Improving the system of appeals

Philip Kolvin QC

Cornerstone Barristers

A. INTRODUCTION

The purpose of this article is to describe a number of problems with the system for licensing appeals under the Licensing Act 203 in England and Wales and to propose a series of solutions. If implemented, the solutions would make appeal proceedings cheaper, speedier, fairer to all parties and less of a burden on the court system.

It is a remarkable feature of the system of licensing appeals under the Licensing Act 2003 that so little is specified in statute. The Licensing Act confers rights of appeal, allocates appeals to the magistrates' court, says what remedial steps may be imposed on appeal and then leaves the courts to get on with it. The higher courts have stepped in with judge-made solutions, in seminal cases such as Hope and Glory[1] dealing with the nature of the appeal hearing, Khan v Coventry City Council[2] dealing with the production of new evidence on appeal and City of Bradford MBC v Booth[3] on costs. However sturdy these keystones, however, the absence of interstitial mortar in the form of procedural rules and guidance has left a rickety edifice, which results in an appeals system which is slow, cumbersome and expensive. The edifice, however, does not require demolition, merely structural improvement.

While a quicker and cheaper appeal system is superficially desirable, it must nevertheless find its correspondence in a first instance hearing which does full justice to the case and the evidence and arguments of all parties. This article also makes brief suggestions for the improvement of the hearing process, all of which may be implemented as incidents of good practice, and without the need for legislation.

B. THE PROBLEMS

(1) The appeal tribunal

Justices of the Peace perform an invaluable function in dispensing local justice, particularly in the light of their knowledge of their local area and its requirements. However, where the matter is an appeal from local councillors who are also lay people sharing those characteristics, there is a strong argument for the appeal to be conducted by a professional judge. The benefits are manifold: that the District Judge is more likely to have pre-read the papers, to manage the case so as to expedite the hearing, and to be appraised of and/or rapidly grasp the legal and policy principles involved. If the Judge sits on a number of appeals – which is rarely the case for lay magistrates – then s/he will acquire a measure of expertise, aiding the equitable distribution of justice. At present, while one can make an argument for a hearing in front of a District Judge, it is usually serendipity whether one is allocated to the case. It should not be.

[1] [2011] EWCA Civ 31.
[2] [2011] EWCA Civ 751.
[3] [2000] EWHC Admin 444.

(2) Delay

The time lag between notification of the licensing authority's decision and the appeal hearing is usually too long. Typically, appeal hearings take place between 4 to 6 months after the licensing authority's decision. If there is a case management hearing, that can prolong proceedings by a further two months. This creates unfortunate consequences. If the decision appealed against is an application, it means that an appellant is waiting far too long for a hearing, so that business planning is detrimentally affected. If the appeal is against a decision on review, it means that the steps imposed on the licensee are held in abeyance for an excessive period. If the appeal is against a decision on a summary review then arguably interim steps continue for many months; if those steps turn out to have been disproportionate, the appellant's trade is unjustly curtailed over a long period, with neither recourse nor recompense.

Given that the regulations governing hearings before licensing authorities generally provide for hearings within eight working weeks of the initial application (or half that in the case of summary reviews) it is unacceptable that appeal hearings should take double or even treble that period to come on. Justice delayed is always justice denied, but in the case of licensing appeals delay is the enemy of the system.

(3) Evidence on appeal

A further difficulty to which delays in the hearing of appeals gives rise is that appeals are often conducted on an entirely different evidential basis from that pertaining before the licensing authority. Appellants will treat the authority's decision as merely a stepping stone towards the main event - the licensing appeal - taking management steps to overcome the deficiencies identified in the authority's decision, or proposing a wholly new set of conditions. In one sense this could be seen as a benefit. After all, if the resultant operation is improved, then the regulatory process has served its purpose. On the other hand, such manoeuvring can add greatly to the cost of the process, as well as creating a justifiable grievance in the minds of the councillors who originally adjudicated, when the appeal is conducted and the original decision overturned on a basis different from that presented before them. While the rules allow for this to happen, it is arguably inimical to the local democratic decision-making which the Licensing Act was designed to engender. While the second hearing may be termed an appeal, is the nomenclature really appropriate when the evidence in the second may be radically different from that in the first? Indeed, applicants may elect <u>not</u> to serve certain evidence, e.g. expert evidence, at first instance so as to keep powder dry or costs down for the hearing at first instance. While this is perfectly legitimate and understandable, it does arguably turn on its head the purpose of the Licensing Act 2003 to bring hearings before democratically elected local councillors.

(4) Length of appeal hearings

Licensing appeals have been largely immune from the case management advances made by the civil courts. The reason is not just that the Licensing Act has so little to say on appeals. It is also because there are far fewer appeals than, say, criminal or family cases in the magistrates' courts and so rules have never been formalised for their conduct. Allowed to develop unchecked, the current system provides precious little control, or even incentive, for the expeditious disposal of the appeal. This places an unnecessary administrative burden on the courts, which have other important matters to

deal with. It leaves witnesses waiting around court for hours or even days on end. However, the chief consequence is cost. We are now seeing costs claims and awards approaching and in one or two cases even reaching six digits. The potential cost of appeals can exercise a dissuasive effect on licensing authorities in their decision-making: the question on the lips of councillors often being *"will this decision, if we dare to make it, survive an appeal?"* Equally concerning is that business people find themselves unable to challenge a decision because the costs of losing are so exorbitant. It is reputed that some licensees would rather walk away from their business than fight a review, because the costs of running the process through to an appeal are beyond their reach. If the system effectively inhibits the check and balance inherent in an appeal, it is broken and requires fixing.

(5) The cost of appeal hearings

The cost of appeal hearings is chiefly a function of their length. It is also a function of the preparation costs which are partly a result of the delay between the original and appeal hearings and consequently the ability to mount an entirely fresh case. To echo Cyril Northcote Parkinson, legal bills will grow to fill the time available for their expansion. To target delay is also to target cost.

(6) The test on appeal

It is remarkable that, over 8 years after the implementation of the Licensing Act 2003 there could still be issues about the nature of the test on appeal. However, while the joint efforts of the Administrative Court and the Court of Appeal in Hope and Glory cleared up some important controversies, they did not resolve all the issues, which repeatedly take up time and cost in argument in magistrates' courts across the land. This is an unsatisfactory and unnecessary position.

What is for sure is that a) the appeal hearing is a fresh hearing on the merits, b) the licensing authority's decision is to be overturned only if it is wrong, c) the burden of satisfying the court that it is wrong lies on the appellant, and d) the decision, being that of the democratically elected licensing authority, is only to be overturned if it is wrong.

However, arguments remain. First, in Hope and Glory[4], Burton J, with whose judgment the Court of Appeal agreed, said: *"It means that the task for the District Judge - having heard the evidence which is now before him, and specifically addressing the decision of the court below - is to give a decision whether, because he disagrees with the decision below in the light of the evidence before him, it is therefore wrong."* For some, this means that the District Judge must first make up his own mind as to the correct outcome, and then compare it to the result arrived at by the licensing authority, so that if the two differ then the authority's decision is therefore wrong. The opposite view (which I share) is that this is to forget the crucial point in Hope and Glory – described by Burton J as a caveat, a limitation, a stricture and a wagging finger – that the decision is to be overturned only if it is wrong. If all that entails is that the magistrates' court should overturn the decision if it disagrees with it, then the stricture is meaningless. After all, it is highly unlikely that a court would overturn the decision if it agrees with it. No, the proper interpretation is, as Burton J stated, is that the magistrates' court must specifically address the decision below, and should not lightly reverse it. While this may be considered a difference of emphasis or nuance, it is important that the appeal is

[4] [2009] EWHC 1996 (Admin).

correctly framed – it is not simply a second bite at the cherry but a process of ascertaining whether the decision is wrong.

The nuance was addressed by Lindblom J in R (Townlink Limited) v Thames Magistrates' Court[5], a decision which, being attended by one party only, is caught by the Practice Direction (Citation of Authorities)[6] and so cannot be cited in Court. Lindblom J said that it was an error for the court to start by considering whether the decision was wrong. What the court had to do was to consider the evidence before it with the relevant principles in mind, including the promotion of the licensing objectives and proportionality. Then, bearing in mind that this is a decision of the duly elected licensing authority and not lightly to be overturned, the Court should consider whether, because it disagreed with the decision, the decision was therefore wrong. While this represents a first class lawyer's attempt to reconcile the twin poles of "only overturning the decision when it is wrong" and "overturning decisions with which the court disagrees", it is a difficult test for magistrates to grasp. When added to the feature that a decision may be wrong when it was not wrong at the time, it is sad but true that magistrates are being asked to engage in mental gymnastics for which their training does not necessarily equip them.

The Court of Appeal in Hope and Glory dealt with the weight to be given to the licensing authority's decision. It concluded that careful attention should be paid to the reasons, being those of the elected licensing authority, with the weight accorded to be a matter for judgment, taking account of their fullness and clarity, the nature of the issues and the evidence given on the appeal. That is undoubtedly right (and is the law of the land). But it does not necessarily help to resolve the key issue of whether a decision is wrong just because the court disagrees with it, or whether more is required.

The second main issue arises from a dictum of the Court of Appeal in Hope and Glory, to the effect that where the licensing authority has exercised a statutory discretion to attach conditions to the licence, it makes good sense that the licensee should have to persuade the magistrates' court that the sub-committee should not have exercised its discretion in the way that it did rather than that the magistrates' court should be required to exercise the discretion afresh on the hearing of the appeal. This appears to be saying that the court should not exercise its own discretion. This is intellectually very hard to reconcile with the notion that the court must not start by considering whether the decision is wrong, but should instead ask itself whether, because it disagrees with the decision it is therefore wrong. Given that many if not most appeals concern conditions added to the licence, or variations of hours, it is crucial to understand whether it is being said a) that the appeal court should reach its own view and interfere with the decision below if different, or b) that the appeal court, having heard the evidence, should consider whether the decision below is wrong, or c) that the appeal court should not interfere unless satisfied that the court below should not have exercised its discretion as it did.

It is a remarkable circumstance that, over eight years after the implementation of the Act, such questions should remain, but they do, providing daily mooting fodder for licensing lawyers, all at the clients' and the courts' expense.

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[5] [2011] EWHC 898 (Admin).
[6] [2001] 1 WLR 1001.

A further difficult question on appeal concerns the role of proportionality. There is a nettle which remains to be grasped. Is the test to be applied whether the aim of the licensing intervention (e.g. revocation or the attachment or conditions) can be achieved by measures which are less interfering of an individual's rights? Or is the test simply whether a fair balance has been drawn between the interest of the licensee and the general interest? The former is the rule which is generally applicable in public law decision-making, see e.g. R (Samaroo) v SSHD SSHD.[7] The latter is the test generally applicable in planning decisions: Lough v First Secretary of State.[8] While the tests will often lead to the same result, they are not the same test. While space forbids a full exegesis, my own view is that, in general, given that it is dealing with commercial rights, a licensing authority ought to start with the minimum intervention and work upwards. That is to say, if the desired aim (e.g. to prevent public nuisance), can be dealt with through management measures, then management measures should be applied rather than curtailing or revoking the licence. However, others may argue that the margin of discretion afforded in proportionality exercises gives authorities wider scope to hold the balance between private and other private or public interests, so that authorities are not constrained to interfere by the least intrusive means. Again, this is an area where guidance is urgently needed.

(7) Applicability of decisions pending appeal

There are unjustifiable inconsistencies in the Licensing Act to the treatment of review decisions pending appeal, producing a position which is as illogical as it is complicated.

First, when a decision is taken on an ordinary review, it is clear that the decision is of no effect pending the appeal.

Second, however, when the decision is taken on a review following police closure of the premises under section 161 Licensing Act 2003, then the time when the decision takes effect varies according to whether the magistrates' court ordered closure (conditionally or otherwise) under section 165(2). Where it did, then the authority's decision continues until disposal of the appeal, save that if it imposes steps short of revocation it may suspend those steps pending the appeal: section 167. Further, whether or not the authority revokes the licence the magistrates court has power, effectively, to stay the operation of the order with or without terms: Schedule 5 paragraph 18 Licensing Act 2003.

Third, where the decision is taken on a summary review, then while the final decision is not effective pending the appeal, there is an argument – oft debated in this journal – as to whether the interim steps decision may be effective immediately. The decision of District Judge Knight in the Gary Oates case says it is not. The decision of Dingemans J in R (93 Feet East Limited) v London Borough of Tower Hamlets[9] says it is. The former is fully reasoned although of persuasive authority only. The latter is only briefly reasoned and not capable of being cited since it was delivered in a permission hearing and is therefore caught by the preclusive rule in the Practice Direction (Citation of Authorities).[10] In my view, logically, if any decision should have effect pending an appeal against a

[7] [2001] EWCA Civ 1139.
[8] [2004] 1 WLR 2557.
[9] [2013] EWHC 2716 (Admin).
[10] Above.

summary review decision, it is the decision at the final hearing rather than the decision on interim steps. The argument has certainly not run its full course.

More fundamentally, however, there is no necessity for the different legislative treatment of decisions on review according to how they commenced. The facts arising on an ordinary review can be just as serious as those on a summary review or those which led the Police to make a closure order. The trading position of the premises pending appeal should not vary according to the happenstance of the originating process. This is an area where primary legislation is required.

The discussion above concerns reviews. Some of those opposing licences and variations may argue that it is equally unjust that appealed decisions should have effect pending appeal. In some cases, it may indeed be unjust on objectors. However, rather than curtailing rights which have been conferred, it is considered that justice is better served by providing for speedier, more economical appeal processes, allowing for the rapid testing of the original decision. Where the matter is of particular urgency, then still earlier appeal listings may be sought.

C. SOLUTIONS

(1) The appeal tribunal

Licensing appeals can be of huge importance to the parties. The appeal may make the difference between a viable and an unviable business, the preservation or loss of scores of jobs, a tolerable or unacceptable living environment, a safe event or a death trap. The costs involved may be very substantial. The paperwork may be voluminous. The understanding of the balance between appropriateness and proportionality, law and policy, or national guidance and local policies, may be hard won, even by those specialising in the field. To lay all of this at the feet of lay magistrates, advised by non-specialist clerks, is asking a lot of them, however conscientious and intelligent they may be. Many, of course, rise to the challenge admirably. Others understandably struggle. In the former system, where there was a further appeal to the Crown Court, it was more easily justifiable to have licensing justice dispensed by lay benches. Now, however, it is hard to justify.

In my view, the quality, speed and therefore cost of justice will all be improved by having a specialist judge in each court centre, with training delivered by the Judicial College. Training will include education in all aspects of licensing appeals – e.g. case management, interim orders, tests on appeal, the use of guidance and policy, proportionality, costs and so forth. The District Judge will hold copies of core materials – the Act, national guidance, local policies, the leading case law etc., obviating the need for reproduction and argument in each and every case. S/he will be able to issue directions without the need to convene a hearing, so as to obviate lengthy pre-trial delays. S/he will also be able to pre-read material, so that, taking account of the ability to serve skeleton opening submissions, the case may be opened but briefly, with evidence in chief cut to a bare minimum. This, together with other measures suggested below, ought to lead to far shorter and cheaper hearings without any loss of quality of justice. This solution can be achieved without any legislative change at all, and can therefore be implemented immediately.

(2) Delay

Much of the delay can be knocked out of the system immediately. The solutions advocated here will result in far shorter hearings and therefore far earlier listing dates. More can be done. A case

management hearing is rarely necessary: even less so if standardised directions are issued for appeals against decisions on applications and reviews. If variations to standard directions are needed they can be argued for and decided on paper.

Still further, adoption of standard practises by District Judges could result in even earlier listing dates. For example, the Court could direct that parties lodging appeals should lodge dates to avoid for their advocates and witnesses with their notice of appeal, with respondents to lodge their dates within 7 days, and with a 1 day listing then allocated forthwith to suit the witnesses and, if possible, the advocates. Any party asking for longer than 1 day should file with their dates to avoid their time estimate with reasons in support, following which the court will list for the time which it considers necessary for the disposal of the appeal.

An alternative method would be for the court to hold appeal dates in its diary, into which appeals will be slotted as they are lodged. Then, if the dates are not taken up by any pending appeals, they can be released back into the system. In this way, there is no reason why newly lodged appeals cannot be heard within a matter of weeks rather than months, to the advantage of all concerned.

(3) Evidence on appeal

It would be difficult without primary legislation to undo the common law rules on service of evidence on appeal. It is unlikely that Parliament would in fact undo the rule that parties may serve fresh evidence on appeal. In fact, the White Paper *Time for Reform* proposed that there should be a single "judicial review" type appeal to the Crown Court from decisions of licensing authorities, but a full merits hearing was considered obligatory on human rights grounds, leading to the current system.

However, by substantially bringing forward appeal dates, the scope for producing new evidence ought to be naturally limited. More can be done by setting directions which require early service of evidence, for while the Court cannot preclude parties from adducing new evidence, it can case manage when and how they do so.

A leaf may be taken out of the new planning procedures introduced by The Town and Country Planning (Development Management Procedure) (England) (Amendment No.2) Order 2013[11], which were designed to result in an early submission of material supporting the appeal, the setting of early dates for hearings and reinforce the practise of the Planning Inspectorate of simply returning any evidential material submitted out of time, on the basis of the likely waste of time and cost late submission causes.

District Judges may, without any legislative changes, issue standard directions requiring appellants, within 7 days of submitting a notice of appeal, to submit, duly paginated and indexed, the agenda papers and any supplemental material before the licensing authority, together with the decision of the licensing authority and full particulars of why it is submitted that the decision of the licensing authority is wrong, if the same was not furnished with the notice of appeal itself. This will ensure that the Court is supplied at an early stage with the basic material in relation to the dispute.

The standard directions may then provide:

[11] (SI 2013/2136).

1) for an exchange of any supplemental evidence within 21 days of service of the notice of appeal;

2) for rebuttal evidence to be exchanged 7 days thereafter;

3) for skeleton arguments and any authorities to be lodged within 7 days thereafter;

4) for an indexed, paginated, agreed bundle to be lodged within 7 days thereafter. This should not include the agenda papers or the core legal and policy materials, which will already be held by the District Judge.

Two crucial points remain.

First, it can happen that an inordinate amount of time is spent on appeal hacking through Police CRIS and CAD reports relating to individual incidents, and watching extended CCTV footage in relation to the same. This is rarely necessary. A licensing hearing is not an Old Bailey trial, far less a series of mini-trials of dozens of incidents, conducted on largely hearsay evidence. It is an exercise in determining what the public interest requires. Guilt or innocence is irrelevant. Therefore, it is rarely necessary for more than a general impression to be gained of the number, severity and outcome of incidents, and the management response.

Therefore, any party wishing to rely on CRIS and CAD material should serve within 28 days of service of the notice of appeal a table in the following format. An example entry is also given.

Number	Date/time	Facts	Outcome	Comment	Response
1	Sat. 11.1.14 11.50 p.m.	Drunken customer ejected by door supervisors, head-butted a door supervisor outside entrance.	Charged with ABH.	The individual was allowed to become intoxicated in the premises. The incident was unreported until the following day.	The individual was not intoxicated but claimed to be as an excuse for his actions. The incident was witnessed by passing police officers so did not require a separate emergency call.

All but the final column should be completed by the party submitting the table. The final column should be completed by the party served within 14 days thereafter. The parties ought then to use reasonable endeavours to agree the table prior to the hearing. The District Judge can then decide whether he needs to hear evidence about individual incidents, or whether he can rely on the table. He can also visit unreasonable failures to complete and/or agree the tables with orders as to costs. In this way, much of the time currently spent in argument at licensing appeals ought to be saved.

Second, opposing parties often avoid discussion of conditions as a cat avoids Jacuzzis. Licensees avoid such discussion because their interest is to preserve their licence free of them. Authorities and

residents may avoid such discussion because their interest may be in preventing activity rather than discussing the terms on which such activity may occur. In planning appeals, parties are obliged to present a list of condition to the Inspector. These may be without prejudice to their primary position, but it ensures that the Inspector at least has an idea of what the middle ground may look like if he is inclined to reconnoitre it. One party having proposed a condition, the other party may object to it in principle, or agree it in principle but object to the wording, or may argue that there is a better way of achieving the objective. In this way, fruitful discussions proceed on a without prejudice basis, leading to more sensitive, lucid decision-making. This procedure is, for no good reason, anathema to many working in licensing, and frequently it is necessary to cajole the opposing party into such discussion by writing letters without prejudice save as to costs. Anything the courts can do to move the parties from war to jaw is to be applauded. Here, it is simplicity itself for the Court to issue directions requiring parties to produce a list of agreed and non-agreed conditions with reasons for non-agreement prior to the commencement hearing, again with costs sanctions for non-compliance. In some cases, the process will result in settlement of the appeal. In others, the process will simply shorten and cheapen the appeal proceeding itself.

(4) Timetabling the hearing

It is a phenomenon worthy of comment that, while almost every other civil and criminal proceeding is now case managed to achieve expedition, licensing appeals have remained immune from such controls.

In the case of Drinkwater[12], a criminal case, Sir John Thomas, the President of the Queen's Bench Division, pointed to the duty on magistrates to timetable their hearings so as to ensure the expeditious completion of the trial. He said:

> *"47. It is self-evident that proceedings in the Magistrates' Courts ought to be simple, speedy and summary. That requires close attention to the Criminal Procedure Rules and active case management before and during the trial…*
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> *49. …. Since the amendment to CPR Part 3.10, a court must consider setting a timetable for the trial of a case. We were told by counsel that, although it was their experience that this was done in the Crown Court, it was not being done in the Magistrates' Courts in cases such as the present. Whether that experience reflects more general practice or not, it is clear that in any case in the Magistrates' Court where a trial is likely to be other than a short one, it should be the ordinary practice for a timetable for the conduct of a trial to be set at the time the trial date is fixed and the estimate made.*
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> *50. In setting the timetable, the court should scrutinise the reasons why it is said a witness is necessary and the time examination and cross-examination would take. It is also important in setting a timetable to have regard to the nature of the issues and the fact that the trial is a summary trial; any estimate of more than a day in the Magistrates' Courts should be scrutinised with the utmost rigour. Parties must realise that a summary trial requires a proportionate approach. If a timetable for the trial is not set, it is difficult to have any real confidence that the estimate is accurate.*

[12] [2012] EWHC 765 (Admin).

51. At the commencement of the trial, the Magistrates' Court should check with the parties that the timetable and the estimates remain valid. If there is any variation which lengthens the estimate, the court should make every effort to see if the trial can still be accommodated that day by sitting late or otherwise.

52. Once the trial has started, the court must actively manage the trial, keeping an eye on progress in relation to the timetable. It is essential in a Magistrates' Court, just as the Crown Court, that the court has in mind the observations of Judge LJ, as he then was, made as long ago as 2004 in Jisl [2004] EWCA Crim 696 at paragraph 114-115:

> *"The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.*
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> *Almost exactly a year ago in R v Chaaban [2003] EWCA Crim. 1012 this Court endeavoured to explain the principle:*
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> *…*
>
> > *37. … nowadays, as part of his responsibility for managing the trial, the judge is expected to control the timetable and to manage the available time. Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time. At the risk of stating the obvious, every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to justice in cases still waiting to be tried, adding to the tension and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses. Most important of all it does nothing to assist the jury to reach a true verdict on the evidence.*
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> > *38. In principle, the trial judge should exercise firm control over the timetable, where necessary, making clear in advance and throughout the trial that the timetable will be subject to appropriate constraints. With such necessary even-handedness and flexibility as the interests of the justice*

require as the case unfolds, the judge is entitled to direct that the trial is expected to conclude by a specific date and to exercise his powers to see that it does.""

I believe that what is good for cases in which criminal records and reputations are at stake is good for licensing disputes.

In Northern Ireland, the Court in the case of Re Sainsbury's Supermarket,[13] which concerned licensing, took a similar approach, Gillen J stating:

"[13] I have already adverted to the overriding objectives of Order 1, Rule 1A. Courts and those appearing before them must adopt a business-like approach in dealing with litigation if resources are to be properly deployed and unnecessary expense and delay are to be avoided.

[14] Hence in all divisions of the High Court, robust case management practices are now invoked. Whilst the ultimate overriding principle is that justice must be done, that aim must be achieved within the ambit of Order 1, Rule 1A...

[18] There is no reason why licensing cases should not be subject to similar case management structures as obtained in other areas of litigation. Cases such as the present appeal take up a disproportionate amount of court time and in my view incur a level of expenditure on the part of both parties which could easily be substantially reduced.

[19] In order to meet the overriding objective, in future licensing cases, firm case management prior to the hearing should be invoked."

This sensible and modern thinking is supported by rule 3A of the Magistrates' Courts Rules 1981, which has now been in force for four years:

"(1) The court must actively manage the case. That includes—

(a) the early identification of the real issues;

(b) the early identification of the needs of witnesses;

(c) achieving certainty as to what must be done, by whom and when, in particular by the early setting of a timetable for the progress of the case;

(d) monitoring the progress of the case and compliance with directions;

(e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;

(f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion and avoiding unnecessary hearings;

(g) encouraging the participants to co-operate in the progression of the case; and

(h) making use of technology."

[13] [2012] NIQB 45.

I believe that, if the approach advocated in this article is taken, then opening submissions should be capable of almost total elimination. Statements should be taken as read, so that examination in chief is reduced to issues which genuinely could not have been raised in the written statements. Cross-examination should be timetabled witness by witness, with re-examination confined to matters which genuinely require further explanation. Closing submissions should be timed and refined and, where possible, presented in writing.

If this seems draconian, I have participated in one appeal which was listed for 8 days but was taken by the scruff of its neck by a District Judge and completed in 3½, without any damage to justice. In my experience, most appeals are capable of completion in a day, with two days reserved for more difficult or serious cases, and three days very much the exception. This is eminently achievable with nothing more than case management by experienced District Judges.

(5) The test on appeal

There is no need for primary legislation to set out the test on appeal and the influence of concepts of proportionality. However, as I argue above, the principles lack lucidity. The quickest way to achieve consistency would be for the principles to be the subject of judicial training through the Judicial College, so that the same principles are applied in every case. Then, in the unlikely event that the principles are wrong, they may be corrected in the first subsequent High Court challenge. Then, there will be no further need for theological debates about the meaning of Hope and Glory to be intoned by able advocates at subsequent appeals: they will be burnished in gold by the Judicial College, and sealed with the imprimatur of the Administrative Court. This will save time and cost, and promote consistency, which is an end in itself.

(6) Interim steps

It is fair to describe the varying rules for interim steps as a muddle. They should be harmonised by primary legislation at the first available opportunity. The solution is obvious. When imposing steps on review, the authority should order whether they are intended to have interim effect. If the authority orders steps to have interim effect, the appellant ought to be able to apply on paper to the District Judge to vary or discharge the interim steps, which can be opposed by the licensing authority or any responsible authority which appeared at the hearing. Arguments should be set out on paper, with a hearing, which should be listed for no more than an hour, only necessary if the District Judge is minded to refuse the application to discharge the interim steps. In this way, the Court will control what should happen in the interim, according to the justice of the situation rather than the happenstance of which originating method was used. Of course, unlike under the current system, interim steps will only continue for a short time, because the appeal hearing itself will occur far earlier than it currently does.

D. IMPROVING FIRST INSTANCE DECISION-MAKING

The effect of the above recommendations, if implemented, would be to expedite appeal hearings, so that licensing authority decisions which are right will be less likely to become wrong with the passage of time and the incidence of events. They are only likely to be overturned when they are inherently wrong. That may be considered a benefit to local democracy and closer to that which Parliament intended when it removed the originating jurisdiction from the magistrates' court.

However, what it would also do is to throw focus on the decision of the Licensing Sub-Committee. It makes it the more important that that decision is not only right, but is arrived at in a transparently fair way. It is one thing to say that the appeal hearing should be early, quick and cheap. But if full justice has not been done at first instance, cheap justice may end up equating with poor justice.

It is considered that the following minor improvements could be made, which would provide further justification for an attenuated appeal process:

1) By the date of the notice of hearing, the applications and representations are in. The licensing officer can see what the issues are and should use the notice of hearing to issue directions accordingly. While evidence submitted before the hearing is generally admissible, the notice of hearing should exhort the earlier submission of material in writing, particularly if the material will require rebuttal or explanation, such as CRIS and CAD data, noise reports or film footage.

2) Better, more systematic guidance should be given to licensing authorities on decision making, and in particular in relation to proportionality and the need to take a ratcheted approach to intervention, starting at the bottom and working up to the apposite solution, with management changes being considered before operational curtailments or revocation.

3) Licensing officers should not be afraid to make recommendations, whether they are in a role as responsible authority or simply acting as professional advisers to the Sub-Committee. Planning officers perform that function daily – it is an important part of what they do. While this topic is beyond the scope of this paper, I strongly believe that exactly the same applies to licensing officers. They are there to assist their lay members in the same manner as local government officers of all disciplines, and should not be cowed from doing so by the now antique and discredited concept that Sub-Committees sit quasi-judicially. As the Court of Appeal explained in Hope and Glory, they sit administratively, and can expect the same support as they would receive if they were sitting on any other committee.

4) Authorities should be encouraged to write fully reasoned decisions. This assists immeasurably on appeal. It is, after all, the decision of the authority which is under challenge. If it cannot express itself fully, it can hardly expect to be treated seriously on appeal. It should explain in full why it took certain courses and rejected others, and which evidence it accepted or rejected. Given that the time lag before the appeal hearing will not have permitted much of a change in circumstance, the decision under appeal will be even more at centre stage than it is now: it should dress appropriately.

E. CONCLUSIONS

The function of the appeal system is to provide a check and balance on the power of licensing authorities. Since the abolition of the necessity test by the Police Reform and Social Responsibility Act 2011, that power is substantial, including a power to remove licences on the basis that it appears appropriate to do so. The function is both necessary and crucial. However, this does not entail that only a cripplingly expensive, slow and exhaustive procedure will do. Appeals should not push licensees towards liquidation and licensing authorities towards unnecessary compromise, and their cost should not be held out as a weapon by one side over the other. It is the duty both of the court system and all who appear within it to work to achieve justice in a speedy, efficient and cost-

effective manner. This article has set out, if not a blueprint, then at least a block of ideas to set the ball rolling.