EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2015/0141

IN THE MATTER OF THE LIQUOR LICENCE ORDINANCE (CAP. 106)

-AND-

IN THE MATTER OF AN APPLICATION BY NEVILLE POLE d/b/a PL CONSULTANCY FOR LEAVE TO APPLY FOR AN ORDER FOR JUDICIAL REVIEW QUASHING UNLAWFUL ACTS UNDER THE SAID ACT

BETWEEN:

(1) NEVILLE POLE d/b/a PL CONSULTANCY
(2) ALFRED CHRISTOPHER
(3) d/b/a CASTLE MARIA HOTEL

Claimants

-AND-

THE LICENSING MAGISTRATE

Respondent

Appearances: Mr. Jamal Smith, Counsel for the Claimants
Mrs. Jo-Ann Williams-Roberts, Solicitor General, Counsel for the Respondent

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2018: March 27

JUDGMENT

[1] **Ellis J.:** This claim for Judicial Review is brought by the First Claimant, a former tax inspector who was employed with the Inland Revenue Department for 21 years. He asserts that he has also served as a tax consultant for several businesses including persons seeking to obtain or renew liquor licences under the **Liquor Licence Ordinance** Cap 106 of the Laws of the Virgin Islands (the Ordinance). On that basis he claims to possess expertise in relation to the operation of the

Ordinance and in bringing this suit, he also contends that he is acting on behalf of his clients who have sought to obtain or renew a liquor licence.

[2] The Second Claimant is a client of the First Claimant and the holder of a liquor licence issued under the Ordinance. In October 2014, he was the holder of a liquor licence issued under the Ordinance Pursuant to an Order of the Court granting them leave to apply for judicial review on the grounds of illegality and want of procedural fairness/ breach of natural justice, the Claimants filed a Fixed Date Claim Form in which they challenge the Notice issued by the Respondent in October 2014 advising of a Special Sitting of the Magistrate's Court to be convened on 1st December 2014 for the purpose of hearing and determining applications for licences for the sale of intoxicating liquor ("the Notice"). The Claimants contend that they are directly affected by the decision to issue the Notice and seek the following relief:

1. A declaration that the Notice and its contents are ultra vires and that the Respondent exceeded her authority in issuing the same.

2. A declaration that the revised Forms issued by the Respondent in relation to the Notice are ultra vires.

3. A writ of mandamus requiring the Respondent to revert to the use of the previous forms until such time as the Legislative Assembly amends the Ordinance.

[3] The Claimants complain that the Notice and the Forms are ultra vires because the Respondent thereby purported to:

1. Revise the statutorily prescribed Form in excess of her powers under the Ordinance;

2. Require applications for licences to be served on the Commissioner of Police, the Commissioner of Inland Revenue, the BVI Fire and Rescue Department, the Environmental Health Division, the Department of Trade and Consumer Affairs and Town and Country Planning Department;

3. Require new applicants to be in possession of valid trade licence;

4. Require new applicants to obtain development planning permission to operate at the location from which they propose to operate and the premises to be inspected by the BVI Fire and Rescue Department; and

5. Require objections to be served on the Commissioner of Police and the Commissioner of Inland Revenue.

[4] The Claimants also claim that the matters complained of are in the public interest and deserve to be ventilated because it not only affects the Claimants but all persons who may seek to obtain or renew a liquor licence under the Ordinance.

[5] The Respondent disputes that the Claimants are directly affected by the Notice or that the matters raised are of public interest. The Respondent also disputes that she acted without lawful authority in issuing the Notice or in mandating the use of the new forms which purport to prescribe the several new requirements.

[6] The Parties both agree that the following issues arise for the Court's consideration:

1. Whether the Claimants have the relevant *locus standi* to bring the Claim?
2. Whether the Respondent acted ultra vires her prescribed statutory powers in issuing the Notice and the Forms by which she purported to:
    i. Revise the application forms in excess of her powers under the Ordinance;
    ii. Require applications for licences to be served on the Commissioner of Police, the Commissioner of Inland Revenue, the BVI Fire and Rescue Department, the Environmental Health Division, the Department of Trade and Consumer Affairs and Town and Country Planning Department;
    iii. Require new applicants to be in possession of valid trade licence;
    iv. Require new applicants to obtain development planning permission to operate at the location from which they propose to operate and the premises to be inspected by the BVI Fire and Rescue Department; and
    v. Require objections to be served on the Commissioner of Police and the Commissioner of Inland Revenue.

DO THE CLAIMANTS HAVE THE RELEVANT *LOCUS STANDI* TO BRING THIS CLAIM?

[7] It is now settled law that the person or entity launching a judicial review action must have sufficient standing or interest in the matter to justify the courts intervening on their behalf with respect to the decision of a public body. Courts will not allow mere busybodies to bring proceedings to question the decisions of public bodies. This position is now crystalized in Part 56.2 of the **Eastern Caribbean Civil Procedure Rules** which prescribes the persons who may apply for judicial review. It provides that:

"56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

(2) This includes –

(a) any person who has been adversely affected by the decision which is the subject of the application;

(b) anybody or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);

(c) anybody or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;

(d) anybody or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application;

(e) any statutory body where the subject matters falls within its statutory limit; or

(f) any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution."

[8] The Defendant submits that the Claimants are not persons who can bring this claim for juridical review because they do not fall within the category of persons listed in subparagraphs (a) – (f) of Part 56.2 (2). With respect to the First Claimant, the Defendant submits that based on the evidence before this Court, he only has a mere interest in the subject matter of this Claim. Counsel for the Defendant based this submission on the First Claimant's evidence which discloses his career history; the description of his clientele; the relationship between himself and his clients and the remuneration; and his level of expertise in acting as their agent.

[9] Counsel for the Defendant submitted that in examining an alleged breach of statutory duty or an excess of power or other public error, the Court must look at the relevant legislation to ascertain whether it gives the Claimants the right to the relief sought. Counsel argued that the purpose of the relevant Ordinance is to prohibit the sale of spirits without a licence and to regulate licencing and renewal procedures and licence holders. Having reviewed the relevant legislative provisions, Counsel for the Defendant submitted that the Ordinance is not one in which the ordinary citizen

would have a sufficient interest in to entitle him to obtain relief unless he was a licence holder or an applicant for a licence at the relevant time.

[10] Counsel submitted that had the Notice been related to objections made by members of the public to licences being granted after the notice of intention to apply for a licence was published in a newspaper in the Territory, the situation would have been different.

[11] It is common ground between the Parties that there are cases in which courts have decided that sufficient standing can be ascribed to a public spirited citizen whose only association with the claim is to raise a serious issue of public importance. Counsel for the Defendant noted that **CPR Part 56.3 (3) (i)** provides that if applicant for leave is not personally or directly affected, the applicant must state what public or other interest he or she has in the matter; In such cases, the public spirited citizen would have standing without the need to demonstrate that the decision has any greater impact on him than any other member of the public.

[12] At paragraph 94 of **Walton v Scottish Ministers**[1]**:**

> "In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. **But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it." Emphasis mine**

[13] Relying on the judgment of **R v Secretary of State for the Environment ex parte Rose Theatre Company**[2] Counsel for the Defendant submitted that the Ordinance does not give the Claimants expressly of impliedly a greater right or expectation than any other citizen to have the decision to issue the Notice reviewed. Counsel submitted that in any event, the level of an individual's expertise in the subject matter of the claim in a judicial review in and of itself does not create a sufficient interest.

[1] [2012] UKSC 44
[2] Page 522, paragraph C

[14] However, this form of standing is not an open floodgate. Counsel relied on the judgment of Lord Reed in **Walton v Scottish Ministers** where at paragraph 153 he noted:

> "**Of course, this must not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development. Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity**. There is, after all, no shortage of well-informed bodies that are equipped to raise issues of this kind, such as the Scottish Wildlife Trust and Scottish Natural Heritage in their capacity as the Scottish Ministers' statutory advisers on nature conservation. It would normally be to bodies of that kind that one would look if there were good grounds for objection. But it is well-known they do not have the resources to object to every development that might have adverse consequences for the environment. **So there has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied." Emphasis mine**

[15] Counsel for the Defendant submitted that the evidence filed in support of the Claim discloses that the First Claimant has no particular expertise but instead has only a mere interest in the subject matter under review. She concluded that the matters relied on by the First Claimant to support his standing are not sufficient. He is an ordinary citizen who is not a licence holder or an applicant for a licence and thus cannot maintain this claim.

[16] Counsel for the Defendant further submitted that the Virgin Islands legislature has established an alternative regime to address the matters raised by the Claimants which they have failed to utilize. She submitted that it was open to the Claimants to apply the parliamentary processes established in the Act to appeal to the High Court against the decision to refuse the Licence or to apply to the Governor to issue the licence in his absolute discretion under section 25C of the Ordinance. They have chosen not to pursue this course and so cannot advance that they have standing on the basis that they seek to pursue a matter of public interest.

[17] Counsel for the Defendant went on to submit that in failing to pursue this alternative recourse and in seeking to raise a challenge to the text of the Notice and the new requirements set out in the amended Forms, the Claimants are seeking to frustrate the Defendant's efforts to undermine the fraudulent and unlawful activities which these new measures were intended to subvert. Relying on

the authority on **Chandler v Secretary of State for Children, Scholls and Families**[3] and **R (Feakins) v Secretary for State for the Environment**[4] Counsel argued that in seeking to secure this collateral advantage the Claimants cannot be said to be approaching the Court with the public interest in mind and as such lack the standing to bring a judicial review claim in the public interest. Counsel specifically relied on the judgment of Dyson LJ in **R (Feakins) v Secretary for State for the Environment** where at paragraphs 23 – 24 he noted:

> "23. In my judgment, if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing merely because he raises an issue in which there is, objectively speaking, a public interest. As Sedley J said in ***R v Somerset County Council and ARC Southern Ltd, ex p Dixon***[5], when considering the issue of standing, the court had to ensure that the claimant was not prompted by an ill-motive, and was not a mere busybody or a trouble-maker. Thus, if a claimant seeks to challenge a decision in which he has no private law interest, it is difficult to conceive of circumstances in which the court will accord him standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill-will or for some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances. If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but some other reason, then that is material to the question whether he should be accorded standing.
>
> 24. It follows that I must reject the submission of Mr. Stephen Smith QC that a claimant's motive is irrelevant."

[18] Turning to the *locus standi* of the Second Claimant, Counsel argued that the Second Claimant is in fact a holder of a licence and is therefore not a person aggrieved by the refusal of the Defendant to grant a liquor licence. As such, he can have no sufficient interest in the Notice related to the sitting in December 2014. Counsel for the Defendant submitted that it is not enough for the Second Claimant to say that he had no choice but to comply with the unlawful Notice in order to obtain this licence. Counsel for the Defendant submitted that in any event, if he was dissatisfied with the Magistrate's decision, under section 26 of the Ordinance, the Second Claimant may appeal the Defendant's decision or may apply to the Governor who in his absolute discretion may grant a licence to sell intoxicating liquor.

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[3] [2010] ACD 7
[4] [2003] ALL ER 39
[5] [1997] Env LR 111

[19] The evidence before the Court also reveals that between October 2014 and April 2015, the First Claimant acting on behalf of his clients wrote several letters to the Licensing Magistrate, the Governor, the Premier, the Attorney General seeking redress. Counsel for the Respondent relied on the case of **R v Secretary of State for the Environment ex parte Rose Theatre Company**[6] and submitted that this action alone could not clothe the First Claimant with sufficient interest if he did not initially have sufficient interest to pursue the Claim.

[20] In that case, the applicants argued that they were not mere busybodies. Counsel submitted that the very fact that the Secretary of State has answered with care the representations made by those whose will the applicant embodies gives them a sufficient interest for the purpose of this application. Schienmann J did not agree. He held that an individual does not have sufficient interest in an executive decision just because they are concerned about it or its effect. A collection of people without sufficient interest could not obtain standing as a result of grouping together or forming an organization. In essence, if the individual members do not have standing, the group will not have standing.

[21] Schienmann J observed:

> 'I can therefore consider the question of standing by considering whether an individual of acknowledged distinction in the field of archaeology, of which the company has several amongst its members, has sufficient standing to move for judicial review of a decision not to schedule… It seems to be that the decision not to schedule is one of those governmental decisions in respect of which the ordinary citizen does not have a sufficient interest to entitle him to obtain leave to move for judicial review' and 'I do not consider that an interested member of the public who has written and received a reply in relation to a decision not to schedule a site as an ancient monument has sufficient interest in the decision to enable him to apply for judicial review. Finally, I ought to say that I recognise the force of Mr. Sullivan's submission that since an unlawful decision in relation to scheduling either has been made or may well be made in the future, my decision on standing may well leave an unlawful act by a minister unrebuked and indeed unrevealed since there will be those in the future who will not have the opportunity to ventilate – on this hypothesis – their well-founded complaints before the court.
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> This submission is clearly right. **The answer to it is that the law does not see it as the function of the courts to be there for every individual who is interested in having the legality of an administrative action litigated. Parliament could have given such a wide right of access to the court but it has not done so. The challenger must show that he 'has a sufficient interest in the matter to which the application relates'. The**

[6] [1990] 1 QB 504 at 521

court will look at the matter to which the application relates – in this case the non-scheduling of a monument of national importance – and the statute under which the decision was taken (in this case the Act of 1979) and decide whether the statute gives that individual expressly or impliedly a greater right or expectation than any other citizen of this country to have that decision taken lawfully. We all expect our decision makers to act lawfully. We are not all given by Parliament the right to apply for judicial review.' Emphasis mine

COURT'S ANALYSIS AND FINDINGS

[22] Although the issue of *locus standi* is technically a preliminary issue, the courts have held that apart from cases where the applicant's interest is so tenuous that standing can easily be denied at the leave stage, standing will generally be determined alongside the merits of the case.[7]

[23] Applying this legal principle[8], this Court is obliged to consider the issue of standing as part of the hearing of the merits of this case and in so doing the Court has had regard to the provisions set out at CPR Part 56.2.

[24] At the substantive hearing of the case, the question of what is a "sufficient interest" in the matter to which a claim relates has been deemed to be a mixed question of fact and law and is not purely a matter of discretion for the court. At this stage, the question of standing is a question of fact and degree and taking into account the relationship between the applicant and the matter to which the application relates and having regard to all the circumstances of the case.

[25] In **R v IRC ex parte National Federation of Self Employed and Small Businesses Ltd**[9], Lord Wilberforce observed:

> "…it will be necessary to consider the powers or duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed."

[26] A classic exposition of principle of standing is contained in the judgment of Rose LJ in **R v Secretary of State for Foreign Affairs ex parte World Development Movement Ltd.**[10] At page

[7] IRC v National Federation of Self Employed and Small Businesses [1982] AC 617
[8] The Court has also applied the reasoning in Spencer v Attorney General of Antigua and Barbuda, Civil Appeal 3 of 1998 applied in Attorney General of Saint Lucia v Martinus Francois
[9] At page 630
[10] [1995] 1 ALL ER 611

620 of the judgment the learned Judge made it clear that a number of other relevant factors may also be considered:

> "The authorities referred to seem to me to indicate an increasingly liberal approach to standing on the part of the courts during the last 12 years. It is also clear from ***IRC v National Federation of Self-Employed and Small Businesses Ltd***, that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case (see [1981] 2 ALL ER 93 at 96, 110, 113, [1982] AC 617 at 630, 649, 653 per Lord Wilberforce, Lord Fraser and Lord Scarman).
>
> **Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing**. In Professor Sir William Wade's words in *Administrative Law* (7th edn, 1994) p 712:
>
> > '… the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved.'
>
> **Leaving merits aside for a moment**, **there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law**, as Lord Diplock emphasised in ***IRC v National Federation of Self-Employed and Small Businesses Ltd*** [1981] 2 ALL ER 93 at 107, [1982] AC 617 at 644 **the importance of the issue raised, as in** Ex ***p Child Poverty Action Group*****; the likely absence of any other responsible challenger, as in** Ex ***p Child Poverty Action Group*** **and** Ex ***p Greenpeace*** **Ltd; the nature of the breach of duty against which relief is sought (see *IRC v National Federation of Self-Employed and Small Businesses Ltd*** [1981] 2 ALL ER 93 at 96, [1982] AC 617 at 630 **per Lord Wilberforce); and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid (see** Ex ***p Child Poverty Action Group***[1989] 1 ALL ER 1047 at 1048, [1990] 2 QB 540 at 546***)*****.** All, in my judgment, point, in the present case, to the conclusion that the applicants here do have a sufficient interest in the matter to which the application relates within s 31 (3) of the 1981 Act and Ord 53, r 3 (7).
>
> It seems pertinent to add this, that if the Divisional Court in **Ex *p Rees-Mogg*** eight years after **Ex *p Argyll Group*** was able to accept that the applicant in that case had standing in the light of his 'sincere concern for constitutional issues', a fortiori, it seems to me that the present applicants, with their national and international expertise and interest in promoting and protecting aid to underdeveloped nations, should have standing in the present application." Emphasis mine

[27] The Claimants in the case at bar contend that the allegations of illegality which arise in this action are meritorious and of critical public importance. They say that the case before the Court reveals a Magistrate who has purported to usurp the legislative functions which are constitutionally ascribed to the Legislative Assembly. Counsel for the Claimants submitted that in our democracy there is no

greater challenge than ensuring the sanctity of the separation of powers doctrine. It is for the Legislature to enact laws and for judiciary to interpret and execute these laws. In that regard, the Claimants state that this case raises significant constitutional issues which go to the very heart of this democracy.

[28] The Claimants further state that their primary concern is vindicating the rule of law. They say that the issues raised are of some importance because it is critical that the citizenry be clear as to the substantive and procedural requirements of the laws which govern them.

[29] In **Attorney General of St. Lucia v Martinus Francois,** St. Lucia Civil Appeal 3 of 2004, Rawlins J A approved the approach of first considering the merits of the claim. At paragraph 144 -146 he stated:

> "Historically, locus standi has been a threshold issue that was determined before the substantive issues in public law cases. Recent years have seen inexorable changes that have sometimes resulted in the determination of substantive issues before locus standi is considered. This was the approach that this Court took in Re Blake (1994) 47 WIR 174. In this case, this Court canvassed the merits of an application that challenged the appointment of a Prime Minister after inconclusive general elections. It found that the application was unmeritorious. The Court therefore decided that it was unnecessary to consider whether the applicant had locus standi, either by way of sufficient interest or relevant interest, in the subject matter of the application. In Spencer v The Attorney General of Antigua and Barbuda (1999) L.R.C. 1, through the Judgment that was delivered by Sir Dennis Byron, C.J., (Ag.), as he then was, confirmed and commended this approach.
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> The applications in Spencer were for declarations under the Constitution. However, it is my view that the approach that was used and recommended in that case is also referable to claims for judicial review and for declarations outside of the Constitution. Lord Denning, MR, applied it in Blackman v A.G. [1971] 1 WLR 1037, in which a private citizen sought an order declaring that it was unconstitutional for the United Kingdom to submit to the Treaty of Rome. In that case he found that the claim was unmeritorious and did not therefore consider whether the applicant had locus standi.
>
> This approach that was recommended in Spencer accords with good law and reason. **An applicant for a declaration can have no locus standi in an unmeritorious claim. On the other hand, in a meritorious case, it must be necessary to canvass the issues and the facts in order to determine whether there is sufficient nexus between an applicant and the subject matter of the claim to give him or her locus standi." Emphasis mine**

[30] After a through consideration of the merits of the case, the learned Judge concluded at paragraph 152:

> "In this case Mr. Francois does not have locus standi because I have found the claim to be unmeritorious. Even outside of this, he would have perhaps encountered some difficulty on the test of standing for declarations that comes out of the Gouriet case. It might have been open to the court to use the factors adumbrated in R. v. Secretary for Foreign Affairs, ex p. World Development Movements Ltd. [1995] 1 ALL E.R. 611 if the claims were meritorious."

[31] Taking guidance from this approach, it follows that the Court should first consider the merits of claim before it can arrive at a conclusion on the question of standing.

[32] However, Claimants appear to contend that the question of their standing can be determined in a more direct way. In that regard, the Court has had to consider the modern approach to standing as revealed in regional appellate decisions which have considered **CPR Part 56.2**. In **Attorney General of Saint Lucia v Francois**,[11] Rawlins JA after referring to **Gouriet v Union of Post Office Workers** commented as follows:

> "Part 56.2 of the Rules then provides very liberal and relaxed rules of standing for applications for judicial review. These, as we have seen, relate to applications for the prerogative orders, interest groups and bodies are particularly facilitated. There is still a requirement that the person or body should be "adversely affected' by the decision. Interestingly, Part 56.2 (d) of the Rules confers standing on a body or group that can show that the subject matter complained of is of public interest, and the body or group possesses expertise in the subject matter of the application."

[33] In **Belize Bank Limited v Association of Concerned Belizeans**[12] the Belize Court of Appeal in considering Part 56.2 noted that it was common ground that the phrase "sufficient interest" describes a test of standing that was relatively easy to satisfy, or a "generous conception of *locus standi*.**"** That Court could not ignore the movement in public law away from the "technical restriction on *locus standi*".

> "The editors of the 9th edition of Wade's Administrative Law, in a discussion on "the old law of standing", observe that the law of standing "has been passing through a transitional phase", from the days when there were different rules for different remedies "as might be expected in a system which operates with a mixture of private law and public law remedies" (page 680). They go on to recognize the transformative effect of the Order 53 procedure for judicial review in 1977 (and its subsequent embodiment in the the Supreme

[11] St. Lucia Civil Appeal 3 of 2004 at paragraph 151
[12] Belize Civil Appeal 18 of 2007

Court Act 1981) on the old law of standing. **The introduction of the CPR in Belize in 2005 was, for us, an equally or even more significant watershed that makes it strongly arguable, in my view, that, by structuring Part 56 in the way in which they did, the rule makers fully intended a further transformation of the old rules of standing in the jurisdiction."**

[34] Judicial authorities also reflect an increasingly liberal approach to standing. In the case of individuals, it will normally be fairly easy for them to demonstrate sufficient interest, so long as they are in some way personally interested in the decision they wish to challenge. Applicants are not required to have a direct financial or legal interest, although it does help. The difficulties arise in determining when one individual may challenge a decision taken in respect of another individual, or who may challenge a decision that affects the public generally or a sector of the public.

[35] In **R v Independent Broadcasting Authority, ex parte Whitehouse**[13], a television licence holder was found to have sufficient standing to challenge a decision to broadcast a controversial film. It was indicated that every television licence holder would have *locus standi* in litigation relating to the broadcast of programmes likely to give offence. Thus, the fact that the applicant was a licence-holder, rather than simply a viewer, was enough to give her sufficient standing.

[36] In the case at bar, the facts reveal that the Second Claimant operates a business which requires that he recurrently obtains a licence to sell intoxicating liquor. In the absence of a valid licence, it is clear that the Second Claimant would be in breach of the law and guilty of a serious offence. The Second Claimant avers that he is in fact a licence holder and in 2014 he made an application which engaged the services of the First Claimant and which engaged the process prescribed in the Ordinance. He avers that in November 2014, he applied for a liquor licence renewal in a form which was prescribed by the Ordinance and which had been accepted in the past. However, this Form was not accepted by the Respondent on that occasion.

[37] He avers that on 6th November 2014 he submitted the revised form which appears to have been prescribed by the Respondent and it was only on that basis that his application was processed and he was granted a renewal. On June 2015, he followed a similar process and he was again successful in obtaining a renewed licence.

[13] (1984) Times 14 April

[38] The Court has no doubt that the Second Claimant yielded to the revised process because he is ultimately a businessman with an eye on the bottom line. It is however clear that in doing so he had serious reservations which he highlighted at paragraphs 12 – 17 of his Affidavit filed on 16th October 2015.

[39] The Respondent has submitted that because the Second Claimant's licence was in fact granted, he is not a person aggrieved and therefor has no standing to bring the claim. This Court does not agree with this contention. As a person who operates a business which obliges him to obtain a licence under the Ordinance, the Second Claimant is clearly a person whose interest is affected by the decision taken by the Respondent to make what are clearly substantial changes to the legislative regime. Given the nature of Second Claimant's business and its nexus to the liquor licensing regime, this Court cannot come to the conclusion that the Second Claimant has no interest at all or no sufficient interest in the subject matter of the claim.

[40] The application which he initially submitted was clearly rejected. Moreover, the fact that he sought and eventually obtained a renewal of the licence does not deprive him of standing in circumstances where he felt compelled to follow a procedure about which he clearly has reservations and which he maintains is unlawful.

[41] In light of the obvious standing of the Second Claimant, it was clearly unnecessary for the First Claimant to maintain his role in this Claim. However, he has chosen to do so, advancing that his personal rights have been affected because he is not able to properly advise his clients on the statutory requirements of the Ordinance. There is case law which supports this contention.

[42] In **Re Ward, Application for Judicial Review**[14], the court held that an architect with a rural practice has in interest in the proper administration of planning law which directly impacts on his clients and on his business. In that case, the applicant identified the following interests (a) The impact of the impugned policy on his business, short and long term; (b) Its potential impact on the people he employs (c) The impact on the planning applications which he had submitted on behalf of his family which he asserts is directly affected by Draft PPS 14 and in respect of which he has a family interest.

[14] [2006] NIQB 67

[43] Girvan J dealt with the question of his standing in the following way:

> "Where, as here, the claimant is bringing the claim in as personal capacity, the House of Lords in ***Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses***[15] has held that at the leave stage the court should take a preliminary view of standing as the question of standing can be reconsidered at the full hearing in the light of all the evidence. At the leave stage the court is only concerned to exclude those with no legitimate interest in the proceedings, that is those who can properly be described as cranks, busybodies or mischief makers (per Lord Wilberforce, Lord Diplock and Lord Scarman in *IRC*). At this stage, I conclude that the applicant has a sufficient interest to bring the application. It could not be said that he is a mere busybody. As an architect with a rural practice he has an interest in the proper administration of planning law and the proper administration of the planning law which directly impacts on his clients and on his business."

[44] In this regard, the Court notes the several unchallenged affidavits produced by persons who claim to have utilized the First Claimant's services over the years. Much like the Second Claimant, any one of those persons would have been similarly compelled to follow the Respondent's new procedures and utilized the revised forms if they wished to obtain a licence to sell liquor in the Territory. In the premises, it could not be said that he is a mere busybody.

[45] Alternatively, the Second Claimant advances that the matters raised in this Claim are of public importance and should be examined by a court. According to him, a public spirited citizen may be allowed to seek judicial review where there is a serious issue of public importance which should be examined by the court. Such a claimant need not show any personal proximity to the decision or special impact or interest over or above that shared with the general public, neither does he have to be a part of the community impacted by the impugned decision.[16] In **R (on the application of Kides) v South Cambridgeshire DC**[17], the English Court of Appeal observed:

> "That leaves the issue of standing. As to that, **it seems to me that there is an important distinction to be drawn between, on the one hand, a person who brings proceedings having no real or genuine interest in obtaining the relief sought, and on the other hand a person who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he has no personal interest.**

[15] [1982] AC 617 ('*IRC*')
[16] R v Surrey CC ex parte Williams [2012] EWHC516 (Admin)
[17] [2002] EWCA Civ.1370 at paragraph 132 – 135

> **I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief which he seeks from relying, in support of his claim for that relief, on grounds (which may be good grounds) in which he has no personal interest.**
>
> It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds. Nor do I read the judgment of Sedley J (as he then was) in *ex parte Dixon* as casting doubt on that proposition. Similarly, Lord Donaldson MR's reference (**in *R v. Monopolies and Mergers Commission, ex parte Argyll Group plc*** [1986] 1 WLR 763 at 773) to "the applicant's interest" is, as I read it, a reference to the applicant's interest in obtaining the relief sought: in this case, the quashing of the planning permission.
> Accordingly, I would respectfully disagree with the judge's conclusion (in paragraph 109 of the judgment) that the appellant be debarred from relying on the argument based on affordable housing." Emphasis mine

[46] In **Ex parte World Development Movement Ltd**. none of the supporters of that group were directly affected by the particular grant of overseas aid to Government of Malaysia and yet were held to have standing. In **R v Secretary of State of Foreign and Commonwealth Affairs ex parte Rees-Mogg**[18] a former editor of The Times was held to have sufficient standing to challenge the Foreign Secretary's decision to ratify the European Union Treaty because of "*his sincere concern for constitutional issues*". In **R v H.M. Treasury ex parte Smedley**[19]**,** a public spirited tax payer objected to the proposed payment of £121m to the European Community without an Appropriation Act, but under an Order in Council. It was felt that this raised a serious issue as to the powers to make an order in council, that would automatically lead to substantial expenditure by the government and he was held to have sufficient standing.

[47] The Court concurs that the fact that a claimant has made representations to a public authority and may or may not have received responses would not afford him standing to commence a claim. However, a track record of activism in the area may well tip the scales. In the case at bar, the First Claimant recounts his professional background which included his work with liquor licence applications through his business PL Consultancy. Counsel for the Claimant submitted that the First Claimant's extensive experience in dealing with liquor licencing applications demonstrates

[18] [1994] QB 552
[19] [1985] QB 657

that he has a clear interest in promoting and protecting the regime of liquor licensing in the Territory and in giving guidance and advice and assistance to persons who engage this law.

[48] In the Court's judgment, the facts of this case reveal a public spirited applicant who has a genuine professional interest in the relief sought notwithstanding that he may not himself be a vendor of liquor or an applicant under the Ordinance. Given the liberalized interpretation of Part 56.2 prescribed by the Eastern Caribbean Court of Appeal, a reasonable assessment of the First Claimant's position leads this Court to conclude that he is a person who is legitimately and perhaps passionately interested in obtaining the relief sought.

[49] Counsel for the Respondent has submitted that the Claimants' motive for bringing this claim should deprive them of standing. In the Court's judgment the Respondent has failed on a balance of probabilities to demonstrate that the Claimants are actually personally motivated by the suggested collateral motive. In considering this submission the Court is guided by the following caution prescribed by Dyson LJ in **R (Feakins) v Secretary for State for the Environment** at paragraph 24 of the judgment:

> "Since the hearing of this appeal, our attention has been drawn to **R *(Mount Cook Land Limited) v Westminster City Council*** [20], and in particular the obiter dicta of Auld LJ at paras 45 and 46. He counselled caution against treating motive as important in this context. He said:
>
> > "I do not say that considerations of a claimant's motive in claiming judicial review could never be relevant to a court's decision whether to refuse relief in its discretion, for example, where the pursuance of the motive in question goes so far beyond the advancement of a collateral purpose as to amount to an abuse of process. The court should, at the very least, be slow to have recourse to that species of conduct as a basis for discretionary refusal of relief".
>
> I would not disagree with these observations."

[50] The Court is not satisfied that the Respondent has shown that the Claimants reason for filing the Claim was to further the purpose of frustrating the Respondent's efforts to undermine the fraudulent and unlawful activities which these new measures were intended to subvert, rather than from a genuine desire to challenge, the lawfulness of the Respondent's actions.

[20] [2003] EWCA Civ 1346

[51] In the course of her submissions, Counsel for the Respondent placed significant reliance on the reasoning in **R v Secretary of State for the Environment, ex parte Rose Theatre**. *In that case* The Divisional Court ruled that the Trust did not have standing to challenge the decision. An individual does not have sufficient interest in an executive decision just because they are concerned about it or its effect. A collection of people without sufficient interest could not obtain standing as a result of grouping together or forming an organization. In essence, if the individual members do not have standing, the group will not have standing.

[52] While this judicial authority sets principles of general application, the Court was not satisfied that it assisted the Respondent's case because the Claimant in the case at bar does not claim to be bringing the claim on a representative basis.

[53] For the reasons set out herein, the Court finds that the Claimants have the requisite standing to bring this claim. The Court will now proceed to consider the substantive merits which arise.

WHETHER THE RESPONDENT ACTED ULTRA VIRES HER PRESCRIBED STATUTORY POWERS UNDER THE ORDINANCE

The Claimants' Case

[54] In framing his submissions Counsel for the Claimants referred the Court to the **Magistrate's Code of Procedure Act** Cap 44 of the Laws of the Virgin Islands which provides for the appointment of a magistrate by the Governor and which prescribes the powers and duties of that office. He submitted that these powers are supplemented by the provisions of the Liquor Licensing Ordinance which is intended to regulate and control the sale, supply and consumption of alcohol in this Territory.

[55] Turning then to the Ordinance, Counsel observed that it is a complete code with no rules and regulations enacted to effect its provisions. He further submitted that other than section 39 (3) which empowers the Governor in Cabinet to amend the Fifth Schedule of the Ordinance, there is

no other delegated law making power vested. As such, he submitted that the Respondent would have no delegated power to effectively amend the legislation or to amend or prescribe forms.

[56] Counsel submitted that the Licensing Magistrate must not only act in accordance with the Ordinance, she may only carry out those functions which are specifically prescribed by the Legislature. He submitted that in issuing the Notice in October 2014, in which she alerted the public to changes to the Form prescribed in the Second Schedule to the Ordinance, the Licensing Magistrate acted unlawfully.

[57] The Claimants do not dispute that comprehensive legislative reform was appropriate and necessary. However, they argue that it is not for the Respondent to legislate these reforms in breach of the constitutional doctrine of separation of powers. In that regard, Counsel relied on the cases of **R v Dudley Magistrates' Court, ex parte Payne [1979] 2 All ER 1089** and **Maynard v Osmond - [1977] 1 All ER 64.**

[58] First, the Claimants submit that on its face the Notice appears to have been issued by the Licensing Magistrate and not the Clerk as is prescribed by section 12 of the Ordinance. This contention was not disputed by the Respondent who argued that the current human resource arrangements no longer provide for the position of Clerk to the Magistrate's Court. Counsel for the Respondent also submitted that it must be part of the Respondent's power under section 19 of the Interpretation Act that she is authorized to issue the Notice.

[59] Further, the Notice went on to significantly amend the prescribed **FORM A** which is the prescribed form of application for persons applying for a temporary permit to sell intoxicating liquor and those persons making a new application for premises permit. The Notice also prescribes a hitherto unknown and entirely new form intended for persons seeking to renew their licence.

[60] Counsel submitted that under the Ordinance, the Licensing Magistrate's powers are circumscribed. Unlike section 106 of the Registered Land Ordinance Cap 229 of the Laws of the Virgin Islands, the Licensing Magistrate has no equivalent power to issue forms or to introduce requirements which were not prescribed by the legislation. He concluded that the new Forms are ultra vires and repugnant to the Ordinance. He argued that where a statute has conferred on any body the power

to make decisions affecting individuals, the courts will not only require the procedure prescribed to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

[61] The Claimants also contend that the Respondent's actions were procedurally unfair. Counsel relied on the legal principle which prescribes that persons who are likely to be directly affected by a public authority's actions should be given prior notification of the action proposed to be taken. Counsel argued that in the case at bar, the Claimants were not made aware of the new requirements (including the requirement that the application be notarized) within a reasonable time. They assert that the Notices was issued separately from the Forms and that applicants only became aware of the same when they attended before the Magistrate's Court with the old forms only to be provided with a copy of the new Forms and instructed to complete the same. The Claimants submit that this abrupt departure from the normal practice and procedure is unfair and contrary to the principles of natural justice.

[62] Counsel further argued that the Respondent failed to give the Claimants an opportunity to submit representations to her before deciding to issue the Notice which was clearly outside the express provisions of the statute. After the Notice was issued, the Respondent compounded her error when she failed to respond to the several written representations made by the First Claimant. Counsel submitted that fairness dictated that the Respondent respond to the First Claimant's letter which required clarification of the legal basis for her decisions.

The Respondent's Case

[63] The Respondent's case commenced with the general proposition that legislation includes what is implied as well as what its expressed. She relied on the *maxim verba relata inesse videntur* (words are to be considered as incorporated) and the judgment in **Gwynne v Burnell**[21]**.** In that case Coleridge J observed:

> "if …the proposed addition is already necessarily contained, although not expressed, in the statute, it is of course not the less cogent because not expressed."

[21] (1840) 6 Bing NC 453

[64] The Respondent contends that she has a full grasp of the Ordinance's provisions and that the Notice gives effect to the Ordinance by indicating what was necessary to be implied by the factors which she is expressly required to consider. She contends further that to the extent that the Notice contains what must have been implied, it is an expression of the Ordinance and therefore not an illegality.

[65] The Respondent finds further support for this contention in the judgment of **Chorlton v Lings**[22] where at 387 Willes J stated that "an *implication need not be necessary: it is enough if it is proper to draw it."*

[66] Counsel for the Respondent then identified several judicial authorities which illustrate instances where the court considered statutes and implied the necessary detail to make them effective given the state of the law.[23] Words may be implied in a statute by operation of law, because they arise as a matter of grammar or syntax from the words that are expressed or the implication may arise from the legal and political context of the Act. Counsel submitted that the proposed adjustment to the Form of application and the creation of the Form for renewal was necessary for all these reasons and is therefore lawful.

[67] The Respondent asserts that the October 2014 Notice was issued to alert applicants to the information which the Licensing Magistrate now requires and which were incidental to her powers and mandate. She further submitted that she is generally empowered to administratively control her proceedings. In regulating such proceedings, she submitted that as a judicial officer she is entitled to take judicial notice of intervening legislative provisions which could affect her functions under the Ordinance. She pointed to the Physical Planning Act, Building Regulations the Public Health Ordinance and the Business Professions and Trade Licences Act all of which came into operation after the Liquor Licensing Ordinance but she submitted that she is obliged to taken into account their legislative provisions because they speak to the fitness of the premises. In fact, she went further to state that these statutes must be taken to have implied amended the Liquor Licensing Ordinance. She relied on the cases of **Chorlton v Lings (1868) L.R. 4 C.P. 374 and**

[22] (1868) LR 4 CP 374
[23] Brett v Brett (1826) 3 Add 210; Williams v Bedwellty Justices [1996] 3 App ER 737;

Brett v Brett [1824-34] All ER Rep 776 and R-(Williams) v Bedwellty Justices - [1996] 3 ALL ER 737 which she contends illustrate this point.

[68] Counsel concluded that the Forms are not amended arbitrarily but merely reflects matters which must properly be implied as a result of the statutes which have been enacted since the Ordinance came into force.

[69] The Respondent does not deny that these new requirements constituted a new licensing regime but she asserts that it is necessary to avert fraudulent conduct and illegalities which persisted because the legislative provisions were not comprehensive or modern. She pointed to the fact that under the previous procedures, persons were able to obtain licences without having their identification properly authenticated. So that long after the licence holder had passed died or otherwise ceased to carry on business, licences were still being obtained in their names. She also noted that persons were purporting to obtain licences on behalf of their principals in circumstances where there was no proof of agency. Counsel relied on legal principle that an Act of Parliament must not be allowed to be used for fraudulent purposes.

[70] Counsel for the Respondent further submitted that when the Ordinance is considered holistically within the existing legal framework, it is impossible to conclude that the inly investigative functionary would be a member of the Police Force. She suggested that if one were to consider the factors which the learned Magistrate is obliged to consider, it is clear that the Police could not be the only entity to whom application should be directed. It is the Respondent's view that the new Forms are intended to solicit information relevant to the fitness and propriety of the applicants and their premises. Counsel therefore argued that referral to the named agencies i.e. the Fire and Rescue Department, Environmental Health Division, Department of Trade and Consumer Affairs and the Town and Country Planning Department should necessarily be implied.

[71] Counsel for the Respondent also submitted that the Respondent must have an implied power to amend and to prescribe statutory forms because she must be deemed to have the power to do all things reasonably necessary and incidental to her powers under the Ordinance. In that regard, she relied on section 19 (3) of the Virgins Islands Interpretation Act.

[72] With regard to the Claimant's contention that Respondent's actions breached the principles of natural justice and were procedurally unfair, Counsel for the Respondent relied extensively on the judgment in **Hopkins Developments Ltd. v Secretary of State for Communities and Local Government**[24] and made several submissions. First she argued that as no adversarial process obtains here, the question of procedural fairness would not arise. She also submitted that the Notice issued in relation to 1st December 2014 hearing actually resulted in the Second Claimant being granted a licence. She asserts that since the Second Claimant did not "test the Respondent" to see if indeed he would have been refused a licence without complying with the terms of the Notice and then pursue an appeal therefrom, it is not open to him to complain about the Notice.

[73] Counsel for the Respondent submitted that the First Claimant cannot complain about a want of procedural fairness because while he admits to knowing about the alternative recourse for redress under the Ordinance, he failed to lodge an appeal on behalf of his clients. Instead, they commenced a letter writing campaign which is not prescribed in the legislation and which could not assist them.

[74] She further asserted that there can be no complaint about a lack of procedural fairness when it comes to the Renewal Application Form because there was never a legislatively prescribed form for the renewal of licences under the Ordinance.

[75] Finally, Counsel argued that there was no procedural unfairness because the Notice was issued in October 2014 for a licensing hearing day in December 2014 and so the Claimants would have had more than sufficient time to prepare for the renewal applications.

COURT'S ANALYSIS AND CONCLUSION

The Legislative Framework

[76] It is clear that any discussion of the issues which arise must begin with an examination of the provisions of the Ordinance which existed at the material time. Section 3 of the Ordinance provides that:

[24] [2014] EWCA Civ. 470

> "Save as herein specially excepted, or hereby specially permitted, no spirits shall be sold either by wholesale or by retail in the Virgin islands except by persons thereunto duly licensed under this Ordinance, or on their behalf by persons in their immediate employment and then only in conformity with the terms of the licence held by such persons as set forth in this Ordinance. Any persons who without being at the time of such sale duly licensed so to do, or otherwise in conformity with the terms of his licence, shall either be personally or through or by any agent of servant, sell any spirits, or who shall permit any spirits to be sold in any house in his occupation shall be deemed in respect of each and every such sale to have committed an offence against this Ordinance and shall on summary conviction by liable to a fine not exceeding three hundred dollars or in default of payment thereof to imprisonment with or without hard labour for any term not exceeding six months."

[77] The Ordinance then goes on to prescribe the procedure for obtaining a liquor licence. It prescribes assigned licensing days on which the Licensing Magistrate shall hold special sessions of the Magistrate's Court for the purposes of hearing and considering applications for licences for the sale of intoxicating liquor.[25] The section also provides that the public is to be notified of such sessions by the publication (by the Clerk) of an advertisement in a local paper at least 1 month in advance of the session.

[78] Section 13 of the Ordinance provides that every person desiring to apply for a licence for the sale of intoxicating liquor shall, 14 days at least prior to any one of the licensing days, serve on the Licensing Magistrate, the Commissioner of Police and the Commissioner of Inland Revenue a notice in writing of his intention to make such application and shall publish such notice in a newspaper published in the Territory.

[79] The relevant form of the application is prescribed in **FORM A** of the Second Schedule to the Ordinance.

[80] Section 14 of the Ordinance provides that following the service of a notice, a police officer may enter the premises in order to inspect it.

[25] Section 12 of the Ordinance

[81] Section 16 of the Ordinance regulates the actual hearing of the application. It provides that every person applying for a licence shall appear before the Licensing Magistrate on a licensing day, and the Licensing Magistrate shall hear any objection which may be made by the Commissioner of Police or any person to the grant of the licence.

[82] At the completion of the hearing, if the Magistrate considers that the licence should be granted, his or her role is to issue to the applicant a certificate specifying the particular licence to be granted to such person and the location of the premises in respect of which the licence is to be granted. The Magistrate then forwards a copy of the certificate to the Commissioner of Inland Revenue. On the production of the Licensing Magistrate's certificate and on the payment of the prescribed fee, the Financial Secretary then grants to the person named in the certificate a licence of the kind and in the relevant form specified in the Third Schedule. The licence so granted shall be sufficient authority for the person named therein to sell intoxicating liquor on the premises in the manner set out in the licence.

[83] With the exception of the wholesale or still liquor licence, all licences granted remain in force for a period not exceeding 6 months and expire on the next licensing date after the date of such licence.

[84] Under section 22 of the Ordinance, a licence holder may *without notice* apply to the Licensing Magistrate on any licensing day for a *renewal* of the licence. There is no form prescribed in the Ordinance for such application. Interestingly, section 22 also prescribes that (1) the applicant need not attend in person unless he is required to do so by the Licensing Magistrate; (2) the Licensing Magistrate shall not entertain any objection to the renewal or take any evidence with respect to the renewal unless written notice of an intention to object has been served on the holder and on the Licensing Magistrate at least 7 days before the licensing day and; (3) if the applicant for renewal objects to any such notice and the Magistrate finds the notice defective in form or substance, or if it is served out of time, the Licensing Magistrate may adjourn the session to a convenient day to allow a fresh notice to be served on the applicant within such time as ordered by the Licensing Magistrate.

[85] After considering the application and unless cause can be shown to the contrary, the Licensing Magistrate grants to the applicant a certificate authorizing the renewal of the licence. Thereafter, on

producing the certificate, the expired licence and the appropriate fee, the Financial Secretary shall issue a licence to the applicant.

[86] Under this Ordinance, the Financial Secretary is not the only authority who can grant a licence. Under section 25C, the Governor may in his absolute discretion authorize and grant a licence to any person whether a licence holder or not and for such period and during such hours and on such premises and subject to such conditions as he may prescribe.

[87] The Ordinance also establishes an appeal procedure if an applicant feels aggrieved by a refusal of his application. Section 26 prescribes that he may appeal to High Court Judge who may confirm or overrule the decision of the Magistrate.

The Scope of the Decision under Review

[88] It is common ground between the Parties that the subject matter of this Claim is not a refusal of a licence or indeed the refusal of a renewal of a licence. The subject for review is the decision of the Respondent to issue the October 2014 Notice which set out significant substantive and procedural changes. Critically, the Notice makes it clear that the application forms have been revised. There is now a Form A intended for new applications and another intended for renewal applications. The Forms and the Notice make the following fundamental changes to the legislative regime:

i. All applicants must identify the Block and Parcel number for the relevant premises;

ii. New applications must be served on the Commissioner of Police, the Commissioner of Inland Revenue, the Fire and Rescue Department, Environmental Health Division, Department of Trade and Consumer Affairs and the Town and Country Planning Department;

iii. Renewal applications must be served on the Commissioner of Police and the Commissioner of Inland Revenue;

iv. All applicants must demonstrate that they are in possession of a valid trade and business licence to trade in the manner in which they propose to be licensed;

v. New applicants may also need to obtain development planning permission to operate at the location. Applicants may also need to be inspected by the BVI Fire and Rescue Department. The Notice urges new applicants to make inquiries of the relevant government departments on these issues;

vi. Applicants who wish to seek renewal through a third party agent must submit proof of the agent's authority to act;

vii. Objectors to a renewal application must serve their written objections on the Commissioner of Police and the Commissioner of Inland Revenue and are required to attend the sitting on the licensing day;

viii. Persons whose licences have lapsed are required to make a fresh application as a new applicant;

ix. All application forms must be signed and notarized.

[89] It follows that the Claimants grievance is not directed at a specific grant or refusal of a licence but rather at the administrative decisions taken by the learned Magistrate which fundamentally changed the law and procedures which govern the liquor licensing regime in this Territory. The Claimants clearly do not confine their grievance to any particular licensing period and so it is no answer to their claim to advance that they have not proved that they were refused a licence on the particular licensing day. Instead, the Claimants contend that from October 2014, the Respondent radically changed the legislative landscape going forward in a way which was constitutionally improper and ultra vires.

[90] The Respondent has argued that in creating these Forms and incorporating these substantive changes, she acted within her statutory powers and in furtherance of the policy and objectives of the Ordinance. Counsel for the Respondent premises this contention on the principles of statutory interpretation which implies a power in a court to supply an omission in a statute so as to bring out its real intention.

Does the Respondent have implied ancillary powers under the Ordinance?

[91] Generally, legislative drafters are constrained to be brief and so they are forced to leave much of what they intend to implication. As such, words have been deemed to be unnecessary where, although the proposition they embody is intended to have effect, interpreters will accord that effect without its being spelt out. Effect may be given to unexpressed words for any one of three reasons. The first is that it is the known and accepted practice to treat the words as implied: they

are there by operation of law. The second reason is that the implication arises as a matter of grammar or syntax from the words that are expressed. The third reason is that the implication arises from the legal or political context of the Act.[26]

[92] Case law is replete with examples where judges have recognized the existence of implied meanings. The question whether an implication should be found within express words of an enactment depends on whether it is proper to find the implication having regard to the legislative guides to legislative intention.

[93] In **R (on application of Morgan Grenfell & Co. Ltd) v Special Commissioner**[27] Blackburne J cited the following dictum from Lord Nicholls:

> "Relevant to (4) - what must be shown to give rise to a necessary implication that a fundamental right such as legal professional privilege is intended to be overridden - is the observation of Lord Nicholls of Birkenhead in ***B (A Minor) v DPP*** [2000] 2 WLR 452 at 458 (a case concerned with whether there was a need for a mental element in a particular sexual offence) that:
>
> > "'Necessary implication' connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence."

[94] In construing the wording of an enactment to find the legal meaning it is therefore necessary to take account of the nature of the enactment and the surrounding circumstances.

[95] The Legislature makes laws by enacting primary legislation. However, it is not always appropriate or possible for that body to deal with all of the detailed underlying systems and structures that give effect to an Act. In these cases, Parliament often includes in an Act a provision which authorizes another body, usually part of the executive, to exercise some of its law-making functions to deal with those detailed underlying systems. For example under section 106 of the Virgin Islands Registered land Ordinance, Cap 229, the Chief Registrar is directly empowered to approve or prescribe forms.

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[26] Bennion, ***Statutory Interpretation***, 4th edition,
[27] [2001] EWCA Civ. 329

[96] The question of whether an implication should be found within the express words of an enactment depends on whether it is proper or legitimate to find the implication in arriving at the legal meaning of the statute having regard to the accepted guides to legislative intention. In determining whether an implication is "*proper*", a court must consider the relevant factors including the rules of language and the principles of law. One critical legal principle is that of proportionality. This was explored in the case of **Director of Public Prosecutions v Meaden**[28] where at paragraph 20, Rose LJ observed:

> "Mr. Davies submits, and this is conceded by Mr. Fitzgibbon on behalf of the defendant, that it is a legitimate and proportionate reading of any statutory power to search that reasonable steps may be taken by the police to ensure that the search is effective. The right of any individual to move freely around premises as they are searched, and thereby likely to compromise the search, must be balanced against the forensic requirements of the search in terms of evidence. There is an obvious public interest in the police being able to carry out thorough, effective, searches, and to secure the integrity of exhibits for evidential purposes."

[97] Another critical legal principle which arises in this case is best set out in the case of **Attorney General v Great Easter Railway Co.**[29] That case established the rule which provides that an express statutory power carries implied ancillary powers where needed. In that case, an Act of Parliament authorized a company to construct a railway. Two other companies combined and contracted with the first to supply rolling stock. An injunction was brought to try to restrain this, saying that such a contract was not explicitly provided for in any of the Acts incorporating the companies. The Court held that the contract was not ultra vires, but was warranted by the Acts. Lord Blackburn expressed the rule in this way:

> "where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited . . those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited."

[98] In that case Lord Selbourne also opined:

> "The doctrine of ultra vires 'ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

[28] [2003] EWHC 3005 (Admin)
[29] (1880) 5 App Cas 473

[99] More recently, in **Ward v Commissioner of Police for the Metropolis and others**[30] the claimant had been taken under warrant to a mental hospital, but was found not to be suffering any mental illness. The warrant in respect of the claimant had stated that the constable executing it was to be accompanied by a named psychiatrist, a named social worker and a named medical practitioner, the claimant's own doctor. She complained that the arrest was unlawful, since the police officer had not been accompanied by the persons named on the warrant. In the event, a doctor from the psychiatrist's team and a different medical practitioner had attended. The House was asked whether a magistrate being requested to issue a warrant under the 1983 Act had the power to require the police officer executing the warrant to be accompanied by a named social worker or mental health worker. If he had not, the names had been surplusage and the requirements of section 135 had been complied with.

[100] In the majority judgment written by Baroness Hale, the Court observed that as a general principle, there could be implied into a statutory power such incidental powers as were necessary for its operation. The implication had, however, to be necessary to make the power effective to achieve its purpose. The Court concluded that could not be said of section 135(1). It might not be possible to assemble the named professionals when the warrant came to be executed, and it made little sense to delay the execution, which was for the protection of the person concerned, until they were available. The presence of a doctor and social worker who knew the case well or, in the case of the doctor, was skilled and experienced in mental health might assist in judging whether the basis for the warrant was made out, but it could not be said that that was necessary for the proper functioning of section 135. It was not permissible to imply a power to insist that named persons were present and the claimant's claim against both defendants were dismissed.

[101] As a general principle, there can be implied into a statutory power such incidental powers as are necessary for its operation.[31] Thus, in **Bodden v Commissioner of Police of the Metropolis**[32]**,** a magistrate's power to order the detention of someone who willfully interrupted the proceedings of the court included *'all incidental powers necessary to enable the court to exercise the jurisdiction in*

[30] [2005] UKHL 32
[31] Bennion, ***Statutory Interpretation***, 4th edition, section 174.
[32] [1990] 2 QB 397

a judicial manner', specifically the power to direct that the person be brought before him. At page 405 of that judgment, the Beldam LJ stated:

> "In argument before us it was contended for the plaintiff that the power given to magistrates to order the detention of the offender under section 12 (2) did not include a power to order the defendant's officers to bring the plaintiff before the magistrate; the only power given was to take him into custody and detain him until the rising of the court. It was further contended that the magistrate had no power to inquire into the circumstances of the interruption for the purpose of deciding whether the person detained was acting wilfully.
>
> **In giving the magistrates' court jurisdiction to deal with the different kinds of contempt referred to in section 12 (1) (*a*) and (*b*), Parliament obviously intended to confer all incidental powers necessary to enable the court to exercise the jurisdiction in a judicial manner. After all, the powers were being conferred on justices who could be expected to discharge their functions as responsibly as when they were exercising their ordinary criminal jurisdiction.** It is, moreover, clear from the construction of section 12(2) that the purpose of the power to detain an alleged offender until the rising of the court was to ensure that the magistrates dealt with the matter as soon as they conveniently could without thereby interrupting the proceedings of the court; further, before committing the offender to custody, it is obvious that magistrates would, in cases where the circumstances demanded it, have to inquire into them because they can only exercise this further power "if [they think] fit."' **Emphasis mine**

[102] The Court is guided by the reasoning in these cases.

[103] It is now well established that statutory powers must be exercised for the purpose for which they are conferred and statutory authorities have a duty to promote the policy and objects of the statute. The policy and objects of a statute must be determined by construing the Act as a whole. If a public authority misconstrues the legislation or for some reason uses his discretion as to frustrate or run counter to the policy and objects of the statute then a person who is aggrieved is clearly entitled to invoke the protection of the courts.[33]

[104] The discussion must therefore commence with an analysis of the purpose and objectives of the legislative regime.

[105] Generally, liquor licensing legislation creates obligations and allocates responsibility to individuals, businesses, and communities for the supply, consumption, and promotion of alcohol. It regulates:

[33] Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935

i. who may sell and supply alcohol
ii. the commercial practices of licensed premises
iii. who may consume and access alcohol
iv. where alcohol may or may not be consumed
v. who is responsible for ensuring compliance with the regulations
vi. the offences, disciplinary procedures, and penalties applicable to those who fail to adequately comply with their statutory obligations.

[106] A comprehensive reading of the Ordinance makes it clear that the following licensing objectives arise; (1) the prevention of crime and disorder; (2) public safety; (3) prevention of public nuisance, and (4) the protection of children from harm. The intention of the Legislature is to regulate and control the sale, supply and consumption of alcohol in a way that is consistent with the expectations, needs and aspirations of the community. Ultimately, the intention is to ensure that the sale, supply and consumption of alcohol contributes to, and does not detract from, the amenity of community life.

[107] The Ordinance prescribes grounds on which a licence may be refused. In regard to the individual, persons under the age of 21 or who are of bad character; or who have allowed licensed premises to become a nuisance to the neighbourhood within the preceding 5 years; or who have neglected to comply with the provisions of the Ordinance; or are already the holder of a licence within a 3 mile radius of the place in respect of which an application is made, may not be granted a licence. In addition, if a previously held licence was endorsed or forfeited under the provisions of the Ordinance or a repealed version of the Ordinance then this may also be a ground for refusal.

[108] In the case of premises, the legislation provides that if they are unfit for the purpose of the licence or in the opinion of the Licensing Magistrate undesirable to be licensed then a licence may be refused. It may also be refused if the premises are located in an area where they cannot be kept under effective police control or are likely to be a nuisance to the neighbourhood or if there are a sufficient number of premises already licensed to meet the needs of the neighbourhood. A licence may also be refused if the premises do not meet the specifications prescribed under section 15 of the Ordinance. That section prescribes that where licensed premises are connected by internal

communication with any unlicensed premises used for public entertainment or resort or as a refreshment house or a shop, unless it is substantially built with a weather tight roof, is floored with timber, concrete tiles or other suitable material and is in good repair then the licence may be refused.

[109] Where, as in the case at bar, the Licensing Magistrate is given the jurisdiction to hold special sessions of the Magistrate's Court for the purposes of hearing and considering applications for licences for the sale of intoxicating liquor; to hear any objection which may be made by the Commissioner of Police or any person to the granting of the licence and to grant to an applicant a certificate authorizing the grant or renewal of a licence, in the Court's judgment, the Legislature clearly intended to confer all incidental powers necessary to enable the magistrate to exercise that jurisdiction in a reasonable and judicial manner.

[110] In the Court's judgment, there is an obvious public interest in ensuring that the Licensing Magistrate is able to consider objections and to carry out hearings in a thorough and effective manner and to make determinations which are consistent with the statutory objectives. Given these objectives and the mischief which is sought to be prevented, a legitimate and proportionate reading of the Licensing Magistrate's powers properly warrants an implication that she is entitled to assure herself of the integrity of the application. In the Court's judgment, in circumstances where the Ordinance mandates that a notice must set forth the situation and description of proposed licensed premises, it would not be ultra vires to imply a power to demand that applicants precisely identify the location of proposed licensed premises by providing a Block and Parcel number. This is clearly consistent with the description of real property prescribed in the Registered Land Ordinance which came into force in 1970 incorporating the Torrens system of land registration. The Court is also satisfied that it is reasonably incidental to her powers for the Respondent to seek to verify and authenticate the actual applicant before her. It would therefore not be ultra vires for her to demand that those applicants who wish seek renewal through a third party agent submit proof of the agent's authority to act. Neither would it be inappropriate in the Court's view, to demand that application form be signed by the applicant and that appropriate proof be provided verifying the signature and identity of the applicant. Applying the reasoning of **DPP v Meaden and Bodden v Commissioner of Police for the Metropolis,** the Court is satisfied that these are matters which

can reasonably be implied to make the exercise of the Respondent's powers effective and to achieve the purposes of the Ordinance.

[111] However, the Respondent has gone much further. She has in fact substantially amended and/or created entirely forms of application and the Claimants contend that in doing so, she has essentially exercised legislative powers under the Ordinance.

[112] Section 26 of the Virgins Islands **Interpretation Act**[34] addresses the issue of amending prescribed statutory forms. It provides that:

> "Where a form is prescribed or specified by any enactment, deviations therefrom not materially affecting the substance nor calculated to mislead shall not invalidate the form used."

[113] The effect of this provision is that where an Act prescribes a form, compliance with its exact content and format is not required, provided that the substance of the same is not materially altered and there is no intention to mislead. Slight deviations including deviations to the size, and quality of the official form, even a slightly different arrangement of the items may not be objectionable as long as the substance of the prescribed form is conveyed.

[114] The case of **Thomas v Kelly**[35] best illustrates the point. In that case, the English Bill of Sale Act 1878 prescribed the form of bill of sale, and declared that, "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule to this Act annexed" (sect. 9). At page 520, Lord Macnaghten observed:

> "This section seems to me to deal with form, and form only. So purely is it, I venture to think, a question of form that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to sect. 7, though I cannot see that the omission would alter the legal effect of the document in the slightest degree, or mislead anybody. **It has been held, and I think rightly, that sect. 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are "in accordance with the form," not "in the form." But then comes the question, When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which**

[34] Cap 136 of the Laws of the Virgin Islands
[35] (1888) 13 App Cas. 506

> **is not merely a matter of verbal difference. Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form**. Now it seems to me that if there is any one thing which is plainly a characteristic of the statutory form it is this: that in the body of the instrument there is no substantive description of the things intended to be assigned. Following the directions contained in sect. 4, the statutory form relegates to a schedule the description of the personal chattels intended to be comprised in the bill of sale." Emphasis mine

[115] In **Davis v Burton**[36] the bill of sale departed from the statutory form by requiring unearned interest to be paid in some circumstances. That form of bill was held to void. Brett MR set out the ratio in this way:

> "That enactment provides that a bill of sale shall be "in accordance with the form in the schedule." **That must mean that every bill of sale shall be substantially like the form in the schedule. Nothing substantial must be subtracted from it and nothing actually inconsistent must be added to it**….. But if upon failure to pay the first instalment the whole of the interest, which the grantee is ultimately upon performance of the contract to receive, becomes immediately payable, the bill of sale would, I think, be contrary to the form in the schedule of the Act; for interest is payable upon money only so long as it is due, and it is contrary to the nature of interest to make it payable before it is due, on the ground that a condition has not been performed, or because a certain event has happened; that is an alteration of, and a departure from, the form given in the schedule to the Act." Emphasis mine

[116] Lindley LJ went on to observe that "*The bill of sale before us has the vice of asking for too much."*

[117] In the same way, this Court must consider whether the actions of the Respondent in the case at bar goes too far. First, it is readily apparent that the revised forms before the Court bear little resemblance to the prescribed statutory form. The changes do not reflect mere deviations but instead make substantive and material alterations to what was clearly a fairly simple form. The contents of the application form are prescribed under section 13 (2) of the Ordinance which directs that:

> "Every such notice shall be in the form set forth in the Second Schedule and shall specify the description of the licence for which such person intends to apply, the situation and description of the premises in respect of which he intends to apply and the licensing days on which he intends to apply."

[36] (1883) 11 QBD 537

[118] Moreover, when one has regard to the actual substance of the changes, it is apparent that the amendments represent a significant departure from the statutory provisions and the previously established practice and procedure. This presents a significant hurdle for the Respondent's case. First, it cannot be disputed that the Ordinance does not vest the Respondent with power to make delegated legislation. Under the Ordinance, she has no authority to make rules or regulations or indeed forms.

[119] Counsel for the Respondent has sought to argue that given the state of the law, the proposed details must necessarily be implied so as to make her role effective and to give effect to the statute. She has relied extensively on the judgment in **Gwynne v Burnell** and the cases which followed it and she submits that it implies a power in an authority to supply an omission in a statute so as to bring out the real intention behind it. However, Counsel appeared to have ignored a critical part of the ratio in that case where Coleridge, J., observed:

> "The principle, then, on which I rely will not let in the consideration of particular circumstances in each case, or a regard to a greater or less degree of convenience, a more or less complete effect to be given to the presumed intent of the Legislature. Nothing, in short, which is founded on what the Legislature might better have done, nor simply even what the Legislature intended; the sole-legitimate inquiry is, I conceive, what intention is to be found in the words of the Act, expressed or-implied: unless, by words written or words necessarily implied and therefore virtually written, the-intention has been declared, we cannot give effect to it."

[120] The point was further illustrated in **The Corporation of The County of Vercheres v The Corporation of The Village of Varennes**[37] where the Municipality of the County of Vercheres passed a by-law defining who were to be liable for the rebuilding and maintenance of a certain bridge. The Municipality of Varennes by their action prayed to have the by-law in question set aside on the ground of certain irregularities. The above was maintained and the by-law set aside.

> "But we cannot extend our jurisdiction by interpretation to cases not clearly and unmistakably provided for by the statute. In Parliament, not in this court, lies the power to remedy the act if an omission appears therein. We cannot add anything to its enactment."

[121] The Court concluded that:

> "No right of appeal can be given by implication, *Langevin v. Les Commisaires etc. de St. Marc* ([5]); and " **the courts are not to fish out what may possibly have been the**

[37] (1891) 19 Scr 365

> **intention of the legislature;" per Lord Brougham, C*rawford* v. *Spooner* ([6]); or extend the language of a statute beyond its natural meaning for the purpose of including cases simply because no good reason can be assigned for their exclusion;** *Denni v* 1891 *Reid* ([7]); and unless by "words "written, or words necessarily implied and therefore virtually written, the intention has been declared, we cannot give effect to it. Coleridge J. in *Gwynne* v. *Burnell* ([8]), or as Lord Verchéres Eldon said in *Crawford* v. S*pooner* ([9]), **"we cannot add and mend and by construction make up deficiencies which are left there**." Emphasis mine

[122] In the Court's view, this approach must be the starting position.

[123] The Ordinance in question expressly requires that new applicants serve notice of his application on the Licensing Magistrate and on the Commissioner of Police. Thereafter, it empowers a police officer may then enter the premises in respect of which such notice is given to inspect the premises. Certain requirements for these premises are set in section 15 and 20 of the Ordinance. In the case of renewal applications, the Ordinance prescribes that on any licensing day, an applicant may without notice apply to the Licensing Magistrate for renewal. It goes on to say that the applicant need not attend, unless he is required to do so.

[124] It follows that in mandating that new applications be served on the Commissioner of Inland Revenue, the Fire and Rescue Department, Environmental Health Division, Department of Trade and Consumer Affairs and the Town and Country Planning Department the Respondent has imposed requirements which are clearly not prescribed by the legislation.

[125] In the same way, where the Respondent demands that a renewal application be served on the Commissioner of Police, she has essentially created a regime when it is apparent that the Ordinance contemplates a more summary procedure in which a licence holder may apply without notice on any licensing day and need not attend before the Licensing Magistrate in person unless specifically required to do so.

[126] The Respondent also purports to prescribe that objectors to a renewal applications must serve their written objections on the Commissioner of Police and the Commissioner of Inland Revenue and are required to attend the sitting on the licensing day. Moreover, the Respondent has also imposed the requirement that all applicants must demonstrate that they are in possession of a valid trade and business licence to trade in the manner in which they propose to be licensed.

[127] Where the proposed addition is essentially contained although not expressly set out in the statute, the Court accepts that there may be a basis upon which it may be implied. However, in the Court's view, it is not open to a public authority to add or augment statutory requirements where they are not necessary to give effect to the legislative provisions.

[128] It is clear that the Licensing Magistrate can only take into consideration matters which are consistent with the objectives of the Ordinance. The Scottish case of **Brightcrew Limited v. City of Glasgow Licensing Board**[38] illustrates the point clearly. That case concerned an application for judicial review of decision to refuse a premises licence.

> "[24] Turning to the substance of the issues before us, we consider that, in general terms, there is force in the submission advanced on behalf of the appellants that, on a proper construction of the statute, the essential function conferred on a licensing board by the 2005 Act is that of licensing the sale of alcohol. It is, in our view, clear from what the 2005 Act terms its "core provisions" that the statute is concerned with the regulation of the sale of alcohol by means of the grant of licences. Of significance also, in our view, are the terms of section 27(7) of the 2005 Act which limit the extent to which a licensing board may impose particular conditions. **In particular, a licensing board may not impose such a condition which "relates to a matter (such as planning, building control or food hygiene) which is regulated by another enactment.""' Emphasis mine**

[129] This dictum summarizes the position which has been generally been adopted and applied by courts - that a licensing authority, cannot take into account any issues that are dealt with in other legislation, such as public health, cleanliness, hygiene and the ability to trade under the **Business, Professions and Trade Licences Act 1989.**

[130] Therefore, where for example there is a requirement in other legislation for operators to possess a licence to carry on business in the Territory, it would not be a relevant consideration as it concerns matters which are unrelated to the sale of alcohol. It is in any event fully regulated under the separate legislative regime.

[131] In **Kell (Scotland) Ltd v. City of Glasgow Licensing Board, 2000 SLT (Sh Ct) 197,** the Sheriff Principal also looked at the question of the extent to which a Board was entitled to enter into consideration of areas which might properly be thought to be for other regulators. There, the Board sought to impose via policy a requirement that the dancers be given separate toilet facilities from

[38] [2011] CSIH 46; 2012 SLT 140

patrons. The Sheriff Principal made it clear the Board policy could not assist there. If an aspect of activity in licensed premises is already covered by a regulatory regime he was of the view the Board should not stray into that area.

[132] In light of these authorities, the Court cannot accept that the Respondent is entitled to essentially duplicate the functions of public authorities established for the express purpose of regulating their own Acts.

[133] The inescapable reality is that the Respondent has no delegated law making powers under the Ordinance. This unavoidable reality makes it clear that she is not authorized to repeal or amend the statute which empowers her. While Counsel has argued that it is reasonable and proper for the Respondent to imply matters which are reasonably incidental to her powers, in the Court's view, this is a far cry from what has occurred here. That definition focuses on the "legislative character" of the instrument, in that it must determine or alter the content of the law and affect a privilege or interest, impose an obligation, create a right, or vary or remove an obligation or right.

[134] For the reasons adumbrated, and save for the matters which this Court has determined can be properly implied under this Ordinance, the Court is satisfied that in issuing the Notice and in prescribing the relevant forms, the Respondent acted in excess of her powers under the Ordinance. For the reasons set out herein

Natural Justice

[135] The general position is that a public authority must comply with published or adopted procedures because the public is entitled to rely on published or adopted procedures in its interaction with a public authority. This position is illustrated in the judgment appellate judgment in **The National Water Commission ex parte Desmond Reid.**[39] In that case the applicant was an employee of the National Water Commission (NWC). A formal charge was preferred against him and he was suspended. He responded in writing but did not elect to have the charges dealt with on the basis of a written reply or an oral enquiry. The respondent decided to hold an oral enquiry and the applicant's attorney-at-law objected to the persons sitting on the enquiry because this was in

[39] (1984) 21 JLR 62

breach of the disciplinary procedures. Smith CJ in delivering the judgment of the full court at page 65 said:

> "The Water Commission was a statutory corporation established for public purposes. Having adopted and published procedures to be followed in the exercise of its powers of disciplinary control over its employees, it was, in my judgment, bound thenceforward by the principles of administrative law to follow those procedures until they are validly altered. This, if an employee was dismissed in breach of the procedural requirements he would have a right to challenge the decision by seeking a judicial declaration or an order of certiorari, as appropriate."

[136] The question which then arises is whether an applicant could be said to have a right to be heard before a public authority could effect such alteration.

[137] It is clear that there is no right to be heard before the making of legislation, whether primary or delegated, unless it is provided by statute. **See: Bates v Halisham [1972] 1 WLR 1373 and CREEDNZ v Governor-General [1981 1 NZLR 172.** However, is the position the same in respect of administrative policy and procedures? The relevant case law makes it plain that while public authorities may be entitled to develop policy guidelines and procedures to assist and provide guidance for the exercise of their discretion, they must not be inconsistent with the legislation and they must be made public. In **R v Torquay Licensing JJ, ex p. Brockman**[40] Lord Goddard stated for the avoidance of further doubt that justices may lay down general rules and prescribe a policy for themselves, provided that it is made public, so that applicants know what to expect, but they must apply themselves to the circumstances of each case in order to decide whether the general policy is to be applied in the particular case. Their discretion should be exercised towards the best implementation of the licensing laws not the best implementation of their policy.

[138] The Claimants complain that this basic requirement was not satisfied because the Notice was issued separately from the Forms and that applicants only became aware of the same when they attended before the Magistrate's Court with the old forms only to be provided with a copy of the new Forms and instructed to complete the same. In her evidence before this Court, the Respondent did little to address this critical issue. Instead, in responding to the Second Claimant contention that in November 2014 he was unable to obtain appropriate advice from the First

[40] [1951] 2 ALL ER 656

Claimant as to the new procedure for renewal of licences because of the changes which had been introduced, at paragraph 103 of her Third Affidavit, the Respondent responds:

> "I note however that the Second Applicant could have called the court and ask about the procedures as there must be a duty on the applicant to make his case, not for the court to make it for him."

[139] This position is clearly inconsistent with established legal precedent. This difficulty was further compounded when towards the close of the trial, it was revealed that Guidance Notes had been issued by the Respondent which had hitherto never been disclosed to the Claimants and which had never been placed before the Court. This development was of course not well received as it was a clear breach of the duty of candour. Moreover, it demonstrated a failure to appreciate the legal obligation to inform and apprise applicants so that they know what to expect. Licensing power has been described as a drastic power greatly affecting the rights and liberties of citizens and in particular their livelihoods and this fact alone demands a fair administrative procedure.

[140] The Claimants have also contended that the Respondent was obliged to solicit representations from them before introducing the new requirements. It is clear that there is no general duty to consult. An obligation to consult might arise by way of an express or implicit statutory duty, or consultation might be required in order to give effect to a legitimate expectation of consultation.

[141] In **R (Harrow Community Support Ltd) v Secretary of State for Defence [2012] EWHC 1921 (Admin)** the court summarized the law in the following terms:

> "28. [...] When decisions will have a specific impact on a definable group, fairness and natural justice may entail a duty to consult with those affected by the decision depending on the context of the decision. [...]
>
> 29. A duty to consult does not arise in all circumstances. If this were so, the business of government would grind to a halt. There are four main circumstances where consultation will be, or may be, required. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors there will no obligation to consult.
>
> 30. The general law will be slow to require a public body to engage in consultation if there is no obligation or promise so to consult. [...]"

[142] There have been cases in which the courts have found in fairness that the public authority should provide the affected persons with a right to make representations or consultation. In **Elcock v Attorney General of Trinidad and Tobago**[41] the issue before the Court was whether in its adoption and implementation of the new policy, the Cabinet's decision not to recommend the applicant for appointment as the president of the industrial court was procedurally improper as having breached his legitimate expectation. The Court held that this was a classic example of legitimate expectation where there was a long established practice. The expectation was that Mr. Elcock would have been *"treated in accordance with prevailing policy and that if Government wished to depart therefrom it would first observe the dictates of natural justice by notifying him of their intention to replace the existing policy sufficiently in advance of implementing the change, so as to enable him to prepare representations which he wished to make in order to persuade them against implementing the change and hearing his representations before implementing them*…".

[143] In failing to notify the applicant of its intention to depart from the old policy and in failing to invite and to hear the applicant's representations the Court ruled that the defendant acted with procedural impropriety and in breach of the rules of natural justice.

[144] In **Attorney General of Barbados v Joseph and Boyce,** the President of the Caribbean Court of Justice provided clear guidance as to the approach which a court must adopt.

> "In matters such as these, courts must carry out a balancing exercise. The court must weigh the competing interests of the individual, who has placed legitimate trust in the State consistently to adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority. As indicated by Dyson, LJ in Rashid, "... [W]here, for example, there are no wide-ranging policy issues, the court may be able to apply a more intrusive form of review to the decision. The more the decision which is challenged lies in the field of pure policy, particularly in relation to issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found".

[145] The Court has had regard to all of the circumstances of this case. In that regard, the Court has taken into account the fact that the Ordinance does not impose a statutory duty to consult. It is also

[41] HCA 3308 of 2004 High Court Trinidad and Tobago per Dean – Armorer J

not disputed that there was no promise to consult or established practice of consultation. The Court has also considered whether the failure to consult could lead to conspicuous unfairness to the Claimants and in doing so the Court has weighed the relevant competing interests. Notwithstanding the laudable justification for doing, it is clear to the Court that in augmenting the legislative provisions in the manner prescribed, the Respondent has acted in excess of her powers. The obvious lacunas in the statute demanded parliamentary intervention and in this regard this Court is encouraged by the draft Liquor Licences Act No.1 of 2018 which is now the subject of consultation.

[146] In light of the conclusions drawn herein, it is not strictly necessary for the Court to pronounce on this ground of review. However, for the avoidance of doubt, where in the exercise of her functions it becomes necessary for the Respondent to satisfy herself of any factor relevant to the exercise of her jurisdiction, this may not necessarily amount to a change in policy or procedure such as to warrant broad consultation. Indeed, where the requirements are clearly articulated and appropriately circulated, it would in the Court's judgment be difficult to conclude that conspicuous unfairness would result.

ALTERNATIVE REMEDY

[147] During her submissions, Counsel for the Respondent submitted that the Court should decline to grant the relief sought by the Claimants because there were alternative recourses available to them which they have deliberately chosen not to pursue.

[148] It is clear that public law remedies are all discretionary in nature. Although a plaintiff may succeed in proving his case, he may nevertheless be refused relief on discretionary grounds. This discretion is exercised in accordance with well-established principles which include the existence of an alternative remedy and the adequacy thereof. A court must therefore consider the remit of any alternative remedies which may be available and the motive which informed the failure to pursue the same.

[149] In **State (Abenglen Properties Ltd) v Dublin Corporation**[42] O'Higgins CJ adopted a flexible approach when he stated as follows:

> "The question immediately arises of the existence of a right of appeal or an alternative remedy as to the effect on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. **The court ought to take into account all the circumstance of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground of refusing relief.** Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with error in the application of the code in question. In such cases, while retaining always the power to quash, the court should be slow to do so, unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate." Emphasis mine

[150] More recent pronouncements tend to reflect the attitude adopted by O'Higgins CJ in *Abenglen*. In **McGoldrick v An Bord Pleanála**.[43] Barron J stated as follows:

> "The real question to be determined where an appeal lies is the relative merits of an appeal as against the granting of relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind."

[151] In the case at bar, the relevant appeal provisions provide as follows:

> "If an applicant feels aggrieved by the refusal of the Licensing Magistrate to grant the certificate required under sections 16 and 23, the applicant so aggrieved may appeal to a Judge of the High Court sitting in Chambers, and such Judge shall have power either to confirm or overrule the decision of the Magistrate, and in the latter case, shall grant the certificate for which the application has been made."

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[42] State (Abenglen Properties Ltd) v Dublin Corporation [1984] IR 381, 393.

[43] [1997] 1 IR 497 at page 509. The applicant had appealed a decision of the respondent on a reference to it under s. 5 of the *Local Government (Planning & Development) Act 1963* and also sought to challenge the validity of the respondent's determination of that reference by way of judicial review.

[152] It is clear that in this case, the Claimants do not seek to challenge the grant or refusal of the certificate. For them, the issues which arise are much more fundamental. They seek to challenge decisions from which there is clearly no statutory right of appeal. In this case, the Claimants challenge the validity of the statutory Notice and Forms issued by the Respondent rather than the decision which applied the same. In the Court's judgment neither of the suggested recourses would adequately address the jurisdictional challenges raised in this Claim.

[153] Moreover, the Court is satisfied that this Claim considered issues which are of general public importance and may well benefit from judicial guidance. The Court is guided by the judgment in **R v Huntingdon District Council, Ex parte Cowan**[44], where Glidewell J allowed the applicant to seek judicial review of a licensing decision rather than use the appeal procedure. The case raised for the first time the question of how local authorities were required to exercise their licensing functions under a particular statute. The Court held that it was in the public interest that the court should give a ruling which would provide authoritative guidance for all local authorities.

[154] During the course of the trial, Counsel for the Defendant submitted that the Court should not exercise its discretion to grant the relief sought by the Claimants because the issues raised have now become academic and because good governance may be prejudiced by the "domino effect" on other decisions made on the assumption that the Respondent's actions were lawful. Counsel argued that the relief claimed could lead to administrative chaos and deprive individuals of their benefits. Counsel argued that the Notice which is the subject of this action heralded a licensing period which has long since passed. Any licence granted on that pursuant to that Notice would have lapsed (their statutory validity is 6 months).

[155] It is now established law that declaratory relief in judicial review will not be granted if the issues raise are academic or hypothetical. In **R v Home Secretary ex parte Salem**[45]**,** Lord Slynn noted that appeals which are academic between parties should not be heard unless there is a good reason in the public interest for doing so for example when a discrete point of statutory construction arises which does not involve detailed consideration of the facts and where a number of similar cases exists or are anticipated so that the issue will most likely need to be resolved in the near

[44] [1984] 1 ALL ER 58
[45] [1991] 1 AC 450 at 457

future. For all of these reasons, this Court finds that the grant of relief would be meaningful in this case. Further, it is clear that from a practical standpoint, good administration would not likely be prejudiced for the very same reasons advanced in support of refusing relief and because the presumption of validity would have applied in any event. See: **Percy v Hall[46].**

[156] Having arrived at the conclusions herein it is clear that the issues raised were justiciable and meritorious. Applying the reasoning of Rawlins JA Ag (as he then was) in **Attorney General of St. Lucia v Martinus Francois** as well as the factors adumbrated in **R. v. Secretary for Foreign Affairs, ex p. World Development Movements Ltd**, the Court is satisfied that the Claimants have the requisite standing to bring this Claim.

COSTS

[157] In this clear that both sides have achieved some success in this Claim. For that reason the Court is satisfied that Claimants' costs will have to be assessed in accordance with the principles set out in Part 64. 6.

[158] **It is therefore ordered and declared as follows:**

i. **That the Notice of October 2014 and the attendant Forms issued by the Respondent are ultra vires.**
ii. **Costs to the Claimant to be assessed in accordance with Part 65.12 and Part 64.6.**

Vicki Ann Ellis
High Court Judge

By the Court

Registrar

[46] [1997] Q.B. 924