

LEGAL SUBMISSIONS ON BEHALF OF THE PREMISES

Preliminary Point - Are matters relating to Covid the proper subject of a summary review?

As a preliminary point we wish to respectfully submit that a breach of Covid regulation or guidance is not a legitimate basis on which the premises licensing review, let alone a premises licence summary review, may be brought before a licensing committee.

Summary review

A summary review is brought in circumstances where, in the opinion of a senior police officer, the premises is associated with serious crime and or serious disorder. There is no other matter that is relevant and anything outside of this cannot be considered as relevant for the purposes of the Certificate produced by the senior officer that must accompany the review.

Therefore, the expressions of concern about Covid compliance do not fairly allow for the conclusion that a summary review is the correct mechanism to attend to those concerns.

There are specific powers afforded to the authorities to attend to premises trading otherwise than in a safe and secure Covid manner. An application, for review, is not one of them.

Summary Review Certificate

The certificate from the Superintendent makes this point eloquently, if unintentionally.

First of all, the officer seeks to rely upon the fact that the previous summary review in 2017 is a necessary part of the current story, so as to allow the application to tie the serious crime association point to the premises. Without that association, of course, the application is invalid. This is in spite of the fact that in November 2019 an application for variation to the premises was granted, in part, by this Licensing Committee. It is fair to observe that whilst the Metropolitan Police objected to the variation application. They make that point within their evidence. However, they did not suggest, at that point, in November 2019, that the premises could fairly "still" be associated with serious crime.

Secondly, whilst it is said in the certificate that public nuisance can be a criminal offence (Rimmington), that is not to fairly state that the circumstances in this case can properly be described as a criminal offence of causing public nuisance. The factual background is prefaced with the fact that the defendant sent racially offensive packages and white powder in the post. The quotation on which the Police here rely obliges the defendant (the criminal if you will) to do an act, or omit to discharge a legal duty, the effect of the act or omission being to endanger life, health and property and not, as the police appear to interpret the case, as to do an act or omit to discharge a legal duty that might in certain circumstances that have not yet been established, cause infection which, for some, might be to endanger health.

Thirdly, the certificate also stretches the argument to suggest that, because the Applicant can identify one public nuisance case, where one person was sentenced to three years custodial prison sentence, the suggestion that that, in some way, allows for the conclusion that this offence (if indeed it is an offence) would likely meet a similar custodial prison sentence is respectfully stretched beyond breaking point. To quote this case, or at least the judge who first passed sentence, (pp10) "*you represent a substantive and significant risk not only of recidivist behaviour but also of an escalating level of severity, as indicated by attempts to lure young adolescent girls into your car.*"

That the Summary review statement goes onto to advise that alcohol being sold at the premises would have resulted in substantial financial gain, respectfully, stretches the point again. No evidence appears in the police paperwork to support this proposition.

It's difficult to understand the legitimacy of the review application in the first place. No doubt Mr Grant will say that it is not for a licensing committee to go behind a summary review certificate. Whilst I don't accept that the Lalli case, on which he no doubt relies, could fairly allow for an inappropriate or invalid certificate to go unchallenged, we are of course not dealing with a Summary review. That ship has sailed and the premises have been closed under the committees' direction for more than 3 weeks.

However, at the time of the hearing on 1 October, the premises licence holder was not represented and did not, with respect to them, understand these new and frankly difficult arguments.

It is right that I make the observation that today we are dealing with a review, and so any failing to make these points a month ago does not in any way invalidate them now.

Alternate Powers and Controls

The last paragraph of the certificate that accompanies the Police application for the Summary review states: *"I am of the opinion that the expedited process at the summary review is necessary in order to promote the licensing objectives. Other steps would not achieve the same aim."* In the context of the licensing objectives that may be correct. However, it is right to observe that other measures would achieve the aim of inhibiting Covid regulations and guidance being ignored or breached. That is why the Authorities have been given specific closure and prohibition powers under the Coronavirus legislation The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020

It appears, respectfully, that there is some confusion amongst the Metropolitan Police about the Covid regulations/guidance, and the degree to which they have authority, under the Licensing Act, or the other pertinent legislation, to enforce and deliver compliance. We submit it is not their place, within the Licensing Act, to seek to shoehorn Covid concerns into the Licensing objectives.

Public health

Ultimately this is a public health issue.

The Covid-related legislation is emergency legislation brought in specifically to deal with an international pandemic which is a public health issue. The starting point for this Public health concern is that public health remains outside of the Licensing Act and licensing concerns in England and Wales. It is worth observing that, unlike in Scotland, the public health objective has been rejected not once, on introduction of the Act, but twice, following the House of Lords review of the Licensing Act ten years after its enactment.

The National Guidance under section 182 (paragraph 2.7 onwards) attends to issues of public safety. This specifically and expressly excludes public health from the licensing objectives. It states:

- ***This concerns the safety of people using the relevant premises rather than public health which is addressed in other legislation.***
- *Physical safety includes the prevention of accidents and injuries and other immediate harms that can result from alcohol consumption such as unconsciousness or alcohol poisoning. Conditions relating to public safety may also promote the crime and disorder objective as noted above.*
- ***There will of course be occasions when a public safety condition could incidentally benefit a person's health more generally, but it should not be the purpose of the condition as this would be outside the licensing authority's powers (be ultra vires) under the 2003 Act.***
- ***Conditions should not be imposed on a premises licence or club premises certificate which relate to cleanliness or hygiene.***

This final point about conditions is of particular significance when one considers that on a licensing review, modifications to conditions is one of the five possible outcomes (or a mix thereof), within the discretion of the licensing committee (no formal action; removal of the DPS; suspension of the licence; revocation; and modification to the conditions).

Some cases will fall neatly with each of those categories, others less so. If it is right that some Covid related breach cases ought to be resolved by modification to the licence conditions, relating to cleanliness or hygiene, as seems likely, it is impossible to square that final comment. Putting it another

way, if it is right that conditions may not attend to issues of cleanliness or hygiene, then it is difficult to understand how concerns about, as an example, a lack of compliance with Covid guidance or perhaps a failure to attend to measures within a risk assessment, as an example relating to hand sanitiser or toilet cleaning, could fairly be attended to by a premises licence review decision amending conditions.

The fact that it is expressly removed from the gift of a licensing committee goes to the heart of the matter which is that licensing is not the proper mechanism for determining such matters.

Covid as part of the other 3 licensing objectives

That the other three sections of the national guidance that develop and explain the licensing objectives, (crime and disorder, public nuisance and protection of children from harm) fail to mention public health speaks (if you forgive) volumes. The Government has articulated that public health is not a licensing objective and goes on to explain that public safety is not to be interpreted as being a means to including public health within its remit.

Public Nuisance

The police submissions appear to be that public nuisance can be injurious to health and that therefore Covid concerns can fairly be wrapped up within the public nuisance objective. Respectfully, that is to reverse engineer the point on an unnecessarily academic basis, in an attempt to seek to utilise licensing and the Licensing Act 2003, to control something that is appropriate for other legislation and controls. The attempt to bring this case within the licensing umbrella should be resisted. This is not the same as playing music at a deafening level or releasing noxious smells into the environment. The bar for what is being attempted here is set incredibly high (by the very nature of the case relied upon) and not a justifiable mechanism for what the police are trying to do.

Licensing reviews must be considered in the context of licensing and the licensing objectives and their promotion and nothing else.

But a premises, where the licensing objectives are not being undermined by lack of Covid compliance, where there is nothing in and of itself about the operation of the premises, and there is nothing about the way in which the premises is operating in terms of its Covid controls, or lack thereof, is itself a public nuisance, then that, is not a legitimate engagement of the Licensing Act.

I hope that fairly articulates the point that the objectives are being unnaturally stretched.

Protection of Children from Harm

The same point might equally be made about the Protection of Children from Harm where the extent of the evidence in this case is that the premises licence holders' young child was present. Such concern, as the application may have, can only be articulated as a health concern. There is nothing in and of itself injurious to Children, by a premises failing to deliver a Covid compliant environment.

Crime and Disorder

When turning to the issue of crime and disorder the crimes that are alleged, within the comprehensive reams of paperwork produced by the constabulary, attend to concerns about there being a lack of a personal licence holder at the premises one afternoon and a series of failings around the retention of and production of CCTV.

Those issues attend to the licensing objectives. Those issues may be said by counsel to legitimise the review (although could not fairly be said to legitimise a summary review). It is then for the committee to consider how to attend to those apparent breaches. I am perhaps getting ahead of myself but obviously the licence holder would say, even if all of the concerns that relate to these points were accepted, revocation would appear unlikely.

Prosecution / Covid specific sanction-Enforcement

Furthermore, the various regulations and guidance have been subject to a number of revisions in the past six months. Counsel for the Police sets out in his written submissions a comprehensive commentary about the various elements he says are “in play”. To try to import these into the licensing sphere therefore leads to the bizarre situation where a licensing committee could be asking on review to determine a matter where it might be argued that the crime and disorder objective on the day the application was made, was being undermined, but it could equally be agreed by all parties to be perfectly legal at the time of the hearing. That anomaly, if anomaly it is, is why there is provision for prosecution and for fines being levied for breaches of the regulations. That, we would suggest, is the relevant remedy.

[The Closure Regulations \(The Health Protection \(Coronavirus, Restrictions\) \(England\) \(No.3\) Regulations 2020\)](#) came into effect on 18 July. On first reading of the regulations it is fair to say that these provide local authorities with significant new enforcement powers. The circumstances where an authority can exercise these powers are broadly where they consider that there is a serious or imminent threat to public health and it is necessary for the purpose of preventing, protecting against, controlling or providing a public health response to the spread of coronavirus within the local authority area. A direction may be given to close the premises, restrict entry to the premises or secure restrictions in relation to the location of persons within the premises. The powers are comprehensive and specifically directed toward Coronavirus concerns.

It must be a reasonable conclusion that these powers being introduced are intended to be used. If, as the constabulary suggest, these powers are either unnecessary or in addition to such powers as existed under the Licensing Act one must simply ask the question, why were they introduced?

I attach a [link](#) from the Charles Holland website, by way of example only, to Authorities using closure powers which makes plain that Durham CC are making liberal use of these powers. The first such document references the Smiths Arms, DH3 4HE whereby the authority directs, in response to a serious and imminent threat to public, that the Premises is to be closed.

The grounds for direction are disclosed in the document but can variously be quoted as:

- (B) *the premises was visited by officers by the local authority and the Durham constabulary where matters were witnessed and contraventions identified*
- (C) *There was evidence that the premises were not following social distancing guidelines*
- (D) *There is no confidence that those managing the premises and running the business are presently operating the premises in a safe manner.*
- (F) *The closure of the premise is necessary for the purpose of preventing and protecting against the instances and spread of infection.*

Of course it may be suggested that what measures Durham County Council take is of no particular concern in Southwark. It does, we would respectfully suggest, fairly rebut any suggestion that no other measures are available to the authorities in regard to these type of Covid related concerns.

Local Government Association

You need not take the licence holders word alone for that. The Local Government Association called, in August this year, for councils to be given the powers to close down pubs and other licensed premises which are failing to comply with Covid19 safety guidelines. I attach a [link](#) to the Local Government Lawyer website. The report makes clear that the LGA, at least, does not believe that the Licensing Act, contains sufficient measures to help delivery of Covid compliance.

Obviously no such reform has been introduced.

Director of Public Health

It is worth also observing that the Director of Public Health (a responsible Authority and consultee) hasn't tried to bring Covid into licensing in this matter by submitting a representation.

Covid v Licensing

It is perhaps not the most attractive point but we are faced here with the simple proposition that such Covid failings as may be evidenced within the Police application could not and should not be written into the licensing legislation because it is convenient to do so. Put simply offences or concerns under the Covid regulations need to be tried or considered under the Covid regulations and controls.

We are, if you will, in the wrong room.