Neutral Citation Number: [2023] EWHC 128 (Admin)

Case No: CO/2177/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITITNG IN LEEDS

Friday, 27th January 2023

Before:
MR JUSTICE FORDHAM
- -

Between:

THE PORKY PINT LTD	**Appellant**
- and -	
STOCKTON ON TEES BOROUGH COUNCIL	**Respondent**

- -
- -

Paul Oakley (instructed by Tilbrooks Solicitors) for the **Appellant**
James Kemp (instructed by Stockton on Tees BC Legal Services) for the **Respondent**

- -

Hearing date: 12.1.23

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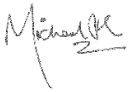
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This case is about a pub which stayed open despite Covid-related restrictions and has lost its licence. The case comes before me as an appeal by way of case stated pursuant to section 111 of the Magistrates' Courts Act 1980, from an adjudication of District Judge Hood ("the Judge") sitting at Teesside Magistrates' Court on 15 and 16 March 2022. The question for me is whether the Judge's adjudication was wrong in law. Three questions of law are stated in the Judge's stated Case of 11 May 2022 (the "Stated Case"). I first encountered this case in July 2022, in making the Venue Determination at [2022] EWHC 1705 (Admin) (the "July Judgment"). The appeal had wrongly been filed in London. The Administrative Court in London is not the National Administrative Court. Rather, it is the South-East Regional venue of the Administrative Court. As I explained in the July Judgment, this case plainly has its closest connection with the North-East Region, where the pub is located, where the events took place, where the hearings of the Respondent ("the Council")'s Statutory Licensing Committee ("the Committee") and of the appeal before the Judge took place, a geographical orientation and connection decisively outweighing the implications, inconvenience and travel cost associated with the Appellant's choice of Essex-based solicitors and London-based barrister.

2. The Porky Point is a popular pub in Mill Lane, Billingham. Its director and Designated Premises Supervisor is Mr Paul Henderson. After a hearing in July 2021 the Committee, on an application made by Cleveland Police ("the Police") for a review of the licence, decided that the licence should be revoked. The Committee said this (Mr Kolvin QC is Counsel who represented the Appellant at that hearing):

> ***The Committee noted and took into consideration the representations received in support of Mr Henderson and the premise. In excess of 40 representations had been received from local residents and others who supported Mr Henderson and the premise. These included character references praising Mr Henderson and comments showing that that the premise was valued by the local Community. The Committee noted that this it was very sad that the local community would lose out if the premise licence was revoked and the premise closed. The Committee noted that the pandemic has not ended and case numbers are continuing to rise especially in the North East, albeit the number of hospitalisations does not appear to be increasing. The Committee were not persuaded that Mr Henderson had an awareness of the impact of his actions or that he would not continue to act in such a reckless manner and undermine the licensing objectives in future… The Committee were not persuaded that Mr Henderson would act in a different way should there be any further lockdowns or restrictions imposed in the future. Despite the assurances provided by Mr Kolvin QC on behalf of Mr Henderson these were not persuasive. The Committee took this matter extremely seriously and were satisfied that this was a case where revocation of the premise licence was a necessary and appropriate sanction. After considering and weighing up all of the evidence and submissions made by the parties to the hearing the Committee resolved to revoke the premises licence.***

   The Appellant's appeal was then dismissed, and the revocation upheld, by the Judge for the reasons given in a judgment dated 16 March 2022 (the "Judgment"), after an oral hearing on 15 March 2022.

The 2003 Act

3. The relevant key features of the statutory scheme were identified by John Howell QC in Lalli v Metropolitan Police Commissioner [2015] EWHC 14 (Admin) at §§19-24. Under section 136 of the Licensing Act 2003 (the "2003 Act") it is an offence to sell alcohol (or knowingly allow it to be sold) by retail on or from any premises without an authorisation. Such an authorisation can be given by a premises licence granted by a licensing authority under Part 3 of that Act. At the heart of the Act are the "licensing objectives" identified in s.4(2):

> ***The licensing objectives are (a) the prevention of crime and disorder; (b) public safety; (c) the prevention of public nuisance; and (d) the protection of children from harm.***

The "prevention of crime and disorder" licensing objective is also known by the shorthand "crime prevention objective" (see 2003 Act s.193(1)). A responsible body (the relevant licensing authority itself and the chief officer of police for the area or any other person) may apply for a review of a premises licence (s.51). The licensing authority may reject any ground on which the application is made if it is satisfied that it is not relevant to one or more of the licensing objectives. Having followed the prescribed procedure and having had regard to any relevant representations, the authority must take such of the steps mentioned in section 52(4) of the Act (if any) as it considers appropriate for the promotion of the licensing objectives. These steps are: "(a) to modify the conditions of the licence; (b) to exclude a licensable activity from the scope of the licence; (c) to remove the designated premises supervisor; (d) to suspend the licence for a period not exceeding three months; (e) to revoke the licence". Prior to the hearing of the review, the application for the review must be advertised for representations to be made to the authority. Any determination on the review does not take effect until any appeal (s.183 and Sch 5) is disposed of.

4. As will be seen below from the Judge's Findings, the case arises out of the sequence of events from October 2020 to February 2021. During that time there was a sequence of Regulations in the form of Statutory Instruments made by the Secretary of State for Health, in the exercise of the powers conferred by the Public Health (Control of Disease) Act 1984 (the "1984 Act"). The prior sequence of such Regulations, in the first part of 2020, was described by the Court of Appeal in R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ1605 [2021] 1 WLR 2326 at §§9-10. Subordinate legislation of that kind is lawful only if falling within the reach (vires) of the empowering Act. The key provisions of the 1984 Act, which the Court of Appeal in Dolan ruled did empower such Regulations, are set out in Dolan at §§44-54. The Regulations had a consistent design pattern. They made it a criminal offence to contravene, without reasonable excuse, the restrictions imposed in the Regulations, or to fail to comply with a Prohibition Notice issued under the Regulations. The Regulations also made provision for fixed penalty notices ("FPNs"), offering the person to whom the FPN was issued the opportunity of discharging, by paying the FPN, any liability to conviction for the offence in respect of which the FPN had been issued. For the hearing before me, Mr Oakley provided November 2020 Regulations (SI 2020 No. 1200) which came into force on 5 November 2020; and December 2020 Regulations (SI 2020 No. 1374) which came into force on 2 December 2020. After the hearing, he provided further Regulations (SI 2020 No. 1611). The Judge described the sequence of relevant Regulations in the following way (taken from Judgment §§31, 32, 35), with which description no issue was taken on this appeal:

> ***On 30 October 2020, Stockton-on-Tees Borough Council came within the Tier 2 area for the purposes of the coronavirus regulations. Under these regulations, meetings of 2 or more persons were prohibited indoors. However, para 4(10) allowed an exception for a wedding reception whereby a reception could be held provided it did not consist of more than 15 people … On 5 November [2020], the 4th set of regulations came into force and required public houses to close. The sale of food or drink including alcohol was allowed under Regulation 17 provided it was off the premises… All areas of England were in Tier 4 from 6 January 2021. In effect, this continued the previous No 4 restrictions regarding closure of public houses with the exception that sale of food/drink for consumption off the premises was now no longer allowed…***

5. The steps taken by the Council and the Police included the following, again as described in the Judgment (§25):

> ***A warning letter was issued to Mr Henderson on 13 November 2020. When this was unsuccessful, a prohibition notice was issued on 23 November 2020. Following a longer period without any reports of incidents, an incident on 30 January 2021 resulted in a fixed penalty notice being issued on 9 February. This was preceded by a telephone call and further warning letter on 29 January 2021.***

6. In the Committee's determination there was a discussion of events of 22 June 2021, said to involve the Appellant's staff and customers not wearing face coverings. The Judge put those to one side. He concluded – given that the then Regulations provided for reasonable excuses and given that insufficient was known about the individuals and their characteristics – there was insufficient evidence to be able to determine that this conduct should be taken into account. I too leave that out of account.

7. The Judge set out the principles governing his function on appeal (on which there was and is no dispute), which he derived from R (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court [2011] EWCA Civ 31 (Judgment §21):

> ***[i] The appeal at the Magistrates Court is a hearing de novo. [ii] I may hear fresh evidence and take into account events and matters occurring between the decision and the appeal. [iii] I can consider matters of law and fact. [iv] That evidence may include hearsay evidence. [v] I must form my own decision about the merits of the case. In doing so I will consider the evidence before me. I will consider the statutory provisions of the Act and the applicable policies and guidance. [vi] The decision I must make is whether, because I disagree with it in light of the evidence before me, the decision of the Licencing Sub Committee is wrong (even if it was not wrong at the time). The case law is clear. It is not sufficient for me to simply disagree with part or all of the decision, I must be satisfied that it is wrong. [vii] The burden of proof to show that the decision is wrong lies with the appellant. The standard is on the balance of probabilities. [viii] I should not lightly set aside the decision of the Licensing sub-committee. [ix] I should pay careful attention to the reasons given by the licensing authority for arriving at their decision under appeal. The weight I should ultimately attach to those reasons is a matter of judgement in all the circumstances of the case.***

8. Witnesses who gave oral evidence before the Judge included Acting Sergeant Thorpe of Cleveland Police (who had made the Police's section 51 application to the Council for a review of the Premises Licence); James Jones (the Council's Trading Standards Officer); Leanne Maloney-Kelly (the Council's Licensing Team Leader); John Wynn (the Council's Licensing Officer); and Mr Henderson. There were witness statements from these and other witnesses. There was documentary evidence.

Findings

9. In the Stated Case (§10) the Judge records these "Findings of Fact" (the "Findings"). None of them are challenged on this appeal.

> ***[a] Complaints had been made to the Respondent regarding a lack of COVID control measures at the premises of the Appellant.***
>
> ***[b] On 30 October 2020, a wedding reception took place at The Porky Pint consisting of 30 guests. At the time, the relevant coronavirus regulations allowed wedding receptions but with a limit of 15 people.***
>
> ***[c] On 7 November 2020, the Porky Pint was open and operating as a takeaway and as a public house. Mr Wynn from the Respondent council entered the premises and was asked if he wanted a pint of alcohol. Others were sat in the public house with alcoholic drinks. The sale of on-premises food and drink was not allowed at the time.***
>
> ***[d] On 12 November 2020, the Porky Pint was open and serving alcohol. A TV screen was showing sport and 10-15 males were in the bar. At least 6 males were drinking alcohol. Hot food was being served. The staff were told to remain open. Mr Henderson, as owner, spoke to the police and told them he was not required to close the premises. He felt that the track and trace requirements along with social distancing was a breach of his human rights. A warning letter was issued to the Respondent.***
>
> ***[e] On 20 November 2020, the pub was again operating as a public house. 5 individuals were in the premises consuming alcohol and were removed from the premises by police officers. One was issued with a fixed penalty. Mr Henderson was obstructive to the officers and told them that he didn't believe in coronavirus. A prohibition notice was issued to the Respondent.***
>
> ***[f] On 28 January 2021, Mr Henderson advertised the re-opening of his premises on Twitter. He spoke to a licensing officer and said that he disbelieved official statistics, had views on the honesty of the Government and validity of the pandemic. He subsequently re-opened on 30 January where individuals were found inside drinking alcohol and was trading as a public house.***
>
> ***[g] On 12 February 2021, a licensing officer attended The Porky Pint to request CCTV. A member of staff said that only Mr Henderson could access the system. Mr Henderson refused to provide the CCTV and, despite numerous requests being made, did not subsequently produce the CCTV.***

Reasons

10. The Judge "found that the Appellant had failed to demonstrate that the decision of the licensing committee was wrong and dismissed the appeal" (Case Stated §15) based on this analysis (Case Stated §14):

> ***[a] I had to consider the four licensing objectives of which two were engaged in this appeal: prevention of crime and disorder and public safety. I was not trying the Appellant to the criminal standard for breaches of coronavirus regulations. Nevertheless, the behaviour of the Appellant and the evidence of opening (or re-opening) the premises during a period when this was not allowed was, in my view, relevant to the question as to whether the objective of preventing crime and disorder was engaged. Similarly, the behaviour of the Appellant in refusing to provide CCTV was also relevant to this objective.***
>
> ***[b] I accepted that the guidance issued by the Home Office under s.182 Licensing Act 2003 indicates that the objective of public safety is aimed at "the safety of people using the relevant premises rather than public health". In my judgment, the opening of premises which should have been closed at the time and the lack of COVID measures was direct evidence relevant to the safety of those using the premises. The transmission of a virus (requiring specific regulations) involved the consideration of public safety for licensing purposes.***

> ***[c] The issue as to whether CCTV should have been provided on the basis of the license was primarily a matter of fact when considering the wording. I did not find that the Regulation of Investigatory Powers Act 2000 assisted. Whilst section 81(1) outlines the meaning of "serious crime", that is a definition for the purposes of the Act rather than a definition of wider interpretation. In any event, my finding was that there was not a need for serious crime to be established in order for the authorities to request CCTV. I was not referred to specific parts of or guidance on the Data Protection Act. The CCTV was requested in order to investigate potential breaches of coronavirus regulations, i.e. a criminal investigation. I found that the licence condition would be unworkable to imply a requirement of consent by the licence holder before requiring CCTV to be handed over.***
>
> ***[d] The Appellant's Article 6 rights were not interfered with by the Respondent's refusal or the police's refusal to instigate proceedings following the non-payment of the fixed penalty notice. The case of R v Crown Court at Maidstone ex parte Olson allowed me to consider evidence which did not amount to a criminal conviction in any event. I was not considering matters to a criminal standard so Article 6(2) and (3) rights did not arise. I ensured that the Appellant's Article 6(1) rights were preserved by holding a fair and public hearing.***
>
> ***[e] In so far as Article 1 Protocol 1 rights arose, I accepted the submission from the Appellant that a company can attract these rights following Tre Traktorer Aktiebolag v Sweden ECHR but that the revocation of the licence was specifically allowed during a review of a licence (s.52(2) Licensing Act) and, provided I was satisfied that it was in the public interest to do so, any revocation of the licence would comply with these Article rights.***
>
> ***[f] Further arguments regarding the legality of the coronavirus regulations due to them being disproportionate, outside of the powers of the enabling Act of Parliament, outside of the state of mind of the Secretary of State or not justified by the evidence (in particular of the Scientific Advisory Group for Emergencies) were matters to be argued in a judicial review of the legislation at the High Court. I was considering the decision of the licensing authority rather than a procedural review and followed the principles laid out in R (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court.***

Questions

11. The three Questions of law stated for the Opinion of the High Court (1980 Act s.111(1)) were identified by the Judge as follows (Stated Case §16):

> ***[a] Was I right to consider matters of public health when considering the four licensing objectives at section 4(2) Licensing Act 2003? [b] Was I right to take into account behaviour which did not result in a criminal prosecution for the purposes of determining an appeal against revocation of a premises licence? [c] Was I right to conclude that the Appellant had no lawful right to withhold CCTV footage on request by the Respondent?***

Question [a]: "Public Health"

12. This is the Judge's Question [a]. It arose out the Judge's Reason [a] (that the licensing objective of public safety was engaged) and Reason [b] (see §10 above). The Judge had earlier summarised the arguments he had heard as follows (Stated Case §§11-12). The argument on behalf of the Appellant:

> ***The issue of 'public health' cannot be considered as part of the licensing objectives contained in section 4(2) Licensing Act 2003, specifically the objective of 'public safety'. Reliance was placed on paragraph 2.7 of the Revised Guidance issued under s.182 by the Home Office which states "Licence holders have a responsibility to ensure the safety of those using their premises, as a part of their duties under the 2003 Act. This concerns the safety of people using the relevant premises rather than public health which is addressed in other legislation."***

The argument on behalf of the Respondent:

The Guidance which had been issued by the Home Office predated the beginning of the Coronavirus pandemic. The effect of the pandemic was something which could properly be taken into account. In any event, the guidance is not binding on the committee's decision or on the court and they could depart from the guidance if appropriate.

13. Mr Oakley submitted in essence, as I saw it, as follows:

i) The Judge's Question [a] of law is a question of statutory interpretation of section 4(2). It is not a question of the Guidance, departure from the Guidance, or reasons for such a departure. There is no power or function – whether on the part of the Committee, the Judge or this Court – to depart from the legally correct interpretation of the licensing objectives for which Parliament has made provision in the primary legislation. The Court's function of statutory interpretation is, moreover, confined to ascertaining the meaning of the legislation from the words used, by reference to the intention, and effect must be given by the Court to the plain meaning even if considered inexpedient or even unjust or immoral: Duport Steels Ltd v Sirs [1980] 1 WLR 142 at 157B-E (Lord Diplock). The Court's task is to ascertain and give effect to the true meaning of what Parliament has said in the enactment, giving effect to Parliament's purpose within the permissible bounds of interpretation, and considering whether any new state of affairs or fresh set of fact falls within the Parliamentary intention, but the Court cannot fill gaps: R (Quintavalle) v Secretary of State for Health [2003] UKHL 13 [2005] 2 AC 561 at §§8, 10 (Lord Bingham).

ii) As a matter of the legally correct interpretation of the primary legislation, "public safety" is distinct from "public health" and does not encompass communicable diseases. It would have been open to Parliament to include, as a licensing objective, "public health". It did not do so. If that was or is a gap, it was or is for Parliament to fill.

iii) The choice must be taken to have been deliberate. The choice not to amend the licensing objectives subsequently to include "public health" must also be taken to be deliberate. In fact, there are admissible aids to interpretation which underscore the latter point. In the equivalent Scottish legislation – the Licensing (Scotland) Act 2005 – the Scottish Parliament included a fifth licensing objective (see section 4(1)(d)), namely: "protecting and improving public health". It is distinct from "securing public safety" (section 4(1)(b)). This illustrates precisely the licensing objective is conspicuously absent from section 4 of the 2003 Act. Whether to amend the 2003 Act to add such an objective was, moreover, the subject of specific consideration in the post-legislative scrutiny conducted by the House of Lords Select Committee on the Licensing Act 2003 in its Report of 4 April 2017 (HL Paper 146), to which the Government issued a Response in November 2017 (Cm 9471). The Select Committee's recommendation number 22 was this (Report §261): "whereas promotion of health and well-being is a necessary and desirable objective for alcohol strategy, it is not appropriate as a licensing objective". The UK Government agreed (Response p.20) and the 2003 Act was left unamended.

iv) It is correct that "public safety" is not limited to "physical safety": it could include mental health. It is also correct that it is not limited to safety on the

licensed premises: it could include the vicinity. The scope of the licensing objective is therefore broader than the focus emphasised in the Guidance at §2.7 (§13(vi) below), referenced in the Judge's summary of the argument and his Reason [b]. But what "public safety" does not, and cannot, include is "public health".

v) There is a further and independent point. Also as a matter of the legally correct interpretation of the primary legislation, "public safety" – including any overlap between it and "public health" – is necessarily restricted to "safety" which is alcohol-related. That is the focus of section 4(2). Indeed, even if there were a further licensing objective concerning "public health, it too would be restricted to alcohol-related matters. That is because the 2003 Act and the licensing objectives are concerned with licences authorising the sale of alcohol, which would otherwise the criminal offence by virtue of section 136 of the 2003 Act (Lalli para 19). Matters which are not alcohol-related are the subject of other statutory and regulatory regimes.

vi) This legally correct analysis is found correctly understood in the statutory Guidance issued under section 182 of the 2003 Act. In particular, paragraph 2.7 of the Guidance reflects both that "public safety" does not include "public health" (the first and third parts underlined below) and that the licensing objectives are concerned with alcohol-related matters (the second part underlined below):

> ***Licence holders have a responsibility to ensure the safety of those using their premises, as a part of their duties under the 2003 Act. This concerns the safety of people using the relevant premises rather than public health which is addressed in other legislation. Physical safety includes the prevention of accidents and injuries and other immediate harms that can result from alcohol consumption such as unconsciousness or alcohol poisoning. Conditions relating to public safety may also promote the crime and disorder objective … There will of course be occasions when a public safety condition could incidentally benefit a person's health more generally, but it should not be the purpose of the condition as this would be outside the licensing authority's powers (be ultra vires) under the 2003 Act. Conditions should not be imposed on a premises licence or club premises certificate which relate to cleanliness or hygiene.***

vii) Paragraphs 9.21 to 9.23 of the Guidance further reflect the correct understanding that the licensing objectives are alcohol-related, in identifying the sort of representations which could be made by health bodies acting as responsible authorities:

> ***9.21 Health bodies may hold information which other responsible authorities do not, but which would assist a licensing authority in exercising its functions. This information may be used by the health body to make representations in its own right or to support representations by other responsible authorities, such as the police. Such representations can potentially be made on the grounds of all four licensing objectives. Perhaps the most obvious example is where drunkenness leads to accidents and injuries from violence, resulting in attendances at emergency departments and the use of ambulance services. Some of these incidents will be reported to the police, but many will not. Such information will often be relevant to the public safety and crime and disorder objectives. 9.22 However, health bodies are encouraged to make representations in respect of any of the four licensing objectives without necessarily seeking views from other responsible authorities where they have appropriate evidence to do so. There is also potential for health bodies to participate***

> ***in the licensing process in relation to the protection of children from harm. This objective not only concerns the physical safety of children, but also their moral and psychological well being. 9.23 Evidence relating to under 18s alcohol-related emergency department attendance, hospital admissions and underage sales of alcohol, could potentially have implications for both the protection of children from harm and the crime and disorder objectives.***

viii) The Select Committee Report of April 2017 reflects the same correct understanding; for example in this passage (from the Summary at p.4):

> ***Alcohol, in moderation, can enhance community cohesion. In excess, it is harmful to the health of the consumer and can damage the community. The state has a duty to ensure that alcohol is sold only at appropriate premises, by those who are alive to their responsibilities to customers and the community alike. For five hundred years the licensing of persons and premises was the task of justices of the peace. Those who devised the new policy in 2000 thought, rightly, that this was not a task for the judiciary but for local administration. If they had looked to see how local authorities regulate the responsible use of land in other situations, they would have seen that the planning system, already well established and usually working efficiently, was well placed to take on this additional task.***

ix) The Government Response of November 2017 reflects the same restrictions, for example in these passages (at p.6 §10, p.9 §10, and p.27 responding to Recommendation 22):

> ***As part of Government's continuing commitment to fight crime, stand up for victims, and introduce more effective crime prevention measures, the Government published the Modern Crime Prevention Strategy in March 2016. The strategy targets the key drivers of crime, and sets out an updated approach to crime prevention. Alcohol is one of the six drivers of crime. The focus lies on preventing alcohol-related crime to make the night-time economy safe and enable people to enjoy a night out without the fear of becoming a victim of crime…***
>
> ***The Act cannot, however, be the means by which all alcohol-related harms are tackled, something which the House of Lords Select Committee itself recognises through its recommendation that a health and well-being licensing objective is not added to the current list of licensing objectives. For these types of harms, a more sophisticated, joined up approach from a range of public services is required. The Government will work with partners to identify the most effective means of responding to those alcohol-related harms that cannot be addressed through further change and amendment to the Act.***
>
> ***The Government is committed to working with public health organisations and professionals, in particular Public Health England, to support local areas to tackle the public health harms associated with excessive alcohol consumption. Public health teams have an important role to play in the licensing system, and that is why they have a statutory role as a responsible authority under the 2003 Act. We believe there is much that can be done within the existing licensing framework. The Government's interest in this area has helped spark a range of work to provide better access to health data and improve public health's engagement, as a responsible authority, with licensing. This has brought many benefits, including better decision making, improved partnership working, better informed commissioning of services, service delivery and design. We are determined to continue to support an increased focus on public health engagement with licensing. We are working with public health stakeholders to ensure that the promising work underway in this area continues and that new evidence is considered to support future policy decisions. This includes promoting the use of Public Health England's analytical support package to improve access to and use of health data and supporting the Information Sharing to Tackle Violence programme to encourage A&E departments to share***

> ***their data with Community Safety Partnerships. The new Local Alcohol Action Area programme is a key driver of much of our work in this area through the promotion and sharing of best practice and support with overcoming barriers to data use.***

x) The restrictions relevant to this case, contained in the various Regulations, do not and cannot fall within the scope of the "public safety" licensing objective. The Regulations were made by the Health Secretary. They are "health protection" Regulations. They were made pursuant to (and – see Dolan – intra vires of) the 1984 Act, an enactment obviously concerned with "Public Health".

xi) Moreover, and in any event, the restrictions relevant to this case are not concerned with alcohol-related harms. Accordingly, for that further and independent reason, they do not and cannot fall within the scope of the licensing objective on "public safety". Nor for that matter can they fall within the scope of the crime prevention objective. For this reason, even if there were some relevant overlap between public safety and public health, it still would not bring these restrictions in these Regulations within the reach of the section 4(2)(b) public safety licensing objective.

14. On this part of the case, Mr Oakley advanced a further line of argument which in essence – as I saw it – was as follows:

i) He argued that, if there had been a legally recognised emergency under the Civil Contingencies Act 2004 (the "2004 Act") Part 2 (emergency powers), based on an event or situation which threatens serious damage to human welfare in the United Kingdom (2004 Act section 19(1)(a)), and emergency regulations (2004 Act section 20), then potentially restrictions of this kind contained in those regulations could fall within the "public safety" licensing objective. The same is true if these restrictions had been in regulations under the Coronavirus Act 2020. In those scenarios, there would have been an enhanced Parliamentary scrutiny and greater safeguards. But Covid-19 was not a legally recognised emergency, nor did the observations of the Court of Appeal in Dolan at §72 (that "the meaning of 'emergency' in section 19(1)(a) [of the 2004 Act] would apply to the present circumstances") mean that it was a legally recognised emergency, or at least not after the period in the early lockdown part of 2020 with which the Court of Appeal in Dolan was concerned.

ii) He argued that the Covid-19 pandemic, in reality, was not a great and particular threat. It is questionable whether it was a pandemic at all. The relevant minutes of the Government's SAGE (Scientific Advisory Group for Emergencies) committee, at the relevant time, did not record an evidenced specific threat from Covid-19 in relation to "licensed premises", nor indeed in relation to any other "premises". The November 2020 Regulations allowed a long list of businesses to remain open (including supermarkets and banks). There was no evidence as to why licensed premises constituted a specific threat, while supermarkets and banks and so on did not. It is true that assertions were made that "case-control studies indicate that restaurants and bars are associated with increased transmission risk" (SAGE Committee 8 October 2020 §20) referencing the Scientific Pandemic Influenza Group on Modelling (SPI-M-O) assertion that "there is clear evidence from a well-designed case-control study from the USA that shows restaurants and bars are particularly risky environments" (SPI-M-O

Consensus Statement on Covid-19 7 October 2020 at §6). But those were unsupported by evidence and based on a speculative study.

iii) He argued that the absence of a legally recognised emergency, and the absence of an evidenced specific threat relating to licensed or indeed other premises, is vindicated by updating information available to the Judge and to this Court, including as to numbers of deaths said to have been "associated with" Covid-19. From 19 March 2020 onwards Covid 19 was no longer considered to be a high consequence infectious disease (HCID) in the UK and was therefore no longer classified as meeting the criteria for an HCID, as was recorded by the UK Health Security Agency.

iv) He argued that the Judge overstated the nature of Covid 19 in the Judgment §58 when he spoke of Covid-19 as a virus in respect of which there was "no known cure or effective treatment in 2020" and when he spoke about the prevention of "immediate harms" as including transmission of the virus.

v) He argued that the repeated preamble to the relevant Regulations – recording that they were made "in response to the serious and imminent threat to public health which is posed by the incidence and spread of [Covid-19]" – was an unjustified and legally irrelevant description.

15. Those, then, were the arguments advanced on this first Question on behalf of the Appellant. In the light of them, submitted Mr Oakley, the Judge went wrong in law in his approach and reasoning. The legally correct approach – as a matter of legally correct statutory interpretation – was that the "public safety" licensing objective was not engaged. The Judge was wrong in law (Reason [a]) when he said the opening of premises which should have been closed and lack of Covid measures was evidence relevant to the "safety" of those using the premises; and when he said the transmission of a virus requiring specific regulations involved the consideration of public safety for licensing purposes.

16. In my judgment, the correct analysis is as follows. First, the legally correct interpretation of section 4(2) is a question of law for the Court, to be derived from the words used by Parliament and the discernible statutory purpose, and that the Court has no role in seeking to expand the statutory reach beyond that position. The licensing objective is "public safety", and not "public health".

17. Secondly, on their legally correct interpretation, the licensing objectives are not restricted to "alcohol-related" matters: alcohol-related public safety; the prevention of alcohol-related crime and disorder; the prevention of alcohol-related public nuisance; the protection of children from alcohol-related harm. Parliament did not include such a restriction and it would have been very easy to do so. Certainly, alcohol-related matters can be expected to be the principal focus of these licensing objectives, in this statutory scheme concerned with licensed premises. It is thus a proper function of the Guidance, to which regard has to be had, to commend such a focus. To test whether the licensing objectives are, in principle, restricted to alcohol-related matters it is helpful to take the crime prevention objective. Lalli was about an alleged serious assault by a publican in ejecting a customer. East Lindsey District Council v Hanif [2016] EWHC 1265 (Admin) was about licensed premises employing an individual whose immigration status precluded their working. In each, the crime prevention objective was engaged.

The Guidance understands the broader reach of the crime prevention objective correctly when (at §11.27) refers to criminal activity that may arise in connection with licensed premises in which needs to be treated particularly seriously for the purposes of that licensing objective. These include the sale and distribution of drugs, the laundering of the proceeds of drugs crime, the sale and distribution of illegal firearms, the evasion of copyrights in respect of pirated or unlicensed films and music; the employment of persons disqualified from work by reason of immigration status; unlawful gambling; the sale or storage of smuggled tobacco; and so on. A group of teetotallers dealing drugs from a licensed bar would plainly engage the crime prevention objective and it could be no defence on the part of the licensee that this was a matter capable of being addressed only under other statutory schemes.

18. Thirdly, the licensing objectives are plainly capable of overlapping. For example, as correctly identified in §2.7 of the Guidance, conditions relating to public safety may also promote the crime prevention objective. Even if "public health" were a fifth licensing objective, there would be the same susceptibility to overlap between public safety and public health as can be seen between public safety and the prevention of crime and disorder. The licensing objectives – including "public health" had it been included – would in those circumstances operate in the way of a Venn diagram: with overlapping circles of scope and reach. The fact that "public health" is not a licensing objective means its circle is absent. But the overlap it has – and would have – with "public safety" remains within the scope of the "public safety" objective. Put another way, the fact that "public health" is not present as a licensing objective does not 'strip out' anything which could be said to be "public health" from what properly falls within "public safety". The reach of "public safety" does not stop at something which could also be said to be "public safety". That would deny the room for any overlap.

19. Fourthly, there are necessarily questions of evaluative judgment and appreciation, in characterising a borderline scenario as against the licensing objectives. They do not require a judicial gloss or definition. The words have an ordinary and natural meaning. These are the realms of "application"; not "interpretation". It is not a hard edged question of interpretation of the statute where there a particular set of circumstances or concern is assessed as engaging the "public safety" licensing objective. The Claimant's further line of argument acknowledges that regulations, if made under other parent statutes, with Parliamentary scrutiny, would then fall within "public safety". Nothing in the wording or purpose of the statute can support a hard-edged and blanket exclusion of all aspects regarding communicable diseases. A similar point was made by John Howell QC in Lalli at §48 when he spoke of the need for a relevant connection or link between licensed premises and serious crime or serious disorder, for the purposes of the accelerated review under section 53A of the 2003 Act, saying this: "Parliament has decided not to define or to limit the nature of the association with serious crime or serious disorder which the licensed premises must have." Not all questions are hard-edged questions of law. Many call for an exercise of evaluative judgment.

20. Fifthly, I can find no error of law in the reasoning of the Judge relating to "public health". Giving the words "public health" their ordinary and natural meaning, and in light of the circumstances of the pandemic at the relevant times, there was nothing incorrect – still less unreasonable or unjustified – in the Judge concluding, as the Committee had before him, that this licensing objective was engaged and relevant. I agree with Mr Kemp: there is no error of law. But nor, having rejected the argument

about the licensing objectives being restricted to alcohol-related matters, would this be a material error of law – in my judgment – to stand as a freestanding vitiating flaw, given the Judge's strong emphasis on the crime prevention objective.

21. I add the following points, given in particular Mr Oakley's further line of argument. The Court of Appeal in Dolan, a judgment given on 1 December 2020 of Lord Burnett CJ, King and Singh LJ: (at §4) described the 30 January 2020 announcement of the Director General of the World Health Organisation ("WHO") which "declared a public health emergency of international concern over the global outbreak of Covid-19"; (at §16) recorded the preamble to the Covid-19 Regulations describing their being made in response to "the serious and imminent threat to public health which is posed by the incidence and spread of [Covid-19]"; (at §72) said that the "meaning of an emergency in section 19(1)(a) [of the 2004 Act] would apply to the present circumstances: 'an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region…'"; (at §77) said that the fact that the 2000 Act involved different procedure and different Parliamentary scrutiny did not detract from the fundamental point that the Health Secretary was able to act instead by making Regulations under the 1984 Act; and (at §89) that this was "an area in which the Secretary of State had to make difficult judgments about medical and scientific issues and did so after taking advice from relevant experts". The announcement of the UK Health Security Agency that, as of 19 March 2020, Covid-19 was no longer considered to be a HCID in the UK was alongside the recognition by that same Agency that the WHO continued to consider Covid-19 a "Public Health Emergency of International Concern". The SAGE committee – itself the "Scientific Advisory Group for Emergencies" – at its meeting on 21 September 2020 (§2) was advising that a package of interventions would need to be adopted to reverse the exponential rise in Covid-19 cases and the shortlist of interventions for consideration included "closure of all bars, restaurants, cafes, indoor gyms, and personal services (e.g. hairdressers)", and was advising (§19) that the earlier additional measures were introduced the more effective they would be; and (§20) that "case-control studies indicated that restaurants and bars were associated with increased transmission risks". The SAGE Committee did not think those studies unreliable or speculative. The SPI-M-O – remembering that this was the Scientific Pandemic Influenza Group on Modelling – in a "Consensus" Statement of 7 October 2020 recorded (§5) that: "There is complete consensus in SPI-M-O that the current outlook for the epidemic's trajectory is concerning, if there are no decisive interventions or behavioural changes in the near future"; and (6) that there was "clear evidence from a well-designed case-control study from the USA that shows restaurants and bars are particularly risky environments".

22. It is, in my judgment, illuminating to reach down to consider the reasoning of the front-line Committee who noted that reference had been made to the fact that "public health is not a licensing objective in its own right". The Committee accepted this but was nevertheless "satisfied that in particular the licensing objectives of crime and disorder and public safety were engaged and relevant to the evidence presented". In a passage, which reflects the overall public interest purposes of the 2003 Act and licensing objectives in the context of the licensed premises, and which illustrates the legal permissibility of evaluating the circumstances of this case as engaging the "public health" licensing objective, the Committee's described:

> ***Mr Henderson's deliberate and wilful actions in failing to comply with the Coronavirus Regulations. This was aggravated by the fact that he had done so during a state of national***

> ***emergency in the Covid pandemic when in excess of 120,000 people had lost their lives. It would not be possible to show that Mr Henderson's actions in operating his premise had led to a spike in coronavirus cases in the Borough. However restrictions were implemented by the Government in order to protect the population of the country and to ensure the NHS would not be overwhelmed. It appeared that Mr Henderson gave no thought to that and engaged in a social media inspired movement The Great Reopening in an attempt to undermine the efforts been made to control the virus. Mr Henderson posted on Twitter encouraging the Great Reopening, stating he was opening his premise and that he hoped hundreds or thousands would become involved. Mr Henderson gave no thought to whether his customers or staff would spread the virus to more vulnerable members of society. Mr Henderson gave no thought to whether his actions would lead to serious illness or death. Mr Henderson gave no thought to whether his actions would lead to key workers becoming sick or having to isolate and the subsequent impact that would have. The Committee noted the submissions made on behalf of Mr Henderson that he has the right to take a stand of conscience and to protest. Mr Kolvin QC had likened Mr Henderson's stance to that of the suffragettes. The Committee noted that the cause pursued by the suffragettes did not have the potential to lead to the hospitalisation or death of members of the local community or further afield…***

Question [b]: Unprosecuted Behaviour

23. This is the Judge's Question [b]. It arose out the Judge's Reasons [a] and [d]-[f] (see §10 above). It links to the Judge's Findings [b]-[f] (§9 above). The Judge had earlier summarised the arguments he had heard as follows (Stated Case §§11-12). On behalf of the Appellant:

> ***The Respondent had failed to consider the rights of the Appellant under the Human Rights Act 1998, in particular Article 6 and the European Convention on Human Rights, in particular Article 1 Protocol 1. The Respondent and the Court are required to consider Convention rights due to section 6 Human Rights Act 1998. The Coronavirus Regulations (in their various stages) were unlawfully invoked and do not comply with Convention rights or with the parent Act of Parliament: Public Health (Control of Disease) Act 1984. It was also submitted that the regulations are disproportionate and ultra vires.***

On behalf of the Respondent:

> ***The behaviour of the Appellant when acting in apparent breach of regulations was something which should be taken into account by the court. It was accepted by the Appellant at the committee hearing that he had broken the law and had done so deliberately… Any issue as to the lawfulness of the coronavirus regulations is not an issue that the magistrates' court should consider in these circumstances. Reference was made to the case of Little France Ltd v LB of Ealing [2013] EWHC 2144 (Admin) which stated that an appeal...against the decision of the licensing authority is not a procedural review. It is an appeal on the merits against the licensing authority's decision.***

24. As I saw it, Mr Oakley's arguments for the Appellant proceeds in the following three stages, supported by the following key points. Stage 1 is the proposition that – approaching the case on a legally correct analysis – the Judge was obliged to address this question: whether, in respect of breaches of the Regulations (including non-compliance with the Prohibition Notice), the Appellant and Mr Henderson – if prosecuted – would have had a defence. Thus, it was an error of law for the Judge not to address this question. As the Judge's Reason [8] makes clear, this was a case in central focus was behaviour of the Appellant and the opening or reopening of premises during a period "when this was not allowed", that being the central aspect relevant to the crime prevention objective. That same central focus can be seen from the Judge's Findings [b] (that a wedding reception at the pub consisted of 30 guests at a time when

the Regulations imposed a limit of 15), Findings [c]-[e] (about operating as a pub when on-premises sales were not allowed) and Finding [f] (about reopening the pub). The implications of all of this conduct, viewed in terms of the crime prevention objective, necessarily involves considering this question: was there actually any offence? This is a case in which, at the stage of the appeal before the Judge, the Appellant was saying it had a defence. As Jay J explained in Hanif at §18, the application of the crime prevention objective is in part retrospective, inasmuch as antecedent fact will usually impact on the statutory question. As he said at §19:

> ***To the extent that the analysis must be retrospective, the issue is whether, in the opinion of the relevant court seized of the appeal, offences have been committed.***

That observation encapsulates the question which the Judge needed to ask. There is a further and independent reason why he needed to do so. This is a case in which it has been said that criminal offences have been committed, but the question of whether they were or were not committed has never been the subject of a determination by an independent and impartial tribunal. There was never any prosecution, because – as the Judge accepted (Judgment §24) – the issues were the subject of the Police application for review of the licence. The Appellant and Mr Henderson have never had their day in court. They have never been able to contest the question of whether a crime was committed, either by non-compliance with restrictions in the Regulations or by non-compliance with the Prohibition Notice. Article 6 ECHR, as Scheduled to the Human Rights Act 1998 ("the HRA"), guarantees through section 6 that the determination of a civil right or obligation requires an independent and impartial tribunal. The Judge could have secured that guarantee, and needed to do so, but only by addressing the question of whether or not the asserted defence was a good one. This Court can, and should, secure that right by determining that question.

25. Stage 2 is the proposition that, on a legally correct analysis, it would have been a defence in any criminal proceedings to show that the restrictions in the Regulations – which would have been relied on in any prosecution for their breach (including non-compliance with the Prohibition Notice based on them) – constituted a violation of the Appellant's Article 1 Protocol 1 (A1P1) ECHR property rights, as also Scheduled to the HRA and protected through section 6. Thus it was an error of law for the Judge (Reason [e]) to treat A1P1 as answered by whether revocation was in the public interest; and an error of law (Reason [f]) to treat the A1P1-compatibility of the restrictions in the Regulations as matters for "judicial review of the legislation in the High Court". These key points made in support of stage 2. In a criminal prosecution based on alleged breaches of rules, regulations or byelaws a defendant is in principle entitled to raise as a defence the lawfulness – by reference to some relevant and applicable superior legislative enactment – of those rules, regulations or byelaws said to have been breached. Thus, the question of whether there is a crime does not turn on the narrow issue of whether the individual 'went by the book', in terms of compliance with the rules, regulations or byelaws. Rather, it turns on the broader and fundamental question of whether those rules, regulations or byelaws said to have been contravened had been lawfully made, when viewed against the terms of the superior legislative instrument. This principle was recognised in the Dolan case at §41, where the Court of Appeal explained why it would address the vires issue of whether the Covid-19 Regulations in early 2020 were unlawful when viewed against the superior empowering statute (the 1984 Act). As the Court of Appeal there explained, in Boddington v British Transport Police [1999] 2 AC 143, the House of Lords held that a public law argument about the

vires of an instrument in which a criminal offence is created can be raised by way of defence in criminal proceedings. The Boddington logic is not however restricted to issues of incompatibility with the superior 'empowering' primary legislation. It would equally apply if the rules, regulations or byelaws were unlawful as being in conflict with some 'freestanding' but superior primary legislative source. Indeed, in Dolan itself one of the arguments arose out of what were said to be the legal consequences of the 2004 Act, which was not the empowering Act but a 'freestanding' Act (see §§72-77). As it happens, the Court of Appeal in Dolan did not treat the HRA-compatibility arguments as apt for adjudication, by reference to the same Boddington principle. But that was not because the Boddington principle would not apply to an HRA-incompatibility. Rather, it was because the 1984 Act (vires) issue was a clean-cut legal issue which would apply, as a matter of generality, to any case involving any person affected by Covid-19 Regulations. HRA arguments were necessarily different, because they would depend on analysing the particular restriction on the particular right interfered with, by reference to the impacts and justification. The 'vires' argument in relation to the 1984 Act, on the other hand, was a discrete point of statutory construction (see Dolan §40). Finally, there is this point. The Judge (Judgment §54) relied on the fact that a declaration of incompatibility of secondary legislation pursuant to section 4 of the HRA was not something for him to consider. But subordinate legislation will be unlawful pursuant to section 6 of the HRA if it violates a Convention right. No question of a declaration of incompatibility arises in the case of secondary legislation, unless the violation is the inevitable and necessary consequence of the terms of primary legislation: see R (Bono) v Harlow District Council [2002] EWHC 43 (Admin) at §34.

26. Stage 3 is the proposition that, on a legally correct analysis, the restrictions in the Regulations – which would have been relied on in any prosecution for their breach (including non-compliance with the Prohibition Notice based on them) – did constitute a violation of the Appellant's AIPI rights, providing a Boddington defence so that the Appellant or Mr Henderson would have been bound, if prosecuted, to be acquitted. It was an error of law for the Judge not to address this question and identify this as the answer. In support of Stage 3, Mr Oakley's analysis is as follows. (1) The starting point, as the Judge rightly recognised (Reason [e]), involves acceptance that A1P1 rights (namely, possessions) arise in conjunction with the Appellant's licensed activities. The leading case, as the Judge recognised, is Tre Traktorer Aktiebolag v Sweden (1989) 13 EHRR 309 (mentioned in R (Mott) v Environment Agency [2016] EWCA Civ 564 [2016] 1 WLR 4338 at §50), where the Strasbourg Court said (at §53) that the economic interests connected with the running of the applicant's restaurant were possessions for the purposes of A1P1. That was in a context where maintenance of the alcohol premises licence was one of the principal conditions for the carrying out of the applicant company's business, so that withdrawal (ie. revocation) of the premises licence had adverse effects on the goodwill and value of the restaurant. (2) In this case, the relevant restrictions in the Regulations said to have been breached (and on which the Prohibition notice was based) constituted an interference with the Appellant's A1P1 rights, and the question arises as to whether it constituted a "deprivation" of property or a measure of "control of the use" of property (see Tre Traktorer at §55; Mott §85). The answer to that question is that there was plainly a deprivation of property. That is because the pub was being required to close for on-premises sales (from 5.11.20) and then (from 6.1.21) for all sales. Leaving aside a 'de minimis' closure, any such prohibition must, in law, constitute a deprivation of property, notwithstanding whether it is temporary. (3) Once it is recognised that the interference constituted a deprivation of property, the "general

doctrine" applies that A1P1 rights are to be treated as having been violated absent compensation. This doctrine is reflected in Mott at §85, discussing earlier authority, observing "that there was no general doctrine that measures amounting to control of property, as distinct from deprivation, generally required compensation". As to compensation, even if it is relevant to consider the "measures of financial support which the Government introduced in the exceptional situation created by the pandemic" (see Dolan at §110) what is crucial is that there was no support scheme which addressed the Claimant's substantial loss of "profits". In those circumstances, there was no compensation in relation to the deprivation of property, and therefore the Appellant's A1P1 rights were violated by the restrictions in the Regulations whose breach was relied on as constituting the commission of criminal offences. Accordingly, the Appellant and Mr Henderson would have been bound to be acquitted had there been any prosecution, on Boddington HRA grounds. The Judge was wrong in law not to recognise that and, had he done so, it would have been critical in removing the justification for the draconian response of licence revocation.

27. Mr Kemp for the Respondent contests this argument at every stage. His position, in essence as I saw it, involves two big points.

i) First, the Judge was not obliged to undertake an exercise in evaluating whether the Appellant or Mr Henderson would have had a defence had there been a prosecution. Article 6 did not impose any duty on the Judge to do so. His function in considering the crime prevention objective involved the "much broader approach to the issue than the mere identification of criminal convictions": see Hanif §18. Moreover, each case must turn on its own facts: see Hanif §20. Jay J in Hanif at §19 is not to be understood as having laid down any rigid obligation on a licensing appeal court to answer whether criminal offences have been committed. If he did so, he was plainly wrong, and this Court should diverge from that position. What is particularly important in the present case is this: Regulations had been imposed which were clear on their face; they imposed obligations, with criminal consequences; they constituted the 'law of the land', unless and until they were quashed or declared unlawful by a Court. As a matter of the crime prevention licensing objective, and the public interest considerations which it engages, it matters whether a licence holder (and its designated premises supervisor) went 'by the book' or chose to ignore the 'law of the land' because they disagreed with it. Conduct of that kind is enough, in and of itself, to engage the crime prevention objective. It is relevant, applying the broad approach which is necessary and appropriate, to consider whether a licence holder can be relied to act 'by the book', and apply the 'law of the land', or whether rather they will or may take it upon themselves to flout restrictions with which they disagree. The Judge was perfectly entitled, acting reasonably and within the latitude to be afforded by the judicial review Court, to choose not to embark on the exercise of considering the HRA Boddington defence, said to constitute a defence.

ii) Secondly, and leaving aside all of that, the Appellant is in any event wrong to characterise the restrictions in the various Regulations as constituting a "deprivation" of property and accordingly wrong to say that a general doctrine requiring "compensation" arises, still less to cover loss of profits. A Boddington collateral challenge based on the HRA would not have succeeded and the

Appellant and Mr Henderson would not, as they assert, have been bound to be acquitted, had there been prosecutions in relation to the various aspects of the conduct which materially featured in the Judge's findings of fact.

28. In dealing with these legal arguments, I can go straight to Mr Oakley's Stage 3 and Mr Kemp's second big point. Stages 1 and 2 go nowhere unless Stage 3 is viable. The Judge did not reach Stage 3 because he did not consider it necessary or appropriate to consider HRA arguments relating to the regulations (Reason [f]). I recognise that Mr Oakley submits that that was an error of approach. I also recognise that, if he were right, one possibility would involve remittal. Mr Oakley's position, when I asked him, was that this Court needed to 'roll up its sleeves' and deal with the Boddington/ HRA question of whether the Regulations constituted a violation of A1P1 rights. I am satisfied in any event that I should not remit this case to the Magistrates Court, if this Court can decide the Boddington/HRA question for itself and if the answer is so obvious that no useful purpose would be served: see Hanif para 23. That, in my judgment, is precisely the position in this case. In my judgment, it is very clear that the prohibited conduct did not constitute a deprivation of A1P1 possessions. That is true in relation to the Judge's Finding [b]: a wedding reception consisting of 30 guests at the pub at the time when the Regulations allowed wedding receptions but with a limit of 15 people. It is true of the prohibited conduct which is the subject of the judge's Findings at [c]-[e], at which point the Regulations being breached prohibited on-sales but permitted off-sales. It is also true of the conduct which is the subject of the Finding [f], at which point the Regulations prohibited all sales.

29. In the Tre Traktorer case itself the state measure in question involved the revocation of the alcohol licence, whose maintenance was one of the principal conditions for the carrying on of the claimant company's restaurant business and whose withdrawal had the adverse effect on goodwill and value of the restaurant (§53), meaning that the company could no longer operate the premises as a restaurant business (§55) which it had had to sell (§§23 and 55), a revocation which had caused the restaurant immediately to close, with serious financial repercussions, constituting a severe measure (§61). The revocation had taken place in July 1983 (§20), compensation had been refused in January 1984 (§22) and the restaurant had been sold in June 1984 (§23). Notwithstanding all this, the Strasbourg Court found that there was no deprivation of property in terms of A1P1. Although the applicant could no longer operate as a restaurant business, it kept some economic interests and property assets, which it finally sold; so that the state intervention constituted a measure of "control of the use" of property rather than a deprivation (§55).

30. In Mott (at §86) the Court of Appeal recognised, alongside the primary criterion for establishing a deprivation of property (the "extinction of all the legal rights of the owner"), the Strasbourg jurisprudence recognised "de facto expropriation", so that "there will be a deprivation if the owner of property is deprived of meaningful use of it, although not if the owner remains free to sell it". In that case, the Court accepted that the reality of the state intervention was "closer" to deprivation than to control. That was because the property interest was a lease, due to expire in April 2018, under which the holder of the interest could catch 600 salmon a year (Mott §1) and the public authority had, from 2012 onwards, restricted that catch so as to eliminate at least 95% of the benefit of that right to fish (§87). On no basis, in my judgment, can it convincingly be said that the restrictions in the Regulations had "extinguished all the legal rights" of the

Appellant as owner of the pub, or that those restrictions had deprived the Appellant of "all meaningful use" of its property.

31. The present case is a "control of the use" of property scenario, to which the claimed "general doctrine" requiring "compensation" did not therefore arise (Mott §85). It engages the principle of "fair balance" (Mott §87; Tre Traktorer §62). The challenge, moreover, is across the board (all licensed premises or all those within a relevant tier), and not a particular executive decision (cf. Mott §88). The statement of principle endorsed in Mott §87 would be directly in play: "provided the state could properly take the view that the benefit to the community outweighs the detriment to the individual, a fair balance will be struck, without any requirement to compensate the individual".

32. For these reasons, the HRA argument advanced in this case as a putative defence to criminal proceedings could not have availed the Appellant or Mr Henderson had there been a prosecution, whether relating to the tweeted 30 January 2021 reopening (Finding [F]), or the on-sale prohibition contravention (Findings [c] to [e]), still less the wedding reception on 30 October 2020 (Finding [b]). In my judgment, these conclusions are all very clear, based on the authorities which the Appellant relies (Tre Traktorer and Mott), and in light of the evidence and materials placed before the Court. The Appellant's Stage 3 is unsustainable in law.

33. That is quite sufficient to answer Question [b]. But there is an additional Stage 3 observation to be made. Mr Oakley submitted that the Court of Appeal in Dolan – a case which he produced only when prompted again by me at the hearing, after I had raised it by email two days before the hearing – did not conduct any human rights evaluation, in any respect relevant to the present case. He is right to say that the Court of Appeal expressed only obiter views on the HRA points; that they related to the Regulations imposed in the early part of 2020; and that the A1P1 argument was raised by the owner of an aeroplane-lease business (§11) the economic harm to his business was said in the High Court not even to have been the consequence of the Regulations (§26). But it is unconvincing for Mr Oakley simply to seek to sidestep the fact that the Court of Appeal recorded the High Court as having concluded that there was "no evidence that the Regulations had deprived" the aircraft lease operator "or anyone else of any possessions" (Dolan §26) and the Court of Appeal's own observation that it was "impossible to conceive" that there was through the Regulations in early 2020 any disproportionate interference with an A1P1 right, the margin of judgment to be afforded to the Health Secretary being particularly wide in this context, because "this was a 'control of use' case and not a deprivation of property case" and that the balance to be struck would have to take account of the well-known measures of financial support which the Government introduced in the exceptional situation created by the pandemic (Dolan §110). I say no more.

34. Where does that leave Stages 1 and 2? The appeal namely cannot succeed because, even if the Appellant were right on Stages 1 and 2, my conclusions in relation to Stage 3 are fatal. I will however record my views. As to Stage I, there is force in the first big point made by Mr Kemp, about the relevance to the broader crime prevention objective of the question of 'going by the book' and complying with what on the face of it is 'the law of the land'. But, in my judgment, it is at least highly relevant for the licensing appeal court to consider and reach a conclusion on whether a defence is a good one, a defence having been identified, unless the licensing appeal court is able to say that the outcome would not be materially impacted by a conclusion that no offence has been

committed. I can see that there could be cases where the attitude of the licensee to what is on the face of it required 'by the book' could be relevant and, of itself, sufficiently of concern. But if that is the position, I think it would need to be identified and spelled out. Test it this way. Suppose there is an offence subject to a reasonable excuse defence. Suppose the licensee believed, and contends, that there was a reasonable excuse. It would, in my judgment, be necessary in principle for the licensing appeal court to grapple with that defence and whether it was a good one. The fact that the defence arises as a vires argument from primary legislation, or as an incompatibility argument arising from freestanding primary legislation such as the HRA, does not make it any less of a defence if it engages the Boddington principle. The fact, moreover, the magistrates court has the function and expertise to deal in a criminal setting with a Boddington collateral challenge defence makes it difficult to see why a magistrates' court dealing with a licensing appeal would not be equipped to consider such an issue. For these reasons, I would have accepted Mr Oakley's analysis relation to stage 1. I say for these reasons, because I do not accept that Article 6 add anything. If it is legally relevant to the licensing appeal court's function to consider whether crimes had been committed, then – for that reason – that question needs to be addressed. If not, Article 6 cannot give the question of whether criminal offences have been committed a relevance or require an evaluative determination that does not otherwise arise. Put another way, Article 6 is a procedural right to an independent and impartial tribunal where a civil right or obligation is determined. It is not a right to have issues determined which would not otherwise need determining. As to Stage 2, I would also have accepted Mr Oakley's submissions. I see no reason why a Boddington defence would not arise if it could be shown that the restriction or prohibition in subordinate legislation, whose breach constitutes the crime, was unlawfully imposed because it violated an ECHR right guaranteed by the HRA, in circumstances where the contravention was not the inevitable and necessary consequence of primary legislation. Mr Kemp identified no basis for a contrary view. But none of this goes anywhere in light of the clear conclusions which I have arrived as to Stage 3.

35. There is one footnote to this part of the case. It is, I think, important to acknowledge that the Judge in his Reason [e] did correctly identify the central A1P1 issue which would arise in a licence revocation case. In Tre Traktorer itself, A1P1 rights were raised in the context of revocation proceedings regarding the premises licence. The analysis of A1P1 focused on the justification for the revocation. Viewed in terms of the justification for the revocation, the Judge's reference at Reason [e] to a public interest justification for revocation as satisfying A1P1 is unassailable. This links to a point made by John Howell QC in Lalli at §41iii, explaining that the provisions governing a review and its outcome are compatible with licensees A1P1 rights because they enable a fair balance to be preserved, subject to appropriate safeguards, between the public interest in the proper regulation of licensed premises and the licensee's interests. The reason why, in the present case, that straightforward and compelling answer, was not the whole of the A1P1 legal picture is this. In the particular circumstances of the present case, A1P1 was being raised in a different and much more indirect way. What was being said was that A1P1 rights would have constituted a complete defence in a criminal court, had there been any prosecution, which (if correct) gave the Appellant the platform to say that in law there was no breach of any restriction or prohibition, because the restrictions and prohibitions had been unlawfully imposed. That was a viable position at Stages 1 and 2, but it was a bad point at Stage 3 for the reasons which I have explained.

Question [c]: CCTV

36. This is the Judge's Question [c]. It arose out the Judge's Reasons [a] (that the behaviour in refusing to provide CCTV was relevant to the licensing objective of preventing crime and disorder) and [c] (§10 above). It relates to the Judge's Finding [g] (§9 above). As with the other Questions, the Judge had earlier summarised the arguments he had heard as follows (Stated Case §§11-12). On behalf of the Appellant:

> ***There was no requirement for the Appellant to provide CCTV to the Respondent or Cleveland Police as the licence only requires service of CCTV in cases of serious crime as defined by the Regulation of Investigatory Powers Act 2000. As a data controller, the Appellant could not provide the footage in any event due to lack of consent.***

On behalf of the Respondent:

> ***The licence should be read so as to require the Appellant to provide CCTV on request to the Respondent or Cleveland Police within 24 hours or, in cases of serious crime, at an earlier stage. The court can imply that attendees in a public area covered by CCTV are consenting to CCTV footage being recorded which may be shared with the relevant authorities. The Appellant bears a responsibility to explain that to his patrons.***

37. The Judge referred to Sections 81(2)-(3) of the Regulation of Investigatory Powers Act 2000 (the "2000 Act") which provide as follows:

> ***(2) In this Act– (a) references to crime are references to conduct which constitutes one or more criminal offences or is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom would constitute one or more criminal offences; and (b) references to serious crime are references to crime that satisfies the test in subsection (3)(a) or (b). (3) Those tests are– (a) that the offence or one of the offences that is or would be constituted by the conduct is an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more; (b) that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose.***

38. The Judge set out the relevant licence condition (Judgment §43). It is found in Annex 2, as one of a series of conditions under a heading "Prevention of Crime & Disorder". It begins by requiring a digital CCTV to be installed and maintained in good working order and be correctly time and date stamped" and goes on to provide for further conditions, including:

> ***There will be at all times a member of staff on duty who is trained in the use of the equipment and upon receipt of a request for footage from a governing body, such as Cleveland Police or any other Responsible Authority, be able to produce the footage within a reasonable time, e.g. 24hrs routine or less if urgently required for investigation of serious crime.***

39. A first point concerns the meaning of "serious crime". Mr Oakley submits that the Judge misdirected himself in law in this reasoning (Stated Case §16[c]: "I did not find that the Regulation of Investigatory Powers Act 2000 assisted. Whilst [section 81(2)] outlines the meaning of "serious crime", that is a definition for the purposes of the Act rather than a definition of wider interpretation". In the Judgment (at §45), the Judge said of section 81(2) that it "clearly defines 'serious crime' for this Act, i.e. RIPA. There is no attempt to state that 'serious crime' is defined in the interpretation section for every reference to serious crime. It is only as far as RIPA extends." But that is wrong in law. True, the definition of "serious crime" in section 81(3) of the 2000 Act is defined in

section 81(2) as for the purposes of "this Act". But the 2003 Act uses the phrase "serious crime", and when it does so – as it does for accelerated reviews (summary reviews) under s.53A as considered in Lalli – it provides (2003 Act s.53A(4)) that "'serious crime' has the same meaning as in the Regulation of Investigatory Powers Act 2000 (c. 23) (see section 81(2) and (3) of that Act)". There is therefore very good reason why, on its legally correct interpretation, a licence condition using that same phrase should be construed in that same way. Those who draft licence conditions under the 2003 Act can safely be taken to intend the same concept with the same meaning, absent any identifiable contrary intention. Were it otherwise, the licence condition would be using a description without any definition, and yet supposedly having some other absent and unidentified meaning. I accept these submissions. I think they are correct. In my judgment Mr Kemp had no convincing answer to them.

40. But that is only the beginning. The appeal cannot succeed absence a material error of law. On this part of the case the Judge made very clear that there was a second, and freestanding, basis for rejecting the Appellant's arguments. This was the Judge's "in any event" finding. The judge found (Reasons [c]) that there was not a need for serious crime to be established in order for the authorities to request the CCTV, having found as a fact that Mr Henderson had refused to provide the CCTV on an ongoing basis and despite numerous requests (Finding [g]). As the Judge explained in the Judgment (§46):

> ***my interpretation of this condition is that a request for CCTV must be met within 24 hours as routine. If serious crime is alleged, less than 24 hours is appropriate…***

In my judgment, that interpretation of the Licence Condition is clearly right. Mr Oakley says that "required for investigation of serious crime" governs the whole obligation of production, and not just the less than 24 hour urgency. That means he has to interpret the Condition as if it read as follows:

> ***… upon receipt of a request for footage from a governing body, such as Cleveland Police or any other Responsible Authority, be able to produce the footage – within a reasonable time, e.g. 24hrs routine, or less if urgently required – for investigation of serious crime.***

But that is not how the Licence Condition is drafted. There is no decoupling of "urgently required" and "for investigation of serious crime". On the contrary, these are part of the same phrase. The ordinary and natural meaning is that urgency is being linked to investigation of serious crime. That makes good sense. That fits with the fact that "serious crime" is used in an accelerated scenario – summary review (s.53A) – in the 2003 Act. This fits with the purpose, reflected in the licensing objective (s.4(2)(a): where the word is "crime"; not "serious crime"); the heading to this Licence Condition (prevention of "crime" and disorder; not "serious crime"); and avoids the gaping lacuna which would arise if the licensee could withhold CCTV by declining to consent in relation to an investigation regarding "crime" or "disorder" because it does not meet the definition of "serious crime".

41. There are two footnotes to the discussion of this Question. First, the Judge convincingly rejected reliance on so-called data protection justifications, which were not said on this appeal to raise any distinct issue. Secondly, Mr Oakley submitted that the Police investigation of potential breaches of the coronavirus regulations (the Judge's Reason [c]) was "nothing to do with" the Appellant (as licensee) or Mr Henderson (as its 2003 Act s.15 "Designated Premises Supervisor"), but that position is plainly unsustainable in light of both the relevant Licence Condition and licensing objective section 4(2)(a).

Conclusion

42. For the reasons I have given, the appeal is dismissed. I answer the Questions in the Stated Case (§11 above) as follows: [a] yes; [b] yes; and [c] yes. Having circulated this Judgment as a confidential draft, I can deal here with any consequential matters. I will Order that the Appellant shall within 21 days pay: (i) the Respondent's costs in this appeal summarily assessed at £4,650; and (ii) the Respondent's outstanding costs as ordered and summarily assessed by the Judge on 16 March 2022 in the sum of £6,275.00. Costs must follow the event and are entirely apt for summary assessment. 21 days is appropriate. Costs schedules had been exchanged for the hearing and there is no element of surprise. I am unpersuaded by the Appellant's solicitors' 2-line submission: that they did "not agree" the costs; and that costs should be subject to detailed assessment. I do, however, adopt a broad-brush reduction from the £5,820 in the Respondent's costs schedule; not because the costs are unreasonable but because I am not awarding costs on an indemnity basis.