Case No: CO/9786/2008

Neutral Citation Number: [2009] EWHC 1587 (Admin)
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
MAGISTRATES DIVISION
DISTRICT JUDGE PATTINSON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 April 2009

Before:

LORD JUSTICE RICHARDS
and
MR JUSTICE OWEN

Between:

HALL & WOODHOUSE LIMITED

Appellant

- and -

THE BOROUGH AND COUNTY OF THE TOWN OF POOLE

Respondent

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr P Kolvin QC (instructed by Horsey Lightly Flynn) appeared on behalf of the **Appellant.**

Professor R Light (instructed by the Respondent's Legal and Democratic Services) appeared on behalf of the **Respondent.**

Judgment

(As pproved by the Court)

1. LORD JUSTICE RICHARDS: This is an appeal by way of case stated from a decision of District Judge Pattinson sitting at the Bournemouth Magistrates Court by which he found the appellant, Hall & Woodhouse Limited, guilty of four offences under section 136(1)(a) of the Licensing Act 2003 (the Act). By section 136(1):

> "A person commits an offence if (a) he carries on or attempts to carry on a licensable activity on or from any premises otherwise than under and in accordance with an authorisation, or (b) he knowingly allows a licensable activity to be so carried on."

2. The appellant owns approximately 250 public houses in the south of England. It manages about one-third of them and lets the remaining two-thirds on tenancy agreements. The case relates to the Stepping Stones Public House in Broadstone, Poole, which is owned by the appellant but let by it to a Mr Stephen Cartlidge under a tenancy agreement dated 27 April 2006. Mr Cartlidge in turn employed a Mr Lance Ferguson to be manager and designated premises supervisor of the public house.

3. The premises are subject to a premises licence applied for by the appellant under the Act and granted on 30 September 2005. The application was made under the transitional provisions of the Act for the conversion of an existing 'on-licence and public entertainment licence relating to the premises into a new premises licence.

4. The premises licence so granted was subject to a number of conditions which included (1) a prohibition on entertainment taking place on the premises later than 23:00 hours; (2) a provision that the fire door was to remain closed; (3) a requirement that a lobby entrance/exit should not be removed; (4) a requirement that the fire exits to the beer garden should be unobstructed; (5) a requirement that steps should be taken to notify all persons leaving the premises of the need to minimise noise in the locality of the

premises and (6) a prohibition on consumption of alcohol in the beer garden after 23:00 hours.

5. The allegations were that on four occasions between 27 January and 22 April 2007 a licensable activity, namely the provision of regulated entertainment or the sale by retail of alcohol, had been carried on at the premises otherwise than under and in accordance with those conditions, in that entertainment took place later than 23:00 hours, or a fire door was held open, or the lobby entrance/exit had been removed, or the fire exit was partially blocked and members of staff were not advising people to leave quietly, or the beer garden was being used for the consumption of alcohol after 23:00 hours.

6. There was no dispute as to the facts or therefore that the licence conditions had been broken. The tenant, Mr Cartlidge, and the designated premises supervisor, Mr Ferguson, had pleaded guilty to offences under section 136(1) in respect of those breaches. The appellant, however, denied any liability. Its defence was that although it owned the freehold of the premises and held the premises licence, it had not itself carried on a licensable activity on the premises so as to come within section 136(1)(a), nor did it have knowledge of the breaches so as to come within section 136(1)(b). The prosecution accepted the point about lack of knowledge and did not pursue at trial a charge under section 136(1)(b). The case proceeded only in relation to section 136(1)(a).

7. The Deputy District Judge was satisfied beyond reasonable doubt that the appellant was carrying on a licensable activity from the premises for the following reasons:

> "(1) Section 16 of the Licensing Act specifies a restricted list of persons who may apply for a premises licence. The only basis on which the appellant could apply was as a person who carries on or proposes to carry on a business which involves use of a premises for licensable activities to which the application relates; (2) I am satisfied that use of the term "involves" denotes a broad range of business including that of a landlord receiving rent from premises being used for such purpose as in this case; (3) In making the application for the licence, the appellant must have considered itself to be carrying on a business which involves use of premises for licensable activities; (4) The grant of premises licences and enforcement of any conditions in them are fundamental to the licensing system and enforcement of it. To find otherwise would be to undermine the whole basis of the licensing regime and to negate the effect of the offences in section 136(1)."

8. He pointed out that section 136(1)(a) is an offence of strict liability but that a defence of due diligence is available under section 139(1)(a). The appellant called no evidence and had accordingly failed to satisfy him that it had exercised due diligence. Accordingly, he found the appellant guilty of all four offences. He imposed a fine of £250 for each offence and ordered the appellant to pay the prosecution costs.

9. He has posed two questions for the opinion of this court:

> "(1) for the purposes of section 136(1)(a) of the Licensing Act 2003, are the acts of third parties imputed to the premises licence holder as a matter of law? (2) was I right to find in the case that the appellant, as premises licence holder, was carrying on the licensable activities as charged?"

The Legislation

10. The Act regulates "licensable activities" which are defined by section 1 to mean broadly the sale of alcohol, the supply of alcohol in a members' club, the provision of regulated entertainment as defined in schedule 1 and the provision of late-night refreshment as defined in schedule 2. By section 2, a licensable activity may be carried on under and in accordance with a premises licence, a club premises certificate or a

temporary events notice. This case is concerned with a premises licence of the sort enjoyed by clubs, restaurants and so forth.

11. Section 16 sets out eight categories of persons who may apply for a premises licence. The relevant one is in section 16(1)(a), namely:

> "A person who carries on or proposes to carry on a business which involves the use of the premises for the licensable activities to which the application relates."

12. That is the provision pursuant to which the appellant might, in the ordinary course, have applied for a premises licence in respect of the Stepping Stones public house, but the position is complicated by the fact that the application in the present case was actually an application for the conversion of existing licences made under transitional provisions into which I do not propose to delve, together with, as I understand it, an application under section 16 for a variation.

13. Where a premises licence is granted, it must include certain mandatory conditions and may include other conditions. For example, where the licence authorises the supply of alcohol, it must include conditions specified in section 90 to the effect that there must be a designated premises supervisor and the supply must be made or authorised by a person who holds a personal licence.

13. The Act contains detailed provisions for review and, if necessary, revocation of a licence that has been granted. It also creates a large number of criminal offences. Section 136 is one such provision and is central to the enforcement of the licensing

regime introduced by the Act. Since it is also central to this case, I shall set it out in full:

> "136 *Unauthorised licensable activities*
>
> (1) A person commits an offence if—
>
> (a) he carries on or attempts to carry on a licensable activity on or from any premises otherwise than under and in accordance with an authorisation, or
>
> (b) he knowingly allows a licensable activity to be so carried on.
>
> (2) Where the licensable activity in question is the provision of regulated entertainment, a person does not commit an offence under this section if his only involvement in the provision of the entertainment is that he—
>
> (a) performs in a play,
>
> (b) participates as a sportsman in an indoor sporting event,
>
> (c) boxes or wrestles in a boxing or wrestling entertainment,
>
> (d) performs live music,
>
> (e) plays recorded music,
>
> (f) performs dance, or
>
> (g) does something coming within paragraph 2(1)(h) of Schedule 1 (entertainment similar to music, dance, etc.).
>
> (3) Subsection (2) is to be construed in accordance with Part 3 of Schedule 1.
>
> (4) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £20,000, or to both.
>
> (5) In this Part "authorisation" means—
>
> (a) a premises licence,
>
> (b) a club premises certificate, or
>
> (c) a temporary event notice in respect of which the conditions of section 98(2) to (4) are satisfied."

15. Section 139, which provides a defence of due diligence to a charge under section 136(1)(a), is in these terms:

> "139 *Defence of due diligence*
>
> (1) In proceedings against a person for an offence to which subsection (2) applies, it is a defence that—
>
> (a) his act was due to a mistake, or to reliance on information given to him, or to an act or omission by another person, or to some other cause beyond his control, and

(b) he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

(2) This subsection applies to an offence under—

(a) section 136(1)(a) (carrying on unauthorised licensable activity) ...."

The Construction of Section 136(1)(a)

16. We have had the benefit of substantial written submissions from both sides on the issues arising on this appeal, and the submissions for the respondent have been helpfully elaborated orally by Professor Light. But without intending any disrespect to counsel, I think the essential matters can be dealt with relatively shortly.

17. In my judgment, section 136(1)(a) is directed at persons who, *as a matter of fact*, actually carry on or attempt to carry on a licensable activity on or from premises. That is the natural meaning of the language used. The matters referred to in subsection (2), namely performing a play, participating as a sportsman and so on, also suggest that the focus is on actual conduct. So does section 139(1) which gives a person a defence where his *act* was due to a mistake etc. and he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

18. Section 136(1)(a) is not directed at holders of premises licences as such. An offence may be committed by carrying on a licensable activity when no premises licence exists at all. Where there is a premises licence but a licensable activity is carried on outside the scope of that licence or in breach of the conditions of the licence, it must, in my view, be a question of fact whether it is carried on by the holder of the licence. The mere fact that he is the holder of a licence does not make him automatically liable in

respect of the carrying of a licensable activity on or from the premises to which the licence relates.

19. Had the intention been to make the holder of the premises licence automatically liable, the section could and would have made express provision to that effect. There are plenty of instances where express provision has been made: see, for example, sections 33, 40 and 56 which apply specifically to the holder of a premises licence, and sections 140 and 141 where the holder of a premises licence is one of a number of categories of persons to whom liability may expressly attach.

20. Various policy arguments have been advanced by Professor Light in support of the view that the holder of a premises licence should be liable under section 136(1)(a) for the carrying on of any licensable activity on or from the premises. It is said that the holder is responsible for putting in place a system for ensuring that a licensable activity is carried on only in accordance with the premises licence and that if breaches do occur, the holder is liable for them unless, having put in place an adequate system, he is able to avail himself of the defence of due diligence under section 139.

21. There are, however, sufficient mechanisms under the Act for ensuring that the premises are properly managed without having to stretch or distort the meaning of section 136(1)(a) for that purpose. They include the provisions for review and, if necessary, revocation of a licence. One further mechanism of a criminal nature is to be found in the related provision of section 136(1)(b) under which the holder of a premises licence will be liable if he knowingly allows the carrying on of a licensable activity on or from the premises otherwise than under and in accordance with the licence or other

authorisation. It seems to me that the policy arguments put forward by Professor Light simply do not compel or justify the construction of section 136(1)(a) for which he contends.

22. If there were any real doubt or ambiguity as to the proper construction of the section, I would adopt the construction most favourable to the accused: see Shaw v Director of Public Prosecutions [1962] AC 220, 270A, and R v Ottewell [1970] AC 642, 649D-E, in each case per Lord Reid. But in my opinion the present case does not get close to one of doubt or ambiguity. As I have said, I think it clear that section 136(1)(a) is concerned with actual conduct and whether a person has, as a matter of fact, carried out a licensable activity in breach of the provision.

23. In his submissions, Professor Light has also sought to equate the language of section 136(1)(a) with that of section 16(1)(a) and to contend that a licence holder who applies under section 16(1)(a) for a premises licence must be taken for the purposes of section 136(1)(a) to be a person carrying on a licensable activity on or from the premises for which the licence was granted. I consider that argument to be fundamentally misconceived. There are important differences in the language of the two sections.

24. Under section 16(1)(a), an application for a premises licence may be made by "a person who carries on or proposes to carry on *a business which involves the use of the premises for the licensable activities* to which the application relates." Carrying on such a business is self-evidently different from carrying on the licensable activities themselves, and the fact that a person's actual or proposed business involves the use of the premises for licensable activities does not mean that he necessarily carries on the

licensable activities themselves at the premises for which the licence is granted. The commentary on section 16 in Pattinson's *Licensing Acts*, 117th edition, paragraph 1.3515 states at note 3:

> "It is suggested that the use of the term 'involves' might denote a broad range of businesses including that of a landlord receiving rent from a premises being used for such purpose, an owner of such a business, a local authority, the holder of a franchise or a tenant."

I agree that the statutory expression is broad enough to cover the case where a freehold owner carries on the business of letting premises to tenants on the basis that the tenant will carry on licensable activities at the premises. But the landlord's business in such a case is, in principle, distinct from the activities carried on by the tenant, and I regard it as a complete fallacy to merge the two elements together and to treat the landlord as automatically carrying on the licensable activities at the premises.

25. I should note that the guidance issued by the Secretary of State under section 182 of the Act states at paragraph 8.20 that in the case of public houses it would be easier for a tenant to demonstrate that it has carried on a business within section 16(1)(a) than it would be for a pub-owning company that does not itself carry on licensable activities. That may or may not be so. The language used in that paragraph might be thought to support my construction of section 136(1)(a), but in any event what is said in the guidance does not affect the view I have expressed about the meaning and effect of section 16(1)(a) or the distinction to be drawn between that provision and section 136(1)(a). I expressly reject Professor Light's submission that the premise of the legislation is that the person granted a premises licence is himself necessarily carrying

on such licensable activities as are carried on on or from the premises to which the licence relates.

26. It is, of course, possible for a landlord to carry on a licensable activity at premises notwithstanding that the premises have been let and notwithstanding the existence of the landlord/tenant relationship, but whether he does so or whether, as an alternative possibility, he knowingly allows a licensable activity to be carried on at the premises has to be determined as a question of fact. Nor do I see how the mere inclusion in the tenancy agreement of obligations aimed at ensuring that the premises are managed properly and in compliance with the Act could *of itself* warrant the finding that licensable activities carried on there are carried on by the landlord.

27. Nothing I say is intended to affect what is no doubt the ordinary position where the holder of a premises licence will himself be on the premises and there is likely to be little difficulty in establishing as a matter of fact that whatever licensable activity is carried on at the premises is carried on by him. But the fact that that is the ordinary position does not have the consequence that the holder of a premises licence is always to be treated as carrying on any licensable activity that is carried on on or from those premises.

The Deputy District Judge's Decision

28. The reasons given by the Deputy District Judge for finding the case against the appellant proved have already been set out. The first three reasons were all based on a leap from the appellant's status as the applicant for the premises licence to the

conclusion that the applicant was carrying on the relevant licensable activities for the purposes of section 136(1)(a). For the reasons I have given, I regard that as an impermissible leap. There is an additional point specific to this case, to the effect that because the appellant was applying under the transitional provisions for the conversion of existing licences, it could make the application without falling within one of the categories in section 16(1); but in the circumstances I do not need to deal with that point. The fourth reason given by the Deputy District Judge was that the grant of premises licences and enforcement of conditions in them are fundamental to the licensing system and enforcement of it. I have no quarrel with that broad sentiment, but it tells one thing about the proper construction of section 136(1)(a) or whether the appellant could, on the facts, be criminally liable under it for the relevant activities.

29. The first of the questions asked in the case stated suggests the possibility of a further, deeper error in the Deputy District Judge's reasoning. The question, as I have said, is whether, for the purposes of section 136(1)(a), the acts of third parties are imputed to the holder of the premises licence as a matter of law. Professor Light has submitted that the acts of third parties on the premises are indeed to be so imputed to the premises licence holder, subject to the due diligence defence. In my judgment, however, it is clear for the reasons already given that no such imputation is permitted. Section 136(1)(a) is concerned with the actual conduct of a person charged. It is not a section that establishes some form of criminal vicarious liability or imputation of criminal conduct, and the holder of a premises licence is not liable under section 136(1)(a) as a matter of criminal law for the acts of third parties.

30. Accordingly, I am satisfied that the Deputy District Judge reached his conclusion on an erroneous legal basis.

31. He made no finding that the appellant was, as a matter of fact, carrying on the relevant licensable activities on the occasions when there were breaches of the conditions of the premises licence. I have considered whether, that being so, the case needs to be remitted for further consideration. On the facts summarised in the case stated, however, I can see no reasonable basis upon which the appellant could be found as a matter of fact to have been carrying on the relevant licensable activities on any of the occasions in question. The summary of facts includes reference to the tenancy agreement, the obligations of Mr Cartlidge under the tenancy agreement and Mr Cartlidge's employing of Mr Ferguson as manager and designated premises supervisor of the premises. There is nothing to support, let alone to prove beyond reasonable doubt, a case that the relevant licensable activities at the premises were carried on by the appellant.

Conclusion

32. I therefore conclude that there was no proper basis in law for the conviction of the appellant of any of the four offences under section 136(1)(a) with which it was charged. I would answer the two questions in the negative, allow the appeal and quash the convictions.

MR JUSTICE OWEN: I agree.

LORD JUSTICE RICHARDS: We will grant you a defendant's costs order in respect of the Magistrates Court and this court, but we will leave the amounts to be determined by the appropriate authorities.