Excerpt from "*Cumulative Impact Policies*"

a talk given by Gerald Gouriet QC, Licensing Lawyer
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Nature and purpose of cumulative impact policies

My starting point is to remind myself of the problems that cumulative impact policies are intended to solve. The policies began life in Westminster back in 2001/2. The problems were described –

*"We also recognise the cumulative effect that licences can have on an area. In some mixed residential and commercial areas, a few **well managed [licensed] premises** or night cafes may be able to operate without harming local residents. In these areas, however, the cumulative effect of more and **more such premises** may be such that an adverse effect on local residents is impossible or virtually impossible to avoid. It is argued that in some areas the number of **such premises** has reached saturation point. Consequently, in these areas it would be undesirable to licence any more entertainment premises or night cafes."*

High Court approval of cumulative impact policies came in the Chorion litigation[1]

The language of the Crown Court judge (as summarised by the High Court) is instructive:

"The first question was whether, notwithstanding the applicant was a fit and proper person and the premises would be well managed, a … licence could be refused on the sole ground that the area was already saturated with licensed premises… and that the cumulative effect of the existing premises was impacting adversely on the area to an unacceptable degree. The answer to this [is] 'yes'."

In the High Court, the need for a CIP in Westminster was succinctly put by Scott Baker J:

"The nature of the problem is such that it is cumulative rather than attributable to any specific individual or licensed premises."

The judge continued –

"It is both understandable and appropriate for the Claimant to have a policy in the light of the problems it has identified in the West End. The policy needs to make it clear that it is not directed at the quality of the operation or the fitness of the licensee but on the global effect of these licences on the area as a whole."

Why the problems experienced need to be addressed by a CIP

[1] The Queen on the application of Westminster City Council v Middlesex Crown Court [2002] EWHC 1104 (Admin) ("Chorion")

The evidence in the Chorion case was that the alcohol-fuelled issues on the street (crime, disorder, nuisance) could not with any certainty be traced back to any particular licensed premises; and that even well-run premises, with a decent client base against whom there could be no justifiable criticisms, were making their own contribution, however small, to the cumulative impact experienced away from the premises themselves. The 'global effect' Scott Baker J spoke of was the sum-total of all these small contributions – i.e. the cumulative impact. The Court sympathised with the proposition that it was next to impossible to take effective action other than by stemming the growth of additional licensed outlets.

Exceptions to policy

Scott Baker J concluded his judgment with guidance that finds an expression in most of the cumulative impact policies I see today –

"If the policy is not to be consistently overridden in individual cases it must be made clear within it that it will only be overridden in exceptional circumstances and that the impeccable credentials of the applicant will not ordinarily be regarded as exceptional circumstances. It should be highlighted that the kind of circumstances that might be regarded as exceptional would be where the underlying policy of restricting any further growth would not be impaired. An example might be where premises in one place would replace those in another."

One might have thought the Chorion case had settled the issue once and for all: but in recent years I have seen great bundles of testimonials in support of applications, which only say that like premises elsewhere are well managed and cause no (on-site) problems. And these bundles have been accepted by licensing sub-committees as persuasive, if not determinative.

If there is one principle above all others that stands out in the above citations, it is that even well-run, incident-free premises play a role in contributing to the adverse cumulative impact experienced in our towns and cities; and it is no answer to a cumulative impact objection to say "my premises are well managed and there are no on-site issues."

Badly-run premises can be reviewed, and the licence revoked, suspended or heavily conditioned in order to address concerns. Well-run premises cannot. It is legitimate, therefore, to conclude: **"Cumulative impact policies exist to solve the problems caused by well-run premises."**

What is going wrong?

To be clear: first of all, many licensing authorities do decide applications in accordance with their cumulative impact policies – each case, of course, being decided on its merits. Nothing is going wrong there.

Secondly, I am not saying that every grant of a new premises licence in a cumulative impact zone means that something is "going wrong". A grant, such as the recent grant of a licence for Koko (Camden Palace) seems – I do not know the details – to be a good illustration of things "going right".

Thirdly, even if a new licence will add to the cumulative impact in an area, it may still properly be granted if the licensing sub-committee thinks that the 'Hope & Glory balance'[2] tilts in its favour.

So: when I say "something is going wrong" I am referring to grants of new licences in cumulative impact zones, in respect of premises whose customers (away from the premises) will certainly add to the familiar list of anti-social problems; which premises have nothing *material to the question of cumulative impact* to distinguish them from the existing bars and clubs in the area.

I am truly perplexed by some of these grants, and in preparing this talk I have tried to figure out why the sub-committee has so decided. Here are six possible answers:

1. Sub-committees too readily buy the sales-pitch *(no matter how far-fetched it is)*
I sometimes think there is a crib-sheet doing the rounds of "things to say" (whether they are true or not) when you want a licence in a cumulative impact zone. I mention that because I have begun to see, from application to application, precisely the same words and phrases cropping up in different witness statements, in support of different applications, by different operators, represented by different lawyers – as though these words and phrases have been 'cut-and-paste' from some master document.

My imagined crib-sheet might read –

> **"Say:**
>
> **We have a mature customer base**: it is immaterial that your customers are mostly in their twenties – go ahead and say they're in their late thirties and forties. It's notoriously difficult to assess a person's age, so you won't be found out.
>
> **We don't encourage students:** get your private investigator to visit your existing premises during the holidays.
>
> **We are food-led:** you can give whatever figures of the 'alcohol/food split' you like – no one will be able to contradict you.
>
> **We are hiring in a well-known chef:** he/she needn't be employed – a consultancy will do (but don't volunteer this). They needn't even be well-known! Get them to talk about their "passion" for whatever gimmick food offering you have in mind. "Passion" is the big thing right now.
>
> **We will have 75% of the floor area given to seating:** people drink while they're sitting down, so don't worry: just make sure you don't agree to restaurant conditions. Say you want "flexibility" – no-one will press you as to what exactly that means.

[2] The Queen (on the application of Hope & Glory Public House) v City of Westminster Public House [2009] EWHC 1996 (Admin)

We are not a music venue: say that your disk-jockeys only play background music.

We are not a dance venue: so long as you don't have a dedicated dance-floor, people can do the conga round the whole place every night of the week if you like.

There have never been any problems at our existing premises: although this is wholly irrelevant to cumulative impact, get as many witnesses as you can to say that your existing premises don't cause any problems. Fill your application bundles with them. There cannot be too many pages. Neighbours (like the bank next door) who shut up shop at 5:00 are sure to be able to help.

We will raise the bar locally (i.e. improve the standards of existing bars): an absurd assertion, but it usually goes unchallenged.

Find some gimmick: exotic cocktails and craft beer are almost played to death – but there is still life in them. Have you thought about a "cocktail sommelier"? How about "Local beers, wines and ciders, carefully matched to [whatever specialist food will be on the menus]"? Find something to hang your application on. Anything that deflects attention from the cumulative impact of your drinkers when they have left the premises. Exaggerated claims that the proposed operation wants to focus on the 'education' of its (drinking) customers have, astonishingly, been making the odd appearance in the last year or two.

If that parody seems unfair, let me assure the reader that I have heard every one of those claims made, and a licence granted on the back of them; but when the premises have opened, it has been a very different picture. Which brings me to my second suggestion as to why things are "going wrong":

2. **There is insufficient follow-up by sub-committees** *(or by anyone else)*

I often wonder if there is any follow-up. The country is littered with licensed premises in which the reality falls far short of (or may be wholly different from) what was promised on application. If councillors sitting on licensing sub-committees would only see for themselves (as I have done, frequently) the utterly disappointing finished product – how it operates, who in fact are its customers, how loud the music is – they may be more inclined to look critically at the exaggerations and bland promises offered to them at hearings.

3. Sub-committees accept evidence at face-value

Perhaps it is a function of licensing sub-committees not being at ease with the concept that some witnesses (putting it mildly) tend to exaggerate, and others (putting it bluntly) lie their heads off? The licensing justices, who also sat as magistrates in criminal cases, heard more lies from the witness box, I dare say, than they heard truth. They had no compunction in dismissing evidence as poppycock. By contrast, I find that many local authority sub-committees shrink from any hint that a witness may be untruthful: there is a 'Bateman cartoon' of horrified faces if any such suggestion is made.

Applicants for licences are just as capable of being untruthful as anyone else. An applicant may say of his existing premises (forgive my repeating the list) –

"We have similar premises elsewhere – there is only background music; our customers are mature (not the 18-25s); there is no dancing; we serve food throughout opening hours; we are more a restaurant than a bar."

– when the reality (for anyone that has the opportunity and inclination to look for themselves) is that a DJ plays loud dance music every night, as in a recent case of mine; or that there is an availability of food, rather than the service of it; or that similar operations are not restaurants at all but bars serving alcohol. In one case in which I was involved, investigation found that student discounts were offered – where assurances had solemnly been given that the style of operation "did not attract students".

Regrettably, the unwillingness of sub-committees to believe it even possible that witnesses might lie to them has had the unfortunate consequence of developing a culture – or something close to it – in which just about anything can be said at a licensing hearing without fear of contradiction. There is no real scrutiny or testing of evidence. Cross-examination is rarely allowed; and if it is, most sub-committees loathe it, especially if done effectively. The truth does not always come out on its own, and the usual means of teasing it out are not liked by sub-committees, and discouraged at hearings. As a result, some witnesses, as the saying goes, "get away with blue murder".

Of course licensing sub-committees expect to be told the truth – that is how things should be: but it is not always how they are. It is a matter of genuine sadness to me, over and above mere regret, that I find increasing numbers of witnesses – and even a few lawyers – who seem to have no qualms about misleading a committee or court. When two 'independent' experts give diametrically opposed evidence, and there is no reconciling their versions of events, and it is impossible to smooth things over by saying one of them is simply mistaken or perhaps exaggerating a little, then, unhappily, *one of those experts is probably not telling the truth*. And as for lawyers – all I will say here is that we are required by our codes of conduct never to mislead a court or tribunal: about the law, about the evidence, or even about our availability.

Children and puppies will push the boundaries of what they can get away with. If they are not checked, their conduct goes from bad to worse – sometimes, until they are completely out of control. So it is with all of us who attend licensing hearings

4. Lack of transparency: pre-hearing meetings

I raised concerns about pre-hearing meetings when I gave evidence last year to the House of Lords Select Committee on the Licensing Act. This is what I said:

> *I am concerned at the growing extent to which decisions are influenced (if not effectively taken) by the result of discussions taking place behind closed doors, at which not all interested persons are present.*
>
> *It is usually local communities, residents' associations or individual local people who are kept out of the loop. The position is best illustrated by an example, which may be taken as descriptive of a number of cases in which I have recently been involved:*
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> - *An application is made in a cumulative impact zone.*

- *There is residential objection, as well as initial objection from the police and other licensing authorities.*
- *Pre-hearing meetings take place between the responsible authorities and the applicant and his legal team. As a result of those meetings the responsible authorities withdraw their representations (or do not make any).*
- *What is said at those meetings is not made public. The meetings are "behind closed doors". All that a licensing committee (or magistrates' court on appeal) hears is* ***that "the police do not object", or "the responsible authorities have no concerns"****. The police and responsible authorities frequently do not attend the licensing hearing. <u>The basis upon which they have decided not to object is seldom known, and therefore never examined critically.</u>*
- *The objecting resident or association is left high and dry, often being asked "have all the responsible authorities got it wrong?" – when in fact no one knows if they have got it wrong or right: all we know is that they have made no representation, we do not know upon what basis.*
- *The application is granted, undue weight being given to the fact (but not the reasons behind) absence of police objection, and little scrutiny being given to the application itself.*

Sometimes (rarely) one gets to hear what has been said at these meetings between the authorities and an applicant. At other times it may reasonably be inferred that the authorities have been told a similar story to the one told to the residents in trying to persuade them not to object. And that story, as we have seen already, may be a rather 'tall' one.

I am strongly of the opinion that there should be much greater transparency regarding these behind closed doors pre-hearing meetings. In particular, it is essential that reasons are given (by the relevant responsible authorities) for not making representations.

But even with the benefits of transparency, pre-hearing meetings can sail too close to the equivalent of a hearing. If attended heavy-handed (as in my recent experience) there is a vulnerability to 'discussion' being steamrollered to 'decision' when not all interested persons are present, or if they are present, not having come to the meeting prepared to argue their position to a conclusion.

5. Lack of objection is not the same as support

A fifth culprit for "things going wrong", touched on above, is the undue importance sometimes given by sub-committees to the absence of any representation on behalf of the police or any other responsible authority. Frequently, the lack of any representation means nothing more than that an applicant has given various assurances to the police or licensing officers – at those 'behind closed doors meetings' already discussed – and the authorities are satisfied that, ***if those assurances can be relied on,*** they would have no objections. The all-important question – can the assurances be relied on? – never gets asked.

I have been told by police officers that they have neither the resources nor the time to investigate the truthfulness or otherwise of the various promises and assertions made at pre-hearing meetings. Their lack of objection, on analysis, is no better than: "If what we have

been told is true, then there is no ground for objection" – but it is held out by applicants (and sometimes accepted by committees) as being support.

Current Home office guidance is that *"The police should be the licensing authority's main source of advice on matters relating to the prevention of crime and disorder licensing objective… The licensing authority should accept all reasonable and proportionate representations made by the police unless the authority has evidence that to do so would not be appropriate for the promotion of the licensing objectives."* That guidance is wrongly interpreted by licensing authorities: absence of police (and other) objection is too frequently equated to a representation in favour, and taken as determinative of a decision to grant the application. *Although it is anticipated that this guidance will change, I think it will continue to resonate with licensing sub-committees.*

Even when an applicant's assurances to residents (i.e. as to how their premises in other towns and cities operate) are found to be demonstrably false – as has too often been my experience – the absence of police objection, or objection from other responsible authorities, can present an impenetrable barrier to the application of local cumulative impact policies.

6. The sub-committee is overly concerned as to costs on an appeal

A vulnerability to costs, should there be a successful appeal of a refusal to grant – particularly when the police have not objected – has been cited to me, informally after the hearing, as the principal reason for the sub-committee having granted a licence, when otherwise they would have unhesitatingly refused.

There is a body of case-law to the effect that honest decision-making by an administrative authority which has conducted itself reasonably and with propriety should not be penalised in costs simply because a court on appeal says that the decision was wrong. That any licensing committee should give a decision that it *thinks is wrong*, solely to avoid the risk of costs on appeal, betrays either an ignorance of, or a fundamental misunderstanding of, the principles spelled out in these cases.

Conclusions

I have no doubt that some of the eyebrow-raising grants I have seen would have been decided no differently, even if the sub-committee were alive to the various issues I have raised in this talk. It may be, for example, that the creation of new jobs or the bringing to life of a derelict building weighed more favourably in the balance. The problem then would be that the real reasons for the decision might not have been given. Other grants, however, have to my mind been inexplicable: contrary to policy, with no genuinely exceptional circumstances advanced by the applicant.

In summary, I think that cumulative impact policies are likely to be 'more honour'd in the breach…' unless licensing sub-committees scrutinise applications far more critically, adapting their procedures as necessary to allow evidence to be effectively tested; and committees should be on the alert for the wool to be pulled over their eyes – by the bale.

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Full Article an be found online at
https://licensing-lawyer.co.uk/cumulative-impact-iol/#_ftnref