

The public interest in licensing – legal perspective

Sir Crispin Agnew of Lochnaw Bt QC

Outline of talk

- Public interest and public policy is the background within which Parliament legislates
- Once Act reaches statute book regard can only be had to public interest or policy if Act ambiguous or unclear
 - Policy has to be discerned from within the Act; or
 - From limited approved sources

Licensing (Scotland) Act 1976

- 1976 Act lacked a clear cohesion and policy framework
 - *Argyll Arms (McManus) Ltd v Lorn DLB* 1988 SCLR 241 per Lord Clyde
 - “It does seem to me to be at least difficult to find a clear pattern or consistent philosophy in the legislation embodied in the Licensing Act” of 1976.”

Nicholson Report

- Took on board Lord Clyde's criticism and said:
 - “ 2.21 ... lest we become subject to similar strictures at some time in the future, we consider it appropriate to set out the guiding principles and objectives which have informed the recommendations which follow in subsequent chapters in this report. We venture to suggest that those principles and objectives might also form an appropriate background in future for the work of licensing boards and all others who have to participate in the new system which we propose.”

Interpreting legislation where ambiguous or unclear

- The long title of the Act
- The policy as discerned from the Act
- The legislative history
- A policy Memorandum lodged with Bill
- Ministerial statements in Parliament
- Law Commission Papers or other Reports

Policy of Licensing (Scotland) Act 2005

- *Long title*
 - “regulating the sale of alcohol, and for regulating licensed premises”
- *Brightcrew Ltd*
 - “the statute is concerned with the regulation of the sale of alcohol by means of the grant of licences”
 - The Act “does not empower a licensing board to insist on matters which, while perhaps unquestionably desirable ..., are nevertheless not linked to the sale of alcohol.”

Some interpretation issues (1)

- *BP Oil (UK) Ltd*
 - Scottish Ministers’ Guidance “could not ... alter or qualify the meaning of what Parliament had enacted.”
 - Court construed the ambiguous meaning of excluded premises “having regard to the general nature of the policy apparently underlying the provision”

Some interpretation issues (2)

- *Mitchells & Butler Retail Ltd*
 - Validity of differential pricing – “that construction reflects the natural meaning of the words used in paragraph 7 but in any event is consistent with what I consider to be the underlying purpose of this provision as reflected in the various parliamentary comments and explanatory notes”
 - the policy “the avoidance of circumstances in which people are encouraged to consume in a shorter period of time a larger amount of alcohol than they would otherwise consume. In other words it is a measure aimed at discouraging “binge drinking”.”

Licensing Objectives (1)

- S. 4 The licensing objectives
 - (1) For the purposes of this Act, the licensing objectives are—
 - (a) preventing crime and disorder,
 - (b) securing public safety,
 - (c) preventing public nuisance,
 - (d) protecting and improving public health, and
 - (e) protecting children from harm.
- NB: Licensing Act 2003 same objectives except no (d) – public health.

Licensing Objectives (2)

- Effect of objectives is to narrow the Act in accordance with its purpose or policy:
 - *Brightcrew Ltd*
 - “The fact that the objectives listed in s.4 of the 2005 Act are all desirable in a general sense does not empower a licensing board to insist on matters which, while perhaps unquestionably desirable in that sense, are nevertheless not linked to the sale of alcohol. For a licensing board so to insist would be to divert a power from its proper purpose”

Licensing Objectives (3)

- *Arora*
 - “[13] It seems to me that to characterise the offence in question as amounting to a "fundamental error of judgment" is to state the obvious. ... were licensing boards to do no more than equate the existence of such an error of judgment with a necessity to refuse an application ... then very few, if any, licences would be granted. ... in my opinion, in order to apply the s 74(6) test correctly, a licensing board, in refusing an application, requires to identify a separate, discernible factor pointing to necessity for the purposes of the crime prevention objective.”

Licensing Objectives (4)

- *Tesco Stores Ltd*
 - “[52] I can agree with the pursuer's submission to the extent that overprovision must be seen in the context of the 2005 Act objectives. However, this is not a direct process but an indirect one. The defender's duties are expressly provided for: if it has had "regard to the licensing policy statement" (s.6(4)), it has done all that is required of it in this respect.”

Statements of licensing policy (1)

- S. 6(1) Every Licensing Board must, ... publish a statement of their policy with respect to the exercise of their functions under this Act
 - NB: policy is limited to “the exercise of their functions under this Act”,
 - S. 6(3) “must” have regard to licensing objectives and must consult; s. 7 include overprovision

Statements of licensing policy (2)

- Licensing policy
 - cannot have regard to factors that do not fall within the underlying purpose “that the statute is concerned with the regulation of the sale of alcohol by means of the grant of licences. ...”
 - unlawful for a licensing board to pursue objectives that are “desirable in a general sense”
 - E.g. unlawful to formulate the policy to enhance employment or economic growth or supporting sustainable development because those objectives are not linked to the control of the sale of alcohol

Alcohol policy in the wider context

- *Scotch Whisky Association*
 - Minimum pricing
 - “(5) that the measures were intended to strike at alcohol misuse and overconsumption, the aims of reduction of alcohol consumption, and of consumption by hazardous and harmful drinkers in particular, were legitimate in terms of art. 36 , and there was objective evidence that the measures were appropriate to achieve their aims;”

CONTACTS



Clerk

Sheila Westwater

sheila.westwater@advocates.org.uk

0131 260 5700

Deputy Clerks

Christina Ballantyne

christina.ballantyne@advocates.org.uk

0131 260 5641

Jane Morrison

jane.morrison@advocates.org.uk

0131 260 5828

www.westwateradvocates.com