



## **Licensing Sub Committee Hearing Panel**

Date: Monday, 14 November 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 Antechamber**

Public access to the Council Antechamber 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 entrances of the Extension.**

## **Membership of the Licensing Sub Committee Hearing Panel**

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**Councillors** - Hilal, Hewitson and T Judge

## Supplementary Agenda

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6. **Review of a Premises Licence - Flamingo Restaurant and Bar, 6 Honey Street, Manchester, M8 8RG** 3 - 182  
Now contains additional information submitted by LOOH.

## Further Information

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

Ian Hinton-Smith  
Tel: 0161 234 3043  
Email: [ian.hinton-smith@manchester.gov.uk](mailto:ian.hinton-smith@manchester.gov.uk)

This supplementary agenda was issued on **Tuesday, 8 November 2022** by the Governance and Scrutiny Support Unit, Manchester City Council, Level 2, Town Hall Extension (Library Walk Elevation), Manchester M60 2LA

# **Name: Lauren Connell**

## **Additional Supporting Evidence**

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**Lauren Connell**  
**Neighbourhood Officer**  
**Licensing and Out of hours**

Manchester City Council

**Telephone** 0161 234 1220  
**Email** lauren.connell@manchester.gov.uk  
**Reference** Flamingo Restaurant and Bar Standard Licence Review

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**Exhibit LC1 – Licensing inspection notes 04/05/2022**

Score 29

Non compliant conditions:

- Annex 2 (1) CCTV - Only recording 17 days not 28
- (5) - Advised needs a written notice of authorisation for Staff
- (14) - Advised to make a number readily available
- Advised will be making a referral to GMFS

On inspection the premises have an enclosed area at the rear which is used for smoking Shisha. Advised DPS/PLH of Health Act 2006 and implications this would have on lic and ongoing prosecutions if not dealt with.



Mr Samsom Kahsay  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

**The Neighbourhoods Service**  
 Growth & Neighbourhoods

To reply please contact:

Lauren Connell

Tel: 07966 897 903

Email:

lauren.connell@manchester.gov.uk

Date: 20 April 2022

Our ref: 273779

Dear Sir

**Licensed Premises Inspection**  
**Licensing Act 2003 / Health Act 2006/ Environmental Protection Act 1990**

Following my visit to your premises on 4<sup>th</sup> May 2022 it was found that you were not fully complying with all the conditions within your premises licence. I have enclosed a copy of your licence and highlighted the relevant conditions which were not being upheld at the time of my visit. It was agreed that you would take the necessary steps to ensure that you fully comply with the highlighted conditions following my inspection visit.

As we discussed during the visit, it was also established that:

- You would be referred to Greater Manchester Fire and Rescue Service
- You would seek advice and take action regarding the fixed, fully enclosed structure at the rear of the premises where customers are smoking shisha

You should be aware that under Section 136 of the **Licensing Act 2003** it is an offence to carry on or attempt to carry on a licensable activity on or from any premises otherwise than under and in accordance with an 'authorisation' or knowingly allow a licensable activity to be so carried on. An authorisation includes a premises licence, club premises certificate or temporary event notice. A person found guilty of these offences is liable on conviction to 6 months imprisonment and an unlimited fine.

**Health Act 2006**

During the inspection it was established that customers are smoking shisha in a fully enclosed area at the rear of your premises. Under the Health Act 2006 it is an offence to allow people to smoke in an "enclosed" or "substantially enclosed" public place or work place.

The purpose of writing to you is to make you aware and ask you to ensure that you are taking the necessary steps to comply with the requirements of the Health Act 2006.

A maximum fine of £2500 can be imposed on whoever manages or controls a premises if they fail to prevent smoking in a smoke free place.

If you would like more information about the Health Act 2006 or advice about how to comply with this legislation I would advise you to look at the following website:  
[www.smokefreeengland.co.uk](http://www.smokefreeengland.co.uk).

We may now visit your premises to check that you are complying with the requirements of the Health Act 2006. Should we obtain satisfactory evidence that you are not complying with the requirements of the Health Act 2006 the matter may be referred to the City Solicitors which may result in legal proceedings being taken against you in the Magistrates Court.

### **Health Act 2006 – No Smoking Signs**

During your inspection it was also established that you are failing to display “No-smoking” signs at your premises. Under the Health Act 2006 it is an offence to fail to display the appropriate signage at an “enclose” or “substantially enclosed” public place or workplace.

The purpose of writing to you is to make you aware of the complaint and ask that you consider the measures you are taking in order to ensure that you comply with law.

The purpose of writing to you is to make you aware of the complaint and ask you to ensure that you are taking the necessary steps to comply with the requirements of the Health Act 2006.

If you would like more information about the Health Act 2006 or advice about how to comply with this legislation I would advise you to look at the following website:  
[www.smokefreeengland.co.uk](http://www.smokefreeengland.co.uk).

We may now visit your premises to check that you are complying with the requirements of the Health Act 2006. Should we obtain satisfactory evidence that you are not complying with the requirements of the Health Act 2006 the matter may be referred to the City Solicitors which may result in legal proceedings being taken against you in the Magistrates Court.

### **Receipt of a Complaint - Noise**

I would also like to take this opportunity to make you aware that since the inspection I have received several complaints concerning noise, particularly music and bass. The problem is reported to be generally occurring on Friday and Saturday nights and has been reported to be occurring from 10pm until 4am on occasions.

I am writing to you to make you aware of this complaint to ask you to consider if this problem is or has been occurring. At this stage I have not carried out any other investigation. However, if the alleged problem has been occurring I would ask that you take the necessary steps to ensure that it does not happen in the future.

You were advised that I would be revisiting your premises to ensure that all the above matters have been addressed and I would like to inform you that I intend to visit your premises again on **1<sup>st</sup> June 2022 at 2:00pm** to confirm that you are now complying with all the conditions within your licence.

If you will be unavailable for the above proposed revisit, please contact me using the above details at your earliest opportunity to arrange a more mutually convenient time and date.



You should be aware that we may now carryout monitoring visits to your premises or the area around it to monitor for any noise outbreak and/or customers smoking shisha in a fully enclosed area. Should we obtain satisfactory evidence that demonstrates any of the this matter will be passed to the City Solicitors which may result in legal proceedings being taken against you in the Magistrates Court.

In the meantime, may I thank you for your anticipated cooperation and I look forward to seeing you on the 1<sup>st</sup> June.

Yours Sincerely

Lauren Connell  
Neighbourhood Officer  
City Centre Compliance

**Additional Evidence LOOH – Exhibit LC3**

Descriptions from noise complaints made from 19/05/2022 to 16/08/2022:

**Complainant 1 made on 19/05/2022:**

Extra location information (if applicable): Flamingo Shisha Red Bank Manchester M4 4HF

Description of noise: It's very very loud music It's a place that has only recently opened. They have a makeshift shisha lounge in the garden with bright lights and obscenely loud music. This is an entirely residential area. The only other bar in the area is very quiet and accomodating and closes before midnight every night so it is definitely coming from flamingo.

Time it happens: Every weekend

How long does it last: It's last from early evening through until 3am

How long has it been going on: It's been going for a few weeks now. At least a month.

**Complainant 2 made on 19/05/2022:**

Extra location information (if applicable): Flamingo Shisha Red Bank Manchester M4 4HF

Description of noise: Loud music playing well into the night, sometimes until 3-4am

Time it happens: from 9/10pm through to 3-4am

**Complainant 3 made on 19/05/2022:**

Extra location information (if applicable): 6 Honey Street Manchester M8 8RG

Description of noise: I live in a high rise quite far from this property, not even facing their direction and I can hear its deep bass thumping in early hours. Friday and Saturday mostly. unsure of start time as im usually out, but going on til 4am. 6hr Every weekend

**Complainant 4 made on 07/06/2022:**

Extra location information (if applicable): 6 Honey Street Manchester M8 8RG

Description of noise: Incredibly loud music heard from a quarter mile away - other residents say they've had the same. Heard from [REDACTED] up until 4.30am.

Time it happens: 9pm-4.30am.

**Complainant 5 made on 07/06/2022:**

Extra location information (if applicable): Flamingo Shisha Lounge

Description of noise: Very loud music, pop/chanting Very loud music, can be heard clearly in nearby flat buildings, often on til very early hours of morning

Time it happens: From 9pm- around 3/4am

**Complainant 6 made on 07/06/2022:**

Extra location information (if applicable): Flamingo Shisha Lounge

Description of noise: The noise is very loud and I can hear it from my flat up the road which is approximately 400m away. It's the sound of music playing loudly.

Time it happens: Starts around 10pm until around 1am.

How long does it last: As above, for approximately 3 hours late at night, every weekend

**Complainant 7 made on 07/06/2022:**

Extra location information (if applicable): Flamingo Shisha Lounge

Description of noise: Pop music which is loud enough to travel half way down the street.

Time it happens: 9pm to 3am, weekends- including Sunday nights.

How long does it last: Overnight- 3 -5 hours

**Complainant 8 made on 07/06/2022:**

Description of noise: Music blaring and its full blast speakers

Time it happens: 11pm till 3am

How long does it last: 4 hours

**Complainant 9 made on 16/08/2022:**

Description of noise: Shisha lounge that plays loud music all night Playing loud music extremely late and many people in the area have complained about this property

Time it happens: 10pm till late

**Complainant 10 made on 16/08/2022:**

Extra location information (if applicable): Flamingo Shisha Bar

Description of noise: Loud club music heard from almost 400 metres away. Happening every weekend. Been reported many times and a common issue within the Green Quarter Facebook group – multiple people saying that after measuring sound levels it's at an illegal level yet nothing is being done.

Time it happens: Every Saturday up until 4am

How long does it last: Usually 10pm until 4, sometimes 5am

**Complainant 11 made on 23/08/2022:**

Extra location information (if applicable): music somewhere on the edge of Angel meadows park. If you stand in the park you cannot miss it.

What kind of noise is it: music somewhere on the edge of Angel meadows park. If you stand in the park you cannot miss it. Seems to be the first weekend of every month but If there is an event, such as the jubilee or a heatwave, it happens more speakers playing club music. It is coming from the other side of Angel meadows park and is audible even with all the windows closed

Where is it coming from: the edge of Angel meadows park..

How often is it: Until about 4am

**Exhibit LC4 - Proactive monitoring carried out 19th/20th May – notes as follows:**

00.22 Parked up on junction off red bank and honey St. facing prem, door open at front. windows closed on car. Engine off music heard from prem, heavy bass beat. (google maps in office approx 20m away) left car to determine how far down music could be heard in relation to comps. I walked down and music dies off just after Knowsley St Junction (google maps in office approx 40m). Returned back to prem. Door open at front, went in, no one in front area, possible issue of access to alcohol as no staff in front. 1 speaker on standby bar on excessively loud. Probably to entertain patrons in rear smoking area. Front dimly lit with purple lighting. Air thick with shisha odour, not very smoky but clothes smelt of shisha. I walked to rear approx 3 tables in use around 6-8 people in total in rear covered area hot coals on site and pipes by tables, no one seen smoking at time of visit but can assume people were smoking rear area was smoky and stung my eyes. Spoke to a male (not the licence holder as didn't recognise him) He gave his details as [REDACTED] I explained reason for visit re noise and gave advise re doors, male was very polite and reduced volume. I explained re shisha and no smoking inside, male didn't fully understand implications, I asked where owner/lic holder was, male stated it was his night off. On leaving male shook hands and doors closed. On returning to car music could still be heard as was breaking out from rear smoking area.

**Exhibit LC5 – Revisit following licensing inspection 01-06-2022**

Revisit carried out 1st June 2022

Visited premises with ST2 - Outstanding conditions all now being met.

Awaiting a fire risk assessment to be completed next week and will

email this over to me. Rear still erected, Samsom advised he is waiting for his builder to advise him what to do

**Exhibit LC6 – Noise call out, breach of licence 06-06-2022**

6th June 22 – Call out / music & open beyond permitted hours

Attended at 03:10 and loud music clearly audible from outside premises and could see neon lights at rear of premises. Knocked on front door, which was bolted closed, and a male staff member opened the door and let us in. We went to the bar and there was a female staff member behind the bar and 2 male customers there with a full bottle of beer and 2 full shots. There was no one else in the front bar area. We did not see any transactions take place. The

DPS Samsom came and spoke to us and turned the music off. He advised they had guests there from a wedding that had taken place over the weekend, and he thought today was a bank holiday so his hours were extended. We advised him today is not a bank holiday and even if it had been he would still have been past his permitted opening hours which are 02:30 on bank holidays. He apologised and advised he would close now. He took us into the backroom where everyone was sat and there were approx. 30-40 people sat round table that had bottles and plastic cups of alcohol on them, some full. No shisha pipes seen anywhere. Everyone was compliant and no issues with behaviour. We monitored until everyone had left the premises.

**Exhibit LC7 – Proactive monitoring for noise levels and shisha compliance**

00:08 Proactive visit at Flamingo, on arrival could hear music from across the road. Stood outside premises and could immediately smell shisha, all windows at the front of the premises open and front door.

Asked SIA for DPS Samsom.

Samsom came out and I asked him directly "If there is anyone smoking shisha inside" and he replied "yes" Entered premises and the air was thick with smoke and haze. Approx

30 patrons in front of premises, 'bar area' 4 pots with live glowing hot coals. No one seen smoking on pipe. Music within the premises was so loud I was unable to speak to Samsom, requested he turned it down, he did.

Warned Samsom regarding smoking indoors and also the volume of the music. Advised that I have already warned him regarding smoking shisha within the premises. Samsom said that there was a family party and that's why it's so busy.

I advised Samsom that my concern was not how busy the premises is, but how loud the music is and also the breaches of the Health Act when he has been warned previously.

SR1 checked in rear extension and all enclosed, plastic down. Approx 50 patrons with no evidence of shisha being smoking.

I requested that Samsom removes the coals from the the premises, and I will be returning to monitor dispersal.

**Exhibit LC8 – Notes from call out 24-07-2022****24th July 2022**

01.59 Call from comp to say that she couldn't hear much music anymore

02.06 Outside Flamingo. In vehicle, bass and occasional cheering/singing could be heard from within vehicle with windows slightly open. Parked approx 20 meters away

02.08 Lights within the premises on - music is turned off. People begin to exit

02:11 all lights within premises are turned on. (assume beginning to disperse)

02:18 Approx 25 patrons on street/road outside premises - no order to dispersal

02:21 DPS Samson identified to exit premises and stood with a male in a suit counting cash together, no one monitoring dispersal no SIA could be identified.

02.23 Approx 35 patrons spilt out onto street/road

02.24 approx 10 more patrons exit premises - no attempts to disperse crowds

02.27 one patron in white tshirt dragged out, banging on another external door attempting to get back in

02.34 Approx 40-50 patrons on road and street no attempts still to move on crowds. No Management, no SIA.

02.44 Patrons still continue to stand outside - one single patron exits.

02.55 Exited my vehicle with SR1 and approached Samson (DPS) explained my concerns RE dispersal and lack of management. SIA officers then appeared to exit premises. I expressed concerns RE safety as alot of these people were leaving and getting into cars and

driving off with people spilt out into the roads etc. He explained there had been a wedding party on tonight that's why it's busier than usual. I explained we would be monitoring for future dispersal.



# Temporary Event Notice

Payment Transaction number:- SSES00420097 | Form Reference number EF1/526621

## Premises User Information

Title

Mr

If other please state

*n/a*

Surname

KAHSAY

Forenames

SAMSOM

Previous names (Please enter details of any previous names or maiden names, if applicable)

*n/a*

Your date of birth

[REDACTED]

Your place of birth

[REDACTED]

National Insurance Number

[REDACTED]

Your current address (We will use this address to correspond with you unless you complete the separate correspondence box)

[REDACTED]

[REDACTED]

[REDACTED]

Telephone

[REDACTED]

Evening telephone

n/a

Mobile phone

n/a

Fax number

n/a

Email address

[REDACTED]

Address

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Telephone

n/a

Evening telephone

n/a

Mobile phone

n/a

Fax number

n/a

Email

n/a

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## Premises information

Please give the name and address of the premises where you intend to carry on the licensable activities or if it has no address give a detailed description (including the Ordnance Survey references)

FLAMINGO RESTAURANT AND BAR  
6 HONEY STREET  
MANCHESTER  
M8 8RG

Premises licence number

268123

Club premises certificate number

n/a

If you intend to use only part of the premises at this address or intend to restrict the area to which this notice applies, please give a description and details.

n/a

Please describe the nature of the premises

RESTAURANT AND BAR

Please describe the nature of the event

MUSIC EVENT, DJ, DANCING

## Licensable activities

The sale by retail of alcohol

Yes

The supply of alcohol by or on behalf of a club to, or to the order of, a member of the club

n/a

The provision of regulated entertainment

Yes

The provision of late night refreshment

Yes

Are you giving a late temporary event notice?

No

Please state the dates on which you intend to use these premises for licensable activities.

28/8/2022

Please state the times during the event period that you propose to carry on licensable activities (please give times in 24 hour clock).

0200 TO 0400 HOURS

Please state the maximum number of people at any one time that you intend to allow to be present at the premises during the times when you intend to carry on licensable activities, including any staff, organisers or performers (maximum 499).

80

If the licensable activities will include the supply of alcohol, please state whether the supplies will be for consumption on or off the premises, or both

On

Please state if the licensable activities will include the provision of relevant entertainment.

No

If yes selected, please state the times during the event period that you propose to provide relevant entertainment.

n/a

## Personal Licence Details

Do you currently hold a valid Personal Licence?

Yes

Issuing Authority

[REDACTED]

Licence Number

[REDACTED]

Date of Issue

n/a

Date of Expiry

n/a

Any further relevant details

n/a

Have you previously given a temporary event notice in respect of any premises for events falling in the same calendar year as the event for which you are now giving this temporary event notice?

No

If answering yes, please state the number of temporary event notices you have given for events in that same calendar year

n/a

a) ends 24 hours or less before; orb) begins 24 hours or less after the event period proposed in this notice?

No

Has any associate of yours given a temporary event notice for an event in the same calendar year as the event for which you are now giving a temporary event notice?

No

If answering yes, please state the total number of temporary event notices your associate have given for events in the same calendar year

n/a

a) ends 24 hours or less before; orb) begins 24 hours or less after the event period proposed in this notice?

No

Has any person with whom you are in business carrying on licensable activities given a temporary event notice for an event in the same calendar year as the event for which you are now giving a temporary event notice?

No

If answering yes, please state the total number of temporary event notices your business colleague(s) have given for events in the same calendar year.

n/a

a) ends 24 hours or less before; orb) begins 24 hours or less afterthe event period proposed in this notice?

No

## Declaration and Payment New

Name

[REDACTED]

Capacity in which you are making this application

AGENT

## Additional information

I understand

Yes

These are the files included with this application :-


Acknowledgement

I acknowledge receipt of this temporary event notice

Signature:

On behalf of the Licensing Authority

Date: 10th August 2022

Name of officer signing: 

**Exhibit LC10 – Call out notes from 21-08-2022**

21st August 22 – Call out – loud music / open beyond permitted hours I attended the premises with Paul Bonner at 03:58 am on 21/08/22 following a report of possible unauthorised licensable activities. On arrival I parked my car approx 25 metres away from Flamingo (Restaurant and Shisha) on Honey street on the other side of the road from the premises.

I could see the front door was open and lights were on inside. I could also clearly hear loud music coming from inside the premises. Even with my car windows up the music was loud and intrusive. The music had a heavy bass and what I presumed were African language vocals.

There was also a male standing at the door. I also witnessed another male enter the premises after being dropped off by a car. Another male walked past our cars whilst on the phone and a minute

later at 04:00 the music suddenly was switched off mid song. Paul then spoke to Ben Moran by phone, and we were asked to engage.

We entered through the front door and it was immediately obvious that there had been shisha smoked in the premises. The air was thick with smoke that had a distinct smell that I recognised as Shisha (from work in other Shisha premises). There was no evidence of any pipes.

There were approximately 20 men in the initial area of the premises near the bar. I walked through them to the bar (on the right as we entered). There were 2 bar staff, the till was still lit and switched

on. There was a male drinking a bottle of lager sitting at the bar. I asked a barman if he could get the manager. I then approached a male who identified himself as a security person.

I explained who we were, and he agreed to get the manager. A male then came from the rear of the premises and said he was the manager. He wrote his name and number in my PNB. He wrote [REDACTED] I asked him if he knew what time they were supposed to close as a

condition of the licence. He said 02:30. I said it is now past 04:00am and why were they still open. He said they were trying to get people out.

I asked what time they were allowed regulated entertainment on the licence and he said 02:30 am. I asked why we had listened to the music being played until 04:00 am. He said he was very sorry. Paul and I then went into the rear of the premises. This was also thick with smoke. There was a DJ packing his equipment up and he had his stand still out for his decks.

There were several tables. People by now were all leaving. There was one table in the corner with 5 people who were still drinking from plastic cups until told to leave by the manager.

By 04:10 staff were clearing up and all the customers had left. There were groups hanging around outside shouting. Whilst I got into my car I saw a taxi pick up one group of males.



Exhibit LC – photos 2108 external of premises



Exhibit LC – photo 2108 –



Exhibit LC – extension area with DJ set



Exhibit – rear extension males with alcohol



**Exhibit LC15 – Visit notes when requesting CCTV 25-08-2022**

Visited Flamingo Restaurant and Bar to request CCTV from weekend when officers visited and found the premises to be operating outside of permitted hours.

15.50 Arrived and entered Flamingo Restaurant and Bar. A male greeted myself and MW8 LC4 spoke to a male called Sampson who is the DPS. LC4 wrote down a list of dates and times that she required for CCTV. LC4 asked me to look around to see if there were any no smoking signs. I saw one on the wall next to the bar. I also saw another small one on a door leading into the rear passageway. As I walked into the rear area, that is enclosed (at the sides with plastic sheeting) I saw 2 males at a table, each with a lit Shisha pipe. There were hot coals on the top of the pipes and each person was witnessed inhaling and exhaling smoke. I could smell the smoke and could see it in the air as it filled the room.

LC4 took a photo of one of the pipes (Exhibit LC16) that was in use, LC4 then took some photos of the extension (see Exhibit LC17 and LC18) LC then spoke to Samson again about the CCTV and took photos of the no smoking signs within the premises, one next to the bar area (Exhibit LC19) and one on the door to the corridor to the rear of the premises (Exhibit LC20) then we left at approx 16.00

Exhibit LC – visit 25/08/22 shisha pipe



Exhibit LC – 2508 rear extension



**Exhibit LC – Photos from visit 25/08/22**





Exhibit – no smoking signs



Exhibit LC – no smoking signs



**Exhibit LC21 – Visit to collect CCTV officer 1**

Visit to collect CCTV – not available. Entered the premises at 14:23. 1 x female employee. I asked if the manager was available, and she pointed to a male employee who had since arrived. I asked the male if he was in charge. He stated not however he would call the manager. I spoke with the DPS - Samsom Kahsay (confirmed on phone screen).

He stated the CCTV was not available, he had been in contact with who installed the CCTV about accessing the data and he had updated LC4. I advised the DPS this was required urgently, and he would need to make this available ASAP. He will contact LC4 to arrange collection. There was a small group of male patrons who were initially at the rear of the premises but began to walk through the premises as I discussed with Mr Kahsay. They spoke to the male employee then returned to the rear of the premises.

Whilst I spoke with the DPS, LS2 assessed the rear of the premises to ensure compliance with the Health Act 2006. The air was smoky, and I questioned this with the male employee who stated it was a result of food being prepared, however the kitchen was visible at the front of the premises and didn't appear to be in operation at the time.

The male confirmed his name as [REDACTED] We then exited the premises and left the area.

**Exhibit LC22 – Visit to collect CCTV officer 2**

On Saturday the 27th August 2022 I attended FLAMINGO RESTAURANT. At approximately 1414hrs I was situated on RED BANK ROAD directly opposite FLAMINGO. At this time a black Mercedes saloon parked and 4 males exited and entered FLAMINGO.

At approximately 1419hrs MITCHELL WARD, LICENSING AND OUT OF HOURS OFFICER accompanied me. WARD and I then entered Flamingo at 1423hrs. On entering the premise we were greeted by a female staff member. WARD asked if the manager was available. The staff member then pointed to a black male who entered the premise behind us.

WARD spoke to the male and advised that we had come to collect CCTV footage which had been requested by the area officer LAUREN CONNELL, LICENSING AND OUT OF HOURS OFFICER. Whilst WARD continued to speak to the male, I entered the rear are of the building. The area was fully enclosed with a material roof and plastic sheeting for walls. The room was slightly hazy and there was a very strong smell of burning charcoal. On further inspection I witnessed an electric hot plate with hot glowing red coals (exhibit LC21).

I then proceeded to the front area of the building to ensure WARD was safe and did not require any assistance. Once I had confirmed this I returned to the rear area. I noticed that there was a makeshift chimney where coals were slowly burning and a coal basket containing hot red glowing coals (Exhibit LC22). I am familiar with these baskets due to my previous regulation of the Health Act 2006 and visiting many shisha establishments. These baskets are typically used to transport hot coals to be used in shisha pipes.

Next to the chimney I noted there was a white wooden door which was slightly open. I approached the door and opened it further. Inside I could see approximately 48 shisha pipes, 6 multipack boxes of charcoal, 10 boxes of wet shisha tobacco, 5 clay pots prepared for use (Tinfoil in place), Approximately 30 clay pots and approximately 50 water pipes of various colour and length (Exhibit LC23)

I then left the storage and shisha preparation area and returned to WARD at the front of the premise. We then left. Whilst in this area I witnessed 4 black males sat at a table in the rear garden area.

Exhibit - coals on floor visit 27/08



Exhibit – coals warming 27/08



Exhibit – shisha pipes 27/08





Mr Samsom Kahsay  
 Flamingo Restaurant and Bar  
 6 Honey Street  
 Manchester  
 M8 8RG

**The Neighbourhoods Service**  
 Growth & Neighbourhoods

To reply please contact:  
 Tel: 07966 897 903  
 Email:  
 lauren.connell@manchester.gov.uk

Date: 25 August 2022

Our ref: 279608

Dear Sir

### **Licensing Act 2003 & Health Act 2006**

Following my visit to your premises on **25<sup>th</sup> August** it was found that you were not fully complying with all the conditions within your premises licence. I have enclosed a copy of your licence and highlighted the relevant conditions which were not being upheld at the time of my visit.

As we discussed during the visit, CCTV was requested for the below dates and times:

- Friday 19<sup>th</sup> August – 7pm until 5am
- Saturday 20<sup>th</sup> August – 7pm until 5am
- Sunday 21<sup>st</sup> August – 7pm until 5am

It was agreed during the visit that this CCTV would be collected by council officers on Saturday 27<sup>th</sup> August at 14:00. However, the CCTV was not available when officers visited on Saturday 27<sup>th</sup>. You are now in breach of your premises licence (please see highlighted relevant conditions).

You should be aware that under Section 136 of the **Licensing Act 2003** it is an offence to carry on or attempt to carry on a licensable activity on or from any premises otherwise than under and in accordance with an 'authorisation' or knowingly allow a licensable activity to be so carried on. An authorisation includes a premises licence, club premises certificate or temporary event notice. A person found guilty of these offences is liable on conviction to 6 months imprisonment and an unlimited fine.

### **Health Act 2006**

We have recently visited your premises to reassess your current arrangements for smokers after advising you via written letter dated 20<sup>th</sup> May 2022.

Under the Health Act 2006, a smoke free place includes all buildings or premises which are



wholly or substantially closed and open to the public. A premises is considered substantially closed if it has a ceiling or a roof and the openings in the walls (i.e. gaps and missing walls) are less than half of the total area of the walls. Therefore any smoking area must be more than 50% open. Please find attached some examples of structures which would be considered acceptable and unacceptable. Please note, any tarpaulins and/or water-proof coverings would be considered walls in these circumstances.

**There are no exceptions for smoking shisha and any premises allowing smoking of any kind must comply with the legislation detailed above.**

After visiting your premises, I have found you to be in breach of the Health Act because you do not have any outdoor space in which to allow customers to smoke. Therefore, you must cease allowing customers to smoke inside your premises with immediate effect.

We will continue to monitor your premises and if you are found to be in breach of this legislation, we will take further enforcement action. **This action may include issuing any person found smoking on the premises a Fixed Penalty Notice of £50 under section 7 of the Health Act.**

**Furthermore, under Section 8 of the Health Act, any person who controls or is concerned in the management of the premises and fails to prevent smoking in a smoke free place can be fined, upon conviction, up to £2500.**

The Health Act also gives an authorised officer of the council, powers to seize any substance or product concerned with the offence of failing to prevent smoking in a smoke free place, under Schedule 2, Paragraph 2 of the Act, and to retain it as evidence in legal proceedings. **Officers who attend your premises in future, and find further offences under the Health Act may therefore seize any items, including tobacco and pipes for this purpose.**

You should be advised that I would be revisiting your premises to ensure that the above matters have been addressed. I would like to inform you that I intend to visit your premises again on **Friday 2<sup>nd</sup> September 2022 at 3:00pm** to confirm that you are now complying with all the conditions within your licence and collect the CCTV requested on Thursday 25<sup>th</sup> August.

If you will be unavailable for the above proposed revisit, please contact me using the above details at your earliest opportunity to arrange a more mutually convenient time and date.

In the meantime, may I thank you for your anticipated cooperation and I look forward to seeing you on Friday 2<sup>nd</sup> September.

Yours Sincerely

Lauren Connell  
Neighbourhood Officer  
City Wide Compliance

**Exhibit LC27 – visit 31-08-22 drop warning letter**

Arrived at 13:49 - As per case officer email I attended nearer 14:00.

I entered the premise at 13:56 and spoke to a female staff member and asked if the manager was in. She then shouted a male to come over. I then asked for the person the letter was addressed to, he just took the letter and said ok.

The male then stood in the doorway to the corridor. I said I need to go in the back area and look and walked past him as he moved.

In the rear covered area, there was one male smoking shisha and the room was smoky. (Exhibit LC28)

Exhibit LC28



**Exhibit LC29 – Proactive visit notes 07/09/2022**

Pro-active Visit to Flamingo due to pre-view to identify whether SIA book and incident log were in place. On entry to premises I identified myself with my Council ID badge and introduced RM5.

We spoke to a female who was carrying two bowls of soup to the rear of the restaurant, to the rear there were 2 single males sat on the inside of the awning which was fully secured down, with 2 shisha pipes, I could see the hot coals glowing red, a water pipe which came from the pipe being inhaled by the males who then exhaled smoke. The female, said she would call the DPS (Samson) who would come. He said he would be 20 mins on the phone and I said I would not wait that long and just wanted to see the SIA book and incident log which should be here and accessible if there were open.

He then talked the female to get the SIA book. I took pictures of the book (Exhibit LC30, LC31, LC32, LC33) and noted that the date for logs was August 2022 but the date on the diary was May 22 and all inputs were on one sheet.

Within 10 mins of taking pictures and speaking to Samson on the phone and asking the female about the licence, Samson arrived at the premises. He explained that this is the incident book and there had been no incidents. I asked about refusals, about SIA action and he said no they don't have issues. Samson allowed me to take pictures of the SIA badges of the people who used to work at the premises and the ones that currently work at the premises. There was a separate upside down input from Feb - April 2022 with dates and times which I took a picture of and all inputs were put on a single date in January.

I asked to be shown around the premises as it was not one we had been in before and Samson took us to the rear, where there were now 3 pipes being smoked. The two original males, and a group of 2 males and one female sat within an enclosed space, smoking shisha. We moved to the rear of the premises and stepped out to the rear garden. RM5 asked about the large amount of waste to the side of the food premises.

RM5 took pictures of this and Samson said he was not the owner of the premises to the side and it would appear to be an illegal tip. There were benches one with a glass on and children's play furniture with slide. RM5 asked if Samson has events outside in this space and Samson said he did. RM5 mentioned a complaint we had when we suspected it to be originating from this premises but had not been able to identify on the night and was a long way away so to be mindful of this.

I noted on exit a smashed window which was on an internal door with a sign saying please respect the neighbours. I would have expected - even if this was an accident to be in the incident log.

Exhibit LC30 – SIA door supervisor book (1) 07-09-2022

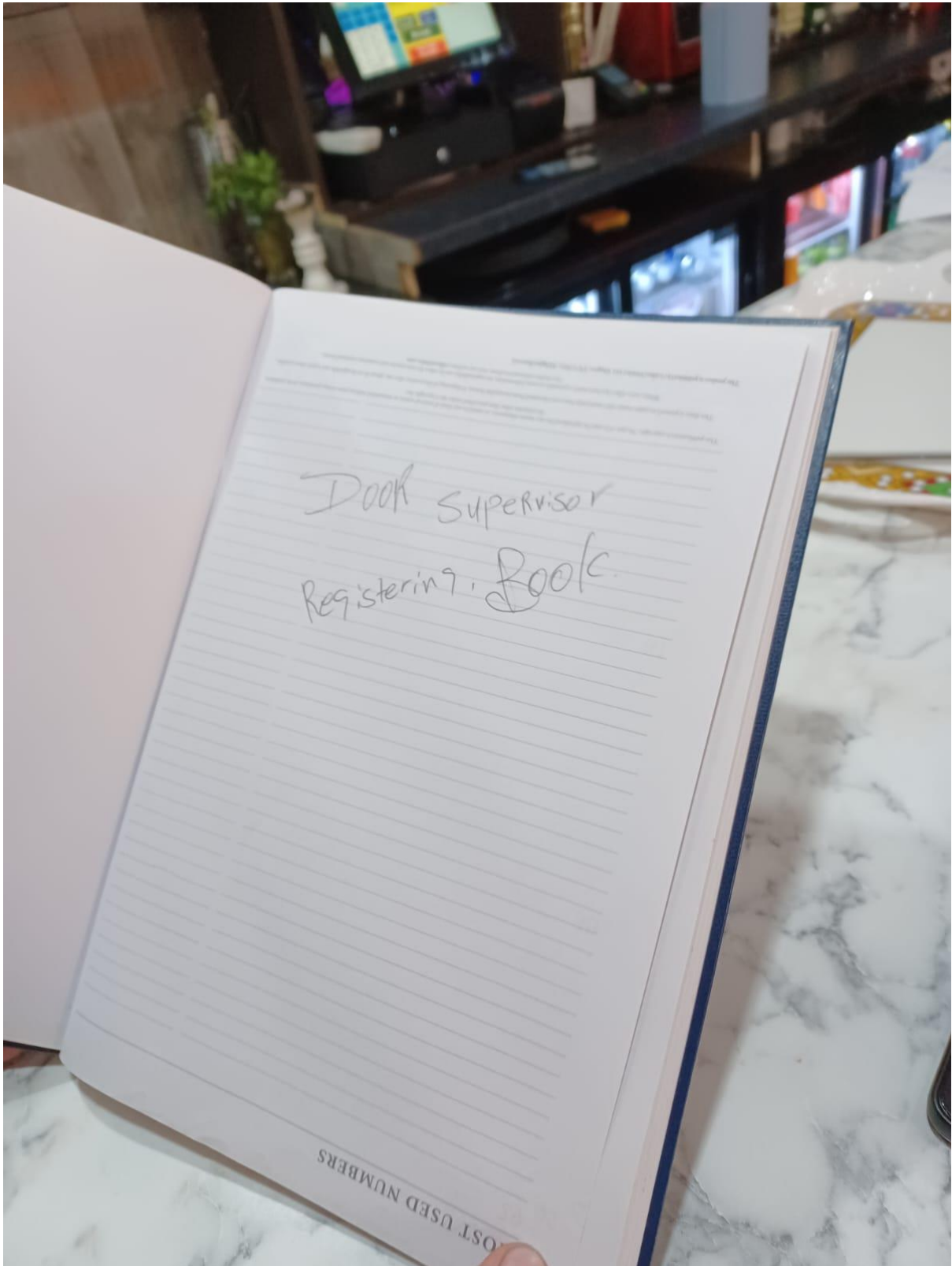
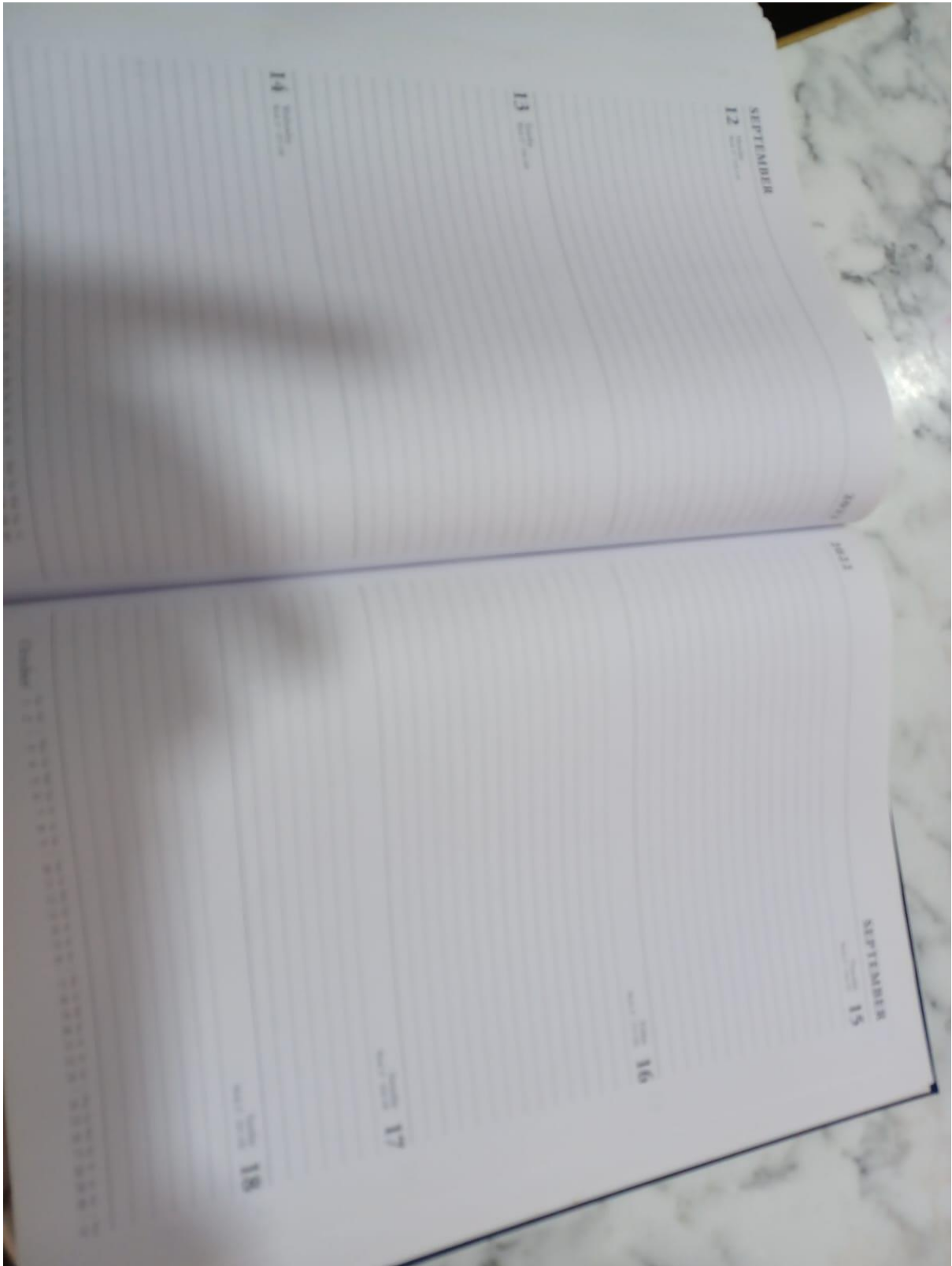


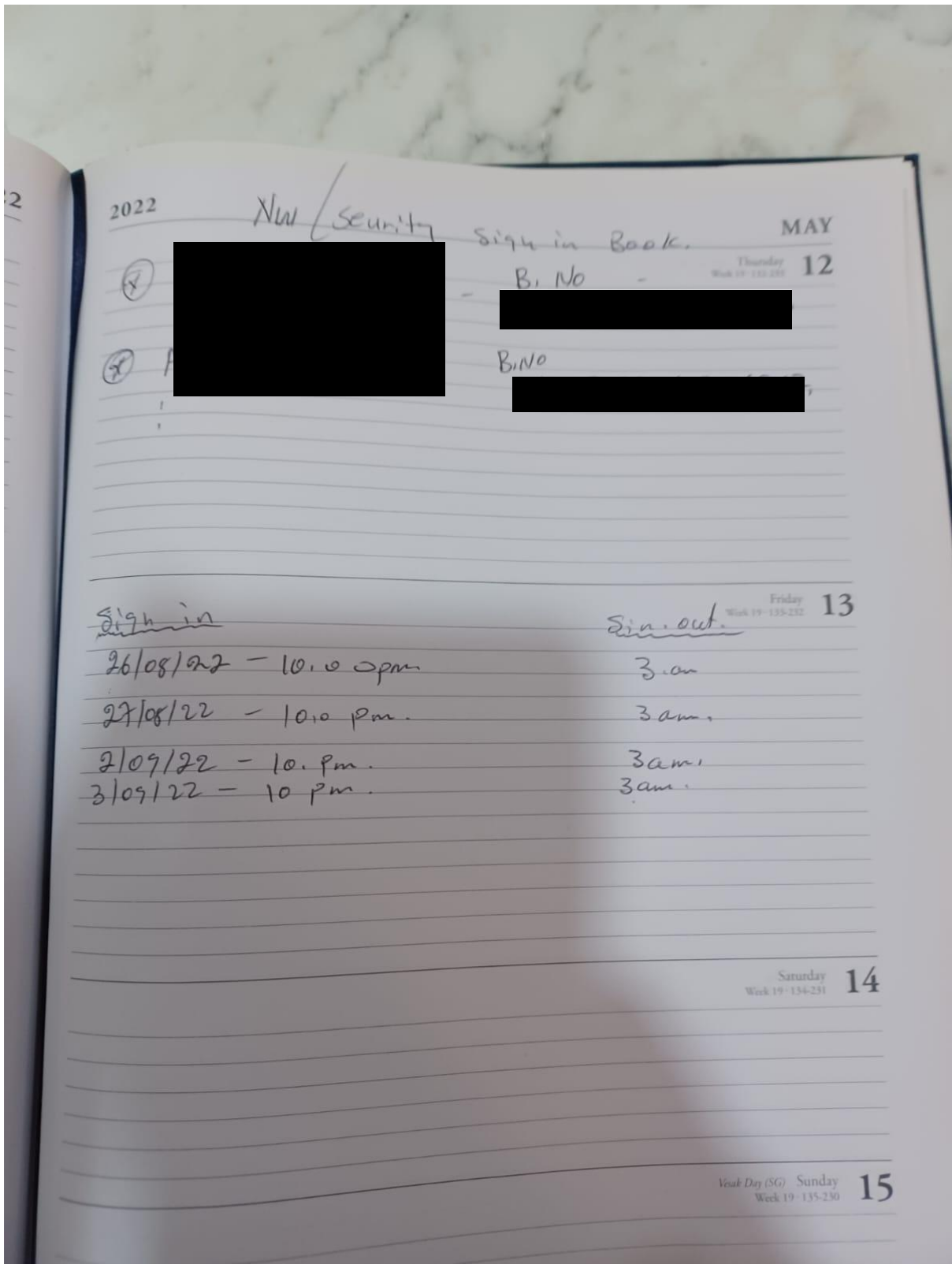
Exhibit LC31 – SIA door supervisor book (2) 07-09-2022



**Exhibit LC32 – SIA door supervisor book (3) 07-09-2022**

Date	Name	B. no	start	Finsh.
1 19/2/2022	[REDACTED]	[REDACTED]	11.00	3.00
2 26/2/2022	[REDACTED]	[REDACTED]	??	3.15
3 5/3/2022	??	??	??	3.15
4 12/3/2022	??	??	??	2.40
5 17/3/2022	??	??	??	1.50
6 26/3/2022	??	??	??	2.00
7 2/4/2022	??	??	??	2.40
8 9/4/2022	??	??	??	2.00
9 16/4/2022	??	??	??	2.00
10 23/4/2022	??	??	??	2.00
11 30/4/2022	??	??	??	3.00

**Exhibit LC33 – SIA door supervisor book (4) 07-09-2022**





**Exhibit LC34 – Summary from Pre review meeting 06-09-2022**

Pre-Review held with LC4, PC Isherwood and Mr Kahsay

LC4 opened the meeting explaining that following a number of visits and complaints we had concerns with the operation and management of the premises to be able to uphold the licensing objectives. She then read through the chronology of events and complaints that we had received.

One element of the noncompliance was the resistance to provide CCTV that had been requested a number of times by LC4. Mr Kahsay advised that he had asked a male called [REDACTED] to fix the CCTV so that he could provide it to MCC. However, this had been ongoing for a number of weeks and when challenged, Mr Kahsay was unable to provide any supporting evidence to show that he had attempted to have this issue resolved.

Mr Kahsay was asked if he knew the conditions that were on his licence but he advised he did not know. This is despite confirming that he prepared the original application in February 2022.

The issue in regards to the Health Act offences was also raised as we had also obtained evidence to show that offences were being committed on a regular basis as the area was not 50% open. Mr Kahsay said that the area in the rear was used for smoking shisha and that had now been opened up to be compliant for the past few days.

When questioned on who else is responsible at the premises he advised that his cousin, [REDACTED] manages the premises when he is back in Birmingham.

Mr Kahsay was questioned as to why he had been witnessed open and carrying out unlicensed activity past his permitted hours and he responded saying that he thought he was able to do so because of the Queens Jubilee, even though with an extra hour he still would have been outside of his permitted hours.

Despite no understanding of what is on his licence Mr Kahsay said that he himself undertakes the training with his staff. When challenged as to how he completes training with no knowledge of his own licence he shrugged.

During one of the observations, officers witnessed someone being carried out drunk. Mr Kahsay was questioned if people are permitted in who are overly intoxicated and he confirmed they are not. However, when questioned how someone was able to get in to such a state to be carried out he said that they were drunk before they even got in to his premises.

Door staff provision was also discussed, and Mr Kahsay advised that the doorman he uses are customers of his that he pays cash to directly, without a wage slip. He does not know which firm employ them and he does not know what an SIA badge looks like and therefore is unable to verify if they are registered doorstaff.

Mr Kahsay was asked what the four licensing objectives were but was unable to articulate a response.

The complete lack of understanding or knowledge around his requirements was astonishing and when asked what he would do to be able to ensure the safe running of the business all he offered was to re-read the licence.

**Exhibit LC35 – Visit to put up blue notice 27/09/2022**

Visited premises to put up blue notice for review requested by Premises Licensing.

No lamppost outside the premises so called Signe to see if she could speak to someone from PL to agree if ok to place on gate/railings next to premises (on their land) Matthew Callaghan agreed this was ok, to take a pic and send it over.

I entered the premises with ML4 to inform them that I was placing up the notice and not to take it down. No one was present in the front of the premises, so I entered the rear of the premises to the extension which was fully enclosed with all the plastic covers down which meant that the areas was fully enclosed. I asked if Samsom was available to speak to, a male made himself known and introduced himself as ■■■ He stated that he would call Samsom and let him know I am here and would ask him to come, I asked if he was near as if not it was ok I didn't need him I was just informing him I was putting up the notice.

ML4 walked around the rear extension as 2 males were sat on a table with a live shisha pipe smoking to one side of the room, to the other side of the room was another two males also smoking shisha with one pipe lit and hot coals. ■■■ then began to start to take sides up to try to attempt compliance. We then advised that we were leaving.

As we were exiting the premises DPS/PLH Samsom made himself known at the front door, I explained that we were placing up the blue notice for the review and that customers and TK were smoking shisha fully enclosed in the extension in the rear of the premises he stated that he would speak to them. Officers left.

**Exhibit LC36 – Proactive visit notes 13-10-2022**

13th October 22

22:55 - Proactive visit to Flamingo - Shisha compliance visit.

■ manager inside premises when entered. Could smell shisha odour as soon as we approached premises from the pavement outside. ■ Advised Samsom was in Birmingham. I explained I was still awaiting CCTV footage from him that I had requested last month.

Whilst I spoke with ■ SR1 entered rear extension of premises and found 13 males in the area playing cards. 5 hot coals pots glowing. 2 males witnessed physically smoking the pipes, All plastic sides down on the extension with two of the sides now made into permanent wooden type physical walls with fake flowers attached to it. SR1 come back to the front of the premises at 22:58.

I then advised ■ re smoking of shisha within the premises and the prosecution process that will be taking place, fines seizures etc. I asked if I could go into the back to take a look he said yes fine. On entering rear, 1 male looked at us and then got up and attempted to take some plastic up.

Left premises.

**Exhibit LC37 – Proactive visit notes 15-10-2022**

15/10/22 We arrived at 22:10 hours.

Flamingo, Honey Street, Cheetham Hill visited to check for Shisha, 8 tables in use in the rear area with a total of 23 people seated. 8 shisha pipes in use and 2 more being prepared. Also 1 table with 5 males seated playing cards, no money or chips/tokens on the table. X2

SIA door staff on duty. Sampson back from Birmingham tomorrow.

**Exhibit LC38 – Proactive visit notes 17-10-2022**

17/10/22 Sunday nights

Flamingo, Honey Street, Cheetham Hill- officers monitored to see what time they closed. At 00:50 officers engaged and advised the DPS that they should have been closed to the public at 00:30.

There were approx 10 to 15 customers still inside with one table of people still drinking (photo shows table after customers got up to leave when they saw us come in)

Enter premises at 0053hrs - premises appeared on first glance to be on close down - lights still on though and around 10-15 people inside spread around the premises. Witnessed 3 males sat at a table drinking pints of beer. Each glass was around half full with several glasses and empty beer bottles on the table. A female then appeared carrying a tray of around 15 empty beer bottles and she went towards the bar.

I heard her then say 'Guys' to the 3 on the table and they then stood up and proceeded to down their beer and prepare to leave (exhibit LC39). At this point various customers were engaging with both me and Mike before the DPS eventually introduced himself to Mike.

**Exhibit LC39 – Photo from visit 17-10-2022**





# MANCHESTER CITY COUNCIL

## LICENSING ACT 2003 PREMISES LICENCE

Premises licence number	268123
Granted	15/01/2022
Latest version	As above

### Part 1 - Premises details

Name and address of premises
<b>Flamingo Restaurant and Bar</b> 6 Honey Street, Manchester, M8 8RG
Telephone number
TBC

Licensable activities authorised by the licence
<ol style="list-style-type: none"> <li>1. The sale by retail of alcohol*.</li> <li>2. The provision of regulated entertainment, limited to: Live music; Recorded music;</li> <li>3. The provision of late-night refreshment.</li> </ol> <p>* All references in this licence to "sale of alcohol" are to sale by retail.</p>

### The times the licence authorises the carrying out of licensable activities

Sale by retail of alcohol							
Standard timings							
Day	Mon	Tue	Wed	Thu	Fri	Sat	Sun
Start	1100	1100	1100	1100	1100	1100	1100
Finish	2400	2400	2400	2400	0200	0200	2400
The sale of alcohol is licensed for consumption both on and off the premises.							
Seasonal variations and Non-standard Timings:							
New Year's Eve: Finish 0300							
Christmas Eve, Boxing Day & Bank holidays: Finish 0200							



Live music							
Standard timings							
Day	Mon	Tue	Wed	Thu	Fri	Sat	Sun
Start	1200	1200	1200	1200	1200	1200	1200
Finish	2300	2300	2300	2300	0100	0100	2300
Licensed to take place indoors only.							
Seasonal variations and Non-standard Timings: Christmas Eve, Boxing Day, New years Eve & Bank holiday: Finish 0200							

Recorded music							
Standard timings							
Day	Mon	Tue	Wed	Thu	Fri	Sat	Sun
Start	0900	0900	0900	0900	0900	0900	1000
Finish	2430	2430	2430	2430	0230	0230	2430
Licensed to take place both indoors and outdoors.							
Seasonal variations and Non-standard Timings: New Year's Eve: Finish 0330 Christmas Eve, Boxing Day & Bank holidays: Finish 0230							

Provision of late-night refreshment							
Standard timings							
Day	Mon	Tue	Wed	Thu	Fri	Sat	Sun
Start	2300	2300	2300	2300	2300	2300	2300
Finish	2400	2400	2400	2400	0200	0200	2400
Licensed to take place both indoors and outdoors.							
Seasonal variations and Non-standard Timings: Christmas Eve, Boxing Day, New Years' Eve & Bank holiday: Finish 0200							

Hours premises are open to the public							
Standard timings							
Day	Mon	Tue	Wed	Thu	Fri	Sat	Sun
Start	0900	0900	0900	0900	0900	0900	0900
Finish	2430	2430	2430	2430	0230	0230	2430
Seasonal variations and Non-standard Timings: New Year's Eve: Finish 0330 Christmas Eve, Boxing Day & Bank holidays: Finish 0230							

## Part 2

Details of premises licence holder	
Name:	Mr Samsom Kahsay
Address:	[REDACTED]

Details of designated premises supervisor where the premises licence authorises for the supply of alcohol	
Name:	Mr Samsom Kahsay
Address:	[REDACTED]
Personal Licence number:	[REDACTED]
Issuing Authority:	[REDACTED]

## Annex 1 – Mandatory conditions

### Door Supervisors

1. Only individuals licensed by the Security Industry Authority shall be used at the premises to undertake security activities, which include guarding against: -
  - (a) Unauthorised access or occupation (e.g. through door supervision),
  - (b) Outbreaks of disorder, or
  - (c) Damage,
 unless otherwise entitled by virtue of section 4 of the Private Security Industry Act 2001 to carry out such activities.

### Supply of alcohol

2. No supply of alcohol may be made under this premises licence:
  - (a) At a time when there is no designated premises supervisor in respect of the premises licence or,
  - (b) At a time when the designated premises supervisor does not hold a personal licence or his personal licence is suspended.
3. Every retail sale or supply of alcohol made under this licence must be made or authorised by a person who holds a personal licence.
4.
  - (1) The premises licence holder or club premises certificate holder must ensure that an age verification policy is adopted in respect of the premises in relation to the sale or supply of alcohol.
  - (2) The designated premises supervisor in relation to the premises licence must ensure that the supply of alcohol at the premises is carried on in accordance with the age verification policy.
  - (3) The policy must require individuals who appear to the responsible person to be under 18 years of age (or such older age as may be specified in the policy) to produce on request, before being served alcohol, identification bearing their photograph, date of birth and either –
    - (a) a holographic mark, or
    - (b) an ultraviolet feature.
5.
  - (1) A relevant person shall ensure that no alcohol is sold or supplied for consumption on or off the premises for a price, which is less than the permitted price.
  - (2) For the purposes of the condition set out in (1) above–
    - (a) “duty” is to be construed in accordance with the Alcoholic Liquor Duties Act 1979
    - (b) “permitted price” is the price found by applying the formula–
 
$$P = D + (D \times V)$$
 where –

- (i) P is the permitted price,
  - (ii) D is the amount of duty chargeable in relation to the alcohol as if the duty were charged on the date of the sale or supply of the alcohol, and
  - (iii) V is the rate of value added tax chargeable in relation to the alcohol as if the value added tax were charged on the date of the sale or supply of the alcohol;
- (c) “relevant person” means, in relation to premises in respect of which there is in force a premises licence –
- (i) the holder of the premises licence,
  - (ii) the designated premises supervisor (if any) in respect of such a licence, or
  - (iii) the personal licence holder who makes or authorises a supply of alcohol under such a licence;
- (d) “relevant person” means, in relation to premises in respect of which there is in force a club premises certificate, any member or officer of the club present on the premises in a capacity which enables the member or officer to prevent the supply in question; and
- (e) “value added tax” means value added tax charged in accordance with the Value Added Tax Act 1994.
- (3) Where the permitted price given by paragraph (2)(b) would (apart from this paragraph) not be a whole number of pennies, the price given by that sub-paragraph shall be taken to be the price actually given by that sub-paragraph rounded up to the nearest penny.
- (4) (a) Sub-paragraph (4)(b) applies where the permitted price given by paragraph (2)(b) on a day (“the first day”) would be different from the permitted price on the next day (“the second day”) as a result of a change to the rate of duty or value added tax.
- (b) The permitted price which would apply on the first day applies to sales or supplies of alcohol which take place before the expiry of the period of 14 days beginning on the second day.
6. (1) The responsible person must ensure that staff on relevant premises do not carry out, arrange or participate in any irresponsible promotions in relation to the premises.
- (2) In this paragraph, an irresponsible promotion means any one or more of the following activities, or substantially similar activities, carried on for the purpose of encouraging the sale or supply of alcohol for consumption on the premises –
- (a) games or other activities which require or encourage, or are designed to require or encourage, individuals to –
    - (i) drink a quantity of alcohol within a time limit (other than to drink alcohol sold or supplied on the premises before the cessation of the period in which the responsible person is authorised to sell or supply alcohol), or
    - (ii) drink as much alcohol as possible (whether within a time limit or otherwise);

- (b) provision of unlimited or unspecified quantities of alcohol free or for a fixed or discounted fee to the public or to a group defined by a particular characteristic in a manner which carries a significant risk of undermining a licensing objective;
- (c) provision of free or discounted alcohol or any other thing as a prize to encourage or reward the purchase and consumption of alcohol over a period of 24 hours or less in a manner which carries a significant risk of undermining a licensing objective;
- (d) selling or supplying alcohol in association with promotional posters or flyers on, or in the vicinity of, the premises which can reasonably be considered to condone, encourage or glamorise anti-social behaviour or to refer to the effects of drunkenness in any favourable manner;
- (e) dispensing alcohol directly by one person into the mouth of another (other than where that other person is unable to drink without assistance by reason of disability).

7. The responsible person must ensure that free potable water is provided on request to customers where it is reasonably available.

8. The responsible person must ensure that –

- (a) where any of the following alcoholic drinks is sold or supplied for consumption on the premises (other than alcoholic drinks sold or supplied having been made up in advance ready for sale or supply in a securely closed container) it is available to customers in the following measures –
  - (i) beer or cider: ½ pint;
  - (ii) gin, rum, vodka or whisky: 25 ml or 35 ml; and
  - (iii) still wine in a glass: 125 ml;
- (b) these measures are displayed in a menu, price list or other printed material which is available to customers on the premises; and
- (c) where a customer does not in relation to a sale of alcohol specify the quantity of alcohol to be sold the customer is made aware that these measures are available.

For the purposes of conditions 6, 7 and 8 above, a responsible person in relation to a licensed premises means the holder of the premise licence in respect of the premises, the designated premises supervisor (if any) or any individual aged 18 or over who is authorised by either the licence holder or designated premises supervisor. For premises with a club premises certificate, any member or officer of the club present on the premises in a capacity that which enables him to prevent the supply of alcohol.

## Annex 2 – Conditions consistent with the operating schedule

1. A CCTV camera system capable of providing evidential quality images in all lighting conditions shall be used. Images will be retained for a period of at least 28 days and be made available to Police Officers on reasonable written request for evidential purposes, in accordance with the relevant data protection legislation (currently GDPR 2018).
2. The CCTV recording equipment shall be kept in a secure environment under the control of the premises licence holder (PLH) and/or another named responsible individual.
3. There shall be sufficient members of trained staff available to be able to download or view CCTV evidence with the minimum of delay at the reasonable request of an authorised officer.
4. An incident log (which may be electronically recorded) shall be kept at the premises for at least six months, and made available on request to the Police or an authorised officer of the licensing authority, which will record the following incidents including pertinent details:
  - a) any crimes reported to the premises;
  - b) all ejections of patrons;
  - c) any incidents of disorder;
  - d) any faults in the CCTV system;
  - e) any refusal of the sale of alcohol;
  - f) any visit by a relevant authority or emergency service.
5. The Designated Premises Supervisor (DPS) shall ensure that a written notice of authority is kept at the premises for all staff who are involved in alcohol sales. The notice shall be made available for inspection upon request of the police or an authorised officer of the licensing authority.
6. The PLH / DPS will aim to develop and maintain good working relationships with Responsible Authorities, in particular with the Police.
7. The premises shall employ SIA registered doorman on a risk assessed basis which shall have regard to various factors including the expected number of customers, the time of the year, special occasions etc.
8. When using doorstaff, a minimum of 2 SIA registered door supervisors shall be on duty and they shall be clearly identifiable as door supervisors.
9. The PLH / DPS shall ensure that the following details for each door supervisor are entered in a register:
  - a) Full name;
  - b) SIA Certificate number and/or badge number;
  - c) The time they began and completed their duty;
  - d) The full details of any agency through which they have been allocated to work at the premises, if appropriate.
10. The register shall be kept on the premises and made available at all reasonable times to an authorised officer of the Licensing Authority or the Police. The register shall be so maintained as to enable an authorised officer to establish the particulars of all door supervisors engaged at the premises during the period of not less than the previous 12 months.

11. A staff training scheme shall be used for all staff authorised to sell alcohol. The training will emphasise the importance of responsible alcohol retailing and compliance with the licence conditions. Refresher training will be provided annually, records will be kept and be made available to responsible authorities.
12. The premises has a zero tolerance to drugs. Staff shall be vigilant, including checking the toilets, with the aim of ensuring that no drugs are being used on the premises.
13. A notice shall be displayed advising customers that the Police will be informed if anyone is found in possession of controlled substances or weapons.
14. A contact telephone number for the DPS or another nominated manager shall be made available for customers at all times when the premises are open.
15. The PLH shall comply with other legislative requirements to ensure that the premises are safe for customers and staff.
16. Deliveries to the premises will be arranged so as not to cause public nuisance.
17. The disposal of empty bottles/waste will be carried out at times that do not to cause any public nuisance.
18. Prominent, clear and legible notices shall be displayed at the exits asking customers to leave the premises quickly and quietly.
19. Staff shall monitor customers smoking outside on a regular basis to ensure that they are not causing any nuisance.
20. Staff shall regularly monitor the outside area.
21. The DPS or another nominated manager shall be in control of the sound levels of the music / entertainment to ensure that there is no nuisance.
22. The Challenge 25 scheme shall be adopted.
23. Any person who appears to be under 25 years old who attempts to buy alcohol will be asked to prove their age by producing an acceptable form of photographic ID such as a passport, photo driving licence, or PASS accredited proof of age cards.
24. The premises shall display clear and prominent signage advising customers of Challenge 25.
25. An alcohol refusals register will be kept and maintained. The register will include details of the date of the refusal, the time, and the reason(s) for refusing the sale. The register will be checked on a regular basis by the DPS or another manager and be made available for inspection by authorised officers.

**Annex 3 – Conditions attached after hearing by the licensing authority**

None

**Annex 4 – Plans**

See attached

# **Health Act 2006**

## **Section 6 No-smoking signs**

(1) It is the duty of any person who occupies or is concerned in the management of smoke-free premises to make sure that no-smoking signs complying with the requirements of this section are displayed in those premises in accordance with the requirements of this section.

(2) Regulations made by the appropriate national authority may provide for a duty corresponding to that mentioned in subsection (1) in relation to—

(a) places which are smoke-free by virtue of section 4,

(b) vehicles which are smoke-free by virtue of section 5.

The duty is to be imposed on persons, or on persons of a description, specified in the regulations.

(3) The signs must be displayed in accordance with any requirements contained in regulations made by the appropriate national authority.

(4) The signs must conform to any requirements specified in regulations made by the appropriate national authority (for example, requirements as to content, size, design, colour, or wording).

(5) A person who fails to comply with the duty in subsection (1), or any corresponding duty in regulations under subsection (2), commits an offence.

(6) It is a defence for a person charged with an offence under subsection (5) to show —

(a) that he did not know, and could not reasonably have been expected to know, that the premises were smoke-free (or, as the case may be, that the place or vehicle was smoke-free), or

(b) that he did not know, and could not reasonably have been expected to know, that no-smoking signs complying with the requirements of this section were not being displayed in accordance with the requirements of this section, or

(c) that on other grounds it was reasonable for him not to comply with the duty.

(7) If a person charged with an offence under subsection (5) relies on a defence in subsection (6), and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(8) A person guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding a level on the standard scale specified in regulations made by the Secretary of State.

(9) The references in this section, however expressed, to premises, places or vehicles which are smoke-free, are to those premises, places or vehicles so far as they are smoke-free under or by virtue of this Chapter (and references to smoke-free premises include premises which by virtue of regulations under section 3(5) are smoke-free except in relation to performers).

**Health Act 2006****Section 7 Offence of smoking in smoke-free place**

(1) In this section, a “smoke-free place” means any of the following—

(a) premises, so far as they are smoke-free under or by virtue of sections 2 and 3 (including premises which by virtue of regulations under section 3(5) are smoke-free except in relation to performers),

(b) a place, so far as it is smoke-free by virtue of section 4,

(c) a vehicle, so far as it is smoke-free by virtue of section 5.

(2) A person who smokes in a smoke-free place commits an offence.

(3) But a person who smokes in premises which are not smoke-free in relation to performers by virtue of regulations under section 3(5) does not commit an offence if he is such a performer.

(4) It is a defence for a person charged with an offence under subsection (2) to show that he did not know, and could not reasonably have been expected to know, that it was a smoke-free place.

(5) If a person charged with an offence under this section relies on a defence in subsection (4), and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding a level on the standard scale specified in regulations made by the Secretary of State.



**Health Act 2006****Section 8 Offence of failing to prevent smoking in smoke-free place**

(1) It is the duty of any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking.

(2) The reference in subsection (1) to a person smoking does not include a performer in relation to whom the premises are not smoke-free by virtue of regulations under section 3(5).

(3) Regulations made by the appropriate national authority may provide for a duty corresponding to that mentioned in subsection (1) in relation to—

(a) places which are smoke-free by virtue of section 4,

(b) vehicles which are smoke-free by virtue of section 5.

The duty is to be imposed on persons, or on persons of a description, specified in the regulations.

(4) A person who fails to comply with the duty in subsection (1), or any corresponding duty in regulations under subsection (3), commits an offence.

(5) It is a defence for a person charged with an offence under subsection (4) to show—

(a) that he took reasonable steps to cause the person in question to stop smoking, or

(b) that he did not know, and could not reasonably have been expected to know, that the person in question was smoking, or

(c) that on other grounds it was reasonable for him not to comply with the duty.

(6) If a person charged with an offence under this section relies on a defence in subsection (5), and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(7) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding a level on the standard scale specified in regulations made by the Secretary of State.

(8) The references in this section, however expressed, to premises, places or vehicles which are smoke-free, are to those premises, places or vehicles so far as they are smoke-free under or by virtue of this Chapter (and references to smoke-free premises include premises which by virtue of regulations under section 3(5) are smoke-free except in relation to performers).

**Health Act 2006****SCHEDULE 2 POWERS OF ENTRY, ETC.**

1 In this Schedule—

- “authorised officer” means authorised officer of an enforcement authority,
- “premises” includes any place and any vehicle.

2 An authorised officer has the right to do any of the following, on production (if required) of his written authority—

(a) at any reasonable hour, enter any premises (other than premises used only as a private dwelling house not open to the public) which he considers it is necessary for him to enter for the purpose of the proper exercise of his functions by virtue of Chapter 1 of Part 1 of this Act,

(b) there carry out such inspections and examinations as he considers necessary for that purpose,

(c) if he considers it necessary for that purpose, require the production of any substance or product, and inspect it, and take and retain samples of or extracts from it,

(d) take possession of any substance or product on the premises, and retain it for as long as he considers necessary for that purpose,

(e) require any person to give him such information, or afford him such facilities and assistance, as he considers necessary for that purpose.

3 An authorised officer may, if he considers it necessary for the purpose of the proper exercise of his functions by virtue of Chapter 1 of Part 1 of this Act, arrange for any substance, product, sample or extract mentioned in paragraph 2(c) or (d) to be analysed.

4 An authorised officer may make such purchases and secure the provision of such services as he considers necessary for the purpose of the proper exercise of his functions by virtue of Chapter 1 of Part 1 of this Act.

5 A person may not be required under paragraph 2 to give any information which he would be entitled to refuse to give in proceedings in the High Court on grounds of legal professional privilege.

6(1) A justice of the peace may exercise the power in sub-paragraph (3) if he is satisfied on sworn information in writing—

(a) that for the purpose of the proper exercise of the functions of an enforcement authority under Chapter 1 of Part 1 of this Act there are reasonable grounds for entry into any premises other than premises used only as a private dwelling house not open to the public, and

(b) of either or both of the matters mentioned in sub-paragraph (2).

(2) The matters are—

(a) that admission to the premises has been, or is likely to be, refused, and that notice of intention to apply for a warrant under this Schedule has been given to the occupier or a person who reasonably appears to the enforcement authority to be concerned in the management of the premises,

(b) that an application for admission, or the giving of such notice, would defeat the object of the entry, or that the premises are unoccupied, or that the occupier is temporarily absent and it might defeat the object of the entry to await his return.

(3) The justice may by warrant signed by him authorise any authorised officer to enter the premises, if need be by force.

(4) Such a warrant continues in force until the end of the period of one month beginning with the date on which the justice signs it.

7 An authorised officer entering any premises by virtue of paragraph 2, or of a warrant under paragraph 6, may take with him such other persons and such equipment as he considers necessary.

8 If premises which an authorised officer is authorised to enter by a warrant under paragraph 6 are unoccupied, or if the occupier is temporarily absent, then on leaving them that officer must leave the premises as effectively secured against unauthorised entry as he found them.

9 If by virtue of paragraph 2(d) an authorised officer takes possession of anything, he must leave on the premises from which it was taken a statement giving particulars of what he has taken and stating that he has taken possession of it.

10 If a direction of the appropriate national authority has effect under section 10(4), this Schedule has effect, in relation to any case or case of a description specified in the direction, as if references to an authorised officer were to a person acting on behalf of the appropriate national authority.

# The Queen on the Application of **Hope, Glory Public House Limited** v City of Westminster Magistrates Court v The Lord Mayor and the Citizens of the City of Westminster



Positive/Neutral Judicial Consideration

## Court

Court of Appeal (Civil Division)

## Judgment Date

26 January 2011

Case No: C1/2009/1736

Court of Appeal (Civil Division)

**[2011] EWCA Civ 31, 2011 WL 197281**

Before: The President of the Family Division Lord Justice Laws and Lord Justice Toulson

Date: Wednesday 26th January 2011

On Appeal from the Queen's Bench Division (Administrative Court)

Mr Justice Burton

CO/5324/2009

Hearing date: 9 November 2010

## Representation

Mr Ian Glen QC and Mr Gordon Bishop (instructed by Jeffrey Green Russell ) for the Claimant/Appellant.  
Mr David Matthias QC and Ms Emma Dring (instructed by Westminster City Council ) for the Interested Party/Respondents.  
The Defendant being neither present nor represented.

## Judgment

Lord Justice Toulson delivered the judgment of the Court:

## Introduction

1. This appeal raises a question about how a magistrates' court hearing an appeal from a decision of a licensing authority under the [Licensing Act 2003](#) ("the Act") should approach the decision.

## Background

2. The appellant owns the Endurance public house in Berwick Street, Soho. The premises are licensed for the sale and supply of alcohol and for the provision of entertainment and late night refreshment. The licence was granted on 12 March 2007 by Westminster City Council ("the council") as the local licensing authority.

3. On 15 April 2008 the council's Environmental Health Consultation Service ("EHCS") applied under [s51\(1\)](#) of the Act for a review of the licence after complaints were made by residents about the level of noise caused by customers taking their drinks out of the pub and congregating on the street during the evenings.

4. The hearing of the review took place before the council's Licensing Sub-Committee on 26 and 27 June 2008. The sub-committee heard submissions and evidence lasting about 5 hours. It decided to attach a number of conditions to the licence, the main condition being that no customer should be permitted to take drink from the premises in an open container after 6 pm. The decision and the sub-committee's reasons were notified to the appellant's solicitors by a letter dated 4 July 2008. The sub-committee stated:

"We have no policy to ban outside drinking, and we have accordingly not approached the case on that basis. We were not referred to the Council's statement of licensing policy by any party. We have had regard, as we must, to the policy,...but we have reached our decision based on the evidence that has been put before us in relation to these premises, and not on any policy ground.

The application was made on the grounds of public nuisance, and we first consider whether it was established that a public nuisance for the purposes of the Act exists. The evidence we heard was that large numbers of customers of the Endurance congregate on a daily basis outside the public house in Kemps Court in the evening, the numbers involved ranging from very few (5–10) to very many (180 or more). Those customers drinking and talking outside the premises make a noise. The noise is amplified by the configuration of buildings in the area. The noise causes public nuisance to surrounding residents, including, in particular residents directly opposite the public house.

The licensee argued that the noise was not so bad as to constitute a nuisance and that the complaints...were exaggerated. He called expert evidence in support of that proposition. We are completely satisfied that the noise is indeed a serious nuisance...

A number of local residents and other customers of the premises gave evidence about the way in which the premises were run, and we accept that the premises are valued by its customers and that a number of people enjoy being able to drink outside. We reject however the argument that a licensee has a fundamental right to, in effect, appropriate a part of the public realm for his own commercial purposes, if the effect of doing so is to cause serious public nuisance to his neighbours. Accordingly, we are persuaded that it is appropriate to take steps to prevent that public nuisance from continuing.

We recognise that steps should only be taken where they are necessary and that it cannot be necessary to take disproportionate steps..."

5. The sub-committee then considered the conditions proposed by EHCS and additional conditions proposed by the police. It concluded that most of the proposed conditions were required.

6. The appellant appealed against the decision to the City of Westminster Magistrates Court under [s181](#) and [schedule 5](#) of the Act.

7. At a preliminary hearing on 7 May 2009 District Judge Snow heard argument about how he should approach the decision of the sub-committee on the hearing of the appeal. He held that he was bound by the decision of the *Court of Appeal in Sagnata Investments Limited v Norwich Corporation [1971] 2 QB 614*, in the light of which he ruled:

“I will therefore

- (1) Note the decision of the licensing sub-committee.
- (2) Not lightly reverse their decision.
- (3) Only reverse the decision if I am satisfied it is wrong.
- (4) I will hear evidence.
- (5) The correct approach is to consider the promotion of the Licensing Objectives. To look at the [Licensing Act 2003](#), the Guidance made under [section 182 LA03](#), Westminster's Statement of Licensing Policy and any legal authorities.
- (6) I am not concerned with the way in which the Licensing Sub-Committee approached their decision or the process by which it was made. The correct appeal against such issues lies by way of Judicial Review.”

8. The district judge heard the appeal over 5 days between 11 and 25 June 2009, during which he heard 4 days of evidence, considered 1797 pages of statements and exhibits and visited the site. On 30 June 2009 he delivered a 22 page written judgment. His conclusions in summary were:

“I find, on the balance of probabilities, that given the number of Residents, Students and Teachers affected, and given the geographical spread, that the nuisance clearly is a public nuisance.

...

The evidence is clear, that the public nuisance arises between 6 pm and 11 pm. The conditions imposed by the Licensing Sub-Committee are necessary and proportionate to ensure the promotion of the licensing objectives.

...

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

9. The appellant applied for judicial review of the district judge's decision on various grounds. The primary argument was that the district judge's ruling about how he should approach the decision of the sub-committee was wrong in law.

10. The appellant's application for permission to apply for judicial review was dismissed by Burton J in a judgment dated 21 July 2009.

11. Permission to appeal was refused by Moses LJ on paper but was granted by Sir Mark Waller after an oral hearing on 19 May 2010. The permission was limited to the single question whether the district judge's self-direction was correct. As to that, Sir Mark Waller observed:

“So far as the direction is concerned, the position may well be covered by the authority *Sagnata Investments Limited v Norwich Corporation* [1971] 2 QB 614, but it seems to me that the question of whether it is an appropriate direction and the question of whether that is the right way in which a magistrate should approach an appeal in which he is hearing all the evidence de novo is a matter of some importance. We can spend a great deal of time arguing about the arguability of the point and it is better to have a decision which clarifies the position, which at present there is not.”

### Fresh evidence

12. In addition to the ground on which leave to appeal was granted, Mr Glen QC sought leave on behalf of the appellant to introduce fresh evidence. The purpose of the fresh evidence was to rebut evidence given by a witness, Ms Bailey, at the hearing before the district judge to the effect that noise from the Endurance disturbed lecturers and students at the nearby Westminster Kingsway College. Ms Bailey had provided a witness statement on 15 January 2009, which had been disclosed to the appellant's representatives soon afterwards, i.e. several weeks prior to the hearing before the district judge. The fresh evidence came from others at the college and was obtained in October 2010, i.e. several months after Waller LJ granted limited permission to appeal. We can see no basis on which the late discovery of this evidence could provide a proper ground for judicial review of the district judge's decision and we refuse the application for permission to introduce it.

### Licensing Act 2003

13. The short title of the Act is:

“An Act to make provision about the regulation of the sale and supply of alcohol, the provision of entertainment and the provision of late night refreshment, about offences relating to alcohol and for connected purposes.”

14. The Act brought about major changes to the licensing system in England and Wales. The background, nature and purpose of its provisions are summarised in the Explanatory Notes to the Act.

15. Essentially, the Act integrated alcohol, public entertainment, theatre, cinema, night café and late night refreshment licensing. Previously there was a patchwork system under which liquor licences were granted by licensing magistrates but other licensing functions, such as public entertainment licensing, were the responsibility of local authorities. The Act followed

the publication in April 2000 of a White Paper (Cm 4696) entitled “Time for Reform: Proposals for the Modernisation of Our Licensing Laws”.

16. The Act created a unified system of regulation of the activities of the sale and supply of alcohol, the provision of regulated entertainment and the provision of late night refreshment, referred to in the Act as the “licensable activities”. The White Paper proposed that the licensing authority under the new scheme should be the local authority; and the Act follows that proposal. The government explained its reasons in the White Paper as follows:

“117. The current responsibility of magistrates for liquor licensing reflects their traditional role in maintaining the peace and the association of alcohol with crime. Entertainment licensing came on the scene at a time when the magistrates' role had moved a long way from law enforcement towards the administration of justice. With an integrated system of licensing it is necessary to decide if the responsibilities should fall to the magistrates or the local authorities or some third body which might involve both.

...

123. There are three compelling reasons in favour of giving the local authority (at district level) the responsibilities we have described in this White Paper. They are:

- **Accountability:** we strongly believe that the licensing authority should be accountable to local residents whose lives are fundamentally affected by the decisions taken
- **Accessibility:** many local residents may be inhibited by court processes, and would be more willing to seek to influence decisions if in the hands of local councillors
- **Crime and disorder:** Local authorities now have a leading statutory role in preventing local crime and disorder, and the link between alcohol and crime persuasively argues for them to have a similar lead on licensing.

124. In reaching our conclusion, we do not in any way seek to devalue the importance of the wider contribution the local licensing justices have made for so many years. While in our proposals they would be relieved of administrative licensing responsibilities, they would retain, in their capacity as magistrates, the responsibility for dealing with people charged with offences under licensing law and for the imposition of sanctions and penalties in respect of personal licence holders.”

17. Magistrates also have an appellate function, which lies at the heart of this appeal.

18. [Section 4](#) sets out general duties of licensing authorities. It identifies “licensing objectives” which licensing authorities are to promote. These include the prevention of public nuisance. [Section 5](#) requires licensing authorities to produce statements



of licensing policy for three year periods. In carrying out its licensing functions, a licensing authority must have regard to its licensing statement and to any guidance issued by the Secretary of State for Culture, Media and Sport under s182 . Before determining its policy for a three year period, a licensing authority must go through a process of public consultation: s5(3) . Section 6 provides for licensing authorities to conduct their licensing functions through licensing committees. Section 9 deals with proceedings before licensing committees and empowers the Secretary of State to make regulations about them.

19. There are various types of “personal licence” and “premises licence” which a licensing authority may grant. The present case concerns a premises licence granted under s18 . It is open to a licensing authority to attach such conditions to a licence under s18 as it considers necessary for the promotion of the licensing objectives identified in s4 .

20. Under s51 an “interested party” or a “responsible authority” may apply to the licensing authority for a review of a premises licence. An interested party includes anyone living or involved in a business in the vicinity: s13(3) . A responsible authority includes the local authority which has statutory responsibilities in relation to the protection of the environment and human health: s13(4)(e) . In the present case the applicant for the review was the council, acting through the EHCS. Section 53 expressly permits a local authority to make an application under s51 for a review of a premises licence in its capacity as a responsible authority and to determine the application in its capacity as the licensing authority.

21. Section 52 provides that a licensing authority which receives an application under s51 may, after holding a hearing to consider it and any relevant representations,

“take such of the steps mentioned in subsection (4) (if any) as it considers necessary for the promotion of the licensing objectives.”

The steps mentioned in subsection (4) include modifying the conditions of the licence.

22. Section 52(10) requires the licensing authority to notify its determination, and its reasons for making it, to the holder of the licence, the applicant, any person who made relevant representations and the local chief officer of police.

23. Section 181 and schedule 5 provide a system for appeals from decisions of a licensing authority to a magistrates' court. Paragraph 8 of schedule 5 deals with appeals against decisions made under s52 . It provides:

“(1) This paragraph applies where an application for review of a premises licence is decided under section 52.

(2) An appeal may be made against that decision by-

(a) the applicant for the review,

(b) the holder of the premises licence or

(c) any other person who made relevant representations in relation to the application.”

24. The powers of a magistrates' court on an appeal from a decision of the licensing authority are to dismiss the appeal, to substitute any other decision which could have been made by the licensing authority, or to remit the case to the licensing authority to dispose of it in accordance with the direction of the court: [s181\(2\)](#) .

25. The [Magistrates' Courts Rules 1981](#) (made under the Magistrates' Court Act ) provide that where a statutory appeal lies to a magistrates' court against a decision or order of a local authority or other authority, the appeal shall be by way of complaint for an order ( [rule 34](#) ). The rules also provide that on the hearing of a complaint, it is for the complainant to go first in calling evidence ( [rule 14](#) ).

### The appellant's submissions

26. Mr Glen submitted that the district judge wrongly placed the burden on the appellant to disprove that the noise caused by customers of the Endurance was such as to amount to a public nuisance and that the conditions imposed by the licensing authority were necessary and proportionate. He submitted that it was for the EHCS to prove its allegation of public nuisance and to establish that the modifications to the licence were necessary and proportionate. The hearing before the district judge was a hearing de novo, at which evidence was given and tested by cross-examination. Mr Glen pointed out that the licensing sub-committee itself stated that its decision was not based on any policy ground. Rather, it turned on the sub-committee's assessment of the facts. On factual issues of that kind, it undermined the nature of an appeal process by way of rehearing if the court started with a presumption in favour of the licensing authority. Moreover, such an approach did not comply with the requirement of article 6 of the European Convention that in the determination of his civil rights everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In support of this submission he relied on the following passage from Paterson's Licensing Acts, 2009, para 5.4 :

“Assuming we are correct in saying that the hearing in the magistrates' court needs to be article 6 compliant, then the magistrates would not be an “independent and impartial” tribunal if the court starts off from a position favouring the decision of the licensing authority. The licensing authority will be a party to any appeal and the success or failure of the appeal should depend on the evidence which is given and the arguments which are put forward.”

27. Mr Glen also cited the decision of the Divisional Court in *R(Chief Constable of Lancashire) v Preston Crown Court [2001] EWHC Admin 928* . That case concerned an appeal from licensing justices to the crown court under the [Licensing Act 1964](#) . It was argued that there was a breach of article 6 because the composition of the court included two members who belonged to the same licensing committee as the magistrates whose decision was under appeal. The argument was rejected, but Mr Glen relied on a passage (at para 18) where Laws LJ, who delivered the main judgment, referred to the crown court conducting “a rehearing in the full and proper sense”. If it was to be a rehearing in that sense, Mr Glen submitted that it must follow that the burden of proof on the appeal was the same as on the original hearing.

28. Mr Glen cited a number of other authorities for the proposition that an appeal against a licensing decision has long been recognised to be a rehearing. It is not necessary to refer to them, because it is not in dispute that the appeal is a rehearing at which the affected parties are all entitled to call evidence, and that the court must make its decision on the full material before

it. The issue is what is the proper approach to the original decision and, in particular, the reasons given for it. Mr Glen did not submit that they should be disregarded. He accepted that the court hearing the appeal could properly take into consideration the reasons given by the licensing authority, but not to the point of placing a legal burden on the appellant.

29. Mr Glen submitted that the district judge went wrong in attaching too much significance to a sentence from a judgment of Lord Goddard CJ in *Stepney Borough Council v Joffe (1949) 1 KB 599* cited by Edmund Davies LJ in *Sagnata Investments Limited v Norwich Corporation*. In *Sagnata Investments Limited v Norwich Corporation* an application was made under the Betting Gaming and Lotteries Act 1967 for a permit to open an amusement arcade in Norwich. The application was refused by the local authority and the applicant appealed to quarter sessions. The recorder who heard the appeal had written reasons for the refusal furnished by the town clerk and evidence of witnesses on both sides as to the merits of the application. He did not have any information about what had happened before the licensing committee. He allowed the appeal. The local authority appealed to the Divisional Court (whose judgment is not reported) and then to the Court of Appeal (Lord Denning MR, Edmund Davies and Phillimore LJJ). Its appeal was dismissed by the majority, Lord Denning dissenting. Lord Denning considered that the local authority was entitled to its opinion that it was socially undesirable to have such arcades in Norwich and that the recorder was wrong to substitute his view for those of the elected body responsible for making such decisions.

30. The majority considered that the recorder had been entitled to conclude that the local authority had effectively decided that it would not grant any permit under the Act for an amusement place in Norwich and that there was no error of law in his decision to allow the appeal. Edmund Davies LJ, at page 633, quoted Lord Denning in the course of argument as summarising the issue in this way:

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

31. Edmund Davies LJ considered that this was a false antithesis. From the reasons which he gave for preferring an intermediate position, he must have understood the second of Lord Denning's alternatives (“an appeal proper”) as confined to deciding whether the local authority's decision was wrong in law on the material before it. He went on to say, at page 636:

“The provision for an appeal to quarter sessions seems to me largely, if not entirely, “illusory” if the contention of the appellant council is right. If it is, I am at a loss to follow how the recorder set about discharging his appellate functions. Lacking all information as to what had happened before the local authority, save the bare knowledge that they had refused the application and their written grounds for refusal, he would be powerless, as I think, to make any effective examination of the validity of those reasons.”

32. Edmund Davies LJ expressed his conclusion as follows:

“...I hold that the proceedings before this recorder were by way of a complete rehearing.

But, contrary to what has been contended, this conclusion does *not* involve that the views earlier formed by the local authority have to be entirely disregarded by quarter sessions. It is true that in *Godfrey v Bournemouth Corporation* [1969] 1 WLR 47, after observing that an appeal to quarter sessions under [schedule 6](#) to this same Act was by way of a complete rehearing, Lord Parker CJ said, at p 52, “the discretion is a discretion which the recorder in the present case had to arrive at himself uninfluenced by what the local authority had done”. But with respect, I do not accept this. It went much too far, it was in direct conflict with the view which Lord Parker had earlier expressed in *R v Essex Quarter Sessions, ex parte Thomas* [1966] 1 WLR 359 -363, it was contrary to the approach adopted both by the recorder and by Lord Parker CJ himself in the instant case, and it was, with deference, an uncalled-for observation. Here again, *Stepney Borough Council v Joffe* [1949] 1 KB 599 establishes what I regard as the proper approach, for, having made the point that there was in that case an unrestricted appeal, Lord Goddard CJ continued at pp 602, 603:

“That does not mean to say that the court of appeal, in this case the metropolitan magistrate, ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter, and ought not lightly, of course, to reverse their opinion. It is constantly said (although I am not sure that it always sufficiently remembered) that the function of a court of appeal is to exercise its powers when it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right.”

Phillimore LJ's judgment was to similar effect.

33. Mr Glen observed that that case was one in which the local authority's decision had been based on a general policy, and that it was therefore right for the recorder to attach weight to the local authority's policy, although he still had to form his own judgment on the evidence whether a permit should be granted. The decision, he submitted, provided no support for taking a similar approach where (as the licensing sub-committee recognised in the present case) no question of licensing policy was involved. The core question in this case was whether the noise caused by the customers of the Endurance amounted to a public nuisance, and this was a matter for the EHCS to establish on the evidence called before the district judge.

### The council's submissions

34. Mr Matthias QC submitted that Burton J was right in his approach to *Stepney Borough Council v Joffe* and *Sagnata Investments Limited v Norwich Corporation* and his dismissal of the appellant's claim. Burton J said in his judgment:

“43. I conclude that the words of Lord Goddard approved by Edmund Davies LJ are very carefully chosen. What the appellate court will have to do is to be satisfied that the judgment below “is wrong”, that is to reach its conclusion on the basis of the evidence put before it and then to conclude that the judgment below is wrong, even if it was not wrong at the time. That is what this district judge was prepared to do by allowing fresh evidence in, on both sides.

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

45. At the end of the day, the decision before the district judge is whether the decision of the licensing committee is wrong. Mr Glen has submitted that the word “wrong” is difficult to understand, or, at any rate, insufficiently clarified. What does it mean? It is plainly not “*Wednesbury* unreasonable” because this is not a question of judicial review. It means that the task of the district judge – having heard the evidence which is now before him, and specifically addressing the decision of the court below – is to give a decision whether, because he disagrees with the decision below in the light of the evidence before him, it is therefore wrong.”

35. Mr Matthias submitted that as a matter of principle, as well as precedent, there are good reasons why the magistrates' court should pay great attention to the decision of the licensing authority and should only allow an appeal if satisfied, on the evidence before it, that the decision was wrong. He pointed out that Parliament had chosen to make the local authority central to the promotion in its area of the licensing objectives set out in the Act, because local councillors are accountable to the local electorate and are expected to be sensitive to the needs and concerns of the local populace. In licensing matters there is often no single “right answer”. Mr Matthias pointed to the conditions which the licensing authority attached to the licence on the review in the present case as an example. The ban imposed on customers taking drink from the premises in an open container after 6pm might equally have been imposed somewhat earlier or somewhat later. It is normal for an appellant to have to show that the order challenged was wrong. The only unusual feature about this type of appeal is that all parties have *carte blanche* to call evidence. It does not, however, follow that the respondent to the appeal should bear the responsibility of showing that the order should be upheld and so should be required to present its case first.

36. On the article 6 issue, Mr Matthias's propositions may be paraphrased as follows:

1. The decision of the licensing authority was an administrative decision, which admittedly involved a determination of the appellant's “civil rights” within the meaning of article 6, as it has been interpreted in the European case law.
2. The extent to which article 6 requires such a decision to be subject to review by an independent and impartial tribunal depends greatly on the nature of the decision. Article 6 is an important expression of the rule of law, but the rule of law itself allows proper scope for democratic process in administrative decision making.
3. Administrative decisions often involve making judgments and assessing priorities on matters of social and economic policy. It accords with democratic principles for such decisions to be taken primarily by democratically accountable bodies. The power of the High Court in judicial review proceedings to review the legality of such decisions and the procedures followed is sufficient to ensure compatibility with article 6.
4. Some administrative decisions, although not necessarily involving wide issues of policy, call for particular knowledge or experience on the part of the decision maker. Often such decisions will involve an evaluative judgment and the exercise of discretion. In such cases, too, the availability of judicial review in the High Court is sufficient to meet the requirements of article 6. It would be perverse if article 6 were to require a full fact-finding appeal to a tribunal which lacked the degree of knowledge and expertise of the original decision maker.
5. There may be cases where an administrative decision does not depend on what may be described as democratic questions (questions of local or national policy, such as belong to the political forum), but which depends essentially on a question of fact requiring no special knowledge or experience on the part of the decision maker. In such a case article 6 may require that an aggrieved person whose civil rights are determined by the decision should be entitled to have it reviewed by a tribunal whose power includes whatever factual review is necessary for justice to be done.
6. There is nothing in domestic or Strasbourg case law to suggest that there is a general principle that it is incompatible with article 6 for a person aggrieved by an administrative decision to bear the responsibility of establishing his complaint.

37. Mr Matthias's concession that article 6 is engaged in the present case followed from the decision in *Kingsley v The United Kingdom* (2002) 35 EHRR 10, paragraph 34, where it was held that article 6 is engaged in proceedings which determine

whether or not an individual is entitled to undertake licensable activities. For his other submissions he cited a number of authorities including particularly *R (Alconbury Developments Limited) v Secretary of State for the Environment, Trade and the Regions* [2001] UKHL 23, [2003] 2 AC 295, *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, *Tsfayo v United Kingdom* 48 EHRR 47, [2007] LGRI, and *Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 AC 39.

38. Mr Matthias submitted that in this case the appellant's right of appeal to the district judge amply satisfied the requirements of article 6.

## Conclusion

39. Since Mr Glen accepted (in our view rightly) that the decision of the licensing authority was a relevant matter for the district judge to take into consideration, whether or not the decision is classified as “policy based”, the issues are quite narrow. They are:

1. How much weight was the district judge entitled to give to the decision of the licensing authority?
2. More particularly, was he right to hold that he should only allow the appeal if satisfied that the decision of the licensing authority was wrong?
3. Was the district judge's ruling compliant with article 6?

40. We do not consider that it is possible to give a formulaic answer to the first question because it may depend on a variety of factors — the nature of the issue, the nature and quality of the reasons given by the licensing authority and the nature and quality of the evidence on the appeal.

41. As Mr Matthias rightly submitted, the licensing function of a licensing authority is an administrative function. By contrast, the function of the district judge is a judicial function. The licensing authority has a duty, in accordance with the rule of law, to behave fairly in the decision-making procedure, but the decision itself is not a judicial or quasi-judicial act. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires. (See the judgment of Lord Hoffmann in *Alconbury* at para 74.)

42. Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on. Sometimes a licensing decision may involve narrower questions, such as whether noise, noxious smells or litter coming from premises amount to a public nuisance. Although such questions are in a sense questions of fact, they are not questions of the “heads or tails” variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. In any case, deciding what (if any) conditions should be attached to a licence as necessary and proportionate to the promotion of the statutory licensing objectives is essentially a matter of judgment rather than a matter of pure fact.

43. The statutory duty of the licensing authority to give reasons for its decision serves a number of purposes. It informs the public, who can make their views known to their elected representatives if they do not like the licensing sub-committee's approach. It enables a party aggrieved by the decision to know why it has lost and to consider the prospects of a successful appeal. If an appeal is brought, it enables the magistrates' court to know the reasons which led to the decision. The fuller and clearer the reasons, the more force they are likely to carry.

44. The evidence called on the appeal may, or may not, throw a very different light on matters. Someone whose representations were accepted by the licensing authority may be totally discredited as a result of cross-examination. By contrast, in the present case the district judge heard a mass of evidence over four days, as a result of which he reached essentially the same factual conclusions as the licensing authority had reached after five hours.

45. Given all the variables, the proper conclusion to the first question can only be stated in very general terms. It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal.

46. As to the second question, we agree with the way in which Burton J dealt with the matter in paragraphs 43-45 of his judgment.

47. We do not accept Mr Glen's submission that the statement of Lord Goddard in *Stepney Borough Council v Joffe*, applied by Edmund Davies LJ in *Sagnata Investments Limited v Norwich Corporation* is applicable only in a case where the original decision was based on "policy considerations". We doubt whether such a distinction would be practicable, because it involves the unreal assumption that all decisions can be put in one of two boxes, one marked policy and the other not. Furthermore, *Stepney Borough Council v Joffe* was not itself a case where the original decision was based on "policy considerations". In that case three street traders had their licences revoked by the London County Council after they were convicted of selling goods at prices exceeding the maximum fixed by statutory regulations. On appeal the magistrate decided that they were still fit to hold the licences. The county council unsuccessfully argued before the Divisional Court that the magistrate's jurisdiction was limited to considering whether or not there was any material on which the council could reasonably have arrived at its decisions to revoke the licences. The court held that the magistrate's power was not limited to reviewing the decision on the ground of an error of law, but that he was entitled to review also the merits. It was in that context that Lord Goddard went on to say that the magistrate should, however, pay great attention to the decision of the elected local authority and should only reverse it if he was satisfied that it was wrong.

48. It is normal for an appellant to have the responsibility of persuading the court that it should reverse the order under appeal, and the Magistrates Courts Rules envisage that this is so in the case of statutory appeals to magistrates' courts from decisions of local authorities. We see no indication that Parliament intended to create an exception in the case of appeals under the [Licensing Act](#).

49. We are also impressed by Mr Matthias's point that in a case such as this, where the licensing sub-committee has exercised what amounts to a statutory discretion to attach conditions to the licence, it makes good sense that the licensee should have to persuade the magistrates' court that the sub-committee should not have exercised its discretion in the way that it did rather than that the magistrates' court should be required to exercise the discretion afresh on the hearing of the appeal.

50. As to article 6, we accept the propositions advanced by Mr Matthias and we agree that the form of appeal provided by [s182](#) and [schedule 5](#) of the Act amply satisfies the requirements of article 6.

51. Although the point is academic in the present case, we doubt the correctness of part of the district judge's ruling where he said:

“I am not concerned with the way in which the licensing sub-committee approached their decision or the process by which it was made. The correct appeal against such issues lies by way of judicial review.”

52. Judicial review may be a proper way of mounting a challenge to a decision of the licensing authority on a point of law, but it does not follow that it is the only way. There is no such express limitation in the Act, and the power given to the magistrates' court under s181(2) to “remit the case to the licensing authority to dispose of it in accordance with the direction of the court” is a natural remedy in the case of an error of law by the authority. We note also that the guidance issued by the government under s182 and laid before Parliament on 28 June 2007 states in para 12.6:

“The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both.”

However, this point was not the subject of any argument before us.

53. For the reasons which we have given, the appeal is dismissed.

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Judgments

**QBD, ADMINISTRATIVE COURT**

Neutral Citation Number: [2016] EWHC 1265 (Admin)

CO/345/2016

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**THE ADMINISTRATIVE COURT**

Royal Courts of Justice

Strand

London WC2A 2LL

Thursday, 14 April 2016

**B e f o r e:**

**MR JUSTICE JAY**

**Between:**

**EAST LINDSEY DISTRICT COUNCIL**

**Appellant**

v

**ABU HANIF**

**(TRADING AS ZARA'S RESTAURANT AND TAKEAWAY)**

**Respondent**

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(Official Shorthand Writers to the Court)

**Mr P Kolvin QC & Mr D Dadds** (instructed by David Dadds LLP) appeared on behalf of the **Appellant**

The **Respondent** did not appear and was not represented

J U D G M E N T

(Approved)

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1. MR JUSTICE JAY: This is an appeal by way of case stated from the decision of the Lincoln Magistrates' Court, District Judge Veits, given on 23 June 2015, whereby he allowed an appeal from the revocation of a premises licence by the licensing authority.
2. The appellant, the East Lindsey District Council, is the licensing authority. The Magistrates' Court in the usual way is not a party to these proceedings. The respondent, Mr Abu Hanif, trading as Zara's Restaurant and Takeaway, is the licence holder. He through a licensing consultant has submitted correspondence making various limited points, but indicating that he would not be taking any part in these proceedings.
3. The premises in question are Zara's Restaurant and Takeaway situated in North Summercoates on the Lincolnshire coast. They are licensed to sell alcohol ancillary to the supply of food. The restaurant is owned and managed by the licensee, Mr Hanif. On 29 April 2014, the premises were the subject of a joint visit by the police and immigration officers, and it was discovered that Mr Miah was working in the kitchen as a chef. It was common ground that Mr Miah had no current entitlement to remain in the UK, let alone to work. I was told that he arrived here illegally some years ago. Furthermore, it was also accepted by the respondent that he (i) employed Mr Miah without paperwork showing a right to work in the United Kingdom; (ii) paid Mr Miah cash in hand; (iii) paid Mr Miah less than the minimum wage; (iv) did not keep or maintain PAYE records; (v) purported to deduct tax from Mr Miah's salary; and (vi) did not account to HMRC for the tax deducted.
4. The police then applied for a review of the respondent's licence under section 51 of the Licensing Act 2003 and the matter came before the appellant's subcommittee on 30 June 2014. The subcommittee decided to revoke the respondent's licence. Its reasons were as follows:
5. "The subcommittee were satisfied that Mr Hanif did not take the appropriate checks of staff members having knowledge that there were problems previously at the other premises with overstayers, and that he continued to allow staff to work at Zara's restaurant without making appropriate checks.
6. The subcommittee were satisfied that Mr Hanif had not undertaken the relevant checks to ensure the employee concerned was eligible to work in the United Kingdom. Instead of not allowing employees to work if they had not provided the correct documentation he allowed them to work and paid cash in hand. With all this in mind the subcommittee were satisfied that Mr Hanif had knowingly employed person/s unlawfully in the United Kingdom.

7. The subcommittee considered the evidence by Mr Kheng on behalf of Mr Hanif and the Home Office section 182 Guidance to Licensing Authorities. The subcommittee were of the view that the premises licence should be revoked and that revocation was an appropriate step with a view to promoting the crime prevention licensing objective."
8. The respondent then appealed to the Magistrates' Court. There was a hearing on 27 March 2015, and on 23 June the district judge decided to allow the respondent's appeal. On 1 September 2015, the district judge determined the issue of costs and on 7 January 2016 he stated the case. The appeal to the district judge was de novo, but he accepted that he could only allow the appeal if the subcommittee's decision was "wrong", the burden being on the appellant before him to establish that.
9. Looking now at the stated case, the district judge noted that the respondent had received a civil penalty for employing an illegal worker under section 15 of the Immigration, Asylum and Nationality Act 2006. An immigration officer gave evidence to the effect that although by virtue of section 21 a criminal offence was committed, such proceedings were rarely brought. The district judge also noted that the police and the Council's licensing officer were no longer saying that the respondent was a serial offender, but a redacted report which was placed before the subcommittee still gave the impression that he "was in a much worse position than he actually was". As for the failure to pay the minimum wage, the district judge said this:
  - A. "In his evidence before me Mr Hanif accepted that he had not paid the minimum wage and this in itself can be a criminal offence. I found that this was not the main basis of the subcommittee's decision however and again there was no evidence that he had been reported for that alleged offence. It would appear from their reasons that the subcommittee used the evidence of paying cash in hand as justification for the finding that he knowingly employed Mr Miah. The prosecuting authority however appear to have taken a different view in offering the civil penalty."
10. The district judge's core reasoning was that no crime had been committed. As he put it:
  - A. "It appeared to me that no crime had been committed as a result of the visit to the premises in April of last year. A civil penalty had been imposed rather than prosecution for the section 21 offence and no other crime had been reported in relation to not paying the minimum wage."
11. In the district judge's view, the crime prevention objective was not engaged.
12. The district judge also criticised the subcommittee for adopting an inconsistent approach because in other similar cases only warnings were issued. Finally, he considered that the subcommittee may have been influenced by comments in the police report, leading them to believe that they were dealing with a serial offender.

13. At the conclusion of the stated case, the district judge posed two questions for my determination. I will address these at the end of my judgment.
14. I was taken by Mr Philip Kolvin QC to various provisions of the Licensing Act 2003 as amended. Under section 4(1)and(2) a licensing authority must carry out its licensing functions with a view to promoting the licensing objectives, which include "the prevention of crime and disorder". The provisions dealing with the review application brought by the police are contained in sections 51 and 52. Under section 52(3), the licensing authority (and on appeal the Magistrates' Court):
  - A. "... must, having regard to the application and any relevant representations, take such of the steps mentioned in subsection (4) (if any) as it considers appropriate for the promotion of the licensing objectives."
15. The epithet "appropriate" was introduced by amendment in 2011. Previously the test had been stricter. In my judgment, it imports by necessary implication the concepts of proportionality and relevance.
16. Mr Kolvin submitted that the district judge erred in a number of respects. First, he wrongly held that, given that criminal proceedings were never brought, the crime prevention objective (see section 4(2)) was not engaged. The statute is concerned with the prevention rather than the fact of crime. Secondly, and in any event, the interested party had committed criminal offences in relation to tax evasion, the employment of an illegal worker, and employing an individual at remuneration below the minimum wage. As for the employment of an illegal worker, Mr Kolvin accepted that this requires knowledge on the part of the employer, and he also accepted that it is not altogether clear whether the district judge found as a fact that the respondent possessed the requisite knowledge. However, the core question is the promotion of the licensing objectives, not the fact of anterior criminal activity, and in this regard a deterrence approach is appropriate.
17. Thirdly, Mr Kolvin submitted that there was no evidence of an inconsistent approach by the subcommittee in giving warnings in some cases because all cases turn on their own facts. Finally, Mr Kolvin submitted that there was no basis for the district judge's conclusion that the subcommittee may have been influenced by a suggestion that the respondent was a serial offender.
18. I accept Mr Kolvin's submissions. In my view the district judge clearly erred. The question was not whether the respondent had been found guilty of criminal offences before a relevant tribunal, but whether revocation of his licence was appropriate and proportionate in the light of the salient licensing objectives, namely the prevention of crime and disorder.

This requires a much broader approach to the issue than the mere identification of criminal convictions. It is in part retrospective, in as much as antecedent facts will usually impact on

the statutory question, but importantly the prevention of crime and disorder requires a prospective consideration of what is warranted in the public interest, having regard to the twin considerations of prevention and deterrence. The district judge's erroneous analysis of the law precluded any proper consideration of that issue. In any event, I agree with Mr Kolvin that criminal convictions are not required.

19. To the extent that the analysis must be retrospective, the issue is whether, in the opinion of the relevant court seized of the appeal, criminal offences have been committed. In the instant case they clearly had been: in relation to tax evasion (see the common law offence of cheating the Revenue and the offence of fraudulent evasion of tax contrary to section 106A of the Taxes and Management Act 1970); and the employment of Mr Miah at remuneration below the minimum wage (see section 31 of the National Minimum Wage Act 1998). Moreover, given the evidence that Mr Miah never provided the relevant paperwork, notwithstanding apparent requests, the obvious inference to be drawn is that the respondent well knew that he could not, and that no tax code and National Insurance number had been issued. The corollary inference in my judgment is that the respondent well knew that Mr Miah could not provide the relevant paperwork because he was here illegally.
20. I also accept Mr Kolvin's submission that each case must turn on its own facts. As a matter of law, unless it could be said that some sort of estoppel or related abuse of process arose in the light of warnings given in other cases, the alleged inconsistent approach led nowhere. In my judgment, it could not be so said.
21. Finally, I agree with Mr Kolvin that there is nothing in the point that the subcommittee could have been misled about the interested party being a serial offender. The point that the subcommittee was making was the fact that the respondent had worked at premises where illegal workers were also employed meant that he should have been vigilant to the issue.
22. Thus the answer to the district judge's two questions are as follows:
  - A. Q. "Was I correct to conclude that the crime prevention objective was not engaged as no crimes had been proceeded with, the appellant only receiving a civil penalty?"
  - B. No.
  - C. Q. "Was I correct in concluding that the respondent had been inconsistent in similar decisions in not revoking the licence [sic]?"
  - D. No.

23. Having identified errors of law in the district judge's decision, the next issue which arises is whether I should remit this case for determination in the light of my ruling or whether I have sufficient material to decide the issue for myself. I should only adopt the latter course if satisfied that the issue is so obvious that no useful purpose would be served by remission. I am so satisfied. Having regard in particular to the twin requirements of prevention and deterrence, there was in my judgment only one answer to this case. The respondent exploited a vulnerable individual from his community by acting in plain, albeit covert, breach of the criminal law. In my view his licence should be revoked. Another way of putting the matter is that the district judge had no proper basis for overturning the subcommittee's assessment of the merits.
24. It follows in my judgment that the only conclusion open to the district judge in the present case was to uphold the revocation of the respondent's licence. This appeal must be allowed and the respondent's licence must be revoked.
25. MR KOLVIN: My Lord, I'm very grateful. Can I deal with the question of costs, both here and below.
26. MR JUSTICE JAY: Yes.
27. MR KOLVIN: Should I start with here.
28. MR JUSTICE JAY: Yes.
29. MR KOLVIN: My Lord, we would ask for the costs before this court. I just want to pray in aid four very brief points. The first is the result. The second is that the district judge's approach was expressly urged on him by the respondent's legal team. Thirdly, that the respondent was expressly urged to concede this appeal to stop costs running, he was given that opportunity at pages 42 and 43 of the bundle. Fourthly, perhaps a little bit tugging at the heart strings, but there's no reason why the Council Tax payers of East Lindsey should bear the cost of establishing what has been established in this court. So we would ask for the costs up here.
30. There is a schedule and the schedule has been served upon Mr Hanif by letter dated 16 March of 2016. I don't know whether the schedule has found its way to my Lord, if not I can hand up a copy.
31. MR JUSTICE JAY: It has.
32. MR KOLVIN: It has. My Lord, I can see that VAT has been added on. It doesn't need to be because of course the Council can retrieve the VAT, so my application is for £16,185. I know there's not a lot of explanation around my fee, but it was

taken on a single fee for all work involved in relation to the case stated; advice, the skeleton argument and attendance today, so it's one single - -

33. MR JUSTICE JAY: What about your junior's fees?
34. MR KOLVIN: My learned junior is also my instructing solicitor, he wears two hats.
35. MR JUSTICE JAY: I see.
36. MR KOLVIN: He has his own firm which is Dadds LLP, and he is also a member of the bar, so although he has appeared as my junior, his fee is wrapped up in the solicitors' fees set out in the schedule.
37. MR JUSTICE JAY: Okay. What about the costs below?
38. MR KOLVIN: My Lord, I'm just trying to ascertain what the position is.
39. MR JUSTICE JAY: I thought there was no order for costs below.
40. MR KOLVIN: There was no order for costs below, that was on the basis that the appeal had been allowed. The situation in relation to costs of licensing appeals are set out in section 181 of the Act, which enables the court to make such order as it thinks fit. Normally when appeals are dismissed there is no real question about it, costs follow the event. When appeals are allowed, some further considerations come into play, which are expressed by the Master of the Rolls in a case which you may have come across called City of Bradford v Booth, which is the case where the Master of the Rolls said that local authorities shouldn't be put off from trying to make honest and reasonable decisions in the public interest. And so one has to take account additionally of the means of the parties and their conduct in relation to the dispute, but in this case of course the appeal has now been dismissed, and so we would say that the ordinary rule is that the costs should follow the event, the appeal having failed. I'm just trying to ascertain whether schedules were ever served below, in the light of the way the case came out. **(Pause)**
41. My Lord, I'm really sorry that we don't actually have the schedule here, apparently it was £15,000. If you were minded to order costs below the options are either I suppose to wait and we will have the thing emailed up, or to say, "Look, it was below, it's a little bit more complex, they should be assessed if not agreed."
42. MR JUSTICE JAY: This is going to wipe him out, isn't it?
43. MR KOLVIN: Well he has already said, I have to say, I'm just telling you frankly what I've been told this morning, that when the bundles and the schedules were



served on him, he had clearly read them, but he said, "If you win in the High Court and get costs against me, then I'm just going to declare myself bankrupt." So there may well be a bit of football(?) about this, but nonetheless it was his appeal, his team raised a point which in retrospect was very surprising, and caused an awful lot of costs to be incurred.

44. MR JUSTICE JAY: Yes. Well I am going to assess the costs here in the round figure of £15,000.
45. MR KOLVIN: Thank you.
46. MR JUSTICE JAY: If there was a schedule, which you tell me there was, below, it is proportionate that I assess those costs rather than put you to the trouble of a detailed assessment, so if you could have that emailed to my clerk in due course, I will assess the costs below.
47. MR KOLVIN: Thank you, my Lord.
48. MR JUSTICE JAY: On the basis of that schedule.
49. MR KOLVIN: We're not trying to be too ambitious, but we would like to see what we can - -
50. MR JUSTICE JAY: I'll take a broad brush approach to that.
51. MR KOLVIN: Thank you.
52. My Lord, the only other thing to mention is that this isn't the only case which is kicking around the east of England where licensing subcommittees are being urged to take no action because there has been no prosecution in these immigration cases. Although I appreciate that this is hardly stellar law making, it's an application of pretty well established legal principles to the facts, I'm asking whether my Lord would be minded to certify this so that we can adduce the authority in other cases, because it's a clear statement of the law that there doesn't need to have been a prosecution. So with the practice direction in mind, would my Lord be minded to - -
53. MR JUSTICE JAY: Just remind me of the practice direction.
54. MR KOLVIN: Yes, can I hand it up?
55. MR JUSTICE JAY: Yes. **(Handed)**

56. MR KOLVIN: If Mr Hanif had come I wouldn't need to make the application. It's paragraph 6.1. The judgment has to clearly indicate that it purports to establish a new principle or extends the present law and that has to take the form of an express statement to that effect, and then 6.2 says what categories of judgment we're dealing with, which include applications attended by one party only.
57. So that's the situation we're in. In reality these judgments get around anyway, because we're dealing with administrative tribunals and not courts, but sometimes the point is taken, "Ah yes, but the court didn't certify".
58. MR JUSTICE JAY: But where's the new principle I've established?
59. MR KOLVIN: My Lord, what you have said clearly, which hasn't been said before, by dint of the fact that not many licensing cases reach the lofty heights of this building, is that there does not need to have been a prosecution in order for the crime to have - -
60. MR JUSTICE JAY: Oh, I see. Well that's so obvious it almost goes without saying, that's why it hasn't been said before.
61. MR KOLVIN: My Lord, it was obvious to everyone except the district judge, the appellant and other licensees in the east of England.
62. MR JUSTICE JAY: Okay.
63. In terms of the logistics, if you want a copy of the judgment, don't you have to pay for it?
64. MR KOLVIN: We may have to, and we would be obviously very pleased to do so.
65. MR JUSTICE JAY: Because I'm not sure that all judgments are, in the Administrative Court, they're not all transcribed and published.
66. MR KOLVIN: That is correct, and I have no doubt that my client would be - this isn't a matter about the costs of the judgment.
67. MR JUSTICE JAY: No, fortunately it doesn't cost that much. But I will give the certification. I have never been asked to do so before, I must confess.
68. MR KOLVIN: Yes.

69. MR JUSTICE JAY: Because these cases are referred to almost willy nilly, if they're available on Lawtel or wherever.
70. MR KOLVIN: Yes, they are.
71. MR JUSTICE JAY: Then they're just provided.
72. MR KOLVIN: They get into the textbooks and they - -
73. MR JUSTICE JAY: No- one objects.
74. MR KOLVIN: Yes. It has happened once before, in relation to the meaning of the Court of Appeal judgment in Hope and Glory, and Lindblom J, as he then was, was asked repeatedly would he certify in relation to the meaning of Hope and Glory, which is an important test, and he was pretty engaged in the practice direction. But since then that judgment, there's always an argument in court about whether it can be cited or not. The difference between licensing and some other fields of law is that very few cases reach here, so when they do, the judgments of High Court judges are gold dust.
75. MR JUSTICE JAY: Yes, well I'm happy to make the certification.
76. MR KOLVIN: Thank you very much indeed.
77. MR JUSTICE JAY: We wouldn't want this point to be taken again successfully.
78. MR KOLVIN: No.
79. MR JUSTICE JAY: Now as a matter of courtesy, is the judgment, once available, sent to the district judge, or is it something that I should do informally?
80. MR KOLVIN: I don't know, my Lord, what the normal practice is. I don't think that I have previously been on a legal team which has sent judgments, but we're very happy to undertake to do so.
81. MR JUSTICE JAY: Yes, I think if you're going to get a copy, obviously you're going to send it to the respondent - -
82. MR KOLVIN: Indeed.

83. MR JUSTICE JAY: - - so he can ingest it. I think you should send it to the district judge, just saying that the judge directed that out of courtesy he should see it.
84. MR KOLVIN: We're very happy to do that. Thank you very much indeed.
85. MR JUSTICE JAY: Thank you very much.

All England Official Transcripts (1997-2008)

## **Daniel Thwaites plc v Wirral Borough Magistrates' Court**

*Licensing - Licence - Application for licence - Guidance issued by Secretary of State as to discharge of functions under legislation - Licensing authority granting licence - Local objectors appealing to magistrates' court - Magistrates' court imposing restrictions - Whether restrictions necessary to promote licensing objective - Whether magistrates' court having proper regard to guidance - Whether decision of magistrates' court lawful - Licensing Act 2003, s 4*

[2008] EWHC 838 (Admin), CO/5533/2006, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

### **QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)**

**BLACK J**

**10 MARCH, 6 MAY 2008**

**6 MAY 2008**

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

D MW Pickup for the Claimant

The Defendant did not appear and was not represented

D Flood for the First Interested Party

M Copeland for the Second Interested Party

Naphens plc; Kirwans; Wirral MBC

**BLACK J:**

[1] This is an application by Daniel Thwaites plc ("the Claimant") for judicial review of a licensing decision made by the Wirral Magistrates' Court ("the Magistrates' Court") on 5 April 2006 and that court's decision on 21 April 2006 concerning the costs of the proceedings. The Claimant seeks an order quashing both decisions. Permission to apply for judicial review was granted by Pitchford J on 2 November 2006.

#### *THE FACTUAL BACKGROUND*

[2] The Claimant owns the Saughall Hotel in Saughall Massie, Wirral which it operates as licensed premises ("the premises"). It originally held a licence under the Licensing Act 1964. In June 2005, it commenced an application to the Licensing Sub-Committee of the Metropolitan Borough of Wirral ("the licensing authority")

for the existing licence to be converted to a premises licence under the Licensing Act 2003 and for the licence to be varied simultaneously.

**[3]** In essence, the Claimant was seeking to conduct business at the premises for longer hours than were permitted under the original licence. The police did not support the extension of the hours to the extent that the Claimant initially proposed. The Claimant agreed to restrict the hours to those that were acceptable to the police. Accordingly, the licensing authority was asked to grant a licence that would permit music and dancing to 11pm and alcohol sales until midnight on all nights except Friday and Saturday and, on Friday and Saturday nights, music and dancing to midnight and alcohol sales until 1pm, with the doors closing one hour after the last alcohol sale every night.

**[4]** The police withdrew their representations against the modified proposals and did not appear before the licensing authority when the matter was heard on 23 August 2005. No representations were made by the Wirral Environmental Health Services either. However, there was opposition to the proposals at the hearing from the Saughall Massie Conservation Society ("the First Interested Party") and other Saughall Massie residents.

**[5]** The Claimant told the licensing authority at the hearing that the hours of operation at the premises would not vary significantly from the existing hours of operation and that the application for extended hours was to allow flexibility to open later "on special occasions" This was a matter of which the licensing authority took note as is recorded in the minutes of their determination.

**[6]** The licence was granted in the modified terms requested together with an additional hour for licensable activities and an extra 30 minutes for the hours the premises were to be open to the public over Christmas and at the major bank holidays. Special arrangements were also permitted for New Year's Eve. The licensing authority removed certain conditions that had been imposed on the old licence (requiring all alcohol to be consumed within 20 minutes of the last alcohol sale and banning children under 14 from the bar) and imposed other conditions which were obviously aimed at controlling noise, namely that the area outside must be cleared by 11pm, that the premises must promote the use of taxi firms which use a call-back system, that all doors and windows must be kept closed when regulated entertainment was provided and that prominent notices should be placed on the premises requiring customers to leave quietly.

**[7]** The Saughall Massie Conservation Society and "others" appealed against the licensing decision to the Magistrates' Court on the ground that the licensing authority's decision "was not made with a view to promotion of and in accordance with the licensing objectives pursuant to s 4, Pt 2 of the Licensing Act 2003".

**[8]** The appeal occupied the Magistrates' Court from 3 - 5 April 2006. The Respondents to the appeal were the licensing authority and the Claimant which both defended the licensing authority's decision. Witnesses were called including Saughall Massie residents, Police Sergeant Yehya who dealt with the stance of the Merseyside police, and Mr Miller, the manager of the premises.

**[9]** The justices granted the appeal. Their Reasons run to three pages of typescript, one page of which is entirely taken up with setting out the new hours of operation they imposed. These permitted entertainment until 11pm and alcohol sales until 11.30pm on all nights except Friday and Saturday when entertainment would be permitted until 11.30pm and alcohol sales until midnight. The premises could remain open to the public until midnight on all nights except Friday and Saturday when they could close at 1am. Similar provisions were imposed to those imposed by the licensing authority in relation to later opening at Christmas and major bank holidays and the provisions relating to New Year's Eve and the conditions of the licence remained unaltered.

**[10]** The new licence had come into effect on 24 November 2005 so the new arrangements had been running for several months by the time of the hearing before the Magistrates' Court. There had been no formal or recorded complaints against the premises under the old or the new regime as the justices acknowledged in their Reasons. The residents who gave evidence were fearful of problems if the extended hours were allowed in the summer. The Chairman of the Conservation Society, who gave oral evidence, spoke of people urinating in the gardens and a problem with litter. It appears from the statement filed by the Chairman of the Bench for these judicial review proceedings that evidence was also given of interference with machinery on nearby Diamond Farm. The justices' Reasons make no reference at all to these matters. As to the statements of the "Witnesses of the Appellant", they say simply that they have read and considered them but attached little or no weight to them.

**[11]** The justices and their legal advisor have filed a considerable amount of material in response to the judicial review proceedings, in all 31 closely typed pages. These comprise their Response to the Claim, statements from Alistair Beere (who was the chairman of the bench), Mary Woodhouse (another of the bench) and Stephen Pickstock (the legal advisor), and what is said in the index to be a document by Mr Beere from which he prepared his statement. There was limited argument before me as to the status of these documents and the weight that I should give to them. It was not submitted that I should decline to have *any* regard to them although I think it is fair to say that it was common ground between the parties, rightly in my view, that I should concentrate principally on the Reasons. It is established by authorities such as *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302, 95 LGR 119, [1996] 2 FCR 208 that the court can admit evidence to elucidate or, exceptionally, correct or add to the reasons given by the decision maker at the time of the decision but that it should be very cautious about doing so. The function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. In the circumstances, I have read carefully what the magistrates have provided but approached its role in the judicial review proceedings cautiously.

#### *THE BROAD NATURE OF THE CLAIM IN RELATION TO THE LICENSING DECISION*

**[12]** The Claimant argues that the Magistrates' Court decision is unlawful for a number of reasons. It is argued that the decision was not in line with the philosophy of the Licensing Act 2003 ("the Act") and imposed restrictions on the Claimant's operation which were not necessary to promote the licensing objectives set out in that Act, that it was based on speculation rather than evidence, that it took into account irrelevant considerations and failed to take into account proper considerations, and that it was a decision to which no properly directed Magistrates' Court could have come on the evidence. In so far as the court imposed conditions as to the time at which the premises must close, it is submitted that this was not a matter which can be regulated under the Act. It is further argued that the magistrates failed to give adequate reasons for their decision.

#### *THE LEGAL BACKGROUND*

**[13]** The Licensing Act 2003 was intended to provide a "more efficient" "more responsive" and "flexible" system of licensing which did not interfere unnecessarily. It aimed to give business greater freedom and flexibility to meet the expectations of customers and to provide greater choice for consumers whilst protecting local residents from disturbance and anti-social behaviour.

**[14]** Note 12 of the explanatory notes to the Act gives an indication of the approach to be taken under the Act. It reads:

"12 In contrast to the existing law, the Act does not prescribe the days or the opening hours when alcohol may be sold by retail for consumption on or off premises. Nor does it specify when other licensable activities may be carried on.

Instead, the Applicant for a premises licence or a club premises certificate will be able to choose the days and the hours during which they wish to be authorised to carry on licensable activities at the premises for which a licence is sought. The licence will be granted on those terms unless, following the making of representations to the licensing authority, the authority considers it necessary to reject the application or vary those terms for the purpose of promoting the licensing objectives."

**[15]** Section 1 of the Act provides:

"S1(1) For the purposes of this Act the following are licensable activities -

- (a) the sale by retail of alcohol,
- (b) [clubs]
- (c) the provision of regulated entertainment, and
- (d) the provision of late night refreshment."

**[16]** To carry on a licensable activity, a premises licence granted under Pt 3 of the Act is generally required, s 2. Application for a premises licence must be made to the relevant licensing authority, s 17(1).

**[17]** By virtue of s 4, the licensing authority must carry out all its functions under the Act (including its functions in relation to determining an application for a premises licence or an application for a variation of a premises licence) with a view to promoting the "licensing objectives". These are set out in s 4 as follows:

"S4(2) The licensing objectives are -

- (a) the prevention of crime and disorder;
- (b) public safety;
- (c) the prevention of public nuisance; and
- (d) the protection of children from harm."

**[18]** In carrying out its licensing functions, by virtue of s 4(3) the licensing authority must also have regard to its licensing statement published under s 5 and any guidance issued by the Secretary of State under s 182.

**[19]** Section 182 obliges the Secretary of State to issue guidance to licensing authorities on the discharge of their functions under the Act. Guidance was issued in July 2004 ("the Guidance"). It was updated in June 2007 but it is the original guidance that is relevant in this case. In any event, none of the changes made are material to the issues I have to determine.

**[20]** The Foreword says that the Guidance:

"is intended to aid licensing authorities in carrying out their functions under the 2003 Act and to ensure the spread of best practice and greater consistency of approach. This does not mean we are intent on eroding local discretion. On



the contrary, the legislation is fundamentally based on local decision-making informed by local knowledge and local people. Our intention is to encourage and improve good operating practice, promote partnership and to drive out unjustified inconsistencies and poor practice."

**[21]** As the Guidance says in para 1.7, it does not replace the statutory provisions of the Act or add to its scope. Paragraph 2.3 says:

"Among other things, section 4 of the 2003 Act provides that in carrying out its functions a licensing authority must have regard to guidance issued by the Secretary of State under section 182. The requirement is therefore binding on all licensing authorities to that extent. However, it is recognised that the Guidance cannot anticipate every possible scenario or set of circumstances that may arise and so long as the Guidance has been properly and carefully understood and considered, licensing authorities may depart from it if they have reason to do so. When doing so, licensing authorities will need to give full reasons for their actions. Departure from the Guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken."

**[22]** An application to the licensing authority for a premises licence must be accompanied by an operating schedule in the prescribed form including a statement of the matters set out in s 17(4) which are as follows:

- "(a) the relevant licensable activities,
- (b) the times during which it is proposed that the relevant licensable activities are to take place,
- (c) any other times during which it is proposed that the premises are to be open to the public,
- (d) where the Applicant wishes the licence to have effect for a limited period, that period,
- (e) where the relevant licensable activities include the supply of alcohol, prescribed information in respect of the individual whom the Applicant wishes to have specified in the premises licence as the premises supervisor,
- (f) where the relevant licensable activities include the supply of alcohol, whether the supplies are proposed to be for consumption on the premises or off the premises, or both,
- (g) the steps which it is proposed to take to promote the licensing objectives,
- (h) such other matters as may be prescribed."

**[23]** Section 18 deals with the determination of an application for a premises licence. Section 35 deals in very similar terms with the determination of an application to vary a premises licence. It will be sufficient only to set out here the provisions of s 18.

**[24]** Section 18(2) provides that, subject to sub-s (3), the authority must grant the licence in accordance with the application subject only to:

- "(a) such conditions as are consistent with the operating schedule accompanying the application, and
- (b) any conditions which must under section 19, 20 or 21 be included in the licence."

**[25]** Section 19 deals with premises licences which authorise the supply of alcohol. Such licences must include certain conditions ensuring that every supply of alcohol is made or authorised by a person who holds a personal licence and that no supply of alcohol is made when there is no properly licensed designated premises supervisor. Sections 20 and 21 are not relevant to this claim.

**[26]** Section 18(3) provides that where relevant representations are made, the authority has certain specified obligations. In so far as is relevant to this appeal "relevant representations" are defined in s 18(6) as follows:

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

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

(b) meet the requirements of sub-section (7),

(c) . . ."

**[27]** Sub-section (7) provides:

"(7) The requirements of this subsection are -

(a) that the representations were made by an interested party or responsible authority within the period prescribed under section 17(5)(c),

(b) that they have not been withdrawn, and

(c) in the case of representations made by an interested party (who is not also a responsible authority), that they are not, in the opinion of the relevant licensing authority, frivolous or vexatious."

**[28]** Where relevant representations are made, the authority must hold a hearing to consider them unless the authority, the Applicant and each person who has made representations agrees that a hearing is unnecessary. By virtue of s 18(3)(b), the authority must also "(b) having regard to the representations, take such of the steps mentioned in sub-section (4) (if any) as it considers necessary for the promotion of the licensing objectives."

**[29]** Section 18(4) provides:

"(4) The steps are -

(a) to grant the licence subject to -

(i) the conditions mentioned in sub-section (2)(a) modified to such extent as the authority considers necessary for the promotion of the licensing objectives, and

(ii) any condition which must under section 19, 20 or 21 be included in the licence;

(b) to exclude from the scope of the licence any of the licensable activities to which the application relates;

(c) to refuse to specify a person in the licence as the premises supervisor;

(d) to reject the application."

**[30]** Conditions are modified for the purposes of sub-s (4)(a)(i) if any of them is altered or omitted or any new condition is added.

**[31]** During the currency of a premises licence, by virtue of s 51, an interested party (broadly speaking, a local resident or business) or a responsible authority (police, fire, environmental health etc) may apply to the relevant licensing authority for a review of the licence on a ground which is relevant to one or more of the licensing objectives. By virtue of s 52, a hearing must be held to consider the application and any relevant representations and the authority must take such steps from a specified list as it considers necessary for the promotion of the licensing objective. The steps range from modifying the conditions of the licence to suspending it or revoking it completely.

**[32]** The Act makes provision in Pt 5 for "permitted temporary activity" which, loosely speaking, is a form of ad hoc licensing to cover licensable activities which are not covered by a more general licence. The system involves proper notification of an event to the licensing authority and the police. Provided the applicable number of temporary event notices has not been exceeded and the police do not intervene, the event is automatically permitted. Temporary event notices can only be given in respect of any particular premises 12 times in a calendar year and the period for which each event lasts must not exceed 96 hours.

**[33]** Section 181 provides for appeals to be made against decisions of the licensing authority to a Magistrates' Court which is, of course, how the decisions in relation to which judicial review is sought in this case came to be made.

#### *THE DETAIL OF THE CLAIM*

**[34]** The Claimant submits that in making its decision to allow the appeal in relation to the premises licence, the Magistrates' Court failed in a number of respects to take account of the changes that the new licensing regime has made and failed to adopt the approach required by the Act. It is further submitted that the magistrates failed properly to consider and take into account the Guidance.

**[35]** There is no doubt that the Guidance is relevant in the magistrates' decision making. As I have set out above, s 4(3) requires the licensing authority to "have regard" to the Guidance. By extension, so must a Magistrates' Court dealing with an appeal from a decision of the licensing authority. The Guidance says:

"10.8 In hearing an appeal against any decision made by a licensing authority, the Magistrates' Court concerned will have regard to that licensing authority's statement of licensing policy and this Guidance. However, the court would be entitled to depart from either the statement of licensing policy or this Guidance if it considered it is justified to do so because of the individual circumstances of any case."

**[36]** Mr Pickup submits that although the Guidance is not binding and local variation is expressly permitted, it should not be departed from unless there is good reason to do so.

**[37]** Mr Flood for the First Interested Party submits that the Guidance simply serves to provide information for the magistrates and provided that they have had regard to it, that is sufficient. He also points out that, in

some respects (as is clear from the wording of the Guidance), the Guidance is a statement of Government belief rather than proved fact. Inviting attention to the judgment of Beatson J in *J D Weatherspoon plc v Guildford Borough Council* [2006] EWHC 815 (Admin), [2007] 1 All ER 400, [2006] LGR 767, he identifies that different policy elements in the Guidance may pull in different directions in a particular case, flexibility and customer choice potentially conflicting with the need to prevent crime and disorder. He submits that provided that the magistrates consult the Guidance, they do not need to use it as "a decision making matrix that the deciding Court has to sequentially address in making its decision in the manner it would if considering a section of a statute".

**[38]** There is no doubt that regard must be had to the Guidance by the magistrates but that its force is less than that of a statute. That is common ground between the parties. The Guidance contains advice of varying degrees of specificity. At one end of the spectrum, it reinforces the general philosophy and approach of the Act. However, it also provides firm advice on particular issues, an example being what could almost be described as a prohibition on local authorities seeking to engineer staggered closing times by setting quotas for particular closing times. I accept that any individual licensing decision may give rise to a need to balance conflicting factors which are included in the Guidance and that in resolving this conflict, a licensing authority or Magistrates' Court may justifiably give less weight to some parts of the Guidance and more to others. As the Guidance itself says, it may also depart from the Guidance if particular features of the individual case require that. What a licensing authority or Magistrates' Court is not entitled to do is simply to *ignore* the Guidance or fail to give it any weight, whether because it does not agree with the Government's policy or its methods of regulating licensable activities or for any other reason. Furthermore, when a Magistrates' Court is entitled to depart from the Guidance and justifiably does so, it must, in my view, give proper reasons for so doing. As para 2.3 of the Guidance says in relation to the need for licensing authorities to give reasons:

"When [departing from the Guidance], licensing authorities will need to give full reasons for their actions. Departure from the Guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken."

This is a theme to which the Guidance returns repeatedly and is a principle which must be applicable to a Magistrates' Court hearing an appeal as it is to a licensing authority dealing with an application in the first instance. I agree with Mr Flood for the First Interested Party that the magistrates did not need to work slavishly through the Guidance in articulating their decision but they did need to give full reasons for their decision overall and full reasons for departing from the Guidance if they considered it proper so to do.

**[39]** In this case, Mr Pickup submits that proper attention to the Guidance would have helped the magistrates to come to a correct and reasonable decision and that they have failed to adhere to it without proper reason and failed to carry out their licensing function in accordance with the Act.

**[40]** The foundation of the Claimant's argument is that the Act expects licensable activities to be restricted only where that is *necessary* to promote the four licensing objectives set out in s 4(2). There can be no debate about that. It is clearly established by the Act and confirmed in the Guidance. For example, in the Act, s 18(3)(b), dealing with the determination of an application for a premises licence, provides that where relevant representations are made the licensing authority must "take such of the steps mentioned in sub-s (4) (if any) as it considers necessary for the promotion of the licensing objectives" (the steps in sub-s (4) include the grant of the licence subject to conditions). Section 34(3)(b), dealing with the determination of an application to vary a premises licence, is in similar terms. The Guidance repeatedly refers, in a number of different contexts, to the principle that regulatory action should only be taken where it is *necessary* to promote the licensing objectives. In particular, it clearly indicates that conditions should not be attached to premises licences unless they are necessary to promote the licensing objectives, see for example para 7.5 and also para 7.17 which includes this passage:

"Licensing authorities should therefore ensure that any conditions they impose are only those which are necessary for the promotion of the licensing objectives, which means that they must not go further than what is needed for that

purpose."

**[41]** The Guidance also refers a number of times to the need for regulation to be "proportionate". This is not a term contained in the Act but if a regulatory provision is to satisfy the hurdle of being "necessary", it must in my view be confined to that which is "proportionate" and one can understand why the Guidance spells this out.

**[42]** Mr Pickup submits, and I accept, that the Act anticipates that a "light touch bureaucracy" (a phrase used in para 5.99 of the Guidance) will be applied to the grant and variation of premises licences. He submits that this means that unless there is evidence that extended hours will adversely affect one of the licensing objectives, the hours should be granted. A prime example of this arises when an application for a premises licence is made and there are no relevant representations made about it. In those circumstances, s 18(2) obliges the licensing authority to grant the licence and it can only impose conditions which are consistent with the operating schedule submitted by the Applicant. Mr Pickup says that such a light touch is made possible, as the Guidance itself says, by providing a review mechanism under the Act by which to deal with concerns relating to the licensing objectives which arise following the grant of a licence in respect of individual premises. He invites attention also to the existence of other provisions outside the ambit of the Act which provide remedies for noise, for example the issue of a noise abatement notice or the closure of noisy premises under the Anti-Social Behaviour Act 2003. The Guidance makes clear that the existence of other legislative provisions is relevant and may, in some cases, obviate the need for any further conditions to be imposed on a licence. Paragraph 7.18 from the section of the Guidance dealing with attaching conditions to licences is an illustration of this approach:

"7.18 It is perfectly possible that in certain cases, because the test is one of necessity, where there are other legislative provisions which are relevant and must be observed by the Applicant, no additional conditions at all are needed to promote the licensing objectives."

**[43]** The Guidance includes a section dealing with hours of trading which the Claimant submits further exemplifies the philosophy of the Act. It begins with para 6.1 which reads "This Chapter provides guidance on good practice in respect of any condition imposed on a premises licence or club premises certificate in respect of hours of trading or supply."

**[44]** It continues:

"6.5 The Government strongly believes that fixed and artificially early closing times promote, in the case of the sale or supply of alcohol for consumption on the premises, rapid binge drinking close to closing times; and are a key cause of disorder and disturbance when large numbers of customers are required to leave premises simultaneously. This creates excessive pressures at places where fast food is sold or public or private transport is provided. This in turn produces friction and gives rise to disorder and peaks of noise and other nuisance behaviour. It is therefore important that licensing authorities recognise these problems when addressing issues such as the hours at which premises should be used to carry on the provision of licensable activities to the public.

6.6 The aim through the promotion of the licensing objectives should be to reduce the potential for concentrations and achieve a slower dispersal of people from licensed premises through longer opening times. Arbitrary restrictions that would undermine the principle of flexibility should therefore be avoided. We will monitor the impact of the 2003 Act on crime and disorder and the other licensing objectives. If necessary in the light of these findings, we will introduce further legislation with the consent of Parliament to strengthen or alter any provisions."

**[45]** The Claimant submits that in imposing shorter hours than it requested for the supply of alcohol and for entertainment, the magistrates went beyond that which was necessary for these premises and failed to take into account that, as the Guidance explains, longer opening times would in fact reduce the potential for problems arising from licensed premises whereas curtailing operations could run counter to the licensing

objectives.

**[46]** The magistrates' Reasons record their acceptance that there had been no reported complaint in regard to public nuisance and that the extended hours had operated without any incidents. The magistrates also record in the Reasons, as I have already said, that they had attached little or no weight to the statements from witnesses of the Appellant. Nothing is said about difficulties mentioned in evidence by the witnesses. As it was clearly incumbent on the magistrates at least to advert in broad terms to those matters that they took into account, it is fair to conclude in the circumstances that they proceeded upon the basis that there was no reliable evidence of actual problems linked to the premises either under the old licence or under the new revised licence. This was in line with the oral evidence of Police Sergeant Yehya (as recorded in the rather truncated notes of the legal advisor):

"1. reported incident for the site. No other incidents or complaints have been received. There are none in my file. There are no incidents we can directly link to the Saughall Hotel since previously open. There have been incidents locally but not linked to these premises."

**[47]** To judge by the Reasons therefore, what led the magistrates to impose restricted hours of operation was their forecast as to what would occur in the future in association with the premises, notwithstanding the absence of reliable evidence of past problems. The First Interested Party observes that the manager of the premises had given evidence that he intended in the summer to "make hay while the sun shines" and submits, correctly in my view, that the magistrates were entitled to take this apparent change of emphasis into account. However, Mr Flood further submits that the evidence of what had happened in the winter months was therefore of "little evidential value" in determining what was likely to happen in the future and I cannot wholly agree with him about this. Undoubtedly the fact that the Claimant intended in future to make more use of the extended hours reduced the value of the premises' past record as a predictor of the future but it could not, in my view, be completely discarded by the magistrates. They still had to take into account that there had been extended hours for some months without apparent problems.

**[48]** It is plain that the magistrates' particular concern was "migration" rather than problems generated by those coming directly to the premises for their evening out. Under the heading "The Four Licensing Objectives", they say that they accept that there have been no formal or recorded complaints against the premises "but feel that because of the concept of migration that public nuisance and crime and disorder would be an inevitable consequence of leaving the hours as granted by the Local Authority". Under the heading "Migration/Zoning" they begin:

"The Saughall Hotel due to its location and the fact that a number of license premises in the surrounding area have reduced hours to that of the Saughall Hotel we believe that as a consequence of this would be that customers would migrate from these premises to the Saughall Hotel. [sic]"

and end:

"We appreciate that the extended hours have been in operation for several months without any incidents but have taken into consideration this was during the Winter months and inevitable numbers will increase in the Summer causing nuisance/criminality."

**[49]** They reiterate their concern under the heading "Nuisance (Existing/Anticipated)" saying that they "feel that public nuisance will be inevitable".

**[50]** The Claimant complains that the magistrates' treatment of the issue of "migration" was fundamentally flawed on a number of grounds.

[51] Firstly, it submits that there was no evidence on which the magistrates could find that customers *would* come to the premises when other premises in the vicinity closed or cause trouble and their concerns were no more than inappropriate speculation. The Claimant's position was that there was no evidence of migration to their premises. There were no recorded complaints of any kind about the premises let alone specifically about migration. Ms Lesley Spencer who lives opposite the premises and is the Secretary of the Saughall Massie Conservation Society gave evidence of her fear that customers would migrate but said that she did not think there had been any migration.

[52] Apart from their own local knowledge, the only material on which the magistrates could possibly have formed their views about migration was what Police Sergeant Yehya said in evidence. According to the legal advisor's notes, whilst being cross-examined by Mr Kirwan, the sergeant gave evidence about the other licensed premises operating in the vicinity (which I have seen marked on a local map and which were within walking distance of the premises) and their closing hours and said that there were three assaults each week at one of the premises. The legal advisor records that he also said:

"We have staggered closing. This could cause problems it has the potential to cause difficulties in the area. I have a list of considerations but none would rank as high as crime, not even noise. No complaints have been made to me even regarding noise. One concern was dispersal. We gave people one hour to disperse and therefore reduced from 2.00am to 1.00am. 1.00am closing at 2. 280 people leaving premises. Other premises subject to high levels of crime *migration not an issue.*" [my italics]

[53] I appreciate that this evidence acknowledged that staggered closing *could* cause problems but, had migration been a significant issue as opposed to a mere possibility, one can, I think, assume that the police would have made representations on that score, particularly given that they had plainly considered the impact of trading hours specifically and *had* initially objected to the even longer hours originally proposed by the Claimant. It is noteworthy that even when they were in opposition to the plans, it was never on the basis of migration of disruptive characters from other licensed premises and always simply on the basis of late noise from ordinary customers of the premises dispersing. The absence of police objections before either the licensing authority or the Magistrates' Court seems to have surprised the magistrates who said so in their Reasons, commenting "We were surprised that the Police originally objected to the application but withdrew that objection after a slight variation of the terms." In so saying, they convey, in my view, not only their surprise about the Police approach but also their disagreement with it.

[54] It was not open to the magistrates, in my view, to elevate what Sergeant Yehya said in the witness box to evidence that a problem with migration could reasonably be expected, nor do they say anything in their reasons which suggests that they did rely on his evidence in this way. The only concerns about migration were therefore the magistrates' own with perhaps some fears expressed by local residents though not on the basis of firm historical examples of migration to the premises.

[55] It is clear from the Guidance that drawing on local knowledge, at least the local knowledge of local licensing authorities, is an important feature of the Act's approach. There can be little doubt that local magistrates are also entitled to take into account their own knowledge but, in my judgment, they must measure their own views against the evidence presented to them. In some cases, the evidence will require them to adjust their own impression. This is particularly likely to be so where it is given by a responsible authority such as the police. They must also scrutinise their own anxieties about matters such as noise and other types of public nuisance particularly carefully if the responsible authorities raise no objections on these grounds. These magistrates did recognise the absence of police objections which caused them surprise and they chose to differ from the police in reliance on their own views. The Claimant submits that in so doing they departed into the realms of impermissible speculation not only in concluding that there would be migration but also in concluding that in this case it would generate nuisance and disorder. The First Interested Party is correct in submitting that the Guidance accepts a link between migration and a potential breach of the licensing objectives but it is also clear from the Guidance that each case must be decided on its individual facts so the magistrates could not simply assume that if people came from other premises, there would be

trouble.

**[56]** The Claimant complains that the magistrates' treatment of the migration issue also flies in the face of the Guidance because firstly it was an improper attempt to implement zoning and secondly it ignored the general principle of longer opening hours.

**[57]** Zoning is the setting of fixed trading hours within a designated area so that all the pubs in a given area have similar trading hours. The problem created by it, as demonstrated by experience in Scotland, is that people move across zoning boundaries in search of pubs opening later and that causes disorder and disturbance. The Guidance says, at para 6.8:

"The licensing authority should consider restricting the hours of trading only where this is necessary because of the potential impact on the promotion of the licensing objectives from fixed and artificially-early closing times."

It stresses that above all, licensing authorities should not fix predetermined closing times for particular areas.

**[58]** I am not convinced that the magistrates' limiting of the Claimant's operational hours can properly be described as implementing zoning which, in my view, is a term that is more appropriate to describe a general policy imposed by a licensing authority for a defined area than an individual decision of this type, albeit made with reference to the opening hours of other premises in the vicinity and having the effect of imposing the same hours as those premises.

**[59]** What has more weight, however, is the Claimant's submission that the magistrates failed to give proper weight to the general principle of later opening hours and to the intention that the approach to licensing under the Act would be to grant the hours sought for the premises unless it was necessary to modify them in pursuit of the licensing objectives. The Reasons include a heading "Flexibility" under which the magistrates say simply "We have considered the concept of Flexibility." In so saying, they may be referring to the sort of flexibility to which reference is made, for example, in para 6.6 of the Guidance (see above) but their shorthand does not enable one to know to what conclusions their consideration of the concept led them in this case nor whether they had reliably in mind that the starting point should be that limitations should not be imposed upon the licence sought unless necessary to promote the licensing objectives rather than that the licensing authority or the court should form its own view of what was necessary for the premises and only grant that.

**[60]** The Claimant was seeking to have the freedom to open later on certain occasions when the trade justified it or, as the magistrates put it, "the application for extended hours was to allow *flexibility* to open later on certain occasions". As the First Interested Party would submit, the magistrates may have inferred from Mr Miller's comment about making hay that the premises would *often* be open late rather than this happening only infrequently in accordance with the picture presented to the licensing authority. If this was their inference, however, it is odd that they considered that the Claimant could deal with the position by applying for a temporary certificate because this would have allowed the premises to open later on only a limited number of occasions. They make no express finding in their Reasons as to the frequency on which they considered the Claimant intended to keep the premises open late. This was material not only to the degree of disturbance that might be caused generally by late opening but also specifically to the issue of whether there would be migration. It would seem unlikely that customers from nearby pubs would bother to walk or even drive to the Saughall Hotel in search of another drink at the end of their evenings unless the Saughall Hotel was open late sufficiently frequently to lead them to a reasonable expectation that their journey would be worthwhile.

**[61]** The magistrates' comment about the temporary certificate also seems to me to be an example of a



failure by them to adopt the lighter approach that the Act dictated and to allow flexibility to those operating licensed premises unless the licensing objectives required otherwise. Temporary certificates would be a cumbersome and restricted means of achieving flexibility, not responsive to the day to day fluctuations in business, only available a limited number of times, and not in line with the philosophy of the Act.

**[62]** There is no consideration in the magistrates' decision of whether the imposition of conditions to control noise or other nuisance (which were going to be imposed) would be sufficient to promote the licensing objectives without reducing the operating hours of the premises. Given that the Act dictates that only such steps as are necessary should be taken with regard to the variation of the terms of operation sought, such consideration was required.

#### *MY OVERALL CONCLUSIONS*

**[63]** It would be wrong, in my judgment, to say that the magistrates failed to take account of the licensing objectives. At the outset of their Reasons, they correctly identify those which are relevant. Similarly, as the First Interested Party submits, whilst they did not *articulate* that the curtailment of the hours sought was "necessary" to promote those objectives, it is implied in their decision that they did take this view and it can also be inferred from their comment that because of the concept of migration, public nuisance and crime and disorder would be "an inevitable consequence" of leaving the hours as granted by the Local Authority. However, in my view their approach to what was "necessary" was coloured by a failure to take proper account of the changed approach to licensing introduced by the Act. Had they had proper regard to the Act and the Guidance, they would have approached the matter with a greater reluctance to impose regulation and would have looked for real evidence that it was required in the circumstances of the case. Their conclusion that it was so required on the basis of a risk of migration from other premises in the vicinity was not one to which a properly directed bench could have come. The fact that the police did not oppose the hours sought on this basis should have weighed very heavily with them whereas, in fact, they appear to have dismissed the police view because it did not agree with their own. They should also have considered specifically the question of precisely how frequently the premises would be likely to be open late and made findings about it. They would then have been able to compare this to the winter opening pattern in relation to which they accepted there had been no complaints and draw proper conclusions as to the extent to which the summer months would be likely to differ from the winter picture. Having formed a clear view of how frequently late opening could be anticipated, they would also have been able to draw more reliable conclusions about the willingness of customers from further afield to migrate to Saughall Massie. They proceeded without proper evidence and gave their own views excessive weight and their resulting decision limited the hours of operation of the premises without it having been established that it was necessary to do so to promote the licensing objectives. In all the circumstances, their decision was unlawful and it must be quashed.

**[64]** I have said little so far about what appears in the magistrates' response for the judicial review proceedings. The various documents comprising the response did nothing to allay my concerns about the magistrates' decision. Indeed quite a lot of what was said reinforced my view that the magistrates had largely ignored the evidence and imposed their own views. They refer in their response to incidents about which the residents had given evidence and to the residents not having complained formally for various reasons, for example because it was Christmas or because there was thought to be no point. If the magistrates considered these matters to be relevant, it was incumbent on them to say so clearly in their reasons whereas they there recorded their acceptance that there had been no formal or recorded complaints, that the extended hours had been in operation for several months without incidents and that they had attached little or no weight to the statements of the witnesses of the Appellant. They also refer extensively in their response to their thoughts on migration, including that people may come from further afield than the pubs in the vicinity in cars. Particularly concerning is that they refer repeatedly to a perceived issue over police resources which is not something that, as far as I can see, had been raised by Sergeant Yehya or explored with him in evidence. Mr Beere says in his statement for example, ". . . there is also the question of Police resources and

their ability to effectively police this area especially at weekends with already stretched resources being deployed in Hoylake."

**[65]** Reference is made in the response documents to the court feeling that the Brewery's proposed opening hours contradicted the acceptable activities of a family pub and that the Saughall Hotel is "a village pub and not a night spot in the centre of town". For the court to take matters such as this into account seems to me to be an interference with the commercial freedom of the premises of a type that was not permissible under the Act unless it was necessary to promote the licensing objectives. I appreciate that the magistrates' response seems to suggest that they feared that a different type of customer was being courted or would invite themselves once it got too late for families but this does not seem to have been founded on anything that was given in evidence so was really not much more than speculation.

**[66]** Mr Beere's statement ends with a reference to the Brewery wanting to make hay while the sun shines, of which he says, "I believe that this statement was indicative of the Brewery's attitude to local residents and to the general management of the premises." Given that problems with or in the vicinity of the premises had been almost non-existent and that the magistrates had not seen fit to make reference in their Reasons to any difficulties caused by the Hotel, it is hard to see how this belief could be justified but it does perhaps exemplify the approach of the magistrates.

**[67]** I have considered quite separately the argument as to whether the hours of opening can be regulated as part of the licensing of premises as opposed to the hours during which licensable activities take place. It was suggested during argument that there was no power to regulate the time by which people must leave the premises. I cannot agree with this. Clearly keeping premises open (as opposed to providing entertainment or supplying alcohol there) is not a licensable activity as such. However, the operating schedule which must be supplied with an application for a premises licence must include a statement of the matters set out in s 17(4) and these include not only the times when it is proposed that the licensable activities are to take place but also "any other times during which it is proposed that the premises are to be open to the public". On a new grant of a premises licence, where there are no representations the licensing authority has to grant the application subject only to such conditions as are consistent with the operating schedule. I see no reason why, if it is necessary to promote the licensing objectives, these conditions should not include a provision requiring the premises to be shut by the time that is specified in the operating schedule. If representations are made and the licensing authority ultimately grants the application, it can depart from the terms set out in the operating schedule when imposing conditions in so far as this is necessary for the promotion of the licensing objectives. It must follow that it can impose an earlier time for the premises to be locked up than the Applicant wished and specified in its operating schedule. It is important to keep in mind in this regard that the role of the licensing authority and, if there is an appeal, the court, has two dimensions: the fundamental task is to license activities which require a licence and the associated task is to consider what, if any, conditions are imposed on the Applicant to ensure the promotion of the licensing objectives. A requirement that the premises close at a particular time seems to me to be a condition just like any other, such as keeping doors and windows closed to prevent noise. I see no reason why a condition of closing up the premises at a particular time should not therefore be imposed where controlling the hours of the licensable activities on the premises (and such other conditions as may be imposed) is not sufficient to promote the licensing objectives.

#### *THE COSTS ARGUMENT*

**[68]** In the light of my conclusion that the magistrates' decision is unlawful and therefore must be quashed, it is not appropriate for me to consider the arguments in relation to their costs order further. The Appellants had given an undertaking to the Licensing Authority that they would not seek costs against the Licensing Authority and they sought the entirety of their costs of the appeal from the Claimant. The magistrates granted that order and the Claimant submits that that was not an order that was open to them. Whatever the merits of that argument, the magistrates' order in relation to costs cannot now stand. The basic foundation for the

order for costs was that the appeal had succeeded and the Claimant had lost. That position has now been overturned and the costs order must go along with the magistrates' main decision. The magistrates would have had no reason to grant costs against the Claimant if the appeal had been dismissed.

*Appeal dismissed.*

# Corporate Enforcement Policy

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# Corporate Enforcement Policy

## 1. Introduction

The Council carries out a wide range of regulatory roles in meeting its many statutory duties of protecting the public, individuals and the environment. These duties are mainly met by carrying out programmed inspections of premises, responding to complaints, issuing licenses and offering advice. This Policy outlines the approach we take when considering enforcement action. This policy is an overarching policy that applies to all the Council's Services with enforcement duties, although it should be noted that some services have specific Legislative Guidance and Regulations which set out the enforcement requirements in these services.

The appropriate use of the full range of enforcement powers, including prosecution, is important, both to secure compliance with the law and to ensure that those who have duties under it may be held to account for failures to safeguard health, safety and welfare or breach of regulations enforced by the Council.

In deciding on the most appropriate course of action officers should have regard to the principles set out in this policy and the need to maintain a balance between enforcement and other activities, including inspection, advice and education.

### a) Principles of Good Regulation

We will exercise our regulatory activities in a way which is:

- (i) Proportionate – our activities will reflect the level of risk to the public and enforcement action taken will relate to the seriousness of the offence;
- (ii) Accountable – our activities will be open to public scrutiny, with clear and accessible policies, and fair and efficient complaints procedures;
- (iii) Consistent – our advice to those we regulate will be robust and reliable and we will respect advice provided by other regulators. The Council shall seek to ensure consistency of enforcement; however, the Council realises that consistency is not a simple matter of uniformity. Officers will need to exercise their professional judgement and discretion according to the circumstances of each individual case and the relevant responsibilities and intervention systems maintained by the Council;
- (iv) Transparent – we will ensure that those we regulate are able to understand what is expected of them and what they can anticipate in return, and

- (v) Targeted – we will focus our resources on higher risk enterprises and activities, reflecting local need and national priorities and where the Council believes its efforts are able to have an impact.

## **(b) Regulators' Code**

The Council has had regard to the Regulators' Code in the preparation of this policy. In certain instances we may conclude that a provision in the Code is either not relevant or is outweighed by another provision. Where Statutory Guidance and legislation specifies the action to be taken this legislation takes precedence.

## **(c) Human Rights Act 1998**

The Council is a public authority for the purposes of the Human Rights Act 1998. We therefore apply the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This Policy and all associated enforcement decisions take account of the provisions of the Human Rights Act 1998. In particular, due regard is had to the right to a fair trial and the right to respect for private and family life, home and correspondence.

## **(d) Data Protection Act 2018**

Where there is a need for the Council to share enforcement information with other agencies, we will follow the provisions of the Data Protection Act 2018.

## **(e) The Code for Crown Prosecutors**

When deciding whether to institute criminal proceedings the Council has regard to the provisions of [The Code for Crown Prosecutors](#) as issued by the Director of Public Prosecutions.

The Code for Crown Prosecutors is a public document that sets out the general principles to follow when decisions are made in respect of prosecuting cases. The Code sets out two tests that must be satisfied commonly referred to as the 'Evidential Test' and the 'Public Interest Test':

- (i) Evidential Test - is there enough evidence against the defendant? When deciding whether there is enough evidence to prosecute, the Council will consider what evidence can be used in court and is reliable. We must be satisfied there is enough evidence to provide a "realistic prospect of conviction" against each alleged offender.
- (ii) Public Interest Test - is it in the public interest for the case to be brought to court? The Council will balance factors for and against prosecution carefully and fairly,

considering each case on its merits. The public interest factors that we will take into account are detailed under the enforcement options available to us in Section 6.

## **Legal Status of this Enforcement Policy**

This Policy was approved by the Executive on 26 February 2015 and was adopted by Council on 1 April 2015 following an open public consultation between 1 December 2014 and 11 January 2015.

This Policy was reviewed on 14 July 2022 and relevant amendments made

[This Policy](#) is available on the Manchester City Council website

## **2. Purpose of this Policy**

One of the functions of the Council is to act as a regulator and an enforcement agency for a large range of legal duties and powers applied by Acts of Parliament and the Regulations and Orders made under them (including various byelaws).

This policy sets out standards that will be applied across the Council when acting in its role as regulator and enforcement agency and what residents, businesses, consumers and workers can expect from Manchester City Council.

This policy also sets out the approach to be followed by authorised Officers when making decisions in respect of the Council's compliance and enforcement activities. The Council is committed to ensuring that all authorised officers will act in accordance with this policy.

## **3. When this Policy Applies**

### **3.1 Scope of the Policy**

This policy is the overarching enforcement policy for the Council. It outlines the approach to enforcement and lays down the principles which will be followed in deciding upon, and taking action.

Enforcement includes any criminal or civil action taken by the Council aimed at ensuring that individuals or businesses comply with the law.

This policy has been set in accordance with the Regulator's Compliance Code and the Statutory Code of Practice for Regulators. This means that the Council will be open, helpful, fair and careful to ensure that any action required by the Council is proportionate to the risks.

The Council has set out its strategic aims and objectives and its enforcement services will carry out their duties in support of these. This approach is intended to provide better



information to businesses and the community and, by doing so, lend support to the Council's efforts to deliver best value services.

Council services will work with and consult other agencies, and other service areas within the Council, as necessary where there is a shared or complementary enforcement role.

Officers will take reasonable steps to assist businesses and individuals to comply with the law. However officers will be prepared to ensure compliance by exercising the formal powers delegated to them in the Council's Scheme of Delegation including, where appropriate, prosecution.

In certain circumstances the Council will seek to raise awareness and increase compliance levels by publicising unlawful trade practices or criminal activity. Where appropriate the results of specific court cases may also be published.

## **4. Non-Compliance**

### **4.1 Approach to dealing with non-compliance**

- An open, fair and proportionate approach will be taken in dealing with breaches of legislation which are regulated and enforced by the Council. Raising awareness and promoting good practice in regulated areas is the first step in preventing breaches, and officers of the Council will signpost to guidance on aspects of the law where requested to do so.
- Best efforts will be used to resolve any issues where the law may have been broken without taking formal action, or referring the matter to the courts when the circumstances indicate that a minor offence may have been committed and the Council is confident that appropriate corrective action will be taken. However, there may be occasions when the breach is considered to be serious and/or where informal action is not appropriate. In such cases immediate enforcement action may be taken without prior notice and as noted above some services have specific Legislative Guidance and Regulations which set out the enforcement requirements in these services.
- Advice regarding the non-compliance, the actions required and decisions taken at the time of our intervention, along with the reasons for these will be clearly explained. An opportunity to discuss the Council's course of action will be provided to ensure actions are proportionate and consistent. As stated in the previous paragraph, where immediate enforcement action is required, the opportunity for discussion may not be given where there is a serious breach or public health or safety is at risk.

- Officers investigate potential breaches of legislation and they are responsible for managing investigations and making decisions on enforcement action. As part of this process, they may consult with colleagues and managers in determining the best and most appropriate course of action. Officers have the power to use a variety of legislation in the course of their duties, and these have been delegated to them by Chief and Deputy Officers. The Council's Scheme of Delegation can be found in the Council's Constitution document online. In relation to prosecutions, where relevant, officers' cases are reviewed by a manager in line with this enforcement policy before submitting to the Council's City Solicitor's department for consideration.
- In some instances, the Council may have shared responsibilities or a complementary role with another enforcement agency. In these circumstances, officers will liaise with that other agency to ensure effective co-ordination, to avoid inconsistencies and to ensure that any proceedings taken are proportionate and appropriate.
- The Local Authority is the enforcing authority for certain activities in relation to its own establishments. Where minor breaches of legislation are observed the outcome will follow that described above for informal action. Should more serious breaches be observed a report will be sent to the appropriate Head of Service with a copy to the facility manager. The most serious breaches will be reported to the Chief Executive with a copy to the Head of Service and the facility manager.
- The Council will be fair, objective and consistent in its approach to enforcement by following the criteria and guidance set down in relevant legislation and codes of practice. The Council's Corporate Equality & Diversity Policy can be found online.
- The Council may publicise information about enforcement action that is taken in line with Government guidance on [publishing sentencing outcomes](#). This is usually once an investigation has been brought to a conclusion via a successful prosecution in Court. Any news releases of this nature are normally sent electronically by our Press Office to newspapers and broadcast media to use in their news bulletins. Such information may also be publicised on the Council's website and via other social media.

## 4.2 How action taken is determined

- Where evidence is found that a business or other regulated person is showing flagrant disregard for the law by deliberately or persistently failing to comply with advice or requests made by the Council, it may be deemed that informal action is not appropriate. Under these circumstances enforcement action may be escalated directly to prosecution or other more severe sanctions where available.
- Where there is specific Legislative Guidance and Regulations which set out the enforcement requirements these will be followed.
- Where a business or other regulated person contacts the Council to ask for advice and it transpires that a breach of legislation is present at the premises, the most appropriate course of action will be determined based on the factors outlined in section 6 below.
- If it is clear that the business or regulated person is keen to resolve the non-compliance quickly, taking on board and completing the steps recommended by the Council, an informal approach is likely to be taken as opposed to triggering enforcement action. However, if there is a serious breach and/or there is an imminent risk to public health or safety, enforcement action may still have to be taken but the Council will seek to work with the business or regulated person to resolve the problem as quickly as possible.

## 4.3 Factors that influence our response to breaches

- Where a breach of legislation is being investigated the approach taken will be proportionate and will take into account factors such as business size and capacity.
- If the Council has provided advice or guidance to a business or regulated person, our officers will make the necessary checks to ensure that, where this relates to a legal requirement rather than best practice, the non-compliance has been rectified.
- The Council may receive referrals from other enforcement bodies which require investigation. These referrals will typically be as a result of the other bodies' inspections or investigations, or intelligence which they have received. The Council will also refer to other enforcement bodies where breaches of legislation which are dealt with by that body are found.

#### **4.4 Approach to complaints of non-compliance**

- Where a complaint of non-compliance relating to a business, or other regulated person, is received the officers investigating this breach will assess the information received and may make further enquiries to determine whether a complaint requires investigation. In assessing a complaint, officers may consult colleagues and managers to help assess what risk may be involved and this will determine what action is taken.

### **5. Conduct of Investigations**

Enforcement action may result in either civil or criminal proceedings being instituted by the Council. The process that will be followed by officers in the investigation of alleged breaches of the law will depend on which branch of law the investigation is being conducted under. As the enforcing authority in any proceedings it instigates, the burden of proof falls to the Council.

Investigations will be carried out in compliance with the following legislation and in accordance with any associated guidance or codes of practice, in so far as they relate to Manchester City Council:

- the Criminal Procedure and Investigations Act 1996;
- the Regulation of Investigatory Powers Act 2000;
- the Criminal Justice and Police Act 2001;
- the Human Rights Act 1998.

These Acts and associated guidance control how evidence is collected and used and give a range of protections to citizens and potential defendants.

The authorised officers of the Council will also comply with the requirements of the particular legislation under which they are acting, and with any associated guidance or codes of practice.

#### **5.1 Powers of Authorised Officers**

- There are numerous pieces of legislation which the Council as a local authority either has a duty to enforce or adopts or chooses to enforce. The powers available to officers under these different pieces of legislation vary considerably and it is not the purpose of this document to provide an exhaustive list of those powers.

- If officers come across situations where they believe they are being obstructed in carrying out their duties they will always explain the provisions of the relevant legislation in order to resolve the issue.
- The Council recognises the Primary Authority scheme and where appropriate will communicate with any identified primary authority as part of the enforcement/compliance process.
- In some cases powers of seizure are used for safety and evidence gathering purposes. Where articles are removed for any of these purposes a receipt or notice will be given at the time of the inspection or as soon as is practicably possible afterwards.
- Officers do not have the power of arrest; however joint working is undertaken with the Police and other agencies. Instances may arise where the Police or other agencies consider that an arrest should be made in connection with an authorised officer's investigation.
- Officers will carry out formal interviews in line with this policy and the Police and Criminal Evidence Act 1984.
- In respect of Legislation in England that contains criminal offences, there are strict time limits beyond which the law prevents proceedings being instituted. These time limits vary and are stated in the relevant legislation.
- In relevant cases where either criminal or civil proceedings are intended to be brought by the Council a report will be prepared containing all relevant evidence that has been gathered during an investigation. This report will be reviewed by a manager and will also be reviewed by the City Solicitor's department before any proceedings are instigated.

## **5.2 Progress of Investigations**

Officers carrying out investigations will keep alleged offenders and witnesses informed about the progress of any investigation as far as their involvement in the process is concerned.

## 6. Decisions on Enforcement Action

### 6.1 The Range of Actions Available as Set Out in Legislation

There are a range of actions that are available to the Council as set out in the different legislation the Council enforces. Examples of the main types of actions which may be considered are set out below.

#### a) Compliance Advice, Guidance and Support

The Council uses compliance advice, guidance and support as a first response in the case of many breaches of legislation that are identified. Advice is provided, sometimes in the form of a warning letter to assist individuals and businesses in rectifying breaches as quickly and efficiently as possible, avoiding the need for further enforcement action. A warning letter (sometimes called an 'informal caution') will set out what should be done to rectify the breach and to prevent re-occurrence. If a similar breach is identified in the future, this letter will be persuasive in considering the most appropriate enforcement action to take on that occasion. Such a letter cannot be cited in court as a previous conviction but it may be presented in evidence.

Where more formal enforcement action, such as a simple caution or prosecution, is taken, the Council recognises that there is likely to be an ongoing need for compliance advice and support, to prevent further breaches.

#### b) Voluntary Undertakings

The Council may accept voluntary undertakings that breaches will be rectified and/or recurrences prevented. The Council will take any failure to honour voluntary undertakings very seriously and enforcement action is likely to result.

#### c) Statutory (Legal) Notices

The Council has powers to issue statutory notices in respect of many breaches. These include: 'Stop Notices', 'Prohibition Notices/Orders', 'Emergency Prohibition Notices/Orders', and 'Improvement Notices'. Such notices are legally binding. Failure to comply with a statutory notice can be a criminal offence and may lead to prosecution and/ or, where appropriate, the carrying out of work in default.

A statutory notice will clearly set out actions which must be taken and the timescale within which they must be taken. It is likely to require that any breach is rectified and/or prevented from recurring. It may also prohibit specified activities until the breach has been rectified and/or safeguards have been put in place to prevent future breaches. Where a statutory notice is issued, an explanation of the appeals process will be provided to the recipient.

Some notices issued in respect of premises may be affixed to the premises and/or registered as local land charges.

**d) Financial penalties**

The Council has powers to issue fixed penalty notices or penalty charge notices in respect of some breaches. A fixed penalty notice or penalty charge notice is not a criminal fine, and does not appear on an individual's criminal record. If a fixed penalty/penalty charge notice is not paid, the Council may commence criminal proceedings in respect of the breach or take civil enforcement action to recover the penalty charge subject to the provisions of the relevant legislation.

If a fixed penalty/ penalty charge notice is paid in respect of a breach the Council will not take any further enforcement action in respect of that breach. Payment of a fixed penalty does not provide immunity from prosecution in respect of similar or recurrent breaches.

The Council is only able to issue fixed penalty notices where it has specific powers to do so. If fixed penalty notices are available, their issue is at the Council's discretion. In some circumstances, in particular where breaches are serious or recurrent, it may be that prosecution is more appropriate than the issue of a fixed penalty notice.

**e) Injunctive Actions, Enforcement Orders etc.**

In some circumstances the Council may seek a direction from the court (in the form of an order or an injunction) that a breach is rectified and/or prevented from recurring. The court may also direct that specified activities be suspended until the breach has been rectified and/or safeguards have been put in place to prevent future breaches.

Failure to comply with a court order constitutes contempt of court, a serious offence which may lead to imprisonment.

The Council is required to seek enforcement orders after issuing some enforcement notices, providing the court with an opportunity to confirm the restrictions imposed by the notice. Otherwise, the Council will usually only seek a court order if it has serious concerns about compliance with voluntary undertakings or a notice.

**f) Simple Caution**

The Council has the power to issue simple cautions (previously known as 'formal cautions') as an alternative to prosecution for some less serious offences, where a person admits an offence and consents to the simple caution. Where a simple caution is offered and declined, the Council is likely to consider prosecution.

A simple caution will appear on the offender's criminal record. It is likely to influence how the Council and others deal with any similar breaches in the future, and may be cited in court if the offender is subsequently prosecuted for a similar offence. If a simple caution is issued to an individual (rather than a corporation) it may have consequences if that individual seeks certain types of employment.

Simple cautions will be used in accordance with Home Office Circular 016/2008 and other relevant guidance.

**g) Prosecution**

The Council may prosecute in respect of serious or recurrent breaches, or where other enforcement actions, such as voluntary undertakings or statutory notices have failed to secure compliance. When deciding whether to prosecute the Council has regard to the provisions of [The Code for Crown Prosecutors](#) as issued by the Director of Public Prosecutions.

Prosecution will only be considered where the Council is satisfied that it has sufficient evidence to provide a realistic prospect of conviction against the defendant(s).

If the evidential test is satisfied a prosecution will usually take place unless there are public interest factors tending against prosecution which outweigh those tending in favour. The more serious the offence or the offender's record of breaches/criminal behaviour, the more likely it is that prosecution will be required in the public interest.

Assessing the public interest is not merely a matter of adding up the number of factors on each side and seeing which has the greater number. The public interest must be decided on the merits of each individual case and making an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction.

A successful prosecution will result in a criminal record. The court may impose a fine and in respect of particularly serious breaches a prison sentence. The court may order the forfeiture and disposal of non-compliant goods and/or the confiscation of any profits which have resulted from the breach. Prosecution may also lead, in some circumstances, to the disqualification of individuals from acting as company directors.

**h) Refusal/Suspension/Revocation of Licences**

- The Council issues a number of different Licences, Consents, Registrations and permits. They are applied for by submission of an application, the form and content of which is sometimes specified in law. Applications are generally granted for a limited defined period and will be required to be renewed annually unless otherwise specified.
- The Council may be permitted to ask supplementary questions on an application form in order to assist it in reaching a decision on whether the applicant is a fit and proper person to hold such a Licence.
- In some cases applications are subject to either a public or interested party consultation process and any application that attracts adverse comment or objection or does not meet Council policy requirements will be referred to an internal civil hearing forum to determine the application.



- Most Licences and other permissions have conditions attached which can be standard conditions or specific conditions or a combination of both. These conditions form part of the Licence and lay down requirements that a business or individual must have regard to when trading. Breach of a condition may be a civil or criminal matter.
- When considering applications information supplied with the application together with any previous enforcement action and compliance record can be taken into account when reaching a decision.

## **6.2 Explanation of how Decisions are made on Enforcement Action**

In assessing what enforcement action is necessary and proportionate consideration will be given to, the following principles for enforcement set out in the Macrory Review:

- 1) aim to change the behaviour of the offender;
- 2) aim to eliminate any financial gain or benefit from non-compliance;
- 3) be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- 4) be proportionate to the nature of the offence and the harm caused;
- 5) aim to restore the harm caused by regulatory non-compliance, where appropriate; and,
- 6) aim to deter future non-compliance.

Where appropriate decisions about what enforcement action is to be taken may involve consultation between:

- (a) Investigating Officer(s)
- (b) Senior Managers
- (c) Manchester City Council -City Solicitors

The decision to prosecute a case will be taken by those with authority to do so in accordance with the Council's Scheme of Delegations.

### **6.3 Explanation of how Decisions are Communicated to those Affected.**

The Council will provide a timely explanation in writing of any rights to representation or appeal and information on the process involved.

## **7. Review of this Policy**

### **7.1 Details of when and how the policy will be reviewed**

This policy will be reviewed periodically or in line with changes in relevant legislation, or Regulators Code.

## **8. Comments and Complaints**

### **8.1 Details of processes for complaints and appeals**

- All appeals in relation to enforcement action taken should be via the statutory appeals process outlined in the relevant legislation.
- Complaints about the conduct of officers should be made via the Council's corporate complaints procedure.

By virtue of paragraph(s) 3 of Part 1 of Schedule 12A  
of the Local Government Act 1972.

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