**[2023] EWHC 194 (Admin)**

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

No. CO/490/2022

03/02/2023

Before:

MR JUSTICE CHOUDHURY

B E T W E E N :

THE KING (on the application of ) CDE — Claimant

- and -

BOURNEMOUTH, CHRISTCHURCH AND POOLE COUNCIL — Defendant

**REPORTING RESTRICTION: Anonymity Order**

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MS J BOYD KC (instructed by Deighton Pierce Glynn) appeared on behalf of the Claimant.

MR J CANNON and MS R PAREKH (instructed by Legal Department, Bournemouth, Christchurch and Poole Council) appeared on behalf of the Defendant.

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**J U D G M E N T**

MR JUSTICE CHOUDHURY:

**Introduction**

1. The Claimant seeks judicial review of the Defendant Council's decision of 9 November 2021 ("the Decision") to adopt a new Sexual Establishment Policy ("the Policy"). The Policy had two features which are relevant to the Claimant's challenge: the first was a policy to impose no cap on the number of Sexual Entertainment Venue ("SEV") licences that may be granted to establishments in the Bournemouth, Christchurch and Poole ("BCP") areas ("the No Cap Policy" or "the NCP"); the second was a policy that those SEVs already licensed to operate in BCP enjoy a presumption in favour of annual renewal of their licence for the duration of the Policy ("the Acquired Rights Policy" or "the ARP"). The Defendant conducted two consultation exercises in respect of the Policy. The majority of responses were unfavourable. Many of these responses raised concerns that the presence of SEVs has a negative effect on attitudes towards, and the treatment by men of, women and girls, by, amongst other things, contributing to a culture in which women and girls are objectified, commodified, exploited, harassed, discriminated against and subject to sex-based violence. These concerns are referred to, collectively, as "sex equality-based concerns" or "SEB concerns".

2. The Claimant contends that the Defendant erred in that it failed to have regard to and/or conscientiously engage with these SEB concerns by dismissing them as amounting to "moralistic" objections which could not be considered in determining whether to adopt the Policy and the NCP in particular. In so doing, the Defendant is also said to have failed to comply with the Public Sector Equality Duty ("PSED") under s.149 of the *Equality Act 2010* ("the 2010 Act"). These two matters form the basis of Grounds 1 and 2 of the Claimant's challenge. The Claimant further contends that the effect of the ARP is unlawfully to fetter the Defendant's discretion in respect of licensing decisions which Parliament has decreed should be reviewed on an annual basis. That is Ground 3.

3. Permission to seek judicial review was initially refused on the papers but allowed on renewal by Steyn J. An additional ground of challenge, contending that the Defendant's reasons for rejecting a zero cap and for rejecting a cap of any sort do not stand up to rational scrutiny, was refused permission.

**Factual Background**

4. This summary of the facts is taken from the Claimant's Statement of Facts and Grounds. The Defendant does not dissent from that summary.

*The Claimant*

5. The Claimant is a resident of BCP, and a survivor of domestic and sexual abuse. She states that she has a diagnosis of complex post-traumatic stress disorder, and that her symptoms are triggered by aggression, abusive behaviour and abusive language from men. She further states that she has experienced both physical and verbal abuse on the basis of her sex and has witnessed verbal and online sexist abuse directed at others, including threats of violence and rape.

6. The Claimant is deeply concerned about the impact of SEVs, and the Policy, on the wellbeing and safety of women. It is her position – and, it would appear, that of many BCP residents – that SEVs contribute to the objectification of women, and to a climate in which women are routinely subjected to sexual and domestic violence, harassment and discrimination.

7. The Claimant believes that the Decision will lead to an increase in the number of SEVs in BCP, with an attendant increase both in risks to women's safety and welfare, and to abusive and demeaning attitudes to women that are detrimental to relations between the sexes and to sex equality generally. In addition, the Claimant considers that the Decision in itself sends a message to BCP residents to the effect that the Defendant sets a low priority on SEB concerns.

*Events leading up to the Decision*

8. Section 2 of the *Local Government (Miscellaneous Provisions) Act 1982* ("the 1982 Act") permits local authorities to resolve to bring Schedule 3 of that Act into force in their area. Paragraph 8 of Schedule 3 permits local authorities to grant, renew and transfer licenses for sex establishments. Paragraph 12 of Schedule 3 identifies the bases on which such licences may be refused, including that the number of sex establishments in the relevant locality at the time is equal to or exceeds "the number which the authority consider is appropriate for that locality".

9. On 1 April 2019, the three erstwhile BCP councils merged to become a single authority. Prior to this, Bournemouth Council had brought Schedule 3 of the 1982 Act into force with respect to Bournemouth, and had adopted a policy of limiting the number of licences granted to SEVs to three; Poole Council had brought Schedule 3 into force with respect to Poole, but had not licensed any SEVs; and Christchurch had not brought Schedule 3 into force with respect to its area. At the time of the merger, there were accordingly three SEVs licensed for operation in and around Bournemouth town centre ("the Existing Licensees"), and none licensed for operation in Poole or Christchurch. That remained the position as at the date of the hearing.

*The First Draft Policy*

10. The Defendant was required within 24 months of the merger to prepare, adopt and publish a new policy in relation to SEV licences. In November 2020, the Defendant commenced the process of implementing a new policy with the production by the Defendant's Licensing Committee ("LC") of a draft Sex Establishment Policy (identified as Version 1). It should be noted that this draft policy was the first step in a lengthy and detailed year-long process, which included two public consultation exercises, several reports and presentations to Members and various meetings.

11. The draft policy was presented at a meeting of the LC on 10 December 2020. Shortly before then, on 23 November 2020, an "Equality Impact [Needs] Assessment: Report and EIA Action Plan" ("EINA") was commenced. The EINA and the minutes of the 10 December meeting record that the original draft policy presented to the LC contained two options for Members' consideration, namely: (i) the continuation of a limit of three SEVs for Bournemouth; and (ii) the removal of any cap on the number of SEVs. However, the LC rejected option (i) at the 10 December meeting. The LC considered that the numbers and localities in the existing policy were historic and no longer appropriate for the conurbation as a whole. It concluded that the LC was capable of determining each application for an SEV on its merits in accordance with the criteria set, without the need to impose a specific cap.

12. On this basis, the LC proceeded to consult on an amended draft Sexual Establishment Policy (also identified as Version 1), which reflected only option (ii), i.e. the No-Cap Policy.

*The First Consultation*

13. The first public consultation ("the First Consultation") was conducted over four weeks from 4 January 2021. The consultation invited respondents to record their level of agreement or disagreement with each of two propositions:

    (1) BCP Council should not seek to limit the number of sex establishments in any given area (Question 1).

    (2) The proximity of the following types of premises should be taken into account when considering a licence application (Question 2).

14. It is clear from the terms of Question 1 that, although the draft policy did not include a specific cap on numbers, the Defendant was seeking views on whether there should not be a cap, and, by necessary corollary, whether there should be one. The First Consultation also asked two further, open questions, namely: (i) whether there were any other locality characteristics that

should be considered (Question 3); and (ii) whether respondents had any other comments on the policy (Question 4).

15. A large number of responses were received (206), the majority (60%) from women. In February 2021, the Defendant published a Consultation Report ("the First Consultation Report"). This recorded that:

    (i) 70% of respondents disagreed with the policy of setting no cap on the number of SEVs in BCP;

    (ii) 64% strongly disagreed;

    (iii) 80% of those who disagreed with this policy were women;

    (iv) of the 82 respondents who addressed the question whether there were additional locality characteristics that should be considered, the majority stated that no locality was suitable and that sex establishments should not be allowed anywhere;

    (v) there was a high volume of comments opposing the licensing of SEVs, which described the venues and the activities within them as degrading and abusive to women. Many of these respondents felt that the council would be failing in its equalities duty if such venues were permitted.

16. The First Consultation Report set out some examples of comments opposing the licensing of SEVs, including the following:

> "I believe that supporting gender equality is seriously undermined by allowing these places, as they objectify women, normalise the commodification of women, exploit women who are poor or disadvantaged and push the notion that men have the upper hand over women."
>
> "…The council should seek to implement a zero cap on any type of sex establishment, recognise the harm caused to women both inside and outside the industry, help women exit this industry, and fulfil its legal obligations to promote equality between the sexes under the gender equality duty/Equality Act 2010. …"
>
> "The draft policy seems to be going in an opposite direction from that indicated by developments in public policy, public health research and research into the causes and consequences of sex discrimination and violence against women. In the last decade all these areas have seen a strengthening of the links between SEVs and the continued scourge of violence against women and girls, in the context of gender inequality…[I]n order to have a joined up

> approach to its obligations on equality and on public health, the authority should move to a nil cap policy not a policy for unlimited SEVs. The absence of an Equalities Impact Assessment may lie behind this – an Equalities Impact Assessment considering the evidence of the negative impact upon women and girls of the presence of SEVs would have led to a different policy proposal."
>
> "Consider the public sector equality duty, there is NO locality where strip clubs are appropriate, you must adopt a policy for ZERO clubs, stop licensing clubs currently operating and support all women out."

17. On 4 March 2021, the LC decided that a working group would be set up due to the sensitivity of the proposed policy and the large number of consultation responses received ("**the Working Group**"). The Working Group met on 29 March 2021. The notes of that meeting make reference to the issue of sexual violence and community safety as follows:

> "Research within the BCP area and reference to police crime statistics shows 1 recent case within a local SEV which related to an altercation between 2 former dancers who argued. There is currently no evidence of other specific crimes linked to currently licenced venues.
>
> It was also confirmed that prior to lockdown engagement with Shores the sexual assault support centre never disclosed any reports of sexual assault linked to any of the licenced venues."

18. The notes make reference to the PSED and the EINA as follows:

> "The process of policy development requires that we are reasonable, consider the Public Sector Equality Duty, consultation responses and make any amendments are appropriate to produce a final document…
>
> …
>
> **Public Sector Equality Duty (PSED)**
>
> Sam Johnson provided an overview of the duty and where we are with our actions to date.
>
> The Licensing Committee need to be confident that the PSED has been considered.
>
> Religious establishments such as church and mosque was included in the direct consultation list however they (sic) synagogue was not included so this will need to added (sic) to the list for next time – not detrimental to this consultation.
>
> The policy and associated EINA consider age, locality, religious beliefs and being considered so having reviewed the documents to date there was no indication that we have not met the duty.
>
> **Equality Impact Needs Assessment (EINA)**

...

The EINA is a working document which is being added to as further consultation such as this meeting takes place.

…[C]urrently no police data to support anecdotal evidence from the consultation feedback of fear (real or imagined) of violence and harassment within vicinity of SEVs. Police analyst is looking into this further.

It was suggested…that we address concerns about human trafficking and exploitation of dancers via conditions relating to recruitment and information provision within venues…"

19. The notes then contain a heading "Consultation Results and the policy". The notes state that "General discussion took place relating to the current draft and removal of numbers". However, they record no further detail of such discussion of whether the Defendant should adopt a policy of no limit on the number of SEVs (Question 1), or of objections to the licensing of SEVs in principle that had been raised in significant numbers in response to Question 3 and Question 4. They do record discussion of the issue of 'acquired rights' for Existing Licensees (though this had not been consulted on) as follows:

> "Regarding existing licensed premises changes in the town centre have been noted and does this/should this result in long standing licenced venues losing their licence due to planning and other decisions being made, also recognised that these are also LA03 licenced venues which could then revert to 24 hour drinking establishments which can cause more ASB [anti-social behaviour] and disturbance to neighbours than the licenced SEVs.
>
> **RECOMMENDATION:** To amend the policy to provide grandfather rights to the existing licenced premises of three SEVs and 3 Sex Shops for the period of this policy as these have proven to be well run,"

20. Finally, the notes record discussion of the First Consultation Report as follows:

> "**Question 1** BCP Council should not seek to limit the number of sex establishments in any given area.
>
> It was acknowledged that most responses 64% disagreed with this…
>
> Members consider the setting of numbers in anyone [sic] area unnecessary as discussed at length at the original meeting on 10th December 2020 where the previous limits were removed.
>
> …

**Question 3** asked for feedback on other locality considerations

There were 82 comments and the majority stated no locality was suitable and that sex establishments shouldn't be allowed.

Sex establishments are legally permitted and as such members felt these opinions were not in line with the objectives of the policy which is to control the location and operation of any of these premises.

…

**Question 4** asked for any other comments.

**…**

Members recognised a high number of comments opposing the licensing of SEVs but on examination the majority of these are on moralistic grounds which are not for consideration within this policy guidelines." (Emphasis added)

21. At a further meeting on 19 May 2021, the LC considered a paper by the Defendant's Licensing Manager ("LM"), updating the LC on progress. The paper attached a revised draft policy and summarised the position reached by the Working Group on 29 March 2021 as follows:

> "The working group carefully considered the consultation responses as well as the wider policy implications of the Public Sector Equality Duty. Members recommended that although many consultees disagreed with not setting any permitted number of SEVs within the BCP area, given the strict locality characteristics set out in the policy which will be considered when determining any application, the number and location of any future premises could be adequately controlled."

22. The paper noted that (in addition to other amendments) the revised draft policy reflected the Working Group's agreement that "existing licenced premises and operators be given grandfather rights for renewal applications as they have existed under previous policies which deemed them to be situated in an appropriate locality". The attached revised draft policy accordingly provided at 10.1-4. as follows:

> "10.1 It is acknowledged that there are currently three licensed Sexual Entertainment Venues within the Old Christchurch Road and Yelverton Road areas of Bournemouth Town Centre….
>
> 10.2…
>
> 10.3 The locations of these existing venues had previously been determined by Bournemouth Borough Council as appropriate for this number of venues. However the character of the locality in which some of these venues are

> situated has changed in more recent years… Any new applications will be considered in accordance with section 11 of this policy – Character and locality of licensed premises.
>
> 10.4 It has been determined that these existing licences will continue to be renewed, on application, by the existing operators during the lifetime of this policy. If there are any objections to an application it will be considered by the Licensing Committee in accordance with the relevant statute. This essentially provides grandfather rights to these existing operators for the current time." (Emphasis added)

23. The paper stated that, due to "the strength of feeling regarding this topic particularly due to recent high profile crimes against women", the Working Group had agreed to hold an all-member briefing meeting on the proposals; and that feedback from performers at existing SEVs was also being sought. It further stated that "the Public Sector Equality (sic) has been considered as part of this ongoing process."

*The Second Consultation and subsequent events*

24. From 14 June 2021 to 15 July 2021, the revised draft policy was subject to public consultation ("**the Second Consultation**"). This time, respondents were invited to answer seven questions, as well as to provide any other comments on the Policy, and to identify any equalities impacts, together with proposed mitigations. The questions included the following:

> "Q2: To what extent do you disagree with the approach [of setting no limit on the number of licences granted] for each of [SEVs, sex shops and sex cinemas]?
>
> Q3: To what extent do you agree or disagree with this list [of locality characteristics] for each of the categories of establishments?
>
> Q4: To what extent do you agree or disagree that sexual entertainment venues complement Bournemouth's entertainment offer?
>
> Q5: To what extent do you agree or disagree with the policy approach of continuing to license the [Existing Licensees]?"

25. Meanwhile, on 29 June 2021, the proposed all-member briefing meeting took place. There was a Powerpoint presentation at that meeting. The presentation contained the following statements:

> "The majority of respondents [to the First Consultation] disagreed that the cap on numbers of establishments should be removed.
>
> The Sexual Entertainment Venues were the most controversial aspect in responses, with many respondents suggesting a nil limit on venues

The Licensing Committee working group considered many of the comments to be objecting to the venues on moral grounds, which cannot be considered

Removing current licenses could also be challenged in court"

A slide titled "Equalities Impact Assessment" stated that research into the impact of sexual entertainment venues was "inconsistent" noting that:

"• Many dancers have degrees and other use the earnings to fund education

• There is little evidence of links to trafficking or prostitution

• Venues provide employment for a number of female dancers

• There are suggestions that venues normalize the objectification of women and can have an impact on women's safety in the locality

• Also, that dancers can suffer harassment from customers and staff"

26. In August 2021, the Defendant published its report on the Second Consultation ("**the Second Consultation Report**"). This recorded that:

i. there were 176 responses;

ii. in relation to Q2, there was a very strong level of disagreement with the policy of setting no limit on licences. Disagreement was strongest in relation to SEVs (in relation to which 76% of respondents disagreed; 72% strongly), and much stronger among female respondents than males;

iii. in relation to Q3, 43 out of 73 respondents stated that SEVs should not be licensed anywhere in BCP;

iv. in relation to Q4, 79% of respondents disagreed with the proposition that SEVs complement Bournemouth's entertainment offer, 74% of them strongly. 95% of female respondents disagreed;

v. 53% of respondents (and 67% of female respondents) disagreed with the proposal to exempt Existing Licensees from new locality character criteria, 45% of them strongly.

27. The Second Consultation Report recorded that 99 respondents made further comments about the revised draft policy. Of these, 19 concerned equality and respect or attitudes towards women and girls, while 17 mentioned concerns around crime and personal safety. In addition,

95 respondents commented on the equalities implications of the Policy, the large majority of whom referred to discrimination against women. The Second Consultation Report noted that "[d]iscrimination was identified both in relation to the exploitation of women working in SEVs and the porn industry, and the wider impact on wider society resulting from the objectification of women". By contrast with the First Consultation Report, the Second Consultation Report set out, in a 24-page Appendix, what appear to be all of the comments of respondents to the Second Consultation.

28. The LC met on 16 September 2021. It considered a report prepared by the LM ("the LM Report") which summarised the Working Group's position (following a meeting of that group on 10 August 2021) as follows:

> "The policy does not impose a limit to the number of sexual entertainment licences permitted within the BCP area. However, any proposed location will be considered on the basis of the character of the locality and whether the grant of the application would be inappropriate having regard to the proximity of the location to the local characteristics listed within the policy. Each application will be considered on its own merits. The characteristics include proximity to residential premises, cultural facilities, public leisure facilities, premises used by children, hospitals, and tourist attractions.
>
> …
>
> The views of workers within the local SEVs were sought and in the majority of cases the feedback was that they feel safe and secure in their chosen work environment and they did not feel exploited but empowered…
>
> Equalities issues were addressed via the EIA and approved by the EIA panel.
>
> Overall, the impact of the policy is positive, strict licence conditions should ensure safe well managed venues for both patrons and dancers. There is no indication of crime associated with local venues therefore, there is no negative proven impact on the safety of dancers, patrons or members of public in the vicinity.
>
> Local research by the Community Safety team analyst has found no evidence to link licensed SEVs and violent crime. Research shows only one reported violent crime linked to these establishments within the BCP area during the period 2018 to March 2020 when they had to close as a result of the pandemic. Analysis of reported sexual violence across Bournemouth & Poole suggests that only 15% of all such reports were in any way linked to Bournemouth's night-time economy and none linked to SEVs.
>
> A Licensing Committee Member workshop took place on 10th August to consider the results of the further consultation. All consultation feedback was considered, and members felt that the views of local dancers and the lack of evidence connecting the SEVs to crime gave positive weight to the policy. It was considered that the majority of consultation comments were outside the

> scope of the licensing framework and as such cannot carry weight in the decision-making process.
>
> Members are now asked to further consider the consultation responses and to agree the final wording of the policy which will then be recommended to full council for approval." (Emphasis added)

29. The LM Report thus addressed the issue of whether reported violent crime and sexual violence could be directly linked to SEVs. It addressed the welfare of dancers by reference to feedback from the "majority" that they felt safe and not exploited. It did not expressly address the issue of SEB concerns more broadly, though these concerns had been the subject of a large number of consultation responses. It would appear that the Working Group considered such responses to be "outside the scope of the licensing framework".

30. An undated document entitled Equality Impact Assessment: Capturing Evidence ("EIACE") was provided with the LM Report. This contained reference to a 2015 article published by Leeds University entitled 'Regulating Strip based entertainment: sexual entertainment venues policy and the ex/inclusion of dancers' perspectives and needs'. The findings were noted to include that one in four lap dancers has a degree and that this work had not been chosen in place of a career in their chosen subject; that there was no evidence or anecdotes of forced labour or trafficking of women; and that there was no evidence of lap dancing having connections with organised prostitution. The EIACE report further noted that other (unnamed) research into SEVs had concluded that they normalise the sexual objectification of women, and have a negative impact on women's safety in local vicinities and may attract and generalise prostitution.

31. The LM Report also included the EINA. This stated that "The Public Sector Equality Duty has been considered as part of the production of this EINA". It concluded:

> "Overall the policy will have a positive impact because it enables a safe space for both dancers and patrons of the SEVs. The licence conditions ensure dancers have private dressing rooms and toilet facilities with security in place to protect those spaces. Conditions requiring codes of conduct for both dancers and patrons ensures standards of behaviour on both sides.
>
> By regulating the industry and issuing licences, BCP Council are having a positive impact on the trade, are not at risk of driving the activities underground whereby they would be unregulated and expose dancers and patrons to risk.

> Although it is recognised that nationally there may be links between SEVs and the sex trade and sexual assaults on a local level within BCP there is no such established link…"

32. The EINA did not contain any analysis of the more general SEB concerns held by many consultation respondents.

33. The LC heard four questions from Councillors on the proposed policy. First, Councillor Northover sought reassurance that the comments which had not been considered on the basis that they raised "moral" concerns did not in fact raise legitimate concerns from women about safety.

34. The Defendant's senior solicitor, Ms Cole, responded, stating that the Council had not ignored the PSED or treated public safety concerns as irrelevant or wrongly dismissed them as moral grounds; that an EIA had been carried out; and that the LC and/or the Working Group had considered police statistics, showing no connection to sexual violence at existing SEVs, the experiences of those working in industry, and the lack of complaints received about existing venues. The LC's position was that it could not say "with any certainty to date that there is an increased risk… of sexual harassment to women in the BCP area based on gender." Ms Cole is recorded as having stated:

> "It is not unlawful to grant a SEV licence. We just need to consider the potential impact on gender equality. Our duty is to consider the impact on the vicinity and the wider society and take mitigating actions to reduce the potential impact on women.
>
> These mitigating actions include,
>
> - considering the protections provided for in the legislation,
> - the fact the licence must be renewed annually,
> - the conditions applied to any licence granted,
> - compliance visits to venues,
> - going back out for a second round of public consultation,
> - consultation with Dorset Police,
> - seeking the opinions of those working in the industry
> - considering any complaints and information that may be received from the Police, performers, members of the public and those running the safe bus in Horseshoe Common

- the lack of objections made at the time there is an application for the renewal of an SEV licence

- the lack of complaints, objections and information can only allow us to conclude that the premises are well managed and women at greater risk in the BCP area as a result of these venues.

Woman (sic) have been given the opportunity to speak and the Council's duty is to consider the impact on all woman, both those who object and those who support these types of venue". (Emphasis added)

35. Secondly, Councillor Lewis asked why the vast majority of comments against having any SEVs were not considered. The LM responded by saying that the consultation was "for consideration but not to dictate the decision made". She explained that:

> "The original draft policy did include the option for licensing members to set a zero limit however this was not included in the final draft for consultation as the proposed policy sets out clear considerations for applicants which would naturally limit the location of any proposed venues based on the character and locality taking into account proximity to sensitive uses".

36. Thirdly, Councillor Dunlop asked about the proposal to treat Existing Licensees differently from new licence applicants. Ms Cole stated in response that:

> "A licence is considered as a possession and the Council could be put at risk of challenge, if that possession is taken away without taking into account that the permission has been in place for a considerable period of time. By including grandfather rights within the policy, for the life of this policy in respect of renewal applications; it is, in the absence of any evidence of concern in respect of these specific venues, a more measured and proportionate response. There have been no objections to renewals to date and there is no particular recent change in the character of the locality in which they operate."

37. The public report of the meeting further records the suggestion that if grandfather rights were not granted to the Existing Licensees, their venues risked turning into nightclubs, although the basis for that suggestion is not set out.

38. Finally, Councillor Filer asked if the LC was aware that the PSED required the Defendant to consider the impact on all women, not only in the clubs but in the vicinity and wider society. The Senior Solicitor responded: "I believe this has been done by consideration of evidence before [the LC] to date".

39. The LC recommended that, subject to limited further amendments, the Policy should be forwarded to Full Council for approval.

*The Council Meeting on 9 November*

40. A meeting of the Full Council was held on 9 November 2021. Prior to that meeting, the LC produced a "Briefing" document ("**the Briefing Document**") for the Chair in relation to the Policy. The Briefing Document contained (amongst other items) the following information:

    i. It stated that, during its initial meeting on 10 December 2020, the LC had discussed a "zero" policy, but that this was "discounted as members felt market forces should prevail and their role should not be to exclude businesses or limit such businesses to any specific area of the conurbation".

    ii. It stated (in bold) that the LC on 10 August 2021 had considered the fact that there was "no statistical evidence from Dorset Police to support feedback comments alleging links to violent crime and disorder or sexual offen[c]es linked to and (sic) of the currently licensed venues."

    iii. It stated that, at its final meeting on 16 September 2021, the LC had "considered the report produced after the second round of public consultation and the dancer feedback and were updated re the EINA and with the crime and disorder statistics in relation to sexual violence, links to the BCP Night Time Economy (NTE) and current SEVs."

41. Seven issues were identified as "Likely Challenges" in the Briefing Document. These included:

    (i) consultee concerns about personal safety and sexual violence near SEVs;

    (ii) anecdotal evidence concerning links to sexual exploitation, human trafficking and slavery;

    (iii) allegations that the PSED had not been complied with since concerns relating to gender equality had been dismissed as moral objections;

    (iv) concerns that SEVs dehumanise and exploit women as commodities and thereby negatively impact on all women; and

    (v) concerns about the Acquired Rights Policy.

42. In response to (i), the Briefing Document referred to the lack of evidence of reported assault or violence linked to the Existing Licensees. In response to (ii), it referred to positive feedback received from dancers at the Existing Licensees. In response to (iii), the document repeated the response that had been given to Councillor Northover's question on 16 September: see paragraph 34 above. In response to (iv) (dehumanisation of, and negative impact on, women generally), the document stated as follows:

> "These are legal venues which are permitted to operate under strict conditions via the licensing regime. Personal and moral views should not be taken into account in the decision making process.
>
> An [EIA] has been undertaken and concludes that overall the policy will have a positive impact…
>
> By regulating the industry and issuing licences BCP Council are having a positive impact on the trade, mitigating the risk of driving such activities underground…
>
> Although it is recognised nationally there may be links between SEVs and the sex trade and sexual assaults, on a local level within BCP there is no such established link. Police crime statistics show no correlation between attendance at these venues and sexual crimes either in the vicinity or wider afield…
>
> The venues within BCP area are currently well run and have not been challenged on reapplication each year…" (Emphasis added)

In response to (v) (objections to the ARP), the Briefing Document repeated the response that had been given to Councillor Dunlop on 16 September 2021: see paragraph 36 above.

43. At the meeting on 9 November 2021, several Councillors voiced strong objections to the Policy. These included Councillor Dunlop who highlighted the "normalisation of porn culture by the sex industry, which dehumanises women as sex objects" and that "Sexual objectification of women, as practiced in sexual entertainment venues, is directly linked to sexual and domestic violence". She concluded that "Simply put, a Council needs no evidence of anything in order to decide that the objectification and exploitation of women does not reflect its values". Some Councillors expressed agreement with Councillor Dunlop's remarks.

44. Councillor Rampton stated that it was understood that "there are very strong feelings of emotion about this particular policy. But we can't based (sic) objections on moral grounds…". Councillor Butt, Chairman of the LC, stated that "Yes, I accept the high passions that are, have been iterated this evening, and I also accept that Councillor Dunlop's statement certainly does put worries on the table. But these worries are not those in the locale. We have to provide

for Bournemouth, Christchurch and Poole, and we have done our very best through a very, very long journey in order to do that…"

45. Council members voted to accept the LC's recommendations by a majority of 35 to 14 with 13 abstentions.

**Legislative Framework**

*Grant and refusal of SEV Licences*

46. Section 2 of the 1982 Act, so far as relevant, provides:

> "[a] local authority may resolve that Schedule 3 to this Act is to apply to their area; and if a local authority do so resolve, that Schedule shall come into force in their area on the day specified in that behalf in the resolution".

47. Schedule 3 of the 1982 Act (as amended by the *Policing and Crime Act 2009*) provides the regulatory framework for the licensing of SEVs. Paragraph 8 of that Schedule provides that:

> "8(1) Subject to sub-paragraph (2) and paragraph 12(1) below, the appropriate authority may grant to any applicant, and from time to time renew, a licence under this Schedule … for a sex establishment on such terms and conditions and subject to such restrictions as may be so specified."

48. A licence, if granted, lasts for a maximum period of just one year: paragraph 9 of Schedule 3.

49. Paragraph 12 of Schedule 3 provides the grounds on which an application *must*, or (as the case may be) *may* be refused. The mandatory grounds for refusal, which are set out under paragraph 12(1) and which include matters such as being below the minimum age of 18, do not arise in this case and are not repeated here. As for the discretionary grounds, these are set out under paragraph 12(3). So far as relevant, paragraph 12 provides:

> *Refusal of licences*
>
> 12 …
>
> (2) Subject to paragraph 27 below, the appropriate authority may refuse—
>
> > (a) an application for the grant or renewal of a licence on one or more of the grounds specified in sub-paragraph (3) below;
> >
> > …
>
> (3) The grounds mentioned in sub-paragraph (2) above are—

(a) that the applicant is unsuitable to hold the licence by reason of having been convicted of an offence or for any other reason;

(b) that if the licence were to be granted, renewed or transferred the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant renewal or transfer of such a licence if he made the application himself;

(c) that the number of sex establishments, or of sex establishments of a particular kind, in the relevant locality at the time the application is determined is equal to or exceeds the number which the authority consider is appropriate for that locality;

(d) that the grant or renewal of the licence would be inappropriate, having regard –

(i) to the character of the relevant locality; or

(ii) to the use to which any premises in the vicinity are put; or

(iii) to the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made.

(4) Nil may be an appropriate number for the purposes of sub-paragraph (3)(c) above.

(5) In this paragraph "the relevant locality" means—

(a) in relation to premises, the locality where they are situated...".

50. Thus, a licence may be refused on grounds relating to the suitability of the applicant (sub-paragraphs (3)(a) and (b)); on grounds that the number of sex establishments is equal to or exceeds the number which the authority considers is appropriate for that locality (sub-paragraph (3)(c); or on grounds that the grant or renewal would be inappropriate having regard to (amongst other things) the character of the relevant locality (sub-paragraph (3)(d)). The "appropriate number" for the purposes of (3)(c) can be nil: sub-paragraph (4).

51. The Home Office has issued non-statutory guidance on the licensing of SEVs ("Sexual Entertainment Venues: Guidance for England and Wales" (2010)). In dealing with "objections", the Guidance states that: "Objections should not be based on moral grounds/values", citing *R v Newcastle Upon Tyne CC ex parte The Christian Institute* [2001] LGR 165. In that case, the issue was whether a local authority was entitled to grant a licence permitting a company to organise a sex exhibition within its area in the face of objections on

"moral grounds" from a local Christian organisation. In dismissing the application for judicial review, Collins J said as follows at 168F to 169C:

> "The applicants in this case are a company registered by guarantee, known as the Christian Institute. They are a local organisation in Newcastle and, as their name suggests, they are concerned to promote the Christian ethic. They oppose, on moral grounds, the activities which are intended to be carried on in the course of this sex exhibition. It is a view which is, no doubt, held by many other people than themselves but, equally, it is a view which is not agreed to by many others. So far as I and the local authority are concerned, in carrying out the provisions of this Act, approval or disapproval of sex shops is not a matter which can be put into the equation. It is a question only of applying the provisions of the Schedule. Mr Holland has suggested that the provisions of paragraph 12(3)(c) and (d), do enable the authority and the court to take account of what he has called the "moral case against the activities" but, in my judgment, it does no such thing. What it entitles the local authority to do is to have regard to the character of the relevant locality and, no doubt, to take into account, if it be the case, that there is a strong body of feeling in the locality which objects to the existence of a sex shop in that locality. Equally, paragraph (d) makes plain that, in addition to the character of the relevant locality, the use to which any premises in the vicinity are put is also a relevant consideration. Thus, for example, it might be perfectly reasonable to refuse a licence for a sex shop which is in the vicinity of a school or some religious building. That is a recognition that sex shops may attract a particular clientele whose presence may not be considered desirable in some areas and that is something again which can be taken into account, but it has nothing to do with the morality of sex shops as such. It is the effect on the locality and on those living nearby which has to be taken into account and that is the distinction which is drawn. Thus, straightforward objections on the ground that sex shops should not be allowed to exist have no part to play in my or a local authority's consideration of the case. Whether I approve or disapprove is nothing to the point. Whether the local authority approves or disapproves is equally nothing to the point, except insofar asthe provisions of paragraph 12 are applicable." (Emphasis added)

52. Although that case was not concerned with SEVs, the analysis is pertinent to such venues as well. It might be thought from reading this passage in Collins J's judgment that there is some bright line distinction to be drawn between those objections to SEVs which are based only on moral grounds and those which are based on other concerns giving rise to a "strong body of feeling" in the locality against SEVs. However, it is clear that other concerns, such as concerns about proximity to a school or a church (which Collins J accepted could be taken into account) could also be grounded on a particular moral outlook even if not expressly articulated in such terms. Furthermore, a person having an objection to an SEV being situated in a particular locality may also be of the view that there should not be any SEVs in any locality. However, does that further "in principle" objection to SEVs render the locality-based objection unfit for consideration by the local authority?

53. The difficulties thrown up by this attempt to exclude consideration of objections on "moral grounds" was considered in the leading text on licensing in this field: *Sex Licensing, Philip Kolvin KC,* at 5.46:

> "Insofar as Collins J was stating that it is not open to an authority to reason that 'sex shops are immoral, therefore we shall not have any sex shops', he was undoubtedly right. But at the other extreme, it is plainly not the function of an Act to prevent any discretion to refuse absent proof of harm. Rather, the character and vicinity grounds give the licensing authority control over the use of urban spaces by sex establishments. It is for the authority to control the use of such spaces on behalf of local people. What local people think may be driven by a number of considerations, amongst which may be moral factors. How different uses should be spatially related may well depend upon one's views about those uses. One person may not mind, or even notice, if every second premises on the high street is a sex establishment. Another may feel that it is an affront. Undoubtedly, consciously or not, one's moral outlook will be engaged in that assessment. Thus, the challenge thrown up by the Christian Institute case is not a particularly easy circle to square. It is suggested that the resolution is to approach the matter in the manner of a balanced urban planner rather than as a moral critic of the commercial sex industry, and to set the standards for localities which are in the best interests of communities who live, work and relax in them."

54. I agree with that analysis. It is not open to a local authority to exclude SEVs from their area on the sole basis that it considers them immoral: to take such a stance would be to disregard Parliament's intention that such venues are permissible subject to the conditions for licensing such premises being met. That may have the effect, during a consultation exercise, that responses expressing an objection only on terms that such venues are immoral, will not carry much or any weight in the local authority's decision. However, a local authority is not thereby precluded from taking into account objections from the local community as to whether there should be SEVs in the locality for other reasons, even if such reasons could be said to derive from or amount to a particular moral stance or outlook on SEVs more generally.

55. Mr Cannon submits that objections to SEVs "in principle" which would apply regardless of where in the country one might be considering them can be equated to objections on moral grounds and are therefore properly to be disregarded. However, that is to construe "moral grounds" far too broadly and is consistent in my view neither with the legislation nor with the terms of Collins J's judgment in *Christian Institute.*

56. Paragraph 12(3)(c) of Schedule 3 to the 1982 Act permits a local authority to refuse a licence on the grounds that the number of existing SEVs in the locality is equal to or exceeds the

number which the authority "consider is appropriate for the locality", and where such number can be nil. The discretion afforded to the local authority by this provision is a broad one, and there is no stipulated restriction on what factors may be taken into account in determining what is "appropriate". Mr Cannon submits that the words "for the locality" necessitate a focus on considerations that relate to a particular locality, such that broader concerns, which might apply to any area, are to be excluded. However, in my judgment, those words do not, on a proper construction, serve to limit the considerations which a local authority may permissibly take into account when considering the number of SEVs appropriate for the locality. As Ms Boyd KC (who appears for the Claimant) points out, the wording of this provision contrasts, in this respect, with that of paragraph 12(3)(d)(i), which permits a local authority to refuse a licence on grounds that the grant would be inappropriate "having regard to the character of the relevant locality". That stipulates expressly for the local authority that the factors to be considered must relate to the character of the locality in question. Had it been Parliament's intention to limit the considerations under paragraph 12(3)(c), it could have similarly provided thereunder the words, "appropriate <u>having regard to the character of</u> the locality". That Parliament chose not to do so suggests that the local authority has a broader discretion under 12(3)(c) as to the factors to be taken into account in determining the number of SEVs that is considered to be appropriate. In any case, the difficulty with Mr Cannon's suggested approach is that many factors which could be said to relate or be relevant to a particular locality may also apply elsewhere. For example, a concern that the presence of SEVs might tend to have an adverse effect on relations between the sexes in a locality could be said to be relevant wherever in the country the location of an SEV was being considered. As such, I do not consider it to be a correct application of paragraph 12(3)(c) to exclude factors which might be said to apply to other localities as well as to the locality in question.

57. In *Christian Institute*, Collins J emphasised that whilst it was not for the local authority or the Court to take account of "straightforward objections on the ground that sex shops should not be allowed to exist", it could take account of a "strong body of feeling in the locality which objects to the existence of a sex shop in that locality". The SEB concerns expressed at scale in the present case would amount to such a "strong body of feeling". The fact that some of those SEB concerns might be said to arise from a particular moral or indeed philosophical stance or outlook as to how society should operate does not preclude them from being taken into account. The SEB concerns expressed views as to the *consequences* of having such venues on relations between sexes and their *effect* on attitudes towards and treatment of women and girls. These concerns did not therefore fall into the category of "straightforward

objections on the grounds that [SEVs] should not be allowed to exist"; rather, they amounted to objections based on the potential consequences and effect of having such venues in the locality. The fact that the logical conclusion of such an objection is that there should not be any SEVs in the locality or at all, does not render the objection a purely moralistic one or one that seeks to challenge the legal permissibility of such venues *per se*. In my judgment, the *Christian Institute* case is not authority for the proposition that SEB concerns should not be taken into account by a local authority.

*Public Sector Equality Duty*

58. Section 149 of the 2010 Act enacts the PSED and provides as follows:

> (1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> >
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it,
> >
> > (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
> >
> > …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
> >
> > (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> …
>
> (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-
>
> > (a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are –

…

sex

…"

59. In *R (Bracking & Others) v Secretary of State for Work & Pensions* [2013] EWCA Civ 1345, (in a summary approved by the Supreme Court in *Hotak v Southwark LBC* [2015] UKSC 30 at [73]) the applicable principles were identified as follows:

"(1) …equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements…

(3) The relevant duty is upon the Minister or other decision-maker personally….

(4) A [decision-maker] must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:

(a) The public authority decision-maker must be aware of the duty to have "due regard" to the relevant matters;

(b) The duty must be fulfilled before and at the time when a particular policy is being considered;

(c) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

(d) The duty is non-delegable; and

(e) Is a continuing one.

(f) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria."

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them".

(8) The combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it."

60. In *Bracking*, the Court also referred to the decision of Elias LJ in *R (Hurley & Moore) v Secretary of State for Business, Innovation & Skills* [2012] EWHC 201, recognising the duty of sufficient enquiry in this context:

> "89 … the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required".

61. The SEB concerns would undoubtedly be relevant to PSED-compliant local authority decision-making as they relate to, amongst other things, the need to eliminate discrimination, harassment and victimisation of women. To read the *Christian Institute* case (which was decided before the PSED came into force) as somehow precluding any consideration of SEB concerns (whether because they are seen as "moralistic" or as not pertaining to the locality) in determining what licensing policy to adopt is, in my judgment, to ignore the requirements of the PSED. For reasons already stated, there is nothing in the terms of paragraph 12(3)(c) of Schedule 3 to the 1982 Act that requires such a narrow approach. Moreover, as Ms Boyd submits, it would be curious, to say the least, if a local authority, in the sphere of SEV licensing, was prohibited by the terms of the 1982 Act from taking into account SEB concerns that, pursuant to the PSED, would be mandatory considerations in other contexts.

**Grounds for Judicial Review**

62. The three grounds on which the Claimant was granted permission are as follows:

(i) Ground 1 – The Defendant has failed to take into account consultees' objections to the Policy, and, in particular, in declining to have regard to the SEB concerns raised by many such consultees. The Claimant maintains that the Defendant was required to take these concerns into account, and that its grounds for not doing so, namely that these were deemed to be "moralistic" grounds or "in principle" objections to SEVs outside the scope of the Defendant's consideration, were erroneous in law.

(ii) Ground 2 – Breach of the PSED and/or failure of adequate inquiry and/or failure to take into account relevant considerations. The Claimant contends that the Defendant failed to have due regard to mandatory considerations under the PSED and failed to adopt the requisite approach to the relevant statutory criteria with the necessary rigour or to take steps to inform itself properly of equalities implications before reaching the Decision.

(iii) Ground 3 – The effect of the ARP, whereby the Existing Licensees will be granted a renewal of their SEV licences so long as there has been no material change in the character of the locality and unless there are any objections, amounts to an unlawful fetter on the Defendant's discretion and/or amounts to a "rubber stamping" of a renewal contrary to the statutory requirement to review the licence each year.

63. I shall deal with each ground in turn.

**Ground 1 – Failure to consider consultees' objections**

*Submissions*

64. Ms Boyd KC submits that the Defendant has failed to comply with one of the four key requirements of a lawful consultation, namely that "the product of consultation must be conscientiously taken into account", before deciding upon policy: see *Nichol v Gateshead MBC* (1988) 87 LGR 435 at 452. The First and Second Consultations asked for views on whether there should be no cap. There were numerous objections to the NCP many of which were based on SEB concerns and/or which advocated a zero cap. However, the Defendant repeatedly disregarded these as being "moralistic" or personal concerns or "in principle" objections not within the scope of consultation. Insofar as the SEB concerns were

acknowledged, Ms Boyd submits that the Defendant did not conscientiously engage with them. There is no support in either the statute or the caselaw for the Defendant's approach that any concerns not focused on the locality cannot be considered. Whilst the discretion available to the Defendant is to be exercised in the context of the locality, it is not thereby precluded from taking into account general concerns (such as the SEB concerns) which might apply wherever an SEV is located. The Defendant's approach is said to be inconsistent with giving communities a greater say in whether and where SEVs should be licensed in their area.

65. Mr Cannon, who appears with Ms Parekh for the Defendant, submits that the Defendant did take the SEB concerns into account. That is evident, submits Mr Cannon, from the numerous documents placed before the Members, several of which refer expressly to SEB concerns, and from the minutes of the Full Council meeting on 9 November 2021 from which it can be seen that several Councillors were also strongly advocating a zero cap based on such concerns. In these circumstances, it is simply not possible to say that these matters were left out of account. Mr Cannon further submits that, insofar as certain objections were kept out of account, that was consistent both with the law and guidance, which deems moralistic or in principle objections irrelevant, and with the scope of the consultation, which was not about whether SEVs should exist but about where they should be located.

*Ground 1 – Discussion*

66. What does a proper consultation require? In the well-known case of *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, the Court of Appeal stated as follows:

> 108 It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168* ." (Emphasis added)

67. It is this fourth requirement, namely that the product of consultation must be conscientiously taken into account, that is relevant to this case. To satisfy this requirement, a local authority would generally have to go further than merely acknowledging the product of consultation. The conscientious taking into account of consultation responses could, depending on the context, involve considering and, where appropriate, analysing such responses, undertaking, if appropriate, any further investigation necessary, and ensuring that the decision-makers are

properly apprised of the product of consultation insofar as it is relevant to their decision-making.

68. The key factual dispute at the heart of this case lies in whether the SEB concerns raised by a large number of consultees were taken into account. In deciding this issue, the Court only has the various documents produced during the process leading to the Decision made by Full Council on 9 November 2021, the Defendant having elected not to rely on any evidence in the form of witness statements to supplement and/or explain what is contained in the documents. Ms Boyd submits that, to the extent that those concerns are referred to in the documents, the Defendant has done no more than acknowledge them, whereas Mr Cannon submits that it cannot be said that SEB concerns have illegitimately been left out of account. Mr Cannon took the Court through the documents in some detail in an attempt to demonstrate that SEB concerns were taken into account. Notwithstanding the elegance and concision of his submissions, I have come to the view that the SEB concerns raised by consultees, although referenced by the Defendant at various stages, were not the subject of conscientious consideration by it and were instead treated as largely irrelevant to its decision.

69. Mr Cannon reminded the Court that the draft policy being consulted on was one that did not seek to impose any cap on SEVs and which would instead consider applications for SEV licenses on a case-by-case basis against locational criteria. He submits that the First Consultation which asked, amongst other things, whether the Defendant "should not seek to limit the number of sex establishments in any given area" was not to intended to invite responses that there should not be any SEVs at all. However, any response disagreeing with the proposed policy would necessarily be contending for a cap of some sort; given that a cap of nil is a permissible statutory option, it is unsurprising that some consultees would contend for a nil cap. Moreover, the First Consultation also invited general comments on the draft policy. Unsurprisingly, once again, that too elicited many responses objecting to the presence of any SEVs. The form and context of the consultation question were such that responses objecting to the presence of any SEVs or effectively advocating a nil-cap were within the scope of the consultation.

70. The First Consultation Report did refer to some of these responses and noted that:

> "Those opposed to SEVs described the venues and the activities within them as degrading and abusive to women, As such, many felt that the council would be failing in its equalities duty if such venues were permitted."

71. Mr Cannon submits that, far from denouncing such views as irrelevant, the Second Consultation Report actually sets out some examples, and it cannot therefore be said that these responses were left out of account. Had the First Consultation Report been left for the Full Council to consider without any further qualification or steer from the Working Group or LC, that argument might have been persuasive. However, as the minutes of the Working Group and subsequent documents show, that was not what occurred.

72. Mr Cannon reminded the Court that the Working Group was tasked with considering the consultation and making recommendations for the Defendant to consider, and that it was not itself a decision-making body. That may be so, but clearly, the recommendations that the Working Group made and the views that it expressed were expected to be taken into account. Those recommendations and views cannot be disregarded as having had little or no impact on the decision-makers. It is therefore instructive to examine what the Working Group said about Questions 1, 3 and 4 in the First Consultation and the responses thereto. These are set out at paragraph 20 above. As can be seen, the views of the majority objecting to the proposal that there should not be a limit on SEVs, appear to be dismissed by the Working Group on the basis that the LC had already determined that the setting of a limit was unnecessary. There certainly does not appear to be any conscientious engagement with the responses or the reasons given for them even though, as stated above, responses advocating a limit (whether that be a limit of nil or otherwise) were within the scope of the First Consultation.

73. Question 3 had asked for feedback on other locality considerations. Although it was noted that there were 82 responses, the majority (46) of which stated that no locality was suitable and that sex establishments should not be allowed, the Working Group's response was merely to state that such establishments are "legally permitted" and that these responses "were not in line with the objectives of the policy which is to control the location and operation of any of these premises". Mr Cannon submits that the Working Group was merely noting here that the responses were not apt to answer the question, and that, as such, the responses were not disregarded, but merely disagreed with. I do not accept that submission. Whilst a local authority is entitled to conduct consultation in terms that express a preferred option (see e.g. *Nichol v Gateshead MBC* (1988) 87 LGR 435 at [451, 456 and/or 463]), that does not permit it to shut its ears to responses that advocate another option within the scope of the consultation. Here, it is clear that the context was whether the Defendant should not impose any cap. Responses which advocated a cap, including a nil cap (i.e. that there should not be any SEVs in the locality), were within scope. The fact that SEVs were "legally permitted" does not

justify the blanket discounting of such responses, when other options within the scope of the consultation (e.g. a reinstated cap or a nil cap) were equally "legally permissible".

74. Mr Cannon further submits that these responses, which were in terms that "no locality was suitable", were not apt to answer the question because they did not focus on the locality. However, a response which provides that no locality is suitable also means that the locality in question is not suitable. Even if the absence of specific locality considerations could justify the disregarding of these responses as inapt to answer the question, the same cannot be said of Question 4 in the same consultation, which merely asked for any other comments. Although it was recognised by the Working Group that a "high number" of these comments opposed the licensing of SEVs, it was said that "on examination the majority of these are on moralistic grounds which are not for consideration within this policy guidelines". Thus, the Defendant has, at a stroke, disregarded a substantial proportion of the responses despite inviting general comments on the Policy.

75. Mr Cannon accepted that if the consultation process had stopped there, it would be difficult for the Defendant to say that the PSED had been complied with. He therefore relies on subsequent documents, the next of which is the slide presentation prepared for a Members briefing held due to the strength of feeling on this issue. The content of the slides is summarised at [25] above. It included the Working Group's view that many of the responses had objected to the venues "on moral grounds, which cannot be considered". Mr Cannon submitted that it was correct to include that in the presentation to members. However, as stated above, the Working Group has adopted a blanket rejection of all responses which advocated there being no SEVs at all on the basis that such "in principle" objections to SEVs equated to objections on moral grounds. For reasons stated already, that approach was incorrect. The SEB concerns expressed in many of the objections could not legitimately be characterised as merely being on moral grounds. It is right to point out, as Mr Cannon emphasises, that the next slide, headed "Equalities Impact Assessment", does mention that "There are suggestions that venues normalize the objectification of women and can have an impact on women's safety in the locality". That is undoubtedly a reference to one of the matters raised in the SEB concerns. However, what is not made clear is the strength of feeling on this issue as indicated by the number of responses raising SEB concerns. By adopting, through the Working Group, a blanket rejection of such concerns as not being relevant or not to be considered, the Defendant has diminished the force with which such concerns were raised during the consultation. This is not a question of the weight to be attached to responses after proper

consideration, which is a matter for the local authority, but of their fair treatment, which is part and parcel of the duty to have conscientious regard to them.

76. As to the Second Consultation Report, Ms Boyd agrees that it does set out some of the SEB concerns and that it does not of itself suggest that these should be disregarded. She submits, however, that there is limited engagement with or analysis of these SEB concerns, the report focusing instead on community safety and dancer welfare concerns. Furthermore, Ms Boyd relies on the minutes of the LC meeting on 16 September 2021 which considered the Working Group's review of the Second Consultation, and in which the LC notes that "the majority of consultation comments were outside the scope of the licensing framework and as such cannot carry weight in the decision-making process.". Mr Cannon submits that the LC here was merely setting out the views of the Working Group but was not endorsing them; that is confirmed, he submits, by the fact that the very next paragraph of the minutes states that the "Licensing Members were asked to further consider the consultation responses and to agree the final wording of the policy which will then be recommended to full council for approval." That invitation to "further consider the consultation responses" would not have been issued, submits Mr Cannon, had the LC regarded the majority of them to be irrelevant.

77. Skilfully though that submission was made by Mr Cannon, I do not accept it for the following reasons:

    (i) The invitation to consider the consultation responses must be read in light of what has gone before. There is a clear statement, based on the work of the Working Group, which had considered the results of the Second Consultation, that the majority of consultation comments were outside scope and as such "cannot carry weight in the decision-making process". In other words, insofar as the consultation responses are to be "further" considered, that was intended to be in respect of those that could carry weight in the decision-making responses (i.e. the minority of responses dealing with matters other than SEB concerns). It would be odd if the writer's intention had been for the Members to consider all consultation responses afresh having just informed them, without demur or qualification, that the majority of them carried no weight.

    (ii) My analysis is based on an objective reading of the minutes and how they would have been understood, there being no witness statements from any officer of the Defendant to suggest that something else was intended or that they had in fact been understood differently.

(iii) Whilst objections based solely on moral grounds could legitimately be excluded from consideration or given less weight, there is nothing here to suggest that the "majority" of the responses fell within that category. Indeed, a cursory analysis of the responses to the Second Consultation, which are summarised in the Appendix to the Second Consultation Report, suggests that only a small proportion could legitimately be described as objections to SEVs on purely moral grounds. Examples include the following:

> "It is morally wrong to have a policy to encourage this sort of thing to destroy the make-up of society and just to please some abhorrent people in our mi[d]st."
>
> "How seedy to you want BCP Council area to become? The[re] should be no more types of these establishments in the area."

(iv) The Second Consultation Report states that only 36 out of 99 responses to the "further comments" question in the Second Consultation were either objections without any reason given or were "based on moral grounds". On any view, that does not amount to a majority of responses.

(v) A subsequent Briefing Report produced by the LM for Full Council, in response to the issue that "these venues dehumanise women and exploit them as commodities and this negatively impacts all women", states that "These are legal venues which are permitted to operate…[and that] Personal and moral views should not be taken into account in the decision making process". In other words, the SEB concerns, which can affect all women, fell (according to the Defendant) within the category of "Personal and moral views" which cannot be taken into account.

(vi) Based on the above, the identifiable thread running through the various documents prepared for and considered by Full Council is that SEB concerns were considered by the Defendant to constitute personal or moral views that were outside the scope of the consultation and irrelevant to the Defendant's decision-making. I accept that some of the documents (e.g. the Second Consultation) read in isolation might suggest that a proper distinction was drawn between "moral" and other concerns. However, the Full Council did not consider documents in isolation, and their cumulative effect is, in my judgment, clear.

78. The LM report also set out four questions from Councillors and the responses given. The first was from Councillor Northover who sought assurance that the comments which have not been considered because they were objections on moral grounds are not in fact legitimate concerns from women about safety. That question was asked in light of an acknowledgement by Sheffield City Council in another case that it had wrongly ignored SEB concerns on the basis that these amounted to "moral objections and irrelevant". The response to that question (from the Senior Solicitor (Litigation Team)) referred to the fact that Sheffield had acknowledged a failure to comply with the PSED in deciding to grant a new SEV licence and suggested that that was the basis on which it had ended up ignoring certain concerns as irrelevant. Ms Boyd submits that in doing so, the Senior Solicitor had put an inaccurate gloss on the Sheffield decision in that the acknowledged PSED failure therein was separate from a further arguable issue which concerned the incorrect rejection of SEB concerns as "moral concerns". I have been shown the relevant orders from the Sheffield case. It is correct to say that the Senior Solicitor's suggestion to Councillor Northover that Sheffield's acknowledged and alleged failures all stemmed from a failure to comply with the PSED was not quite accurate; there was a separate and distinct arguable issue in that case, as there is here, that Sheffield Council had incorrectly rejected objections based on SEB concerns as "moral objections and [therefore] irrelevant".

79. The Senior Solicitor does refer in her response to the Defendant's compliance with PSED and the need to consider the "potential impact on gender equality". However, the mitigating actions focus almost entirely on community safety and dancer welfare issues rather than the impact on gender equality. Mr Cannon submits that the response focused on safety because that was what Councillor Northover's question was addressing. However, that does not answer the key question which was whether the Defendant had ignored SEB concerns on the grounds that these were moral concerns, just as Sheffield had allegedly done. In my judgment, the Senior Solicitor's response, which was given in writing before the relevant meeting, reveals the Defendant's continued downplaying or rejection of SEB concerns as matters which were not really within the scope of the consultation. The fact that the mitigating actions fail to address any such concerns is indicative of a failure to engage conscientiously with them. Mr Cannon submits that it is difficult to conceive of any mitigating action in respect of the SEB concerns short of not having any SEVs at all. That does not appear to me to be correct. I agree with Ms Boyd that proper engagement with the SEB concerns might have resulted in other mitigating actions, such as the obtaining of or considering further research (consistent with the duty to make reasonable inquiry) on the effects of SEVs on attitudes to and treatment

of women and children more generally. Such research does undoubtedly exist: there were several examples in the papers before me, including one prepared in support of a draft policy in Bristol that no SEV licences should ordinarily be granted within any of the localities within that local authority area.

80. Councillor Filer asked if the LC was aware that the PSED required the Defendant to consider the impact on all women, not only in the clubs but in the vicinity and wider society. The Senior Solicitor in response referred to the answer given to Councillor Northover and said: "Yes the Licensing Committee should be aware that their PSED includes the impact of [SEVs] on all women in the vicinity and wider society and I believe that has been done by consideration of evidence before [the LC] to date".

81. Whilst there is here an acknowledgement of need to consider the impact on all women in the vicinity and wider society, there is little to show that there was any conscientious consideration of such impact. There is nothing in the responses to either Councillor Northover or Filer to indicate such consideration, and the mitigating actions (as I have said) focus instead largely on safety issues rather the impact on women more generally. There is, in particular, a distinct absence of any action addressing the broader SEB concerns. That absence tends to support the impression given elsewhere that these concerns were effectively side-lined as being "moral objections" that are not relevant to the Defendant's policy decisions.

82. Mr Cannon also relied upon the EINA and the EIACE. As to the EINA, Mr Cannon acknowledged that, on its own, it does not address the SEB concerns and the points being made by the Claimant. The EINA focuses on harassment of women in and around the venues and on dancer welfare. As with other documents, there is little or nothing in this document addressing broader SEB concerns, although it should be noted that this pre-dated the First Consultation.

83. The EIACE is undated, but refers to the responses to the First Consultation. It does not contain any reference to the responses to Second Consultation. Under a heading. "What sources of research and evidence do we currently have and what does it tell us?", there is reference to "Other research into [SEVs] has concluded that: Lap dancing clubs normalise the sexual objectification of women". Ms Boyd acknowledges that that is a reference to an aspect of the SEB concerns upon which she relies. However, she submits that one looks in vain in the EIACE for anything addressing such concerns and that what one finds instead is a focus on community safety and dancer welfare concerns. Mr Cannon submits that this is further

evidence that the Defendant did not disregard the SEB concerns. However, I agree with Ms Boyd that there is little or nothing here to demonstrate anything beyond mere acknowledgement of the SEB concerns; there is certainly nothing to indicate any real engagement with such concerns.

84. The final document to which I was taken is the minutes of the Full Council meeting on 9 November 2021 at which the Decision was taken. It is not in dispute that the Full Council had before it the Briefing Paper, the First and Second Consultation Reports, the Slides, the EINA and the EIACE. As set out above, a number of Councillors expressed strong objection to the Policy, some doing so on the basis of SEB concerns. Mr Cannon relies on the fact that no one sought to suggest at Full Council that such objections were irrelevant. That is certainly true. However, Councillor Butt, Chair of the LC, having heard the various concerns, stated, "*But these worries are not those in the locale*." Once again, the concerns were downplayed and/or side-lined, this time on the basis that they did not relate to the locality.

85. Based on this review of the documents, and in the absence of any witness evidence from the Defendant, I conclude that Ms Boyd's submission under Ground 1 is made out. That is to say, the product of the two consultation exercises, insofar as it related to the SEB concerns, was not conscientiously taken into account before deciding upon the Policy. I reach this conclusion with some reluctance because the Defendant has undertaken an otherwise diligent and extensive consultation. Regrettably, however, and possibly as a result of construing the *Christian Institute* decision too broadly, the Defendant has consistently downplayed and/or side-lined SEB concerns which ought to have been the subject of conscientious consideration before reaching a final decision. As such, Ground 1 succeeds.

**Ground 2 – Failure to comply with the PSED**

*Submissions*

86. Ms Boyd submits that, having regard to the "heavy burden" (*Bracking* at [60]) which the PSED imposes on public authorities and the need for the decision maker to "properly appreciate[..] and address[..] the full scope and import of the matter which she [was] obliged to consider pursuant to the PSED" (*Bracking* at [77]), it is clear that the Defendant did not comply with the duty. The lack of conscientious engagement with the SEB concerns under Ground 1 is itself evidence of a failure to comply with PSED. Moreover, whilst passing reference was made to the PSED at various points, none of the material before the Court suggests that LC members were, at any stage, directed to the specific requirements under

s.149(1), (3) and (5) of the 2010 Act or that any of these matters were considered in adequate detail or with the necessary rigour.

87. Mr Cannon submits that one should focus on substance and not on form and the mere fact that the court might have attached more weight to the equality implications of a decision would not entitle it to interfere (*Bracking* at [26(5)(iii) and (8)]). He further submits that the requirements set out by the Court of Appeal in *Bracking* are not to be treated as provisions in a statute and must be viewed in context; there the decision was that of a Minister in respect of a policy having national effect whereas the decision-making here only had a local impact. The same degree of rigour in complying with the PSED cannot be expected here. In the present case, the documents before the Full Council, and in particular the Briefing Document, establish not only that the PSED was carefully considered but also that the duty to have due regard to the need to achieve the goals identified in paras (a) to (c) of s.149(1) of the 2010 Act was met.

*Ground 2 - Discussion*

88. The applicable principles in considering whether the PSED has been complied with were summarised in *Bracking* and are set out at [50] above. I can quickly dispense with Mr Cannon's arguments that these principles do not apply with the same degree of rigour in this context, which is different to that in *Bracking*. Whilst it is right that the precise weight and extent of the duty will be fact-sensitive, there is nothing in the Court of Appeal's decision in *Bracking* to suggest that the principles therein were not applicable to public authority decision-making generally. Moreover, those principles were expressly approved by the Supreme Court in *Hotak & others v London Borough of Southwark* [2015] UKSC 30, a decision considering compliance with the PSED in the context of local authority decision-making: see *Hotak* at [73]. In *Hotak*, Lord Neuberger went on to say:

> "75. As was made clear in a passage quoted in *Bracking*, the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in *Hurley and Moore*, it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision".

89. It is clear, therefore, that the *Bracking* principles apply unalloyed in relation to the Defendant's decision-making, and the question for this court is whether there has been "rigorous consideration" of the PSED based on a "proper and conscientious focus on the statutory criteria".

90. Whilst there was mention of the PSED at various stages, I am not satisfied on the material available that there was rigorous consideration of it with a proper and conscientious focus on the statutory criteria. I say that for the following reasons:

    (i) The SEB concerns raised issues of sex-based discrimination, and the potential effect of SEVs in a locality on relations between men and women and generally. Those concerns are clearly matters which fall within the scope of s.149(1)(a) and (c) of the 2010 Act. The fact that, as I have found, these SEB concerns were not the subject of conscientious engagement in the course of consultation, militates against any finding that there was rigorous consideration of the PSED. Those concerns were repeatedly side-lined as not being relevant or not within the scope of the consultation;

    (ii) None of the records of the various meetings and presentations suggests that LC members were, at any stage, directed to the specific statutory criteria under s.149(1), (3) and (5) of the 2010 Act. Whilst I agree with Mr Cannon that the focus should be on substance and not on form, such that the mere failure to cite specific statutory provisions would not denote a breach of duty, it is impossible to discern in this case any substantive consideration of the relevant provisions.

    (iii) The various references to the PSED, such as they are, neither set out the statutory criteria nor summarise their effect in order for the decision maker to be able to understand their full import. For example, the EINA merely states that the PSED "has been considered as part of the production of this EINA". It does not identify what is required by the PSED and makes no reference to discrimination and relations between men and women, focusing instead on "fear and concerns of sexual harassment as a result of the SEV in the locality…". There is insufficient information here to be able to demonstrate that the decision-maker either properly appreciated the requirements of the PSED or for the Court to be able to infer that the PSED was the subject of rigorous consideration by the decision-makers.

(iv) Whilst the consultation reports did analyse responses by reference to gender and acknowledged that some consultees had raised concerns about equality and discrimination, there is nothing in them that establishes that the relevant decision-maker had due regard to the PSED. Indeed, the Working Group minutes of 29 March 2021 merely state that it had been "provided [with] an overview of the duty". There is no evidence to explain what that overview entailed. This section of the minutes concludes by stating that "there was no indication that we have not met the duty." However, there is very little information available that would enable one to test that assertion. Moreover, it is clear from the *Bracking* principles that the relevant duty lies with the decision-maker personally. An assertion, made by an officer preparing materials for members to consider, that the duty has been complied with does not suffice in discharging that duty, particularly where the decision-maker is not told the substance of the specific statutory criteria to be considered.

(v) The responses to questions raised by members of the LC at the meeting on 16 September 2021 did mention the PSED and that there had, in the officer's view, been compliance with it. However, there is little, once again, to indicate that decision-makers were given the necessary information as to the requirements of the PSED in order to be able to infer that there was rigorous consideration thereof. The response emphasises the "duty to consider the impact on the vicinity and wider society and take mitigating actions to reduce the potential impact on women". Whilst that does refer to the impact on "wider society", that being one aspect of the SEB concerns, there is nothing to indicate that there was any real consideration of, for example, the need to eliminate discrimination, foster good relations between men and women or promote understanding, all of which are express requirements of the PSED. The mitigating actions referred to largely focus on community safety and dancer welfare, matters which, albeit important, do not address the broader aims of the PSED.

(vi) The EIACE similarly failed to identify the substance of the requirements under the PSED. It referred to research that had concluded that "Lap dancing clubs normalise the sexual objectification of women" as well as to research suggesting that dancers at such clubs were not victims. However, merely referring to such research, without seeking to analyse or draw any conclusions therefrom or without considering its relevance in achieving the specific aims of the statute, amounts to little more than an acknowledgment that the establishment of SEVs raises equalities issues; it does not

amount to having "due regard" to the PSED by way of conscious approach to the statutory criteria.

(vii) The Briefing Paper contains an assertion that the relevant PSED principles had been followed and referred to other documents such as the EINA in support. For the reasons set out above, the EINA does not demonstrate compliance with the PSED. Furthermore, the Defendant cannot rely on repeated assertions that the PSED has been complied with when there is little material in support to demonstrate that that was the case in substance. As with previous documents, the Briefing Paper does not identify the specific obligations under the PSED. The mitigating actions and the conclusions focus, as before, largely on community safety and dancer welfare. The Briefing Paper notes, for example, that "overall the policy will have a positive impact because it enables a safe space for both dancers and patrons of the SEVs". However, nothing is said about the need to tackle discrimination and foster good relations more generally, two aspects of the PSED that might have been considered adequately had there been "a proper and conscientious focus on the statutory criteria.". Mr Cannon submits that the Briefing Paper alone demonstrates compliance with the PSED. I do not agree that it does, either alone or in conjunction with the other material presented to the Full Council.

91. Mr Cannon warns against the taking of a hypercritical approach resulting from an over-forensic analysis of the Defendant's documentation. However, none of the above conclusions derives from such an approach. The conclusion that the PSED was not complied with follows from the application of well-established principles as to what is required of the decision-maker. Ground 2 succeeds.

**Ground 3 – Fettering of discretion**

*The operation of the ARP*

92. The ARP is set out at paragraph 10 of the Policy. So far as relevant to this ground, it provides:

> "10.1 It is acknowledged that there are currently three licenced Sexual Entertainment Venues within the Old Christchurch Road and Yelverton Road areas of Bournemouth Town Centre. These are For Your Eyes Only, Wiggle and Spearmint Rhino and that these venues have been licenced for a number of years.
>
> …

> 10.4 It has been determined that these existing licences will continue to be renewed, on application, by the existing operators during the lifetime of this policy if there is not material change in the character of the area in the intervening period. If there are any objections to an application, it will be considered by the Licensing Committee in accordance with the relevant statute. This essentially provides acquired rights to these existing operators for the current time."

93. Mr Cannon provided further explanation as to how the ARP would work in practice. He emphasises that, as the ARP provides, renewal is not automatic in that an application for renewal still needs to be made in accordance with paragraph 13 of the Policy. Paragraph 13 of the Policy provides that any such application is to be made in writing and is to be the subject of public notice. The application process also requires the applicant to complete a personal information form and submit a recent DBS certificate. The applicant's suitability to hold an SEV is determined using this documentation and in consultation with the Dorset Police.

94. I am conscious that there is no witness statement confirming these operating procedures and that Counsel cannot give evidence as to such matters. However, the stated ARP does provide that existing licenses will continue to be renewed, "on application". That, and the reference in paragraph 13.1 of the Policy to the need to make an application for the "grant, renewal, …" of a licence does suggest that renewal is not automatic and that an application is still required. I therefore proceed on that basis.

*Submissions*

95. Ms Boyd submits that the ARP has the effect of fettering the Defendant's discretion in relation to the issuing of SEVs. Paragraph 12 of Schedule 3 to the 1982 Act confers a discretion on the Defendant to refuse the grant or renewal (annually) of an SEV licence on the discretionary grounds set out in paragraph 12(3)(a) to (d). By conferring acquired rights and stating that licences "will be renewed" save where there is a change in the character of the locality or where there is an objection, the Defendant is precluding itself from a proper exercise of the discretion under paragraph 12(3). Whilst the Defendant is entitled to formulate a policy to direct the exercise of discretion subject to being open to exceptions (see *R (Westminster City Council) v Chorion plc* [2002] EWHC 1104 (Admin)), it cannot, submits Ms Boyd, limit the exercise of discretion only to those cases where an objection is raised.

96. Mr Cannon submits that the effect of paragraph 10.4 of the Policy is to set up a rebuttable presumption that licences held by Existing Licensees will be renewed upon application if: (i) there is no change in the character of the locality; and (ii) there are no objections. If there is a

change or an objection then the application will fall to be considered in the usual way. In so doing, the ARP permissibly gives weight to the fact that an SEV licence was previously granted and aids decision-making in the case of Existing Licensees. It is further submitted that the discretionary factors are not excluded from consideration. The requirement for an application for renewal to be made in accordance with paragraph 13 of the Policy would enable the Defendant to check whether the discretion to refuse should be exercised because, for example, the applicant has been convicted of a criminal offence since the previous grant of an SEV licence. The requirement that, for the ARP to operate, there has been no material change in the character of the locality in the intervening period means that the Defendant takes this discretionary factor into account. In the event of an objection, the application is determined by reference to the statutory criteria with no presumption of renewal.

*Ground 3 – Discussion*

97. On this issue, Mr Cannon's submissions are to be preferred. In fact, the reason for the claim under this ground may be the result of a lack of clarity as to how the ARP would operate in practice, and, in particular, whether renewal would be granted automatically or only upon an application being made. Ms Boyd accepted in reply that if the ARP operated such that an application for renewal had to be made and that any such application was processed in accordance with paragraph 12 of the Policy, then the Claimant could not maintain her objection. She maintained, however, that that was not how the ARP's operation had been characterised by the Defendant in its Detailed Grounds of Resistance, and it is not how one would interpret it on an objective reading. Notwithstanding what is said in the DGR, I consider that, on an objective reading of the provision, it is clear that an application would be required: there is express reference in paragraph 10.4 of the Policy to the renewal being "on application". In the absence of any provision creating an exception for applications pursuant to this paragraph, the application process described in paragraph 13, which refers to applications for grants and renewals, would apply. The operation of that process means that the first of the discretionary factors to be considered under paragraph 12(3)(a) of Schedule 3 to the 1982 Act, namely that relating to the applicant's suitability, is invariably considered.

98. Furthermore, as the ARP expressly provides, "…existing licenses will continue to be renewed on application by the existing operators during the lifetime of the policy <u>if there is not material change in the character of the area in the intervening period</u>". That necessarily means that upon any such application, the Defendant will need to consider whether has been such change. If there has, then the presumption in favour of renewal falls away and the application is

considered against the statutory criteria. That would include for example, the discretionary factor in paragraph 12(3)(d)(i) of Schedule 3 to the 1982 Act, namely the character of the relevant locality.

99. I accept that the operation of the ARP means that the Defendant may not, in the event of there being no change in the character of the locality, expressly turn its mind to each of the remaining statutory discretionary factors under paragraph 12(3)(d)(ii) and (iii). However, there would only be an unlawful fetter on the exercise of discretion if the effect of the ARP was to preclude the exercise of discretion in every case: see *R (Dickinson) v HMRC* [2019] 4 WLR 22 at [56]. The ARP does not have that effect. As already discussed, at least two of the discretionary factors are considered in every case of renewal. As to those which are not so considered, the ARP does not preclude their consideration: the exercise of the discretion can be triggered at any time after the publication of the application by the raising of an objection. Ms Boyd submits that this places the onus on members of the public who would have to raise an objection before one or more of the statutory discretionary factors is considered. However, it does not appear to me that the need for such intervention means that there is a fetter on the exercise of discretion. The ability of an interested party or any person to raise an objection, and thereby trigger the exercise of discretion, of itself demonstrates that the Defendant has not closed its mind to such exercise or the consideration of matters that would result in the acquired rights not being conferred in a particular case.

100. In my judgment, the ARP does no more than give due weight to the fact that the Existing Licensees had held licences for a number of years. That is perfectly permissible and indeed appropriate. In *R v Birmingham City Council ex p Sheptonhurst Ltd* [1990] 1 All ER 1026, the Court of Appeal considered a claim by a sex shop owner that it was perverse of the local authority to refuse a renewal of his licence where there had been no change in the character of the area in the intervening period. O'Connor LJ, in rejecting that claim, stated as follows at 1035g to 1036b:

> "Counsel for the appellants submitted that Parliament cannot have intended that the vagaries of local opinion should be determinative of an existing trader's right to continue to trade. He pointed to the limited grounds for revoking a licence found in para 17 of Sch 3 to the 1982 Act and to the preference to be given to existing businesses at inception contained in para 29 of Sch 3. I see the force of this submission, but where Parliament, having expressly limited the grounds on which a licence may be refused, has drawn no distinction between grant and renewal of the licence and provided that a licence shall not last for more than a year, then it seems to me that to accede to the submission of counsel for the appellants would be to introduce a fetter

> on the discretion of the local authority in cases of renewal, which Parliament has not done. However, although the discretion is unfettered, there is a difference between an application for grant and an application for renewal and that distinction, as the cases have pointed out, is that when considering an application for renewal the local authority has to give due weight to the fact that a licence was granted in the previous year and indeed for however many years before that. It is of particular importance that the licensing authority should give due weight to this fact in this field, for I do not doubt that there is opposition to sex shops on grounds outside the limits imposed by para 12 of Sch 3. I have come to the conclusion that the licensing authority were entitled to have a fresh look at the matter as the chairman of the sub-committee states in his affidavit, which I have set out earlier in this judgment. In a case where there has been no change of circumstances, if the licensing authority refuses to renew on the ground that it would be inappropriate having regard to the character of the relevant locality, it must give its reasons for refusal: see para 10(20) of Sch 3. If the reasons given are rational, that is to say properly relevant to the ground for refusal, then the court cannot interfere. I believe this to be the true protection for a licence holder applying for renewal against a wayward and irrational exercise of discretion. The fact that in previous years the licensing authority did not choose to invoke those reasons for refusing to grant or renew the licence does not make the reasons irrational." (Emphasis added)

101. For these reasons, Ground 3 of the claim fails and is dismissed.

**Conclusion and Remedy**

102. For the reasons set out above:

(i) Grounds 1 and 2 of the claim succeed.

(ii) Ground 3 fails and is dismissed.

103. It follows that the Decision to adopt the Policy is quashed.