Children Ireland Ltd v. Grogan and Others (C-159/90) , 4 October 1991: [1991] E.C.R. I-4685 ; [1991] 3 C.M.L.R. 849.
>
> 4. Officer Van Justitie v. de Peijper (104/75), 20 May 1976: [1976] E.C.R. 613; [1976] 2 C.M.L.R. 271.
>
> 5. Rochdale Borough Council v. Anders (C-306/88), 16 December 1992 : [1992] E.C.R. I-6457; [1993] 1 C.M.L.R. 426.
>
> 6. Criminal Proceedings against Miro BV (182/84), 26 November 1985 : [1985] E.C.R. 3731; [1986] 3 C.M.L.R. 545.
>
> 7. Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau (265/87), 11 July 1989: [1989] E.C.R. 2237.

8. Aragonesa de Publicidad Exterior SA and Publivía SAE v. Departamento de Sanidad Y Seguridad Social de la Generalitat de Cataluña (C-1/90), 25 July 1991: [1991] E.C.R. I-4151; [1994] 1 C.M.L.R. 887.

9. Germany v. E.U. Council (C-280/93), 5 October 1994: [1994] E.C.R. I-4973.

10. United Kingdom and Northern Ireland v. E.U. Council (C-84/94), 12 November 1996: [1996] E.C.R. I-5755; [1996] 3 C.M.L.R. 671; [1996] All E.R. (E.C.) 877.

11. E.C. Commission v. E.U. Council (C-122/94), 29 February 1996: [1996] E.C.R. I-881.

12. Roquette Freres SA v. E.U. Council (138/79), 29 October 1980: [1980] E.C.R. 3333.

13. Upjohn Ltd v. Licensing Authority Established by the Medicines Act 1986 and Others (C-120/97) , 21 January 1999: [1999] 1 C.M.L.R. 825 ; [1999] 1 W.L.R. 927.

14. Bosphorus Hava Yollari Turizm Ve Ticaret A/s v. Minister for Transport, Energy and Communications, Ireland (C-84/95), 30 July 1996: [1996] E.C.R. I-3953; [1996] 3 C.M.L.R. 257.

Before the European Court of Human Rights:

15. Sporrong and Lonnroth v. Sweden (A/52), 23 September 1982: (1983) 5 E.H.R.R. 35.

16. Holy Monasteries v. Greece (A/301-A), 9 December 1994: (1995) 20 E.H.R.R. 1.

Before the United Kingdom courts:

17. R. v. Cornwall Quarter Sessions Appeal Committee, Ex parte Kerley, 28 June 1956: [1956] 1 W.L.R. 906; [1956] 2 All E.R. 872.

18. R. v. Minister of Agriculture, Fisheries and Food, Ex parte Roberts, 12 November 1990 : [1991] 1 C.M.L.R. 555.

19. R. v. Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd, 28 January 1997: [1998] Q.B. 477; [1998] 3 W.L.R. 1260.

20. R. v. Ministry of Agriculture, Fisheries and Food, Ex parte First City Trading Ltd, 29 November 1996: [1997] 1 C.M.L.R. 250.

JUDGMENT

Lord Chief Justice:

[1] On 20 May 1998 the Secretary of State for Health made an emergency control order under section 13 of the Food Safety Act 1990. The text of that order was amended by a further order under the same section made on the following day. It is convenient to treat these as a single order in the amended form. The effect of the order was to prohibit the carrying out of any commercial operation in

relation to cheese originating from R. A. Duckett & Co. Ltd of Walnut Tree Farm, Wedmore, Somerset. On 10 July 1998, the order was again varied: the prohibition was not to apply to any cheese manufactured on or after 11 July.

[2] So long as the order remained fully in force it paralysed the cheese-making business which Ducketts carried on, and had carried on with notable distinction for several generations. The order also paralysed the business of cheese processors and maturers to the extent that they depended on supplies of cheese obtained from Ducketts. Such a business was that of the Eastside Cheese Company, a firm in Godstone, Surrey, in which Mr James Aldridge, a well-known and respected figure in the cheese-making world, is the leading cheesemaker.

[3] Eastside obtained leave to seek judicial review of the emergency control order made by the Secretary of State and were supported by Ducketts as an interested party. A number of different grounds were advanced. In a long and careful judgment delivered on 13 November 1998, Moses J. dismissed most of the grounds relied on by Eastside and Ducketts but he upheld one ground of challenge and on that ground held the emergency control order as amended to be unlawful. The ***127** Secretary of State appeals, contending that the judge was wrong to find the order unlawful on that ground. Eastside and Ducketts for their part contend that the judge should have found in favour of Eastside on some of the grounds which he dismissed as well as that which he upheld, and they rely on other grounds not argued before the judge.

[4] Ducketts produce two types of cheese, Caerphilly and Wedmore. The difference is that Wedmore contains chives, and Caerphilly does not. The story begins for present purposes on 19 April 1998 when a 12 year old boy became seriously ill and was admitted to hospital suffering from food poisoning. On 28 April 1998 it was diagnosed that his symptoms were attributable to a very dangerous organism, E-coli 0157.

[5] This organism is very dangerous because it can cause severe illness and death, kidney failure requiring dialysis, strokes, blindness and brain damage. In evidence before the judge Dr Hilton, a Senior Medical Officer and head of the Micro-biological Safety of Food Unit at the Department of Health, deposed:

> It is worth noting that E-coli 0157 is categorised as a containment level 3 pathogen which means that it is considered to be more dangerous than the types of *Salmonella* that cause food-poisoning or the bacteria that causes cholera, and that it is considered to be as dangerous as the bacteria that cause typhoid or the plague.

[6] The danger presented by E-coli 0157 is insidious, because the number of organisms needed to cause infection is apparently low and the organisms tend not to be evenly distributed within foods. This makes sampling difficult and unrealiable, unless a test for the organism proves positive. Then it is clear that the product is contaminated. A negative result does not however give the same assurance that the food is not contaminated: because of the low number of organisms needed to cause infection and the non-uniform distribution of organisms in food, it is only possible to be sure that the organism is absent if the whole of every product, in this case cheese, is tested to destruction. Part of the factual background to this case was a recent outbreak of E-coli 0157 poisoning in Scotland, which had claimed the lives of 17 people.

[7] On 28 April 1998 it was believed that Ducketts' Wedmore cheese might be the source of the boy's E-coli 0157 infection. The cheese in question had been supplied by Ducketts to a shop in Wellington, Somerset, where it had been bought by the boy's parents and eaten by him shortly before he fell ill. Samples of cheese were obtained from the shop and tested. On Friday 1 May these were provisionally thought to show the presence of E-coli 0157. Ducketts were informed of this result by the Sedgemoor District Council, and the presence of E-coli 0157 was confirmed on Saturday 2 May. Ducketts then told Mr Aldridge of Eastside, who bought most of their cheese from Duckets for maturing and smoking before onward sale. The District Council told Mr Duckett that the cheese had been supplied to the shop in Wellington on 8 April ***128** 1998, and on that basis Mr Duckett "guesstimated" that the cheese had been made between 4 and 6 April 1998.

[8] The judge has summarised the narrative very fully and accurately in his judgment, but it is necessary to draw attention to some of the main points. Mr Aldridge, on learning of the infection from Mr Duckett, at once isolated the Duckett cheese in the possession of Eastside which included Ducketts' 5 April 1998 production, and took steps to ensure that that cheese was not sold. The District

Council set up a Food Incident Team, and there were discussions between the Environmental Health Department of the District Council and the Department of Health, which was first alerted on Saturday 2 May. On Sunday 3 May Mr Curtis, a Senior Principal Environmental Health Officer, and Team Leader of the Food Hazard Unit, was informed and co-ordinated investigations on behalf of the Department. On that Sunday, representatives of the District Council and the Department met at Bridgwater and visited Ducketts' farm. Monday 4 May 1998 was a bank holiday. On that day Mr Aldridge confirmed to Mr Curtis that none of his Duckett cheese produced on 5 April had been sold, and that it was clearly marked. Ducketts meanwhile tried to recall supplies from other customers. There is no doubt that both Ducketts and Eastside acted very promptly and properly.

[9] There followed a series of four meetings of the Food Incident Team, on 5, 6, 8 and 13 May, including representatives of the District Council and the Department and, at some meetings, food micro-biologists from the Hygiene Division of the Ministry of Agriculture, Fisheries and Food. At the meeting on 5 May it was recorded that further analytical work was needed finally to establish the link between the cheese and the poisoned boy. On 6 May this link was confirmed. On that date the Department intended to recommend that the Ducketts' production of 5 April should be withdrawn and that subsequent release should be dependent on satisfactory sampling arrangements. By the meeting on 8 May there was much more evidence available from laboratory tests. Forty samples taken from Ducketts' production between 26 April and 3 May 1998 were all found to be negative. But there were eight positive samples: six of these derived from Ducketts' production of 4 April, and came from a single consignment to a retailer known as West Country Fine Foods; one came from Ducketts' production of 5 April, traced in Wandsworth; one came from the cheese which was thought to have caused the boy's infection. It was thought that most of Ducketts' production of 4 and 5 April had been consumed by this time, but it was decided to issue a Food Hazard Warning to local authorities, not limited to specific production dates.

[10] Eastside's cheeses derived from Ducketts' 5 April production were taken for testing on 4 May, and further samples were supplied on 8 May.

[11] On 13 May a further positive sample was reported, this time from the area of Taunton Deane Borough Council. It was thought that ***129*** the cheese sampled had been produced by Ducketts between 4 and 6 April, but confirmation was needed. This made nine positive samples, although six of them came from the consignment to West Country Fine Foods.

[12] At this stage the source of the contamination was unknown. Mrs Duckett was found to be a carrier of E-coli 0157, although showing no symptoms. Later it became fairly clear that Mrs Duckett's infection was irrelevant, but this finding was a source of some concern at the time since she was involved in handling and packing the manufactured cheeses. Samples received by the laboratory from Ducketts since 11 May were found to be negative, as were samples of production during the period 4 to 6 April. It was decided to issue a second Food Hazard Warning, in particular to seek information for purposes of settling a suitable sampling plan. The Warning, sent on 13 May 1998 to all local authorities with a possible interest, stated:

> Enquiries have indicated that cheeses may be relabelled and repackaged during distribution through the trade. Some cheeses are subject to further treatment or processing as described in our original Food Hazard Warning. We urgently require further samples of Ducketts Caerphilly or Ducketts Wedmore cheese to help identify whether the hazard is confined to a particular period of production. We would like to ensure samples are examined throughout the period of production, from 4 April. Please let us have any information available direct on Fax … on production dates (or if not available, delivery dates) of Ducketts cheeses within the premises visited so that we can advise local authorities on a targetted sampling programme.

[13] The Warning listed the 34 outlets then known to the Department of Health to be directly involved and the local authorities requested to act. The outlets were dispersed throughout the West Country, London and the Home Counties, Scotland, Manchester, Harrogate and elsewhere.

[14] No further cases of food poisoning were reported, and no positive samples shown to have come from a production period outside the production period 4 to 6 April identified by Ducketts were reported. Both Ducketts and Eastside were continuing to act co-operatively, and plans were being laid to devise a safe sampling system. But the source of contamination was still not confirmed, and could have been found either in the raw material from which the cheeses were made, or from the production process, or from handling or treatment after manufacture. There was no certainty about the suspect

dates of production, partly because of the problems of repackaging mentioned in the second Food Hazard Warning.

[15] On 15 May Mr Aldridge wrote to the Department arguing that there was no reason to withhold any of his ex-Duckett cheese from the market save within the two-week period of production covering 4 to 6 April 1998. Shortly after this, on 18 May, Mr Aldridge told the Tandridge District Council (Eastside's local council) that he intended to deliver some Duckett cheese to a wholesaler, and he did deliver ***130*** some such cheese which he had received in early March and which had been maturing since then. It seems, and the judge accepted, that his intention was to provoke the District Council into issuing a detention notice under section 9 of the 1990 Act. Under that section, to which we will come, compensation is payable if food which is the subject of a notice under the section is found not to be unfit (unless the notice is withdrawn). Mr Aldridge's objective was not to depart from the restrictive régime he had voluntarily accepted, but to put Eastside in a position to claim compensation. His tactic was successful to this extent, that on 19 May 1998 his local district council did issue a detention notice under section 9.

[16] On the same day, 19 May, a crucial meeting of the Food Incident Team was held. It was attended by representatives of the Department, the Ministry of Agriculture, Fisheries and Food, Public Health Laboratory Services, Tandridge Environmental Health Department, Somerset Health Authority and the Sedgemoor Environmental Health Department. Seventeen people attended in total, including a note-taker. There was new information that some beef cattle on Ducketts' farm had been found to be infected with E-coli 0157. More significantly, there was a report from the Mendip Environmental Health Department that a sample of Duckett cheese had been tested for E-coli 0157 and found to be presumptively positive. This was the tenth positive sample. An official from the Department of Health had requested additional information as to the source of this sample, and had been told by the District Council that the sample had been supplied direct by Duckets to a retailer in Wells. The delivery had been on 30 April 1998, and would accordingly have been produced between about 25 and 27 April, well outside what had hitherto been implicated as the suspect period of production. Later, this information proved to be incorrect. But on 19 May there was no reason to suspect the reliability of this report, which inevitably put an even more serious gloss on the facts as understood up to then.

[17] At the meeting the representative of Tandridge District Council Environmental Health Department explained the financial consequences for Eastside of detaining £30,000 worth of cheese. It was recorded that Mr Aldridge had made a number of representations and a copy of his letter of 15 May to the Department was tabled. It was thought that he might be considering a legal challenge to the section 9 notice that had been served in respect of his stock, and reference was made to samples taken from him. There was a lengthy discussion whether an appropriate sampling plan could be devised that would identify with reasonable certainty which batches of cheese held by Eastside were likely to be contaminated with E-coli 0157, but the problem was complicated by the fact that Mr Aldridge could only identify a particular week's production from Ducketts and not a particular day's. The record of the meeting concludes with two important paragraphs: ***131***

> 11. It was agreed that it would not be possible for any sampling plan, short of total destructive testing, to provide adequate assurance as to the safety of Mr Aldridge's stock for the following reasons:
>
> > i. given the evidence that E-coli 0157 had been found in Ducketts cheese produced on different days
> >
> > ii. positive samples had been contaminated at low levels
> >
> > iii. a sampling plan for positive release of suspect cheese would need to give a high level of assurance that no sample from any cheese would be likely to be contaminated
> >
> > iv. it could not be assumed that any contamination was randomly distributed in an individual cheese.
>
> 12. There was agreement that the food sampling programme that had been instigated following

> the previous Food Hazard Warning had not helped to identify the cause or period of the contamination because of a lack of information regarding production dates. As infection from E-coli 0157 can occur from ingesting a very small number of organisms, no sampling programme could give a satisfactory assurance of the safety of the cheese. It was agreed, therefore, that all cheese produced by Ducketts that is currently held at outlets is potentially unsafe and its sale should be banned. Due to the logistical problems that could be faced by EHDs trying to do this "on their own" it was considered to be appropriate at this stage to pursue the idea of asking the Minister to sign an Emergency Control Order under section 13 of the Food Safety Act 1990 to remove the cheese from the market. DH agreed to seek advice from its lawyers to decide if this was appropriate. If it was, DH undertook to put a submission to the Minister. If such an Order was to be signed it was agreed that it would be worded in such a way any cheese produced by Ducketts included any anonymised Caerphilly.

It appears that the meeting concluded at about 7.30 p.m.

[18] On 20 May Eastside and Ducketts were told that an emergency control order under section 13 of the 1990 Act was under consideration and given reasons for that course. It seems that the faxed letter giving this information reached Eastside at about 1.47 p.m. and there was very little time to respond. Mr Aldridge, however, did reply, without the benefit of legal advice, arguing that there was no legal or scientific reason for withholding from the market cheese made by Ducketts before the earliest of the suspect dates. At 6.30 p.m. a Minister of State at the Department made the Food (Cheese) (Emergency Control) Order 1998.[1] This order recited that it appeared to the Minister that the carrying out of any commercial operation with respect to Ducketts' cheese involved or might involve imminent risk of injury to health. The order prohibited the carrying out of any commercial operation in relation to cheese originating from Ducketts. A duty was imposed on each food authority to enforce and execute the order within its area. The effect of the amendment made on 21 May [2] was to modify section 9 of the Act so as to provide that a justice of the peace could only decide whether any cheese fell within the terms of the section 13 prohibition and not whether it was fit or unfit. Thus compensation would only be payable if cheese was detained by a local authority which did not fall ***132*** within the prohibition and not if cheese was detained which, although falling within the prohibition, was not unfit. Although Ducketts were served with a section 9 notice giving effect to the section 13 order in its amended form, Eastside were never served with such a notice.

The Act

[19] Section 9 of the 1990 Act provides:

> (1) An authorised officer of a food authority may at all reasonable times inspect any food intended for human consumption which:
>
> (a) has been sold or is offered or exposed for sale; or
>
> (b) is in the possession of, or has been deposited with or consigned to, any person for the purpose of sale or of preparation for sale;
>
> and subsections (3) to (9) below shall apply where, on such an inspection, it appears to the authorised officer that any food fails to comply with food safety requirements.
>
> (2) The following provisions shall also apply where, otherwise than on such an inspection, it appears to an authorised officer of a food authority that any food is likely to cause food poisoning or any disease communicable to human beings.
>
> (3) The authorised officer may either:
>
> (a) give notice to the person in charge of the food that, until the notice is withdrawn, the food or any specified portion of it:
>
> (i) is not to be used for human consumption; and

(ii) either is not to be removed or is not to be removed except to some place specified in the notice; or

(b) seize the food and remove it in order to have it dealt with by a justice of the peace;

and any person who knowingly contravenes the requirements of a notice under paragraph (a) above shall be guilty of an offence.

(4) Where the authorised officer exercises the powers conferred by subsection (3)(a) above, he shall, as soon as is reasonably practicable and in any event within 21 days, determine whether or not he is satisfied that the food complies with food safety requirements and:

(a) if he is so satisfied, shall forthwith withdraw the notice;

(b) if he is not so satisfied, shall seize the food and remove it in order to have it dealt with by a justice of the peace.

(5) Where an authorised officer exercises the powers conferred by subsection (3)(b) or (4)(b) above, he shall inform the person in charge of the food of his intention to have it dealt with by a justice of the peace and:

(a) any person who under section 7 or 8 above might be liable to a prosecution in respect of the food shall, if he attends before the justice of the peace by whom the food falls to be dealt with, be entitled to be heard and to call witnesses; and

(b) that justice of the peace may, but need not, be a member of the court before which any person is charged with an offence under that section in relation to that food.

(6) If it appears to a justice of the peace, on the basis of such evidence as he considers appropriate in the circumstances, that any food falling to be dealt with by him under this section fails to comply with food safety requirements, he shall condemn the food and order:

(a) the food to be destroyed or to be so disposed of as to prevent it from being used for human consumption; and

(b) any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the food. ***133**

(7) If a notice under subsection (3)(a) above is withdrawn, or the justice of the peace by whom any food falls to be dealt with under this section refuses to condemn it, the food authority shall compensate the owner of the food for any depreciation in its value resulting from the action taken by the authorised officer.

(8) Any disputed question as to the right to or the amount of any compensation payable under subsection (7) above shall be determined by arbitration.

[20] The expressions “food authority” and “authorised officer” are defined in section 5(1), (2) and (6) respectively, but nothing turns on those definitions. It is plain from section 9(2) and (3) that the section provides for action by food authorities in relation to specific food held by specific persons. It is also plain from subsections (3)(a) and (4) that on giving notice under subsection (3)(a) the authorised

officer has a maximum of 21 days in which to decide either to withdraw the notice or to seek condemnation of the food by a justice of the peace. If the food is seized under subsection (3)(b) or (4)(b) the authorised officer is obliged to seek condemnation of the food by a justice of the peace: this action is subject to no statutory time limit, but since there is a liability to pay compensation if the food is not condemned, and the compensation is for depreciation in the value of the food resulting from the action taken by the authorised officer, the officer has a strong incentive to bring the matter before the justice of the peace as promptly as possible. Section 9 of the 1990 Act derives from section 10 of the Food and Drugs Act 1938, which in turn derives from section 116 of the Public Health Act 1875. It is established that under these sections a justice of the peace acts administratively and not judicially, with the result that there is no appeal to the Crown Court under section 108 of the Magistrates' Courts Act 1980.[3] Thus the decision of a justice can be challenged only by way of judicial review.

[21] Section 13 of the 1990 Act provides:

> (1) If it appears to the Minister that the carrying out of commercial operations with respect to food, food sources or contact materials of any class or description involves or may involve imminent risk of injury to health, he may, by an order (in this Act referred to as an "emergency control order"), prohibit the carrying out of such operations with respect to food, food sources or contact materials of that class or description.
>
> (2) Any person who knowingly contravenes an emergency control order shall be guilty of an offence.
>
> (3) The Minister may consent, either unconditionally or subject to any condition that he considers appropriate, to the doing in a particular case of anything prohibited by an emergency control order.
>
> (4) It shall be a defence for a person charged with an offence under subsection (2) above to show:
>
> > (a) that consent had been given under subsection (3) above to the contravention of the emergency control order; and ***134**
> >
> > (b) that any condition subject to which that consent was given was complied with.
>
> (5) The Minister:
>
> > (a) may give such directions as appear to him to be necessary or expedient for the purpose of preventing the carrying out of commercial operations with respect to any food, food sources or contact materials which he believes, on reasonable grounds, to be food, food sources or contact materials to which an emergency control order applies; and
> >
> > (b) may do anything which appears to him to be necessary or expedient for that purpose.
>
> (6) Any person who fails to comply with the direction under this section shall be guilty of an offence.
>
> (7) If the Minister does anything by virtue of this section in consequence of any person failing to comply with an emergency control order or a direction under this section, the Minister may recover from that person any expenses reasonably incurred by him under this section.

[22] Section 13 is supplemented by section 48 of the Act which provides, so far as material:

> (1) Any power of the Ministers or the Minister to make regulations or an order under this Act includes power:
>
> > …

> (c) to provide for such exceptions, limitations and conditions, and to make such supplementary, incidental, consequential or transitional provisions, as the Ministers or the Minister considers necessary or expedient.

(2) Any power of the Ministers or the Minister to make regulations or orders under this Act shall be exercisable by statutory instrument.

(3) Any statutory instrument containing:

> …
>
> (b) an order under this Act other than an order under section 60(3) below,

shall be subject to annulment in pursuance of a resolution of either House of Parliament.

[23] Thus an emergency control order under section 13 is made by a Minister in contrast with a notice issued under section 9, or a seizure under that section, which is given or effected by the food authority. An emergency control order may be directed to all food authorities, as this order was, and not to a specific person in charge of specific food. The emergency control order need not relate to specific identified food. Such an order is, as section 48(3) makes clear, subject to parliamentary annulment, but it does not provide for compensation and may be in terms which limit or exclude the right to compensation under section 9.

[24] Plainly, an order made under section 13 is wider in its scope and more draconian in its operation, particularly when made in the amended form adopted here, than a notice given or action taken under section 9. Section 13 empowers the central Government to act in response to a perceived emergency: this is recognised by the name given to the section 13 order and by the pre-condition of making a section 13 order, that it must appear to the Minister that the carrying ***135*** out of commercial operations with respect to any food involves or may involve imminent risk of injury to health.

[25] In referring to these sections, the judge spoke of a “hierarchy of powers”: the Secretary of State initially challenged this description, but did not pursue his challenge. The judge was in our opinion correct when he observed[4]:

> If section 9 powers are considered to be equally effective, then it is those powers which should be exercised. Any other approach offends the principle of proportionality which the Department accepts to be applicable. The exercise of section 9 powers, if they would be equally effective, would be a less restrictive alternative.[5] That approach is confirmed in the guidance which refers to section 13 powers being exercisable only in exceptional circumstances.

[26] In speaking of “guidance” the judge was referring to a code of practice issued under section 40 of the Act, to which food authorities were required to have regard in carrying out their functions under the Act. Our attention was drawn to this code in argument, in particular to show the extent to which effective action in any locality ultimately depends on action by the food authority.

The judge's findings

[27] The judge made a number of findings which are important and which (subject to one qualification noted below) are not challenged on this appeal. References are to the transcript of his judgment.

> 1. By 19 May the cause and period of contamination of Ducketts' cheese production were still unknown. It had previously been thought that a satisfactory sampling programme could be devised. This was now considered impossible (pages 29C–D).
>
> 2. The information concerning the Mendip sample was a significant factor in reaching the decision to seek a section 13 order. It was not unreasonable for those attending the meeting on

19 May to rely on the information then available (pages 29D, 30B–C).

3. The Department were entitled on 19 May to reach the conclusion that while it remained ignorant as to the cause and period of contamination, all cheese from Ducketts should be regarded as unsafe (pages 30F, 42G).

4. Since the Department could reasonably take the view that all Ducketts' production should be regarded as unsafe and the source and period of contamination were unknown, there was an imminent risk of injury to health (pages 31A–E, E, 43A).

5. It was reasonable for the Department on 19 May to take the view that reliance should no longer be placed on voluntary arrangements (page 35C). ***136**

6. The circumstances known to the authorities on 19 May were such as to require immediate action by the central Government rather than relying on local authorities throughout the United Kingdom who would act with varying degrees of expedition (pages 37A–C, G).

7. It was open to the Department to take the view that speedier and more effective protection would be afforded to the public by an order under section 13 than by leaving food authorities to act under section 9 (pages 40F, 43A).

The qualification to be noted is that both Eastside and Ducketts criticised the test of proportionality applied by the judge.

The Secretary of State's appeal

[28] The judge found against the Secretary of State on the ground that he had wrongly taken account of considerations of administrative convenience which should not have weighed with him. In reaching this conclusion, the judge attached importance to the reference to “logistical problems that could be faced by EHDs” in paragraph 12 of the minutes of the meeting of 19 May quoted above. The judge also attached importance to three passages in affidavits sworn by Mr Curtis. They were to the following effect:

57. The meeting [of 19 May] was also concerned that there was a possibility that some local authorities might resist taking formal action for cheeses in their area where they felt there was a danger of legal costs falling to them. The point was made during the discussion, by Mr Furlong and supported by Mr Barton [local authority environmental health officers], that, in view of the widespread distribution (including Scotland and Wales), this was an issue on which the Department should take the lead to secure the withdrawal of products from sale.[6]

62. The primary advantage of the proposed course of action was that it provided the most effective way to safeguard public health. It also avoided local authorities having to take individual enforcement action, with the risk that some would fail to do so. A further risk was that such actions might be challenged in a number of different courts. If this occurred, DH would not have the resources to support individual LAs and feared inconsistent decisions around the country which would be difficult to challenge quickly enough to prevent release of contaminated cheese.[7]

9. We also considered that action on a national basis was needed due to our concern as to whether local authorities would be willing to take the necessary action locally. During the course of the investigation I became aware through my contacts with local authorities that some enforcement officers would be reluctant to commit their authority to taking action to detain suspect products where they might subsequently become liable for compensation and legal costs. This concern stems from the well publicised judgment in the Scottish courts where the local authority failed to satisfy the Sheriff that unpasteurised cheese containing Listeria monocytogenes (bacteria which can cause listeriosis, an illness which is hazardous to pregnant women as it can cause miscarriage) was unfit for human ***137** consumption. The local authority in this case was ordered to pay costs and compensation.[8]

[29] The judge had accepted that the Department could reasonably take the view that immediate effective action by central Government was called for and that food authorities would act with varying degrees of expedition, and accepted, although reluctantly, that fears of inaction were a relevant and legitimate factor to be taken into account (page 37G). His reasons for ruling against the Secretary of

State on this ground were these:

> The phrase “logistical problems” seems to me more apt to cover the problem to which Mr Curtis refers in paragraph 62 of his first affidavit that the Department of Health would not have sufficient resources to support individual local authorities taking action in different courts. That seems to me to smack of administrative inconvenience. Whilst I accept that it was open to the Department to take the view that food authorities would need to rely upon expert evidence obtained from the Department of Health, I cannot understand why that would pose insuperable difficulties. If, as the Department believed, it was necessary to test batches of cheese to destruction, such tests would either reveal the presence of E-coli 0157 in which case no compensation would be payable, or they would demonstrate that the organism was not present. It does not seem to me to have been open to the Department to take the view that the time and expense of testing seized batches of cheese to destruction was so onerous as to justify action under section 13. After all, until such cheese was tested to destruction, no one has suggested that authorities would be compelled to permit the release of cheese onto the market.
>
> I am also concerned as to the reference to the risk, in paragraph 62 of Mr Curtis's first affidavit, that actions might be challenged in a number of different courts. I do not understand why that should give rise to such fears as to justify action under section 13. Mr Curtis says that the Department feared inconsistent decisions which would be difficult to challenge quickly enough to prevent release of the contaminated cheese. I do not understand what he means by inconsistent decisions. Any batch of cheese seized would, on the Department's understanding, have to be tested to destruction. If that cheese was free of E-coli 0157, then the food authority would not have been able to satisfy a justice of the peace that it failed to comply with food safety requirements. If another batch of cheese was tested and proved positive, the food authority would succeed. That does not give rise to any inconsistency at all; it is merely a question of some cheese proving positive and some negative. There would be no need to challenge any decision, after testing, because the cheese in question would, in the light of the Department's conclusion that testing was necessary to destruction, not be available for consumption in any event. Moreover, I repeat, pending testing of a particular batch of cheese, I do not see how there could be any fear that it would be released notwithstanding that it might be contaminated. In my judgment, analysis of this part of the reasoning discloses a flawed approach. The fear as to absence of resources was not, in my judgment, a legitimate consideration. Both the statute and the code in my judgment support the proposition that section 13 action should only be taken where it was the only means of providing quick and effective protection. Fears as to absence of adequate resources to support food authorities taking action under section 9 is a ***138** consideration which finds no place in the statutory scheme. In addition the fears of inconsistent decisions do not stand the analysis that this court must undertake when considering whether the evaluation by the Department contained a patent or manifest error. In my judgment that evaluation in its reference to the fears of inconsistent decisions was manifestly in error.

[30] Underlying this reasoning, the Secretary of State contends, is a misunderstanding by the judge of the Department's approach to testing to destruction. Because of the special characteristics of the E-coli 0157 organism, a cheese could only be found to be uncontaminated if each and every part of it was tested to destruction. The Department did not, however, at any stage suggest that such testing to destruction should be carried out, or was feasible. At the relevant time, Eastside held over 4 tonnes of ex-Ducketts' cheese. The evidence was that samples of 25 grams needed to be tested. This meant that, for Eastside's cheese alone, over 160,000 samples would have to be tested. The scale of this exercise, the Secretary of State submits, ruled it out as a practical possibility.

[31] The Secretary of State also criticises the judge's approach to “logistical problems” and the risk of inconsistent decisions. He points out that the Department were, on the judge's finding, entitled to conclude that all Ducketts' cheese was unsafe and that there was or might be an imminent threat to the life and health of members of the public if any of it were released on to the market. If food authorities were to take urgent action under section 9, having identified stocks of Ducketts' cheese in their areas, they would have, in almost every case, to do so in reliance on evidence received from the Department. They would in all probability have no evidence of their own. They were subject to constraints of time in deciding what action to take. If food authorities withdrew notices issued under section 9 for want of evidence to support a complaint of unfitness, there was an obvious possibility that contaminated cheese might reach the market. If on the other hand they seized cheese and sought condemnation orders from a justice of the peace, it was to be expected that some

cheese-owners would contest the complaint of unfitness, perhaps adducing sampling evidence to support the contention that their cheese was not contaminated. To rebut that case, it would be necessary for food authorities to call evidence to substantiate the grounds of their complaint and (perhaps) to criticise the reliability of the owners' samples. The prime source of authoritative evidence on the safety of the cheese was, inevitably, the Department, which could reasonably expect urgent demands for assistance from all over the country. This could not in truth be regarded as a “logistical problem”, but as an impediment to affording the public the protection for which the situation was judged to call. Nor, the Secretary of State argues, can the risk of inconsistent decisions be dismissed as the judge did. Even if it were the case that most justices of the peace upheld the food ***139*** authorities' contentions, some might not: in such cases, there was no opportunity for a speedy challenge, and every cheese released into the market represented (on the findings made), a threat to the life and health of the public. By 19 May there were already more than 100 local authorities involved, and it was unknown how many of the remaining 300 local authorities might become involved. The scope for aberrant decisions was, the Secretary of State argues, considerable.

[32] Eastside and Ducketts reject these criticisms and support the judge's approach. There was, they say, no evidence before the judge that testing to destruction was impracticable. They draw attention to the powers of the central Government to compel action by local authorities even in the absence of an order under section 13. They rely on the necessary participation of local authorities in enforcing action whether under section 9 or section 13. They suggest that the evidential problems described by the Secretary of State are exaggerated, and dismiss the risk of inconsistent decisions by suggesting that no contaminated cheese could reach the market since cheese would either be found, on testing, to be contaminated, in which case it would be condemned, or it would be tested to destruction and found to be uncontaminated, in which case it would not reach the market.

[33] We accept the criticisms made by the Secretary of State of the judge's ruling on this aspect. The considerations which led the authorities to conclude, on 19 May, that an emergency control order was appropriate cannot, in our judgment, be fairly described as considerations of administrative convenience. Since 2 May the Department had carefully and cautiously explored the possibilities of taking action less drastic than under section 13. It had not precipitately resorted to action under this section. But by 19 May, the scale of the potential problem, the gravity of the potential threat and the uncertainty still surrounding the source and duration of the contamination led all the authorities involved to conclude that the protection of the public required action under section 13. We can discern no failure by the authorities to concentrate on matters which were properly the subject of their attention or to take account of matters which were not.

[34] Having found that the Department had taken account of irrelevant considerations, the judge went on to consider whether the same decision would have been reached even if the Department had not done so. He was unable to conclude that the same decision would have been reached and so held that the reliance on irrelevant considerations invalidated the decision. The Secretary of State criticises this conclusion; Eastside and Ducketts support it.

The judge prefaced this part of his judgment by ruling (page 42F):

> The Department was entitled to conclude that:
>
> 1. Ducketts' cheese was unsafe.
>
> 2. That since the source and period of contamination was unknown and the destination of its distribution unknown, the risk of injury was imminent.
>
> 3. Bearing in mind different food authorities would act with different ***140*** degrees of urgency and could not be compelled to act, section 13 was the proportionate means for providing quick and effective protection.

[35] Given these conclusions and accepting that the Department was entitled to reach them, as the judge held, we consider that the Department would in all probability have reached the same decision, if indeed it was not bound to do so, whether or not account had been taken of the matters which the judge held to be irrelevant. The Department faced the classic dilemma of any regulator: if strong action is taken and the apprehended harm to the general public does not ensue, the authority is criticised for taking unnecessarily draconian action and causing damage which would otherwise have been avoided; if, on the other hand, the authority holds its hand and harm does follow, the authority is

castigated for abdicating its responsibility to exercise powers which Parliament has conferred for dealing with such a situation. The danger of hindsight is obvious. At the time, perceiving an imminent threat to the life and health of the public, the Department was bound to regard the need to take quick and effective action as paramount. We differ from the judge on this issue.

Exemption of Eastside

[36] By a respondent's notice, Eastside argue that even if it was appropriate for the Secretary of State to make an order under section 13, he should in all the circumstances have excepted Eastside from the operation of that order. Before the judge the Secretary of State contended that there was no power to make such an exception under the Act but the judge held that there was and the Secretary of State now accepts that, in making a section 13 order, the Secretary of State could have provided an exception in relation to Eastside under section 48(1)(c) of the Act. He points out, however, correctly in our view, that section 13(3) of the Act has a somewhat different effect, by empowering the Minister to consent in a given case to something which is prohibited by the order.

[37] If, therefore, the Secretary of State could have excepted Eastside from the operation of the section 13 order, the question arises whether he acted unlawfully by failing to do so. Eastside contend that he did. They rely on the facts that Eastside had from the beginning complied voluntarily with the requests made of them; that they had given notice to their local district council before delivering cheese to a wholesaler, and had then only delivered cheese produced before the suspect dates; that although protesting that the restraints they were asked to observe were unnecessarily wide, they had not sought to violate the régime which they had accepted; that no evidence of contamination had been found in samples of cheese held by them; and that all Ducketts' cheese held by them was clearly marked and identified. In this situation, Eastside contend, they should have been exempted from the section 13 order and made subject only to a section ***141*** 9 order, which would have enabled them to establish that their cheese was not contaminated and to claim compensation for any depreciation in the value of the cheese which they had suffered as a result of the local authority's action.

[38] The judge did not accept this argument. He held (page 41D):

> In my judgment it would have been inconsistent with the exercise of the powers under section 13 to make an exception in the case of Eastside. It is true that Eastside had been identified as an outlet for Ducketts' cheese and thus in its particular case a section 9 action, would have served to prevent distribution of that cheese. But in my judgment it would have been inconsistent with the scheme of the Act to allow one distributor the benefit of section 9 action, whilst imposing prohibition in relation to all other commercial operations under section 13. Other distributors which had been identified would have had to be given a similar opportunity to challenge the safety of particular cheeses under section 9 and once further outlets had been identified, they too should have been afforded the advantages of section 9 action to which Eastside claims it was entitled. Any other approach, which permitted only Eastside the advantage of section 9 action would have been inconsistent. If section 13 action was appropriate on the part of central Government the statute envisages nation-wide effect. In those circumstances the complaint that no exception was made in the case of Eastside appears to me to be without substance. Moreover Eastside's assertion that there was no possibility of any commercial operation in relation to Ducketts' cheese on the part of Eastside does not stand comfortably with the letter sent on its behalf to Tandridge District Council of 20 May 1998 which stated:
>
> > We understand E-coli 0157 was associated from a batch of cheese around 4 or 5 April at Walnut Tree Farm (Ducketts). We therefore require the immediate release of the cheeses being detained which were supplied to our client to mature within the next week/two days.
>
> The basis upon which that requirement was made was wrong. As I have already pointed out, the contamination could not at that date be associated merely with production dates of 4 or 5 April.

[39] We agree with the judge. We readily understand the sense of grievance felt by Eastside as an innocent recipient of Ducketts' cheese, but the Department had properly to be alive to the complaints of unfair discrimination which would be made by other innocent recipients of Ducketts' cheese if

Eastside were to receive more favourable treatment. If Eastside could make a persuasive case for relaxation of the section 13 order in relation to them, or any of the cheese held by them, it was open to them to seek the Minister's consent under section 13(3). It cannot in our view be said that the Secretary of State erred in law in failing to exempt Eastside from the section 13 order.

Proportionality

[40] It was common ground before the judge that since the exercise of powers under section 13 of the 1990 Act interfered with the operation of Article 34 of the E.C. Treaty, such exercise had to be justified under Article 36 of the E.C. Treaty which does not preclude ***142*** "prohibitions … justified on grounds of … the protection of health and life of humans …". It was accepted that the judge should adopt the same approach to proportionality as would be adopted by the European Court of Justice. The judge made reference to R. v. Minister of Agriculture, Fisheries and Food, Ex parte Roberts, [9] Case C-44/94, R. v. Minister of Agriculture, Fisheries and Food, Ex parte National Federation of Fishermen's Organisations and Others, [10] R. v. Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd [11] and R. v. Ministry of Agriculture, Fisheries and Food, Ex parte First City Trading Ltd. [12] He concluded (at page 27D):

> … if grounds manifestly do not justify the making of an order under section 13 then this court will interfere. Moreover if the objective which the prohibition was designed to achieve, namely the avoidance of injury to health by consumption of Ducketts' cheese could have been achieved by lesser measures then this court should declare that the Department misused its powers.

Eastside and Ducketts contend that the judge applied the wrong test of proportionality.

[41] The principle of proportionality is one of the basic principles of Community law. It has been expressed by the European Court of Justice in Case C-331/88, R. v. Minister of Agriculture, Fisheries and Food, Ex parte Federation Europeene de la Sante Animale (FEDESA) and Others [13] in the following terms:

> By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

Because the principle is so general (and may affect a range of issues from the validity of primary legislation such as the Shops Act 1950 to much narrower points such as the quantum of penalties for customs infringements) it must be related to the particular situation in which it is invoked. In this case the issue is whether the prohibitory action taken by the Secretary of State under section 13 of the 1990 Act was justifiable under **Article 36** of the E.C. Treaty on grounds of "protection of health and life of humans".

[42] Eastside and Ducketts submit that the application of the principle required a two-stage approach, and that the judge had failed ***143*** to carry out the balancing exercise required at the second stage. Sometimes a three-stage approach has been adopted, as in the opinion of Mr Advocate General Van Gerven in Case C-159/90,Society for the Protection of Unborn Children Ireland Ltd v. Grogan and Others [14]:

> I consider that the following points should be considered on the basis of the principle of proportionality. First, does the prohibition … which is at issue pursue a legitimate aim of public interest which fulfils an imperative social need. Secondly, is that aim being realised using means which are necessary (and acceptable) in a democratic society in order to achieve that aim? Thirdly, are the means employed in proportion to the aim pursued and is the fundamental right concerned … impinged upon as a result?

[43] However the test is formulated, it is clear that in the application of **Article 36** E.C. the maintenance of public health must be regarded as a very important objective and must carry great

weight in the balancing exercise. In Case 104/75Officer Van Justitie v. de Peijper, [15] the Court of Justice said that health and life of humans rank first among the interests protected by **Article 36** E.C., and it is for Member States to decide (within the limits imposed by the E.C. Treaty) what degree of protection to provide. There are similar observations in FEDESA at 4051, paragraph 42 (Mr Advocate General Mischo) and 40637–4064, paragraphs [16]–[17], ECJ.

[44] The parties to this appeal differ as to the scope of judicial review of the proportionality of national measures or action. The Secretary of State submits that the English court is not required to adopt the role of prime decision-maker, and cites the decision of the House of Lords in R. v. Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd [16] in support of that submission. But the passages relied on do not support such a wide submission. [17]

[45] In principle the decision on proportionality has to be taken by the national court which is seised of an issue on **Article 36** E.C., subject of course to any possible reference to the Court of Justice.[18] But in the case of a legislative measure the national court must not simply accept the view of the national legislature or confine itself to deciding whether what the legislature has enacted is reasonable. [19]

[46] Nevertheless it is clear that the national legislature has a considerable margin of appreciation, especially in legislating on ***144*** matters which raise complex economic issues connected with the Community's fundamental policies. In FEDESA the Court of Justice said,[20]

> However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the E.C. Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.[21]

The same approach can be seen in Case C-1/90, Aragonesa de Publicidad Exterior SA and Publivía SAE v. Departamento de Sanidad Y Seguridad Social de la Generalitat de Cataluña [22]; Case C-280/93, Germany v. E.U. Council [23]; Case C-44/94, R. v. Minister of Agriculture, Fisheries and Food, Ex parte National Federation of Fishermen's Organisations and Others [24]; Case C-84/94, United Kingdom and Northern Ireland v. E.U. Council [25]; and Case C-122/94, E.C. Commission v. E.U. Council, [26] in which the Court of Justice stated:

> In reviewing the exercise of such a power the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion.[27]

[47] The Secretary of State also relies on Case C-120/97, Upjohn Ltd v. Licensing Authority Established by the Medicines Act 1986 and Others. [28] In that case the Court of Justice stated [29]:

> According to the court's case law, where a Community authority is called on, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a ***145*** misuse of powers and that it did not clearly exceed the bounds of its discretion.[30]

That case was concerned with the Community wide system for authorising the marketing of proprietary medicines under Council Directive 65/65 and later directives, which require each Member State to have a competent national authority which has power to grant, refuse, revoke or suspend licences in accordance with the directives. But on being notified of an adverse decision the party is to be informed[31] "of the remedies available to him under the laws in force"—in that case, the Medicines Act 1968 as extensively amended pursuant to section 2 of the European Communities Act 1972. It was therefore a situation in which the Directive itself contemplated some form of judicial review, and the Court of Justice has in effect confirmed that judicial review on the English model was in those

circumstances an adequate form of review by the national court. Proportionality as such was not an issue. Eastside and Ducketts are right to submit that Upjohn is not directly in point. It does however illustrate that on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers.

[48] Eastside and Ducketts submit that FEDESA, and the numerous cases following FEDESA, area also distinguishable since in those cases the Court of Justice approved the application of a special test in special circumstances. In this case, it is submitted, the court should apply what counsel called the orthodox test, requiring a critical revaluation of all the factors bearing on proportionality. But there seems to be no good reason in principle or authority for two sharply different tests. The margin of appreciation for a decision-maker (which includes, in this context, a national legislature) may be broad or narrow. The margin is broadest when the national court is concerned with primary legislation enacted by its own legislature in an area where a general policy of the Community must be given effect in the particular economic and social circumstances of the Member State in question. The margin narrows gradually rather than abruptly with changes in the character of the decision-maker and the scope of what has to be decided (not, as the Secretary of State submits, only with the latter).

[49] This appeal is not concerned with whether the enactment of section 13 of the 1990 Act was itself a disproportionate measure to deal with the grave threat to public health posed by unfit food. The challenge is to the Secretary of State's exercise of his power under section 13 in the particular factual situation which arose in May 1998. The judge examined the evidence critically and in great detail. The ***146** judge's task was (so far as **Article 36** E.C. was concerned) to see whether the exercise of the Secretary of State's power under section 13 of the 1990 Act had been objectively justified and had been shown not to be disproportionate. The test is more demanding than that of “manifest error” and is also more demanding than that of *Wednesbury* unreasonableness.[32] The difference between the two tests has been lucidly described by Laws J. in R. v. Ministry of Agriculture, Fisheries and Food, Ex parte First City Trading Ltd [33]; the whole passage repays close study; its conclusion is that:

> *Wednesbury* and European review are different models—one looser, one tighter—of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power.

[50] This appeal must be approached on the basis that the Secretary of State, in making the emergency control orders on 20 and 21 May 1998, was not entitled to the broad margin of appreciation which might be accorded to primary legislation enacted by a national legislature. He is however entitled to the narrower margin of appreciation appropriate to a responsible decision-maker who is required, under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to public health risks, and which have serious implications both for the general public and for the manufacturers, processors and retailers of the suspect cheese.

[51] The judge did observe these principles and did perform the necessary balancing exercise. Although he referred to what the Court of Justice said in National Federation of Fishermen's Organisations, [34] he also referred to First City Trading and correctly concluded that he should scrutinise the grounds of justification put forward by the Secretary of State. His decision cannot be challenged as having applied the wrong test of proportionality.

Failure to consider compensation

[52] Ducketts submit that the Secretary of State erred in law by failing to take account of the fact that Ducketts and others in the same position would be denied compensation under the section 13 order. It does not appear that this point was relied on before the judge, with the result that no evidence was expressly directed to it, and it is not a point raised in either of the respondent's notices.

[53] It is however plain that at the meeting on 19 May the representative of Eastside's local district council did explain the financial implications to Eastside of detaining £30,000 worth of cheese. He was, we infer, drawing attention to the obvious fact that detention ***147** of the cheese was having a very damaging effect on Eastside's business. Under the section 9 notice issued to Eastside on the same day, the company was entitled to compensation for depreciation in value of the detained cheese if the notice were withdrawn or a justice of the peace refused to condemn the cheese. It was obvious that any order which deprived Eastside of that right was bound to be, potentially, damaging to

its interests. The view of the meeting was, however, that there was[35] no effective alternative to taking "immediate action to prevent the sale and distribution of any Ducketts cheese". We cannot conclude that the Secretary of State, when deciding to make the order, was unmindful of the effect the order was likely to have on Eastside and others in the same position. In any event we would think it wrong to reach this conclusion in the absence of evidence directed to the issue.

Article 1 of Protocol 1 of the European Convention on Human Rights

[54] Ducketts and Eastside submit that the Secretary of State may not rely on **Article 36** E.C. to justify the breach of **Article 34** E.C. since the making of the section 13 order violates their fundamental rights guaranteed by Article 1 of Protocol 1 of the European Convention on Human Rights 1950 and **Article 36** E.C. cannot, they argue, be relied on to justify such a breach. This was not an argument advanced before the judge. If reliance was to be placed upon it, it should have been relied upon before him. We have grave reservations whether we should permit the matter to be argued for the first time in this court. But since we have heard argument, it may be appropriate to express brief conclusions.

Article 1 of the First Protocol provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[55] In Case C-84/95, Bosphorus Hava Yollari Turizm Ve Ticaret A/s v. Minister for Transport, Energy and Communications, Ireland, [36] Mr Advocate General Jacobs helpfully summarised the approach of the Court of Human Rights to this Article:

> In a line of cases starting with Sporrong and Lonnroth the European Court of Human Rights has held that Article 1 of the First Protocol comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property; the second rule, contained in the second ***148*** sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions; and the third rule, stated in the second paragraph, recognises that the contracting States are entitled to control the use of property in accordance with the general interest. The three rules are not distinct in the sense of being unconnected; the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.

[56] The court must look behind the appearances and investigate the realities of the situation complained of,[37] and it would seem clear that the effect of the section 13 order made in this case was to interfere with the peaceful enjoyment by Ducketts and Eastside of the cheeses which belonged to them. We are doubtful whether the present case is one in which the effect of the order was to deprive them of their possessions: there was no transfer of ownership from them to the State or any other party; the section 13 order could have been revoked at any time, and if revoked could have ceased to have any effect; and it was always open to Ducketts and Eastside to seek the Minister's consent under section 13(3) of the Act. In a deprivation case the availability of compensation is a relevant consideration. In Case A/301-A Holy Monasteries v. Greece, [38] the European Court said:

> In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances.

[57] Such a rule is readily understandable where the State is itself assuming ownership of property belonging to another, or where property is being transferred from one citizen to another. It appears to

us to have very much less force where, in a case such as the present, the object of the measure is to restrain the use of property in the public interest. If, however, the general rule stated by the court concerning compensation has any application to a situation such as faced by the Secretary of State, we would have little hesitation in holding that the circumstances were sufficiently exceptional to displace it.

[58] The present case is in our judgment much more appropriately regarded as one in which the State deemed it necessary to control the use of property in accordance with the general interest. Although the Holy Monasteries case was concerned with deprivation, it would seem to us that the observations of the court at page 48, paragraph [70] are relevant:

> 70. An interference with peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including therefore the second sentence, ***149*** which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.

[59] Thus there must be proportionality between the means employed and the ends sought to be achieved, and a fair balancing of the interests of the public and those of private individuals. While the court must never abdicate its duty of review, it will accord a margin of appreciation to the decision-making authority. Particularly must this be true, in our view, where the decision-making authority is responding to what it reasonably regards as an imminent threat to the life or health of the public.

[60] No doubt the Secretary of State appreciated when making the section 13 order that its effect might well be to lead to the destruction of cheeses held by Ducketts and Eastside and others in the same position. These cheeses were, however, reasonably regarded as unsafe. Had they ceased to be so regarded, the order would, we assume, have been revoked. On the present facts we can see no room for an argument that the emergency action taken by the Secretary of State involved an unjustified violation of fundamental human rights on the part of Ducketts and Eastside.

[61] We would accordingly allow the appeal by the Secretary of State and reject the grounds advanced by Eastside and Ducketts in their respondents' notices.

[62] This is the judgment of the court. ***150***

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1. S.I. 1998 No. 1277.

2. S.I. 1998 No. 1284.

3. See R. v. Cornwall Quarter Sessions Appeal Committee, Ex parte Kerley: [1956] 1 W.L.R. 906; [1956] 2 All E.R. 872.

4. At p. 32F of the transcript of his judgment.

5. See the argument of the Crown in R v. Minister of Agriculture, Fisheries and Food, Ex parte Roberts: [1991] 1 C.M.L.R. 555, para. [575].

6. Affidavit sworn 29 September 1998.

7. *ibid.*

8. Affidavit sworn 3 November 1998.

9. Cited above.

10. [1995] E.C.R. I-3115.

11. [1998] Q.B. 477; [1998] 3 W.L.R. 1260.

12. [1997] 1 C.M.L.R. 250.

13. [1990] E.C.R. I-4023; [1991] 1 C.M.L.R. 507, para. [13].

14. [1991] E.C.R. I-4685; [1991] 3 C.M.L.R. 849, para. 35.

15. [1976] E.C.R. 613; [1976] 2 C.M.L.R. 271, para. [15].

16. Cited above, at pp. 1277, 1287 and 1289.

17. In any event, International Trader's Ferry was, for the reasons mentioned by Lord Hoffmann at pp. 1283–1284, far from a typical case applying **Articles 34** and **36** E.C.

18. The collaboration called for between the Court of Justice and the national courts is described in the opinon of Mr Advocate General Van Gerven in Case C-306/88, Rochdale Borough Council v. Anders: [1992] E.C.R. I-6457; [1993] 1 C.M.L.R. 426, para. 19.

19. See the same opinon at I-6480, para. 27, citing Case 182/84 , Criminal Proceedings against Miro BV: [1985] E.C.R. 3731; [1986] 3 C.M.L.R. 545.

20. FEDESA, para. [14], immediately after the passage already cited .

21. See, in particular, the judgment in Case 265/87, Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau: [1989] E.C.R. 2237, paras [21] & [22].

22. [1991] E.C.R. I-4151; [1994] 1 C.M.L.R. 887, paras [17]–[18].

23. [1994] E.C.R. I-4973, paras [89]–[91].

24. Cited above, para. [28].

25. [1996] E.C.R. I-5755 ; [1996] 3 C.M.L.R. 671; [1996] All E.R. (E.C.) 877, para. [58].

26. [1996] E.C.R. I-881, para. [18].

27. See the judgment in Case 138/79, Roquette Freres SA v. E.U. Council: [1980] E.C.R. 3333, para. [25].

28. [1999] 1 C.M.L.R. 825; [1999] 1 W.L.R. 927.

29. Upjohn, cited above, at p. 945, para. [34].

30. This was followed by numerous citations; see also the opinion of Mr Advocate General Leger at p. 937, para. 50.

31. Under Article 12 of Directive 65/65.

32. Although in International Trader's Ferry, Lord Slynn, at p. 1277, thought that the same result is often produced under both tests.

33. Cited above.

34. Which was concerned with the Sea Fish Licensing (Time at Sea) (Principles) Order 1993.

35. As it was put in the letter to Eastside on 20 May.

36. [1996] E.C.R. I-3953; [1996] 3 C.M.L.R. 257, para. 57.

37. See Case A/52, Sporrong and Lonnroth v. Sweden: (1983) 5 E.H.R.R. 35, para. [63].

38. (1995) 20 E.H.R.R. 1, p. 48, para. [71].

[redacted] - [redacted] MANCHESTER RESIDENT TESTIMONY ON TRIBECA, 07.04.2022

H[redacted] ...

With thanks

[redacted]

[redacted]

www.manchesterevents.org

Begin forwarded message:

[redacted]

Date: 8 April 2022 at 10:17:04 BST

[redacted]

Subject [redacted] - [redacted] **MANCHESTER RESIDENT TESTIMONY ON TRIBECA, 07.04.2022**

TO WHOM IT MAY CONCERN

My name is [redacted] and I am a resident of [redacted] TriBeCa Night Club (50 Sackville Street, Manchester, M1 3WF). I am writing as I wish to make it clear, as a member of the local community, what this establishment means to me and to so many others in the Gay Village of Manchester.

TriBeCa has been an iconic institution in the LGBTQIA+ community for more than 20 years: it has pioneered in the provision of safe spaces for intersectionality, with events such as Club Zindingi (an LGBT+ night for those in the Asian Community), promoted cultural awareness nights (including inter alia: Bulgarian, Hungarian, Romanian and South Asian nights) and trailblazed feminist causes, such as several women in comedy festival shows over the years, indicative of its ability to assume the role of sanctuary for all, not limited to those who want to "party" and have a good, safe time at the club. As further evidence of this, one only need look to Drywave, a series of alcohol-free nights, which is an initiative to help those recovering from addiction issues, by coming together and celebrating the small steps taken in their recovery in a place that is accommodating to their exact needs. Finally, TriBeCa is a haven for the surrounding community; during a recent fire at Sackville Place (part of the

[redacted], [redacted] opened up TriBeCa to offer shelter, warmth and a friendly face to those families and individuals affected, evidencing again that she and her club are the heart of our community.

For myself personally, [redacted], I have not only felt safe at the TriBeCa venue, but felt at home, repeatedly admiring [redacted] capability to take into consideration all surrounding stakeholders and do her utmost to make this institution as comfortable as possible for **all** (including potential noise pollution). Before I knew [redacted] I would often marvel at TriBeCa, and erroneously attribute any shouting in the street to individuals frequenting TriBeCa (the club was often closed at these particular times at 5/6am and these shouts were actually from individuals leaving Canal Street, walking along Sackville Street and passing in front of TriBeCa). As time has passed and I've become more aware of the attacks against [redacted] it is my perception that she (and by default TriBeCa) is the scapegoat for each & every noise complaint against the vibrant Gay Village nightlife, whereby all similar sounds are "pinned on" the club - and I have to say that this assumption is simply false! There needs to be an acknowledgement that the surrounding pollution originates, in reality, from those leaving the Canal Street area. [redacted] has taken extraordinary measures to mitigate the noise pollution that her venue may have been causing, working closely with sound engineer [redacted] of more than 20 years' experience in order to guarantee the comfort of the residents o[redacted] Whitworth House [redacted] and, of course, of all residents in the general area. Despite her efforts, she has again been met with much criticism from frustrated residents, who continue to blindly hold the incorrect perception that it is solely her club, TriBeCa, that is causing noise pollution for their residences. Indeed, in some cases, they have been refusing to work with [redacted] and her sound engineer, both of whom are trying so desperately to rectify any issues and to protect the institution that is TriBeCa.

To remove TriBeCa from the community would irrevocably tear a hole and destroy a haven for the LGBTQIA+ inter alia communities in the very fabric of Manchester's cultural soul; to do so would represent a regression in LGBTQIA+'s presence (first TriBeCa, then Canal Street?), the rights of any club owner not to receive the brunt of criticism and consequences of noise pollution (in a city centre, which is returning to normality following a 2-year pause as a result of Covid-19 lockdown restrictions) and finally would, in my view, fragment trust between the council and the respective community stakeholders. It is so refreshing, special and rare for a community to be blessed with a club owner, who not only searches for continuous feedback from those on whom her venue may have an impact, but who will also never cease to go above & beyond to incorporate this feedback, even to the detriment of her personal finances; and all of this she does out of unwavering and limitless respect to all of us.

I hope that those reviewing this case can see the morally correct course of action that should be adopted here; we, in our capacity as residents of the community in question, can, indeed, see it – it is unambiguously self-evident.

Should you require any further information from me, I am available at any time via my contact details below.

Yours faithfully

Fwd: Open letter about TriBeCa

[redacted]

With thanks

[redacted]

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Begin forwarded message:

[redacted]

Date: 31 March 2022 at 00:29:48 BST

[redacted]

Subject: Open letter about TriBeCa

[redacted] I feel compelled to have it on record that not once have I experienced any noice nuisance. The owner [redacted] has always asked for clear communication with residents - it is my observation she is been victimised- exclusion from the residents groups, untruths & assumptions all were so unfair. The TriBeCa that [redacted] has created is a vital community space- for far too many reasons I can pen here. Whitworth street & the the village can not loose TriBeCa.
Please feel free to contact me if I can assit with this investigation.
Kind regards

[redacted]

Fwd: Statement from local resident

[redacted]

With thanks

[redacted]

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Begin forwarded message:

From: [redacted]
Date: 10 April 2022 at 14:05:38 BST
To: [redacted]
Subject: Statement

To whom it may concern,

[redacted] and this building is in very close proximity to Tribeca bar. I have never had any issues at all with noise from this bar, in all of the [redacted] that I have resided here. There has never been any more noise from the bar, than from traffic, and the general hustle and bustle etc that is a normal part of city centre living.

Best wishes,

[redacted]

[redacted]

With thanks

[redacted]

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Begin forwarded message:

From: [redacted]
Date: 7 April 2022 at 17:49:09 BST
To: [redacted]
Subject: Tenant reference [redacted]

Hi,

I just wanted to send my thoughts over regarding the fantastic effort and engagement by Tribeca in solving issues that have been raised.

Moving into the area during lockdown has meant that I have had the luxury of living in the city when there was very little city traffic and clubs were not open meaning it was unnaturally quiet for a city center, however, I always realised that would not be the case when the country re-opened.

Early on I was surprised at the noise level (probably very naively), however, as the [redacted] I have to commend the management and staff of Tribeca who have gone above and beyond what a venue is required. They have constantly been on call to any issues (the majority not the venue's responsibility) and available for all local residents - even if at times I believe some of the complaints have been petty bordering on vindictive - the staff and management have handled all issues professionally and efficiently.

I highly value the venue and believe as a locally managed venue engages and contributes to the local community (for example opening for teas and coffees when there was a fire nearby to keep people warm and offer them somewhere to go)

I have always felt welcomed and respected whenever I have been to the venue and believe it is incredibly well managed and offers an inclusive atmosphere to everyone.

As previously mentioned I feel that the management has constantly engaged with the local community to understand issues and believe they have always come to an efficient and high quality solution. I am a huge fan of the work the manager and staff have done to address concerns and believe the venue is a valuable asset to the area and hope to see it continue to contribute for many more years to come.

Thanks,

[redacted]

[redacted]

With thanks

[redacted]

www.manchesterevents.org

Begin forwarded message:

From: [redacted]
Date: 7 April 2022 at 18:00:33 BST
To: [redacted]
Subject: TriBeCa reference

Hi [redacted]

Thanks for asking me to write a review of your club and business as a local resident, please feel free to circulate this feedback as you see fit.

For anyone reading this I have been a resident [redacted] and [redacted] which includes the majority of residents. The chat serves a purpose of getting to know your neighbours, general queries, and to raise any complaints we may have about the neighbourhood. I can state with absolute certainty and [redacted] of the building that we have had very little complaints of TriBeCa. There have been noise complaints from our building when there were a lot of people outside the venue, however the staff have reacted quickly when they have been made aware.

[redacted] set up a group where local residents within the surrounding buildings could voice any concerns they have had about noise in general. It would appear that the majority of concerns held have been in [redacted] as they are [redacted] It should also be noted that there were noise complaints from that building when the venue was not even open so there are a multitude of factors involved here and when there has been any mention of a noise complaint Tribeca's staff have reacted and been attentive to the residents needs. Soundproofing has taken place at the venue and a sound engineer is now on call at anyones need to ensure that residents have volumes set in the venue which don't disrupt them - this is first class service and basically offered as soon as any complaint is registered.

On first moving to Manchester TriBeCa was the only venue offering a delivery service of fresh pints, and this is what started my relationship with the venue. Deliveries were

prompt and b[redacted]erself, always with a big smile on her face. This made me want to go to the venue when it opened back up after lockdown, and I felt included in an lgbtq environment which [redacted]'ve not ever had this experience of a supportive culture previously.

When lockdown eased we ended up going to some of the open mic nights and dj nights which were very inclusive of all genders, race sexuality, age there was no judgement and essentially everyone is welcome. The staff and management have always been the friendliest making me feel like I could finally call Manchester my home after a long lockdown period and moving here when there was nothing open. There is a real need for the venue in the village as I don't have the same connection to any of the other venues in the gay village, they are a painted face with no soul behind it. With TriBeCa there is soul and the staff and management are the ones who make this the place I want to go to. It's always been safe, secure and a place I haven't felt judged on who I am - if this wasn't in the village I think we would be losing out on a true gem of a venue.

I'd like to wrap this up by thanking [redacted] who personally has made me feel like Manchester and TriBeCa are my home.

Kind regards
[redacted]

Sent from my iPhone

Re: Review

[redacted]

resident reference

On Thu, 7 Apr 2022 at 17:31 [redacted] wrote:

Hi [redacted]

Please feel free to circulate this feedback as you see fit.

[redacted] I have had a number of experiences with the venue and staff.

I was drawn to the venue initially due to the services being offered to local residents during lockdown when other venues were not operating. We availed of the food and drinks delivery service which was prompt, in person and always was an efficient and friendly handoff.

During this we discovered the pay it forward option whereby we could purchase an extra meal which would then pay for 4 meals for the homeless which would be handed out through a scheme run in the bar which is amazing as there is not enough support at all for the homeless in Manchester from any businesses.

I have had a couple of nights out in the venue which really have highlighted the diversity and inclusiveness of the venue as these nights have ranged from music from all parts of the world, to dance classes, to workshops, and [redacted]s a local amateur theatre company were gifted the facilities to shoot promotional footage for their upcoming shows which was a great gesture.

While attending the bar the staff have been very friendly, attentive and supportive, and I've always felt safe while there. Additionally [redacted]of a major city I've of course experienced the shock of post Covid noise pollution as venues open back up. I'd make very clear that Tribeca operates well within my expectations and very rarely can I hear music from the venue or even issues in the street that can be attributed to Tribeca directly.

I'd like to extend my thanks for setting up a local residents group where we can voice our concerns and you and your team have clearly worked tirelessly to address concerns promptly and satisfactorily. No other business in this very busy area has attempted the same.

In addition the nights when Tribeca has been closed has really highlighted the disruption caused by other bars, clubs and air bnbs in the area which I might have incorrectly attributed to Tribeca, so I'd like to apologise where I've been wrong in the past.

Thanks for your contribution in the community,

[redacted]

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