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Institute of Licensing 25th National Training Conference 2021

Farewell to the Rule of Law

GERALD GOURIET QC

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An important demand of the Rule of Law is that decision-making bodies (such as courts and tribunals – and, dare I say it, licensing sub-committees) should exercise their powers ***within an established framework of the law***, rather than in an arbitrary, ad hoc, or purely discretionary manner on the basis of their own preferences.

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So: when Parliament says that something has to be done – such as procedural steps to be taken in a licensing application – the Rule of Law might be thought to require:

(a) That they *are* taken
(b) That no licensing sub-committee will say "never mind what Parliament says, <u>we</u> think it's OK that you failed to take the required steps, because <u>we</u> think that no one has been prejudiced,"

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- In a series of recent cases, that is precisely what licensing sub-committees have said.
- Their decisions have been affirmed in the High Court
- And we haven't been that concerned, **because the end result was eminently sensible**

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Some recent examples:

Wrotham Parish Council v Tonbridge and Malling Borough Council

The law:

- **The regulations** require an applicant to place notices of an application every 50 metres along the external perimeter of the site in question.
- compliance would have meant that the applicant had to place 30 notices of the application around the site perimeter.
- He only placed 3.

The sub-committee decision:

- it was just in all the circumstances to let the application proceed

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It was just – and utterly sensible

- No one could realistically complain that people did not know about the application.
- Every conceivable point had been taken:
  - "*lights should be in the red/yellow spectrum only (to minimise the effect on nocturnal wildlife)*", and
  - '*attendees might climb on the nearby BBC mast*' or '*fall onto the M20 from pedestrian bridges*'.
- **BUT: are we entitled to ignore the law?**

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Ex parte Shine [1971] 1 WLR 1216

An applicant had advertised his bingo application as required

But had added some superfluous information…

It shouldn't have mattered – (but it did)

Lord Widgery CJ: The procedural requirements are "*a complete code written in the most precise and positive language. Anyone who takes the statute in front of him and reads the code carefully is minutely and specifically and precisely directed as to what he has to do.*"

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Regina v Pontypool Gaming Licensing Committee
[1970] 1 WLR 1299

Everything was done as it should have been

- ***Except*** *that the newspaper containing the statutory advertisement was not sent to the clerk to the justices within 7 days.*

The court acknowledged that no difficulty was caused and no one was prejudiced.

BUT: the time limits laid down by Parliament had to be observed.

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R v Secretary of State for the Home Department, ex p Jeyeanthan
[2000] 1 WLR 354

The "important question" is –

what the legislator *should be judged to have intended* should be the consequence of the non-compliance.

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R v Soneji [2005] UKHL 49

Lord Steyn

"The emphasis ought to be on the consequences of non−compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity".

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Barker v Palmer (1881) 8 QBD 9

(cited in *ex parte Shine*)

"It is impossible for the court to speculate upon the reasons for legislation in the way suggested and say upon those reasons that part of the enactment is directory and part obligatory."

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R v Secretary of State for the Home Department, ex p Jeyeanthan [2000] 1 WLR 354

In the majority of cases… the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances

NB: that is a departure from "what Parliament intended"

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R (D&D Bar Services Limited) v Romford Magistrates' Court (Funky Mojoe) [2014 EWHC 344

- Review by licensing authority
- Failure to comply with regulations as to advertising of Notice of Application

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The 2005 ('Premises licences)' Regulations:

Regulation 38(1)

LA to advertise an application to review licensed premises –

By displaying prominently a notice which is

(a) Equal or larger than A4
(b) Pale blue
(c) Printed legibly in black ink or typed in black in a font equal to or larger than 16

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Regulation 39

The notice is to state –
(a) The address of the premises
(b) The dates between which representations may be made
(c) The grounds of the application to review

Decision

- Not in the overall interest of justice to quash the review
- No "substantial prejudice or injustice"

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TC Projects v Newcastle Justices
[2006] EWHC 1018

- Has there been "substantial performance"?
- Does the defect consist of a slight error?
- Has the purpose of the legislation been "substantially achieved"?

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Plans: the 2005 Regulations

Section 17(4) of the 2003 Act provides that application for a premises licence must be accompanied by a plan of the premises in the prescribed form.

Regulation 23 of the *Licensing Act 2003 (premises licences etc.) Regulations 2005* ("the 2005 Regulations") provides -

23 (1) An application for a premises licence under section 17… shall be accompanied by a plan of the premises to which the application relates and which shall comply with the following paragraphs of this regulation.

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(3) The plan shall show—

(a)the extent of the boundary of the building, if relevant, and any external and internal walls of the building and, if different, the perimeter of the premises;

(b)the location of points of access to and egress from the premises;

(c)if different from sub-paragraph (3)(b), the location of escape routes from the premises;

(d)in a case where the premises is to be used for more than one licensable activity, the area within the premises used for each activity;

(e)fixed structures (including furniture) or similar objects temporarily in a fixed location (but not furniture) which may impact on the ability of individuals on the premises to use exits or escape routes without impediment;

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(f)in a case where the premises includes a stage or raised area, the location and height of each stage or area relative to the floor;

(g)in a case where the premises includes any steps, stairs, elevators or lifts, the location of the steps, stairs, elevators or lifts;

(h)in the case where the premises includes any room or rooms containing public conveniences, the location of the room or rooms;

(i)the location and type of any fire safety and any other safety equipment including, if applicable, marine safety equipment; and

(j)the location of a kitchen, if any, on the premises.

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Milton Keynes Council v Skyline Taxis

[2017] EWHC 2794 (Admin)

The law: LGMPA 1976

55A Sub-contracting by operators

(1) A person licensed under section 55 who has in a controlled district accepted a booking for a private hire vehicle may arrange for another person to provide a vehicle to carry out the booking if—

(a) the other person is licensed under section 55 in respect of the same controlled district **and the sub-contracted booking is accepted in that district**;

Hickinbottom LJ:

It's good enough if the second operator "is licensed under section 55 in respect of another controlled district and the sub-contracted booking is accepted *as a booking subject to the* ***licence*** in that district…".

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The above Examples

Are where Parliament says something *must* be done

But licensing committees, tribunals and the courts say: "No, it needn't' be done."

Allowing that power to be override Parliament is a slippery slope.

What if:

Parliament says something *may* be done

Is anyone entitled to say: "*no it may not be done*!"?

(or otherwise restrict the Parliamentary permission)

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Betting Premises Machine Entitlement

The law: (2005 Act, section 68(5) & 172(8)

A betting premises licence shall, by virtue of this section, authorise the holder to make up to four gaming machines, [categories B2 (FOBTs) to D] available for use.

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The Gambling Commission LCCP 9.1.1

1. Gaming machines may be made available for use in licensed betting premises only where there are also substantive facilities for non-remote betting, provided in reliance on this licence, available in the premises.

3. Licensees must ensure that the function along with the internal and/or external presentation of the premises are such that a customer can reasonably be expected to recognise that it is a premises licensed for the purposes of providing betting facilities.

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- Again laudable
- But once we allow quangos, tribunals, courts, ministers
- To make up the law as they go along – because we approve of what they are trying to achieve
- *What are we to do, when their law-making is less than laudable, and we don't approve*?
- We had some fine examples during the Covid-19 lockdowns

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STATUTORY INSTRUMENTS

2020 No. 350

PUBLIC HEALTH, ENGLAND

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

Made - - - -	*at 1.00 p.m. on 26th March 2020*
Laid before Parliament	*at 2.30 p.m. on 26th March 2020*
Coming into force	*at 1.00 p.m. on 26th March 2020*

THE HEALTH PROTECTION (CORONAVIRUS, RESTRICTIONS) (ENGLAND) REGULATIONS 2020

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

Restrictions on movement

6.—(1) During the emergency period, no person may leave the place where they are living without reasonable excuse.

(2) For the purposes of paragraph (1), a reasonable excuse includes the need—

(a) …

(b) to take exercise either alone or with other members of their household;

(c) …

Guidance

Coronavirus outbreak FAQs: what you can and can't do

Published 29 March 2020

< NB "can" & "can't"

1. When am I allowed to leave the house?

You should only leave the house for very limited purposes:

- Shopping for basic necessities… etc
- One form of exercise a day… etc
- Any medical need, including to donate blood… etc
- Travelling for work purposes, but only where you cannot work from home.

Bindmans

News

Jamie Potter and Emma Varley of Bindmans, and Steve Broach of 39 Essex Chambers, were instructed on behalf of two families with children with autistic spectrum disorder whose conditions necessitate them leaving the house more than once day for their own well-being. One child in particular is deliberately taken to a quiet location that is not local to them, because of their particular needs and where there is a far more limited risk of infection (of him and others) than if he were to remain in an urban environment.

Guidance

Coronavirus outbreak FAQs: what you can and can't do

Published 29 March 2020

15. Can I exercise more than once a day if I need to due to a significant health condition?

You can leave your home for medical need. If you (or a person in your care) have a specific health condition that requires you to leave the home to maintain your health -

This could, for example, include where individuals with learning disabilities or autism require specific exercise in an open space two or three times each day...

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Enforcement

- **Police helicopter chasing walkers in remote area**
- **Man with son in front garden ordered to go back inside**
- **Shops told not to sell Easter Eggs**

(Morten Moreland in Sunday Times)

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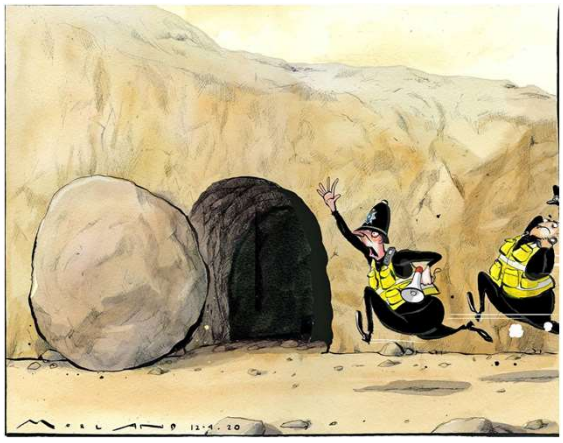

Complacency re Rule of Law – because we like the result

- Encourages a disrespect for the law
- Lets in lawlessness that we may not like quite so much

- Has given us an executive that thinks
  - It can dictate the law, irrespective of Parliament
  - it itself is above the law

THE TIMES

There is a difference between law and official instructions. It is the difference between a democracy and a police state. Liberty and the rule of law are surely worth something, even in the face of a pandemic.