pany had failed properly to train the relief manager. Accordingly, if the justices' finding related to a head office failure in implementing training policy, then that finding was not supported under the evidence before them. In these circumstances, while, as I have said, I have great sympathy for the justices in the circumstances in which the case was put before them, I would, for my part, having answered the questions along the lines that I have suggested, and set aside the conviction.

MR JUSTICE SEDLEY: I agree that this appeal must be allowed and the conviction set aside, for the reasons given by my Lord. I wish, however, to add two observations. One is that I found disturbing the repeated submission by Mr Philpott, for the Appellant, that it was a material fact that people, including the complainant, could, but did not always, ask for a top-up if they felt that the head on their beer was excessive. The person who orders a pint is entitled to a pint. If a pint (including, if legally proper, a head) is not supplied, there is no onus on the customer to demand full measure before an offence is committed. My second reservation I express briefly and tentatively. We have heard very little argument upon it because Mr Gioserano has had to live with the concession made below that the Appellant could be liable, if at all, only by way of vicarious liability or an "other person" under section 32, namely the relief manageress. I simply wish to put on record my doubts about what appears to be the accepted approach to Part IV of the Weights and Measures Act 1985. The primary offence of giving short measure created by section 28 is committed by any person who sells beer by the pint. The concession made before the justices reflected the conventional view that the decision of this Court in *Goodfellow v Johnson* [1966] 1 QB 83, precludes any prosecution of the owners whose beer the licensee is selling on the ground that it is the licensee alone who may sell beer. I have been concerned whether it follows from the proposition that only a licensee may sell beer that the company which owns the premises, provides the beer and employs the licensee to sell it is not equally selling beer. I have also asked myself whether the decision in *Hotchin v Hindmarsh* [1891] 2 KB 181, on which the Divisional Court founded in *Goodfellow v Johnson* and which holds that the forbidden act in this context is the parting with possession and not with title, truly negatives this possibility. If the true position were that a company in the Appellant's position is selling beer though the licensee, then the only relevant question would be under section 34 whether each had exercised due diligence in order to prevent the bartender giving short measure. If this were the statutory scheme, then absent a defence of due diligence neither the brewer nor the licensee could escape liability by blaming the bartender. Indeed section 32 makes it clear that the bartender may also be prosecuted. There would then be no need for the artificiality of trying, as Mr Gioserano has skilfully but unsuccessfully tried, to bring in the Appellant by the device of common-law vicarious liability, a doctrine which distributes civil liability on grounds of legal policy without regard to fault, pinning such liability on the default of someone not (so far as we know) before the Court as a Defendant. The problem of slotting a due diligence defence into a vicarious liability case is evident. The defence either exonerates the licensee or fails altogether, but cannot help the owner. This cannot be right. These considerations, however, cannot directly arise here because the conceded basis on which the case proceeded below makes them immaterial. Given this, I agree that the appeal has to succeed upon the single ground explained by my Lord, Brooke LJ.

R v Liverpool Crown Court, ex parte Luxury Leisure

COURT OF APPEAL
9 October 1998

Lord Justice Simon Brown, Lord Justice Aldous and Lord Justice Clarke

Section 34 Gaming Act 1968 and section 16, Lotteries and Amusements Act 1976 — permits for amusement machine premises — local authority refused application — whether social conditions and nature of community relevant considerations in refusing permit — whether opposition to project should be taken into account

Decision: local authority entitled to take social conditions into account — nature of community, prevalence of young people and possible effects of amusement arcade on the area were relevant — Crown Court entitled to take extensive evidence as justifying refusal

John Saunders QC, instructed by Hay & Kilner, Newcastle, for the appellants
Stephen Sauvain QC, instructed by Liverpool Legal Services, for the respondents

LORD JUSTICE SIMON BROWN: The appellants are part of the Noble Organisation Group, the largest privately owned group of companies in the leisure field, whose operations include something over 70 amusement centres. They wish to open a further such centre at 72 Broadway, Norris Green in Liverpool. For that purpose they require permits respectively under s.34 and schedule 9 to the Gaming Act 1968, and under s.16 and sch.3 to the Lotteries and Amusements Act 1976.

On 15 August 1995 the second respondents, Liverpool City Council, refused the appellant's application for such permits. On 12 January 1996 the first respondent, the Liverpool Crown Court, dismissed the appellant's appeal against that refusal. On 17 October 1997 Owe J dismissed the appellant's judicial review challenge to the crown court's decision. Before us now is the appellant's appeal from Owen J's order, brought with the leave of the single Lord Justice.

The statutory context in which this appeal arises can be shortly stated. Paragraph 8(1)(a) of sch.9 to the Gaming Act provides that:

> The grant of a permit [a permit under section 34 of the Act in a case like the present one] shall be at the discretion of the appropriate authority.

That authority here was the Liverpool City Council. An appeal from the refusal of the necessary permit lies by way of rehearing to the crown court, and on such an appeal the crown court has a precisely similar discretion. The Lotter-

ies and Amusements Act 1976 contains similar provisions, which I need not consider separately.

The reasons given by the second respondents for their refusal of the permits were these:

> After very careful consideration the sub-committee is agreed that in view of the social conditions prevailing in the area and the nature of the community, the granting of this licence would have a negative effect on the area (which is frequented by children and young people in significant numbers). Furthermore, the Sub-Committee also notes that facilities for gaming are already available in the area for he client who is most likely, according to the applicant, to make use of the facilities, and for those reasons the sub-committee considers that, on balance, this is the wrong location for this facility and therefore refuses the application.

The appeal to the crown court was heard by Judge Crompton and four justices, judgement being given extempore after a retirement of some two or three hours at the conclusion of a three-day hearing. The crown court accepted that the appellants were a fit and proper applicant for a permit of this kind, and the premises (for which indeed the applicants had already obtained the necessary planning permission in March 1995 for change of use) were physically suitable for the purpose. The crown court further accepted that the appellants would endeavour to enforce an undertaking which they were prepared to give to the court not to allow admittance to the premises of persons under the age of 21. They had, I may note, in their original application given an undertaking in relation to persons under 18, an undertaking which would not, as it happens, be necessary today; a recent amendment to the 1968 Act has now introduced a statutory condition restricting entry to such premises to those over 18.

One area of concern had been the risk of young people congregating outside the premises, were a permit to be granted. Having regard to the evidence given on that issue, however, the crown court concluded that that was simply not to be regarded as a problem at all.

What then was it that decided the crown court to reject the appeal? The critical passages in Judge Crompton's judgement, the reasoning in which was agreed unanimously by all four of the justices with whom he was sitting, are these:

> I move on next to the question of the social problems in the area. *[One of the specific issues identified by counsel for the crown court's determination was the second respondent's assertion 'that because of the social conditions in this area persons over 21 must be protected from the provision of AWP machines']*. We have, of course, heard statistical evidence about the very high rate of unemployment and the number of single parent families. We have also heard evidence from witnesses who have many years experience of actually living in the area, and who have evidence not simply of their own views, but also on behalf of a very large number of groups and organisations operating in the Norris Green area.
>
> The quantity of the groups and organisations was itself indicative of the perceived problems in this area. In assessing that evidence we had no hesitation in coming to the conclusion that Norris Green is a very deprived area with wide social problems.
>
> Furthermore, we had the advantage yesterday of going to the area and viewing it for ourselves. We have to say that confirmed our assessment of the evidence presented to us.
>
> Then, a little later:
>
> ... we are satisfied there has been very wide consultation amongst the community. Furthermore, there has been careful explanation made of what is involved and therefore the views expressed are informed and not simply a gut reaction.
>
> We consider that in those circumstances the view of the majority should be considered as an important factor, and not be lightly cast aside. the voice of the people in this context is important. we were urged to listen to it and we have. We have no doubt on the evidence that there is strong opposition to this application, and by a substantial majority of the community ...
>
> Ultimately we came to this conclusion: that those who wish to play machines can do so at the bingo hall which is no more than a few yards from the premises [which are] the subject of this appeal.
>
> Overall we take the view that, having regard top the social conditions prevailing in the area, the very strongly expressed view of the community and facilities for gaming already available in what is a relatively small shopping area, the location of these premises is, on balance, unsuitable and we are therefore dismissing the appeals for the reasons I have endeavoured to express.

Before turning to consider the grounds upon which the applicants sought to challenge that decision, initially before Owen J and now again before us, let me finally summarise the contents of certain petitions which were put in evidence before the crown court, two in opposition to the proposal, two in support. Those in support were, first, what was described as a demand survey of 300 members of the public conducted by a polling organisation on a particular day within the vicinity of the premises. In answer to the question 'If such an amusement centre existed would you use it?' some 25 per cent answered yes. The second petition in support, carrying just over a thousand names, was in these terms:

> We, the undersigned agree that there is a demand for a Nobles Amusement Centre (restricted to adults - those over eighteen) with fruit machines and prize bingo and should be available in Norris Green Shopping Centre.

The first of the two petitions in opposition had been conducted by the Morningside & Area Residents Association and contained 500 signatures under this rubric:

> We, the undersigned object most strongly to the proposal to open an amusement arcade in Broadway shopping centre, Liverpool 11, on the grounds that in an already impoverished area with a high percentage of unemployment young people especially will be tempted to waste their money on the machines and some may resort to petty thieving in order to finance their gambling.

The other was a petition organised by local churches signed by some 650 peo-

ple in support of the proposition that:

We, the undersigned, do not want an amusement arcade in Broadway.

Thirty three of the signatories to that petition had added short comments of their own, amongst which were included 'Harmful to the community', 'Very bad for our youth' and 'Encouraging the young to spend money they do not have.'

I turn to the grounds upon which it is sought to impugn the crown court's decision. These are conveniently summarised in the appellant's skeleton argument as follows:

(a) Taking into account the strength of the local opposition per se rather than considering whether the grounds for that opposition were valid.

(b) Failing to deal adequately with the question of demand

(c) Failing in its judgement to set out clearly why the appeal had been rejected.

Ground (b) is no longer persisted in. Ground (c) is pursued, but essentially as an alternative to ground (a), i.e. on the footing that if the strength of local opposition was taken into account permissibly and for reasons other than merely the strength of numbers involved, the crown court failed to make that plain in their judgement.

Let me turn at once, therefore, to the critical issue as to the relevance, if any, f the strength of opposition to the proposal

That there was strong local opposition cannot be doubted. What Mr Saunders QC submits, however, is that this is frankly irrelevant unless only, first, the reasoning underlying that opposition is plain and secondly, the court itself agrees with that reasoning.

That submission is said to be supported by a line of Scottish authorities, most importantly *The Noble Organisation Limited v City of Glasgow District Council (No.3)*, (1991) SLT 3 March, 213, and *Kilmarnock and Loudon District Council v The Noble Organisation Limited* [1992] unreported, transcript 25 June 1992.

In the first of those cases, which I shall call *Noble*, these same appellants succeeded in the second division of the Court of Session, as indeed they had done before the sheriff below. Under the legislation there in play, the licensing authority were entitled to refuse the licence on certain specified grounds or for 'other good reason'. (Here I would observe that although under the English legislation the discretion afforded to the licensing authorities is on its face wholly untrammelled, I accept that in England too a permit could only be refused for some good reasons.) The 'other good reason' relied upon by the licensing authority in Noble was the strength of local opposition to the proposal. As their decision letter made plain, this was

> evidenced by the receipt of objectors from Dennistoun Community Council, local cvhurches, business interests and some 94 local residents whose names and addresses are attached hereto. While the committee accepted the submission that these objectors came from only a small proportion of the total population, it took the view that the objection by the Community Council could be regarded as representing the feelings of the local community and it was impressed by the fact that some 94 persons were prepared to sign individual letters objecting to your clients' application. The Committee concluded that such a substantial body of local opinion could not be ignored and the fact that the local community did not wish an amusement centre to be located at 523/525 Duke Street, Glasgow, was good reason for refusing the application.

In upholding the sheriff's decision that the licensing authority 'erred in law in considering the mere number of objectors to be a good reason for refusal', the Lord Justice Clerk, Lord Ross, at page 216 said this:

> Counsel for the defenders made it plain that it was no longer being contended on behalf of the defenders that any of these grounds had in fact been made out. The consequence accordingly is that the grounds of objection relied on by the objectors have been rejected and, if that is so, I agree with counsel for the pursuers that there is nothing left in any of the objections. The fact that there were 94 objections is therefore of no consequence. As counsel for the pursuers put it, 94 times nothing still equals nothing ... I am not persuaded that an 'other good reason for refusing the application' would be the number of objections which contained grounds which had been rejected ...
>
> It is unnecessary to determine whether the number of objections could ever be relevant, but I am certainly satisfied that the mere number of objections irrespective of their content could never be a good reason for refusing an application. I am accordingly persuaded that the committee erred in law in considering that the strength of local opposition per se justified their decision to refuse the application. I am also of the opinion that the sheriff was well founded in his conclusion that the defenders' discretion was not reasonably exercised by counting objections, regardless of their content. Indeed, the case is stronger than that because the defenders were not merely regardless of the content of the objections but attached weight to the number of the objections despite the fact that these were all objections which had been rejected so far as their content was concerned.

Lord Murray's supporting judgement concluded, at page 217

> It might even be open to a licensing authority in an appropriate case, where the quality and quantity of opposition is adequately vouched by written objections and evidence led before the committee for a licensing authority to take account, say, of overwhelming local opposition against an application, but I would prefer to reserve judgement upon that matter. It is perfectly clear in this case not only that the licensing authority erred in law in taking into account as a separate factor the mere number of objections but also that there is no rational basis upon the undisputed facts here on which the licensing authority could hold that an 'other good reason' for refusal was constituted by the number of these objections alone.

The second case, *Kilmarnock*, perhaps carried that decision a little further forward. The petition of objection there consisted solely of a substantial number of signatures in support of the proposition that 'Kilmarnock does not need a bigger arcade' (that being the proposal

in question).

As to that the Lord President, Lord Hope, having referred to Noble, at page 13 said this:

> The mere number of objections irrespective of their content can never be good reason for refusing an application. What matters are the grounds on which the objection is based. This makes it all the more important, when numerous signatures have been obtained to indicate the weight of opinion on the point, for the grounds of the objection to be clearly specified. Unless this is done it cannot be assumed that the signatories are all objecting for the same reason. Lack of precision in the reason given in the petition may indicate that they themselves were not clear in their own minds about the content of the objections with which they wished to be associated. An objection is not to be treated more leniently in this regard simply because it takes the form of a petition for public signature. On the contrary, it is important that the requirement that the grounds of objection must be specified should be applied as strictly in these cases as it must be in the case of an objection by an individual. If this is not done, the licensing authority may be tempted to attach weight to the objection because of the number of persons associated with it regardless of its content, which is something they are not entitled to do.

As to the terms of the petition in that case, the Lord President said:

> The question is whether the grounds for the objection have been specified in the seven words which remain. Although the point is a narrow one, we have reached the opinion without much difficulty that the sheriff was entitled to hold that this test was not satisfied. It seems to use that these words contain a proposition which simply invites the question, why not? It is in the unspoken answer to that question that the grounds for the objection are concealed, not in the pro[position which invites it.

Whereas, therefore, *Noble* can be explained on the footing that the reasons underlying the weight of public opposition there had been plainly demonstrated to be invalid, *Kilmarnock* appears rather to suggest that the burden lies on those seeking to rely on public opposition to show that the reasons underlying it are in fact demonstrably sound.

Let me at this stage turn briefly to the one other authority on this central aspect of the appeal which seems to me of some relevance: the judgement of Brooke J in *R v Chichester Crown Court ex parte Forte* [1995] JPR 285. In common with Owen J, I find in this some broad support for the view that strong local opposition may in certain circumstances indeed be relevant.

True it is, as Mr Saunders submits, that the *Chichester* case was concerned principally with the question whether the extent of the demand is a relevant consideration in all these cases. As to that, Brooke J held, at page 291:

> Issues involving gaming machines often gave rise to strong and passionate feelings in 1968, as they still do in Chichester today, and if there has never been an amusement centre in an authority area and its proposed introduction awakens strong opposition I can see no reason why the authority may not lawfully consider the extent to which a demand for the centre exists before deciding whether to grant or refuse a permit.

A little later he said, at page 292:

> ... I am concerned with the 1968 Gaming Act, when Parliament must be taken to have known that in some areas of the country there would be strong opposition to the introduction of amusement centres. Parliament left these matters for local decision, with an appeal to the local Crown Court, and I do not see any reason why the introduction of a criterion by which the likely demand for a new centre, against a background where none existed before, required any special justification in that context.

Those passages in Brooke J's judgement to my mind reflect the fact that in this context opposition and demand are to some extent related concepts. If a lot of people for perfectly good reason want the facility of a new amusement centre, then that is relevant, but so too is it relevant if a lot of people, again for acceptable reasons, object to it. That is local decision making in action, something which Parliament plainly intended in this area. Judge Crompton to my mind expressed it well in the present case:

> The view of the majority should be considered as an important factor, and not be lightly cast aside. The voice of the people in this context is important.

If of course the objections of the public are founded on a demonstrable misunderstanding of the true factual position, or otherwise indicate no more than an uninformed gut reaction to a proposal, then I would accept that they can carry no weight whatever and must be ignored. Take this very case as an example. Insofar as the objections here were based on the anticipated problem as to youths congregating outside the premises, those objections would fall once the court concluded, as it did, that in fact no such problem was going to arise.

That, however, was by no means the only, or indeed the main, objection here. Take the terms of the Morningside petition itself. The objections expressed there were to introducing this temptation to further gambling into an 'already impoverished area with a high percentage of unemployment', against the fear, entirely understandable, that young people (an expression I would take to include those in their 20s) would be tempted to waste their money on the machines and some might resort to petty thieving to finance their gambling.

Perhaps more important still was the crown court's finding that there had been 'very wide consultation amongst the community', 'careful explanation ... of what is involved' and, in the result, their conclusion that 'the views expressed are informed and not simply a gut reaction.'

I would reject the appellant's central contention here that the crown court relied on what the Scottish cases forbid, namely the mere weight of local opposition. Still less did it rely on opposition based on demonstrably unsound reasoning. Rather, it is plain that the crown court (having listened to very extensive evidence and benefited from their own view of the area) were in agreement with the weight of objection that this was an undesirable proposal. They effectively say that when they state that their view 'confirmed our assessment of the evidence presented to us.'

As to their final overall conclusion,

that seems to me wholly unexceptionable. They have regard to three, plainly interlocking, considerations: (a) the social conditions prevailing in the area, (b) the very strongly expressed views of the community and (c) the fact that there are already available facilities for gaming in this area. The very strongly expressed views of the community there being referred to are those objecting to this proposal in the light of the social conditions prevailing, objections which the court does not regard as outweighed by the demand for the facility given the alternative opportunities for gaming provided elsewhere in the area.

That conclusion effectively disposes of the other limb of the challenge too, the reasons ground. All I need to say as to that is that I regard the reasons given here as more than sufficient to satisfy the requirement that decisions of this nature be properly reasoned, a requirement analysed and explained in Kennedy J's decision in *R v Warwick Crown Court ex parte Patel* [1991] 8 LR 22. I would accordingly dismiss this appeal.

LORD JUSTICE ALDOUS: I agree. His Honour Judge Crompton gave on 12 January 1996 an extempore judgement which set out the reasons why he and the bench of justices who sat with him dismissed the appeal of Luxury Leisure Ltd. As has been pointed out by Brown LJ, the substantive attack upon that judgement which was made before us was that the crown court had erred in taking into account the strength of local opposition per se, rather than considering whether the grounds for that opposition were valid.

I do not believe that the crown court took into account merely the strength of local opposition. In his judgement, the judge said:

> We have, of course, heard statistical evidence about the very high rate of unemployment and the number of single parent families. We have also heard evidence from witnesses who have many years experience of actually living in the area, and who gave evidence not simply of their own views, but also on behalf of a very large number of groups and organisations operating in the Norris Green area.

He went on to conclude that the Norris Green area was a very deprived area with wide social problems, and pointed out that he and the bench of justices had had the advantage of going to the area and viewing it form themselves. He concluded that they were satisfied that there had been wide consultation amongst the community, there had been careful explanation made of what was involved and that 'the views expressed are informed and not simply a gut reaction.

The discretion given in the legislation is unfettered. That means that the council and the crown court must act judicially and found their decision upon a rational basis. However, it is for the local court and council to decide the matter. To adopt a sentence from the judgement of Lord Scarman in *Westminster City Council v Great Portland Estates plc* [1985] 1 AC 661 at 670:

> It would be inhuman pedantry to exclude from the control of our environment the human factor.

That, of course, was a planning case. However, informed views of the community can be a factor which can be taken into account by both the crown court and the council. It will only be one factor which a council, exercising the discretion given to it, will take into account.

As I have said, the council and the court must act judicially when exercising their discretion. It follows that opposition which is misinformed is of no weight, and remains of no weight even if held by many people. However, that is not this case. As I have pointed out, the court heard evidence. It held that there had been wide consultation, careful explanation and that the views expressed by the witnesses were informed. It was implicit in that conclusion that the views were not unreasonable. I believe that the court was right to conclude that the views expressed, being informed views, were one of the factors to consider.

It was also submitted that the reasons which were given by the court were not sufficient. It is sometimes possible to attack a judgement on the basis that the reasons are not sufficient. The attack in this case was made with hindsight. It was not suggested to the judge when he gave his judgement that further reasons were necessary. Like my Lord, I believe the reasons are more than adequate. I would dismiss this appeal.

LORD JUSTICE CLARK: I agree that for the reasons given in both judgements, this appeal should be dismissed.

Etridge v Leeds Licensing Justices

CROWN COURT, LEEDS
7 September 1998

Adams J and justices

Licensing Act 1964, section 1 — refusal of grant of new on-licence — condition on existing licence prohibiting off sales — applicant wished to place tables on pavement outside premises — condition inhibited service to tables — whether condition valid under terms of Act

Decision: Justices cannot lawfully exclude off sales from an on-licence by condition — statement of intent by applicant on method of operation might offer a solution

John Saunders QC appeared for the applicant;
Martin Walsh for the respondent justices

JUDGE ADAMS: This is the second day of an appeal which began on 24 April 1998 and it began by a notice of appeal dated 28 July 1997 when the applicant, the licensee of the All Bar One, situated at the corner of East Parade and Greek Street in Leeds, appealed against the refusal of the licensing justices on 18 July 1997 to grant a new on-licence for the premises.

The applicant already held a licence, granted on 17 March 1995, which was subject inter alia to a condition which forbade off sales; and the purpose of the application was to obtain an on-licence without this condition.

There was no desire on the part of the applicant to promote off sales, but permission had been obtained, or perhaps the position is it was hoped to obtain it, for the local authority to place seven tables on part of the adjacent pavement and the existing licence would not allow the customers seated there to be served with drinks; hence the application for a new licence.