Deterrence and sanctions in licensing

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Introduction

A licensing sub-committee considering an application for review of a premises licence under the Licensing Act 2003 is given a wide discretion, from taking no action to revoking the licence. As is well known, in exercising its discretion, it must take the steps which it considers appropriate for the promotion of the licensing objectives. The question for consideration in this article is whether and, if so the extent to which, it may use its powers to impose a sanction or take into consideration a need for deterrence.

The discussion below covers the permissible limits of deterrent disposals as contemplated by the section 182 Guidance and applicable case law. It also considers the old case of *Regina v Knightsbridge Crown Court, Ex parte International Sporting Club* [1982] QB 304, and deals with whether its teachings remain relevant in a modern licensing environment.

The nature of review proceedings

Although it is not a prerequisite for a review that there has been a past breach of a licence condition or harm to the licensing objectives, this will be so in almost all cases. In that sense, the Licensing Sub-Committee will be considering what has happened in the past in order to decide what steps are appropriate in the future.

This is inherent in the statutory scheme itself. Section 4(1) of the Licensing Act 2003 imposes a duty on the authority to exercise its functions *"with a view to promoting the licensing objectives"* while each of the licensing objectives themselves is framed in terms of prevention or protection. In other words, the overriding duty of the authority is to promote the prevention of harm. It is not, for example, to punish anyone.

This essential approach, of looking backward at what the problem was in order to look forward to the appropriate remedial measures was well-expressed in the Scottish case of *Lidl UK GmbH v City of Glasgow Licensing Board* [2013] CSIH 25 in which Lord MacKay, considering the similarly worded Licensing (Scotland) Act 2005, stated:

> *35. At a review hearing held in terms of section 38 of the 2005 Act a licensing board is required, in light of the terms of section 39 of that Act, to consider whether a ground for review of the premises licence in question has been established and, if a ground is established, whether it is necessary or appropriate for the purposes of any of the licensing objectives to take one or more of the steps listed in section 39(2). While a licensing board necessarily has to consider the earlier factual allegations upon which the application or proposal for review is made, the process of review is essentially forward looking. It involves examining whether the continuance of the particular premises licence in issue, without taking any of the steps listed in section 39(2), would be inconsistent with endeavouring to achieve the licensing objective in question. The process of review is therefore not directed to imposing a penalty in respect of some past event which is not likely to recur to an extent liable to jeopardise the licensing objective.*

The same notion – having an eye to the past in governing for the future – is also reflected in the section 182 guidance regarding reviews:

> *11.20 In deciding which of these powers to invoke, it is expected that licensing authorities should so far as possible seek to establish the cause or causes of the concerns that the representations identify. The remedial action taken should generally be directed at these causes and should always be no more than an appropriate and proportionate response to address the causes of concern that instigated the review.*

The role of deterrence

The Licensing Act assigns no express role to deterrence in the licensing system. This might be contrasted with criminal sentencing functions, in which the reduction of crime, including by deterrence, is one of the five statutory purposes of sentencing adults: section 57(2) Sentencing Act 2020.

However, the absence of express reference to deterrence in the Licensing Act does not mean that it has no role to play. It is not hard to imagine a Licensing Sub-Committee reaching a conclusion that by imposing deterrent measures on a licensee, it may help to fix the gravity of the situation in the licensee's mind, so dissuading the licensee from a repeat performance, thus promoting the licensing objectives in the future.

Indeed, while the Act does not refer to deterrence, the guidance does, and of course the licensing authority is to have regard to the guidance in exercising its functions: section 4(3). However, the reference in the guidance to deterrence is unhelpfully fleeting. Amongst a number of different considerations, paragraph 11.23 includes this sentence: *"So, for instance, a licence could be suspended for a weekend as a means of deterring the holder from allowing the problems that gave rise to the review to happen again."*

However, even this single reference is sufficient to highlight that remediation is not the only purpose of measures imposed following a review: deterrence might also have a role to play.

The role of deterrence has been considered in two cases under the Licensing Act 2003, which bear some consideration here.

In *R (Bassetlaw DC) v Worksop Magistrates' Court* [2008] EWHC 3530 (Admin) a licensee had failed a test purchase operation, twice serving alcohol to 14 year olds. The authority suspended the licence for a month. On appeal, the District Judge overturned the suspension, stating that it was not his job to administer punishment. The Council successfully appealed to the High Court.

Slade J was impressed by what is now paragraph 11.26 of the guidance, which states that where premises have been used for criminal purposes, the job of the authority is to take action in the interest of the wider community and not that of the licensee. This, she thought, supported the notion of a deterrent measure. She said:

> *"32 Accordingly, in my judgment, the district judge misdirected himself by confining his consideration of the case to the test which would be appropriate where no criminal activity was concerned. Where criminal activity is applicable, as here, wider considerations come into play and the furtherance of the licensing objective engaged includes the prevention of crime. In those circumstances, deterrence, in my judgment, is an appropriate objective and one contemplated by the guidance issued by the Secretary of State.*
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> *"33 The district judge held that the provisions are not to be used and cannot be used for punishment. That may strictly speaking be correct. However, in my judgment deterrence is an appropriate consideration when the paragraphs specifically directed to dealing with reviews where there has been activity in connection with crime are applicable. Therefore, when the district judge confined himself, as in my judgment he did, to the considerations of remedying, …. he erred in law. In my judgment, that error is sufficient to undermine the basis of his decision."*

The decision is undoubtedly correct. Reviews do not provide an opportunity to punish the licensee for their sins. And where crime is involved, deterrence may be part of the equation.

However, it may be asked whether the decision goes far enough. Does there have to be a crime to underpin a deterrent measure? What of a licensee which had made a decision to play fast and loose with safeguarding, or public safety? It is certainly arguable that the learned Judge placed undue emphasis on the interests of the wider community just in criminal cases. The general idea that licensing is an exercise carried out for the benefit of the public and not the licensee is neither novel nor even exclusive to the Licensing Act. See e.g. *Leeds City Council v Hussain* [2002] EWHC 1145 (Admin), a private hire case, in which Silber J held that, since the purpose of the power to suspend or revoke

private hire licences was public protection, the personal circumstances of the driver are irrelevant except, very rarely, to explain or excuse their conduct: paras 25-26.

It is not clear, therefore, why deterrence is an appropriate approach where there has been a crime and not in other cases. In any case, it is a crime contrary to section 136 of the Licensing Act 2003 to breach a licence condition, and so there is on any view a low bar for the application of deterrent measures.

The height of the bar fell for consideration again in *East Lindsey DC v Hanif* [2016] EWHC 1265 (Admin), 2016 in which the authority had revoked a licence where the licensee had employed illegal workers but the District Judge had overturned the decision, including because there had been no conviction. In turn, his decision was overturned by the High Court. Jay J stated:

> *13…. 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.*

In other words, not only is the jurisdiction forward-looking, but deterrence provides an appropriate basis for the imposition of measures.

If commission of a crime is not the critical factor, is deliberate misconduct? Again, that would be to impose too narrow a rule. There will be cases where a licensee has simply not paid enough attention to the licensing objectives, or was slipshod in its management. It is hard to see, in such a case, why deterrence should not form part of the consideration of the licensing authority, to bring it home to a licensee that negligent mismanagement is not tolerable.

In summary, deterrence can be part of the authority's armoury in all cases and can be pressed into action when the case calls for deterrent measures: there are no artificial exclusions.

The unresolved question, however, concerns the impact of taking a deterrent approach. As stated above, the guidance seems to suggest it can be used to impose a short sharp shock, e.g. suspension for a weekend. It would be fair to say that it is unlikely that a condition could be used as a deterrent measure because a condition is either appropriate or it isn't. If it isn't, it could not be added anyway as a deterrent. It also seems very unlikely that revocation could ever be imposed as a deterrent measure. A licensee who is put out of business is not deterred but prevented. Nor, in my view, could a measure be imposed to deter others: premises licensing is focussed on the management of the instant premises by the instant licensee.

Therefore, in practice, while I argue that deterrence has a wider potential role than is contemplated by the guidance and case law, by deduction it is probably only material in fixing the length of any suspension imposed. Even then, this is counterbalanced, as the guidance states, by the requirements of proportionality.

Sanctions

It goes without saying that sanctions are widely employed in the field of regulation. But are they apposite under the Licensing Act?

Starting with an example close to home, section 121 gives the Gambling Commission express power to impose a penalty where there has been breach of a condition of the licence. The Commission's *Statement of Principles for Determining Financial Penalties* states, at paragraph 2.6, that there are two elements in a financial penalty, namely a) an amount to reflect the detriment suffered by consumers and/or to remove any financial gain made by the licensee and b) an amount that reflects the

seriousness of the contravention or failure, the impact on the licensing objectives and the need for deterrence.

In *Daub Alderney Limited v The Gambling Commission* [2022] UKFTT 00429 (GRC) Judge Findlay, upholding a penalty of £5,850,000 imposed by the Commission's Regulatory Panel on a non-compliant operator, strongly endorsed a deterrent approach, stating:

> *82. The Panel rightly considered the need for a deterrence uplift to the penal element, having regard to the principle that non-compliance should be more costly than compliance and that enforcement should deliver strong deterrence against future non-compliance.*

From this, we can safely conclude that where the statute confers an express power to impose a sanction, the regulator may take a conventional sentencing approach in fixing the sanction, including deterrence.

Outside the field of licensing, the Courts have been prepared to uphold stiff sanctions for non-compliance. In one leading case, *Bolton v Law Society* [1994] 2 All ER 486 Lord Bingham MR said:

> *"Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors' Disciplinary Tribunal…. There is in some of these orders a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment… The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission … A profession's most valuable asset is its collective reputation and the confidence which that inspires… The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."*

While Lord Bingham was speaking of solicitors, what he had to say applies to professions across the board, whether legal, medical or financial. The concepts underpinning schemes for professional registration share some of the language concerning fitness and propriety and the need to maintain confidence in the professional register: see for example *Harris v The Registrar of Approved Driving Instructors [2010] EWCA Civ 808* at para [30].

However, while professional regulation and the Licensing Act 2003 are both regulatory schemes involving evaluative judgments about what the public interest requires, the considerations at play are different. A deviant professional harms the standing of their profession, reduces hard-won public confidence in the profession and weakens the trust between members of the profession and their clients, so the penalty is imposed to maintain or restore public confidence. A licensing review is focussed on making the premises safer for the public to visit. In short, the functions of disciplinary tribunals are penal; the functions of licensing authorities are not. While some of their considerations cross over – for example deterrence – they are nevertheless engaged in altogether different exercises. Therefore, it is extremely difficult to envisage a draconian penalty imposed on a licensee to improve public confidence in the licensing system surviving the scrutiny of the High Court.

Regina v Knightsbridge Crown Court, Ex parte International Sporting Club (London) Ltd

The Sporting Club case is one of some antiquity, concerning long-repealed legislation, and is not found in any modern licensing textbooks. Nevertheless, in law antiquity can confer authority – precedents do not have shelf-lives. Conversely, the absence of a case from a book is no warrant of irrelevance. Sporting Club has enjoyed a comeback in some recent hearings, so it is necessary to consider if this presages a second coming or an echo from beyond the grave.

In Sporting Club, casino operators had been guilty of serious breaches of the Gaming Act 1968 extending over a period of years. The licensing justices cancelled their licences on the ground that they

were not fit and proper to hold them. The operators accepted that they had not been fit and proper at the time of that determination. But they had an ace up their sleeve. By the time their appeal had reached the Crown Court, they had sold their shareholding to completely new operators, who contended that they were fit and so the licences should not be cancelled. The Crown Court was not interested in this late turn of events and upheld the cancellation. The High Court, however, held that the Crown Court should have taken into account the position at the time of the appeal, and so had been wrong to exclude consideration of the corporate turnaround.

However, said the High Court, that is not to say that a completely new management structure is necessarily a trump card. Just because the licensee is fit at the point of appeal does not guarantee the resuscitation of their licence. Griffiths LJ said:

> *"We have no hesitation in saying that past misconduct by the licence holder will in every case be a relevant consideration to take into account when considering whether to cancel a licence. The weight to be accorded to it will vary according to the circumstances of the case. There may well be cases in which the wrongdoing of the company licence holder has been so flagrant and so well publicised that no amount of restructuring can restore confidence in it as a fit and proper person to hold a licence; it will stand condemned in the public mind as a person unfit to hold a licence and public confidence in the licensing justices would be gravely shaken by allowing it to continue to run the casino. Other less serious breaches may be capable of being cured by restructuring.*
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> *"It is also right that the licensing justices or the Crown Court on an appeal should have regard to the fact that it is in the public interest that the sanction of the cancellation of a licence should not be devalued. It is obvious that the possibility of the loss of the licence must be a powerful incentive to casino operators to observe the gaming laws and to run their premises properly. If persons carrying on gaming through a limited company can run their establishment disgracefully, make a great deal of money and then when the licence is cancelled sell the company to someone who because he is a fit and proper person must be entitled to continue to hold the licence through the company, it will seriously devalue the sanction of cancellation… [I]f because of the restructuring the court considered that the company was now a fit and proper person, but it also found that in the past the company had used the premises for an unlawful purpose, it would certainly be open to the court in the exercise of its discretion to cancel the licence. A licensing authority is fully entitled to use the sanction of cancellation in the public interest to encourage other operators or would-be operators of gaming establishments to observe the law in the area of their jurisdiction.*

It is right to say that that dictum remains relevant in cases where the regulatory body is imposing a sanction, in that particular case the sanction of cancellation. Indeed, the language and concepts used are redolent of the approach of Lord Bingham in *Bolton.* But, in my view, it is equally true to say that the dictum has no application to bodies which are not charged with the function of imposing sanctions. A licensing authority has no power to impose a sanction of cancellation. Its role is to impose measures to protect the licensing objectives in the future. Therefore, the ideas propagated in *Sporting Club*, including whether the licensee will "stand condemned" in the public mind, and whether "public confidence" in the licensing system would be affected by a failure to cancel the licence, have passed into history. They have no place in the modern licensing system.

That conclusion might be tested. Imagine a publican who had committed some egregious breach, for example dealing drugs on the premises. By the time the review is heard he has sold the pub on to a perfectly respectable national operator. If *Sporting Club* is applied literally, it will be open to the Sub-Committee to revoke the licence because of the depredations of a party who has long since quit the scene. The Sub-Committee might wish to revoke the licence to make a point. However, even in this stark case, once it accepts that the new operator will run the premises lawfully, I believe it would be wrong to do so. That is because the licensing objectives do not require that the premises licence be revoked. The criminal justice system will deal with the publican for his past sins. The licensing system will ensure that the premises are run properly in the future.

Conclusion

This article has shown that there is some commonality between systems of licensing, wider regulation and sentencing. That throws up some common approaches too. In the case of the Licensing Act, there is some room for a deterrent approach, and probably in a wider set of circumstances than remarked upon in the case law and guidance, although the scope for actually applying strongly deterrent measures remains limited.

On the other hand, there is clear blue water between the remedial approach of a licensing authority and the approach to sanctions and punishment practised by disciplinary and sentencing bodies. The licensing authority under the Licensing Act 2003 does not apply sanctions, and should not be concerned with public confidence in itself, in the licensee or in the system more widely. Its job is to take measures appropriate to promote the licensing objectives, no more and no less.

The case of Sporting Club was correct on its facts. But it has nothing to tell a modern licensing authority acting under the Licensing Act 2003. It should be allowed to rest in peace.