

SOUTHBOURNE SPORTS CLUB

APPLICATION TO REVIEW THE PREMISES LICENCE

SKELETON RESPONSE ON BEHALF OF THE LICENCE HOLDER

Introduction

This is an unusual case for a variety of reasons that will be elaborated on below but I trust that I might be forgiven for outlining relevant matters of law as follows:

1. Any decision must be evidence based and not founded on speculation;
2. Hearsay evidence is admissible but the sub-committee must decide what (if any weight) to attach to the evidence before it, particularly if those providing that evidence are not available to be challenged about their assertions and have not provided either detailed information nor supporting evidence (e.g. CCTV footage or photographs).
3. Particular care needs to be taken about evidence that may have been obtained unlawfully (see further below).
4. The “burden of proof” is on those who bring or support the review to prove their case but the standard of proof is that of the balance of probabilities.
5. The “relevant date” is that of the hearing and not the date upon which the review application was made. This means that the sub-committee can (if not must) take into account anything that has happened during the intervening period both to exacerbate and improve the situation.
6. It is an offence to provide licensable activities (my emphasis) other than in accordance with an “authorisation” (i.e. either a Premises Licence, Club Premises Certificate or a Temporary Event Notice). Unlike the previous regime (Licensing Act 1964), the Licensing Act 2003 does not include the concept of “permitted opening hours”. Whilst this is a matter of debate between academic lawyers, the fact that customers might remain in licensed premises beyond the closing times stated on the licence is not an offence in the absence of a specific condition requiring the premises (or part thereof such as an external area) to be cleared by a specific time. There is no such condition on this licence.
7. I always hesitate to introduce matters of Human Rights but two are important here:
 - a. The Premises Licence is a possession with the terms of the Convention; and
 - b. All parties here are entitled to a fair hearing before an impartial tribunal. Whereas no-one is suggesting that the sub-committee would be anything other than scrupulously unbiased, the right to a “fair hearing” is an issue in this case – for example, the Police have talked about numerous complaints but have not disclosed any specific details about the dates or nature of the complaints, making it well-nigh impossible for us to obtain evidence to refute the same. Similarly, although not mentioned at all in the original application, the Police now mention “Mobile phone footage which clearly indicates that 3 persons inside the cubicle of one of the toilets are using drugs”. No evidence (and in

particular the footage referred to) has been disclosed and no explanation given for the non-disclosure. Even the date and time of the alleged transaction have not been provided.

8. Any decision made by the Sub-Committee must relate to one or more of the licensing objectives and be reasonable and proportionate in terms of what is appropriate to support the same.
9. Proper reasons for any decision must be given.

I have not troubled to cite specific provisions of legislation or case law to support those propositions but can do so at the hearing if necessary – I would however hope that all parties agree that these submissions on matters of law are correct.

Why is this case unusual?

As the Officer's report asserts, the relevant licensing objectives are the prevention of crime and disorder, prevention of public nuisance and public safety. No reference is made to protecting children from harm and although some of the local residents have made reference to that, there is no evidence that any child has (or indeed) will be harmed by the operation of these premises.

To deal with each in turn (albeit briefly):

Crime and Disorder

In most cases where a review is brought under this licensing objective by the police, there is clear and direct evidence that (for example):

There has been (or more usually several) incidents of disorder associated with the premises – in this case, the police do not allege any incident of disorder but instead simply rely on complaints made by residents (see further below); and/or

That the premises are associated with crime (such as a series of assaults, drug offences or other similar matters) – in this case, what is asserted in the application is that “that the premises management consistently fail to meet the conditions of the licence intended to promote this licensing objective despite significant support and engagement” (my emphasis) and nothing more.

Whilst it is of course acknowledged that providing licensable activities other than in accordance with an authorisation is an offence, it is unusual for a review application brought under this ground not to allege (or specify) specific incidents of crime and disorder. The alleged breaches of licence conditions are dealt with below. However, it should be specifically noted that there is no condition on the licence requiring customers to have left by a specific time.

The prevention of **public nuisance** (my emphasis)

The Guidance makes it clear that the sub-committee should take its lead from your Environmental Health Officer (see page 40 of your papers) and will no doubt again remind itself that its decision must be evidence based.

Whilst it is clear that local residents have “issues” with the premises that they regard as a “nuisance” your EHO provides no evidence that its operation has been the cause of any “public nuisance” in the sense that one would normally regard the same (e.g. excessive noise from music within the premises – there is none). The evidence in this regard comes from local residents and in many instances, it is questionable whether the matter described does indeed amount to a public nuisance: For example (page 45),

10/10/21 – 19:33 - customers loitering, smoking and discarding a lit cigarette;

7/10/21 – 22:16 - customer who appears unwell or intoxicated spends several minutes leant on a display vehicle;

29/9/21 – 09:56 – 3 customers loiter outside a neighbours house smoking for several minutes.

In each case it is said that there are no staff monitoring but there is nothing that requires staff to monitor anything other than the smoking area which is to the immediate front of the premises.

Other assertions are difficult to believe, one of the most serious being (page 44 second paragraph) at 22:40 on 16/7/21 “We found that 3 individuals were in the toilet opposite our bedroom window snorting what they believed to be cocaine which I then decided to video. I then text Mr Kocaby.....”

Despite the serious nature of this allegation, this video has never been produced by neither the resident nor the police.

I have visited the premises and noted that the toilet windows are obscure glazed. The lower windows do not open and the upper window (which is at head height) only opens to a limited degree.



Public Safety

Looking through all of the papers, it seems that here there is but one issue and that is that on two occasions one specific smoke alarm was found to be covered. The holder of the licence will explain that this came about because he was using josh-sticks which were setting off the alarms and nothing more. There is no evidence that the safety of members of the public has ever been actually put at risk (nothing

untoward has happened) and, in any event, matters relating to Fire Safety are exclusively the preserve of the Fire Authority who have their own legislative powers (The Regulatory Reform (Fire Safety) Regulations 2005) and have not either made any representation in connection with this review nor taken any enforcement action under their own powers.

The case is also unusual because:

It is understood that only one of the local residents who have made representations has asked to attend the hearing and that person has asked to simply observe and not to speak. This denies my client and me the opportunity to challenge their allegations (or to question their CCTV surveillance of the premises which we believe to be unlawful). As Sgt Gosling asserts in his most recent submission “it is for these residents to provide further details in support of these reports” and they have manifestly failed to do so.

The Police have not disclosed any details of the complaints that they have received, thereby denying the holder of the licence the opportunity to gather evidence to rebut or challenge specific allegations (in particular the very recent allegation of mobile phone footage – see above).

The Police have provided a schedule of the conditions attaching to the licence but have not only indicated whether or not a breach has occurred but in a number of instances have commented “U/K”. This suggests that even though there may be no evidence to support the alleged breach, the Police invite the sub-committee to conclude that “there probably was a breach” but this cannot be proven. This, frankly, is wrong and unfair.

Further, there appears to have been no recent “follow” up visit to ascertain whether previous breaches of conditions have now been rectified.

Local Residents

It is clear that certain local residents are unhappy with the existence of the club and have gone to extreme lengths to try and obtain evidence to force its closure. This clearly includes putting a great deal of pressure on the police by making a large number of complaints (although these have not been disclosed by the police and as a result, we are not in a position to either evaluate the same in terms of their relevance nor to but the same).

A number have installed CCTV cameras specifically directed at the entrance to the premises. There is an issue about the lawful use of these cameras – see Appendix 1 below which is an extract from a web page published by Brett Wilson LLP, a firm of London Solicitors specialising in privacy law and the like referring to a very recent County Court case.

External photos



The club itself



Brewhouse and Kitchen opposite the end of Deans Road and Deans Road itself



CCTV camera opposite pointed at the club's entrance



Camera on the neighbouring house, again pointed at the club's entrance/smoking area



Camera on the property to the right of the club, again directed at the entrance/smoking area.



These photos were taken from the smoking area at the front of the club – the camera is on the rear of the flat above a Take-away on the junction with Deans Road, opposite the Brewhouse and Kitchen. Note the recently reported case below at appendix 5 – it is clear that these cameras have been installed for the specific purpose of monitoring persons going into or out of the club (and/or using the smoking area to the front) and are not intended to protect the individual properties upon which they are located.

Alleged breaches of conditions and action taken to remedy the same.

Training

There are only two members of staff – Mr Kocaby and Ms Viktoria Naujokaite. I have an email from Mr David Ramsay, Licensing Consultant dated 26th October, confirming that Ms Naujokaite completed her level 2 APLH on 5th October 2021 and I have a further email on the same date confirming that on 26th September 2021, both completed a Licensing course which covered essential licensing law, drug awareness and conflict management.

Refusals Book and Incident Log

I visited the premises on 1st October 2021 when the photographs were taken and examined both records. Whilst the language and grammar in both are not perfect, I have seen much worse over the years. I took photos of both which appear at appendix 1.

CCTV

On 1st October when I visited the premises, I asked Mr Kocabay to demonstrate the CCTV to me. It is fair to say that he struggled to remember the procedure to access the system and the password but he did eventually succeed.

I asked him to show me the earlier recordings and we were able to view recordings on various dates including 1st September. The system appeared to be functioning properly with the correct date and time displayed.

Picking dates and times at random in September, I noted that there were relatively few people present – usually a maximum of about a dozen persons. I also noted that although there were a few occasions when customers were still in the premises after midnight, on no occasion were they either being served or were consuming any drinks.

Documented checks of the system were being maintained.

Photographs of the system are at appendix 3.

Poker

There was signage inviting people to sign up for Poker tournaments but I was advised that there had been no interest and that poker was not played in the premises. The lounge or poker room was not at the time of my visit equipped with a CCTV camera but I understood that Mr Kocabay was endeavouring to extend the coverage to that room (the system appears to have capacity for additional cameras).

Pubwatch

Mr Kocabay has applied for membership and will update the sub-committee during the hearing.

Major Sporting Events

No such events have been shown since Euro 2020. Whilst it is accepted that no risk assessments were undertaken on that occasion, it is also noted that nothing untoward occurred during the broadcasts.

Conclusion and submissions

These small premises are not frequented by a great many customers and, as previously commented, the police do not allege a catalogue of incidents of crime nor disorder. Rather, I suggest that this Review was instigated largely because of pressure from residents (and one in particular) and out of frustration that the premises were not complying with licence conditions. In that regard, it is noted that the premises were “escalated through the system” unusually quickly.

In this sort of situation, a frequent course of action would be to suspend the licence to provide an opportunity for breaches to be put right. However, in this case, it is submitted that the licence holder has already rectified the matters complained of by the police and suspension is not therefore appropriate.

Suspension of the licence is sometimes regarded as a punishment for breaches but in this case, the sub-committee will note please that Mr Kocabay has already suffered financially in that the legal costs that he has incurred are significant.

Revocation of the licence (or the removal of the sale/supply of alcohol) would spell the death knell for this business and, it is submitted, would not be a reasonable or proportionate response to the alleged breaches, particularly as they have now been rectified. In that regard, please note the petition signed by users of the premises reproduced at appendix 4.

It is submitted that there is some scope to modify the licence by adding conditions – specifically requiring that the premises be cleared of all customers by midnight and that the use of the smoking area be restricted to two customers at a time (please note that the area is covered by the premises’ CCTV system).

It is noted that the police suggest that door supervisors be deployed from about 21:00 hours each day until all persons have dispersed from the vicinity of the premises. As members will be aware, there is currently a severe shortage of SIA registered door supervisors which would be a problem in itself. Given the small number of patrons it is submitted that the imposition of such a condition would again be a disproportionate response and would result in the premises becoming financially unviable.

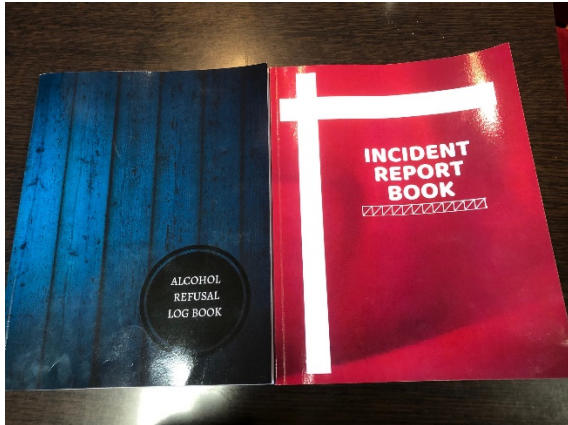
We therefore ask that the sub-committee take no action other than to modify the licence as suggested above but that a strong warning is given to the holder of the licence with regard to his future management of the premises.

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27th October 2021

Appendix 1 – Refusals register and Incident Book

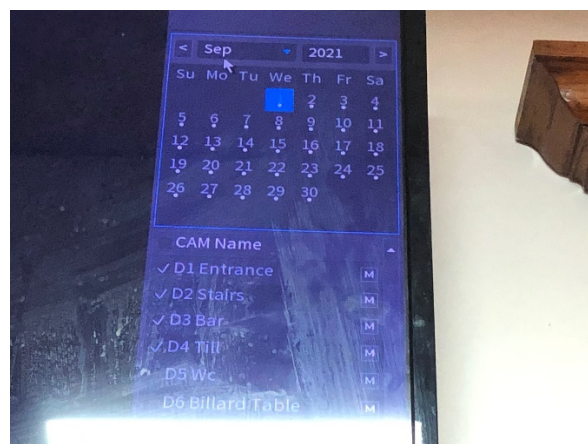
Note – images have been removed from the published version as they include personal information



Appendix 2 – Internal photographs



Appendix 3 – CCTV



Appendix 4 – Petition (as it was on 1st October)

Note – images have been removed from the published version as they include personal information

Appendix 5

19.10.21

Neighbour CCTV harassment and data protection claim succeeds

Introduction

On 12 October 2021, Oxford County Court handed down judgment in [*Fairhurst v Woodard* \(Case No: G00MK161\)](#). A dispute between neighbours over the use of cameras for security purposes, the case gave rise to successful claims in harassment and data protection, and offers an important note of caution for those looking to install surveillance systems to protect their homes.

The facts

The Claimant Mary Fairhurst lives at Number 83 Cromwell Road and the Defendant Mr Jon Woodard lives on the same side of the road at number 87. Mr Woodard had placed several cameras around his property, including a 'Ring' doorbell that had both video and sound recording capabilities, and a camera on the top of his garden shed overlooking a communal car park. With permission, he had also placed a camera on the gable end wall of number 85's property (the 'driveway camera'), which overlooked a shared access road leading to a communal car park. Throughout proceedings, Mr Woodard maintained that the cameras were installed for security purposes.

The dispute arose after the Defendant had shown the Claimant his shed camera, and had apparently boasted to her that he could view footage from it at any time via his mobile phone or smartwatch. The Claimant was alarmed at the Defendant's apparent disregard for others' privacy and several incidents followed which crystallised the Claimant's concerns. For example, on one occasion, Mr Woodard sent the Claimant images of her taken from the driveway camera – in what the judge later determined was a veiled threat - claiming that there was a 'suspicious stranger' loitering near his property. At various times, Mr Woodard had lied to the Claimant, suggesting that the cameras were not operational when in fact they were. As the relationship between the two became more strained, the Defendant even threatened to set up concealed cameras on his property.

By the time of trial at Oxford County Court, the Claimant's case was that the Defendant consistently failed to be honest with the Claimant about the cameras, had invaded her privacy without justification by his use of the cameras, and had intimidated her when challenged about that use and that this amounted to, *inter alia*, harassment and a breach of the Claimant's rights under the Data Protection Act 2018. The Claimant sought damages and injunctive relief. A collateral claim was brought under the tort of nuisance.

Harassment

HHJ Clarke held that the Defendant's conduct amounted to harassment within the terms of the Protection from Harassment Act 1997. The Defendant had engaged in a course of conduct and on several occasions he had communicated with the Claimant in a way designed to intimidate or scare her. A reasonable person, the Court concluded, would have known that the Defendant's conduct amounted to harassment.

The Judge also rejected the Defendant's submission that the cameras were in place for the purpose of preventing or detecting crime, a defence under section 1(3)(a) of the 1997 Act. The Defendant had

placed considerable emphasis on this point to justify his use of the cameras, citing an episode where thieves had attempted to steal his car as evidence of the cameras' necessity. HHJ Clarke was unconvinced. She dismissed the Defendant's justification as amounting to essentially *"arguments that women who are being bulldozed and intimidated by men should show them empathy and understanding for the circumstances which 'made them' do it."*

Data protection

Section 3 of the Data Protection Act 2018 defines personal data broadly as *"any information relating to an identified or identifiable living individual."* The Claimant argued that images and audio files of the Claimant are personal data within the meaning of Article 4(1) of the General Data Protection Regulation 2016/679 and that the Defendant had retained and processed such data unlawfully.

The Defendant submitted that all of his data collection and processing was necessary for the purposes of crime prevention at his property. Thus it was left to the Court to determine the appropriate balance between on the one hand, the Claimant's interests in protecting her personal data and the Defendant's interest in securing his home on the other.

HHJ Clarke ruled that the Defendant had misled the Claimant over the functionality of the cameras and that this amounted to a breach of the requirement under Article 5(1)(b) the GDPR that data only be collected for 'specified, explicit and legitimate purposes'.

Further to this, the Judge made specific findings regarding the use of each of the cameras. Regarding the Ring doorbell camera, the Court drew a distinction between its video recording capabilities and its audio capturing capabilities. Concerning the former, the judge held that the balance was struck appropriately between the legitimate interests of the Defendant in preventing crime at his property, and the Claimant's right to privacy: images of the Claimant were only likely to be captured incidentally as she walked past, and the Defendant's *'legitimate interest in protecting his home...are not overridden by her [the Claimant's] right to avoid such incidental collection on a public street.'*

However, the Judge ruled differently on the question of the Ring's doorbell camera's audio recording capabilities. The Claimant presented evidence to the Court suggesting that the camera was able to capture audio from over 60ft away, far beyond the boundaries of the Defendant's home and covering a radius encompassing nearly the whole of the Claimant's property. The Court found that this was entirely disproportionate to the needs of protecting the Defendant's home. Indeed, the Judge suggested that the security needs of the home may be adequately served if the doorbell camera had no audio capabilities at all.

The Court determined that the use of the driveway camera to capture video and audio was unlawful and without justification. It only collected data from outside the Defendant's property and there were other, less intrusive ways that the Defendant could ensure his cars (parked in the communal car park) could be kept safe.

Nuisance

The nuisance claim failed for two reasons. Firstly, the Judge considered she was bound by ***Fearn & Ors v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104**, in which the Court of Appeal held that the mere overlooking from one property to another was not capable of giving rise to a cause of action in private nuisance. Secondly, in respect of the triggering of a light on the driveway camera visible through a conservatory roof, the Judge accepted that whilst this could be irritating, it was not an undue interference with the Claimant's enjoyment of her property, particularly taking into account that she lived in a town rather than a country (where night-time lights were a feature).

Remedy

The Judge has invited further submissions from the parties on the appropriate remedy (i.e. the terms of any injunction and the level of damages) following consideration of her findings. The Claimant will no doubt be seeking an order prohibiting the processing of her personal data in the manner complained of and prohibiting similar harassment.