

NORTH LANARKSHIRE CASE CREATES DILEMMAS FOR THOSE FACING OBJECTIONS

SHOULD LICENSEES BE OBLIGED TO SEEK OUT BETTER INFORMATION FROM OBJECTORS?

THE decision in *Chief Constable, Strathclyde Police v North Lanarkshire Licensing Board and another*, reported at page 35 of this issue, is scrutinised by SCOTT BLAIR, advocate.

At one level this case is just a further restatement of earlier authority as to whether there is any practical onus on an applicant to rebut any negative inference that might be drawn from the terms of an objection. While in *Din* it had been held that there was no onus on an applicant to establish that any ground for refusal did not apply, this was qualified in *McAllister v East Dunbartonshire Licensing Board* 1998 SLT 713 to the extent that there was no onus on an applicant to satisfy the Board on all matters, at least insofar as points not taken by the objectors were concerned.

However, in some ways it goes further than earlier authority. For example, in *McAllister* there was no suggestion that the terms of the objection were unspecific. Moreover in that case the subject matter was the question of demand in the context of an application for a betting office licence. In that regard it might be reasonably maintained that the applicant is well-placed to deal with any objection given that the applicant might be thought to be in possession of all material facts.

It might open to question whether the same approach should apply in a situation where the applicant is unlikely to be in full possession of all relevant facts. In such a situation it might be thought that the rules of natural justice would require the applicant to be made aware of all relevant facts within the body of any objection itself and in advance of the hearing itself.

It is arguably one thing to justify a practical onus arising at the hearing itself because of the state of the evidence from all relevant parties before the Board as it emerges at the hearing but arguably quite another to in effect place a practical onus on an applicant in advance of a hearing to make inquiry of his opponent as to the basis of the case against him.

'Due diligence' undermined

Moreover, unlike the present case there was no question of the applicant in *McAllister* being able to rely on a statutory defence of due diligence and which might in turn be undermined by an inability to properly counter an objection because of a lack of proper notice. That might also be a point of distinction from the circumstances in *McAllister*.

Another difficulty with the approach taken by the Court is that, looking at paragraph 23, of the opinion, and indeed the opinion as a whole, it seems to be implicit in the approach taken by the Court that the Chief Constable can

be assumed to be a 'responsible' objector and will in turn endeavour to co-operate with any requests made for further information. The inference appears to be that it was the status of this particular objector which has been treated as being relevant as to whether a licensee should have approached that objector for further information.

How far should that indulgence be taken? Should a local authority or Community Council be given this apparently favoured status? Can they be expected to co-operate in the way in which the Court assumed would be forthcoming from the Chief Constable?

Conversely one is perhaps left wondering if an objection from an objector in a less favoured category would be entitled to the same assumption that the Court seems to have made in relation to the Chief Constable. There is nothing in the Act which places objections from the police (or indeed any other public authority) in a more favoured position than the ordinary citizen.

There might be a danger in taking this line too far in that the status of the objector might be used to bolster objections which are unspecific or at least make it easier for it to be argued that there exists a practical onus on a licensee to raise possible lack of specification with such an objector.

Surprising leeway

Indeed an argument might be made to the opposite effect. Whilst it might be maintained that an objection from the police must be assumed to have been made after careful inquiry and in general terms, is likely to contain *prima facie* relevant material, if anything, given their role and ready access to legal advice, objections from the police might be expected to be particularly well-framed. On one view the decision seems to afford a leeway as to specification which is perhaps surprising given this background.

There must also surely be force in the point made by Counsel for the Respondents that it was not beyond the Chief Constable to devise a means of providing the licensee with the relevant information without running the risk of disclosing identities at a public hearing. For example what would have stopped the police from naming the alleged 'under-age drinkers' in question in the letter of objection but thereafter asking the Board not to name them at the hearing? That would have allowed the applicant an opportunity to investigate the allegations in advance of the hearing whilst at the same time preserving the anonymity of the individuals in question.

Of course if the police were to continue to refuse to divulge the identity of the individuals in question at any

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stage then that might raise separate issues as to the weight to be attached to the objection at the hearing. The Court raises this latter possibility but does so after holding that the applicant had a practical onus to raise the point with the police in the first place.

Further criticisms might be advanced. It seems somewhat formalistic to appear to hold that one reason for holding that the decision of the Respondents was unreasonable was that the objection contained an invitation to approach the police for further information or clarification and that the Respondents failed to give this proper weight. Should anything turn on whether or not such an invitation was extended in the body of the objection given that the Court

'It is not apparent why it was more unreasonable for the licensee not to take up the offer of further information from the police, as opposed to the police not providing sufficient information in the body of the objection itself'

refers to the onus being a practical one? If the presence or absence of such an invitation was relevant to the question of whether a practical onus arose then by simply insert-

ing such an invitation in the body of an objection an objector can go some way to creating such an onus. That surely cannot be correct.

While the Court appear to have held that it was unreasonable for the licensee in this case not to have approached the police, that arguably fails to fully understand the reality of the situation a licensee might have to confront. In particular there may be a natural reluctance on the part of a licensee or any representative to approach the police lest that approach in itself divulges to the police something of their position of the applicant in advance of the Board hearing. The difficulties might be particularly acute where it is as yet unclear as to whether criminal proceedings are to be taken in relation to the circumstances forming the basis of the objection.

Moreover it is not apparent from the opinion why it was more unreasonable for the licensee not to take up the offer of further information from the police as opposed to the police not providing sufficient information in the body of the objection itself or explaining therein why it was not possible to divulge the identities of the youths in question; nor is it clear why, as between them, it appears that any onus to seek an adjournment should lie with the applicant as opposed to the police.

Tactical decision

Whatever the criticisms that can be made of the decision, in practical terms the decision appears to require agents to make a tactical decision as to how they should approach an objection which they consider to be unspecific, particularly where it emanates from the police, or perhaps other 'responsible' objector. The practical dilemma is whether a licensee should in effect put the objector on guard that

their objection may be lacking in specification on the one hand and on the other risk failing to discharge any practical onus which is said to emerge from the general terms of any objection.

There are probably no hard and fast rules and the opinion of the Court does nothing to provide any concrete guidance as to when an applicant is required to make an approach to an objector. Whether much turns on whether an invitation to make further inquiry is contained in the objection itself might be open to doubt. Much will depend on the facts and circumstances of a given case which are potentially relevant to the basis of an objection. In some cases the answer will be obvious. The terms of the objection may be so lacking in specification (for example, where there is nothing more than a re-iteration of the grounds of refusal) that a representative might feel justified in not making any further inquiry.

Such cases are likely to be rare. But what of the situation where the issues are more diffuse and it cannot be readily said in advance that the objection is so unspecific that no weight should be given to it? In such a case the dilemma of the representative is clear.

While in this case no doubt sound reasons existed for taking that course - not least the acceptance of the police warning - the agent for the minuter accepted that enough information had been provided to allow the minuter to identify the incidents in question.

In future representatives might be reluctant to make similar concessions and may be tempted to put the objector 'to their proof'. Even then there are difficulties. The opinion of the Court seems to suggest that a licensee who takes that tack runs the risk of failing to discharge the practical onus on them to rebut any negative inference which might be drawn from the objection simply because the material, even if arguably unspecific, is deemed to be sufficient in itself to create such an onus. Putting the objector to their proof may simply highlight the need to deal with the objection.

Inconsistent reasoning

The Court was perhaps on stronger ground when it criticised the reasoning of the Respondents for being inconsistent in holding, on the one hand, that the minuter had been denied a chance to rebut the allegations and, on the other hand, that there was no evidence that the minuter had been culpable or that there was any evidence that the minuter had done anything wrong.

It might be suspected perhaps that what the Respondents meant was that as the Respondents had failed to make a specific case they did not regard that the allegations had been made out. However the language used does not make that clear. Whatever the failure of reasoning on this point, that is not in itself inextricably bound up with the separate issue of whether the Respondents erred in their approach to the question of onus on the minuter.

• **Mr Blair will discuss this and other key decisions when he presents 'Case Law Review of the Year' at CLT's Annual Licensing Conference in Edinburgh on 27 April. In our next issue he examines the Glasgow Board's policy on the promotional pricing of alcohol.**