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News: Another opportunity missed.

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I wrote in July about the Interim Steps issue and Judge Roscoe's decision (you can read that eNews here).

A further development has arisen over the summer.

The Victoria Pub in Hayes was subject to a summary review by the Police alleging significant issues with drugs and, at a subsequent Interim Steps hearing, the Premises Licence was suspended. This was followed by revocation of the Premises Licence at the substantive hearing. A representations hearing followed to vary the interim steps to allow the premises to open pending the appeal hearing. The request was refused and an immediate claim for a Judicial Review followed partly because of alleged irregularities at the interim steps hearing. At the same time an interim application to allow the premises to reopen was placed before Mostyn J. A decision regarding the request for Judicial Review was deferred pending submissions form the Police and Licensing Authority however Mostyn J did grant an order lifting the interim steps because of the claimants potential to 'suffer irremediable and severe economic damage'.

On 27 August 2014 Collins J considered the papers from both sides in his deliberation regarding the outstanding claim for a Judicial Review. In discharging the order made by Mostyn J and refusal of the claim for the Judicial Review he did however make some encouraging comments for the future prospects in respect of a Judicial Decision regarding Interim Steps.

Collins seemed to suggest that in his judgment that in his view' Interim Steps are what they say, namely steps taken pending determination and once determination has come into effect they will automatically lapse' but then went on to say:

'However, it must be assumed that Parliament meant s.53C(2)(c) to have some effect and in my judgment it only makes sense if it implies and must enable justice to be done carry within it by the words in brackets a power to vary or indeed to remove any interim steps pending the expiry of 21 days or any appeal.'

He further went on to say that 'the legislation is badly drafted and is by no means clear. Whatever the construction there clearly should be a procedure which enables there to be a possibility of suspending the effect of the determination or of any interim order pending Appeal'.

Is this one step further forward in getting a Judicial decision or one step back? The grant of the Judicial Review proceedings which will determine the Interim Steps issue is still only going to happen when an 'appropriate' case comes along. Who knows when that will be however, until the issue is decided we will continue to live with the uncertainty generated from these alternative decisions.

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Summer-Y Justice?

The heat goes to the head in the High Court dealing with Summary Reviews

In two cases over the summer the High Court granted injunctions staying the effect of interim steps imposed on a summary review of a premises licence. Readers will be familiar with the controversy over the effect of the interim steps in the summary review procedure set out in sections 53A-53C of the Licensing Act 2003. This has gone on since 2011 when DJ Knight declared in Oates that section 53C(2)(c) was "incapable of understanding by any human being".

In **R (Saral) v LB Hillingdon** the premises licence of the Victoria Public House was suspended at the interim steps stage and then revoked at the full review hearing. According to the approach taken in R (93 Feet East Ltd) v Tower Hamlets [2013] EWHC 2716, the interim steps remain in place until any appeal has been disposed of, therefore the premises should have stayed closed. But an application to the High Court produced an injunction which allowed the premises to reopen.

In an apparently copy-cat action, a similar injunction was obtained by the British Luxury Club in **R (Tennic Ltd) v LB Camden**. The injunction allowed the premises to open under its pre-review licensing conditions and hours pending appeal to the magistrates against the decision on review.

Licensing authorities will see this as a worrying development. There were serious issues at stake in both cases: the Victoria had been the subject of a drugs raid, with 9 arrests; at British Luxury Club the police were concerned that a vicious attack on a bouncer had been deliberately targeted and might lead to further attacks. Yet in both cases the injunction was granted on the papers, without any consideration of the views of the licensing authority and the police.

The problem with this is that getting an injunction is often a good deal easier than getting it set aside. This is made worse during the High Court summer vacation because judges are in short supply, so just getting the matter listed can be difficult. Sadly not much has changed since Munby J.'s resounding quotation from Magna Carta in **R (Casey) v Restormel BC [2007] EWHC 2254**. In Camden's case it took a week to get the court to consider its views; with Hillingdon it was 41 days. That is a long time for a premises to operate unregulated after a senior police officer has certified it is associated with serious crime or disorder. This delay was not through want of effort by the authorities, but rather lack of court resources.

In both cases the injunctions were stopped as soon as the views of the licensing authority and the police were taken into account. In both cases permission to apply for judicial review was refused on the papers, meaning that the underlying claims were not arguable. This only highlights the concern over the time it took for a balanced consideration of the claims.

A number of the judges dealing with these cases suggested that the meaning of the legislation needs further consideration in court, but ultimately these cases were not right on their facts for a test case. It is certain that this will not be the last time that this issue appears in the High Court.

Rory Clarke acted for the London Borough of Camden in the British Luxury Club case and for Tower Hamlets in 93 Feet East Ltd.

One Interim Step Forward - Two Steps Back

Published Date: 29/Aug/2014

Collins J refuses permission for judicial review and rules that the legislation is badly drafted and contains an omission.

What a summer it has been for the interim steps debacle. With cases coming out of the woodwork all year, in a shock decision this week, the High Court has thrown the whole question of interim steps out of Court and back into turmoil. In a short judgment refusing permission for judicial review, Collins J also confirmed that: "The legislation is badly drafted and is by no means clear." and "There is undoubtedly a serious lacuna in the legislation". However, he stated that the case before him on its facts was not the case to address these issues:

" I recognise that the provisions are far from clear and it may be a judicial decision is needed. But this is the wrong case since it is clear beyond doubt that for good reason the committee decided that the suspension should remain pending appeal. This therefore is not the case for the matter to be determined since the facts are against the claimants."

On the 15 May 2014 the Metropolitan Police made an application for a summary review under s53A LA2003 against the Victoria Pub in Hayes. The Police made a series of allegations against the premises relating to drug dealing by patrons which were hotly contested.

In an ex-parte first hearing by the Police, the Licensing Committee suspended the licence. The Licensees made representations, and after some initial issues in getting the Council to list the matter within 48 hours, the representations against the interim step of suspension were heard in a second interim steps hearing on 23 May 2014. The Police were notified of this hearing, but did not attend and were not represented.

The second hearing for the Licensees' representations against their suspension was given a time allocation of five minutes. Part of the Judicial Review claim was that this in itself had breached the Licensees' human rights. This was hotly denied by the Council, who filed evidence with the Court to contradict the Licensees' claim that they had only been afforded five minutes to make their case.
According to that evidence, the original five minute allocation had in fact been further extended to afford an additional two minutes in closing, if the Police turned up to make representations. The Police were only to be given three minutes. (As it happens, the Police did not turn up, so this extended time appeared unnecessary to the Council.)

The evidence also pointed out that Counsel for the Licensees had turned up with a ten page note of submissions. According to the Council's evidence, the Licensees were further accommodated in that the Committee took "at least four to five minutes reading while they were waiting to see if the Police turned up."

Further, according to the evidence, Claimant's counsel "was in fact given over five minutes to speak; between six or seven minutes", and this was noted down in the Minutes by the clerk.

The evidence goes on to point out that the sub-committee spent, in estimation, "no less than six minutes" deliberating on this matter in private before giving their decision to continue the suspension. And it was also pointed out that the Police had only needed five minutes at the original hearing to convince the sub-committee to impose the suspension in the first place, so parity would appear to have been satisfied.

At the conclusion of the allotted time, the Chair of the Committee left the room. The 23rd May 2014 was local council

election day. The decision to suspend was upheld.

Thereafter, in a lengthy full review hearing, on the 11th June, the evidence was thoroughly disputed, and both versions of events fully canvassed. The Committee made a decision to revoke the licence, based upon the Police version of events, and also made a separate decision to continue the suspension of the licence as an interim step, pending any Magistrates' Court appeal.

The Licensees appealed to the Magistrates', and to date, the matter has not yet even been listed for directions. In the meantime, the Licensees lodged an immediate Claim for Judicial Review with the Court, to stay the decision of the Sub-Committee to impose the interim step of suspension in the first place, making complaint about the procedure in the hearing of 23rd May 2014, and also challenging the interpretation of the statute that sees interim steps extending beyond review, and seeking judicial guidance on that important point generally.

At the same time, the Licensees made an application for emergency interim relief from the Court, to stay the determination of the Committee, and to allow them to carry on trading, pending the determination of the Court on the substantive Judicial Review Claim.

In an Order dated 17th July 2014, the Honourable Mr Justice Mostyn allowed that interim application, and re-opened the premises, giving his reasons as follows:

"5. The law concerning the award of interim injunctions requires the court to have regard to (a) the underlying merits of the main claim and (b) whether any irremediable damage would be caused were the Injunction not to be granted.

6. As to the merits I say no more that it seems to me that it is arguable that the claim would be arguable at the permission hearing. Certainly the statutory provisions concerning the evanescence (or otherwise) of Interim steps is unhappily framed and has given rise to inconsistent judicial decisions. The controversy ought to be resolved. For what it is worth it seems to me that the approach of Dingemans J is logical.

7. Further it does seem as though the procedure adopted on 23 May 2014 was questionable to say the least.

8. If the interim steps are not lifted pro tem it seems highly likely that the claimants will suffer irremediable and severe economic damage."

The premises started to trade again.

On 25th July, the London Borough of Hillingdon (Gerald Gouriet QC acting) the Metropolitan Police (Gary Grant acting) put in responses and applications to close the premises down again, stating that, on the matter of clarification of the statute, all

was clear, and there was: "no serious issue to be tried". Accordingly, the Court was urged to refuse permission for the Claim.

Heavy reliance was placed upon the recent case of Metropolitan Police –v- Mayfair Realty Ltd in the Westminster Magistrates' Court before District Judge Roscoe on the 22nd July 2014.

This case is also respectfully suggested to have added a touch more heat than light to the whole debate.

In Mayfair Realty, the District Judge stated that:
"23. The intention of section 53B is, in my view clear. It is to set out the requirement of and procedure for a LA to consider if it is necessary to take interim steps. Although a LA is obliged to consider whether or not it should take interim steps under section 53A(2). it is not obliged to take such steps. It states: "……whether it is necessary to take interim steps pending the determination of the review applied for….". My understanding of that is the phrase "pending the determination of the review…" relates to the period in which it may take such interim steps. It does not relate to the longevity of those steps."

Collins J in the latest judgment would appear to disagree with that particular piece of statutory interpretation:

"S.53C(2)(c) does indeed seem to be an unnecessary provision since s.53B(1) makes clear that interim steps are what they say, namely steps taken pending determination and once a determination has come into effect they will automatically lapse. "

In Mayfield Realty, DJ Roscoe went on:

"29. If one allows for my interpretation of the meaning of section 53B(1) it allows the meaning of section 53C(2)(c) to become clearer. There is no other provision that deals with the lapse or expiry of the interim steps. Accordingly, section 53C(2)(c) deals with that. It makes it clear that the LA has a duty to resolve what happens to the interim steps. Its responsibility is to terminate the interim steps (the only exception being if the effect of the interim steps continues by virtue of the determination made by the LA). Put simply it must either terminate or ratify the interim steps. That decision does not take effect, however, until the expiry of the period set out in 53C(11)."

Again, it is respectfully suggested that if the decision to ratify the interim steps did not 'take effect' until the expiry of the period set out in 53C(11), then we wouldn't be arguing about it. That was, essentially, one of the arguments before Dingemans J in 93 Feet East, which he found "interesting", but declined to resolve.

Back to The Victoria. Upon consideration of the application of the Council and Police to close the Victoria Pub again, and to refuse permission for Judicial Review, the Honourable Mr Justice Collins made his decision on the papers alone, without hearing argument on 27th August 2014.

He said:
"Reasons:
1. While the papers were put before me as a result of the defendant 's application to set aside Mostyn J's order, it was obviously sensible to consider whether permission should be granted. I have decided that it should not and so the order of Mostyn J is inevitably discharged.

2. I have sympathy with the concerns about the conduct of the 23 May 2014 hearing. However, the committee for reasons which cannot be said to be arguably unlawful decided on 11 June 2014 that

the licence should be revoked. This was based not only on serious crime but a breach of the
licence conditions by public nuisance.

3. The legislation is badly drafted and is by no means clear. Whatever the true construction, there clearly should be a procedure which enables there to be a possibility of suspending the effect of a determination or of any Interim order pending appeal. Section 53B(1) enables an Interim order to be made 'pending the determination of the review', but s.53C(2)(c) makes clear (if it is to be given
any sensible meaning) that such an interim order may extend to when the determination comes into effect. However, s.53C(2)(b) enables the committee to modify any interim order by imposing different and perhaps less onerous measures. In this case it decided to revoke the licence so that the suspension would inevitably continue in force. The committee clearly also decided that the licence should continue to be suspended. That it was on whatever is the true construction of the statutory provisions entitled to do.

4. There is undoubtedly a serious lacuna in the legislation since it was in my view be disproportionate in terms of Article 1 Protocol 1 if there were no power to suspend an adverse decision pending appeal or a fortiori no power to give immediate effect to a decision that the application under s.S53A was not made out albeit an Interim order had been made. S.53C(2)(c) does indeed seem to be an unnecessary provision since s.53B(1) makes clear that interim steps are what they say, namely steps taken pending determination and once a determination has come into effect they will automatically lapse. However, it must be assumed that Parliament meant s.53C(2)(c) to have some effect and in my judgment it only makes sense if it implies and must enable justice to be done carry within it by the words in brackets a power to vary or indeed to remove any interim steps pending the expiry of 21 days or any appeal.

5. If the magistrates have no power to suspend, as to do justice they should have, it is clearly essential that a hearing takes place as soon as possible and the magistrates court must pull out all stops to ensure a speedy hearing.

6. I recognise that the provisions are far from clear and it may be a judicial decision is needed. But this is the wrong case since it is clear beyond doubt that for good reason the committee decided that the suspension should remain pending appeal. This therefore is not the case for the matter to be determined since the facts are against the claimants."

All wording is precisely as it appears on the Order.

This is a salutary ruling for those who have scoffed that the legislation is clear, and that they understand it completely. If the clear meaning of anything eludes Collins J, then it is obscure beyond dispute, and those who claim to have mastered it entirely have obviously stopped thinking too early.

It brings to mind the much maligned District Judge Knight in the almost forgotten Gary Oates case in which she said:
"I will not claim to understand section S53C(2)(c) because I think it defies understanding by any human being".

We now, therefore, have four cases on the table: Gary Oates; 93 Feet East; Mayfair Realty and now, The Victoria.

It appears to be recognised that there is a question that needs answering, and an answer to be had – but this is comfortless with no hint as to what it might be, or when it might come.
Licensees must continue to endure the frustration of the National Interim Steps Lottery.
Licensing Authorities must make their decisions in the teeth of conflicting interpretations of legislation now judicially

acknowledged to be a mess, in the knowledge that one of these cases, one of these days will have all the right ingredients to be the Golden Ticket back to the High Court again.

Just to make the game more interesting, Mayfair Realty and Gary Oates have now both approved, apparently, multiple challenges to interim steps decisions, including after the full review hearing has concluded. The principles said to be behind this facility, and the way in which it is to be exercised are, of course, entirely different, but there seems to be some agreement that it is possible and proper. This will give rise to some interesting situations.

It looks as though Interim Steps just took another step away from resolution.

Sarah Clover
Kings Chambers
29th August 2014
(Sarah Clover was instructed by S Z Solicitors for the Claimant Licensees).

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Gerald Gouriet QC - Interim Steps

Published Date: 04/Sep/2014

The assertion in Sarah Clover's news article ("One Interim Step Forward, Two Steps Back", 29.8.14) that the decision of Collins J in Sarai v London Borough of Hillingdon came as a "shock" should perhaps be taken with a pinch of salt. There have been two decisions by district judges on the duration of interim steps, and three by High Court judges. The decision by District Judge Roscoe in the Amika appeal was fully argued by Queen's Counsel on both sides: the Judge (in a reserved judgement) came to the conclusion that on the plain meaning of the words of the statute interim steps lasted until final determination of the section 53C review, i.e until the disposal of any appeal. A contrary decision was taken by a district judge in Halton Magistrates' Court, but one who confessed that she did not understand the meaning of section 53(2)(c), and was of the opinion that it defied any human understanding. Happily, Dingemans J did not labour under any such difficulty in the 93 Feet Street East decision, and although he found the provisions for interim steps cumbersomely worded, he ruled that it was unarguable that they fell away at the first section 53C hearing, and he refused permission to bring a judicial review accordingly. A second High Court Judge, Mostyn J said (on a paper application) that he found Dingeman J's approach to the construction of section 53C "logical" – not quite a ringing endorsement for the proposition that Dingeman J was wrong. A third High Court judge (Collins J; again on a paper application) has now refused permission to judicially review the same point as arose in the Hillingdon case, insisting (with respect, quite rightly) that s. 53(C), however badly drafted, has to be given meaning, and that meaning necessarily implies that interim steps remain in force pending any appeal against a s. 53C review decision. The potential for injustice, so I read his short judgment, is cured by inferring a power to vary interim steps at the review hearing if justice requires it.

I speak from a personal view-point only, and with a perhaps flawed memory of the facts (I am on holiday!), but I find myself entirely unshocked by the latest decision, which not only accords with the words of the section (however badly drafted) but with common sense. In sporting terms we have two judges who heard full argument, teamed with two judges who decided on the papers, versus one judge who candidly admitted she didn't understand the provision in question. Not what I would call a score-draw.

Gerald Gouriet QC
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3.9.2014

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