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Primary use test for garage licensing

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The decision in *R (on the application of) Murco Petroleum Limited v Bristol City Council* [2010] EWHC 1992 (Admin), reported in the October 2010 issue of *Licensing Review* ([83] 19-25), has introduced some uncertainty into the operation of s.176 Licensing Act 2003 in respect of the sale of alcohol from premises at which 'garage use' takes place. Before considering s.176 and the *Murco* decision it is instructive briefly to consider the background to the section.

Background

Section 176 has its origins in s.10(1) of the Licensing Act 1988 which inserted two new subsections into s.9(4) of the Licensing Act 1964 (which until 2005 regulated alcohol licensing in England & Wales):

S.9(4A) Premises shall be disqualified for receiving a justices' licence if they are primarily used as a garage or form part of premises which are primarily so used.

S.9(4B) In subsection (4A) of this section, the reference to use as a garage is a reference to use for any one or more of the following purposes, namely, the retailing of petrol or derv or the sale or maintenance of motor vehicles.

Section 10 was headed 'Disqualification – garages'. Its intention was clear – that premises 'primarily used as a garage' would be disqualified for receiving a justices' licence for the sale of alcohol, but the meaning of 'primary use' was not defined. Further, by s.10(2), the 180 or so existing garage licences were protected even if the premises were primarily used as a garage.

The genesis of the new provisions was explored in the July 2000 issue of *Licensing Review* ([42] 21); by which time it was estimated that were then some 600 forecourt stores which held justices' licences. (For as *Paterson's Licensing Acts* put it: 'service stations continue to be used increasingly for the purpose of shopping as well as, or instead of, places for the purchase of fuel' (*PLA* 2000, p.xiii)).

The 22 years since the passing of the section have seen a dramatic change in retailing generally and in garage forecourts in particular. The traditional garage with workshops, a used car lot and a small kiosk has been replaced by forecourt convenience stores which sell a wide variety of products and little resemble the garages of old (which could not compete with supermarket fuel sales and national tyre and car repair centres). The number of petrol stations has reduced dramatically and those that survive operate as convenience/neighbourhood stores selling a range of products which customers expect will include alcohol. The success of a convenience store depends on the availability of alcohol, not only in terms of alcohol sales but also for all other sales, as customers require a 'one-stop shop'.

The 1980s saw increased concern over all forms of alcohol-related harm, including drink-driving, and the Government came under strong pressure to restrict forecourt licensing. Lobbying from a number of groups persuaded the Government to review 'the implications for drink-driving' of garage off-licences. However, the review found no evidence of any adverse effects and the Government accordingly declined to amend the Licensing Bill to disqualify garages from holding justices licences.

But the Bill was amended in the Lords, despite the Government's view that 'there are about 180 garages with licences. There is no evidence that would stand up to detailed analysis that the possession by those suppliers of a licence has led to any drunken driving' *Hansard (Commons)* 1988, 478). The measure was seen as a symbolic nod to the fight against drink-driving rather than as a necessary practical measure. As Douglas Hogg put it for the Government 'Whatever the evidence might prove, we are probably dealing with perceptions' (*Hansard* (Commons) 27 April 1988, 478).

It is interesting to note that customers continue to drive to supermarkets and other stores to buy alcohol and that almost all public houses have car parks. Additionally, while the

number of licensed forecourt shops has increased dramatically over the years (it is estimated that in 2011 there are now some 2500 to 3000 such stores – the latest DCMS statistics do not separate out forecourts from 'other convenience stores'), drink-drive figures have generally shown a corresponding decrease. Moves to introduce random breath testing and to lower the permitted alcohol limit are recognised as having significant potential for drink-drive gains, but their introduction is still long awaited.

S.176 Licensing Act 2003

Section 176 of the 2003 Act effectively re-enacts the provisions contained in s.9(4) of the 1964 Act: premises primarily used as a garage are not authorised to sell alcohol and garage use is defined as the same four activities. The practice, procedure and case law utilised for s.9(4) has therefore been followed for s.176 by licensing committees and magistrates' courts on appeal in many hundreds of cases over the past five years throughout England and Wales.

The licensing of forecourts seemed settled. However, difficulties were beginning to surface and the *Murco* decision has brought these sharply into focus. Four matters fall for consideration: is there a power to adjourn; is primary use to be considered at the application stage; what is the test for primary use; and what is included under 'maintenance of motor vehicles?

Power to adjourn

The issue in the *Murco* case was a simple one. Murco made an application for a premises licence for one of its forecourt shops. The application was made in the same way, providing the same figures, as had been done in many previous applications, including applications to the Bristol licensing committee. The sub-committee requested further information from the applicant which was not available. The sub-committee then asked for other information. The applicant stated that it had supplied sufficient information and it was now for the sub-committee to decide the application as s.18(4) of the Act is clear that an authority at a hearing 'must' grant or refuse the application. The Guidance cannot override the statutory provisions and regulations. As the Guidance itself puts it: 'Nothing in this Guidance should be taken as indicating that any requirement of licensing law or any other law may be overridden. The Guidance does not in any way replace the statutory

provisions of the 2003 Act or add to its scope and licensing authorities should note the interpretation of the Act is a matter for the courts' (para.1.8).

The proper course, it was argued, for an authority faced with what it perceives as an uncooperative, unreasonable or dishonest applicant is to refuse the application. There is then an appeal to the magistrates' court. If the authority's decision is upheld it is protected in costs and if it is not upheld then fairness can prevail.

The sub-committee disagreed and adjourned the hearing to a specified date. When further information was not forthcoming the sub-committee purported to adjourn the hearing to an unspecified date. This denied the applicant an appeal to the magistrates' court and it was left with judicial review as its only legal recourse. The Administrative Court agreed that the sub-committee had no power to adjourn to an unspecified date (paragraph 32). However Cranston J dismissed the appeal on the basis that there was power to adjourn the hearing utilising regulation 12 of the Licensing Act 2003 (Hearing Regulations) 2005 in accordance with the Secretary of State's Guidance which states that 'where there is insufficient evidence to establish primary use, it is for the licensing authority to decide whether to grant the licence and deal with any issues through enforcement action or to defer granting the licence until the primary use issue can be resolved to its satisfaction' (para.5.23).

The effect of the decision is that an application may be put on hold indefinitely, by repeated adjournments, if a sub-committee is not content with the information contained in an application. One leading commentator has described the decision as 'a denial of justice … The applicant is entitled to a decision one way or the other, not to be put 'on hold' without the opportunity of recourse, except expensive and at times frustrating judicial review' (83 *Licensing Review* 2).

When does the question of primary use arise?

The wording of s.176 differs in a small but significant way to that of s.9(4). Whereas s.9(4)(A) provided that 'premises shall be *disqualified for receiving* a justices' licence if they are primarily used as a garage, s.176(1) provides that 'no premises licence … *has effect* to authorise the sale by retail … from excluded premises' (emphases added).

So does s.176 operate as a mechanism to disqualify excluded premises for receiving a premises licence (and as such is a matter to be addressed at the premises licence application stage as was the case under the 1964 Act) or is its effect to remove authority for the sale of alcohol under a premises licence where the premises are used primarily as a garage thus becoming excluded premises (and as such does not need to be addressed at the application stage but is an enforcement issue)? It can be argued that the wording of s.176(1) presupposes the existence of a premises licence, but provides that such a licence will not authorise the sale or supply of alcohol if the premises are used primarily as a garage. This interpretation also allows for the fact that the primary use of premises may change over time.

Paterson's Licensing Acts 2011 supports this contention (fn1 to s.176 LA 2003) 'Whereas it was incumbent on the Licensing Justices to undertake a detailed consideration of whether, on the evidence, garage premises were entitled to be granted – or 'receive' - a Justices Licence at the time of the application, it can be argued that under the new regime such an approach is less important since any such licence granted will be null and void if the premises are – or become – technically "excluded"'.

Thus it began to be argued, and it was initially before the licensing committee in the *Murco* case, that primary use is now an enforcement rather than eligibility issue. Licensing committees around the country adopted different views on the matter; with an increasing number being content to proceed without the need for evidence to be produced on the question of primary use.

The application process

Where a licensing authority receives an application for a premises licence it must initially determine whether the application has been properly made in accordance with s.17 of the Act and the Licensing Act 2003 (Premises licence and club premises certificates) Regulations 2005. An incomplete application or one that has not satisfied the notice requirements is invalid and will be returned to the Applicant.

There is no requirement in the legislation or regulations that an applicant for a premises licence must prove the primary use of the premises. An application valid in all other respects

cannot it seems be refused simply if no evidence as to primary use is presented. Where no representations have been made the licensing authority must grant the licence in the terms sought (s.18(2)). It cannot defer the application under Hearings Regulation 12 or ask for further information under regulation 17 as the hearing regulations apply only if there is a hearing. Where representations have been made the licensing authority must hold a hearing to consider the representations (s.18(3)). The Act is clear on these matters and there is no discretion on the part of the authority to do otherwise. The power under s.111 Local Government Act 1972 would probably not authorise such an enquiry in the absence of representations as the power is 'subject to the provisions of … any other enactment passed before or after this Act' – it could therefore not override the clear wording of s.18(2).

In any event, it is the case that, as Richards J (as he then was) put it in *R(on the application of the British Beer and Pub Association) v. Canterbury City Council* [2005] EWHC 1318 (Admin) (at para 85), 'The scheme of the legislation is to leave it to applicants to determine what to include in their applications, subject to the requirements of Section 17 and the Regulations as to the prescribed form and the inclusion of a statement on specified matters in the operating schedule'.

In *Murco,* Cranston J expressed the view that the original policy behind the legislation was to remove the temptation to drink and drive, although this would now be expressed as engaging the crime and disorder licensing objective (para.14), and that an interested party, by making a representation raising the issue of alcohol sales from a garage, put the 'issue of the juxtaposition of petrol sales and alcohol firmly before the licensing committee' in relation to the crime and disorder licensing objective (para.27). The Court's reasoning then is that primary use becomes an issue for a licensing authority where the question of alcohol sales from a garage is raised by a representation. This supports the position that if there are no representations to an application, or no representations relating to 'the juxtaposition of petrol sales and alcohol', primary use does not fall to be considered at the application stage.

What is the test for primary use?

All applications for a justices' licence under the 1964 Act went to a hearing before the licensing justices. Premises which carried on all or any of the four categories of 'garage use'

would generally be required to address the issue of primary use. While many matters were raised as having a possible bearing on primary use – for example, the physical size of the shop compared to the forecourt (but balanced by the size of a car compared to a person!) – the test for primary use quickly came to be based on two matters: initially turnover and then footfall. A review of the approach to primary use and other relevant matters appeared in the January 2004 issue of *Licensing Review* ([56] 11). Two Divisional Court cases are instructive.

The first, *Green v Justices for the Inner London Area* (1994) 19 LR 13, is authority for the proposition that *if* figures for financial turnover are used they must be 'properly analysed' and considered net of duty and vat (para.5A-C). Also, a higher shop footfall figure was considered to be 'a large gain or advantage in the argument put forward by the applicants in that regard' (para.4B). Figures for turnover are complicated and technical. For, as *Green* had decided, the duty and vat elements must be stripped out of all sales to produce a meaningful comparison between garage and other sales. Also, vat rates differ for product groups (some such as newspapers being vat exempt), vat rates are subject to change and excise duty applies to fuel and tobacco products.

It is questionable too whether the amount a customer spends at the premises increases their 'use' of it. If £4 is spent on a magazine are the premises used more than if £1 is spent on a newspaper? Is £20 worth of fuel more 'use' than £10? In these examples it seems that the customer has used the premises once to purchase reading material or fuel.

In the second case, *R v Liverpool Crown Court, ex parte Kevin John Goodwin* (1998) 38 LR 21, Laws J gave a more definitive view holding that: '*The question must be*, what is the intensity of use by customers at the premises? So that evidence such as that of customer lists, to take an example, might be highly material' (emphasis added) (para.4E).

Post *Goodwin* footfall rather than turnover was generally adopted, both before the justices and in the Crown Court on appeal, as the test for primary use. For as *Paterson's* put it: 'This seems to us, with respect, to be both an appropriate and practicable approach to the interpretation of a measure which, presumably, was intended by parliament to bear upon the purposes for which the public actually use particular premises, rather than require the justices to engage in any academic calculation of

turnover and taxes, although such figures might provide useful corroborative evidence' (*Paterson's Licensing Acts 2000,* p.xiv).

In the Parliamentary debates on s.176 the phrase 'intensity of use by customers' was used by the Minister, Baroness Blackstone (*Hansard,* HL Deb, vol.643, col.457 (20 January 2003)) and again, 'If the intensity of use in supermarkets becomes mainly that of selling petrol to motorists who drive in with their cars to pick up petrol and move on, the same limit and prohibition will apply to them' (*Hansard,* HL Deb, vol.643, col.757 (4 March 2003)). This is reflected in the *Guidance:* 'The approach to establishing primary use so far approved by the courts has been based on an examination of the intensity of use by customers of the premises.' (para 5.28).

However, the judgment in *Murco* has resulted in some authorities seeking to request figures for turnover. At paragraph 18, Cranston J states that 'in my view it is a matter for each licensing authority to decide whether it will decide primary use on the basis of numbers or evidence of turnover … there is nothing in Laws J's judgment to suggest that intensity of use – the phrase used - cannot be calculated by reference to the turnover figure'. While this might literally be the case it is not consistent with Laws J's judgment as a whole – as the question of turnover is dealt with elsewhere in the judgment and the reference to intensity of use is followed by the words 'so that evidence of customer lists , to take an example, might be highly material' (paragraph 4E).

As Cranston J states, quite correctly 'there is no need for me to draw the parameters to the information the sub-committee could ask about' but as he rightly continues 'relevance and materiality are obviously central considerations' (paragraph 31). Laws J's judgment makes it clear that in deciding on primary use 'the question must be what is the intensity of use by customers at the premises'.

'Maintenance of motor vehicles'

The Act specifies garage use to be the retailing or petrol or derv and the sale or maintenance of motor vehicles. The last of these has sometimes given rise to debate (see further 56 *Licensing Review* 11). The licensing authority in *Murco* accepted that car wash, airline and water facilities are not included in 'maintenance of motor vehicles' and this is

noted at paragraph 31 of the judgment. The decision thus supports the contention that such facilities are not included in 'maintenance' for the purposes of primary use.

Conclusion

The ratio of *Murco* is that a sub-committee at a hearing can request further information from an applicant under regulation 17 of the Hearings Regulations (this was not disputed) and that if an answer is not forthcoming the sub-committee can adjourn the hearing until it is satisfied with the response that it receives, but that adjournment must be to a specified date. This will certainly have application in cases involving the primary use of garage premises, as in the case itself, although it is less clear whether the ratio will be narrowly confined to such cases. At its widest, it could extend to adjournments for information on any matter at any sub-committee hearing, under the 2003 Act. The Claimant in *Murco* chose not to appeal the decision but, if such a broad interpretation is given in subsequent cases, the decision may come under future challenge.

The adjournment was held to be valid as the information was 'considered necessary for (the sub-committee's) consideration of any representation made' (Hearings Regulations paragraph 12(1)). The Court held that a valid representation had been made in relation to primary use and that primary use related to promotion of the licensing objectives (public safety and crime and disorder). It was not argued by the Respondent or found by the Court that the question of primary use always falls to be considered in an application to which s.176 may apply.

It seems clear then, that in the absence of representations, or where representations do not raise the issue (as a hearing needs to focus on the representations raised), primary use does not fall to be considered in the application process; but where a valid representation is received which refers to primary use (either expressly or by implication) the committee may request information relating to the use of the premises.

Other matters raised in the judgment are obiter. First, the test for primary use. As the judgment states, the matter was listed for a permission hearing but was on the morning of the hearing, with the agreement of the parties, treated as rolled-up hearing to consider

both permission and the substantive issue (paragraph 10). The test for primary use was not considered by the parties as necessary for the purposes of deciding the issues before the Court on the Judicial Review application, it was not fully argued and it was not necessary for the court to make any decision in respect of it. Although as a matter of law, trading figures can be used to determine the issue of primary use, in the light of the above, the judgment in *Goodwin* and the difficulties faced by a consideration of turnover, the test of intensity of use by way of customer lists or footfall should continue to be the approach adopted. Secondly, the definition of 'maintenance of motor vehicles' is acknowledged to exclude matters such as air lines and car washes.

On the key question of adjournments for further information, it remains to be seen whether the ratio is confined subsequently by courts to cases involving the primary use of garage premises or whether it extends beyond this to other cases and, if so, to what extent.

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