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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 12/06/18*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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In the Matter of an Application by DENMIN LIMITED for leave to apply for Judicial Review

-v-

CLERK OF PETTY SESSIONS, DISTRICT OF LISBURN

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McCLOSKEY J

Introduction

[1] Given the factor of urgency this judicial review challenge has been processed on a fast track, via the so-called "rolled up" mechanism.

[2] The Applicant, Denmin Limited, is a limited liability company registered in Northern Ireland. Its sole director (and, it would appear, sole shareholder) is one Frank Denny. The company, which has its registered office at The Colin Centre, Good Shepherd Road, Poleglass, Dunmurry, evidently carries on business in the sphere of licensed premises operations.

[3] The target of the Applicant's challenge is:

> "… *the decision of the Clerk of Petty Sessions made on or about 19 September 2017 to renew the licence held by Michael Gallagher in respect of Laurel Glen Road House, Dairy Farm District Centre, 208 Stewartstown Road, Belfast*".

The words quoted describe the intoxicating liquor business of a competitor at the Dairy Farm District Centre (hereinafter "Dairy Farm"), evidently less than a mile from the Applicant's proposed place of business of a comparable nature, described in [6] *infra*.

The Challenge

[4] The author of the impugned decision is the Clerk of Petty Sessions in the Petty Session District of Lisburn (the "CPS"). The evidence establishes that on 19 September 2017 the CPS made a paper order whereby the licence in respect of the Dairy Farm business was renewed until 30 September 2022. This is evidenced by an extract from the Register of Licences for the Petty Sessions District of Lisburn.

[5] The Applicant avers that on 20 February 2018 he learned, via one Michael Rodgers, an architect in independent practice retained by the Applicant in connection with a pending licensing application at another location (*infra*), that certain structural alterations to the Dairy Farm licensed premises had been made. The effect of these was to create a sub-divided business engaged in the activity of an E-Cigarette retail shop. There is clear photographic and diagrammatic evidence of this discrete retail activity, which occupies a substantial proportion of the formally licensed area, previously designated as a lounge, together with part of the previously designated off sales area. Evidence of the signage contained in two "Google Street View" photographs is invoked in support of the assertion that the E-Cigarette retail activity was inaugurated some time in advance of the impugned order of the CPS.

[6] The context in which Mr Rodgers was engaged and that in which the Applicant brings these proceedings is that the company is currently applying for a licence in respect of specified units at The Colin Centre, Pembroke Loop Road, Belfast. The Dairy Farm licensee is objecting to this application. A hearing at Lisburn County Court is scheduled on 08 June 2018. The Applicant contends that, by reason of the factual framework outlined above, the Dairy Farm licensee is disabled from maintaining an objection to the Applicant's Colin Centre application.

[7] The nub of the Applicant's case is that the impugned order of the CPS is vitiated by a failure by the Dairy Farm licensee to notify an alteration/change of use of part of the licensed premises to the retail sale of E-Cigarettes. A consequential breach of Article 14 of the Licensing (NI) Order 1996 is asserted. The effect of the Applicant's central contention, if correct in law, would appear to be that the purported renewal of the Dairy Farm licensee's licence was legally ineffective, with the result that no legally valid licence has been in existence in respect of such premises since the expiry of the former licence which, but for the impugned decision, would have occurred on 30 September 2017.

Evidence on behalf of the CPS

[8] Commendably, a replying affidavit, with certain documentary attachments, was provided timeously on behalf of the CPS in the compressed timetabling circumstances noted above. The court had been assisted by this affidavit and the skeleton argument of Ms Fee (of counsel). The affidavit contains the following salient passage:

> "*The licensee, Michael Gallagher, did not notify the CPS or the Court that any alterations had taken place to the licensed premises, such as would have required the CPS to list the renewal application for hearing and to notify objectors in accordance with Article 14 of the Licensing (NI) Order 1996 …..*
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> *The licensee specified on his* [renewal] *application ….. that 'no alteration as specified in Article 31 of the Licensing Order 1996' had been made since the last renewal and he did not indicate that any other alterations had been made to the premises.*"

These averments are confirmed by the renewal application which is exhibited.

Relevant Statutory Provisions

[9] Article 14 of the Licensing (NI) Order 1996 (the "1996 Order") regulates the subject of renewal of intoxicating liquor licences. It provides:

> *"14. - (1) An application for the renewal of a licence shall be made to a court of summary jurisdiction except where the licence is renewed by the clerk of petty sessions under this Article.*
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> *(2) `The procedure for applications for the renewal of licences is set out in Part I of Schedule 4.*
>
> *(3) `Subject to paragraph (4), where notice of an application for the renewal of a licence otherwise than under Article 16 or 23 has been served upon the clerk of petty sessions, he may renew the licence as if the application had been made to him and may do so in the absence of the applicant.*
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> *(4) Where-*
>
> *(a) a notice of application is in respect of the renewal of a licence which has been in force for a period determined by the court under Article 13(1)(a)(ii) or (b)(ii) or Article 21 (1)(b)(ii) or (c)(ii), or*
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> *(b) a notice of objection has been served on the clerk and has not been withdrawn, or*

(c) the licensed premises have been altered since the last previous renewal of the licence (or, where the renewal applied for is the first renewal of the licence, since the licence was granted), or

(d) the application for renewal is in respect of premises of a kind mentioned in Article 5(1)(a) for which the applicant has also applied to the court for-

(i) a direction specifying that on Sunday there shall be no permitted hours on the premises, or

(ii) the cancellation of such a direction, or

(e) the application for renewal is made by virtue of Article 18 or with respect to a licence to which Article 77(4) or Article 80(3) applies, or

(f) the application for renewal is in respect of licensed premises for which the applicant has also applied to the court for the variation of a direction specifying the number of gaming machines which may be made available on the licensed premises or, where such a direction has not been given in respect of the licensed premises, for which the sub-divisional commander of the police division in which the licensed premises are situated has applied for such a direction, or

(g) the clerk is of the opinion, for any other reason, that an application for the renewal of the licence should be made to the court,

the clerk shall require the application to be made to the court and shall notify the applicant and the objectors, if any, of the requirement and of the time and place of the hearing.

(5) Where a licence is renewed, the clerk shall note the renewal on the licence."

By Article 31 of the 1996 Order:

"31. - (1) An alteration shall not be made to premises for which a licence is in force if the alteration-

(a) gives increased facilities for drinking in a public or common part of the premises; or

(b) adds to the premises a public or common part in which intoxicating liquor is sold, or substitutes one such part for another; or

(c) conceals from observation a public or common part of the premises in which intoxicating liquor is sold; or

(d) affects the means of passage between the public part of the premises where intoxicating liquor is sold and the remainder of the premises or any road or other public place,

unless either-

(i) an application under this Article has been made by the holder of the licence to a county court and the court has made an order consenting to the alteration; or

(ii) the alteration is required by order of some lawful authority and, before the alteration is made, notice of the requirement is served by the holder of the licence on the clerk of petty sessions. [am. 2015 NI c.9 on 31 Oct 2016].

(2) The procedure for applications under paragraph (1)(i) is set out in Part I of Schedule 8, and Part II of that Schedule shall have effect in relation to notices under paragraph (1)(ii).

(3) If any alteration such as is mentioned in paragraph (1) is made to premises otherwise than in accordance with an order of the county court or an order of some lawful authority, a court of summary jurisdiction may order the holder of the licence to restore, as far as is practicable, the premises to their original condition within a period fixed by the order.

(4) The period fixed by an order under paragraph (3) may be extended by order of a court of summary jurisdiction on the application of the holder of the licence.

> *(5) If paragraph (1)(ii) is not complied with, the holder of the licence shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 2 on the standard scale.*
>
> *(6) If the holder of the licence makes default in complying with an order under paragraph (3), he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 6 months or to both."*

Paragraph 5 of Schedule 4 to the 1996 Order provides:

> *"5. A sub-divisional commander upon whom notice is required by paragraph 3 to be served, the district council mentioned in that paragraph or any person owning, or residing or carrying on business in, premises in the vicinity of the premises for which the renewal of the licence is sought may appear at the hearing of the application and object to the renewal of the licence on any ground mentioned in Article 15(2)."*

Consideration and Conclusions

[10] The assembled evidence establishes to the satisfaction of the Court that this is a case to which Article 14(4)(c), together with the ensuing mandatory provisions, applied at the time of submission of the Dairy Farm licensee's renewal application to the CPS by Notice dated 31 July 2017. This Notice contained the following representation:

> "*No alteration such as is specified in Article 31 ….. has been made to the premises since the licence was last granted.*"

Given the factual matrix outlined above, this was a demonstrable misrepresentation. The conclusion that the CPS was misled in consequence is readily made.

[11] It is necessary at this juncture to apply the framework of public law. The Applicant seeks an Order quashing the impugned decision of the CPS. It is appropriate to dispose of two issues at once. First, the fundamental qualifying condition that the CPS was exercising public law powers is plainly satisfied. Second, having expressly raised with the parties' representatives, and having duly considered, the question of whether the Applicant has at its disposal any alternative remedy, in particular a statutory right of appeal against the impugned order, I am

satisfied from a consideration of the statutory code that this form of recourse is not available.

[12] The next principle which it is appropriate to highlight is that public law is rarely concerned with questions of fault, or blame. Rather, in judicial review the Court generally conducts an exercise involving the objective and dispassionate application of legal principles to the established facts. One paradigm illustration is that of a case where the public authority concerned has, without any shadow of blame, in making the impugned decision taken into account an immaterial fact or factor or has disregarded something material. The question for the Court is not whether either of these public law misdemeanours has occurred in some blameworthy manner. Rather, the Court is concerned to establish only the legal status of the fact or consideration in question as something material – or, as the case may be, immaterial – and, having done so, to determine the purely factual question of whether the matter in question was properly taken into account or was disregarded. Applying this template, it matters not in law that the CPS is properly to be considered blameless in the present context.

[13] The critical provision in the statutory matrix is Article 14(4)(c) of the 1996 Order. The effect of this is that where an application for the renewal of a licence is made, this may be granted by the CPS concerned unless the licensed premises have been altered since the last previous renewal. Where this is the case, the CPS is disempowered from renewing the licence and, rather, shall require the renewal application to be made to the Court and shall notify the applicant and the objectors, if any, accordingly.

[14] In the absence of adversarial argument (see *infra*), the only issue which has given rise to some degree of hesitation on my part is that of the interplay between Article 14 and Article 31 of the 1996 Order. Neither of these two discrete provisions makes reference to the other. While Article 14(4) purports to be exhaustive of the grounds upon which the CPS shall refuse to make a renewal order on paper and shall require the application to be made to the Court, with due notification to specified parties, it is striking that the 7th in the menu of grounds upon which the CPS shall take this course is one which invests the CPS with a discretion of demonstrable breadth –

> "*Where … the clerk* ***is of the opinion, for any other reason****, that an application for the renewal of the licence should be made to the Court …*"
> [My emphasis.]

This is the first – and clear – statutory indication that the CPS was undoubtedly empowered to take this course vis-à-vis the Dairy Farm licensee's renewal application giving rise to the impugned order.

[15] The second of the statutory indicators to like effect is a little more subtle. Article 31 of the 1996 Order prohibits four specified types of alteration to premises having a licence in force. Article 31(1), in its formulation of the four expressly prohibited alterations, is silent on the type of alteration with which these proceedings are concerned. However, I would highlight two features of Article 31. First, it does not purport to prescribe unauthorised alterations in exhaustive terms. Second, it does not purport to limit Article 14(4)(c) to the list of alterations described in Article 31(1). Third, Article 14(4)(c) is not expressed to be "subject to" or otherwise limited or qualified by Article 31(1). None of the familiar statutory drafting devices which could have achieved this with facility and clarity has been deployed. Furthermore, I can identify no warrant for implying qualifying words which would either dilute or confound the second and third components of this analysis.

[16] I turn to consider whether the decided cases to which the attention of the Court was helpfully drawn by Mr McCollum QC (with Mr Shields, of counsel) on behalf of the Applicant contra-indicate the statutory interpretation which I have espoused in [14] – [15]. These included in particular Re Doherty's Application [1998] NI 14. This concerned a judicial review challenge to a licence renewal order made under the corresponding provision of the predecessor legislation, namely section 20 of the Licensing Act (NI) 1971. Considered at this remove viz some 30 years later, the erudite judgment of Kelly LJ is an interesting illustration of the approach to judicial review challenges which prevailed until the emancipation effected by Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374: this landmark decision does not feature in the judgment.

[17] The application of this historical retroscope does not alter the indelible juridical reality that the legal criteria on which the Court of Appeal based its decision, namely errors of law going to jurisdiction and appearing on the face of the record have, in substance, been subsumed within the compass of the simpler and more direct public law misdemeanour of illegality. The decision of the Court of Appeal, affirming the first instance decision that the renewal order of the Resident Magistrate be quashed, is in my estimation to be viewed through this lens.

[18] For the record I draw attention to the other sources to which the attention of the Court was referred: Wine Inns v Lavery [1985] NI 427; Barr v Delargy [1989 NI 1, Belfast Co-Operative Society v Kelly [1990] 2 NIJB 1; Belfast Co-Operative Society v – Stewarts Supermarkets [Unreported, HHJ Hart, 15/04/94]; and the standard text book in this field, namely The Liquor Licensing Laws of Northern Ireland (McBrien), paragraphs 5.05 – 5.39. Having considered these various sources, I find that none of them provides any clear illumination of the court's resolution of this challenge.

[19] I consider that in the refreshingly uncluttered world of contemporary judicial review the impugned decision of the CPS is unsustainable in law applying two separate, though inter-related, prisms. The first is that it is vitiated by a failure to take into account a self-evidently material fact, namely the significant structural

alterations and associated change of business activity within the licensed premises in question. The second is pure illegality, the CPS having no power to make the impugned order having regard to the foregoing. Given the significant alterations to the Diary Farm licensed premises, I consider it clear that the impugned order of the CPS was *ultra vires* his powers.

Conclusion and Order

[20] Finally, it is appropriate to make reference to the principle of presumptive regularity, still known to many as the "omnia praesumuntur" principle. The effect of this is that the impugned order of the CPS has at all material times benefited from the presumption that it is legally valid and effective. In the United Kingdom legal system, this presumption applies, and continues to apply, unless and until the order is upset by a Court of competent jurisdiction. This analysis explains why it was necessary for the Applicant to bring the present challenge. The decision whether to grant a remedy and, if so, the remedy to be afforded are matters lying within the discretion of this Court.

[21] In the present context the remedy which emerges as the strongest candidate is that of an order of certiorari quashing the impugned decision of the CPS. The possibility of a competing order, namely a declaration of illegality (duly particularised), also arises. The court is alert to the significant differences between these two forms of discretionary public law remedy, considered at some length in the reported case of R (SA) v Secretary of State for the Home Department (IJR) [2015] UKUT 536 (IAC) at [17] – [30].

[22] The court's deliberations on the issue of remedy brought into focus that, though duly served and notified, the non-party with an obvious interest in the outcome of these proceedings, namely the Dairy Farm licensee did not seek participation facilities.

[23] In the events which have occurred it has not proven necessary for the court to adjudicate on the issue of a final remedial order. At a point when the preparation of this judgment was at an advanced stage, the court was informed that adjudication was not necessary as the parties had (commendably) achieved a consensual outcome entailing the withdrawal of the Dairy Farm licensee of its objection to the Applicant's licensing application specified in [6] above. I trust that it will be instructive to add the following.

[24] Whereas declaratory orders sometimes have the potential to generate consequential debates about their full legal reach and extent, a quashing order has the strong attraction of cleanliness and finality. In the exercise of the court's discretion I would have made an order quashing the impugned decision of the CPS as framed in [8](a) of the Order 53 Statement.

[25] In the exercise of its discretion the court would have been disinclined to make an order for costs against the CPS, for three principal reasons. The first is that of blameworthiness, highlighted above. The second is that the legal default giving rise to these proceedings is attributable exclusively to the Dairy Farm licensee, a non-party. The third is that the contribution of the CPS to the court's resolution of the issues, via its affidavit and the skeleton argument, has been positively helpful.

[26] Taking into account the non-participation of the Dairy Farm licensee in these proceedings, coupled with its willingness to submit to a costs saving consensual resolution, an order for costs against this agency would not have been appropriate.