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Daniel Davies MIoL
Chairman

Welcome to the Summer 2020 edition of the IoL's *Journal of Licensing*. It is difficult to believe it is only four months since my last foreword, such has been the upheaval in our personal and professional lives since the scale and seriousness of the Covid-19 pandemic became evident and "lockdown" commenced.

It goes without saying that the landscape for operators has changed beyond all recognition. There have been commensurate challenges for licensing authorities and other regulatory authorities, particularly the police.

What has been abundantly clear in this post-Covid-19 world is that it is more vital than ever that the IoL is the go-to resource and support – and advocate - for our members. This means that we have to be sufficiently agile as an organisation to respond to all manner of imperatives in a timely fashion, and to provide a conduit to the powers that be to reflect the views of our members and ensure that the pressing issues affecting the present and the future for our members are vocalised effectively.

But just as we like to think that our members can rely on and look to us, so we rely on them. Our aim is to be a "broad church" of members, and the feedback we gain from information and best-practice sharing amongst stakeholders has enabled us to disseminate information, assistance, opinion and guidance as efficiently as possible.

It also fed into the IoL's *Protocol*, a document which we hope has been a useful reference tool for the trade, licensing authorities and other stakeholders alike. We are delighted that "remote" licence hearings are now taking place as a matter of course, and hope that the *Protocol* helped to encourage and, perhaps, embolden, licensing authorities to hold remote hearings. The positive effects of keeping licensing processes moving will be felt as a semblance of normality returns.

It is a source of concern for us that the appellate process is not proceeding on a similar path. Readers may recall a lively discussion at the National Training Conference (NTC) last year where the delay in substantive appeal hearings in the Magistrates' Court was one of a number of misgivings expressed by members. I am pleased to report that the IoL wrote to HM Court Service on 9 June 2020 to urge them to encourage the courts to list licensing appeals.

That allows me to segue neatly to this year's National Training Conference (NTC). Due to the uncertainty around social distancing measures in the longer term we have had to take an extremely difficult decision to cancel the NTC for this year.

Although we will postpone the face to face conference until November 2021, instead this year we will host a series of webinar conferences in the week commencing 9th November 2020. We hope that many of you will be able to join us online to discuss all areas of licensing regulation and practice.

There has been a surfeit in recent months of primary legislation, secondary legislation, guidance (formal and informal) from numerous sources, reports, analysis, and predictions. We have tried to steer a course through this to distil the important "need to know" information to our members in a succinct and accessible way – news items on the website, email alerts, Licensing Flashes. The *Journal* allows, of course, for a more considered discourse on the panoply of ramifications of Covid-19. We have authoritative analysis from Philip Kolvin QC, who looks at how the hospitality sector can return post-Covid, and from Sarah Clover, who presents a practical example of how different operators are joining together to help each other - the NEXSTART group. Gareth Hughes performs an invaluable service in looking at the mysteries of the regulation of tables and chairs on the street- an article which I am sure many practitioners will look to as premises begin re-opening with social distancing in place.

But this is far from just a 'Covid' issue of the *Journal*. The lead article is an important summary of CCTV provision in licensed premises, as Matt Lewin monitors current law and practice and provides some thought-provoking ideas for the future. David Lucas gives us an accessible guide to gambling in alcohol-licensed premises. Caroline Loudon delves into the outer reaches of the licensing solar-system with an informative piece on The Travelling Funfairs (Licensing) (Scotland) Bill.

Space prevents mentioning others, but rest assured that we have the usual range of high-quality contributors and diverse subject matters. We also have our regular feature articles from James Button, Nick Arron, Julia Sawyer and Richard Brown.

I hope that you enjoy this edition and I look forward to seeing as many of you as possible in person as soon as the current situation permits.

Institute of Licensing

JOURNAL OF LICENSING ISSUE 27

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Leo Charalambides FIoL
Editor, Journal of Licensing

With so much change and reassessment of the "new normal", I shall start with a question: what is the purpose of a review or of a summary review under the Licensing Act 2003? Is the approach one of strict dogmatic adherence to the letter of the law (and to conditions)? Or, ought pragmatism prevail (ie, the spirit of the law and conditions) in the context of the current concerns and the particular premises (ie, the time-honoured phrase of a case-by-case basis)?

It seems to me that the purpose of reviews is diagnostic. The aim is to identify specific causes of concern and to provide a proportionate and appropriate remedy in the current circumstances of a particular application. Further, any such remedy is taken in the interests of the wider community and not of the individual interests of the licence holder. Reviews in our town halls are administrative hearings seeking to promote ever better regulation in the wider public interest. For this reason, for my part, pragmatism ought to prevail. Indeed, one of the consequences of the Covid-19 emergency period has been the enhancement of genuine partnership and pragmatism – a legacy that I hope we retain and build upon.

The brutal killing in police custody of an unarmed black man, George Floyd in Minneapolis, Minnesota has once again focused global awareness on prejudice, inequalities and racial discrimination. It might not seem obvious, but it also invites consideration of the question: what is the purpose of a review?

As a licensing barrister I have been involved in a great number of review applications and hearings. Reviews have certain recognisable common concerns and characteristics. I want to focus here on reviews that arise in respect of premises where the patrons are predominately black or BAME or where the entertainment (whether internally or externally promoted) is predominately music of black origin.

In such cases the review application, the "off-the-record" discussions and the public hearing itself will frequently involve consideration and discussion of the implied if not direct request that action is taken to "change the operating style" so as to change the demographic profile of patrons. The very clear aim is to agree to impose measures or conditions where the desired outcome will be that there will be fewer black and BAME patrons. These discussions also involve consideration of music and operating styles. The review will often seek to limit or prohibit music, artists and external promoters of black origin. The effect of a seemingly innocuous condition that states "no urban music" is as sinister and offensive as a sign that reads: "No blacks, no dogs, no Irish"! The review process is perverted to target black and BAME people and culture and fails to address the direct cause or causes of concern. Instead, the focus is unfairly upon particular communities and upon particular manifestations of cultural expression.

In our entertainment and night-time offering and economies, the adverse impact of this prevailing attitude upon women (particularly harassment and violence), the critical reduction of LGBTQ+ spaces and the discriminatory attitudes to black and BAME venues is well evidenced. The causes of concern are clear; we are in dire need of a remedy. All too often the commercial needs of keeping the premises open, the desire to *be seen to* engage in partnership with responsible authorities, other persons and councillors and not to rock the boat has stopped me from highlighting the implied and at times patently direct prejudice and discrimination. This complicity of silence and self-censorship is shared by the operators of the premises, responsible authorities and local councillors. This cannot and should not continue into our "new normal".

Licensing functions – of which a review is one – do not sit in isolation but are part of the wider operation of local government which includes the Public Sector Equality Duty (PSED) imposed by the Equality Act 2010 which places a legal obligation on public authorities to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation; to advance equality of opportunity; and to foster good relations between persons with different protected characteristics. The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Each local statement of licensing policy should refer to the PSED and how this has been complied with. Decision makers must be personally able to discharge the PSED with substance, with rigour and with an open mind.

It seems to me that one small step towards challenging the self-evident discrimination against black and BAME premises, patrons and culture and to advance equality in our entertainment and night-time economies is to request and require licensing authorities to rigorously engage in the exercise of the PSED. As a licensing community it is time to talk about inequalities and race and for my part I pledge to do so.

Why it's time for a re-think on CCTV in licensed premises

As monitoring technology advances, licensing authorities must be on their guard against 'surveillance creep' argues **Matt Lewin**

It is often said that in the UK we have an unusual degree of tolerance for mass surveillance compared to other countries in Europe, many of which have more recent histories (and therefore reasons to be wary) of authoritarian government. There is no official number but, according to an estimate reported by the BBC in 2015, there were between 4.5 and 9 million CCTV cameras in the UK. Over four series and counting (including a celebrity edition), Channel 4's *Hunted* – in which 10 contestants attempt to evade surveillance by a team of security experts for 25 days – makes entertainment out of our security-industrial complex.

CCTV and other digital surveillance technologies have had a profound impact on licensing. Virtually all premises licences require the use of CCTV in the premises, and in the last few years licensing authorities have also begun to introduce (or at least consider) the mandatory use of CCTV in taxis as well.

In principle, as the Surveillance Camera Commissioner's Code of Practice acknowledges, surveillance technology can be "a valuable tool in the management of public safety and security, in the protection of people and property, in the prevention and investigation of crime, and in bringing crimes to justice". Given their potential value in promoting the licensing objectives, it's not surprising that the use of CCTV, ID scanning devices and, more recently, body-worn video have become unremarkable features of licensing.

Yet we shouldn't become complacent about highly intrusive technologies with significant potential for invasions of our privacy. This was powerfully brought home to me in a recent licensing committee meeting. Having dimmed the lights in the council chambers and turned on the big screen, we sat awkwardly through 15 painful minutes of CCTV footage from the private dance areas of a sexual entertainment venue: "Yes, councillor, what you can see there is a *twerk*. We can rewind it if you want to see it again?" It was weird.

Since 25 May 2018, data protection appears to have captured a lot of public attention: there can be few people who have not heard of that dreaded four-letter acronym, GDPR. The General Data Protection Regulation has made little change to the basic principles of data protection – rules which have effectively been in place in the UK since the Data Protection Act 1984. Yet, thanks to GDPR, virtually all public and private sector organisations have now woken up to the importance of compliance – not least because of the massively-expanded enforcement powers of the Information Commissioner, which include fines of up to 4% of global turnover.

In this article, I will consider three specific areas of licensing which I think require some more careful thought in the light of GDPR: CCTV; body-worn video; and facial recognition technology.

Let's start with CCTV. However, before I go any further, I must emphasise that (despite the title of this article), I am *not* saying that CCTV cannot be used in licensed premises (or taxis). It is beyond doubt that the use of CCTV in both settings is both lawful and sensible. Rather the "re-think" suggested by my headline is that licensing authorities need to recognise that, in law, *they* are accountable for the use of CCTV by the operators they licence – and that they must put in place additional safeguards in order for their use of CCTV to comply with data protection rules.

First things first: recording images and / or sound recordings of individuals, and monitoring, analysing, sharing and deleting those recordings, all amount to the "processing" of their personal data and is therefore regulated by the GDPR.

Under GDPR, there are two categories of people who carry out processing activities such as these: data controllers and data processors. Data controllers decide to collect personal data; they determine the reason for collecting the data, choose which data to collect and which individuals to target. In the context of CCTV conditions on premises or taxi licences, it is readily apparent that it is *licensing authorities* which are calling the shots: they make the use of CCTV a legally-enforceable obligation in order to promote the licensing objectives; the condition specifies what footage is to be recorded, when the system should be operational, for how long and in what form recordings must be retained and, crucially, to provide it on demand to the licensing authority or other responsible authorities. In these circumstances, it is clear that the licensing authority is the data controller – and therefore the licensing authority shoulders the highest level

of compliance responsibility under the GDPR.

In my experience, few licensing authorities have recognised the practical implications of being a data controller in relation to CCTV footage recorded at their behest by the hundreds of operators they licence. It means, among other things, obligations to respond to subject access requests and requests to be "forgotten", to carry out data protection impact assessments and to adopt retention schedules and other policies to ensure overall GDPR compliance.

A data processor carries out processing activities on behalf of a data controller. Data processors have more limited compliance responsibilities under the GDPR. The hallmark of a processor is that their processing activities serve the controller's interests rather than their own. Clearly, licensed operators use CCTV for their own interests as well as those of the licensing authority. Therefore, in legal terms, both the licensing authority and the operator are *joint controllers*. For joint controllers, the GDPR imposes accountability on each but requires them both to adopt a "transparent arrangement" that sets out each party's roles and responsibilities for complying with the GDPR and to ensure that this arrangement should be made available to the individuals whose data is being collected. I have not come across any such arrangements so far.

What does this mean in practice? Although the detailed policy requirements need to be worked up in collaboration with your data protection officer, there are at least two practical steps licensing authorities can and should take:

- A CCTV review which sets out the circumstances in which CCTV will be required as a licence condition and the safeguards for protecting individual privacy. It should address questions like: when will we require CCTV as a condition?; when should the CCTV system operate?; who should have control over it?; who will have access to it?; how long will it be retained?; how will it be deleted?; and who can it be shared with?
- A "licensing privacy notice" which provides essential privacy information in relation to the licensing authority's use of CCTV footage from licensed premises. The privacy notice should be published on the authority's website and a version of it made available in each licensed premises or vehicle where CCTV has been made mandatory under a condition.

Finally, on the subject of CCTV, I want to talk about requests for disclosure of CCTV footage. Increasingly in recent committee hearings, I have noticed that this has emerged as an area of contention and have seen a number of licence holders try to justify refusals to disclose the footage. We can put this controversy to rest.

In data protection terms, in principle, there is no reason why responsible authorities cannot make such requests nor a data protection reason why a licence holder should refuse to comply.

- From the perspective of the responsible authorities, the reason why such requests are made is to enable them to perform their statutory licensing enforcement duties and law enforcement obligations – and therefore they can rely on the "public task" (Article 5(1)(e) of the GDPR and section 35(2)(b) of the Data Protection Act 2018) legal basis for processing the personal data contained in the CCTV footage.
- From the perspective of the licence holder, compliance with such requests is a legal obligation, in that it is a condition of the licence. Therefore disclosing the footage on request is made lawful by Article 5(1)(d)).

Inevitably, where requests for footage are made – especially by the police – the chances are that the footage might contain images of criminal offences taking place. This constitutes the processing of "criminal offence data" for the purposes of Article 10 of the GDPR. Therefore additional conditions must be satisfied – and, again, all parties involved can quite easily satisfy in a licensing context: para 6 of Schedule 1 and para 1 of Schedule 8 to the Data Protection Act 2018 authorises the processing where it is necessary for the exercise of a statutory function (eg, under the Licensing Act 2003) or the common law exercise of police powers; and para 10 of Schedule 1 where it is necessary for the purpose of preventing or detecting an unlawful act.

Now let's consider body-worn video, which has been universally adopted by police forces across the country. Officers today deploy it as a matter of routine and it has have become a valuable method of gathering evidence as well as deterrence. Given the prominent role played by the police in the licensing system, it's not surprising that police licensing teams have, in the last few years, begun to push for the use of body-worn video by private security personnel in licensed premises.

Yet body-worn video is even more intrusive than CCTV; close-up, mobile and usually capable of recording audio. Not only that but, in both a policing and a licensing context, it will frequently be used in situations where footage will show victims of criminal offences and suspects as well as individuals in a state of distress.

The risk to privacy from body-worn video is so great that the College of Policing has issued a 42-page guidance document which sets out seven principles governing its use. For the public sector, there are some safeguards provided by the Protection of Freedoms Act 2012 (in particular, all local authorities and police authorities are obliged to have regard to the Surveillance Camera Commissioner's Code of Practice) but they do not apply to the private sector. Even then, the Code has not been updated since 2014 and the document itself makes just one reference to body-worn video.

All this is to say that some caution needs to be exercised when licensing authorities are asked to mandate the use of body-worn video by private security personnel at licensed premises. That is especially the case where, as I have seen far too many times in practice, the proposed condition requires the cameras to be in continuous operation *throughout licensable hours*. There is simply no justification for such an excessive use of this intrusive technology and licensing authorities should not be accepting conditions drafted so broadly. Even the College of Policing accepts that, in a policing context, "continuous, non-specific recording" is unlawful and that the use of the technology must be "incident-specific".

Given the obvious potential for capturing "special category" and "criminal offence" data (what we used to call "sensitive personal data" under the Data Protection Act 1998), additional safeguards are required under the GDPR in order to make lawful the use of body-worn video cameras. The same principles apply here as they do in relation to CCTV in licensed premises: if the use of body-worn video is made mandatory by licensing authorities and they use it to perform their licensing functions, then the licensing authority is the data controller and is therefore accountable for its use under the GDPR.

As it is a "high risk processing activity", any proposal to deploy body-worn video should be supported by a data protection impact assessment. The assessment should identify why the technology is necessary and proportionate in the circumstances of the particular premises, assess the risk to privacy of individuals and set out what steps will be taken to mitigate that risk.

The key message to take away is that licensing authorities should not be accepting these proposals at face value and should only accept body-worn video conditions where a clear justification has been advanced.

Finally, I thought it might be worth commenting briefly on facial recognition technology or "live facial recognition". This is a hot topic in data protection and law enforcement circles. Its deployment in the UK has been relatively limited so far but it has been put to more extensive use elsewhere in the world, particularly in China, where its effect has been particularly oppressive. We are clearly someway from the day when facial recognition technology is installed in licensed premises but its use in town centres and centres of the night-time economy seems a much more imminent prospect.

In some ways, facial recognition technology represents a natural next step in the surveillance technologies I have already considered above, from static CCTV to mobile body-worn video. Obviously, facial recognition technology goes considerably further, given that it involves unwarranted processing of the biometric data of large numbers of people by the police.

South Wales Police and the Metropolitan Police have run trials of the technology and, in South Wales Police's case, it resulted in a test case being brought in the High Court in late 2019.[1] The High Court held that, in principle, the police could lawfully deploy facial recognition technology and that the current legal framework – the European Convention on Human Rights, data protection law and the Surveillance Camera Commissioner's Code of Practice – were sufficient "to ensure the appropriate and non-arbitrary use" of the technology.

Licensed premises are likely to be a particularly advantageous location for the deployment of facial recognition technology. One of the main burdens on licence holders in the management of their businesses is to prevent trouble-makers from getting in and many police forces have long taken the view that certain premises, or particular promoters, tend to attract a more problematic clientele.[2] Facial recognition technology would make that process considerably easier – albeit a more rudimentary technology does already exist in the form of ID scanners. Likewise, large numbers of people congregating in a small space presents an attractive source of data for the police to match against their "watch lists" of known offenders, absconders and criminal suspects.

This is very much a developing area and I predict it won't be long until we start to see trials of facial recognition technology in and around licensed premises. For now, however, there is already enough to mull over as licensing authorities and operators slowly come to terms with the new reality of GDPR.

Matt Lewin
Barrister, Cornerstone Barristers

1 *R (Bridges) v Chief Constable of South Wales Police* [2019] 2341 (Admin).

2 The potential for discrimination inherent in this policy would make for an interesting and important discussion – but that's for a separate article.

Taxi licence renewals – a suitable case for treatment

In marked contrast to other licensing regimes where licences are granted for a finite period of time, there is no statutory mechanism to facilitate taxi licence renewal. This oversight needs addressing, suggests **James Button**

The recent crisis has highlighted an issue that has been problematic for many years, namely the mechanisms to renew hackney carriage and private hire licences. All taxi licences are granted for a finite period of time. The duration of any licence is determined by the local authority and the legislation merely specifies maximum periods for which a licence can be granted. All statutory references are to the Local Government (Miscellaneous Provisions) Act 1976.

Hackney carriage proprietors' (vehicle) licences can last for a maximum of one year:

> *every licence so to be granted . . . shall be in force for one year only from the day of the date of such licence . . .*

(Section 43 Town Police Clauses Act 1847, but can be granted for a shorter period by virtue of s 5 of the Town Police Clauses Act 1889).

Private hire vehicle licences can last for a maximum of one year:

> *every licence granted under this section shall . . . remain in force for such period not being longer than one year as the district council may specify in the licence.*

(Section 48(4)(c) of the 1976 Act.)

Hackney carriage and private hire drivers' licences can last for a maximum of three years by virtue of s 53(1)(b) of the 1976 Act in respect of hackney carriage drivers and s 53(1)(a) of the 1976 Act in respect of private hire drivers.

In both cases, they can be granted for "such lesser period, specified in the licence, as the district council think appropriate in the circumstances of the case".

A private hire operator's licence can last for a maximum of five years by virtue of s 55(2) of the 1976 Act or "such lesser period, specified in the licence, as the district council think appropriate in the circumstances of the case".

In relation to each licence there is also an expectation of renewal, both on the part of the licensee and also on the part of the local authority as it is clearly anticipated by the legislation that an authority has the power to refuse to renew any licence: s 60(1) of the 1976 Act in relation to both hackney carriage and private hire vehicles; s 61(1) of the 1976 Act in respect of hackney carriage and private hire drivers; and s 62(1) of the 1976 Act in relation to private operators.

However, what is missing is any statutory mechanism to facilitate renewal.

That omission is in marked contrast to other licensing regimes where licences are granted for a finite period of time. In most cases the legislation specifies (to paraphrase) that provided an application to renew a licence has been made before the expiry of the old licence (sometimes a specific time beforehand), then the current licence is deemed to continue on the same terms and conditions until such time as the renewal application is determined.

Both sex establishment licences and street trading licences granted under the Local Government (Miscellaneous Provisions) Act 1982 carry such provisions. In relation to any sex establishment licence, Schedule 3 para 11(1) states:

> *Where, before the date of expiry of a licence, an application has been made for its renewal, it shall be deemed to remain in force notwithstanding that the date has passed until the withdrawal of the application or its determination by the appropriate authority.*

And likewise Schedule 4 para 6(10) in respect of street trading licences states:

> *If a licence-holder applies for renewal of his licence before the date of its expiry, it shall remain valid—*
>
> *(a) until the grant by the council of a new licence with the same principal terms; or*

(b) if-

(i) the council refuse renewal of the licence or decide to grant a licence with principal terms different from those of the existing licence, and

(ii) he has a right of appeal under this paragraph, until the time for bringing an appeal has expired or, where an appeal is duly brought, until the determination or abandonment of the appeal; or

(c) if he has no right of appeal under this paragraph, until the council either grant him a new licence with principal terms differing from those of the existing licence or notify him of their decision to refuse his application.

It is the absence of a statutory procedure in relation to all taxi licences that causes the problem. Each local authority needs to determine its own procedure which will regulate how it will deal with licence renewal applications, and that procedure should then be contained within its hackney carriage and private hire policy. The authority might need to determine different approaches for the different licences.

In relation to drivers' licences there are four potential options:

1. No over-run – if the licence renewal is not applied for and granted before expiry of the old one, the existing licence expires and cannot be used until the renewal is determined. While this is legally perfectly correct, it is seen by many local authorities as being overly harsh.
2. The issue of a short-term licence which will run from the expiry of the existing licence until the determination of the renewal application, provided that the renewal application was made before the existing licence expired. In these circumstances it is vital that the short-term licence is issued as being clearly "without prejudice" to any subsequent decision that the authority may make. This prevents any argument being put forward that the authority determined the applicant to be suitable and then changed its mind.
3. An informal acceptance by the local authority of the old licence "continuing" to have effect until the determination of the renewal application provided that the renewal application was made before the existing licence expired. This is unacceptable as in these circumstances there is no valid licence. While it is unlikely that the local authority itself would enforce in those circumstances, there is a potentially catastrophic situation where an unlicensed vehicle, driver or operator is involved in an accident and as the licence had expired, any insurance is likely to be invalid.
4. An approach whereby the local authority simply ignores the fact that the licence has expired and "turns a blind eye" to use of continued expired licences until such time as the renewal application is determined. This is also completely unacceptable for the reasons outlined in point three above.

In my view only the first two are reasonably practicable.

Number 1 is clear and certain but could lead to hardship if the application is made within the duration of a licence but when there is only a short time remaining.

Number 2 is to my mind the best approach. The issue of the short-term without prejudice licence enables the authority to maintain legitimate control while allowing a licensee who has overlooked the need to apply for the renewal of a licence to continue to earn a living. Such licences could be granted by officers under delegated powers. This will also address the situation of the licence expiring during this renewal process.

Numbers 3 and 4 are completely unacceptable as they allow unlicensed drivers to continue to work.

In relation to operators' licences, a similar approach could easily be taken.

In relation to vehicle licences, most authorities are not prepared to issue a renewed licence until the vehicle has been tested and the insurance certificate has been produced. Accordingly, only the first option can be used for vehicles.

The problem is that many local authorities have not addressed this in their policies. In the absence of any approved mechanism, the approach is then largely based on a loose concept of custom and practice, which is not always consistent. This can then lead to problems.

The policy should clearly outline what is required for a renewal application for each type of licence, and at what point the application will be accepted. This should include specific information, eg, DBS certificates, medicals, immigration documents etc. This will reduce any possibility of disputes over whether a valid renewal application has actually been made.

It is also important to ensure that the policy covers the question of late renewal applications. In *R (on the application of Exeter City Council) v Sandle*[1] It was accepted that an

1 [2011] LLR 480 Admin Crt.

application to renew a vehicle licence could still be made after the licence had expired, provided two criteria were met. Firstly, the application had to be made within a short time of expiry (the judge mentioned two or three days before it should not be accepted); and secondly, there must also be a good reason for the delay in applying before expiry. The judge also made the point that any condition on the licence (which should derive from the council's policy) would be significant. Collins J stated:

> *But I must make it clear that if it is apparent from the conditions that the application has to be made within the period the licence is in force, it will take very strong case and very exceptional circumstances for an applicant who fails to make his application for renewal in time to be able to justify a claim that the council ought in the circumstances to have granted his licence. Such exceptional circumstances can exist and as I say it would be sensible for a council to give two or three days at least before taking the step of deciding to grant it [in this case a hackney carriage proprietor's licence] to someone else.*

Finally, there is the question of a right of appeal. Sections 60, 61 and 62 of the 1976 Act all provide a right of appeal against a refusal to renew a licence. That is, an appeal against a decision to refuse to renew, following a valid application to renew. In those circumstances, s 77(2) of the 1976 Act allows the licence to continue in effect until that appeal is determined. However, if no valid application has been made, there is no determination of that application and therefore no refusal. As a consequence, there is no right of appeal. In those circumstances the only challenge to the decision of the authority not to accept the renewal application would be judicial review. Again, it would aid licensees if this was clearly detailed in the council's policy and reiterated on any renewal reminder letters that the council may send.

It can be seen that from both the council's and the licensee's perspective, it is essential that the council's policy clearly details the renewal process and the requirements for a valid renewal application. Unless these are in place, uncertainty, confusion and a lack of consistency are likely to ensue.

James Button
Principal, James Button & Co Solicitors

Gambling in pubs

David Lucas offers a comprehensive summary of the manifold licensing requirements that licensees and operators must observe when offering gambling on their premises

It may seem odd to be considering this subject at a time (June 2020) when pubs and other alcohol-licensed premises are closed, with no indication as to when they will re-open. Nevertheless, as someone whose glass is half-full (preferably with a decent cask beer) I look forward to the day when we can once again enjoy a visit to our local pubs.

When we do eventually reach that point in time, there will be a need to ensure that any gambling activities provided in pubs and other alcohol-licensed premises are lawful. The purpose of this article is to consider the types of gambling that may be provided without contravening the Gambling Act 2005 (the Act), and some practical aspects of compliance.

Alcohol-licensed premises

Before considering the gambling activities which may take place in pubs it is necessary to identify which premises benefit from the provisions in the Act. It is not only pubs that may qualify for the entitlements contained in the Act. Premises may be used to provide specific gambling activities subject to them satisfying the following criteria:[1]

- The venue has the benefit of a premises licence issued under the Licensing Act 2003, which includes the authority to sell alcohol for consumption on the premises.
- The venue is not a vehicle.
- Alcohol is served to customers from a physical bar, as opposed to service only by way of a waiter or waitress.
- The alcohol premises licence is not subject to a requirement that alcohol is served only with food.

Provided that the premises meet the above criteria, the gambling entitlements may only be provided at a time when the supply of alcohol is permitted under the alcohol licence. As a consequence, any alcohol-licensed premises operating under the authority of a temporary event notice cannot qualify for the gambling entitlements.

Gaming machines

The Act and relevant regulations identify gaming machines by reference to different categories. Basically speaking, there are four categories of gaming machine: A, B, C and D.[2] The categories determine the locations where gaming machines may be provided and the maximum amount of the stake and maximum value of the prize.

Adults are allowed to play all categories of gaming machine. Persons under 18 are only allowed to play category D gaming machines.

Alcohol-licensed premises which satisfy the qualifying criteria may provide gaming machines without the need for any other form of authorisation.[3] This is referred to as the "automatic" entitlement but is not immediately available. The holder of a relevant alcohol premises licence must initially notify the licensing authority of their intention to provide gaming machines under the entitlement and pay a fee of £50.

There is no prescribed form of notification or requirement to pay any further fee. The entitlement is not transferable. If the alcohol premises licence is transferred and the new licence holder wishes to provide gaming machines, they must give a new notification and pay the fee to the licensing authority.

Provided that notification and the fee have been given to the licensing authority, the alcohol-licensed premises will be able to provide a maximum of two gaming machines which can be category C or D.

If alcohol-licensed premises wish to provide more than two gaming machines, application can be made by the holder of the alcohol premises licence for a licensed premises gaming machine permit.[4]

The application must made to the licensing authority accompanied by the relevant fee, currently £150. The application form and supporting information are prescribed by the individual licensing authority. Applicants would be well advised to consider the statement of gambling policy issued by the relevant licensing authority for any specific requirements in connection with licensed premises gaming machine permits.

The permit will only authorise the provision of category C or D gaming machines. The Act does not limit the number of

1 GA 2005, s 278.
2 GA 2005, s 236(1).
3 GA 2003, s 282.
4 GA 2005, s 283.

gaming machines which may be requested in the application.

When considering the application, the licensing authority must have regard to the licensing objectives under the Act, the guidance issued to licensing authorities by the Gambling Commission and any other relevant matters.

On the basis of those considerations, the licensing authority may grant the application, refuse it or grant the application for a smaller number or different category of machines to those requested in the application.

There is no power for a licensing authority to attach any conditions to the permit.

Once granted, the permit will remain in force provided that the alcohol premises licence continues to have effect and the permit holder continues to hold the alcohol premises licence.

The permit is subject to payment of an annual fee (currently £50) and is capable of being varied or transferred to a new holder of the alcohol premises licence.

The permit may be surrendered and is also subject to provisions relating to cancellation and forfeiture.

The Act provides a right of appeal against a decision of a licensing authority in respect of a licensed premises gaming machine permit.[5]

The provision of gaming machines in alcohol-licensed premises is subject to compliance with a code of practice issued by the Gambling Commission.[6]

Compliance with the code of practice is the responsibility of a designated person. For example, in England and Wales that person is the designated premises supervisor named in the alcohol premises licence. In Scotland, it will be the premises manager.

In summary, the code of practice requires the following:

- Gaming machines to be located where they can be supervised by staff or other means (such as CCTV).
- Gaming machines to be located away from any ATM machines on the premises.
- Procedures to prevent under-age gambling.
- Procedures for complaints regarding the use of gaming machines on the premises.

5 GA 2005, Sch 13 para 21.

6 https://www.gamblingcommission.gov.uk/PDF/Code-of-practice-for-gaming-machines-in-clubs-and-premises-with-an-alcohol-licence.pdf

Exempt gaming

Alcohol-licensed premises which satisfy the qualifying criteria in the Act may provide equal chance games without the need for any form of further authorisation.

The Act provides that gaming is equal chance if it does not involve playing or staking against a bank and the chances are equally favourable for all participants.[7] Examples of equal chance games include bingo, poker, dominoes and cribbage.

The provision of exempt gaming in pubs and other qualifying premises is subject to a number of conditions:[8]

- Depending upon the type of game, there are prescribed limits on the maximum value of stakes and prizes.[9]
- No deduction or levy can be made from stakes or prizes.
- No fee can be charged for taking part in a game (other than the stake).
- The game must be played on one set of premises.
- Persons under 18 must be excluded from taking part in the game.

In addition, games of bingo in alcohol licensed premises are subject to the "high turnover" restriction.[10]

High turnover bingo occurs if the total amount of stakes or prizes exceeds £2,000 in a seven-day period. It is not illegal for high turnover bingo to occur initially, but an offence will be committed if there is a further incident of high turnover bingo within the next 12 months (this is known as the high turnover period).

An offence will also be committed if the Gambling Commission is not notified of the initial period of high turnover bingo.

In some alcohol-licensed premises, the provision of bingo has become so popular that the high turnover provisions have been breached. In response, the Gambling Commission has required that such games of bingo are provided by the holder of a bingo operating licence issued by the Commission.

"Social or entertainment bingo", as it is called by the Commission, which is provided under an operating licence remains subject to all of the conditions relating to exempt gaming in alcohol-licensed premises previously mentioned.

7 GA 2005, s 8.

8 GA 2005, s 279.

9 GA 2005 (Exempt Gaming in Alcohol-Licensed Premises) Regulations 2007 SI 2007/1940.

10 GA 2005, s 281.

In addition, the Commission has attached a condition to the bingo operating licence which requires the operator to provide the Gambling Commission and the relevant licensing authority with specific information before the gaming takes place.

There is also a code of practice issued by the Gambling Commission in respect of equal chance gaming provided in alcohol-licensed premises.[11]

Once again, the designated person or premises manager is responsible for compliance with the code of practice.

In summary, the code of practice requires the following:

- Gaming must take place where it can be supervised by staff.
- Procedures to prevent under age gambling.
- All payments to be made in cash before a game begins.
- Gaming equipment to be supplied by the premises, secured when not in use and replaced when damaged or marked.
- Rules of games must be displayed or made available.
- The provision of a pleasant atmosphere, which excludes cheating or customers being threatened.
- Compliance with specific provisions relating to games of poker.
- A procedure for complaints regarding equal chance gaming on the premises.

Lotteries

According to the Gambling Commission, lotteries are the preserve of good causes. If an arrangement constitutes a lottery as defined in the Act, it may only be provided if it falls within one of the eight types authorised by the Act. None of the eight lawful lotteries may be used for private gain.

Other than lotteries which are used to raise money for good causes or non-commercial purposes, the only arrangement which may lawfully be provided in a pub is a customer lottery.

However, it is important to ensure that the conditions relating to a customer lottery are observed, namely:[12]

- The lottery must be provided by the occupiers of a business premises.
- The lottery may only be advertised on those premises.
- The lottery must be provided for the benefit of customers of the business premises.
- Lottery tickets may only be sold on those premises.
- Lottery tickets must contain specified information, including details of the promoter and the price.
- No profit can be made from the lottery (not even for good causes), and all proceeds excluding reasonable expenses must be distributed to those taking part.
- No prize can exceed £50 in value.
- Rollovers are not permitted.
- There may only be one draw made in a seven day period.

The Gambling Commission has highlighted two issues relating to lotteries in pubs - lottery ticket vending machines and “Chase the Ace” style arrangements.

The Commission became aware of several companies offering pull-tab lottery ticket vending machines to pubs, stating that the pub will earn a profit from the ticket sales. This is contrary to the Act and society lotteries guidance, which state that it is an offence to use lottery proceeds for a purpose other than the promoted cause and they are not to be promoted for commercial gain.

The Commission also received reports of unlawful lotteries being organised in pubs. The lottery is operated by customers purchasing a raffle ticket at £1 each. The draw takes place each Saturday with the winning customer invited to choose one of the envelopes pinned to the wall behind the bar. Each of these envelopes contains a playing card with any card other than the Joker resulting in the customer winning £30. Should the card picked be the Joker, the customer wins the jackpot. The jackpot is comprised of the amounts above the £30 paid out weekly (in effect a rollover).

Based on the fact that the pub company was deriving no financial profit from the scheme it was decided by the Commission that the promotion may be operated as a customer lottery, subject to compliance with the conditions previously mentioned. This would require any monies in the jackpot above the prescribed limit of £50 maximum prize value to be returned to customers who have paid for tickets during the time that the scheme was operating.

Betting

Having considered the types of gambling which may lawfully be provided in pubs, it is worthwhile remembering the position regarding betting. Quite simply, commercial betting is not allowed in pubs.

Customers in pubs are allowed to watch sport on television and place bets using their own telephone account or take a

11 https://www.gamblingcommission.gov.uk/PDF/Code-of-practice-for-equal-chance-gaming-in-clubs-and-premises-with-an-alcohol-licence.pdf.

12 GA 2005, Sch 11, Part 3.

betting slip to a bookmaker themselves.

It is not illegal to have betting slips in a pub provided that the completed slip is taken to the bookmaker by the customer.

It is illegal to take betting slips that customers have completed together with the stake money to a bookmaker before the event, or to telephone bets to a bookmaker on behalf of customers using the pub's own telephone account.

It is also illegal for an employee or agent of a bookmaker to take bets in a pub.

Compliance

Not surprisingly, the Act contains a number of measures which may be used to control the way in which gambling activities are provided in pubs and other alcohol-licensed premises.

Under the principal compliance provision,[13] a licensing authority may order removal of the exempt gaming provisions or the automatic gaming machine entitlement if satisfied that:

- It would not be reasonably consistent with the licensing objectives contained in the Act for gaming to continue to be provided at the premises.
- Gaming is taking place at the premises in breach of a provision of the Act.
- The premises are mainly used for gaming.
- An offence under the Act has been committed at the premises.

Similar grounds are provided in the Act for cancellation of a licensed premises gaming machine permit.[14]

The holder of the alcohol premises licence must be given 21 days prior notice of the licensing authority's intention to remove the entitlement or cancel a permit. The licence holder is allowed to make representations against such action and the licensing authority must hold a hearing if requested to do so.

It was those provisions that were subject of publicity following action taken by the London Borough of Redbridge last year. The action was taken following concerns expressed by the Gambling Commission concerning the use of adult only (category C) gaming machines in pubs by persons under 18 years of age.

In November 2018, the Gambling Commission announced that it had been working with licensing authorities and local police to test compliance with laws in place to protect children from the risks posed by gambling in pubs.

Tests on a sample of pubs in England indicated that almost 90% failed to prevent children under 18 from playing category C gaming machines.

In October 2019, the Gambling Commission announced that it had continued to work with local authorities and local police during the previous 12 months to test compliance with age verification in pubs.

A review of pubs in England and Wales had shown that 84% of them were failing to prevent under 18-year-olds from playing category C gaming machines.

In the context of this activity by the Gambling Commission, officers from the London Borough of Redbridge carried out underage test exercises in January 2019 on gaming machines in pubs within their area. The failure rate was significant and included pubs managed by major operators.

In June 2019, officers from Redbridge Council carried out a repeat exercise and once again found that children under 18 were able to play a category C gaming machine unimpeded by staff at the premises.

As a consequence, Redbridge Council gave notice to JD Wetherspoon, Spirit and Mitchells & Butlers of the authority's intention to remove the gambling entitlements and cancel the gaming machine permits relating to three pubs operated by those companies.

All three companies made representations and requested hearings. A hearing lasting five hours, in which leading counsel represented each party, was held in one case and the other two were concluded by agreement without the need for a hearing.

In each case, the pub company relied upon action taken throughout the pub industry by the implementation of a new Social Responsibility Charter for Gaming Machines in Pubs, published jointly by the British Beer and Pub Association and UKHospitality. The charter incorporates a code of practice aimed at promoting collaboration and training to prevent underage gambling.[15]

The three companies also provided details of other measures implemented at their premises, including the

13 GA 2005, s 284.

14 GA 2005, Sch 13, para 16.

15 https://beerandpub.com/briefings/social-responsibility-charter-for-gaming-machines-in-pubs/.

installation of pressure mats placed in front of category C gaming machines which provide an alarm to notify staff of the need to verify the age of the customer playing the machine.

When pubs are eventually allowed to open their doors to customers once more, it is anticipated that the issue of under 18s playing category C gaming machines will continue to be a priority of the Gambling Commission and licensing authorities.

That is certainly the view taken by pub operators who are working with gaming machine manufacturers to provide solutions within the machine itself to prevent their use by underage customers.

Illegal betting in pubs has also been the subject of enforcement action by the Gambling Commission.

Following a multi-agency operation involving officers from the Commission, HM Revenue and Customs, the police and a licensing authority, a pub manager pleaded guilty to providing illegal gambling at his premises.

The manager was sentenced to 100 hours of unpaid work and ordered to pay costs of £930. HMRC also imposed back-dated tax of £2,952 and penalties totalling £9,750 for general betting duty, as well as for failing to declare betting income and submit betting duty returns.

Enforcement

Enforcing compliance with the provisions of the Act is the responsibility of three types of officer:

- Enforcement officers[16] – designated by the Gambling Commission.
- Authorised persons[17] – including those designated by a local authority.
- Police officers.

It is important to be aware that the Act provides specific rights of entry but they are not the same for each type of officer. Before exercising a right of entry it is important to consider the specific provisions of the Act as they vary according to the type of premises and gambling activity.

In the case of pubs, the Act deals with premises licensed for alcohol and provides that:[18]

- Enforcement officers and authorised local authority officers (but not police officers) may enter premises to assess an application for a licensed premises gaming machine permit.
- Enforcement officers, authorised local authority officers and police officers may enter premises for which an on-premises alcohol licence has effect:

    1. To determine whether any gaming carried on at the premises complies with the Act.
    2. To determine if any bingo played on the premises complies with any operating licence or the Act.
    3. To check the number and category of gaming machines available on the premises.

It is worthwhile noting that the Act creates an offence of obstruction which not only makes it an offence (without reasonable excuse) to obstruct an officer exercising a power under the act but also to fail to co-operate with such an officer.[19]

Obviously, it will only be necessary to exercise a right of entry under the Act if it is not possible to gain admission to the premises voluntarily.

In the case of inspections of pub premises carried out with the consent of the operator, there is some excellent information published by the Gambling Commission in partnership with Leicester, Leicestershire and Rutland Licensing Forum and LLEP.[20]

The information consists of guidance to compliance visits and an assessment template form which are specific to alcohol-licensed premises, together with templates for outcome letters and written records of assessments.

To end on a personal note, I have found preparing this article to be a form of masochism, writing about pubs which are an environment that I enjoy so much but which is denied to me at this point in time. I hope that reading the article will not provoke a similar response, but instead will provide practical information which will be beneficial in the, hopefully, not too distant future.

David Lucas
Licensing Consultant

16 GA 2005, s 303.
17 GA 2005, s 304.
18 GA 2005, s 310.
19 GA 2005, s 326.
20 https://bizgateway.org.uk/our-services/support/business-regulation/gambling-commission-2/.

How does modern slavery impact on events and public safety?

The licensed trade needs to be on its guard against exploitation, says **Julia Sawyer**

Modern slavery is a human rights violation. It can take various forms such as slavery, servitude, forced and compulsory labour, child labour and human trafficking, all of which exploit individuals for personal or commercial gain. Modern slavery may be prevalent within sectors such as construction, facilities / cleaning services, entertainment, hospitality and manufacturing.

Modern slavery is defined as the recruitment, movement, harbouring or receiving of children, women or men through the use of force, coercion, abuse of vulnerability, deception or other means for the purpose of exploitation. It is a crime under the Modern Slavery Act 2015.

Referrals of potential victims of modern slavery have been made to the National Referral Mechanism (NRM), the UK's identification and support system for victims of modern slavery since it was formed in 2009. Each year the numbers referred to NRM have increased.

Areas of economic activity such as hospitality, nail bars, construction, agriculture, fishing, private homes, car washes, cannabis farms and brothels have been highlighted as exploiting people. These are the cases that are reported, but many go unreported. To stop the increase in vulnerable people being exploited we all have a part to play in ensuring we report any concerns we may see during the course of our work.

What can we do to help?

UK businesses with an annual turnover above £36 million must fulfil certain requirements under The Modern Slavery Act 2015. This Act requires a company to:

- Provide policies and procedures on modern slavery, human rights, ethical trading and whistleblowing.
- Look at their supply chains – often suppliers will have their own complex supply network, which can make it difficult to ensure working conditions comply. However, if every business aims to reduce the complexity of their own supply network this will aid transparency and mitigate risk.
- Include certain terms in contracts which protect the workers.
- Communicate to their suppliers and contractors to highlight the importance of guarding against modern slavery and respecting human rights.
- Train their employees.
- Carry out a periodic audit of suppliers.
- Check supplier policies – to have a selection and verification process to ensure that only reputable third party suppliers and contractors are engaged (ie, which comply with internationally recognised human rights).
- Be aware of any sub-contracting to ensure the same principles are being applied.
- Investigate any complaints of modern slavery.

It is good practice for all businesses to:

- Comply with the Modern Slavery Act 2015 even if the annual turnover is not above £36 million.
- Be a signatory to or a member of an ethical trading or ethical working conditions initiative, or anti-slavery initiative or charter.
- Report any concerns of working conditions that do not protect someone's human rights.
- Source employees and contractors from the UK.
- Have a 'champion' for this issue within the business

to ensure that employees and contractors are aware of the importance of following the company policies and procedures on modern slavery.

- Make reference to the company policy on modern slavery in the procurement process, finance policies, for staff on the intranet, tender documents, new vendor request documents and in the employee handbook.

Questions to ask

Whether you are going through a procurement process or a tender process it is important to ascertain the level of commitment from the provider of the service or the contractor to their employees. Some of the questions that should be asked to judge the level of commitment to prevent modern day slavery could be:

- Are workers free to leave their employment subject to contractual notice period?
- Are any workers required to surrender their identity documents for the duration of their employment?
- Have all workers attained the relevant legal age to work?
- Do workers work reasonable hours to comply with national law?
- Do workers have regular breaks?
- Are workers free to refuse overtime?
- Do all workers receive payment for their work directly into their bank account?
- Do all workers have the correct safety equipment to fulfil their roles safely?
- Are break / rest facilities available?
- Are drinking water and cups provided?
- What is the provision for food?
- Are sufficient toilets available and are they kept clean and properly lit?
- Are there separate toilet facilities for female workers?
- Are there medical / first aid facilities available where they work?

Verifying the answers given to the above questions should be carried out during the audit process, and the relevant action taken if the requirements of the contract are not being met.

Taking action

Employers need to ensure that the policies and procedures they have provided are followed, and that modern day slavery is taken seriously during any procurement process. They need to be confident a tenderer isn't just ticking boxes to win the contract.

Questions should be asked if a contractor comes in much cheaper than the others tendering. Is the tender realistic, and can standards for workers be maintained at that price? Ensure you know and understand the supply chain.

Any complaints received should be acted upon. Investigations need to be carried out and reported on to show the company does act and take complaints seriously. All businesses should be taking the appropriate actions to prevent modern slavery.

Julia Sawyer
Director, JS Consultancy

A guide to the law on street tables and chairs in England & Wales

The law governing outside trading is positively Byzantine, prompting confusion and delay for many operators. It needs clarifying suggests **Gareth Hughes**

This edition of the *Journal* will appear when many restaurants, bars and pubs up and down the country would normally be applying with great gusto for permissions to trade outside their establishments to tables and chairs primarily on the public highway. The summer months represent a significant proportion of the landlord's income and outside trading can serve as a way of attracting customers, who see others enjoying themselves with a meal and a glass of beer outside the establishment.

Sadly, this year Covid-19 has left its terrible mark on the hospitality sector with many premises closing for good. In an effort to breathe much needed new life into the industry, leisure industry calls have grown for the government in recent weeks to lift all restrictions on the use of tables and chairs in outdoor areas. However, I suspect that a general blanket exemption from the need to seek permissions to place tables and chairs on the public highway may face difficulties because the use of highway is governed not just under the Highways Act 1980 but also by planning legislation and licensing law. And in London there is the added obstacle of street trading legislation.

While most premises know that they need a premises licence to sell alcohol under the Licensing Act 2003, or planning permission to act as a restaurant or bar, there is great uncertainty within the hospitality sector about the permissions that are required in order to set out tables and chairs on the public highways outside of their establishments.

I would argue that a significant reason for this is the inconsistency and lack of clarity in local authority policies on this matter up and down the country and particularly within the Greater London area.

The confusion

In advising on this issue for many years, I am led to question why, for instance, the London Borough of Camden requires a Highways Act permit but does not mention planning permission or street trading while Westminster City Council makes no mention of the Highways Act permit but requires planning permission and a temporary street trading licence. Why does the London Borough of Kensington & Chelsea seek a Highways Act and planning permission application but not a street trading licence when the London Borough of Hackney requires a temporary street trading licence and planning permission but has no mention of a Highways Act permit?

Outside of the Greater London area, why do Liverpool, Manchester and Birmingham all make adequate reference to the Highways Act but fail to guide applicants clearly on the planning implications? Further, why does Birmingham City Council refer to a "pavement licence" while Liverpool talks about a "street café licence"? Why does Hackney refer to a "shopfront trading licence"? The astute reader will, of course, quickly recognise there are no such licences as these in existence in statute.

Why on earth does this aspect of licensing need to be so complicated when in law, and in fact, it is relatively straightforward? Let me explain what the law says and requires in terms of the relevant statutory provisions, which are:

i. The Highways Act 1980;
ii. The Town & Country Planning Act 1990;
iii. The London Local Authorities Act 1990 and the City of Westminster Act 1999 (applicable in the Greater London area only).

I will address each piece of legislation in turn.

The Highways Act 1980

Starting from first principles, a highway is defined in the Act, under s 328 as:

> *In this Act, except where the context otherwise requires, "highway" means the whole or part of the highway other than a ferry or waterway*.

In general terms, under the Act, the council of a county or the metropolitan district is a highway authority for all highways in that county or district, while in London responsibility mainly lies with the 32 London boroughs. There are exceptions for major roads and trunk roads.

Furthermore, in general terms, where a highway has been used by the general public as a right and without interruption for a period of 20 years or more, it is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. Such an intention might be evidenced by the placing of a sign proclaiming that the highway is private with no public right of way (s 31 of the 1980 Act).

For those highways which fall under the control of their respective highway authorities (usually the local authorities), there is a duty to maintain such highways at the public expense. This means that the local highways authority will be responsible for ensuring that the public highways are kept free of obstruction but also that paving stones are properly maintained and that signage and markings are clear and surfaces are level.

Councils have enforcement powers under s 137 of the Highways Act which states:

> *If a person without lawful authority or excuse in any way wilfully obstructs the free passage along the highway, he is guilty of an offence ….*

The issue of what constituted an obstruction arose in the 1994 case of *Westminster City Council v Aladdin Limited* which was determined in the High Court of Justice by McCowan LJ, citing with considerable favour remarks made by Parker LCJ in the earlier cases of *Wolverton Urban District Council v Willis* (1962) 1 All ER 24 and *Seeking v Clark* 59 LGR 268.

In *Aladdin,* an operator on Argll Street had placed a mobile food cabinet and an advertisement board on the highway. The city council prosecuted for wilful obstruction of the highway but the operator sought to argue in the High Court that the infringement onto the public highway was merely *de minimis* and did not constitute an encroachment which obstructed free passage along a potentially wide highway or pavement. This line of defence failed to recommend itself to McCowan LJ who cited the Parker LCJ, in a previous case, as follows:

> *It is perfectly clear that anything which substantially prevents the public from having free access over the whole of the highway which is not purely temporary in nature is an unlawful obstruction. There are of course, exceptions to that. One possible exception would be on the principle of* de minimis *which would no doubt cover the common case of the newsagent who hangs out a rack of newspapers, which although they project over the highway, project only fractionally.*
>
> *In my judgment however, in this case it is quite impossible to say that the principle of* de minimis *applies. Here was a substantial projection (or a few feet) into the footway whereby the public were prevented from having free access over the whole of the footway. Although the courts in those cases were dealing with stalls placed out on the public highway in front of shops and restaurants, the principle no less applies to the placing of tables and chairs on the highway which can, of course, encroach even further than some stalls. The general rule is that any encroachment upon the public highway such as a pavement, no matter how wide, will obstruct the free passage along that pavement of individuals who have that entitlement. Accordingly, in order to avoid a charge of wilful obstruction there is a necessity to obtain a permit providing lawful authority to obstruct the public highway and this is where the key sections, beginning at s 115A, now apply.*

Section 115B gives local authorities the power to place objects on the highway (which includes footways or pavements – see s 115A) for the purposes of providing a service for the benefit of the public or a section of the public.

Section 115E further allows a local highways authority to grant a person permission to use objects on the highway which result in the production of income.

This is the key Highways Act provision, which allows for the granting of a permit to allow the placing of tables and chairs on the highway.

It is entitled a "permit" rather than a "licence", which I think is very much a distinction without a difference, but may be there because confusions have arisen in local authorities up and down the country when attempting to provide an adequate title for the permission in question.

Procedure is conducted by way of an application from the individual seeking to place the tables and chairs on the highway and is subject to a consultation with other interested parties, including those who have properties which front onto that highway.

In many cases the matter will be disposed of by local highways officers taking a view on an application but very often there will be references up to a highways committee of the local authority to determine whether the permit should be granted. That committee will also have the same powers as officers in attaching any conditions that they see fit to the permit before it is granted.

There is also a fee-charging power set out at s 115F.

Fees

There is no national fee structure, as there is with the Licensing Act 2003, and the Highways Act 1980 leaves it very much to the discretion of each local highway authority area as to how it assesses the reasonable expenses incurred in granting a permission. It should be noted that the fee is payable in respect of the costs associated with the granting of the permission rather than any enforcement costs which may be incurred by the council in, for example, the employment of Highways Act officers to patrol to ensure that the provisions of the Act are being met by those who have permits and that there is compliance with conditions.

With regard to the costs of granting the permission, it appears that every local authority has a different way of calculating such costs, ranging from a fixed fee per permit right the way through to the City of Westminster, which charges on the basis of the number of chairs and the number of tables to be placed out on the highway. It is not quite clear why there should be so much expense with regard to placing of table and chairs in the highway in Westminster, as opposed to an authority which charges a fixed fee per permit.

This is, in essence, the 1980 Act regime, governing permits for use of the highway but there is another statutory regime which addresses the actual use to which land is put and lies in planning laws.

The Town and Country Planning Act 1990

The planning regime, as it now operates under the Town and Country Planning Act 1990 (as subsequently amended), requires planning permission for any development of land.

Development of land is defined as either the "carrying out of any building, engineering, mining or other operations in, on, over, or under land" or "the making of any material change of use of any building or other land" (s 55(1) of the 1990 Act).

It is the second part of this definition which concerns us in this article – the change of use element.

A public highway is used for that very purpose – in other words, the free passage along the highway for individuals who have an entitlement not to be obstructed when they do so. In general, therefore, a public highway (and in this article I refer to the pavement) is not an area which should not have all kinds of objects, structures, or bric-a-brac placed upon it, without an express consent provided by the Highways Authority. It is a piece of land upon which people have the right to pass over freely. In respect of pavements in particular, it is an area upon which people walk to get from one place to another. The "use" is that of a highway.

Accordingly, the placement of objects, including tables and chairs to a significant degree on the public highway could be said, in planning terms, to amount to a change of use of that area from a public highway to an area where members of the public can sit and partake of a meal. However, as the definition states, such a change of use must be "material".

In the vast majority of cases, tables and chairs placed on a pavement will be regarded by planning authorities as "material" because this amounts to a significant degree of usage to the pavement as an area where members of the public may sit at tables and consume a meal and take some refreshment. The pavement then loses its characteristic as an area of land over which the public may walk.

Further, the placement of tables and chairs amounts to a significant use of a part of the public highway for another purpose which is more than what planning lawyers and practitioners describe as a *de minimis* use. In the remarks of the former Parker LCJ, in the *Wolverton* case cited above, he makes reference to this principle (in the context of a Highways Act obstruction) by using as an example the case of a newsagent who hangs a rack of newspapers outside his shop. Although there is an encroachment over the area of the pavement, it is a matter of just a few inches and therefore *de minimis*. This would not require planning permission because it could not be regarded as a "material" change of use.

The classic case in planning law on this point is *Bendles Motors Limited v Bristol Corporation* [1963] 1 WLR 247.

The case concerns the placement on a garage forecourt of an egg vending machine which measured 6 feet in height, 2 feet 7 inches deep, 2 feet 7 inches wide and was free standing and gravity-fed. The owners of the garage had applied to the local authority for planning permission, but were refused. They nevertheless decided to continue with the use of the egg vending machine, and in response, the planning authority served an enforcement notice on the owner of the garage forecourt in respect of the use of the egg vending machine. That enforcement notice was subsequently appealed to the Secretary of State.

The view taken by the Secretary of State on appeal was that the use of the egg vending machine on the forecourt amounted to a "material" change of use in that, although the space occupied by the machine was small, it represented a new activity on the forecourt. People were now coming to the garage in order to buy eggs rather than to buy fuel and this was in the nature of a shop use for which there was no permission.

On appeal to the Divisional Court, the matter once again went before Parker LCJ and again, referring to the *de minimis* principle, he said:

> *I confess that at first sight, and indeed at last sight, I am somewhat surprised that it can be said that the placing of this small machine on this large forecourt could be said to change the use of these premises in a material sense from that of a garage and petrol filling station by the addition of a further use. It is surprising, and it may be if it was a matter for my own personal judgement, that I should feel inclined to say that the egg vending machine was* de minimis *but it is not a question of what my opinion is on that matter, it is for the Minister to decide.*

It was the Lord Chief Justice's view that it was a question of fact and degree in every case for a planning authority to determine whether there has been a material change of use and such a matter cannot be impugned if the authority has reached its decision properly.

What the early cases determine, and this is still good law, is that the assessment of facts and matters of planning judgement are exclusively held by the decision maker – in this case the planning authority.

In most cases, therefore, it is clear that planning authorities take the view that any encroachment of tables and chairs on to a public highway amounts to a "material" change of use of that highway to another use which involves a restaurant use.

Permitted development

To avoid the necessity for an application for planning permission for change of use, a system of permitted development has been in place for several decades which in many cases allows for a move from one use to another. However, under the Town and Country General Permitted Development Order 2015 there is no provision for a public highway to be used for restaurant, café or bar use by the placement of tables and chairs on that highway and, accordingly, a planning permission will be required.

Planning permission

The question of whether a planning permission would be granted for a change of use from public highway to, for example, restaurant use, would very much depend upon an individual planning authority's policy on such matters.

In formulating these policies, the local planning authorities will be guided by policies set down from central government via the National Planning Policy Framework and any regional policies which apply, including county policies and metropolitan policies in England and Wales and the Mayor of London's plan in the Greater London area. In addition, there will not only be the borough-level planning policies but also those relating to the planning development in local areas and even in streets. Conservation area policies may also apply.

Accordingly, in arriving at its planning policy on any area of activity the local authority will have to have regard to a hierarchical suite of policies and consider the views of the public through extensive consultation before sign off by the Secretary of State.

Another element to take into account when framing a planning application in respect of tables and chairs is any supplementary planning guidance (referred to as "SPGs") which usually provides voluminous amounts of assistance in how to frame an application prior to submission. By way of example, the City of Westminster supplementary planning guidance on tables and chairs runs to 36 pages of advice, which is very useful and detailed and makes reference to the requirement for a street trading licence at the same time (see below). It also gives extensive guidance on the quality of the furnishings to be placed on the highway and the type of furniture as well as advice on reducing crime in connection with those drinking and eating on the pavement. It also gives very helpful assistance with regard to the nature of the drawings to be submitted with any application.

Neighbourhood planning

Yet a further tier of policy is now being developed within the framework of what has become known as "neighbourhood development plans" which are promulgated using powers under the Localism Act 2011. There are now many hundreds of these plans in force and being developed at the time of writing.

The principle behind neighbourhood development plans is that local people living and working in an area are given the right to draw up their own plans in order to shape the development and growth of their local area in the coming years. Guidance indicates that local people will be able to choose where they want new homes, shops and offices to be built and have their say on what those new buildings should look like and what infrastructure should be provided, as well as grant planning permission for the new buildings they want to see go ahead. The general principle is that neighbourhood planning will provide a powerful set of tools for local people to ensure that they get the right type of development for their community, where the ambition of the neighbourhood is aligned with the strategic needs and priorities of the wider local area.

There will need to be fairly wide consultation within

the local area on the formulation and development of the plans, and the acceptance of such a local development plan is dependent upon the results of a referendum to be held in each area. Accordingly, to use the example of the City of Westminster again, the Soho Neighbourhood Area was set up in April 2013 and has been developing a plan for its neighbourhood in the heart of London for several years. The plan is now at an advanced stage of consultation with the public and businesses in the area and covers such policies as culture and heritage, commercial activity, entertainment and the night-time economy, housing and environment.

Of particular relevance to this article is the references within this developing plan to the use of tables and chairs on pavements. This is an indication of how local people and organisations are now, more than ever, taking control of their street environments, meaning that those who wish to place such furniture on the highway need to take full part in the consultations in their respective areas.

The Soho Neighbourhood Plan indicates that:

There has been a substantial increase in the numbers of tables and chairs placed on the highway by hospitality businesses. In the light of the modal shift towards more trips on foot and the opening of the new tube lines referred to, it is important that the use of pavements is reinforced for pedestrian priority.

The proposed policy, therefore, goes on to say that:

All development proposals should be designed in such a way as to facilitate pedestrian movement and prevent it being impeded by other uses such as the provision of tables and chairs.

This provides a very clear steer to businesses operating in the Soho area that if this policy is agreed in a referendum then the ability to place tables and chairs on the public highway will probably become that much more difficult than it is now.

Countless other local neighbourhood plans across the country will, I have no doubt, be referring to the use of tables and chairs and other street furniture on the public highway within their own plans and it is very much something which operators in particular will need to have regard to in considering their proposals for outside use.

Having covered both the Highways Act 1980 powers and the planning legislation, there is a further limb of legislation affecting London to consider.

Street trading in London

The issue of street trading is not one which is pertinent to the placement of tables and chairs on the public highway outside of London.

The reason for this is quite simple. Street trading in England and Wales, outside Greater London, is governed by the provisions of the Local Government (Miscellaneous Provisions) Act 1982 and street trading is defined differently under that Act as compared with the London legislation. The 1982 Act defines street trading as:

the selling or exposing or offering for sale of any article (including a living thing) in a street.

This definition, therefore, refers only to articles and not to the provision of services on the public highway which are specifically brought in under the London legislation to which I now turn.

The principle enactment in respect of street trading within the Greater London area is the London Local Authorities Act 1990 (as amended by the London Local Authorities Act 2004 and 2007).

This Act sought to update the relevant street trading laws and rules as they had applied in the Greater London area since just after the Second World War. The legislation was promoted by the City of Westminster in the late 1980s and it worked with all of the other London boroughs apart from the Corporation of London which had its own legislation. Following its enactment in 1990, all of the London boroughs, by way of resolutions passed in full council, adopted the provisions of the Act so it applies in every borough.

Ironically, the City of Westminster saw further need for a tightening of the legislation in respect of its own area and promoted a private bill which subsequently became the City of Westminster Act 1999, which altered some of the definitions in the 1990 Act in order to deal with issues within the district which need not concern us in this article. The definition of street trading is the same in both Acts of Parliament.

Accordingly, in London, street trading is defined as not only the selling of articles on the highway but also “the supplying of or offering to supply any service in a street for gain or reward whether or not the gain or reward accrues to the person actually carrying out the trading”.

It can be seen, therefore, from this definition that the provision of services on the highway, such as waiter services to tables immediately outside bars, pubs or restaurants where the service is linked to the provision of food or sale of

alcohol, is regarded as street trading and therefore an activity which requires a licence under the 1990 Act.

The Act specifically excludes the provision of services on land adjacent to a "shop" but restaurants are not shops and therefore cannot take advantage of this exception. Hence the reason why the City of Westminster requires a street trading licence in this respect.

Accordingly, having already made applications for a Highways Act permit and planning permission, there is, in London, a third hurdle which needs to be surmounted which is the application for a street trading licence.

However, in the policy documents of many of the London boroughs references to the need for applications under the London Local Authorities Act are rare or almost invisible. It appears that some of the London local authorities do not even require a street trading licence. Notwithstanding that those operating tables and chairs outside their bars or restaurants without such a licence in an area which has adopted the Act would face prosecution, there appears to be no reference to street trading in the policies of Camden, Islington, Kensington & Chelsea, Southwark and Hammersmith & Fulham, while there is a vague reference to it in the Lambeth policy. On the other hand, Westminster City Council and the London Borough of Hackney make references to temporary street trading licences being required in respect of the use of tables and chairs.

It is a somewhat confusing picture all round within the Greater London area and one can understand why applicants are baffled by the overlapping provisions because there appears to be no clear steer from the local authorities.

The situation is further confused by the varying nomenclature that is applied to permissions for tables and chairs across the London boroughs and even in England and Wales.

The London Borough of Hackney, for example, refers to "shop front trading licences" while other boroughs refer to pavement café licences, street café licences and so on. It goes without saying that none of these so-called "licences" is known to the law. Outside of London, Birmingham refers to its "pavement licences" while Liverpool refers to "street café licences".

As with the applications for Highways Act permits and planning permissions, there is a clearly laid down procedure for applying for a street trading licence in the Greater London area, and the potential for hearings where such applications are resisted. The refusal of applications may also be appealed to the Magistrates' Court.

Fees are payable upon applications and in both the 1990 Act and the 1999 Act there are detailed and elaborate procedures laid down for the calculation of those fees.

Conclusion

To summarise, there are two main pieces of legislation affecting the provision of tables and chairs on the public highway in England and Wales and three in London with the inclusion of street trading.

Confusion has arisen among operators and indeed even within local authorities as to which permit or licence is required.

In my submission, it would be extremely helpful if local authorities across the country, and particularly those in London, could streamline this process. They could do so by ensuring that when applicants apply online for a Highways Act permit, they are steered into the planning application process and street trading. This way, all permissions can be applied for at the same time.

If all of these procedures were clearly set out in one "Tables and Chairs" page on a local authority website, applicants would then know the full scope of what was required and make application early to avoid becoming caught up in a labyrinth of different legislation and application processes, inevitably leading to delay. A streamlined procedure would avoid disappointment for operators who would have all necessary permissions in place in time for the summer – however restricted by the current crisis that turns out to be.

Gareth Hughes
Barrister, Keystone Law

Institute of Licensing

Calendar of Online Events 2020

July

2	Now & Next
3	Schemes of delegation, Joint Working & Shared Services
8	Acupuncture, Tattoo & Skin Piercing
9	Taxi Licensing (Basic)
21	Taxi Licensing (Basic)

August

11	Street Trading, Street Collections, Pavement Cafés & SEV Licensing
18	Caravan Site Licensing

September

8	Taxi Licensing (Advanced)
10	Taxi Licensing (Advanced)
15 - 18	Professional Licensing Practitioners Qualification (TBC)
16	Taxi Licensing (Advanced)
18	London Region Training Day (TBC)
24	Now & Next (TBC)
29	Scrap Metal
30	Wales Region Training Day (TBC)
30	East Midlands Regional (TBC)

October

6	South East Region Training Day (TBC)
13	Taxi Licensing (Advanced)
15	Taxi Licensing (Advanced)
20 - 23	Professional Licensing Practitioners Qualification (TBC)

November

5	Taxi Licensing (Advanced)
9 - 13	**National Training Conference Webinars**
23 - 26	Professional Licensing Practitioners Qualification (TBC)
30 - 3 Dec	Professional Licensing Practitioners Qualification (TBC)

December

9	South East Region Training Day (TBC)
11	London Region Training Day (TBC)

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The flaw in Lucy's Law

Dog welfare campaigners have been sold a pup, so to speak, by the new amended regulations governing third party sales, as **Sarah Clover**, **Piers Riley-Smith** and **Julia Bradburn** explain

On 6 April 2020, the amendments to the Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 came into force by virtue of the Animal Welfare (Licensing of Activities Involving Animals) (England) (Amendment) Regulations 2019.

These amendment Regulations were intended to embody the much anticipated "Lucy's Law".

Triggered by an online petition that secured an astonishing 250,000+ signatures, Lucy's Law was launched in 2017 and debated in Westminster Hall in 2018. The campaign was well received by the Government Ministers, and by 29 June 2018, Environment Secretary Michael Gove confirmed that the Government's intention was to introduce new law to restrict puppy and kitten sales to licensed breeders only,[1] effectively putting third-party dealers out of business.

This was the widely understood purpose and scope of the 2019 Regulations, but recently published guidance from DEFRA confirms that it interprets the 2019 Regulations differently.

DEFRA's intention for the Regulations, contrary to the intentions of Lucy's Law campaigners, was that they would only prevent people from selling puppies in England that they had not bred themselves. It would not prevent puppy breeders from selling puppies they had bred elsewhere and from transporting them to England for sale provided that they could prove that they bred the animals.

DEFRA has insisted that the ban could not extend as far as a requirement that all puppies sold in England must have been conceived here, as that would potentially be seen to be a breach of EU and WTO trade law rules. Thus a policy decision was made that a wider ban would amount to a restriction on imports which could potentially be challenged, and rather than trigger a derogation from the trade rules on welfare grounds it was better to draft the 2019 Regulations to avoid this blanket ban.

This interpretation raises certain complications within the Regulations and the Pet Sales Guidance[2] which accompanies them. To understand these complications it is important first to understand the differences between a breeder's licence and a pet sales licence.

The 2018 Regulations distinguish between a licence for breeding animals and a licence for selling them as pets. DEFRA's interpretation allows for breeders who breed puppies outside of the jurisdiction to sell them in England under a pet sales licence, as opposed to a breeder's licence.

This causes a number of practical issues. A breeder in England can have a licence to breed puppies and to sell those puppies under Schedule 1, Part 5, para 8 - 9.

Such breeding premises must be located in the district of the local licensing authority which granted the licence (Part 2, para 4(1)(a): "a licence to carry on a licensable activity on premises in the local authority's area"). Those are the premises that must have been inspected before the grant of a licence (Part 2, para 4(2)(a)).

The licensed breeder's puppies must be:

a. advertised and / or offered for sale only from the premises where they were bred and reared (Schedule 6 – Specific Conditions paragraphs 1(1)(a) and (b)). Paragraph(c) does not apply because it is not possible for someone to sell a puppy that they did not breed themselves, so a breeder cannot sell to another seller.
b. sold in the presence of the purchaser at those licensed breeding premises (Schedule 3 para 5(2)). "Dog" in this context covers both adult dogs and puppies.
c. shown to a prospective purchaser in the presence of the biological mother (Schedule 6, paragraph 1(1)(6), as epitomised in the "Where's Mum?" campaign).

However, under a pet sales licence there are more limited safeguards built into the conditions of the licence. The relevant safeguards in the specific conditions for selling

1 Although the regulations relate to puppies and kittens, this article focuses upon puppies specifically, which were the focus for Lucy's Law.

2 The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018. Guidance notes for conditions for selling animals as pets – April 2020.

animals under Schedule 3 are in para 6:

Protection from pain, suffering, injury and disease

6 (1) All animals for sale must be in good health.

(2) Any animal with a condition which is likely to affect its quality of life must not be moved, transferred or offered for sale but may be moved to an isolation facility or veterinary care facility if required until the animal has recovered.

(3) When arranging for the receipt of animals, the licence holder must make reasonable efforts to ensure that they will be transported in a suitable manner.

(4) Animals must be transported or handed to purchasers in suitable containers for the species and expected duration of the journey.Under a pet sales licence, no inspector will have the opportunity to check the health of the puppy at the end of its transportation journey and upon arrival at the selling premises. The first an inspector or council officer is likely to know about the health of the animal is at the time that a member of the public makes a complaint, and, often, the seller will claim that the illness arose in the puppy after the sale, and beyond their responsibility. It will be very difficult to prove the point in time at which the animal ceased to be "in good health". The rest of the "safeguards" under Schedule 3 para 6 positively envisage that the puppy will be transported, and potentially over long distances – the diametric opposite of the requirement on a breeder's licence.

A person with the pet sales licence is only required to make "reasonable efforts" to ensure that the animals are "transported in a suitable manner", whatever that is interpreted to mean.

A key purpose of Lucy's Law was to require the potential purchaser to go to the puppy, not for the puppy to come to the purchaser. That is the purport of Schedule 3 Para 5(2):

(2) The sale of a dog must be completed in the presence of the purchaser on the premises.

The Guidance further states:

- *Puppies and kittens can only be sold by their breeder. The breeder must be the same named individual as the licence holder on the pet vending licence.*
- *Where the licence holder is found to be breeding dogs and advertising a business of selling them in England (from the same premise) and/or breeding three or more litters of dogs per year in England, the licence should include conditions relating to dog breeding (see guidance on dog breeding). It is clearly envisaged, therefore, that a person breeding puppies within the jurisdiction must hold a breeding licence with the enhanced welfare requirements within Schedule 6. If the sale of a puppy is taking place under a seller's licence as opposed to a breeder's licence, however, then not all of the safeguards built into Schedule 6 would apply. The specific requirements for a potential purchaser to see the puppy on the premises where it was born, in the presence of its mother, are missing. A seller's licence requires a purchaser to go the place of sale and purchase the puppy from there. It is not the same as the place of breeding, and it does not require the presence of the puppy's mother.*

It is very difficult to understand why someone importing puppies without having a breeding establishment in this country should be allowed to evade those welfare requirements. It would give rise to a double standards situation where a breeder who had bred puppies in and also out of jurisdiction would be perfectly entitled, as a matter of law, to apply different welfare standards to each of the sets of puppies, depending only upon where they originated. This would be hopelessly confusing for the public, who would be able legitimately to ask to "See Mum" only in relation to puppies that had been bred in this country, but would not be entitled to see the mother for imported puppies. This bizarre inconsistency in itself must surely undermine the Regulations.

The Guidance indicates that where a breeder sells puppies originating from both in and outside the jurisdiction, then their pet sales licence should have the breeding licence Schedule 6 conditions imposed on it as well, but this is not lawful, and a licensing authority cannot do this. An application for a pet sales licence can only have pet sales conditions on it, and it will relate to the premises from which the puppies are being sold, which cannot be the place where they were bred because they were imported. A breeder's licence will have the Schedule 6 conditions on it, but those will only relate to the puppies that were bred on those premises, within jurisdiction. A breeder's licence conditions requires purchasers to go to the breeding establishment, licensed in this country, to buy a puppy direct from the breeder from the place it was bred, in the presence of its mother. There is no way of "blending" breeding and sales conditions on one licence - the Regulations do not require it, or permit it.

If the breeder who is breeding in and out of jurisdiction is using the same premises as the breeding premises for English

puppies with a breeder's licence, and as sales premises for non-English puppies on a pet sales licence, then there must be an application of two different sets of conditions and standards to the two different sets of puppies. They are two separate licensable activities. There can be a "double licence" for one set of premises, but the different licensable activities are distinct and attract their own conditions. This is the case in law, whether the breeder is responsible and conscientious, or not. Licensing authorities cannot smooth out the differences in welfare requirements by applying breeders' conditions to a pet sales licence on the same premises. Irresponsible breeders can therefore simply take the non-English puppies to licensed sales premises that are not their breeding premises to conclude the sale. That allows them to circumvent "Where's Mum?" – a central tenet of Lucy's Law.

The Guidance at this point in time purports to require a licensing authority, before granting a pet sales licence, to make checks on the place of breeding and the circumstances in which the puppies were born, and to make efforts to secure the welfare of the puppy in the course of transportation to England, and particularly, to see the puppy with its mother. These requirements appear to be largely aspirational, and will be practically very difficult for local authorities and inspectors to comply with.

The Guidance sets out:

- *The inspector must also be shown the mother and the offspring in the environment that will be used for potential buyers.*
- *Licence holders may provide other supporting evidence such as photographs, microchip and veterinary records to show that they housed and cared for the animal and its mother for the first 8 weeks of its life.*

This is not what the Regulations say, These, above, are only requirements set out in the Guidance and are not legal requirements that applicants must comply with. Breaching the Guidance is not breaking the law. In any event, in relation to the first bullet point above from the Guidance, it is difficult to imagine how the requirement to show an inspector the puppy with its mother from the place of sale could legitimately be achieved. This pre-supposes that a litter of puppies would be imported from the breeding facility outside of jurisdiction to one single sales location in this country, together with the biological mother. This takes no account of possibilities of splitting the litter; leaving some at the breeding establishment with the mother, and taking others to different points of sale. If long journeys are involved, then this has welfare implications for the mother as well. Presumably, the mother would then be transported back to the breeding facility. This seems a very unlikely exercise. On the other hand, if the biological mother of the puppy remains in the breeding facility abroad, then the "Where's Mum?" safeguard would be largely impossible to achieve, and one of the key protections of Lucy's Law would be lost.

The Guidance also encourages licensing authorities to seek "evidence" from applicants for pet sales licences to demonstrate the welfare credentials of foreign breeding establishments, through photos and other means, and to demand that they get to see the breeding mother, and check the means of transportation to England.

The Guidance in this regard states:

- *In order to demonstrate that they have bred the animals, the licence holder must be able to evidence that they had control over the decisions made for the complete reproductive process from dam/sire selection, conception and gestation to birth and in the case of dogs being born in England, must be licensed as a dog breeder (see Guidance on dog breeding).*
- *The inspector must be shown records of the mating(s), including the location of mating / fertilisation (including where this may have occurred on other premises), the identity of the sire (where known), as well as being shown how and where the animals are born, reared and kept until sale.*

As a practical point, it must be virtually impossible to check that the information being provided to the licensing officers in this regard is accurate and true. However, even if it is, it provides no welfare safeguards for the puppies being transported into jurisdiction for sale. The breeder might be able to prove with cast-iron evidence that they were the breeder in a foreign jurisdiction, and yet be flagrantly indifferent to the welfare of the animals in the breeding establishment. They could produce photographs that proved clearly that the breeding establishment was the worst kind of puppy farm, out of jurisdiction, and there would be nothing that the English authorities could do about those premises. To be stark, the English authorities could not even refuse to grant a pet sales licence as a result of their knowledge about the inadequacy of the breeding facility abroad. The Regulations do not permit them to refuse a pet sales licence in those circumstances. "Breeding" as a licensable activity, as DEFRA has made clear, only applies to the activity of breeding within the jurisdiction of the Regulations. The licensing authorities have no control whatsoever over breeding in any

other country. The only criteria that are required to be met before a pet sales licence must be issued are those within the Regulations. A refusal for any other reason would be unlawful.

The purpose of Lucy's Law was to address the welfare harms involved with transporting a puppy to a place of sale at a young age. It is not the identity of the seller which is critical so much as the welfare issues associated with transporting and selling away from the breeding premises. Indeed, third party sales may not be an issue in themselves, if the sale were taking place at the breeding premises with the mother present. The person conducting the sale itself is largely irrelevant to those safeguards.

The Guidance as currently drafted is silent as to the requirements under the Balai Directive and Pet Passport requirements which relate to the import of dogs (as well as other animals) into the UK.

The Balai Directive deals with the commercial importation of dogs (over five dogs), while the Pet Passport regime deals with the personal importation of pets.

However, both have the same requirement in relation to minimum age of travel and vaccination. This requires that puppies are vaccinated for rabies before they are imported into the UK. Puppies cannot be vaccinated until at least 12 weeks of age and then must wait a further 21 days before they can be imported.

The practical impact of these requirements is therefore that there is a ban on the import of puppies under 15 weeks old. This has a number of impacts on the points discussed above but at the moment the Guidance is silent on this requirement. Clear Guidance for licensing authorities on this point is critical. Puppy importers who have a higher regard for profit than for welfare want to import young puppies for sale as early as possible, to preserve maximum "cuteness". Older puppies start to lose this appeal, and their value drops, so the incentive to import them, as opposed to breeding them in this country, also drops. This could prove an important welfare protection in itself, which the Guidance would do well to address.

DEFRA's current interpretation of the impact of the 2019 Regulations as reflected in the Guidance causes a number of issues that frustrate the purpose of Lucy's Law. It seems entirely inimical to the campaign which made such strides forward for animal welfare to end up with Regulations that have at their heart a conflict in welfare standards. The fact that those welfare standards are compromised as a direct result of policy and preserving trade interests does not help.

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Institute of Licensing News

When writing the IoL pages for the March edition of the *Journal of Licensing* (at the end of January), there were two reported cases of Covid-19 in the UK and British Airways had suspended flights to mainland China amid travel advice to avoid all but essential travel to China in light of the disease. Less than eight weeks later on 23 March 2020, the UK went into lockdown.

Covid-19 has fundamentally changed every aspect of life for everyone, and the official regulations and guidance have necessarily altered on an almost daily basis, and even more than daily in some instances. There have been profound consequences for regulators and businesses across the country, and the importance of the licensing system and its continued operation during the pandemic has been apparent throughout the period.

The IoL has produced a Protocol[1] for its members, aimed primarily at local authorities and encouraging them to continue to fulfil their statutory duties as licensing authorities despite the challenges of office closures, home working and social distancing. Crucially, this includes facilitating licensing committee hearings to ensure that applications for new licences or variations, as well as reviews of existing premises licences (described in the Secretary of State's *Guidance on the Licensing Act 2003 - a key protection for the community*), are heard without unnecessary delays. This accords with the entreaties in the Lord Chief Justice's advice to judges and courts, which stated:

> *It is clear that this pandemic will not be a phenomenon that continues only for a few weeks. At the best it will suppress the normal functioning of society for many months. For that reason we all need to recognise that we will be using technology to conduct business which even a month ago would have been unthinkable.* ***Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage****. Even now we have to be thinking about the inevitable backlogs and delays that are building in the system and will build to an intolerable level if too much court business is simply adjourned.*

Local authorities have risen to the challenge. The licensing system continues to operate, and licensing hearings are now being heard and determined remotely as a matter of course in most areas.

1 https://www.instituteoflicensing.org/media/nclhqkqf/iol-protocol-applications-hearings-covid19-28-4-20-update-4-annex-1.pdf

The pub industry faces the biggest existential threat it has ever faced, and at the time of writing the outlook is bleak, with reports that as many as 30,000 pubs and restaurants may not reopen. In the meantime, the Government's Taskforces are working on guidelines to support reopening of businesses forced to close or radically change their business model during the lockdown period.

Amid deep concern at the already catastrophic impact of the lockdown on the UK's economy in general and the hospitality sector in particular, it is hoped that the closure restrictions will be eased sooner rather than later. Certainly by the time this edition of the *Journal* is published in July, it is expected that all non-essential retail including pubs will be open and operating, albeit with safety measures and social distancing in place.

The IoL has responded to the pandemic, firstly through support to members through regular and timely updates: *Covid-19 Licensing Issues*, a Covid-19 section on the website which includes useful links, FAQs, our regular publications (the *Journal of Licensing* and *LINK* magazine) and a summary of the many news and authored articles published during the period. The authored articles have been particularly valuable, giving detailed insights and opinions into various issues around different licensing issues in lockdown.

The regular news updates, and most especially the IoL Protocol, authored articles and FAQs have only been possible due to the input and contributions from many of our key contacts, including Daniel Davies, Gary Grant, Sarah Clover, James Button, Gareth Hughes, Leo Charalambides, Charles Holland, Stephen McGowan, Philip Kolvin QC and others and we are extremely grateful for all their contributions and support.

Meetings, Training and Events

IoL meetings, training and events were initially derailed (along with everyone else's events), but we were able to rapidly adapt to provide online delivery in many cases, including our Taxi licensing courses, Scrap Metal, Caravan Sites and more. The planned Now & Next Conferences were transformed into two half-day webinars, and the Summer Training Conference into a full day webinar.

Many other planned face to face courses were initially postponed, and will remain under review as the lockdown eases, but plans are to continue to transform affected courses to enable online delivery wherever possible during these times.

Regional meetings can also be held online, and we are delighted that our Regional Committee members are keen to go ahead and use online options. This will enable regional members to come together to hear about developments and to discuss local issues, and will allow regions to conduct their AGMs and confirm regional committee appointments.

There are many benefits to bringing people together to discuss, learn and network through training, and we will revert to face to face training when it is safe to do so. Equally, online / remote training is accessible to all with no travel or accommodation issues, so we are likely to continue to provide online course options as well in the future.

Summer Training Conference 2020

The IoL Summer Training Conference (STC) was our first large scale, multi-speaker event during the lockdown period. We were delighted to be able to go ahead with the event as an online webinar, and 120 delegates joined us on the day to hear from our expert speakers, including Daniel Davies (IoL Chairman), Michael Kill (NTIA), Sarah Clover (Kings Chambers), Peter Rogers (Sustainable Acoustics), Gareth Hughes (Keystone Law), James Button (James Button & Co), Leo Charalambides (Editor of this Journal) and Gary Grant (Francis Taylor Building).

Naturally, the programme focused heavily on COVID-19 licensing issues, and it was extremely valuable to hear from Daniel and Michael about the challenges and concerns from the industry, as well as considering issues such as planning and licensing, noise, hearings and taxis.

National Training Conference 2020

At the start of the Summer Training Conference Webinar, Gary Grant announced the decision to cancel the November conference this year. An incredibly difficult decision, but unavoidable given the nature and scale of the NTC.

So, we have postponed the face to face conference until November 2021, and instead this year we will host a series of webinar conferences in the week commencing 9 November 2020. We hope that many of you will be able to join us online to discuss all areas of licensing regulation and practice.

The Jeremy Allen Award

November 2020 would also have seen the presentation of the 10th Jeremy Allen Award (JAA), an annual award jointly presented by the Institute of Licensing and Poppleston Allen Solicitors. The award is a tribute to Jeremy Allen, founding partner of Poppleston Allen Solicitors, and previous Chairman of the Institute of Licensing.

The annual presentation for this award, takes place at the National Training Conference Gala Dinner. In light of the necessary decision to cancel the NTC this year, we have agreed with Poppleston Allen that the JAA award will also be postponed until 2021.

IoL Outstanding Achievement Award

The IoL recognises that in these exceptional times, there will be examples of individuals, groups and businesses who will stand out as a result of their innovation, dedication and exceptional achievements.

We will therefore be inviting nominations for the IoL's Outstanding Achievement Award to recognise exceptional achievements during the COVID-19 pandemic. More details on this will follow in due course.

Fellowship

It's worth reminding everyone that in addition to the Jeremy Allen award, nominations can also be made for Fellowship of the IoL. Consideration of Fellowship requires nomination of a person by two IoL members and is intended as a recognition of individuals who have made exceptional contributions to licensing and / or related fields. More information is available on our website (https://www.instituteoflicensing.org/MembershipPersonal.aspx), or email the team via **info@instituteoflicensing.org**.

Membership

IoL memberships are now overdue, and the IoL team have made every effort to contact members direct to offer assistance in renewing. If you have any queries about membership, or if we can help with a membership renewal, please contact us via email to **membership@instituteoflicensing.org**

National Licensing Week 2020

National Licensing Week (NLW) took place from 15 – 19 June 2020, coinciding with the STC webinar, and giving us the opportunity to highlight the breadth and importance of licensing in everyday lives and businesses.

It was also a chance to acknowledge the huge part licensed businesses (premises and vehicle based) have played (and continue to play) in the pandemic. Many breweries and distilleries have produced alcohol for hand sanitiser and disinfectant, while local pubs have provided takeaway and delivery services, and in some cases food supplies and deliveries for the most vulnerable in our society. Meanwhile, many taxi and private hire companies have continued to provide essential transport for key workers, as well as providing local delivery services for vulnerable residents.

The licensing regime has been essential throughout the lockdown, and most local authorities have risen to the

challenge, and maintained the licensing service as much as possible, with staff working from home, applications accepted online and hearings being held remotely. Most local authorities have been as flexible as possible to assist businesses in making changes to their licence conditions to allow them to continue to operate. There have been other examples as well, including Cheltenham Borough Council - one of the first local authorities in the country to accelerate applications for temporary changes to the use of public areas and private land.

COVID-19 has taken much of the focus this year, but National Licensing Week will be back again in 2021, and we very much look forward to a more active and involved #NLW2021!

#NLW2021 #licensingiseverywhere

Appeals – Concerns registered over long delays on licensing hearings

In a letter sent to HM Courts and Tribunal Service together with the Magistrates' Association, Office of the Lord Chief Justice and government ministers, the Institute of Licensing and NALEO have raised concerns in relation to the delays on licensing hearings in the magistrates' court.

The letter sets out the position, impact and implications of the current delays as shown below, and the full letter can be viewed here. The LGA have indicated that they have not received any representations from local authorities in relation to delays to hearings, so members may wish to consider contacting the LGA if they share these concerns.

Extract from the letter:

The COVID-19 pandemic has had profound consequences for regulators and businesses across the country, and the importance of the licensing system and its continued operation during the pandemic has been apparent throughout the period.

The IoL has produced a Protocol for its members, aimed primarily at local authorities and encouraging them to continue to fulfil their statutory duties as licensing authorities despite the challenges of office closures, home working and social distancing. Crucially, this includes facilitating licensing committee hearings to ensure that applications for new licences or variations, as well as reviews of existing premises licences (described in the Secretary of State's Guidance on the Licensing Act 2003 " as a key protection for the community"), are heard without unnecessary delays. This accords with the entreaties in the Lord Chief Justice's message to Judges in the Civil and Family Courts, which stated:

"It is clear that this pandemic will not be a phenomenon that continues only for a few weeks. At the best it will suppress the normal functioning of society for many months. For that reason we all need to recognise that we will be using technology to conduct business which even a month ago would have been unthinkable. ***Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage.*** Even now we have to be thinking about the inevitable backlogs and delays that are building in the system and will build to an intolerable level if too much court business is simply adjourned." (Emphasis added)

Local authorities have risen to the challenge. Licensing hearings are now being heard and determined remotely as a matter of course.

However IoL members across the country are expressing deep concerns that licensing appeals to the magistrates' court against decisions made by the local authority are simply not being heard by the courts at present and are being routinely adjourned to unspecified dates in the future.

Our members report that in many cases this is down to greatly restricted hearing numbers, meaning only priority 1 cases are being heard. In many cases, IoL members have been advised that the earliest possible date for licensing appeals to be heard (unless they relate to COVID-19 / public health issues) is October 2020.

These long delays are causing real problems for local authorities and the trade and is damaging the public interest and the interests of justice. In the case of taxi/ private hire appeals, there is also the significant issue of public safety.

To take just two illustrative examples:

Where the operation of a licensed premises has led to crime and disorder, or public nuisance being suffered by local residents, or the public safety and the protection of children licensing objectives are being undermined, premises licences can be "reviewed" by a local authority on application by a responsible authority (e.g. the police) or other person (e.g. residents). The local authority may have determined to revoke the premises licence or reduce its operating hours in order to reduce crime and disorder or public nuisance in the public interest. However,

importantly, in most cases (e.g. standard reviews under s.51 Licensing Act 2003) the decision of the local authority, made in the public interest, does not come into force until any appeal is determined by the magistrates' court (or in some areas of licensing, such as taxi licensing, an onward appeal to the Crown Court). Therefore, a premises can continue to operate, albeit whilst undermining the licensing objectives, prior to the appeal being heard. This is often contrary to the public interest. Long delays in listing the appeal compounds the impact. The current lockdown of many (but not all) licensed premises due to the pandemic may well be lifted in the coming weeks and months and so the adverse impact on communities can be expected to rebound until the appeal is determined.

A trade applicant, such as a supermarket or local convenience store, may require longer hours to operate in order to survive the financial challenges prompted by the pandemic or to remove conditions on their premises licence prohibiting food or drink takeaways or deliveries in order to better serve their local community. Other operators still wish to open up new stores and require a premises licence if they wish to sell alcohol or provide hot food or drink after 11pm. If their licence application is refused by the local authority then the trade applicant may well wish to appeal that decision to the magistrates' court. The failure of the courts to list these hearings stifle the ability of the trade operators to obtain licences enabling them to serve the community or may jeopardise the survival of the business.

We are aware of the Court's Listing Priorities and the efforts being made by HM Court Service to meet the current challenges which are significant and exceptional. However, our Members are concerned that licensing appeals are currently being overlooked by the courts and de-prioritised to such a degree that this is now damaging the public interest which the licensing processes seek to advance.

We are also aware that in the parallel system of planning appeals, the Government is rightly making efforts to ensure those appeals are heard by the Planning Inspectorate, for which see this press release from 28 May: https://www.gov.uk/government/news/more-inquiries-and-hearings-to-be-held-virtually-in-june?utm_source=a09e4c81-2bc0-46af-a374-0d828d6c4950&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

In the magistrates' courts it is our view that licensing appeals are well-suited to being heard remotely using audio and video technology. We are aware the courts are already using this technology in criminal cases.

The backlog of licensing appeals caused by the current inability of courts to list licensing appeals is an additional matter of concern.

We would urge you, please, to take such steps as are necessary to encourage the Courts to list licensing appeals, remotely or otherwise, in a more timely fashion.

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Cometh the hour, cometh the councillor

Licensing must take a lead in nurturing the hospitality sector's return to work by promoting the basic human need for social interaction says **Philip Kolvin** QC

This article is written at a moment when the social economy is moribund, with some of it artificially ventilated by furlough, grants, business loans and rates moratoria. The question of what happens when the ventilator is switched off is of fundamental importance, for it is becoming clear to policy-makers that the patient will not be flying out of intensive care. The post-Covid landscape will be radically different. The social economy will be fragile. In many places, unaided, it will rapidly collapse.

Therefore, local authorities will need to adapt to head off incipient disaster. There are three main elements to this.

First, they should treat the social economy as a social good to be supported and propagated, not a pandemic to be controlled.

Second, they should reconsider their approach to regulation. What was appropriate to promote the licensing objectives before the decimation of the high street may well not be appropriate now.

Third, they should plan positively for their social economy, utilising all the tools at their disposal.

A respectable argument for each of these could have been made, and in many instances was made, before. But Covid-19 is the greatest social and economic waterfall of most of our lifetimes, when the placid currents of our society enter a torrent of acceleration and transformation. Therefore, what was an ideology has now become a pressing necessity. The policy decisions authorities take now, ie immediately, will to a large extent determine the future of our social economy in particular and our town centres in general.

The placid currents

While the previous currents governing high street economies are here described as placid, they were insistent and flowing in one direction over many years. It would be wrong to describe the high street crisis as having been a slow car crash. It has been more glacial than that. But, just as for receding glaciers, what was formerly understood only by glaciologists and their academic counterparts in climatology and geology, became visible on casual inspection.

The elements of change were explored in more detail in my joint paper: *Covid's Metamorphosis*.[1] They comprise a decrease in high street retail, a reduced interest in alcohol, a growth in home entertainment, the rise of urban gentrification and austerity, with falling incomes and rising costs (particularly rent and rates) hitting drinking establishments, nightclubs, music venues, LGBT venues and retail establishments particularly hard.

To illustrate the thesis, it is worth taking just two indicia, on-line retail and alcohol consumption.

First, on-line retailing has increased from a very low base at the beginning of the millennium to a fifth of all sales now, as Figure 1 demonstrates. Coupled with unsustainable increases in town centre rents and rates and a younger generation more interested in experiences than things, it is not at all hard to imagine why seemingly every month brings another loss of a household retail name.

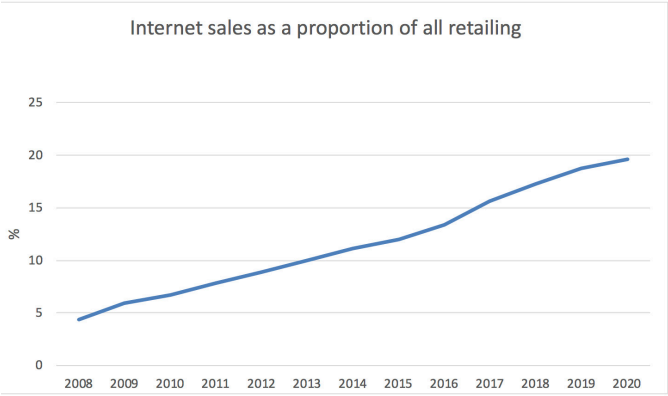

Figure 1.

Meanwhile, the reduced propensity of young people to drink, the rise of home consumption and, again, rising rent and rates have conspired to produce a persistent egress of bars from our society, as Figure 2 illustrates. It is fair to say that loss of bars does not always equate to loss of social venues, since the rise of the experiential economy has led to the development of premises which are not alcohol-led – competitive socialising, street food, gelaterias, coffee-

houses and the like – which many would judge to be not a bad thing. In some cases, the opening of larger bars has coincided with the loss of smaller bars, so the phenomenon is as much consolidation as cull. Nevertheless, it is undeniable that pubs, for two centuries community hub and high street mainstay, are, if not yet an endangered species, then certainly on the decline. And this was before the baleful influence of the pandemic.

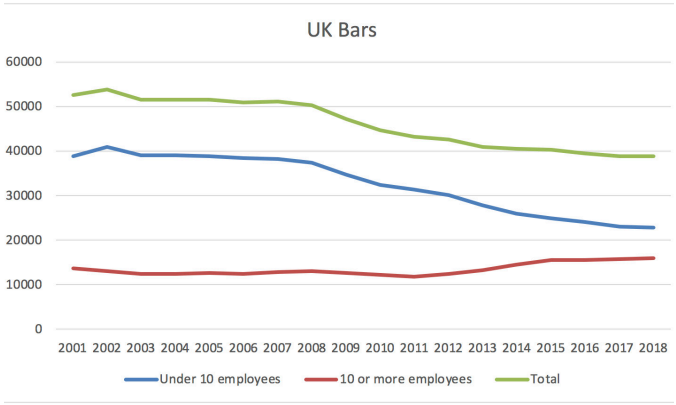

Figure 2.

The offset by the rise of a more diverse social economy has helped compensate for loss of traditional retail and hospitality. Nevertheless, even pre-Covid, high street vacancies reached a five year high of 12.2%, with that figure masking regional woes: for example the North East rate was 16.7%.[2] These figures, which have been on a rising curve for three years, should not be viewed complacently, particularly in the face of a catalysing pandemic.

The immediate response

By the time this article is published, the Government plan to restart the hospitality sector will be known, as will how much of the sector considers re-opening (as opposed to closing or mothballing) worth the candle. There is no point crystal-ball gazing as to the precise constituents of the plan, not least because the gestation from embryonic thought to ministerial policy announcement presently seems measurable in hours, and sometimes more according to the exigencies of the press round than any careful weighing of competing priorities for which the Civil Service is globally renowned.

It is fair, however, to say that, whatever the protestations of being led by the science, and whatever that now well-worn phrase actually means, the response to the different stages of the pandemic has been principally political and not clinical. That is not a criticism, for if the overriding objective was the removal of all known scientific risk, nobody would be let out at all and the economy and much else would collapse.

Partly for this reason, it is observable that the terms of emergence from lockdown have varied considerably from nation to nation. For example, at the time of writing, Spain, which was badly hit by the virus, is allowing outdoor events of up to 400 people, whereas the Netherlands, which was less affected, is not permitting mass outdoor events at all.

The discussion about the immediate response has understandably taken up most of the political and media bandwidth, but the socio-economic ramifications of the virus require a horizon measurable in years if not decades, and the precise mechanism by which one moves from lockdown to re-opening is not the concern of this article.

When, however, premises do start to re-open, the economic landscape will be bleak. There will be possibly unprecedented public and private debt, higher unemployment and, for a proportion of the population, an aversion to going out and rubbing shoulders with fellow citizens. Of course, there will also be an element of physical distancing, be it imposed or voluntary, together with other reminders to customers that the absence of the virus in any given space cannot be assumed, such as Perspex screens, masked waiting staff and so on. None of that bodes well for an industry which relies on spend, fun, proximity and sociability.

Therefore, what is needed now is a far more imaginative long-term plan which turns the problems likely to beset the social economy into opportunities, and perhaps even re-conceives the very nature of hospitality and its regulation to keep town centres alive. The solutions are not pre-election fixes but the long-term restructuring of thinking, planning and approaches to regulation within local authorities.

The social economy as a social good

In 350 BCE Aristotle wrote that a social instinct is implanted in all men by nature,[3] and no doubt in women too. Aristotle would have been as familiar with the agora as a forum for exchange of goods, ideas and pleasantries as we are with the town centre. The interplay between business and socialising is inherent in the etymology of the very word commerce which, even by Shakespeare's time, could mean either business or social intercourse. Those towns and cities which lack full physical provision for the latter would be said by many to lack a heart or a soul.

Towns and cities were created by humans for humans, not just as places to trade but as hubs where we may indulge our basic impulse to meet, celebrate, commiserate, share ideas and form social bonds.

As Western society has developed, so the locations where such commerce occurs have become private facilities, open to all on payment of the price. The price of a coffee bears

2 Local Data Company.

3 Aristotle: *Politics*.

no relation to the cost of the beans, water and milk, but represents the price of rental of the space one occupies for the average length of the sojourn.

In general political theory, when discussing social goods, one considers goods which are the right of everybody to access and where the use by one person does not exclude the right of another. Common examples would be drains, lighthouses, parkland and air.

I would argue that, while each licensed venue may not be a social good, the social economy as a whole most certainly is. If it were not provided by the private sector, the state would be under compulsion to provide its equivalent to assuage the desires of its populace.

If proof were needed, the current health crisis has proved it. How many of us engaged with friends and family on Zoom or Teams before March 2020? Now these words have become the *lingua franca* the world over. This is not because none of us has anything better to do. It is because we crave commerce with those close to us, the sharing of news, jokes and feelings, the consolation of human company. Virtual outreach may be a poor second, but it proves the absolute necessity of the first.

For this reason alone, public authorities should be inspired and humbled by the fact that what they have in their hands is something ancient and precious, as vibrant and meaningful on a species level now as it was to Aristotle.

I have been working in this field for decades, for public authorities, communities and applicants. Just sometimes, my anecdotal experience is that some authorities view the social economy, particularly the alcohol economy, with suspicion, as a beast to be tamed, rather than a gift to be nurtured.

But the social economy satisfies one of the most basic human urges. It also pays rates which keep local authorities functioning. It is one of the biggest employers in the land, particularly of young people. It keeps alive a network of businesses, including food growers and suppliers, drinks manufacturers and allied industries such as security, transportation and manual and professional services. It is also one of the biggest tourism draws from abroad.

This is not to say that the social economy lacks externalities. Of course there can be negative effects: noise, anti-social behaviour and street congestion being just three. It is obviously the duty of a public authority to mediate out some of these impacts. But it should do so in the context of support for what we should all recognise as a major net contributor to society and our human experience. The singer Joni Mitchell wrote: "You don't know what you've got till it's gone". The remarkable and unanticipated gift of the coronavirus and the lockdown it engendered is that, in the case of the social economy, we very much do.

Until now, the public sector largely relied on the private sector to constitute and develop the social economy. If there is an assumption underlying this approach, it is that of Adam Smith, in whose *Wealth of Nations* was espoused the theory that through market competition is to be attained the conditions of common good for the benefit of all humankind, however elevated or lowly be their rank. But no market economics keep park greens mowed or children safe on our roads, and so the state cannot shuffle off all responsibility for social goods just because they could in theory be provided by the market. Sometimes the state has to step in.

What is more, Smith's analysis becomes more troublesome when one is considering the economic interplay between markets – in this case the competing demands for urban centre properties, the competition between home and town centre socialising or between on- and off-trade products, between neighbouring urban centres or even between local socialising or holidaying abroad. A local authority would be remiss if it stood by in the name of market capitalism as its social economy crumbled. Its political and moral imperative would be to intervene in a supportive capacity. This is one such time.

The approach to regulation

There will be those to which the idea of regulators actually supporting those they regulate as anathema, even heresy. It is not, and it is rooted in principle. The first provision of the Better Regulation Delivery Office's Regulatory Code[4] is:

> "Regulators should carry out their activities in a way that supports those they regulate to comply and grow."

Those are very fine sentiments. What would they mean in practice?

In the planning context, the idea of a regulator setting out to support a sector is non-contentious. It may provide for land allocation and presumptions in favour of development in an authority's development plan. Then, s 70(2) of the Town and Country Planning Act 1990 enjoins the planning authority to have regard both to the development plan and to other material considerations. In the classic case of *Stringer v MHLG* [5] Cooke J said: "Any consideration which relates to the

4 April 2014.

5 [1970] 1 WLR.

use and development of land is capable of being a planning consideration." That might be a positive consideration, such as that the construction of a barn might support an agricultural operation. It might also be negative such as the undesirability of a heavy industrial use in a quiet residential street. Either way, the planning authority must specifically balance out the positive and the negative to determine where the public interest lies.

Under the Licensing Act 2003, the correct approach is by no means so clear even though it is 15 years since it came into force. The philosophical underpinning of the Act was a concept which would have been familiar to Adam Smith himself, but came to be known as neo-liberalism, whereby left to itself the market will conduce to the common good, and should only be interfered with where necessary. The notion of necessity as the prerequisite for regulation of commercial aspirations found its expression in s 18(3) of the Licensing Act 2003, whereby the authority could only interfere with the operating plan if, and to the extent that, it considered it necessary for the promotion of one of four defined licensing objectives. In short, you only clip businesses' wings if you have to.

Come a change of government, come a new approach. In 2010, allegedly in response to a "growing concern" that Tony Blair's café culture had failed to materialise and that the Act was leading to behavioural excess, the then Government proposed to rebalance the Act in favour of communities, including by removing the need to show that intervention was necessary, rather than for the benefit of, promotion of the licensing objectives.[6] This culminated in the substitution of "appropriate" for "necessary" in the Police Reform and Social Responsibility Act 2011. Whether and the extent to which this supposed exercise in bar-lowering actually influenced decision-making is a matter for conjecture.

The impact of the Act, though, in either its initial or subsequent iteration, has clearly tended to lean against the careful balancing of considerations which is the hallmark of the planning system, a system in which the downsides of a proposal can be acknowledged and weighed evaluatively against its benefits so as to reach an overall assessment. Rather, in licensing hearings, licensing sub-committees have tended to focus on the reasons why applications should not be granted rather than why they should. In a subversion of the popular song,[7] they "Ac-Cent-Tchu-Ate the negative and eliminate the positive".

In fairness, they are encouraged to do so by statutory wording which throws focus onto the licensing objectives. What is more, nothing in the s 182 Guidance appears to presage a different approach. In planning, the concept of proportionality means striking a fair balance between competing interests.[8] In licensing, it means something else altogether. In teaching authorities how to go about exercising their powers, the Guidance states: "The authority's determination should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve."[9] In other words, proportionality is like an advance to a field surgeon: "Don't amputate more than you need to".

In a world in which the social economy is to be treated as a social good, it is time to view the Act through a different lens. The Act does not in fact say that nothing which might harm a licensing objective can possibly be granted. If that were the case, nothing could ever be permitted. Nor does it say that the authority must take all steps required to obviate any harm to the licensing objectives. Its target is rather more nuanced. It must take the steps which it considers "appropriate" to promote the licensing objectives. It does not state that anything less than full cauterisation of the risk to the licensing objectives is *verboten*. Rather, it asks the authority to appraise the risk to each of the licensing objectives and then decide what is appropriate, not to obviate the risk, but to promote the objectives in question.

Take Pavarotti in the Park. Most people would be thrilled to know the event is happening at all. Some will be lucky enough to be there. Some won't care. Some will judge the music purely in decibels, regarding any heightened levels as a monstrous assault on their liberty. On the traditional approach, the poor licensing sub-committee has to behave as the linguistic equivalent of a contortionist, finding that, despite an obvious interference with local amenity, the event is not a public nuisance as properly so understood, even though it is the law that low level interference with the amenity of a few can constitute such a nuisance.[10]

In a brave new world of supporting the social good, the authority does not need to engage in sophistry. It can acknowledge that people may be disturbed, but do so with equanimity, making it clear that it is simply not appropriate on the facts of the case to curtail the proposal. In other words, while the licensing objectives are an important material factor, they do not enjoy exclusivity when it comes to deciding what is relevant.

6 *Rebalancing the Licensing Act a consultation on empowering individuals, families and local communities to shape and determine local licensing* (Home Office).

7 By Arlen and Mercer.

8 *Lough v First Secretary of State* [2004] EWCA Civ 905.

9 Para 9.43.

10 *R (Hope and Glory) v City of Westminster Magistrates' Court* [2009] EWHC 1996 (Admin).

If this is right, its effect is that, through consideration of what is appropriate, the authority has full power to take into account all factors, positive and negative, in favour of a proposal. Some authorities do this already, by writing considerations concerning public health into their licensing policies. But few if any openly take account of the positive virtues of a proposal as outweighing any negative implications. As a matter of law they can, and in some cases undoubtedly should.

It is cardinally important that authorities grasp this nettle now, for the hospitality sector is in desperate need of latitude when it comes to exterior consumption. Physical distancing, whether set at two metres or (as the World Health Authority has it) one metre, will render many licensed premises unviable. The only way they will get through the next year, while devoutly praying for a vaccine, is to expand their operation both in terms of hours and exterior space. It follows as night follows day that there is an increased risk of disturbance to local residents, which may result in shorter hours than are prescribed for the interior. But may the authority hold that it can live with increased disturbance in the early part of the evening so as to save the hospitality sector, the jobs, the culture, the social cohesion and the rest of it? In my view it plainly may, on the basis that to do so is "appropriate".

In these extreme times, there is a human urge to shrink to what is comfortable and familiar. But that won't be enough. We will need to do things differently and do different things.

Let me take two different examples.

First, few of the larger towns and cities in England and Wales are without their cumulative impact policies which, depending on their language, operate as anything from a hurdle to surmount as an impregnable portcullis. But all of these cumulative impact policies were conceived and born before the coronavirus. They are weapons trained on different enemies in former times. They are as apt as the Light Brigade in an aerial dogfight.

In many cases such policies were designed to deal with issues of over-consumption of alcohol by too many people in a saturated economy. But what if the economy is no longer saturated but slip-sliding away, visited by people deeply relieved to be out at all, and sitting chatting outside at tables for two in the early evening? As a matter of lexicology, you might not be able to say that the policy does not apply. But, in the new world, there is no statutory obligation to follow a cumulative impact policy, and no political imperative to do so, especially where the policy stands in the way of necessary social progress. Therefore, there is no just cause or impediment preventing an authority holding, very simply, that preventing early evening exterior consumption is not inappropriate, despite a formal breach of its cumulative impact policy.

Second, the accentuation of the negative has caused the cumulative impact policy to emerge as the principal licensing policy response to the night-time economy. These range from the densely licensed area of Soho in the West End of London to suburban areas where it is quite hard to find a drink in the evening. Since such policies have only recently been placed on a statutory footing by the Policing and Crime Act 2017, it would be a quixotic commentator who advocated their abolition.

However, it remains deeply asymmetrical that at both national and local level there is such a strong focus on what should not be permitted and so little on what should. Is the ability to enthuse, advocate, promote and exhort a disqualification from political office, or from practising in licensing at all? It is not. This, then, is precisely the moment for authorities to state loud and clear through policy what they want to see to help the social economy survive and thrive as the malign microbe of Covid-19 recedes from our bodies and our body politic. Whether this is restaurants, cafés, gelateria, table tennis, laser games, escape rooms, trampolines, street food, low-alcohol bars, music venues, gay bars, high-tech darts, e-gaming, bingo, warehouse gigs, events in libraries, museums and galleries, pop-ups, markets, microbreweries, gastropubs or community theatres, or all of the above, it is time for authorities to lead the way in listening to what local people want and then driving provision of it with positive policies. This should now become a litmus test of competence for licensing authorities and their officers.

Positive planning for the social economy

For a Parliament which deliberately brought licensing into the care of local authorities because they were already responsible for regulating what happens in town centres and in the hospitality industry in general, our rule-makers have never descended into detail on the true nature of the interplay between the different functions. The nearest one gets to policy prescription is when the s 182 Guidance instructs us that planning and licensing are to be separated to avoid duplication and inefficiency, which has always begged the question of why planners are a responsible authority at all, a confusion which is reflected in the minuscule proportion of representations coming from that quarter. The non-duplication principle is comprehensible when it comes to regulatory interference: why set out to amputate a limb which has already been removed by a different surgeon?

But the Guidance is incomprehensible when it comes to

positive policies to support a type of venue or a sector of the social economy. Why on earth should planning and licensing policies not harness themselves together to pull the social economy in the same direction? What is the logic in trying to decouple them and leave them to go off in separate directions? Surely, if something is worth having, it is worth advocating for both in planning and licensing policy? And if that is true for planning, why is it untrue for highways, regeneration, compulsory purchase or any other relevant area of council policy-making?

Post-Covid policies might, therefore, be expected to support extensions of hours or space for particular types of venues, for example those which are family friendly or not alcohol-led. They might particularly express support for a café culture with highways measures to reduce the amount of carriageway assigned to motor vehicles, with greater provision for tables and chairs, cyclists and pedestrians. They might seek to build, or rebuild, the social economy in suburban locations so as to reduce the need to travel, and reflecting the truth, perhaps insufficiently acknowledged, that the fading away of shops and offices from central locations might, whatever is done, mean that the only policy option for some town centres in coming years will be to repurpose them. The best way forward will always be a matter of local choice. This article does not presume to pontificate about the end-game. But it does presume to rebel against self-denying ordnances by local authorities which prevent them entering their licensing policies in the race to make their areas better.

Conclusion

It has been said that Covid-19 is a great leveller, in the sense that it can affect every one of us. That myth has been exploded by evidence as to its disproportionate impact on different age, gender and ethnic groups. What it is, rather, is a great accelerant, advancing trends which had long been eroding the economic base of the social economy.

Now, at this moment of maximum crisis, of profound change, of infinite risk, authorities can take one of two courses. They can wait for the ship to founder and take on the mantle of the *Titanic* orchestra as it disappears into the deep. Or they can rush for the bridge and steer the majestic vessel from danger. They need no legislative fiat or ministerial exhortation to do so. They can do it all by themselves utilising the powers they have been given in a creative manner. If this were my political career, I know which course I would prefer.[11]

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11 The author thanks Marcus Lavell (Solicitor, Keystone Law), Professor Guy Osborn (University of Westminster) and Dr Laurie Johnston for their comments on a draft of this article.

The new world of virtual licensing

Operating the licensing system on-line during the current lockdown has presented many challenges, not least the need to ensure neither applicants nor objectors are disadvantaged by unequal access to the facts of a case, as **Richard Brown** explains

I tried to come up with subject matter for this article which did not have Covid-19 as its focus. I really did. But it is inescapable that the pandemic has replaced Brexit as the ubiquitous topic of our times. In fact, more so. If Brexit was the ultimate office water-cooler conversation, Covid-19 has made office water-coolers redundant. All bets are off. I have settled, then, for the challenge of writing this article without including the phrase "in these unprecedented times". And so, with thesaurus at the ready, I begin.

Of the challenges to society thrown up by Covid-19, maintaining the efficacy and the integrity of the licensing system will not, perhaps, be among the headlines when the tale is told of how society absorbed the seismic impact, soldiered on and recovered from lockdown. Yet the importance should not be downplayed. As in "normal" times, licensing touches all areas of life, but often in a way which the end user may not appreciate. This is the focus of the IoL's National Licensing Week. In these novel times, we still see this - for instance, the bar providing off sales to a parched populace by way of a change to their licence which has been facilitated by the local authority embracing remote technology to enable a hearing to take place. At the other of the spectrum, we see it in a recalcitrant pub, let's call it "The Bad Apple", opening to its beer-soaked barflies in defiance of the lockdown and being closed down to make the community safer.

The way that licensing authorities have embraced the challenges has and will contribute significantly to the hospitality and leisure industry's ability to withstand the slings and arrow of this most outrageous fortune and, then in time, prosper. What must not be forgotten in the maelstrom are the basics. One such basic is maintaining the integrity of the system so that all participants receive a fair hearing.

'Who needs remote control from the civic hall?'

So the Clash posited in their 1977 hit "Remote Control". Well, hindsight is always 20/20, and it turns out that in 2020, everyone needs it as face-to-face meetings remain impossible and are likely to be so for some time. It is often said that "justice delayed is justice denied". The legal system must maintain public trust in the criminal and civil justice systems. For many licensing processes, particularly contested premises licence hearings, similar considerations apply. The licensing cogs should continue to turn, promoting the licensing objective and protecting the public, as it is clearly in the public interest to do so. It would have long since ground to a halt had remote control from the civic hall not been possible.

Lockdown

On 20 March 2020 food and drink businesses were ordered to close by the Prime Minister. On 26 March 2020 regulations[1] were made under Public Health (Control of Disease) Act 1984. These regulations required the closure of businesses selling food or drink for consumption on the premises, and enforced what is colloquially referred to as "lockdown". This would clearly have serious implications for both the hospitality and leisure sector, and the legal profession as a whole.

The Courts and Tribunal Judiciary were quick off the mark,[2] publishing a *Protocol regarding remote hearings* under the auspices of the Master of the Rolls, the President of the Queen's Bench Division, the Chancellor of the High Court and the Senior Presiding Judge, on 20 March, updated on 26 March.[3] In short, the CTJ Protocol recommended to undertake as many hearings as possible remotely. The CTJ Protocol applies to "hearings of all kinds, including trials, applications and those in which litigants in person are involved in the County Court, High Court and Court of Appeal (Civil Division), including the Business and Property Courts". Licensing hearings are clearly not bound by the CTJ Protocol, but by the same token it is clearly sensible to follow this judicial guidance.

The IoL quickly picked up the baton and has run with it such that Linford Christie would have been left trailing in its slipstream. The IoL's work found expression in the *Protocol for*

1 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

2 https://www.judiciary.uk/wp-content/uploads/2020/03/Civil-court-guidance-on-how-to-conduct-remote-hearings.pdf.

3 https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1-1.pdf.

Licence Applications and Hearings under the Licensing Act 2003 during the Covid-19 Pandemic. This is a "living document" and has been updated as necessary. As government guidance on Covid-19 changes, so the protocol has been tweaked to reflect this through the prism of licensing.

There were two principal questions on everyone's lips in the early days of the pandemic. Firstly, the lawfulness of remote licensing hearings and, secondly, their efficacy.

Any lingering doubts about the lawfulness of remote licensing hearings were put to bed by regulations under Coronavirus Act 2020.[4] Given my remit, it will be of no surprise that I will now proceed to express some thoughts on the second point, particularly although not exclusively as it relates to objectors. There are advantages and disadvantages for objectors, but also advantages and disadvantages for applicants. Just as licensing itself involves a sometimes complex balancing act of competing interests, rights and responsibilities, so ensuring the continuation of the licensing regime necessitated a thorough analysis of how best to preserve the balance of those rights. It is clear that the rights of objectors could potentially be impinged, in two ways. Firstly, difficulty in making their views known. Secondly, being able to give voice to them at a hearing.

How to ensure continued public participation?

At the risk of stating the obvious, in order to make a representation on an application, one needs to know of its existence. How do residents become aware of applications?

It may assist to remind ourselves briefly of the advertising requirements for an application for a new premises licence / club premises certificate or a variation of a premises licence / club premises certificate. The statutory responsibilities of the applicant are set out in the Licensing Act 2003 (Premises licence and club premises certificate) Regulations 2005. Regulation 25 provides that the applicant must display a pale blue notice no smaller than A4 in size with a font size of 16 or more "for a period of no less than 28 consecutive days starting on the day after the day on which the application was given to the relevant licensing authority…". The notice must be displayed "prominently at or on the premises to which the application relates where it can be conveniently read from the exterior of the premises", with additional notices required for larger premises.

An applicant is also required to publish a notice in a local newspaper or similar document "circulating in the vicinity of the premises".

In the case of minor variation applications under s 41A Licensing Act 2003, there are less onerous advertising requirements but a notice must still be displayed "prominently at or on the premises to which the application relates so that it can be conveniently read from the exterior of the premises".

A licensing authority is under a duty to advertise an application for the grant or variation of a licence or certificate, or the application for a provisional statement. The licensing authority must advertise the application for the period of 28 days starting on the day after the day on which it receives the application, and it must publish a notice on its website containing certain information.

The licensing authority is also under a duty to advertise licence review applications in broadly the same way as that set out in Regulation 25, save for the authority is also required to advertise the application "at the offices, or the main offices, of the licensing authority in a central and conspicuous place".

The advertising requirements exist to bring the application to the attention of members of the public, to enable them to i) become aware of an application; and ii) make an informed decision as to whether or not to comment. The requirements of the pale blue notice have, famously, been the subject of litigation in the Magistrates' Court and the High Court,[5] leading to the words "substantial compliance" becoming a staple of every practitioner's lexicon.

Will the efficacy of these requirements survive "lockdown"? Clearly, during strict lockdown, the purpose of the pale blue notice is stymied as footfall diminishes drastically, at times almost to zero. Those who have become aware of a licence application through the newspaper advertisement are, as my grandmother would say, as rare as hens' teeth.

So how else can residents become aware of applications which may affect them? This is important, of course, even during the normal course of events, as people of limited mobility are less likely to see a blue notice anyhow.

Extra-statutory measures can be of great assistance in furthering the legislative aim of the Regulations and Schedule noted above. The IoL Protocol suggests that licensing authorities create "an online page for licensing notices with an option to be kept informed by way of an e-mailed circular".[6] It is further suggested that "licensing authorities advertise the full details of applications on their websites or online licensing registers".[7]

4 The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020

5 Notably, *R (D&D Bar Services Ltd) v LB of Redbridge* [2014] EWHC 344.

6 Para 17.

7 Para 18.

Some people will of course fall through the cracks, particularly those who are less technologically savvy. But then, this happens already. Other measures suggested in the *IoL Protocol* to cover as many bases as possible are: emailing details of all new applications to local ward councillors; parish councils; local residential and civic amenity groups; and organisations representing local operators and businesses. This is not without its challenges, and the adage "if something is worth doing, it's worth doing properly" applies; care must be taken when notifying residential and civic amenity groups to be comprehensive - err on the side of caution.

Again, these are measures which some licensing authorities already implement to a greater or lesser extent. Each could usefully be adopted by all on a permanent basis.

There are other methods by which some licensing authorities undertake to engage residents. Some licensing authorities write to residents within a certain vicinity of the premises. This is perfectly lawful (although again, if done, it must be done properly).[8] This would go a long way towards mitigating the loss of effectiveness of the blue notice and "word of mouth" and should be considered by licensing authorities during periods of lockdown or restricted movement. Other examples include email alerts of individual applications in a specific area; weekly email alerts of pending applications within the consultation period; and systems of greater or lesser sophistication to enable residents to tailor alerts to their requirements.

In view of the strictures imposed on the general public by Covid-19, could a licensing authority be persuaded to accept an objection submitted after the 28 day consultation period? Received wisdom would say not, citing the *Albert Court* case, referenced in footnote 8. If no relevant representations had been received within the 28 day consultation period, then the answer certainly is a resounding "no". What, though, if there had been relevant representations? And the late objection came in on the 29th day? Is there scope to accept a late objection (albeit the right to speak at / be represented at the hearing would not attach) and argue that there has been "substantial compliance"?[9] One for another day perhaps, but the *Albert Court* case did not express a view either way.

Remote hearings

Effective participation by the general public and facilitating remote hearings go hand in hand, for where representations are received and not withdrawn, a hearing will almost always need to be held.

A significant minority of licensing authorities will by now have held remote hearings. A number of different platforms are available, such as Zoom, Skype for Business, Microsoft Teams, Google Hangout, and more. Some hearings have been audio-only, some with full video.

At the time of writing, I have taken part in several remote hearings and the experience has largely been positive for me and my clients (in terms of the process, if not the outcome). My view is that it is not ideal, but it is a vital bridge from the current situation to the post-Covid-19 licensing world.

Those I have taken part in have not disadvantaged any party (at least, not in ways which have not also disadvantaged another party).[10] However, it is not difficult to foresee cases where the process as a whole is less effective, and it is understandable that some authorities, resources already stretched and perhaps even more so now as officers are redeployed, are wary of going down this route.

I agree that remote hearings should take place wherever possible. However, licensing authorities must facilitate effective participation by all so far as is reasonably possible, and have at the forefront of their minds the promotion of the licensing objectives, and of discharging their duties in accordance with the public interest (construed widely). On a case by case basis a remote hearing may not always be a viable way of achieving this for an applicant / licence holder / objector or all three, as the case may be.

The field of family law, particularly cases involving the welfare of children, was always going to be a fertile area for discussion of the appropriateness of remote hearings. The first such case which reached the Court of Appeal provided a useful general summary of the considerations.[11] Clearly, the exigencies of this area of family law may not relate directly to licensing, but it is nevertheless worth reading. Paragraph 6 of the judgment refers to a message sent on 9 April 2020 by the Lord Chief Justice, the Master of the Rolls and the President of the Family Division to all circuit judges and district judges concerning remote working during the lockdown:

Generally:

> a. *If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the*

8 See *Corporation of the Hall of Arts and Sciences v The Albert Court Residents' Association* [2011] EWCA Civ 430 for the pitfalls which can arise.

9 See *Jeyeanthan* [1999] EWCA Civ 1465; and, in a licensing context, *R (D&D Bar Services Ltd) v LB of Redbridge* [2014] EWHC 344.

10 For instance, the problem of communicating effectively with clients during a hearing.

11 *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

'green light' to conduct a hearing in this way;

b. Where the final hearing is conducted on the basis of submissions only and no evidence, it could be conducted remotely;

c. Video / Skype hearings are likely to be more effective than telephone. Unless the case is an emergency, court staff should set up the remote hearing.

d. Parties should be told in plain terms at the start of the hearing that it is a court hearing and they must behave accordingly.

The CTJ Protocol is clear that "Judges, clerks and / or officials" (so, in a licensing context, the licensing authority) should propose one of three options:

i) *a stated appropriate remote communication method (BT conference call, Skype for Business, court video link, BT MeetMe, Zoom, ordinary telephone call or another method) for the hearing;*

ii) *that the case will proceed in court with appropriate precautions to prevent the transmission of Covid-19; or*

iii) *that the case will need to be adjourned, because a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time.*[12]

The default position should be that licence hearings should proceed remotely, where possible. However, licensing authorities should always remember their overarching power to adjourn "in the public interest". The Licensing Act 2003 (Hearing Regulations) 2005 confers a power to "extend time etc"[13] "for a specified period where it considers this to be necessary in the public interest". However, this should not be open-ended, as the notice required to be given to the parties must state "the period of the extension". Further, there is a specific power for the authority to adjourn a hearing to a specified date, "where it considers this to be necessary for its consideration of any representations or notice made by a party".[14] The inability of a party, for whatever reason, to participate via remote technology, could clearly come within this regulation. Again, the power is not open-ended - the authority must "forthwith notify the parties of the date, time and place to which the hearing has been adjourned".

Safeguards for remote hearings

The Legal Education Foundation has provided some interesting thoughts in a briefing entitled *Coronavirus Bill, Courts and the Rule of Law*.[15] The LEF is a grant-making foundation, and until 2012 was part of the College of Law. The briefing note was concerned with maintaining the principles of access to justice and of open justice, both of which are important considerations for a licensing authority exercising its functions. Its content and recommendations are referenceable to licence hearings.

The summary recommendations include that all parties in hearings facilitated fully by video link, Skype or telephone must be provided with effective access to free legal advice.[16] I have seen the importance of this in action, in a recent case where one of my clients was not able to obtain and use the appropriate technology in order to participate, and another was unable to do so remotely owing to a language barrier. Their reluctance was overcome by the provision of free advice and representation, obviating a (probably contested) adjournment request.

The LEF also suggests that the impact of remote hearings on the ability of legal representatives to effectively communicate with their clients must be monitored. This is indeed a challenge in a species of hearing such as licensing where minutiae matter and where a hearing should take the form of a "round table" discussion.

Compliance with Equality Act 2010 is, of course, a duty of a local authority. The impact of this on remote licence hearings has perhaps not had the attention it deserves. The LEF further suggests that:

> *resource should be dedicated to proactively identifying parties who may be considered vulnerable under existing law and practice directions and ensuring that reasonable adjustments are made to enable them to participate fully in proceedings. The impact of shift in mode of proceedings on individuals with protected characteristics under the Equality Act 2010 should be monitored.*

There is no reason why this should not apply in just the same measure for licensing.

Finally (for our purposes), the LEF suggests that "Parties and legal representatives should confirm that they consider the performance of the technology sufficient to facilitate a

12 CTJ Protocol para 16.

13 Regulation 11.

14 Regulation 12.

15 https://research.thelegaleducationfoundation.org/wp-content/uploads/2020/03/Recommendations-for-Coronavirus-Bill_V6.pdf.

16 Although this is seemingly downgraded later in the document to "effective access to legal advice".

fair and effective hearing" - in effect, maintaining the ancient legal maxim *quod omnes tangit, ab omnibus approbatur* (what touches all, must be approved by all).

The LEF has subsequently carried out a consultation at the request of the Civil Justice Council on changes to the civil justice system developed in response to Covid-19, foremost among which is the expansion of the use of remote hearings. The questions asked in the consultation could usefully be adapted to conduct a similar exercise for licensing hearings:

- What is working well about the current arrangements?
- Which types of cases are most suited to which type of hearings and why?
- How does the experience of remote hearings vary depending on the platform that is used?
- What technology is needed to make remote hearings successful?
- What difference does party location make to the experience of the hearing?
- How do remote hearings impact on the ability of representatives to communicate with their clients?
- How do professional court users and litigants feel about remote hearings?
- How do litigants in person experience hearings that are conducted remotely?
- How do remote hearings impact on perceptions of the justice system by those who are users of it?
- How is practice varying across different geographical regions?
- What has been the impact of current arrangements on open justice?[17]

The outcome of the consultation is awaited, but any lessons which can be learnt and which are transferable to licensing should be welcomed and embraced.

Until next time, stay safe in these unprecedented times.

Richard Brown
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17 https://www.thelegaleducationfoundation.org/articles/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system.

A mellower form of cannabis regulation is now emerging

Cannabis and its derivatives are inching their way towards wider acceptance in medical and personal usage, as **Gary Grant** and **Michael Brett** explain

Since the last issue of the *Journal* went to press, there have been significant further developments in the way in which cannabis and cannabis derivatives are treated and regulated in the UK. The direction of travel is clear, towards greater openness to their presence in both formal and medical settings, and also to personal consumption, albeit with careful regulatory controls.

Scientific interest in the medicinal effects of cannabis is rampant. Several trials are taking place worldwide, including in Canada, Israel and the UK investigating whether medicinal cannabis could be used as a treatment for Covid-19. The trials are at a very early stage and it is too soon to draw any conclusions about whether cannabis will prove an effective treatment. One US study, for example, is investigating whether cannabinoids can be added to anti-viral therapies to reduce lung inflammation in those suffering from the pandemic.[1] From a less academic standpoint, an article in *The Times* of 9 May 2020 suggests that recreational interest in the drug has not waned either, with its headline reading, "Record high: Britons stock up on cannabis to cope with lockdown".[2]

A diversifying cannabis marketplace

The UK leads the world in the production of legal cannabis, particularly for pharmaceutical purposes. The UN International Narcotics Control Board estimated in 2016 that the UK produced approximately 44% of the global production of cannabis for medical and scientific research. Although some time has passed, and more up-to-date statistics are hard to come by, the UK cannabis market is a leader in the legalised cannabis-growing industry.

There is considerable corporate interest in consolidating and accelerating this strong market position and UK companies are presenting attractive offerings to aid growth. A good example is the launch of CROP17, a collaboration between land consultants, farming experts, and the pharmaceutical industry aimed at facilitating increased cannabis production, including assisting with compliance with the UK's strict regulatory framework.

In addition, plans for Scotland's first official cannabis farming operation obtained a boost with the recent grant by Dumfries and Galloway Council of planning permission for its greenhouse infrastructure.[3] The future of the project is dependent now on the acquisition of the relevant licences to grow cannabis plants issued by the UK Home Office under regulation 12 of the Misuse of Drugs Regulations 2001.

The cannabis market is expanding beyond mere production and manufacture of cannabis or cannabis-derived products, though, into more sophisticated commercial instruments. The Medical Cannabis and Wellness UCITS ETF launched on London Stock Exchange in January 2020, offering investors the opportunities to acquire legal cannabis, hemp and CBD-related securities.[4]

CBD and novel foods

That said, the primary emerging cannabinoid market in the UK is centred around cannabidiol (CBD), a non-psychoactive compound produced by plants of the cannabis genus, which, as a pure compound, is not a controlled drug. Products containing CBD are readily available on the high street in food supplements, cosmetics, and vaping products. Proponents of the consumption of CBD argue in favour of a number of benefits, from better skincare, through increased relaxation and well-being, to therapeutic effects. Consumer research indicates that this positive messaging is catching on, with approximately 28% of Britons who have never tried CBD indicating that they would be willing to do so.[5]

1 https://www.sciencedirect.com/science/article/pii/S0889159120307078

2 https://www.thetimes.co.uk/article/record-high-britons-stock-up-on-cannabis-to-cope-with-lockdown-65lpzd83j?shareToken=2061396df95d8d1fea1be14138acd0ec.

3 https://www.thetimes.co.uk/article/plans-for-scotland-s-first-cannabis-farm-approved-nf9k2r2m0 . The planning decision notice (ref: 19/1682) can be found here: https://eaccess.dumgal.gov.uk/online-applications/files/0ED8666B41EBBB057C33F33FC9B4943B/pdf/19_1682_FUL-Decision_Notice-949607.pdf.

4 https://www.lseg.com/markets-products-and-services/our-markets/london-stock-exchange/equities-markets/raising-equity-finance/market-open-ceremony/london-stock-exchange-group-welcomes-hanetf-and-purpose-investments-celebrating-launch-medical-cannabis-and-wellness-ucits-etf-0.

5 https://yougov.co.uk/topics/health/articles-reports/2019/10/18/quarter-britons-tempted-cannabis-extract-products.

A recent study from the UK cannabis industry has however raised concerns about variations in quality of CBD products.[6] It highlights a lack of consistency in chemical composition and a high incidence of controlled substances, both tetrahydrocannabinol (THC), the chemical which underlies the "high" experienced by cannabis users, and cannabinol (CBN). The presence of CBN in notable quantities in CBD products may be a source of particular alarm for regulators: this compound is formed by the oxidation of THC and thus its presence in CBD products is likely to indicate that they have contained significantly higher THC levels earlier in their lifecycle.

The continuing rapid expansion of the market, problems identified in the safety of products and concerns about their legality are behind moves towards greater regulation in recent months. Most significantly, in February this year, the UK's Food Standards Agency (FSA) issued Guidance confirming that it would introduce a staggered enforcement scheme in relation to businesses supplying CBD food products in the UK. This followed the FSA's confirmation, back in January 2019, that it considers CBD to be a "novel food" within the EU food regulatory framework when contained in products intended for human consumption (such as CBD infused oils, tea and food supplements).[7]

The EU Novel Foods Regulation 2015/2283 prohibits the sale of products containing novel foods without authorisation. Novel foods are foodstuffs of which there is no evidence of consumption to a significant degree in EU countries *prior* to 1997. If the food was widely used in the EU before 1997, then it is not considered to be "novel" and may continue to be lawfully sold to the public (Article 7 of the regulation). The purpose of the regulation is, of course, to ensure that a relatively untried and untested new food is safe for the public to consume. If its safety cannot be assessed, and scientific uncertainty persists, the precautionary principle may be applied and authorisation refused.

Currently, the necessary authorisation can be obtained from the European Commission in one of two ways. Foods that can be shown to have 25 years' continued use by a significant number of people in a non-EU country have a streamlined authorisation procedure (Articles 14-20 of the regulation). Foods that cannot claim such use must submit a full application under Article 10 of the regulation to the EC, which determines whether or not to authorise the food, taking advice from the European Food Standards Agency.

The recent FSA intervention reflects this crystallisation of the position at European level, which made clear that CBD in its pure form is a novel food. The EC maintains a novel food catalogue, a non-binding list of products which are likely to be novel foods based on information received from EU member states through its Novel Foods Working Group.[8] The catalogue's primary function is to help food business operators comply with their duty, outlined in Article 4 (1) of the regulation, to identify whether their products are novel foods. The entry entitled "Cannabidiol" indicates that it constitutes a novel food, referring to the separate entry entitled "Cannabinoid". The Cannabinoid entry includes the following text:

> *[E]xtracts of Cannabis sativa L. and derived products containing cannabinoids are considered novel foods as a history of consumption has not been demonstrated. This applies to both the extracts themselves and any products to which they are added as an ingredient (such as hemp seed oil). This also applies to extracts of other plants containing cannabinoids. Synthetically obtained cannabinoids are considered as novel. [Emphasis added].*

The FSA has given manufacturers of CBD-containing products until 31 March 2021 to submit authorisation applications, after which time products without authorisation, or a fully validated application pending, will be subject to enforcement. Subsequently, in late April 2020, the FSA clarified to industry that this deadline will not be extended.[9]

In order for authorisation to be granted by the EC, it must be shown that (Article 7 of the regulation):

a. the food does not, on the basis of the scientific evidence available, pose a safety risk to human health;

b. the food's intended use does not mislead the consumer, especially when the food is intended to replace another food and there is a significant change in the nutritional value;

c. where the food is intended to replace another food, it does not differ from that food in such a way that its normal consumption would be nutritionally disadvantageous for the consumer.

The requirements for a valid application for authorisation are set out in Commission Implementing Regulation (EU) 2017/2469. The key message is that the EC requires a high

6 https://www.liebertpub.com/doi/full/10.1089/can.2019.0078.

7 https://www.food.gov.uk/business-guidance/cannabidiol-cbd.

8 https://ec.europa.eu/food/safety/novel_food/catalogue_en.

9 https://www.theaci.co.uk/fsa-no-plans-to-extend-31-march-2021-deadline/.

quality and quantity of technical and scientific evidence to demonstrate that the conditions for authorisation are met. The process from application to authorisation can be long and onerous. In 2015, the average length of time that it took for an application to result in a positive authorisation decision was three and a half years.[10]

A final complication to the authorisation procedure is the scope of the authorisation. Under changes introduced in 2015 (and implemented in 2018) under the regulation, inclusion in the list of authorised novel foods is intended to be generic: that is, it is a foodstuff that is authorised, rather than a particular product. On a basic level therefore, the authorisation of the isolated CBD compound could permit the whole industry to carry on. However, Article 26 of the regulation allows manufacturers to invoke a euphemistically-named "data protection" provision where their application contains proprietary information. This has the effect that only the specific applicant manufacturer can market the authorised food for a period of five years from authorisation.

Brexit adds its own novel dimension to this mix, as the FSA's deadline for the validation of authorisation applications sits beyond the expected date of the end of the Brexit transition period on 31 December 2020. On that date, the regulation and implementing regulations made under it will become retained EU law, subject to alteration by the Novel Food (Amendment) (EU Exit) Regulations 2019/702. These regulations provide that the competency for deciding authorisation applications will pass from the EC to the devolved administrations, food safety being a devolved matter. This fact lies behind the request by the FSA for manufacturers to submit their authorisation applications to them as well as to the EC even before the end of the transition period.

Amidst all this regulatory fanfare, it appears that the industry is moving quickly to keep its products on the shelves. While the EC has four pending authorisation applications for CBD (one from an Irish undertaking,[11] one from a Swiss undertaking,[12] and two from Czech undertakings[13]), the FSA has indicated to industry that it has already started receiving applications.[14] All four of the pending EC applications have invoked Article 26, but it remains to be seen whether a UK industry-wide body will be able to submit a generic application to bypass the monopolistic tendencies of the system.

Although the FSA's move this spring may appear on the face of it highly restrictive, it can be considered beneficial to the CBD industry: it provides regulatory clarity and certainty to business; the FSA's enforcement holiday gives a clear, if temporary, basis for the lawful sale of CBD products; and the FSA's stance offers producers a route to permanent lawful production and sale. Moreover, authorisation offers the prospect of great quality and safety assurance for consumer products, which, beyond their inherent benefits, helps create consumer confidence. Finally, while the application for authorisation procedure is onerous, the actual statutory requirements in Article 7 are not that challenging – or should not be for an industry that repeatedly claims that its products are safe.

However, many smaller, independent producers of cannabis-based products will be deeply concerned by the FSA's novel food designation. Unlike the larger companies, they may be unable to afford the costly exercise of demonstrating their product is safe for human consumption. They fear the FSA's move will extinguish their role in the increasingly lucrative market and serve to restrict consumer choice.

It seems most likely even after the Brexit transition period has ended that the UK will continue on the "novel food" path for cannabis products which its own domestic FSA has now more fully embraced.

Criminal enforcement

The prohibition on the manufacture, importation, supply and consumption of cannabis and controlled cannabinoids is of course enforced through the criminal law. There is a clear trend against strict application of criminal sanctions in this space, both on the part of the police and also in public opinion. Although criminal prosecutions are still brought for simple possession of cannabis in the UK, they are less likely to be subject to criminal sanction, and this is highly unlikely where the possession is said to be for medicinal purposes.

First, police forces are recording fewer offences of possession of cannabis each year, and in particular since cannabis was re-categorised as a Class B drug in 2009, reversing Labour's earlier downgrading of it in 2001. Recorded crime levels are down to 2005 levels. One suggestion for this fall may be a decreasing allocation of police resources to address cannabis possession - another factor may be that regular cannabis use has fallen across that period, although

10 https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5875.

11 https://ec.europa.eu/food/sites/food/files/safety/docs/novel-food_sum_ongoing-app_2020-1670.pdf.

12 https://ec.europa.eu/food/sites/food/files/safety/docs/novel-food_sum_ongoing-app_2019-0935.pdf.

13 https://ec.europa.eu/food/sites/food/files/safety/docs/novel-food_sum_ongoing-app_2019-1371.pdf; https://ec.europa.eu/food/sites/food/files/safety/docs/novel-food_sum_ongoing-app_2018-0349.pdf.

14 https://www.theaci.co.uk/fsa-no-plans-to-extend-31-march-2021-deadline/.

this latter does not fit well with a peak in punishment in 2008-9.[15] Secondly, recent crime statistics show that the police are increasingly preferring to use informal out-of-court methods, including "community resolutions", to deal with cannabis-related crime, in preference to prosecutions or lower-level formal procedures.[16]

These informal measures, which in some police areas are used to deal with more than half of all recorded cannabis possession crimes, do not show up on a criminal record (although they may on an enhanced DBS certificate) and consist of an agreement between the police and offender. The latter may agree to undertake some form of restorative justice or rehabilitation activity.[17]

Both of these features of police response reflect a de-prioritisation of cannabis possession crimes. Some of this may be explained by tighter police resources being focussed on higher-level offences, but some must be attributable to an increasingly permissive stance to possession crimes, exemplified by the Chief Constable of Durham Constabulary's much-publicised stance on personal consumption, namely:

> *If you have a small amount [of cannabis] for personal use you will not be prosecuted, you go into [a rehabilitation programme]. It frees up time to investigate more serious crime – that's why we have a good detection rate.*[18]

Even where prosecution is in fact brought, it may be that shifts in public opinion are making convictions more difficult to obtain, especially in sympathetic cases. In January 2020, a woman suffering MS and her husband were acquitted of possession and cultivation offences. Lesley Gibson had apparently turned to cultivation after her Sativex prescription had been withdrawn. The prosecution's decision not to offer evidence on public interest grounds, despite Ms Gibson's numerous previous convictions for unlawful possession and supply (including a seven-month prison sentence in 2007), is perhaps reflective of wider social trends. Very few people in polls show support for prosecution of medical cannabis users: instead, a YouGov survey in 2019 indicated that a clear majority of people opposed such prosecutions.[19]

Conclusion

The discernible presence of cannabinoids on the high street and a greater public awareness of health claims made about such products cannot help but continue to shift public opinion in favour of the liberalisation of cannabis laws. The FSA's recent move to regulate the CBD market could perhaps be seen as a forerunner for a regulatory approach to recreational products which contain controlled cannabinoids such as THC (despite public denials by the current Government). Although novel food status may, merely by imposing a new layer of bureaucracy and a real possibility of enforcement, have a short-term dampening effect on the CBD market in 2021, the benefits of a clear legal framework for the manufacture and sale of these products should not be underestimated. The engagement of regulators and government with the legal cannabinoid industry, combined with increased permissiveness as to use of cannabis on the part of the police and public, mean that considerable further shifts in the field of cannabis law can be expected, and very soon.

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NB: We are grateful to Hanway Associates for their helpful suggestions during the preparation of article.

15 https://www.bbc.co.uk/news/uk-47950785.

16 https://www.telegraph.co.uk/politics/2020/01/15/cannabis-risk-decriminalised-police-let-users-community-resolutions/; https://www.gov.uk/government/statistics/police-recorded-crime-open-data-tables.

17 http://library.college.police.uk/docs/appref/Community-Resolutions-Incorporating-RJ-Final-Aug-2012-2.pdf.

18 https://www.theguardian.com/society/2018/jun/24/durham-police-chief-mike-barton-for-legalisation-cannabis-uk.

19 https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/jebv23n429/CDPRG_190617_190619_Combined.pdf.

Gambling Commission steps up enforcement activity

Early 2020 saw a flurry of enforcement action taken by the Gambling Commission to safeguard consumers and prevent money laundering, as **Nick Arron** reports

The key engagements reported by the Gambling Commission so far in 2020 are in respect of the online casino Mr Green, Betway and Caesars Entertainment.

Mr Green

On 27 February 2020, the Commission announced Mr Green's regulatory settlement that included a £3 million payment (in lieu of a financial penalty), which is to be directed towards delivering the National Strategy to Reduce Gambling Harms.

The Gambling Commission stated that the operator failed to have effective procedures aimed at preventing harm and money laundering.

The report from the Commission determined that because of these failings the operator:

a. Did not carry out social responsibility interaction with a customer who won £50,000, gambled it away and deposited thousands more pounds.

b. Took ten-year-old evidence of a £176,000 claims pay-out as satisfactory evidence of source of funds for a customer who deposited over £1m.

c. Accepted as adequate source of funds a photograph of a laptop screen showing currency in dollars on an alleged crypto trading account.

Betway and VIP players

On 12 March 2020, the Gambling Commission announced that Betway was to pay £11,600,000 for failings linked to VIP customers. It described one instance where Betway failed to carry out source of funds checks on a VIP customer who had deposited over £8 million and lost over £4 million during a four-year period. The Commission also stated that the investigation found that as a result of a lack of consideration of individual customers' affordability, and source of funds checks, the operator allowed £5,800,000 to flow through the business which has been found to be, or could reasonably be expected to be, proceeds of crime.

The focus on VIP schemes has been a recent theme of Commission regulation. The Commission is working with the industry in a collaborative approach to three challenges. These are: VIP customers, online advertising rules and safer product design. The use of VIP incentives is being addressed with the industry: the group is looking to establish an industry code to address poor practice around the treatment and incentivisation of high value and high spending customers. The industry has agreed:

- To restrict and prevent customers under 25 years of age from being recruited to high value customer schemes.

- All customers must first pass checks related to spend, safer gambling and enhanced due diligence before becoming eligible for higher value customer incentives.

- Reward programmes will also be required to have full audit trails detailing decision making with specified senior oversight and accountability.

The Commission will be consulting on permanent changes to the licence conditions and codes of practice in relation to VIPs, and will monitor the industry's implementation of the code. This work is progressing with no output yet completed.

Caesars Entertainment UK

On 2 April 2020, the Gambling Commission announced that Caesars Entertainment UK is to pay £13 million, the largest penalty yet imposed by the Gambling Commission, in relation to systematic failings relating to social responsibility, money laundering and customer interaction failings, including those involving VIPs. Caesars Entertainment UK operates the Playboy and Empire in London, and is one of the largest gaming companies in the world.

The penalty exceeds the £11,600,000 settlement with Betway only weeks before.

This was the second time that Caesars Casinos had been subject to regulatory action, which in part explains the severity of the regulatory settlement. In December 2015, the Gambling Commission announced that Caesars would be spending £845,000 on social responsibility purposes, after failing to do enough to prevent money laundering.

The social responsibility failings in this recent case included inadequate interactions with customers who previously self-excluded and lost significant sums of money. One player lost nearly £250,000 over a 13-month period and another customer lost £323,000 in a 12-month period which included 30 sessions exceeding five hours. A player was allowed to lose £18,000 a year despite identifying herself as a self-employed nanny, and informing staff that her savings had been spent, that she was borrowing money from family and using an overdraft facility to find gambling activities.

One aspect to note regarding the engagement with the Commission is the action it took in this case regarding personal management licence holders. Three senior managers at the company surrendered their personal licences, including the managing director, the compliance director and the VIP director. Further PMLs are currently under review. Without their PMLs, the individuals cannot work in those positions within the gambling industry.

Caesars Entertainment UK is to pay £13 million in penalties, the largest penalty yet imposed by the Gambling Commission, in relation to systematic failings relating to social responsibility, money laundering and customer interaction failings, including those involving VIPs.

Other Gambling Commission engagements

We also saw in March three suspensions: the suspension of Stakers, operating www.stakers.com, online real event and virtual betting and casino site; the suspension of the Addison Global Operating Licence, trading as Mo Play; and the suspension of the Triple Bet trading as Matchbook Operating Licence, preventing it from offering remote facilities for pool betting, betting intermediary and operating a remote casino.

In April, the Commission published an article with its reasons for suspending the licence of Triple Bet. The operating licence had been suspended with immediate effect on 17 February as part of a package of sanctions for social responsibility and money laundering failings. As well as suspending the licence and imposing further conditions, it imposed a financial penalty of £740,000.

The Commission criticised Triple Bet's anti-money laundering policies for the following reasons: it failed to set out the objective circumstances which would trigger a risk classification for customers; it did not refer to enhanced due diligence measures which would be implemented for particular categories for higher risk customers; it failed to provide guidelines for when source of funds and / or source of wealth investigations should be undertaken; and it did not adequately require customer interactions and monitoring.

As well as criticising the policies themselves, the Commission was critical of the implementation of those policies and procedures, having failed to give staff sufficient guidance.

The Commission referred to specific examples such as where a customer had put at risk over £2 million in a single day, without any source of funds or source of wealth being required. Referring to the operator's top 10 customers on the betting exchange, checks were limited; no risk profiles had been prepared; there was no customer source of funds checked; no recording of interaction; and a general failing to record monitoring of the customers.

Full details of all the engagements are available on the Gambling Commission's website.

The Gambling Commission's enforcement activity

Over the past decade, the Gambling Commission message to the industry regarding failings has been that if operators do not improve their compliance, more serious penalties will be imposed, including the risk of the loss of operating licences. Without a doubt, we are now seeing the Gambling Commission follow through on these statements, with nearly £34 million of penalty packages since 2018, and the revocation of numerous operating licences during the same period.

The message to operators from the Gambling Commission is clear: failings will be treated severely and patience has run thin.

Society Lottery reforms

On 29 April 2020, the Gambling Commission announced changes to the limits on Society Lotteries. They will be raised in line with recent Government legislation. The limit of individual draw proceeds will rise from £4 million to £5 million. The annual aggregate limit proceeds increase to £50 million up from £10 million, and the maximum individual prize will rise £100,000, from £400,000 to £500,000, provided that the lottery proceeds reach the new maximum individual draw level.

To promote the fair and open licensing objective of the Gambling Act 2005, new requirements will be put in place to provide clear and easily accessible information to consumers (continuing the Gambling Commission focus on consumers) on:

- How much is returned to the good causes.
- What good causes the lottery is supporting.
- How much is spent on prizes and expenses.
- The way in which winners are determined and prizes allocated.
- The potential prizes available, and the likelihood of winning a prize.

This will see a change to Licence Condition 11. The changes to the LCCP and the Guidance will come into effect on 29 July 2020, and will apply to all lottery draws taking place after that date.

This relates specifically to Society Lotteries licensed by the Gambling Commission, and does not impact on Small Society Lotteries registered with Licensing Authorities.

Nick Arron
Solicitor, Poppleston Allen

All the fun of the fair - perhaps

The Travelling Funfairs (Licensing) (Scotland) Bill aims to protect the traditional way of life of showpeople. Its ethos is laudable but there are practicalities to sort out says **Caroline Loudon**

I've just had a birthday. Not a momentous one, but every time a candle is added to the already quite busy cake, various reflections seem to rise to the surface of my mind. Ever more so lately, with the world temporarily shrunken due to lockdown. With one child at school, the other heading there later this year and a long summer holiday to fill, thoughts are turning to what to do. Memories of school summer holidays for me include hazy bus trips to Portobello beach, only a few miles from the city centre of Edinburgh. I remember parts of the promenade full of waltzers, teacup rides, inflatable slides, candy floss, hoopla and, of course, goldfish in bags (the fish always seemed to survive a remarkably long time!). All the fun of the fair!

Lately, my involvement in funfairs has included looking at them through a different lens, that of public entertainment licensing (PEL) through the Civic Government (Scotland) Act 1982 and accompanying local authority resolutions. It consists of acting for showpeople in the main and assisting them to overcome various "barriers". Sometimes the barriers are to do with cost within the licensing regime relating to the PEL fee: payment of additional "machine" fees; timings of processing; being unsure whether the application will be granted; and at other times murkier difficulties. It did look, and has looked for some time, that the way of life for those operating funfairs was indeed under threat.

Richard Lyle MSP is clearly of the same opinion. He believes that the current law and practices "threaten the survival of showpeople". Seeking to assist the preservation of this way of life, he introduced the *Travelling Funfairs (Licensing) (Scotland) Bill (SP Bill 69)* to the Scottish Parliament on 29 April 2020.

Public Entertainment Licensing

In Scotland, differing from other parts of the UK, provision of public entertainment in a public place will usually attract a licence. What constitutes "public entertainment" is a matter for each licensing board in the main, and under ss 9 and 41 of the 1982 Act, they will resolve to licence certain premises and activities. Indeed, all 32 local authorities have adopted their own resolution on public entertainment. By definition, in terms of the 1982 Act, a "place of public entertainment" means any "place where members of the public are admitted or may use the facilities for the purposes of entertainment or recreation".

A PEL can be of a temporary (lasting up to six weeks) or permanent / full nature (lasting up to three years) and each local authority decides: what fee to charge; processing timescales (within the 1982 Act); what information is needed; and conditions and grounds for refusal.

Think "fairground" and immediately an image of brightly coloured machinery / rides and (hopefully) blue sky appears. By their very nature, fairgrounds tend to be transient both in terms of geographical location, but also seasonal operation. This leaves those applying for a PEL to wrestle with variances in 32 resolutions, 32 different fee scales, and 32 different ways of licensing. The costs differ greatly; from £50 to £6,148; as do processing times - from 21 days to four months. Add to this the uncertainty of grant and the red tape, and we can see the difficulties for those whose livelihood depends on this way of life. Things can change at the last minute, sites become suddenly unavailable and applications have been made that cannot be altered, so money may be spent with no positive outcome.

Exemptions for the need to have a PEL in place do apply to certain premises, such as: athletic or sports grounds; licensed indoor sports entertainment premises; educational establishments; premises belonging to a religious body; licensed cinemas or theatres; certain premises licensed under the Gambling Act 2005; and premises licensed under the Licensing (Scotland) Act 2005 (but beware of activities within liquor licensed premises that extend beyond the licensed hours). It is worth also remembering that s 126 of the Criminal Justice and Licensing (Scotland) Act 2010 heralded a fundamental change to the definition of "place of public entertainment" which prior to 1 April 2012 included "any place where, on payment of money or money's worth, members of the public are admitted…". The "new" shortened definition of course then extended to charitable and community organisations which might wish to put on an exhibition, which was deemed very unfair. Understanding the issue, many local authorities updated their resolutions, specifically to exempt certain bodies, including charities, from having to pay a fee.

The Bill

At the outset it is important to note that the Bill seeks to create a new mandatory licensing regime for travelling fairgrounds only. Local authorities will not have the ability to "opt in" and set a resolution; the regime will exist as is.

The Bill defines "funfair" as "a number of structures and other equipment designed and operated to provide public entertainment, amusement or leisure activity" and one which moves from site to site, remaining there for no more than six weeks. Its purpose is to simplify applications and create a duty on licensing authorities to grant applications if criteria are met. Importantly, all fairgrounds (either through this new process or for static fairgrounds through the PEL system) will still require to be authorised by the relevant licensing authority. It is not a notification system or an exemption from requiring a licence, although if an application is granted, the applicant is exempt from the need to hold other licences - such as street traders or late hours catering licences.

To try to address some of the current issues with temporary PELs, the Bill seeks to install consistency and efficiency as to what is required in terms of an application. For example for an application to be valid it must:

- Be in writing, signed and made by or on behalf of the person in charge of the operation.
- Be accompanied by a fee of £50.
- Be submitted no later than 28 days prior to the start date of the fair (although late applications up to 14 days prior to start date can be accepted).
- Give detail of the site(s) and machinery/ amusements/rides to be used.
- Provide dates within a six week period.
- Include documentation submitted in support such as health and safety documentation, machine testing documentation and insurance documents.

Licensing processing times are reduced to 21 days, with a default position that if no decision has been made within that time period, the application is granted.

Another key positive from the Bill is the ability for the applicant to apply effectively for two sites: one being the primary site, the other being a back-up site in case of difficulties, which creates much needed flexibility.

The Bill's proposal contains a number of features that will no doubt be welcomed, but notwithstanding this, there is some concern around potential pitfalls with a new licensing regime bringing unintended consequences, to which I now turn.

Processing

In processing an application, the licensing authority is required to consult with the police and fire services in order for them to report. This is the same process as seen currently under the 1982 Act in relation to temporary licences, but it has not prevented licensing authorities across the country from establishing their own processes and procedures. For example, Glasgow City Council will notify community councils and elected members; and East Dunbartonshire requires that the application be advertised in a local newspaper. There is nothing to stop these extended requirements re-establishing themselves in this new regime (other than fairly tight timescales for processing!).

With these new applications being dealt with under delegated authority without a hearing, there is real concern about the applicant's ability to respond to a negative report. The licensing authority may be provided with information that activates one of the grounds of refusal, which could be fatal. Having no provision for hearings, or for an applicant's right of response to reports, would seem to be a pretty big lacunae in the Bill, which I can only imagine comes from the desire to streamline the process and operate within the tight timescales proposed.

Grounds of refusal

As previously stated, there is an onus is on the grant of the licence, unless there is reason for refusal and these are that:

a. the applicant is not fit and proper; and / or

b. the operation would be likely to jeopardise the safety or health of the public to an extent that could not be mitigated by adding a condition to the licence.

The "fit and proper" test is of course no stranger to civic licensing and licensing case law (indeed, many articles have been written on this) but these grounds of refusal are really very wide in terms of what could be taken into account. The caveat when looking at refusal on grounds of public safety and public health is the use of conditions. Applying a condition to the licence that mitigates any jeopardy to safety or public health could save it from refusal, but these conditions are a cause for concern in themselves.

Conditions

The conditions in the Bill can only include:

a. those that limit the dates on which, and times during which, the travelling funfair may be operated;

b. those that promote the observance of the relevant enactments about public safety and public health;

c. those that secure public order;

d. those that protect the environment from undue damage;

e. those that require the repair or restoration of ground surfaces or any other things damaged or displaced by, or as a direct consequence of, the operation of the funfair; and

f. those that protect persons in the neighbourhood of the site of the funfair from undue noise or light nuisance.

A couple of the conditions are tricky and the question of how, or indeed who, would put them forward to avoid a refusal is interesting. The reference to "safety and order" is unsurprising and in keeping with the 1982 Act's framework. The reference to public health, however, is a different matter. The 1982 Act, as it stands, does not regulate public health. This was confirmed by the case of *McCluskey et al v North Lanarkshire Council* where the sheriff found that matters relating to public health are not matters for a licensing authority.[1] Could a licensing authority refuse an application because of the nature of the food offering at the fair or vehicle emissions being damaging to children? The use of conditions would be key here, and they are pretty wide. Could we see a licensing authority seeking to specify the types of food offering or numbers of stalls etc? The answer is yes.

The reference to protection of the environment from "undue damage" in my view expands the licensing authority's remit into matters normally reserved for the landowner; for example, the reinstatement of ground, as well as straying into territory covered by environmental agencies such as the Scottish Environment Protection Agency (SEPA). You could have a situation where a licensing authority places conditions on an application on this basis but the landowner is satisfied with the reinstatement arrangements; or you could generate a scenario where the local authority and SEPA are in conflict, or worse, that the licensing system is used by SEPA to flag up wider prevailing issues in a particular locality.

What is "undue nuisance" when we consider that in terms of light and noise? At the moment, the argument would be that the licensing authority should take no action provided the noise nuisance is not a statutory nuisance. The proposed condition amends that to what appears to be a lower threshold. But it also notes that issues around environmental damage and light nuisance are not routinely matters raised by the police or fire service in their consultation responses. Without concern raised by those two reporting services relating to public health or safety, how indeed could a licensing authority decide how a condition is framed? It is likely that the licensing authority will wish to consult more widely to discover if these conditions may be required.

Appeal

The lack of a statutory appeal mechanism is an oft raised criticism of the 1982 Act when it comes to temporary licences and this new regime does address this particular point. Importantly, the Bill allows applicants to appeal to the Sheriff Principal against refusal of a grant; or revocation of a licence; or the conditions attached to a granted licence. But the same practical issues surrounding licensing appeals apply here. They relate to timing and the cost of an appeal - particularly so when we are considering travelling funfairs and sites with specific dates of use.

Conclusion

The ethos of the Bill is laudable. Mr Lyle had much engagement with the Scottish Showmen's Guild and has listened to issues and responded. Recognising the limits and frustrations of the 1982 Act, he has a sought a better way by taking account of all responses from consultees. There is such a difference in how funfairs are treated throughout Scotland that consideration was given to levelling the playing field and removing them from licensing altogether to tie in with the rest of the UK and Europe.

As with most things licensing, a balance is being sought with this Bill. It promotes fairness, efficiency, consistency and some flexibility, while taking into account reports from Police Scotland and the Fire Service. However, I do have concerns about the practicalities of conditions, the involvement of objectors and lack of an applicant's right to respond.

That said, the Bill has a long way to go through the Scottish Parliament stages. I am hopeful of a positive outcome for it and all those who work, live and enjoy "all the fun of the fair".

Caroline Loudon
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1 [2016] SC HAM 3 and in particular para 96.

Discrimination arguments, PSED and licensing appeals

Appellants who feel that a decision unlawfully discriminated against them are probably debarred from arguing that in front of the magistrates. To **Charles Holland**, this seems absurd, and he explains why

To what extent can complaints about the process by which a regulator came to a licensing decision be challenged on statutory appeals against those decisions?

If a decision is said to be made without regard to the licence holder's human rights, or in breach of the Public Sector Equality Duty (PSED) (found in s 149 of the Equality Act 2010), or in such a way as to constitute unlawful discrimination, are those matters which can be argued in the appeal process the various licensing statutes provide for? Or must they be pursued by a separate judicial review?

Hope and Glory

There is precious little in licensing case-law on this topic. It was a side note in the seminal licensing case of *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31. In giving his ruling on the appeal under s 181 of the Licensing Act 2003, District Judge Snow had said:

> *I am not concerned with the way in which the licensing sub-committee approached their decision or the process by which it was made. The correct appeal against such issues lies by way of judicial review.*

By the time the matter reached the Court of Appeal, this point was academic. In delivering the judgment of the Court of Appeal, Toulson LJ said, *obiter*, that its correctness was doubted [51]. He went on [52]:

> *Judicial review may be a proper way of mounting a challenge to a decision of the licensing authority on a point of law, but it does not follow that it is the only way. There is no such express limitation in the Act, and the power given to the magistrates' court under s 181(2) to "remit the case to the licensing authority to dispose of it in accordance with the direction of the court" is a natural remedy in the case of an error of law by the authority. We note also that the guidance issued by the government under s 182 and laid before Parliament on 28 June 2007 states in para 12.6:*
>
> *"The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both."*
>
> *However, this point was not the subject of any argument before us.*

Judicial review and statutory appeals compared

Judicial review includes a claim to review the lawfulness of a decision, action or failure to act in relation to the exercise of a public function (CPR 54.1(2)(ii)). Permission is required to bring a claim for judicial review (unlike a statutory appeal, which is an appeal as of right). Subject to some (irrelevant) exceptions, claims for judicial review are brought to the Administrative Court, which is part of the Queen's Bench Division of the High Court. In licensing cases, statutory appeals are typically made to the Magistrates' Court, or in some cases the Crown Court. In some regimes, there is a second appeal from the Magistrates' Court to the Crown Court. Statutory appeals generally have to be brought within a short fixed timescale (typically 21 days from the date of the decision appealed against). Applications for permission to judicially review have to be made "promptly and in any event not later than three months after the grounds to make the claim first arose" (CPR 54.5(1)).

Suitable alternative remedy militates against judicial review

Permission to proceed in a judicial review claim will only be exceptionally granted if a claimant has a suitable alternative remedy. In *R v Birmingham City Council, Ex p Ferrero Ltd* [1993] 1 All ER 530, Taylor LJ referred to a number of earlier authorities and said at p.537:

> *These are very strong dicta, both in this court and in the House of Lords as cited, emphasising that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure it is only exceptionally that judicial review should be granted. It is therefore necessary, where the exception is invoked, to look carefully at the suitability of the*

statutory appeal in the context of the particular case.

An appellant whose criticisms of a decision includes a complaint that the decision was arrived at unlawfully therefore has to take care. Proceeding by judicial review alone may result in a refusal of permission on the sole basis that a statutory appeal should have been brought. Where there is doubt, it may be safest to commence both the statutory appeal and to seek permission for judicial review.

Discrimination law and licensing

The PSED has been around for a decade; anti-discrimination law longer. Yet it is only in recent years that PSED arguments have begun to crop up in licensing cases, most notably in objections to the renewal of sexual entertainment venue (SEV) licences, with a well-organised campaign against Spearmint Rhino in Sheffield resulting in not one but two applications for judicial review on the basis of alleged failures on the part of the local authority to consider the PSED, both of which have been compromised.

While the SEV licensing regime does not provide for a statutory appeal, what of regimes that do? Does a complaint that a decision was made without regard to PSED, or is unlawfully discriminatory, have to be by way of judicial review? Or is it justiciable before the magistrates?

Fisher v Durham and the exclusive jurisdiction provisions of the Equality Act

In a recent judicial review involving the statutory nuisance regime, the High Court was asked to grapple with these issues. In the event, it declined to make a determination, but the arguments raised before the Court and referred to, *obiter*, in the judgment make interesting reading for licensing practitioners faced with clients who complain that they have been the subject of unlawfully discriminatory treatment in the making of licensing decisions.

R (Susan Fisher) v Durham County Council [2020] EWHC 1277 (Admin) concerned a claim by SF, the recipient of an abatement notice issued under s 80 of the Environmental Protection Act 1990, that the issue of the notice (1) unlawfully discriminated against her contrary to ss 15 and 29 of the Equality Act 2020, (2) was undertaken by the local authority in breach of the PSED, (3) breached her human rights, and (4) was irrational. The abatement notice required SF to abate a noise nuisance which originated by reason of a medical disorder from which she suffered.

SF had a statutory right of appeal to the magistrates against the notice, which she had exercised. But she had also claimed judicial review (causing the magistrates to adjourn determination of the statutory appeal). SF argued that none of her four grounds of judicial review were justiciable in front of the magistrates. Permission was granted by Jefford J but the question of whether the claim should have been refused on the basis that SF had a suitable alternative remedy was left open. The council re-argued the point at the substantive hearing. In the event, Julian Knowles J decided that even if the council was right that the four grounds of challenge could be raised on the statutory appeal, he was clear that it was appropriate for him, in the exercise of his discretion, to rule upon them now, for not to do so "would simply delay the final resolution of this troubling case" [104].

He did however make some *obiter* comments on the arguments before him.

The statutory regime in question provided for specific grounds of appeal, one of which was "that there has been some informality, defect or error in, or in connection with, the abatement notice". The High Court agreed with the council that this ground was sufficiently widely drafted to allow process challenges before the magistrates [117]. There is in fact Court of Appeal authority for this approach in respect of an identically worded ground in the HMO licensing regime (*Nolan v Leeds City Council* (1991) 23 H.L.R. 135).

The judge considered that there were "arguments either way" in relation to ground 1 (unlawful discrimination), and it was "uncertain" in relation to this ground and ground 2 (beach of PSED). While he acknowledged the force of the council's submission that the statutory ground of appeal was broad enough, he was concerned by the jurisdictional provisions of ss 113-114 EA 2010, which SF asserted meant disability discrimination and PSED arguments had to be dealt with either by the county court or on judicial review. The judge found that the "short answer" to the council's "complex arguments" was to exercise his discretion not to refuse the claim on the grounds of alternative remedy.

For the reasons given by the judge, his judgment did not grapple in any detail with the council's submissions on the jurisdiction point.

Justiciability of unlawful discrimination arguments on statutory appeals

The main thrust of the council's case on this issue was as follows.

Section 113(1) EA 2010 provides that "Proceedings relating to a contravention of this Act must be brought in accordance with this Part". Section 114(1) provides that "The county court … has jurisdiction to determine a claim relating to (a) a contravention of Part 3 (services and public functions….". Part 3 of EA 2010 contains ss 15 and 29 (the prohibitions on

discrimination relied upon by Ms. Fisher). Section 113(3)(a) carves out "a claim for judicial review" from the provisions of s 113(1).

It was accepted by the council that if SF had a *claim* relating to a contravention of Part 3, she must bring it in the county court or by way of judicial review (meaning a CPR Part 54 claim). This is the clear effect of ss 113(1), 114(1)(a) and 113(3)(a) (as interpreted in *Hamnett v Essex County Council* [2017] 1 W.L.R. 115).

However, the council's position was that if a statutory appeal which includes process challenges founded on alleged breaches of Part 3 of EA 2010 was within "Proceedings relating to a contravention of [EA 2010]", then a determination of that appeal would not be a "determination of a claim relating to a contravention of Part 3" within the meaning of s 114(1)(a) EA 2010. On the contrary, it would be the determination of an appeal.

The distinction between the wording of s 113(1) and s 114(1) is not one that the courts dealt with either in *Hamnett* (which was a decision on a point which had become academic by the time of the Court of Appeal's *obiter* discussion) and in the case that followed it, *Adesotu v Lewisham LBC* [2019] 1 W.L.R. 5637.

PSED

An assertion that there has been non-compliance with PSED is not bitten by s 114 EA 2010 - as was recognised by May J in *Summers v Richmond upon Thames London Borough Council* [2018] 1 W.L.R. 782. The council had therefore argued that its justiciability before the magistrates was therefore not in doubt. It is not at all clear why Julian Knowles J considered this to be "uncertain".

PSED - wider considerations

The PSED has been the subject of a flurry of Court of Appeal decisions, the most recent of which are *Luton Community Housing Limited v Durdana* [2020] EWCA 445 and *McMahon v Watford Borough Council* [2020] EWCA 497. It is now clear that the PSED does not amend the statutory powers and functions of a public authority prescribed by other legislation, and that a breach of the PSED will not upset a decision which would have been the same had it been complied with. It was possible (although rare) for the PSED to be complied with even when the decision-maker was unaware of its provisions (*Durdana*). In examining the reasons for a decision, the court should adopt a benevolent approach. It should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach (*McMahon*).

A useful list of potentially relevant factors can be found in the first instance decision of *London and Quadrant Housing Trust v Patrick* [2020] HLR 3 (a housing possession case) at [42]. They are:

1. The PSED is not a duty to achieve a result but a duty to have due regard to the need to achieve the results identified in s 149. Thus, when considering what is due regard, the public sector decision maker must weigh the factors relevant to promoting the objects of the section against any material countervailing factors. The PSED is "designed to secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws it attracts a full appraisal".

2. The public sector decision-maker is not required in every case to take active steps to inquire into whether the person subject to its decision is disabled and, if so, is disabled in a way relevant to the decision. Where, however, some feature or features of the information available to the decision-maker raises a real possibility that this might be the case then a duty to make further enquiry arises.

3. The PSED must be exercised in substance, with rigour and with an open mind and should not be reduced to no more than a "tick-box" exercise.

4. The PSED is a continuing one and is thus not discharged once and for all at any particular stage of the decision-making process.

5. An important evidential element in the demonstration of the discharge of the PSED is the recording of the steps taken by the decision-maker in seeking to meet the statutory requirements. Although there is no duty to make express written reference to the regard paid to the relevant duty, recording the existence of the duty and the considerations taken into account in discharging, it serves to reduce the scope for later argument. Nevertheless, cases may arise in which a conscientious decision-maker focusing on the impact of disability may comply with the PSED even where he is unaware of its existence as a separate duty or of the terms of s 149.

6. The court must be satisfied that the public sector decision-maker has carried out a sufficiently rigorous consideration of the PSED but, once thus satisfied, is not entitled to substitute its own views of the relative weight to be afforded to the various competing factors informing its decision. It is not the court's

> function to review the substantive merits of the result of the relevant balancing act. The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision-maker. In short, the decision-maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.

Take-home points

Any person disappointed by a licensing decision on the basis that the decision was arrived at unlawfully is probably well advised to protect their position by taking those points on a statutory appeal. Even if a judicial review is also sought, the statutory appeal may be a necessary fall-back if it turns out that the Administrative Court considers the appeal to be a suitable alternative remedy.

However, given that most statutory appeals are re-hearings, it should be borne in mind that an appellant who establishes that a decision is unlawful does not necessarily establish that it is "wrong": see *R (Townlink Ltd) v Thames Magistrates Court* [2011] EWHC 898 Admin, per Lindblom J. at [37] and *R (o/a East Herts District Council) v North and East Herts Magistrate Court* [2018] EWHC 72 (Admin) per Ouseley J at [12-15].

Like it or not, the current state of the Court of Appeal authorities is that appellants who assert that a decision unlawfully discriminated against them are probably debarred from arguing that in front of the magistrates. This discriminatory treatment of those who assert discrimination seems absurd. The answer to this absurdity remains, in my view, that s 114(1) EA 2010 only encompasses the determination of claims and not the determination of appeals. This is an argument that will have to await another case.

Charles Holland MIoL
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The need for two licensing committees to avoid *ultra vires*

Not many local authorities appear to know that if they have only one licensing committee, they are breaking the law. **James Button** explains

How many licensing committees does a local authority require? This may seem a peculiar question, but it is fundamental to the lawful decision-making process of local authorities in relation to the Licensing Act 2003, Gambling Act 2005, hackney carriage and private hire, sex establishments, street trading licensing, etc.

The answer to that question is two. The statutory licensing committee established by the authority in its capacity as licensing authority for the purposes of the Licensing Act 2003 and the Gambling Act 2005, and a second committee established for the purposes of hackney carriage and private hire licensing, etc. That may seem surprising, but in my view, that is the correct approach, and using one committee for all licensing functions is not lawful.

My reasoning for this is as follows.

The Licensing Act 2003 section 6(1) is quite specific that a licensing committee must be established: "(1) Each licensing authority must establish a licensing committee consisting of at least ten, but not more than fifteen, members of the authority."

For the remainder of this article, this committee will be referred to as the "statutory licensing committee".

Section 7 of the Act then regulates the exercise and delegation of licensing functions (defined in s 4(1) as being all functions under the Licensing Act - " . . . functions under this Act ("licensing functions") . . .).

Section 7(1) makes it clear that all licensing functions should be discharged via the statutory licensing committee: "(1) All matters relating to the discharge by a licensing authority of its licensing functions are, by virtue of this subsection, referred to its licensing committee and, accordingly, that committee must discharge those functions on behalf of the authority."

Section 9 allows the statutory licensing committee to establish sub-committees (consisting of three members of the licensing committee).

It can be seen therefore that Licensing Act 2003 functions (and Gambling Act 2005 functions by virtue of s 154 of the 2005 Act) are generally discharged by the statutory licensing committee established under the 2003 Act. There are some exceptions (statements of licensing policy etc) but this is the general position. The statutory licensing committee can then delegate to a sub-committee or an officer under the provisions of s 10 of the 2003 Act (again there are some functions cannot be discharged by an officer).

The power of the statutory licensing committee is extended to a limited degree by the 2003 Act. That makes it clear that a matter that is not a licensing function governed by the 2003 Act, but which is related to such a function, can be discharged by the statutory licensing committee, by virtue of s 7(3) which states:

> *(3) A licensing authority may arrange for the discharge by its licensing committee of any function of the authority which—*
>
> *a. relates to a matter referred to that committee by virtue of subsection (1), but*
> *b. is not a licensing function.*

However, that is the limit of the statutory licensing committee's powers. As to what would be related to a licensing function, that would be a question of fact. One example would be an application for a premises licence under the Licensing Act and an application for the same premises for planning permission. Theoretically, s 7(3) would allow the statutory licensing committee to determine the planning permission as well as the premises licence application. Despite the House of Lords recommendations that licensing and planning should be merged, I am not aware of any authority that has taken this approach. One further possibility might be an application for a street trading licence allied to an application for a premises licence to enable the trader to sell alcohol from that street trading pitch. Beyond that, my imagination is limited!

There is no mechanism or power for the statutory licensing committee to consider any matter which is not a licensing function within the meaning of the 2003 Act or which is related to such a licensing function. Taxi and almost all other

licensing matters are not licensing functions as defined in the 2003 Act, and I can see no argument to suggest that they are related to those functions.

This is why a second or "regulatory committee" is required to discharge licensing activities which are not governed by the 2003 or 2005 Acts. The mechanism to enable the local authority to discharge these matters is contained in s 101 and s 102 of the Local Government Act 1972.

Accordingly, in my view it is necessary to have two distinct committees: the statutory licensing committee and the regulatory committee. In fact this has been confirmed by the recent *Institute of Licensing Protocol on Remote Hearings,*[1] which acknowledged that the Licensing Act structure is separate from the general 1972 Act structure, and remote 2003 and 2005 Act hearings could be held before the Local Authorities and Police and Crime Panels *(Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020*[2] came into effect on 4 April.

The two committees must be separately constituted. The statutory licensing committee does not need to be politically balanced (although it can be) as it is not a committee created under the Local Government Act 1972. However, the regulatory committee does have to be politically balanced in accordance with s 15 of the Local Government and Housing Act 1989. Subject to that, they can have the same members, and a similar structure with regard to sub-committees.

In addition they will run under different rules - the *Licensing Act 2003 (Hearings) Regulations 2005*[3] and the *Gambling Act 2005 (Proceedings of Licensing Committees and Sub-committees) (Premises Licences and Provisional Statements) (England and Wales) Regulations 2007*[4] for the statutory licensing committee as opposed to the Council Constitution and Standing Orders for the regulatory committee.

It can be seen that as the statutory licensing committee does not have any power to deal with non-Licensing Act and non-Gambling Act matters, and the regulatory committee does not have the power to deal with such matters, if there is only one committee in existence discharging all of these functions, then some of them will been determined *ultra vires* the power of the particular committee.

In a situation where there is only one licensing committee, the consequences will depend on how that committee is actually constituted. If it is constituted under s 6 of the 2003 Act, then it will not have any power to determine other matters including taxi licensing, street trading, sex establishment licensing etc. Conversely, if it is constituted under s 101 of the 1972 Act, it will have been acting *ultra vires* if it has determined Licensing Act and Gambling Act functions.

As I mentioned earlier, the two committees can have the same members and indeed can meet on the same day, one after the other, but there must be a clear separation of roles. This includes separate agendas, committee reports and minutes. This separation cannot be achieved by the method adopted by some authorities, of having distinct sub-committees to deal with 2003 and 2005 Act matters (the licensing sub-committee) and other matters (the regulatory sub-committee) because those are simply sub-committees of one parent committee.

What are the consequences when an authority only has one licensing committee? There would be no advantage to the council or to any licensee in revealing that a licence may have been granted *ultra vires* (and therefore void). If such discoveries were made by an unsuccessful applicant, then a potential challenge may lie, but that would have to be by judicial review, which is costly and slow. However that possibility is very real if any application has been refused, or a licence revoked following a review of a premises licence or action against another type of licence. Clearly the potential challenge will depend on the nature of the application that was refused and the ultimate constitution of the single licensing committee: if the court determines that it is the statutory licensing committee, there will be no grounds for challenge from an unsuccessful Licensing Act 2003 or Gambling Act 2005 applicant; conversely, a challenge could lie if the court determines that it was a regulatory committee that made such a decision. The same applies in reverse to decisions that do not concern the 2003 or 2005 Acts.

There is also a risk of a third party recognising the deficiency as well. In relation to the 2003 and 2005 Acts, that could be the police or a local resident who could then argue that a premises licence had been granted unlawfully and therefore did not exist. Again, practically speaking, it is hoped that that risk is also minimal, but if such a challenge is brought it could be problematic.

In my experience there are a great many authorities which only have one licensing committee, and while there do not appear to have been any challenges to date, in my view this is a ticking time bomb and is a matter that local authorities need to consider as a matter of some urgency.

James Button
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1 Available at https://www.instituteoflicensing.org/news/covid-10-licensing-issues-iol-protocol-updated-20-april-2020.

2 SI 2020/392 made under s 78 Coronavirus Act 2020.

3 SI 2005/44.

4 SI 2007/173.

NEXSTART - Hospitality's coalition looks to relaunch the sector

The events of the past few months have taken a terrible toll on the licensed trade but key players are fighting back strongly, as **Sarah Clover** explains

On 16 March 2020, in an escalation of the Government's attempt to control the national crisis spiralling from the global coronavirus pandemic, Boris Johnson told the British public to avoid pubs, clubs, restaurants and theatres. This was the worst of all scenarios for our hospitality industry, attempting to trade and survive on a dwindling client base, which was being encouraged but not forced to stay away. That sting did not last for long before it developed into a deep and enduring pain. On 20 March, the Prime Minister announced the formal closure of the hospitality industry and the world changed.

There are dozens of trade and membership organisations representing different sectors of the hospitality and entertainment business world: organisations that lobby, organisations that advance best practice, organisations that promote, and teach and train. Some are amalgamations of pre-existing bodies, such as the fusion of the Association of Licensed Multiple Retailers and the British Hospitality Association in 2018 that became UKHospitality, the largest trade membership body in the industry. Others are specialist and niche, such as the Music Venue Trust, with deep experience and expertise in a smaller but valuable sector. Some, like our own Institute of Licensing, are broad churches representing very different interests, united by common objectives such as education and best practice. There is much cross-over, and much in common between these organisations; in good times, and perhaps even more particularly, in bad times.

There was no real warning of the coronavirus pandemic, nor of the extraordinary impact that it would have on the world, the country in general, or any particular functioning part of it. The impact on the hospitality industry is, perhaps, unique. It is an industry which depends upon sociability and communal gatherings, for whom "social distancing" is anathema. It is also an industry which is uniquely regulated, with bespoke legislation tailored to the risks and opportunities that come with bringing people together for the purpose of having a good time.

The members of this industry are of huge variety: nightclubs and theatres; pubs and theme parks; historic houses and hotels; music venues and zoos. The list goes on and on. Over this vast tent flies one consolidating flag, upon which is written: "Licensed".

No-one in this eclectic family got practical notice of what was about to hit them, and none had the chance to prepare. It is fair to say that all scrambled to respond, in some different and many similar ways. It quickly became apparent that all of the organisations were crying out in different voices, but with common messages, and some unique needs too. It also didn't take long to realise that everyone could benefit from some co-ordination of the different song sheets so that, along with the powerful solos, there could be a harmonious and compelling choir.

From that realisation came NEXSTART. The concept for a coalition of these disparate membership groups was sparked unexpectedly, and ironically, from a completely unrelated discussion about noise. Once the idea was expressed, it seemed too obvious not to test it, and just a few days of suggestions and invitations for others to join, resulting in the most rapid and enthusiastic coalition of stakeholders imaginable. NEXSTART - the National Exit Strategy Advice and Response Team for the hospitality and entertainment industry - took on a life of its own and began to run itself, with 34 organisations involved at the time of writing and growing all the time.

It is an inspiring feature of the licensed hospitality industry that those involved closely are passionate about it. Whether operator, practitioner, employee or regulator, the common theme is that those who are engaged daily with the offer of all the good things in life that are licensed care deeply about those things, and about making sure they are safe and successful. That has never been more evident at this terrible time when we are staring into the abyss of losing so much. This passion drives extraordinary actions and reactions, and NEXSTART, which has been described as the UN of the hospitality world, is an expression of that.

All of the participants have worked tirelessly to understand how we can best work together to mitigate and avoid the worst consequences of this national crisis for the industry and those it serves. The tireless partners include the police and other regulators, the Local Government Association,

the Institute of Acoustics as well as our own Institute of Licensing, NALEO and CIEH, working side by side with most of the industry organisations you have ever heard of, and maybe a few that you hadn't before. Out of such monumental partnership working - a concept coined for this industry - only good things can come.

The mission statement of NEXSTART is "Safe & Successful" and it represents a coalition of experts working together to identify issues, find solutions, contribute to guidance, and act as a resource to support a national strategy for the safe and successful exit of the industry from lockdown. Everything that it does seeks to balance the needs of the public, business and enforcement authorities. It is able to perform a unique role in comparing and contrasting the guidelines and protocols devised for other industries, and the drafts prepared by any of the individual NEXSTART members, to coordinate everything that is working well, and refine anything that is not. The work can be scrutinised by the regulators, to identify any conflicts with current legislation, and anything that needs amending or relaxing in order to get businesses back up and running safely. Problems can be pre-empted, instead of causing road-blocks after guidance has been adopted. All the sectors can share what they know and what they are learning, for the benefit of all.

At the time of writing, Government Departments have established the five Ministerial Taskforces which are just commencing their work to produce Covid-19 Secure Guidance for hospitality and other industries and sectors. Licensed hospitality is split across two Departments – BEIS and DCMS - which will cause challenges in itself. The more that a massive think tank like NEXSTART can pre-consult on evidence and data and distil it down to honed issues to pass forward through individual members, the more quickly the Taskforces and their sub-groups can complete their work and produce well-crafted Guidance for all, which already has the backing of the regulators. This is the vision.

Nobody has all the answers: this is a hugely complex crisis for which no single person or body has the skill set to provide complete solutions. The situation is only exacerbated by bunker and silo thinking. Inevitably, there will be some trial and error, both in this country but also in other countries which are treading the same road. Working and learning together is the only reasonable approach. The speed with which the hospitality industry has embraced that reality and created a team spirit to support one another as much as possible is humbling. The results of their individual and combined efforts will be the best that can possibly be achieved, and a proud testament to what this unique industry is all about.

Sarah Clover
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Phillips' Case Digest

LICENSING AND COSTS

Queen's Bench Division, Administrative Court (sitting at Bristol Civil And Family Justice Centre)
Mr Justice Swift

Case stated of decision to impose costs on a non-party to the appeal

Memet Aldemir v Cornwall Council [2019] EWHC 2407 (Admin)

Decision: 13 September 2019

Facts: In Memet Aldemir the Council's licensing sub-committee had revoked the premises licence previously granted to Eden Bar Newquay Ltd ('EBNL'), known as Eden Bar ('Eden Bar'). The sole shareholder in, and director of, EBNL was Mr Aldemir's brother, Nimetullah Aldemir, resident in Cyprus. On appeal against that decision District Judge Baker stated that: Mr Aldemir's manipulative behaviour, disrespectful attitude and his apparent belief that he is above the law causes me to seriously reflect on whether the new lease and transfer of the business is in fact a bona fide transaction made at arm's length'. The licensing authority sought an order against Mr Aldemir rather than against EBNL. District Judge Baker so ordered.

Points of dispute: (1) Did the court have any statutory power to order costs against a non-party (2) If it had such a power, was it reasonable to make such an order in this case? (3) Were the total costs reasonable? (4) Was the court wrong to hear and determine an application for costs against Mr Aldemir who was not a party to the licensing appeal, was not present at court, did not have legal representation in court, and had no notice of the application?

Held: (1) As regards the first question concerning costs against a non-party, Swift J concluded that the power at s 181(2) of the 2003 Act did include the power to make a costs order against a non-party. The effect of the language used at s 181(2) was materially the same as the language used in the successive iterations of what is now s 51 of the Senior Courts Act 1981, and the corresponding sections of its predecessors, the 1890 Act, and the 1925 Act. (4) The court then proceeded to address the fourth question: was a fair procedure followed when the costs orders were made against Mr Aldemir? The answer was in the negative. An application for costs against a non-party was a course of action that was out of the ordinary and could lead to significant financial consequences. It was important that such an application was heard and determined in accordance with a fair procedure. The principles of natural justice must be observed. The person against whom the application is made must have fair notice of the application and the grounds on which it is made, and a fair opportunity to respond to the application. (2) & (3) Was it reasonable to make a costs order against Mr Aldemir? No, for the reason just given. Were the total costs reasonable? Although it was not obvious that any error of law had been made in this regard, that would be a matter for the District Judge upon her consideration.

TAXIS AND PHVs

Queen's Bench Division, Administrative Court (Leeds)
Court of Appeal, Civil Division
Sir Terence Etherton MR, Lady Justice King and Mr Justice Lavender

Appeal against decision on judicial reviews of fees to be charged for vehicle and operators' licences in respect of PHVs and hackney carriages

R (on the application of Rehman, on behalf of Wakefield District Hackney Carriage and another) v Wakefield Council (Local Government Association intervening) [2019] EWCA Civ 2166

Decision: 10 December 2019

Facts: In 2016, KMBC noticed an increase in the number of applications for PHV driver's licences, which was putting a strain on its ability to process them. On 6 January 2017, KMBC emailed taxi and PHV companies saying it was suspending consideration of driver's licence applications. On 24 January 2017, Mr Paul McLaughlin of Delta complained about the suspension. The broad effect of the policy document adopted by KMBC in March 2017 was to require applicants for PHV driver's licences to commit themselves to driving their PHVs predominantly in Knowsley. The policy was adopted to meet a concern that PHV drivers were applying for licences from KMBC without any intention of doing their PHV driving there. Uber and Delta both held operators' licences issued by KMBC. The two claims sought an order quashing that policy. The High Court held that (i) Uber and Delta's submissions were correct and KMBC was wrong. It was wrong to describe KMBC as having any discretion in the matter of determining applications for driver's licences for PHVs. The issue of the licence was a mandatory consequence of a finding that an applicant was a fit and proper person to

hold the licence: “If you are fit and proper in Gateshead, you are fit and proper in Minehead.” (ii) The second ground of challenge advanced by Delta was that the intended locations where the licence applicant intends to drive the PHV was an immaterial consideration which was wrongly taken into account. That proposition was correct, but added nothing to the first ground of challenge and would naturally stand or fall with it. (iii) If the case turned upon the point, the court would have been reluctant to hold that it was strongly void for uncertainty. In the event, it was not necessary to decide the issue. (iv) it was arguable that the policy did impose a disproportionate burden on licence applicants, since they would have to forego their freedom to base themselves predominantly outside Knowsley which the scheme of the 1976 Act permitted.

Points of dispute (on appeal to the CA): Whether the appellant council acted unlawfully when it resolved to fix the fees for vehicle licences for hackney carriages and private hire vehicles at an amount which included recovery of all or part of the cost of supervising the conduct of drivers licensed to drive such vehicles and, if not, whether such costs may be taken into account in setting the fee for drivers’ licences.

Held: Both on the literal wording of section 53(2) and, if and so far as necessary, applying a purposive interpretation, the court considered that the costs of monitoring and enforcing the behaviour of licensed drivers could be recovered through the fee under section 53(2).

REHABILITATION OF OFFENDERS

UK Upper Tribunal (Lands Chamber)
Sir David Holgate and Judge Siobhan McGrath

Effect of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) on the consideration of appeals

Hussain v Waltham Forest London Borough Council [2019] UKUT 339 (LC), [2019] 11 WLUK 51

Decision: 5 November 2019

Facts: some 36 residential properties had their applications for property licences under Parts 2 and 3 of the Housing Act 2004 refused (or in some cases had their licences revoked) by the local housing authority. A number of the licensees had spent convictions.

Points of dispute: (i) whether on the appeal before the FTT, and on a proper construction of s 4(1) of the 1974 Act, the Respondent might lead evidence and rely upon the conduct of the Applicants (as opposed to the spent convictions, and the offences, sentences and criminal process relating thereto) and the FTT may take into account that conduct when determining the Applicants› appeal. (ii) What was the correct legal test to be applied under s. 7(3) of the 1974 Act to any application by the Respondent to the FTT to rely upon the convictions, offences or sentences of the Applicants, and also to “conduct” (if it was unsuccessful in relation to the first issue); and whether the Respondent’s reliance upon material which might be the subject of such an application before the FTT should now be struck out by the Upper Tribunal; (iii) Whether decisions by a local housing authority under Parts 2 or 3 of the 2004 Act to grant or refuse applications for a licence, or to revoke a licence, fell outside the definition in s 4(6) of the 1974 Act of “proceedings before a judicial authority”.

Held: In its judgment the UTT held that: (i) On a proper construction of the 1974 Act the FTT might receive and take into account in its determination of the Applicant’s appeal, evidence or submissions dealing with relevant conduct of a rehabilitated person, including conduct which had been treated under the criminal law as an offence and resulted in a conviction which was now spent; (ii) The correct legal test to be applied to an application by the Respondent to the FTT under s. 7(3) of the 1974 Act to rely upon the convictions, offences or sentences of the Applicants was that laid down in the provision itself, as explained by the Court of Appeal in Dickinson v Yates (unreported, 27 November 1986) (see [150] to [157] above). There was no justification for the Upper Tribunal to strike out material falling within the scope of s. 4(1) which might be the subject of such an application by the Respondent; (iii) Decisions by a local housing authority under Parts 2 or 3 of the 2004 Act to grant or refuse applications for a licence, or to revoke such a licence, involved “proceedings before a judicial authority”, as defined in s 4(6) of the 1974 Act.

PUBLIC SECTOR EQUALITY DUTY (PSED)

Court of Appeal
Longmore, Bean, Moylan LJJ

No general rule that any decision taken following a breach of the PSED under s 149 EA 2010 had to be quashed or set aside

Aldwyck Housing Group Ltd v Forward [2019] EWCA Civ 1334; [2020] 1 WLR 584

Decision: 16 and 29 July 2019

Facts: The housing association had granted an assured tenancy to the tenant, who was physically disabled. Following a number of incidents of anti-social behaviour involving visitors to the tenant’s property, the housing association

commenced proceedings for possession on the grounds that the tenant was in breach of the terms of his tenancy agreement. It was accepted by the housing association that it had failed to comply with the public sector equality duty (PSED) under section 149 of the Equality Act 2010 before commencing proceedings for possession. The judge made an order for possession, holding that the claimed breaches of the tenancy agreement were established and that breach of the PSED did not constitute a valid defence to the claim. The judge in the High Court dismissed the tenant's appeal, holding that although the judge had erred in holding that breach of the PSED could not amount to a defence in reliance upon recently overruled authority, and so had failed to carry out the required structured enquiry into the consequences of the breach of the PSED, had she done so, she would nevertheless have reached the same conclusion.

Point of dispute: Whether there was a general rule that any decision taken following a breach of the public sector equality duty under s 149 of the Equality Act 2010 had to be quashed or set aside, or alternatively, whether there was there a rule that such a decision had to be quashed or set aside unless it fell within a narrow category of cases.

Held: (i) the authorities did not say that, as a matter of law, it was only in the specified categories that there was a discretion to refuse relief. That would be contrary to the general rule of public law that the nature of any relief granted was a matter of discretion. As to the exercise of that discretion: (a) there had been a finding that there was no viable option for the landlord other than to seek possession; (b) it was not for the court to substitute its view for that of the lower courts, unless there was some error of legal approach. In the absence of any such error, the decision of the courts below should be respected; (c) the court would endorse Turner J's reliance in *Patrick* [2019] EWHC 1263 (QB) on s 31(2A) of the Senior Courts Act 1981. That provided that the High Court must refuse to grant relief on an application for judicial review if it appeared to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. It would be very odd if a non-material breach could be disregarded on a public law challenge, but was fatal to a private law claim in which public law was relied on as a matter of defence. (ii) the court did not see how it could be said that Cheema-Grubb J's reference to the absence of mental disability in any way affected her ultimate decision that the failure by Judge Wood (and indeed the landlord) to have regard to the s 149 question in a structured way was not a material error. Even if it did, the court was in reality concerned with the question whether Judge Wood reached the right decision. In its opinion she did.

Jeremy Phillips QC, FIoL
Barrister, Francis Taylor Building

Phillips' case digest is based upon case reports produced by Jeremy Phillips and his fellow editors for *Paterson's Licensing Acts*, of which he is Editor in Chief.

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NICK ARRON
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Nick is a solicitor and lead partner in the Betting & Gaming Team at Poppleston Allen. He acts for a wide variety of leisure operators from large corporations to single-site operators and has particular expertise with web-based operations. He is retained as legal advisor by the Bingo Association.

JULIA BRADBURN
Licensing Consultant & Trainer

Julia is a Legal Executive, Fellow CILEX and former principal licensing officer at South Somerset District Council and Taunton Deane Borough Council. She regularly trains and gives seminars on different aspects of licensing practice for the Institute of Licensing. She specialises in caravan site licensing, animal licensing and zoo licensing.

MICHAEL BRETT
Barrister, Francis Taylor Building

Michael joined chambers in March 2020 after practising as an employed barrister in the Governmental Legal Department. His work advising the Department for Transport and Department for Business, Energy, and Industrial Strategy gives him a keen sense of the needs of public authorities as well as insight into decision-making processes.

RICHARD BROWN
Solicitor, Licensing Advice Centre, Westminster CAB

Richard is an adviser at the Licensing Advice Project, Citizens Advice Westminster. The Project is an innovative partnership between the public sector and the third sector, providing free advice, information, assistance and representation at licence hearings to residents of City of Westminster regarding their rights and responsibilities.

JAMES BUTTON
Principal, James Button & Co Solicitors

James is a solicitor and runs his own practice, specialising in licensing, environmental health, public health, criminal investigations and prosecutions and human rights. He has a wealth of experience advising and representing councils, as well as the licensed trades, and is the author of *Button on Taxis: Licensing Law and Practice*.

LEO CHARALAMBIDES
Barrister, Francis Taylor Building & Kings Chambers

Recommended in *Chambers and Partners*, Leo advises local authorities on all licensing issues, and niche areas such as garage forecourts and sexual entertainment venues. His licensing practice has developed to include wider aspects of associated local government law, and he recently contributed to Camden's licensing scheme for street entertainment and buskers.

SARAH CLOVER
Barrister, Kings Chambers

Sarah is one of the leading licensing barristers in the country, acting for a wide range of clients. She has been involved in some of the most important cases in the last decade, and has been successfully involved in challenging the Home Office and Police forces to settle statutory interpretation of the Licensing Act 2003. She is Chair of the West Midlands Region of the Institute of Licensing and sits on the Board of Directors.

DANIEL DAVIES
Chairman, Institute of Licensing

Daniel is a co-founder of CPL Training Group. Until its recent sale, Daniel was a hands-on member of the team and developed allied businesses to support CPL's growth. He sits on the House Committee and Council of UK Hospitality and is on the board of the Perceptions Group. He is spearheading a major regeneration project in Merseyside's New Brighton.

GARY GRANT
Barrister, Francis Taylor Building

Gary is a licensing barrister, practising at Francis Taylor Building. He is top-ranked in the leading independent legal directories, and represents the trade, residents, police forces and local authorities alike. Clients have ranged from the Tate Modern to Pacha nightclub, and from the Commissioner of the Metropolitan Police to Spearmint Rhino. He is a Vice-Chairman of the IoL.

CHARLES HOLLAND
Barrister, Trinity Chambers & Francis Taylor Building

Charles is a barrister in independent practice working out of Francis Taylor Building in London and Trinity Chambers in Newcastle upon Tyne. His work covers Chancery / commercial litigation, property issues and licensing. His first licensing brief was in 1996 - obtaining an off-licence in Sunderland in the teeth of a trade objection. He works across a range of areas, and presently spends a lot of time thinking about taxis.

JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

GARETH HUGHES
Barrister, Keystone Law

Gareth is a skilled barrister with over 25 years' experience acting for many of the leading companies and individuals. He acts for an impressive portfolio of clients in the hospitality and entertainment sectors on both licensing and planning matters. Gareth is a member of the Board of the Institute of Licensing and Chairman of the London Region.

PHILIP KOLVIN QC
Barrister, Cornerstone Barristers

Philip Kolvin QC is Head of Chambers at Cornerstone Barristers and a Patron of the Institute of Licensing. Specialising in all aspects of licensing, he acts across the board for licensees, local authorities and national regulators. He is a top-ranked QC in both Legal 500 and Chambers Directories.

MATT LEWIN
Barrister, Cornerstone Barristers

Matt is a barrister at Cornerstone Barristers and practises in all areas of licensing, with a particular focus on premises and taxi licensing. His clients include licensing authorities, music festival promoters, nightclubs and the police. Matt also acts as legal adviser to licensing committees and provides training for councillors and officers. He is a regular speaker at IoL events and contributor to the *Journal of Licensing*, recently co-authoring an article on multi-agency safety testing.

CAROLINE LOUDEN
Partner, TLT

Caroline is a specialist licensing and gambling practitioner with over 18 years' experience in front of Scottish licensing boards. A Band 1 Individual (Chambers and Partners) and a Leading Individual (Legal 500), she is one of the very few Scottish specialists who has significant experience in not only liquor licensing, but civic and gambling law as well. She has been a Partner with TLT LLP since February 2017.

DAVID LUCAS
Licensing Consultant

David is a specialist in gambling, alcohol and entertainment licensing and has recently become a consultant. He has previously represented operators of alcohol, entertainment and gambling premises in Great Britain. David is a member of the Board of the Institute of Licensing and Chairman of the East Midlands Region.

SUE NELSON
Executive Officer, Institute of Licensing

Sue joined the IoL as Executive Officer in October 2007. Sue is heavily involved with the Summer Training and National Training Conferences and continues to undertake the Company Secretary duties. She was previously Licensing Manager for Restormel Borough Council (now part of Cornwall Council) and has over 18 years' experience in local government licensing.

JEREMY PHILLIPS QC
Barrister, Francis Taylor Building

Jeremy Phillips QC is a barrister following a career as a solicitor, both in his own practice and subsequently handling teams in leading international law firms. He offers expert advice in licensing, regulatory and environmental issues, public inquiries and judicial reviews, and is Editor in Chief of *Paterson's Licensing Acts* and a General Editor of *Smith & Monkcom - The Law of Gambling*.

PIERS RILEY-SMITH
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Piers has a varied planning, environment, licensing and highways practice. He is regularly instructed by local authorities, developers and the wider public in planning inquiries, and at local plan and neighbourhood plan exams. He appears in the High Court on behalf of local authorities, private companies and developers.

JULIA SAWYER
Director, JS Consultancy

Director of JS Safety Consultancy, which she set up in 2006, Julia is a qualified safety and health practitioner. She spent 19 years in local government, with her last five years managing safety and licensing at Hammersmith and Fulham. An active member of the IoL - London Region, Julia provided the fire risk assessment for the opening ceremony of the London 2012 Olympics.

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