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Daniel Davies MIoL
Chairman, Institute of Licensing

Welcome to the summer 2019 edition of the IoL's *Journal of Licensing.*

I am delighted at the continued success of National Licensing Week, which ran from 17-21 June. Hopefully, many IoL members participated. More and more organisations have become involved, demonstrating both the broad sweep of activities that are regulated by licensing in all its dimensions and how licensing touches the everyday lives of members of the public. Our Summer Training Conference was also a great success and has developed in terms of the breadth of subjects covered and the numbers attending, year-on-year. Our signature event, the three-day National Training Conference, comes up in November. This event always sells out, so I would advise you to book early to avoid disappointment!

This edition of the *Journal* contains numerous articles that are of interest to licensing practitioners. Our lead article provides a definitive guide to statutory nuisance, the criminal offence of public nuisance, the civil law tort of public nuisance and, of course, the ubiquitous "public nuisance" in Licensing Act 2003. There is also an article from barrister Gary Grant on a way for local authorities to address non-compliance by an appellant with court directions; Claire Eames and Rebecca Cullum give a trade perspective on licensing enforcement and partnership working; Ben Williams and Freddie Humphreys provide an article on a recent taxi licensing case; Lisa Lavia writes on the theory of "soundscape"; and Jeremy Phillips QC gives us a *Paterson's* case update.

All this, together with our regular feature articles from James Button, Nick Arron, Julia Sawyer and Richard Brown.

Of particular interest may be the articles by John Fitzsimons and Josef Cannon (public nuisance in licensing) and Lisa Lavia (soundscape and licensing). They emphasise our commitment to source articles from all corners of the "broad church" which makes up our membership and scope of influence. For here we have both legal expertise as well as technical noise expertise. The first reaffirms our aim to provide in-depth, comprehensive and easily referable practical and legal viewpoints from those with day-to-day experience. The second gives a fascinating and fresh perspective on a highly technical and fundamental building block of Licensing Act 2003 regulation.

Of course, it may say something about the drafting of the legislation that practitioners are still wrestling with some of these issues in 2019, as the passing of Licensing Act 2003 disappears into the mists of time. It certainly reflects how fundamental these issues are to practitioners. Hence, a comprehensive summary of the type provided by John Fitzsimons and Josef Cannon is both tremendously helpful and necessary, even to experienced practitioners. Following on from this, the distinction drawn by Lisa Lavia between "sound" (a "physical phenomenon") and "noise" (a "perceptual judgement") is explained by Lisa in laymen's terms in a way which is both illuminating and thought-provoking. It speaks directly to the evaluative judgements which licensing sub-committees have to make up and down the country. In particular, Lisa's conclusion that "Soundscape practice measures and assesses the human response to sound *in context"* (my emphasis) seems directly relevant to the clear direction in Licensing Act 2003 case law for decisions of licensing sub-committees to be underpinned by qualitative judgements based on what is "reasonably acceptable" for a locality.

I hope you enjoy this latest issue and find it a stimulating read, and as always, we welcome your feedback.

Institute of Licensing

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Leo Charalambides FIoL
Editor, Journal of Licensing

On 18 July 2018 the full Council of the London Borough of Hackney adopted its revised Statement of Licensing Policy in which it advanced a core hours policy for the weekend and extended and retained two of its cumulative impact policy areas. A crowd funded body called *We Love Hackney Ltd* issued an application for judicial review of this decision.

The challenge is two-fold: firstly, that the councillors had not grappled with the Public Sector Equality Duty (PSED) (s 149, Equalities Act 2010). It is argued that the LGBTQ+ community will be prejudiced by the policy because important cultural and community spaces will be undermined. Secondly, it is argued that the report to the councillors didn't properly address competing views.

This second ground of challenge is in essence similar to one advanced in 2018 against Sheffield City Council's sex establishment policy: there, the challenge also stated that competing views (in that case certain views of campaigning groups) had not been properly considered, addressed or responded to.

That the Licensing Act 2003 engages the PSED is uncontroversial; the s 182 Guidance reminds us of this duty at paragraphs 14.66 and 14.67. What the cases in Sheffield and now Hackney demand of us is an understanding of how to grapple with this duty. The duty must be exercised in substance, with rigour and with an open mind by the decision-maker itself, and not by delegated officers (see *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 [25] - [26]). The cases are also an invitation to reconsider what our leisure and night-time economies mean to different sectors of our communities.

In October 2018 the House of Commons Women and Equality Committee reported that sexual harassment is a regular experience for many women and girls in the street. In bars and clubs, it is the most common form of violence against women and girls. In November, 2018 Westminster City Council established a task force on inclusion in the night-time economy after report of plus-size and BME women being turned away or charged higher fees at night clubs. The outcome of that review is pending.

The aspiration of the Licensing Act 2003 to achieve a café-culture society is often mocked. In doing so we fail to give proper appreciation to the role that the Licensing Act 2003 can take in place shaping and contributing to social change and cohesion. Our licensing policies and hearings should be forums wherein we question the extent to which our leisure and night-time economies cater for all sectors of society and in particular those that might be marginalised and excluded. Recently, on 30 May, a lesbian couple was attacked on the night bus going home after a date. The bloody aftermath of their encounter was bravely posted and subsequently shared on social media.

Licensing decisions are not easy. They often present a perplexing challenge between obviously valid but diametrically opposed representations. But what is clear to me is that our leisure and night-time experience should not be characterised by harassment, discrimination and social exclusion. The PSED invites all of us involved in licensing to develop a nuanced and socially conscious approach to licensing so that we may add our contribution to a fairer and better society.

This summer LGBTQ+ Pride Parades around the country and across the world are celebrating the 50th anniversary of the Stonewall Riots. In 1969, on 28 June, drag queens, gay men and women and their supporters made a decision to stand, to fight and to be visible in the face of civil harassment and police brutality at the Stonewall Inn, Greenwich Village in New York City. It is a reminder that community, leisure and night-time venues are places of entertainment, sanctuary and social change. The Stonewall Riots are now considered a mile-stone in the global civil rights movement.

Wishing you all a Happy Pride.

Public nuisance in licensing

The agent of change principle will increasingly impact on the prevention of public nuisance principle as the influence of environmental health officials in the licensing process grows, suggest **John Fitzsimons** and **Josef Cannon**

The concept of "public nuisance" appears in a licensing context at s 4 of the Licensing Act 2003 as one of the four licensing objectives. These objectives are well rehearsed and are namely:

a The prevention of crime and disorder.
b Public safety.
c The prevention of public nuisance; and
d The protection of children from harm.

Famously, the term "public nuisance" is not defined within the 2003 Act. An early attempt to seek a judicial narrowing of the breadth of this term failed in *R (Hope & Glory Public House Ltd) v Westminster Magistrates' Court* [2009] EWHC 1996 (Admin). At that time the statutory Guidance published pursuant to s 182 said that a public nuisance, as the term was to be understood in the Licensing Act context, could range from "a major disturbance affecting the public community" through to a less significant nuisance "perhaps affecting a few people living locally". The appellant sought to argue that this latter description was wrong: that sort of disturbance would not amount to a public nuisance at all. Burton J rejected this: on the facts of the case, this had been a public nuisance, and in any event the Guidance was not wrong on the breadth of the term.

As such, we must look to wider case law, analogous legislation and (insofar as it remains correct!) government guidance made pursuant to s 182 of the 2003 Act for clarity as to the scope of the term.

This article seeks to provide a background to the law of public nuisance, both in its wider context and within the context of licensing. It seeks to assist decision makers and applicants to understand how best to approach public nuisance issues in a licensing context. In doing so, it will also examine the more recent arrival of the agent of change principle in the planning context and consider how this and other matters may affect licensing in the future.

Public nuisance

First, *private* nuisance – ie, a nuisance that is actionable at common law as between individuals - is beyond the scope of this article and does not usually have much to do with licensing. *Public* nuisance is a well-established common law tort as well as being a crime. In its criminal context, it has been defined as:

> A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.[1]

However, it is the tort of public nuisance and its equivalent statutory definition in Part III of the Environmental Protection Act 1990 (the 1990 Act) that relates more closely to issues that arise in licensing. The common law tort is defined in the same terms as the crime of public nuisance within *Archbold*. It is noted that it results either from an act not warranted by law or an omission to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.[2]

This definition was reiterated in *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463, where Lord Justice Dyson noted that:

> …the essence of the right that is protected by the crime and tort of public nuisance is the right not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health etc of the public.

The concept of public nuisance is thus extremely broad. In *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169 - considered the leading authority on the scope of the concept - it was said by Romer LJ that:

> …any nuisance is public which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subject…it is not necessary to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected…a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence.

1 This definition, adopted in *R v Rimmington* [2006] 1 AC 459, has more recently been reiterated in *R v Roberts* (Richard) [2018] EWCA Crim 2739.
2 See Chapter 31 of *Archbold* [31-40].

In a similar way and in the same case, Denning LJ, having declined to define the minimum number of persons that a nuisance would have to affect before it could be considered a public nuisance, explained that:

> …a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large…[3]

This idea that the nuisance must affect the community at large was reiterated by Baroness Hale, as she then was, in *R v Rimmington; R v Goldstein* [2005] UKHL 63 where she stated:

> …it is not enough to point to a collection of private nuisances and to conclude that the point has been reached when they amount to a public nuisance. What is essential, is to identify the breach of rights affecting the public at large – or at least a sufficient section of the public. It is the breach of those rights that constitutes the public nuisance.

However, a collection of private nuisances which do also affect the public at large will be a public nuisance. This was made clear in *Colour Quest Ltd and Others v Total Downstream UK plc and Others* [2009] EWHC 540 where David Steele J noted that:

> …A private owner's right to the enjoyment of his land is not a right enjoyed by him in common with other members of the public, nonetheless any illegitimate interference, being the very same interference contemporaneously suffered by other members of the public, constitutes a common injury satisfying the public nature of public nuisance…

The reality of most environmental and public health nuisances is that they will be dealt with under the statutory nuisance procedure outlined in the 1990 Act.

Part III of the 1990 Act provides local authorities with a range of tools (principally the use of abatement notices) with which they may take action in respect of activities which constitute statutory nuisances. Indeed, there is a positive duty on local authorities to take steps to detect statutory nuisance and to respond to complaints and they may be subject to judicial review proceedings if they fail to exercise their powers.

Section 79(1) of the 1990 Act establishes nine categories of statutory nuisance. These relate to:

1. The state of premises.
2. Smoke emissions.
3. Fumes or gases from dwellings.
4. Effluvia from industrial, trade or business premises.
5. Accumulations or deposits.
6. Animals.
7. Insects.
8. Light.
9. Noise from premises.
10. Noise from vehicles or equipment in a street; and
11. Other matters declared by other Acts to be statutory nuisances.

Although the categories above may appear to traverse a wide spectrum of matters, they all fall to be considered as statutory nuisances (bar those matters declared by other Acts to be statutory nuisances) if they are either "prejudicial to health" or "a nuisance" or both.

It should of course be emphasised that the terms "prejudicial to health" and "nuisance" are used in the alternative. Thus, even if an activity is not prejudicial to health, if it still constitutes a nuisance it will fall within Part III of the 1990 Act (and, presumably, vice versa, although it is hard to imagine an activity being prejudicial to health but not a nuisance, and nonetheless still qualifying as a public nuisance).

Prejudicial to Health

The term "prejudicial to health" is defined by s 79(7) of the 1990 Act as "injurious or likely to cause injury to health". Different judges will of course take different views about what is likely to cause such injury. However, some broad principles have developed and it has been noted by McCracken, Jones and Pereira that:

> a. Injury to the *health* of person must be likely and the contemporary view is that the likelihood of personal injury is not sufficient. The term has a broad meaning and the effects on health may be indirect (i.e. sleeplessness has been held to be injurious to health: *Lewisham v Fenner* [1995] 248 ENDS Report 44); and
> a. The test is objective: it depends not on the particular personal circumstances of the individual affected but on the potential effects on health generally.[4]

Nuisance

In order to understand what is meant by the term "nuisance" in the 1990 Act it is perhaps best to consider the formulation by Lord Millett of the underlying principle behind it:

3 In *Rimmington (ibid.*), Lord Rodger doubted this latter aspect of Lord Denning's formulation in the criminal context.

4 *Statutory Nuisance* by McCracken, Jones and Pereira, 3rd ed, at [1.05].

> The governing principle is that of good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him.[5]

Broadly speaking, the courts have equated the definition of nuisance in the 1990 Act with the meaning given to it in common law and private nuisance (see for example, *North Lincolnshire County Council v Act Fast North Lincolnshire (CIC)* [2013] EWHC 2890 (Admin) at [35-37]).

As such it can be noted that:

- Private nuisance, actionable at common law as between two or more individuals, is seldom relevant to licensing and is beyond the scope of this article completely.
- Public nuisance is both a crime and a tort, the defining distinction with private nuisance generally being said to be that a public nuisance affects the comfort of a class of people, rather than an individual, although that class can simply be a collection of individuals.
- There is a comprehensive regime under the 1990 Act for the policing and enforcement of statutory nuisance of a public nature, led by the availability of Abatement Notices (and criminal sanctions for subsequent non-compliance).

Nuisance in licensing

Notwithstanding the regime outlined above, often issues of public nuisance will be relevant to proceedings under the Licensing Act 2003, whether or not they might also have been subject to action under the 1990 Act. As noted above, the prevention of public nuisance is one of the four licensing objectives outlined in s 4 of the 2003 Act. However, as there is no definition of public nuisance within the 2003 Act, we must look elsewhere to understand the concept and its boundaries. While the case law outlined above is undoubtedly useful, a good starting point for how the concept is intended to be understood in the licensing context is the Government Guidance pursuant to s 182 of the 2003 Act.

The most recent version, revised in April 2018, sets out at [2.15] - [2.21] an overview of the approach to be taken to the concept of public nuisance as a licensing objective. First, "the issues will mainly concern noise nuisance, light pollution, noxious smells and litter."[6] Second, public nuisance is "not narrowly defined in the 2003 Act and retains its broad common law meaning."[7]

Third, "it may include in appropriate circumstances the reduction of the living and working amenity and environment of other persons living and working in the area of the licensed premises…[it] may also arise as a result of the adverse effects of artificial light, dust, odour and insects or where its effect is prejudicial to health."[8]

Thus, in relying on both the wide-ranging case law and the wide-ranging approach taken in the s 182 Guidance, it is clear that issues of public nuisance are liable to arise regularly in the context of licensing given the inherent nature of entertainment venues that licensing law is set to regulate.

Dealing with public nuisance in licensing

The first opportunity to consider the public nuisance implications in the licensing context will be when an applicant for a new premises licence comes to complete the operating schedule element - part 3 - of the prescribed application form, which specifically asks (in section M) for details of the steps proposed to promote this particular licensing objective. Clearly – given that an application which attracts no relevant representations must be granted with no discretion arising – the more information that can be provided here to show that no such implications will arise, the greater the potential for such a grant (ie, without the need to go through the hearing process).

Similarly, even if representations are made, a comprehensive and thoughtful explanation of how the proposed application will promote the prevention of public nuisance (understood in its wide sense) is likely to be of considerable assistance in persuading a licensing sub-committee that the application is worthy of its support. The sorts of measures that might be appropriate vary widely, but could include (as the Guidance points out) measures to deal with noise from patrons, dispersal of patrons, dealing with litter, noxious smells (perhaps from kitchen ventilation systems) and light pollution.

Perhaps more regularly controversial will be instances where allegations of public nuisance are made in the context of a review of a premises licence, where a sub-committee may be called upon to decide whether such allegations are proven and, perhaps more usually, what should be done in response to them.

Once those involved in making licensing decisions are satisfied of the existence of a public nuisance (or its potential), the question is how to address it. Again, the Guidance is useful in this regard: [2.17] explains that in the context of noise nuisance, the imposition of conditions might be as simple as "ensuring doors and windows are kept closed after a particular time" or "more sophisticated measures like the

5 *Baxter v London Borough of Camden* [2000] Env LR 112 at 126.

6 [2.15] s 182 Guidance.

7 [2.16] s 182 Guidance.

8 [2.16] s 182 Guidance.

installation of acoustic curtains or rubber speaker mounts to mitigate sound escape from the premises".

The Guidance goes on to explain that "any conditions appropriate to promote the prevention of public nuisance should be tailored to the type, nature and characteristics of the specific premises and its licensable activities".[9] It also warns licensing authorities that they should "…avoid inappropriate or disproportionate measures that could deter events that are valuable to the community, such as live music."[10]

Finally, "…any appropriate conditions should normally focus on the most sensitive periods. For example, the most sensitive period for people being disturbed by unreasonably loud music is at night and into the early morning when residents in adjacent properties may be attempting to go to sleep or are sleeping."[11]

The test for the imposition of conditions in licensing is simply that they be "appropriate for the promotion of the licensing objectives."[12] However, the test has also been traditionally seen as being analogous to that used in the context of town and country planning: §55 of the National Planning Policy Framework (NPPF) explains that:

> Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Agreeing conditions early is beneficial to all parties involved in the process and can speed up decision making…

While the "necessary" requirement no longer exists in the context of the 2003 Act,[13] it follows from the above that any conditions aimed at tackling a public nuisance still need to be proportionate, and thus should be specifically tailored to the size, style, characteristics and activities taking place at an establishment.

In terms of noise nuisance, the types of conditions that have been found to be unenforceable include references to noise being "inaudible" at the "nearest noise-sensitive premises". This is not least because a test of 'audibility' is hopelessly dependent on the person seeking to "hear" the noise; humans range in their ability to hear noises, and so "audible" is usually considered to be an unacceptably subjective standard, and because merely being able to hear a noise does not make it a nuisance. Indeed, in *R v Developing Retail Ltd v East Hampshire Magistrates' Court* [2011] EWHC 618, the court held such a condition to be "so vague as to be unenforceable" both as to the phrase "nearest noise-sensitive premises" (which was not defined) and as to the requirement that noise be "inaudible" there.

Other enforcement powers

It is of note that one of the most potent enforcement powers available to those regulating licensed premises – the Closure Notice/Closure Order regime under the Anti-Social Behaviour, Crime and Policing Act 2014 – is available in cases of public nuisance. There is growing evidence of regulators using these powers as a measure of first resort where licensed premises are alleged to be causing a nuisance, even ahead of more established powers such as review under the 2003 Act.

The process, which can result in immediate (and sustained) closure and swift revocation of a premises licence, is available *inter alia* where the use of premises (including licensed premises) are considered to have given rise to nuisance (note that there is no equivalent requirement to that under the summary review procedure in the 2003 Act, that the nuisance be "serious"), and that closure is necessary to prevent that nuisance continuing, recurring or occurring.

In such circumstances the local authority (or the police) can issue a closure notice (under s 76 of that Act) prohibiting access to those premises by all but the owner or anyone habitually resident there. The notice lasts 24 hours but can be extended to 48 hours.

Once served, an application must then be made to the Magistrates' Court for a closure order (unless doing so is no longer necessary and the notice cancelled). The application must be heard no more than 48 hours after it is made; and on such an application the court may make a closure order for up to three months' duration which may, at its most stringent, prohibit access to the premises by anyone at all at any time.

Although there are powers to seek to discharge such an order, and to appeal their making, the immediate and draconian effect is clear: the owner of a licensed premises might, within less than a week of an incident of nuisance find herself locked out of her premises altogether and at the mercy of the court listing system for when she might have a first opportunity to challenge the making or duration or nature of that prohibition.

Moreover, on making such a closure order the court must notify the relevant licensing authority, which must (in turn) hold a review of the premises licence within 28 days (much

9 [2.17] s 182 Guidance.

10 [2.17] s 182 Guidance.

11 [2.19] s 182 Guidance.

12 [9.39] s 182 Guidance.

13 Removed by the Police Reform and Social Responsibility Act 2011, and replaced by a test of what is "appropriate" for the promotion of the licensing objectives.

like a summary review). Thus the potential implications include loss of a licence altogether, and in short order.

Agent of change

The agent of change principle concerns the idea that a person or business (ie, the agent) who has decided to introduce a new land use bears the burden and responsibility for managing the impact of that change of use – including where that change of use is not the source of potential disturbance but a new potential receptor (the obvious example being development of residential units close to noise-generating premises such as pubs or bars).

The principle was finally introduced in the planning context by the revised NPPF (known as NPPF2) last year following extensive debate particularly in the context of the introduction of government policy allowing permitted development rights for the change of use of office buildings to residential.

Similarly, in 2017 the House of Lords Select Committee considering the 2003 Act recommended that "a full 'agent of change' principle be adopted in both planning and licensing guidance to help protect both licensed premises and local residents from consequences arising from any new built development in their nearby vicinity".[14]

In response to this, the Government explained its intention to amend the NPPF to emphasise the agent of change principle and noted that it would "ensure the s 182 guidance remains consistent with the National Planning Policy Framework, if changes are made".[15]

The current NPPF, last amended in February 2019, explains at s182 that:

> Planning policies and decisions should ensure that new development can be integrated effectively with existing business and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed.

It is to be expected that any updated s 182 Guidance later this year will also include reference to the agent of change concept as per government policy, although at the time of writing this has not yet occurred.

The question that then falls to be considered is how this agent of change principle might interact with that of statutory nuisance. While the principle is not part of a defence to proceedings in statutory nuisance under the 1990 Act or in common law nuisance, it may come to be developed as such in the years ahead when the courts consider what amounts to a reasonable use of land.

One of the key developments in the law of nuisance in recent years and one that appears to touch on the idea of agent of change came in the Supreme Court's judgment in *Coventry v Lawrence* [2014] UKSC 13.

In simple terms, the defendant at first instance was the owner of a stadium and track used for various motor sports including motocross and held both a grant of planning permission and a later certificate of lawfulness of existing use or development (CLEUD) to carry out these racing events at the stadium. The claimants purchased and moved into a house near the stadium and track in 2006 and complained to the local council about noise from the track.

The council served noise abatement notices under the 1990 Act and works were carried out to reduce the noise. However, the claimants remained unsatisfied with the noise being generated and issued proceedings against the defendants for (private) nuisance. The judge at first instance found in favour of the claimants but was overturned by the Court of Appeal. The Supreme Court used the case to develop and clarify the law of nuisance and ultimately found in favour of the claimants.

In short, the court had to consider the following legal issues in respect of private nuisance:

a The extent to which a defendant can argue that he has established a prescriptive right to commit a noise nuisance.
b The extent to which a defendant to a nuisance claim can rely on the fact that the claimant "came to the nuisance".
c The extent to which it is open to a defendant to a nuisance claim to invoke the actual use of his premises when assessing the character of the locality.
d The extent to which the grant of planning permission can be taken into account when considering the character of the locality; and
e The approach to be adopted by a court when

14 https://publications.parliament.uk/pa/ld201617/ldselect/ldlicact/146/14614.htm#_idTextAnchor201 at §553

15 https://www.parliament.uk/documents/lords-committees/Licensing-Act-2003/Govt_Response_Licensing_Act.pdf at p39.

deciding whether to grant an injunction or whether to award damages.

In summary, the Supreme Court concluded that where a claimant in nuisance is using their land for what is essentially the same purpose as that for which it has been used by their predecessors since before the alleged nuisance started, any defence of "coming to the nuisance" will fail. However, Lord Neuberger did consider in his leading judgment that there was "much more room for argument" where the claimant builds on, or changes the use of their land, before the defendant has started the activity complained of. It is arguable that the agent of change principle provides support for this perspective but the point will have to be argued in a future case.

The case is also of interest insofar as it considers the relevance of the existence of a planning permission authorising the use of the land. Here, following previous case law, the Supreme Court also concluded that the existence of such a permission does not, in and of itself, render lawful the activities that are generating complaints of nuisance. However, the existence of planning permission for the use complained of will still be useful from an evidential perspective, according to Lord Neuberger, depending on the facts of the case. He emphasised that conditions on a planning permission "may be of real value" where they set stipulations as to what the local planning authority considered to be an acceptable impact.

There has been a succession of recent cases in the planning context which, albeit all before the advent of the agent of change principle in the NPPF, deal with the question of what should happen when a new, noise-sensitive use is introduced near to established noise-generating premises.

In *Obar Camden Ltd v LB Camden* [2015] EWHC 2475 (Admin) the court quashed a planning permission for the conversion of a former pub into new residential flats. The pub was adjacent to the nightclub and live music venue known as KOKO in Camden, the proprietors of which sought judicial review of the decision to grant planning permission for the conversion.

The court agreed that the planning officer's assessment of the implications for KOKO (and another neighbouring bar, Purple Turtle) of having a development of residential flats adjacent to it had not been sufficiently robust, and as such the planning committee had been materially misled when they granted permission.

In *Forster v SSCLG* [2016] EWCA Civ 609 the Court of Appeal quashed a planning permission granted by a planning inspector for a new three-storey building with residential flats on its upper floors. The new building was to be adjacent to an established pub and live music venue, the George in Stepney, and the proprietor had expressed her concern about the future viability of the George were residential users to move in next door. Concerns about the future viability of the George were dismissed by the Inspector as not relevant (and upheld by Lindblom J in the High Court) but the Court of Appeal disagreed: although on the present facts that case had not been made sufficiently robustly, Laws LJ made clear that "the impact of a prospective planning permission on the viability of a neighbouring business may in principle amount to a material planning consideration". The planning permission was nonetheless quashed on another ground. It remains to be seen what sort of evidential material might amount to sufficient basis to find that the impact of a proposed new use on an existing business was unacceptable – but the door is clearly open.

Thirdly, in a case that was settled before going to court but nonetheless made headlines locally, a planning permission granted by Lambeth Council to redevelop a building into retail and flats above in circumstances where it presently houses (in the basement) the famous Club 414 in Brixton, London was quashed by consent. The freeholder had served notice on the proprietor of Club 414 (its tenant) to vacate and on that basis the council refused to consider the loss of Club 414 as material to the merits of the planning application.

The proprietors of Club 414 challenged the grant of planning permission on the basis, *inter alia* that the decision had unlawfully left out of account the potential closure of Club 414 and / or the potential for nuisance caused to prospective occupiers of the proposed flats emanating from other nearby licensed premises (including a pub next door). Lambeth submitted to judgment, albeit not explicitly accepting the case made by Club 414 (instead accepting that they had failed to take into account certain policies in the local plan which resisted the loss of night-time economy uses). Nonetheless, this was another case where the potential nuisance caused by an existing noise source to new / prospective residents was material.

Conclusion

As one of the four licensing objectives, the prevention of public nuisance is a familiar aspiration of the licensing regime. The term "public nuisance" is to be understood in its widest sense, by reference to case law on the tort of nuisance, while attempts to narrow its scope have generally been resisted.

In particular, it is clear that the legislative intent in including "public nuisance" as one of the four licensing objectives was to include in the licensing process consideration of potential

disturbance from the very serious and widespread down to relatively contained and low-level, including from (for example) littered streets at night and noise affecting only a few local residents.

The lesson from a review of the case law is that, for a potential disturbance to be relevant in the licensing context, it does not have to cross any great threshold of seriousness, or widespread effect, and any attempt to rule out consideration of such a potential disturbance is likely to fail.

From an evidential perspective, the fact that a separate regime of statutory nuisance control exists within the 1990 Act means that in many cases environmental health departments of local authorities may have already considered, or even taken, enforcement action against disturbance and nuisance emanating from licensed premises, and these previous proceedings (or consideration of them) are likely to be highly relevant in the licensing process.

There are also extremely potent enforcement powers now available (and increasingly enthusiastically used) to close premises which cause "nuisance".

The concept of the agent of change principle is clearly coming over the horizon, having already arrived in the world of planning and promised to be in the s 182 Guidance shortly. A survey of recent cases in the planning context highlight that the potential effect of an existing noise source on a proposed new noise-sensitive use is increasingly likely to be material in decision-making: decision-takers will have to consider the potential for "public nuisance" in the 2003 Act sense being caused to new occupiers by existing (and, one assumes, presently non-nuisance-causing) licensed premises. That sets a challenge for licensing professionals, in particular as to how best to cross Laws LJ's threshold in *Forster* as to how one establishes the likelihood of such future implications.

Josef Cannon
Barrister, Cornerstone Barristers

John Fitzsimons
Barrister, Cornerstone Barristers

Safeguarding through Licensing

Safeguarding - an ongoing licensing concern

Safeguarding is of vital importance to all members of our society, and the failures over the past are all too apparent. Concerns around safeguarding are on the increase, and licensing is a key tool to obstruct and disrupt sexual exploitation of children and vulnerable adults.

Licensing is fundamentally about public protection. It applies to all areas of licensing including taxis, alcohol, gambling, entertainment, late night refreshments and of course sexual entertainment venues.

In October, the Institute of Licensing is hosting conferences in Doncaster and Taunton to discuss the current position, and bring expert speakers together to discuss how licensing can be utilised to best effect and to examine case studies from across the country.

There are differing approaches and working definitions of safeguarding in different sectors, but none currently for licensing, and this will also form part of the discussion - let's work together to highlight the relevance of licensing and the importance of safeguarding.

Come and join the conversation.

Speakers confirmed include:

- James Button, James Button & Co.
- Andy Thompson & Helen Matthews from CYP First
- Andy Bowley, Barnardos
- Julie Hague, Sheffield Safeguarding Children Board

Dates and locations

2 October - Doncaster
15 October - Taunton

This event is aimed at local authority officers, police officers, social services and all those who are involved in the safeguarding of vulnerable persons.

Partnership approach to enforcement – is there a better way?

Knee-jerk enforcement can be avoided when officers know and talk with their operators and vice versa, argue **Clare Eames** and **Rebecca Cullum**

During the course of 2018, I and Rebecca Cullum, Licensing Manager at Stonegate Pub Company, analysed what we believed was going on in the world of enforcement, with a particular assessment of the relationship between the trade, their advisors, the licensing authorities and responsible authorities.

Stonegate operates over 770 licensed premises across England and Wales, and 32 sites in Scotland. The businesses range from small community pubs situated in dense residential areas, through to large capacity premises operating late hours in major city centres.

The diversity of the business, coupled with the array of brands and concepts, makes for an eclectic mix. It is not unusual to find in cities such as Cardiff, Birmingham or Nottingham 10 Stonegate businesses operating within the authority. My role includes providing key advice and guidance when dealing with licensing enforcement issues for the company. As Licensing Manager, Rebecca ensures the company works within the law, providing a safe and legal environment for staff and customers.

Last year, Rebecca and I gave two presentations in relation to enforcement and partnership working and presented at the National Conference last November.

In this article I want to share with you the issues we discussed then and the outcomes against the background that the key reason authorities enforce is to ensure statutory compliance and promote the licensing objectives. However, as we are all aware, there is discretion in how enforcement action is taken, which is something that Rebecca and I experience the length and breadth of the country - often resulting in different approaches. By enforcement, I am talking about verbal warnings, warning letters, meetings and full reviews.

Believe it or not, enforcers, operators and advisors all have the same aim, namely the promotion of the licensing objectives. However, there is often friction between the enforcer and the operator, which becomes a challenge for those assisting in the navigation through murky waters. Here I want to explore the rationale in enforcement and also look at some alternatives.

My aim is not to criticise but to highlight the differences and give some examples of best practice - as well as looking at the outcomes and impact of some decisions and whether there was a better alternative for all. Sharing experiences can result in positive learnings for us all, both good and bad.

Many readers may feel that enforcement is a direct result of an action by an operator that falls short of the required standards. In my view, often the situation is not that clear cut.

Operating licensed premises can be extremely challenging; often you are subject to the actions of third parties, including door staff, albeit they may be vetted, all the way through to the diversity of customers whose behaviour can be unpredictable, resulting in unexpected outcomes that impact on the premises and the licence.

Equally, there are situations where the operator / licence holder has simply failed in their duties and falls short of the standards required. The reality is that many of us, whichever side of the fence we are on, find ourselves dealing with the grey areas in the middle.

It is right to acknowledge that enforcement in the context of the Licensing Act 2003 (which has only been in place since 2005) is still in a process of evolution. Personally, I have witnessed a significant sea change in partnership working and enforcement over recent years, and I have no doubt that in another five years, and five years after that, the licensing landscape will be different again - such is the dynamic nature of the licensed sector. We will continue to see unexpected challenges, such as Brexit, which have the propensity to unfold in the most unpredictable way (I promise, that will be my only reference to Brexit).

Stonegate approaches licensing from the starting point of a comprehensive training programme, and a licensing manual at each site. Dialogue at a local level with the authorities is through the premises management. Area managers play a

key role in maintaining relationships at a local level with the licensing authority and responsible authorities. Stonegate invests over £27.5 million in keeping customers safe, which includes employing a national network of door teams. It also pro-actively works with community safety programmes including Best Bar None, PubWatch, Business Improvement Districts, Purple Flag, Safety First etc.

Like many operators on the high street, it also faces challenges, including the impact of government policy, the economic climate, changing customer behaviour and demands and the reduction in policing.

Partnership working and enforcement

At its simplest level, partnership working starts with having clarity and understanding of who the parties are in that relationship. That may appear to be completely straightforward. However, in the context of a company such as Stonegate, it is more complicated. The structure sees a management team consisting of a general manager, who reports to an area manager, who in turn will report into an operations director. Sitting above them is a board of directors who are the decision makers. The premises licence holder – Stonegate - delegates responsibility on a day to day basis for its premises to be run safely, and in compliance with the licence conditions, to the management team. The link between the boardroom and the bar is the area manager, and it can often also be the role of the "licensing manager".

It is my view that licensing solicitors also play their part here. Licensing solicitors have a multi-functional role but, ultimately, it is to seek resolution of the problem presented. It has always been my strongly held personal view that licensing solicitors can also be a short cut for enforcers. By that I mean that many licensed premises will have licensing solicitors who they use regularly and, rather than have a situation escalated at a local level, if enforcers know who the licensing solicitor is or, for example, know who the licensing manager is at Head Office, then my view is enforcers should reach out. Partnership at its heart is also about communication, which works both ways.

Examples of good and bad practice

Here I am going to share with you some case studies experienced with Stonegate and other clients:

Case Study A

This situation involved a premises that was being purchased by the incoming operator, as the existing operator was going into administration. As the site was part of a larger confidential acquisition project, it was therefore not possible to enter into any meaningful dialogue with the licensing authority or the responsible authorities prior to completion of the acquisition. Immediately the deal went through, the authorities were notified that the new operator was taking occupancy. However, all of this information got slightly lost in translation and the police instigated a review of the licence without any warning or notice, based on evidence gained against the former owners.

Fast forward a couple of weeks and police concerns were satisfactorily addressed very simply by the established new owner's credentials, which demonstrated clear policies, procedures and management structures. As such, the review was withdrawn (another interesting debate – I say you can withdraw), and a minor variation submitted to add conditions.

Case Study B

Here, a review was issued by the police against a premises operated by a pub chain with the only warning being made verbally to the area manager, and no contact established with the licence holder. Once the premises licence holder became aware, as you would expect, a full investigation ensued and procedures were immediately put into place that addressed the concerns. The review was withdrawn. In this example, the operator's internal communication chain had let the side down.

Case Study C

A review was issued by the police following an incident on New Year's Eve, in part alleging breach of licence in that the venue did not have a temporary event notice in place and thus were trading unlawfully. Despite indicating to the police within a matter of days of the review being issued that the premises benefited from the ability to trade all the way through the night on New Year's Eve (the police had the wrong copy of the premises licence), the police still pursued the review. The case caused friction and damage to the relationships at all levels and imposed costs for the police, authority and operator that were, in my view, avoidable.

Case Study D

The premises, part of a national chain, was made aware by the police of an increase in incidents and contact was made with the premises licence holder requesting a meeting. The meeting took place and despite a significant number of incidents at the premises, the police and licensing authority recognised, given it was the largest in town and operated with the latest trading hours, there would inevitably be incidents. However, as an alternative to considering enforcement proceedings, it was agreed that an action plan should be put in place to work to reduce the incidents. This approach worked to all parties' satisfaction.

Case Study E

An operator was made aware by environmental health officials

of noise issues from music escaping from the premises. It transpired that during a significant refurbishment and the installation of a new music system, there was a weak point in the building which allowed music to be heard in neighbouring premises. The approach of the enforcing authority was to work with the operator to find a solution and avoid taking formal enforcement action. Again it worked – and notably quickly, with no conflict, and led to stronger relationships.

A similar example is where a client who operates a number of sites in central London was made aware of noise concerns from one of its neighbours who was calling the out of hours officer on a regular basis. The approach that enforcement officer took is one I have not come across before or since – he sent one text message, then another, and then more, increasingly blunt messages to the premises manager telling him to turn the noise down without at any point attending the premises to listen to the noise for himself.

The operator's viewpoint

And how do the operators feel? For a company like Stonegate, one of the most common frustrations is that there is often no escalation to the premises licence holder. This is a tricky point. Some enforcers will say "Well, we told the DPS", or some will say "We told the DPS and the area manager and surely it is their duty to pass that information higher up the chain". This approach should be balanced against the fact that some DPSs in that situation consider that because they are still working with the police or authority, it is not essential to escalate, as it is manageable at a local level. However, there then becomes a tipping point of concern and the licence holder is made aware and forced to be reactive and is on the back foot.

I ask, is it reasonable to just do that? Ultimately, many enforcement sanctions will involve the premises licence holder; the Guidance talks about warning the premises licence holder, so where is the harm in reaching out first? This also should be considered in the light that some enforcement can be the result of an accumulation of events happening, rather than one large trigger event. At what point should the escalation happen? Of course, this is a question of fact and degree, but where is the harm in more open communication and escalating earlier, which may result in fast tracking the solution?

An inconsistent approach to enforcement can be frustrating. It is inevitable that there is a varied approach, as every town and city licensing authority and constabulary will have different challenges and different goals. Sadly, though, I have had experience of two different approaches from enforcing authorities which highlight the opposite approaches. One authority said that it was not prepared to meet with the operator again to explore solutions and without warning, raised the "review" word. Yet, at the same time I had an authority comment that seeking a review is the last thing it wants to do, as it considers a review as a failure.

Therefore we see inconsistency in communication, in partnership working, in how evidence is used and in how it is applied. As another instance, some authorities say the actions of the door staff directly fall to the licence holder and some say, "No, that was a rogue SIA and I won't hold the premises responsible"!

The enforcer's viewpoint

I have no doubt the enforcers reading this article will have frustrations as well. Don't get me wrong, appropriate and proper enforcement is absolutely key to ensuring a safe night-time economy and is a benefit to the licensed trade as a whole. It would not do for anybody to have rogue operators getting away with improper or illegal practices, and enforcement can be used to raise standards across the board as well as highlight issues. Truly successful enforcement, though, is rooted in partnership working and an acceptance that there is a ladder of enforcement and that powers such as review are a last resort.

Why do authorities enforce at all? If you look at the outcomes that the relevant authorities are trying to achieve, this gives you a clue as to what sort of approach might be better taken. We recently met with some licensing officers who are looking to improve trading on match days in their area. They were considering adding conditions to all premises licences in the borough regarding the use of polycarbonates and door staff on match days. They felt they needed to see change or they might look at enforcement options. However, a face-to-face site meeting led to more innovative ways to improve trading across the board, including knowledge sharing and training. Such an approach had the benefit of really bringing about the change that the officers were seeking but without the slightly heavier handed approach to start with. Of course, if things go wrong then there is still the option of taking the next step.

It is a step-by-step approach which is as advocated by the s 182 Guidance and many authorities take such an approach in their enforcement protocols. I have seen measures such as traffic light systems to guide their enforcement action. A first warning may be verbal, a second may be written and so forth. The benefit of this approach is that it allows premises to investigate incidents that may genuinely be one offs and gives them a chance to improve before restricting them further. Operators add a huge benefit to the local and national economy, providing investment and vibrancy to our town centres which increasingly face challenges with escalating costs and the loss of retail. They also bring many employment opportunities. Often, restricting operators for slight misdemeanours which could be outside their control

can have a negative impact, not just on the business but on the wider community.

I would consider a true success story to be one which does not go beyond the first stage of enforcement. True partnership working means that officers know their operators and vice versa. Partnership working, however, goes beyond enforcement. My article today is an example of how we can all knowledge share - operators, advisors, the police and council officers. We all have something to bring to the table and it is important to at least listen to everyone's views. Of course there will be competing interests, but with a little give and take a successful outcome is almost always easy to achieve.

If serious action is being considered then something leading up to that has gone very wrong. Even in summary reviews, which by their very nature are urgent and immediate, applications should only be in response to instances of crime and disorder that are so serious that immediate action needs to be taken. Even in these circumstances, sometimes the action that the police are seeking can be achieved without the need for the time and expense of issuing the proceedings but simply by conversation with the premises licence holder.

So, what are the considerations when approaching the use of enforcement such as a review and what are the alternatives? A mantra that is becoming increasingly more popular, and one that Rebecca and I would wholeheartedly support, is that a review should never be a surprise. A review should only be instigated if another outcome cannot be achieved, so it is used as a last resort. Escalation to the premises licence holder and appropriate communication is key, and must start early.

Ideally, enforcement action should not be taken before partnership measures have been exhausted, except in more serious and urgent cases.

It is always worth considering measures that can be put into place by undertaking an action plan with the premises licence holder / relevant representatives, without going through the review process. Enforcement action should be based on proportionate, consistent, transparent and agreed evidential standards.

If the above is followed what can enforcers expect when dealing with companies such as Stonegate Pub Company? They can expect a commitment to partnership working. They can expect insight and understanding of the issues identified and a willingness to seek to find a solution.

A final note of caution: beware of the closed mind. All parties want the same outcome - safe and vibrant premises operating within the law. If the premises have deviated from that path there will be a few paths back. The enforcer may want one path to be followed and the operator another. Which one is right may not be immediately obvious but if there is open dialogue and a willingness to work together, the paths can meet to everyone's satisfaction.

Clare Eames
Solicitor, Poppleston Allen

Rebecca Cullum
Licensing Manager, Stonegate Pub Company

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Taxi Case Updates

James Button gives his analysis of two important High Court rulings on enforcement of licensing fees and wheelchair passengers

While those involved in taxi licensing await the final version of the s 177 Statutory Guidance, and anticipate the consultation on the updated *Best Practice Guidance*, there have been two significant judgments in relation to taxi licensing handed down by the High Court in the last few months.

The first decision was made in *Wakefield Hackney Carriage and Private Hire Association v Wakefield Council,*[1] but the first published judgment was in the case of *McNutt v Transport for London*[2] The Wakefield case concerned taxi licence fees, and the Transport for London (TfL) case concerned the provision of mobility assistance to wheelchair-bound passengers by drivers.

Wakefield Hackney Carriage and Private Hire Association v Wakefield Council

The High Court handed this judgment down on 5 December 2018, when it was widely reported by counsel acting for both parties, but the final transcript was not available until 28 March 2019. It is not clear why it took the judge (His Honour Saffman sitting as a Deputy High Court Judge) so long to approve the judgment.

The case concerns the attempt by Wakefield Metropolitan Borough Council (WMBC) to recover the costs of enforcement against hackney carriage and private hire drivers via the licence fees levied under s 70 of the Local Government (Miscellaneous Provisions) Act 1976 in relation to vehicle licences. This was challenged by the Wakefield Hackney Carriage and Private Hire Association.

There are two fee-levying powers in relation to Hackney carriages and private hire licenses under the 1976 Act: s 53(2) in respect of drivers and s 70(1) in respect of vehicles and operators.

These sections state:

S53(2) Notwithstanding the provisions of the Act of 1847, a district council may demand and recover for the grant to any person of a licence to drive a hackney carriage, or a private hire vehicle, as the case may be, such a fee as they consider reasonable with a view to recovering the costs of issue and administration and may remit the whole or part of the fee in respect of a private hire vehicle in any case in which they think it appropriate to do so.

and

S70 (1) Subject to the provisions of subsection (2) of this section, a district council may charge such fees for the grant of vehicle and operators' licences as may be resolved by them from time to time and as may be sufficient in the aggregate to cover in whole or in part—

(a) the reasonable cost of the carrying out by or on behalf of the district council of inspections of hackney carriages and private hire vehicles for the purpose of determining whether any such licence should be granted or renewed;

(b) the reasonable cost of providing hackney carriage stands; and

(c) any reasonable administrative or other costs in connection with the foregoing and with the control and supervision of hackney carriages and private hire vehicles.

Gerald Gouriet QC on behalf of the Association argued that there was no power to recover enforcement costs against drivers. Section 53(2) clearly states that the fees can only be levied "with a view to recovering the cost of issue and administration" while s 70 allows the recovery of "any reasonable administrative or other costs in connection with [inspecting vehicles and providing Hackney carriage stands] and with the control and supervision of Hackney carriages and private hire vehicles".

Sarah Clover on behalf of WMBC argued that there was a general principle which allows local authorities to recover their costs in relation to licensable activities. Despite referring to *R v Westminster City Council ex parte Hutton,*[3] *Kelly v Liverpool City Council* [4] and *R (app Hemming) v Westminster City Council* [5] the judge was not persuaded that there was a general principle which entitled local authority licensing schemes to be self funding.

The judge stated:[6]

If Section 53 provides a statutory basis for that to be

1 [2018] EWHC 3664 (Admin).

2 [2019] EWHC 365 (Admin).

3 [1985] 83 LGR 461.

4 [2003] EWCA Civ 197.

5 [2015] UKSC 25 and [2017] UKSC 50.

6 At para 23.

factored into the fees payable by drivers then at least from the Council's point of view, well and good, but, if it does not, then, in my judgment, it does not form the basis for construing section 70(1)(c) to mean that they are recoverable under that subsection. That is all the more the case where there is no general principle of self-funding.

And further:[7]

In my judgment it is clear that Section 70(1)(c) relates to the supervision and control of hackney carriages and private hire vehicles, not the supervision and control of drivers and enforcement steps in relation to the Activities in my view clearly relate to the activities of the driver, not the vehicle. That must be so even though it is the drivers that drive those vehicles.

Before concluding:[8]

I have had regard to the academic discussion in both Button[9] *and* Paterson.[10] *The reference in* Button *is in the 4th Edition, Chapter 4, page 154. That seems to relate predominantly to Section 53 rather than Section 70, but insofar as it does relate to Section 70, the conclusion reached by the editor (sic) is perhaps informative. It is that 'It does not seem possible for a Local Authority to recover general compliance or enforcement costs for hackney carriages or private hire vehicles via the licence fees'. If that is a general observation, then obviously it is equally applicable to Section 70 as it is to Section 53.*

As to Paterson*, I was referred to the 127th edition, paragraph 2.54 where it is said "the difference in wording between Section 53(2) and Section 70 has led to the suggestion, that enforcement costs such as the prosecution of unlicensed drivers are not recoverable under Section 53(2), whereas they are in relation to the prosecution in relation to the unlicensed vehicles under Section 70. Opinion is far from unanimous, however, and until the matter is resolved by the High Court, it remains uncertain whether the recovery of enforcement costs as part of a drivers licence fee is or is not lawful". With great respect to Mr Gouriet, who as I understand it is the editor of* Paterson,[11] *that is not particularly helpful from where I am sitting.*

However, for the reasons I have given, I am satisfied that it is appropriate to quash the fees decision fixing the fee because it incorporates expenses which in my view it ought not to have incorporated.

As a consequence the challenge succeeded. At the time of writing there is still a possibility of an appeal to the Court of Appeal, but at present this is the position.

Does this judgment alter anything? In my view it does not. While the wording of both s 53, and in particular s 70, could be clearer, I would say that it has always been clear that enforcement costs against drivers must be borne by the council. That does not mean that that is how the law should be, but that it is how it is. This point was addressed by the judge:[12]

There may, and I put it no higher than this, be a hiatus whereby those costs have to be picked up by the general council tax payer. That might be the unintended consequence of the legislation or it might not be but, if it is, it is a matter for Parliament to rectify. Section 70 can only be construed in accordance with its terms where those terms are not ambiguous.

There are certainly other licensing regimes that allow full cost recovery, even allowing for the Provision of Services Regulations (which do not apply to taxi licensing), but each licensing regime has its own fee-levying powers (if there is such a power to levy fees for a particular licence) and those vary between the different regimes.

This judgment also re-states the principle that there can be no cross subsidy between licensing regimes,[13] but unfortunately does not specify how many fee-charging provisions there are in relation to Hackney carriage and private hire licensing. There are clearly two contained within the legislation: s 53 for driver's licences (both hackney carriage and private hire) and s 70 for vehicle licences (hackney carriage and private hire) vehicles and private hire operators. According to one of the advocates in this case, it was generally accepted that there should be five separate charging regimes for taxi licensing,[14] rather than two. This follows the view taken in the Order made by the High Court in *R (on the application of Cummings) v Council of the City and Council of Cardiff.*[15]

Unfortunately, that Order is not a binding precedent,[16] and it is a shame that this point was not clarified in this judgment. It remains to be seen if it will be addressed in any subsequent Court of Appeal decision, or on a future challenge to hackney carriage and private hire licence fees.

7 At para 25.

8 Paras 27 to 29.

9 *Button on Taxis - Licensing Law and Practice* 4th edition 2017 Bloomsbury Professional.

10 *Paterson's Licensing Acts* 2019 LexisNexis.

11 He is one of the editors, but so is Sarah Clover!

12 At para 18.

13 See paras 30 to 32.

14 1. Hackney carriage drivers. 2. Private hire drivers. 3. Hackney carriage vehicles. 4. Private hire vehicles. 5. Private hire operators.

15 [2014] EWHC 2544 (Admin).

16 For details, see *Button on Taxis - Licensing Law and Practice* 4th edition 2017 Bloomsbury Professional para 4.9.

McNutt v Transport for London

McNutt v Transport for London[17] concerned the meaning and effect of the law intended to assist and protect wheelchair-bound users of hackney carriages.

Sections 165 to 167 of the Equality Act 2010 were brought into full effect in April 2017 and apply within and outside London.

Section 167 allows a local authority and TfL to create and publish a list of all hackney carriages and private hire vehicles that are capable of carrying a passenger while they remain in their wheelchair (these are referred to as "designated vehicles"):

167 Lists of wheelchair-accessible vehicles

(1) For the purposes of section 165 [7], a licensing authority may maintain a list of vehicles falling within subsection (2).
(2) A vehicle falls within this subsection if—
(a) it is either a taxi or a private hire vehicle, and
(b) it conforms to such accessibility requirements as the licensing authority thinks fit.
(3) A licensing authority may, if it thinks fit, decide that a vehicle may be included on a list maintained under this section only if it is being used, or is to be used, by the holder of a special licence under that licence.
(4) In subsection (3) "special licence" has the meaning given by section 12 of the Transport Act 1985 (use of taxis or hire cars in providing local services).
(5) "Accessibility requirements" are requirements for securing that it is possible for disabled persons in wheelchairs—
(a) to get into and out of vehicles in safety, and
(b) to travel in vehicles in safety and reasonable comfort,
either staying in their wheelchairs or not (depending on which they prefer).
(6) The Secretary of State may issue guidance to licensing authorities as to—
(a) the accessibility requirements which they should apply for the purposes of this section;
(b) any other aspect of their functions under or by virtue of this section.
(7) A licensing authority which maintains a list under subsection (1) must have regard to any guidance issued under subsection (6).

Section 165 then places duties on the driver of a designated hackney carriage or private hire vehicle when carrying a disabled person:

165 Passengers in wheelchairs

(1) This section imposes duties on the driver of a designated taxi which has been hired—
(a) by or for a disabled person who is in a wheelchair, or
(b) by another person who wishes to be accompanied by a disabled person who is in a wheelchair.
(2) This section also imposes duties on the driver of a designated private hire vehicle, if a person within paragraph (a) or (b) of subsection (1) has indicated to the driver that the person wishes to travel in the vehicle.
(3) For the purposes of this section—
(a) a taxi or private hire vehicle is "designated" if it appears on a list maintained under section 167;
(b) "the passenger" means the disabled person concerned.
(4) The duties are—
(a) to carry the passenger while in the wheelchair;
(b) not to make any additional charge for doing so;
(c) if the passenger chooses to sit in a passenger seat, to carry the wheelchair;
(d) to take such steps as are necessary to ensure that the passenger is carried in safety and reasonable comfort;
(e) to give the passenger such mobility assistance as is reasonably required.
(5) Mobility assistance is assistance—
(a) to enable the passenger to get into or out of the vehicle;
(b) if the passenger wishes to remain in the wheelchair, to enable the passenger to get into and out of the vehicle while in the wheelchair;
(c) to load the passenger's luggage into or out of the vehicle;
(d) if the passenger does not wish to remain in the wheelchair, to load the wheelchair into or out of the vehicle.
(6) This section does not require the driver—
(a) unless the vehicle is of a description prescribed by the Secretary of State, to carry more than one person in a wheelchair, or more than one wheelchair, on any one journey;
(b) to carry a person in circumstances in which it would otherwise be lawful for the driver to refuse to carry the person.
(7) A driver of a designated taxi or designated private hire vehicle commits an offence by failing to comply with a duty imposed on the driver by this section.
(8) A person guilty of an offence under subsection (7) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.
(9) It is a defence for a person charged with the offence to show that at the time of the alleged offence—
(a) the vehicle conformed to the accessibility requirements which applied to it, but
(b) it would not have been possible for the wheelchair to be carried safely in the vehicle.
(10) In this section and sections 166 and 167"private hire vehicle" means—
(a) a vehicle licensed under section 48 of the Local Government (Miscellaneous Provisions) Act 1976;

17 [2019] EWHC 365 (Admin).

(b) a vehicle licensed under section 7 of the Private Hire Vehicles (London) Act 1998;
(c) a vehicle licensed under an equivalent provision of a local enactment;
(d) a private hire car licensed under section 10 of the Civic Government (Scotland) Act 1982.

The case concerned the prohibition in s 165(4)(b) on a driver making any additional charge for providing such assistance.

McNutt was a hackney carriage driver, and was waiting in his designated vehicle as the first vehicle on a hackney carriage rank. He was approached by Emma Vogelman, a lady in a wheelchair, with her assistant, Laura Creek. McNutt activated the taximeter before he started unloading the ramps to load Ms Vogelman. This was noticed and challenged by Ms Creek. There was then what is referred to in judicial terms as an "altercation" between the driver and the passengers. They then boarded the second vehicle on the rank, but McNutt used his vehicle to prevent the second vehicle moving off. The police were called.

At no time did either passenger enter McNutt's vehicle, and no money changed hands between them.

McNutt was prosecuted by TfL under s 167(7) for breaching s 167(4). He argued that as no charge of any sort had been made, the offence could not have been committed. The prosecution contended that if that approach was taken, it would seriously undermine the purpose of the legislation. McNutt was convicted. He appealed by way of case stated, and the questions posed for the High Court were:[18]

(1) Did the Appellant make an additional charge for carrying a wheelchair user, Emma Vogelman, on 4 October 2017 ?

(2) Did the magistrates err in law by convicting the Defendant of making an additional charge for carrying a wheelchair user, contrary to s 165(7) Equality Act 2010 ?

It is not in dispute that if the answer to the first question is "yes", then the answer to the second question automatically follows and is "no".

It was agreed that demanding payment from a wheelchair-bound passenger for the time taken to board would be an additional charge and contrary to s 165(4)(b). The sole point was detailed by the judge, Mr Justice Julian Knowles, in this way:[19]

The main issue on this appeal is whether a 'charge' was made by the Appellant by the act of him switching on his taximeter before Ms Vogelman and Ms Creek had boarded, even though Ms Vogelman never entered his taxi, no money was demanded (either expressly or by implication) and they ended up travelling in a different taxi.

Counsel for McNutt argued that activating the taximeter alone, with no payment being subsequently made, could not amount to making a "charge". The contrary view was advocated by Counsel for TfL:[20]

On behalf of the Respondent Mr Patience submits that the phrase 'make any additional charge' in s 165(4)(b) is not restricted to merely occurring at the point at which the metered fare (including an impermissible extra amount) is actually demanded at the end of the journey, but should be construed as covering both of the following situations:

a. when an indication is given by the driver at the point of hiring to a disabled person that they will be made liable to an additional charge;
b. where the taximeter is switched on before the disabled person and their wheelchair have been loaded, thereby creating a pecuniary obligation on the disabled passenger to pay the metered fare, the boarding process taking more time than it would for a non-disabled person, thereby resulting in an additional charge.

In the absence of any previous Senior Court decision on the meaning of s 165(4)(b), this was a case of statutory interpretation. There was considerable discussion on this point, and the judge addressed it like this:[21]

29. The starting point is to note the precise language used in s 165(4)(b). The driver's duty is not 'to make any additional charge' as a result of being hired by or on behalf of a disabled person. In this phrase the word 'charge' is being used as a noun and not a verb. The online Oxford English Dictionary definition of 'charge' when used as a noun include 'a price asked for goods or services' and also 'a financial liability or commitment' (see https://en.oxforddictionaries.com/definition/charge).

30. The first of these meanings supports, to an extent, Mr Taylor's submission [Counsel for McNutt] that the point in time when a driver makes an additional charge can only be at the end of the journey because it is then and only then that the precise fare can be ascertained, in other words, only is the price asked. On the other hand, the second definition supports Mr Patience's submission [Counsel for

18 At para 15.
19 At para 19.
20 Outlined by the Judge at para 22.
21 At paras 29 to 31.

TfL] that in a taxi fitted with a taximeter the passenger's obligation is to pay whatever the meter shows at the end of journey, and so the moment the meter is switched on the passenger becomes financially liable for the fare, and it is thus at that point that the driver makes the charge.

31. In my judgment it is the second meaning which is to be ascribed to the word 'charge' as used in s 165(4)(b), and a taxi diver makes a charge when he switches his taximeter on, and if he does this for a disabled passenger before the passenger and her wheelchair have been loaded into the taxi, there will be an additional charge and thus an offence under s 165(7) even if, for whatever reason, the driver never actually demands the fare.

He went on to explain his view of the intention behind the legislation and his conclusion on that:[22]

33. [The purpose of the legislation] is the need to ensure that taxi drivers carry disabled passengers and to provide criminal penalties if they fail to do so or fail to comply with the other duties which the section imposes upon them in order that disabled people have access to taxi services on terms which are not disadvantageous by reason of their disabilities.

34. Against that background, it cannot have been Parliament's intention that the word 'charge' should be construed so that a taxi driver only becomes criminally liable for charging a disabled passenger more when he actually demands the additional fare at the conclusion of the journey. The example given by Mr Patience demonstrates why this is so. It would mean that an unscrupulous taxi driver would be able to avoid his duty to carry disabled passengers, and his duty to assist them if necessary, by quoting an inflated fare upon being flagged down, knowing that it will not be accepted and he will then be free to drive off in search of a non-disabled fare. Another example might be the dishonest driver who puts an additional charge on the meter hoping that the disabled customer does not spot it, but who does not demand the additional amount if the passenger does notice. If Mr Taylor's construction of s 165(4)(b) were correct, in neither scenario would the driver commit the offence under s 165(7) because he would not have actually demanded the additional amount, and (in the first scenario) he would be able to avoid his statutory duty without consequence. The second scenario would deprive disabled people of significant protection. These would be absurd results and wholly inconsistent with the stated purpose of the section. In my judgment they are not something which Parliament could have intended.

22 At paras 33 to 35.

35. In my judgment there can be no doubt that no later than the time a taximeter is switched on at the point of hire, an actual financial liability or commitment is imposed on the passenger to pay the amount shown on the meter when the hiring is terminated, and it is therefore at that point that the charge is made for the purposes of s165(4)(b).

The judge then considered the legislation concerning hackney carriages, fares and meters within London, making it clear that he would consider the position outside London as well.

His conclusion in respect of London hackney carriages was detailed:[23]

41. In light of these very detailed provisions specifying what fares may be charged by a driver of a London taxi fitted with a taximeter[24], in my judgment it is clear that a passenger is legally obliged to pay the metered fare, whatever that fare might be. That legal obligation has at least two strands to it. Firstly, it is an implied term of the contract struck between the taxi driver and the passenger at the point of hire. The taxi driver agrees to take the passenger to their destination and the passenger agrees impliedly to pay the fare on the meter. It is always open to the taxi driver to vary the contract by accepting a lesser fare, ([40(1)] of the London Cab Order 1934 making clear that the metered fare is the maximum fare, (and see also R v Liverpool City Council ex parte Curzon Ltd [25]), but absent such a variation the passenger is contractually bound to pay the metered fare. Second, a passenger who fails to pay the fare due according to the meter would likely commit one or more criminal offences. It is an offence contrary to s 41 of the London Hackney Carriage Act 1831 to 'refuse or omit to pay the driver of any hackney carriage the sum justly due to him for the hire of such hackney carriage'. The term 'justly due' is not further defined but must be the fare shown on the meter because that is what the LCO specifies the fare shall be (or a lesser sum if the driver agrees to that). There are further offences in s 1 of the London Cab Act 1896. It is an offence for a person to hire a cab when he knows or has reason to believe that he cannot pay 'the lawful fare'. It is also an offence to fraudulently endeavour to avoid payment 'of a fare lawfully due'. For the same reasons, these expressions must refer to the fare shown on the meter, or a lesser fare if the driver agrees to that.

His overall conclusion was:[26]

42. For these reasons, in my judgment the words 'make

23 At para 41.

24 See paras 36 to 40 of the judgment.

25 [1993] Lexis Citation 2846.

26 At para 42.

an additional charge' in s 165(4)(b) mean to impose an additional financial liability or commitment on a disabled wheelchair user as compared with an able bodied passenger, and such a liability or commitment is imposed no later than the point when a London taxi driver switches on his meter before such a person and their wheelchair have boarded the taxi.

These conclusions accord with the DfT Guidance[27] and the conclusions in *Button on Taxis – Licensing Law and Practice.*[28]

For completeness, the judge also considered the position in relation to private hire vehicles within London:[29]

50. Inside London, licensed private hire vehicles (PHVs) are prohibited from being fitted with taximeters by s 11 of the Private Hire Vehicles (London) Act 1998; cf. Transport for London v Uber.[30] PHVs therefore have to use a different method of fare calculation which, according to TfL, is usually distance based. TfL itself does not regulate PHV fares, although it does require through its licensing regulations that a fare estimate be given in advance of the journey if a fixed fee has not been agreed.

51. Providing an inflated fare estimate to a disabled passenger would in my view infringe s 165(4)(a) even though there may be no liability on the passenger (who may refuse to accept the estimate). To amplify what I have already said about taxi drivers providing inflated fare estimates if, for example, a licensed private hire company had a poster in the window of its office to the effect that there was a £50 surcharge for a wheelchair user, then that would amount be a contingent additional charge caught by s 165(4)(b). If this were not so then private hire companies could avoid taking disabled passengers without consequence which, for the reasons I have already given, would be inconsistent with the entire purpose of s 165.

Finally the judge considered the position of hackney carriages and private hire vehicles outside London. In relation to Hackney carriages he said: [31]

53. I see no basis for reaching a different conclusion in relation to hackney carriages outside London as compared with those in London. In both places the taximeter calculates the fare and there is an implied term in the contract between the driver and the passenger (or an express term, should there be written conditions of carriage – there are no such conditions for London hackney carriages) that the passenger will pay the fare shown on the meter. A financial liability or commitment is therefore created when the driver switches on the meter, precisely as it is in relation to a London hackney carriage and it is no later than this point that 'a charge is made' for the purposes of s 165(4). This liability or commitment is reinforced by s 66 of the 1847 Act, which makes it an offence to refuse to pay the fare due. I reach the same conclusion as before where the driver gives an inflated fee estimate. That in my judgment is a contingent financial liability or commitment falling within s 165(4)(b).

He also reached a similar conclusion in respect of private hire vehicles outside London to the one had reached in respect of London: [32]

54. In relation to PHVs outside London, unlike in London, these may lawfully be fitted with a taximeter. Section 71 of the 1976 Act provides that nothing in the Act shall require any PHV to be equipped with any form of taximeter but if it is then the taximeter must have been tested and approved. For the reasons already given, the use of a taximeter in a PHV creates a contractual obligation to pay the metered fare, and hence switching on the meter amounts to 'making a charge' because it creates a financial liability or commitment. This is reinforced by the criminal law: a failure to pay the fare would likely amount to the offence of making off without payment contrary to s 3 of the Theft Act 1978: see R v Aziz.[33] For PHVs outside London without a taximeter, the position is the same as for PHVs within London, and for the same reasons I conclude that providing a fare estimate or indication in advance of the journey is sufficient to amount to the making of a charge because it creates a contingent financial liability or commitment and that in my view is sufficient to engage s 165(4)(b).

The sections 165 to 167 of the Equality Act were introduced to protect passengers in wheelchairs from being exploited by unscrupulous hackney carriage and private hire drivers. These vehicles are widely and frequently used by people in wheelchairs because they provide a safe, comfortable, reliable and door-to-door service, and the vast majority of hackney and private hire drivers will go out of their way to provide service which goes above and beyond the legislative requirements.

27 *Access for wheelchair users to Taxis and Private Hire Vehicles – Statutory Guidance* DfT 2017 avaialble at https://www.gov.uk/government/publications/access-for-wheelchair-users-to-taxis-and-private-hire-vehicles.

28 4th edition 2017 Bloomsbury Professional.

29 See paras 50 and 51.

30 [2015] EWHC 2918 (Admin).

31 At para 53.

32 At para 54.

33 [1993] Crim LR 708

However, as legislation is always required to prevent the actions of the few, this is a vital judgment in relation to those provisions.

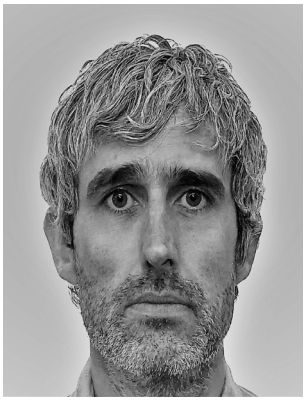
The judge is to be applauded for recognising that this was a matter of importance going beyond simply hackney carriages in London, and his comments on private hire within and outside London, and hackney carriages outside London will be extremely useful. There is an argument to say that those are actually *obita dicta,*[34] but they must be viewed as highly persuasive in the context of the legislation which covers both types of vehicles in both jurisdictions.

James Button
Principal, James Button & Co

34 That is, not part of the actual judgment on the point being considered (which is the *ratio decidendi*). The *ratio decidendi* is the binding precedent, and *obita dicta* are merely persuasive elements of the judgment.

Residents are an integral part of licensing: views must be sought

If residents' views are not sought, an applicant's licensing application may prove a long drawn out and costly business, writes **Richard Brown**



No one is very happy, which means it's a good compromise.
Tyrion Lannister, House Lannister.

Tyrion Lannister, the homunculan scion of the fictional TV fantasy show Game of Thrones, is known for, among other proclivities, pithy prognostications. Fortunately, he is adviser to the ruler of Westeros rather than to a licensing sub-committee. For although many licensing decisions involve what is, or amounts to, a compromise or compromises between different parties, either voluntarily or mandated by the licensing sub-committee, such compromises should not simply be a sop to the competing interests.

Contrary to Tyrion's pithy observation, a good licensing decision commonly takes the form of what amounts to a compromise, but one that should leave all parties happy that they have had the chance to put their case and be listened to, and one where their views are taken into account by the authority in making its decision.

In advising residents on their rights and responsibilities in respect of various licensing processes, the aim is to enable them to engage with and participate effectively (and responsibly) in the processes and, just as importantly, to enable them to feel that they are doing so; that they are an integral part of the process. This is the tricky bit. I am fortunate to undertake the vast majority of my work within an authority that prides itself on doing all it can to facilitate this, but the inherent contradiction between what residents feel should be the case and what the law requires to be the case is at times difficult to reconcile without alienating the very people whom Licensing Act 2003 intends to empower.

This came to my mind when reading a recent Institute of Licensing *Licensing Flash*, the weekly email bulletin sent out to all on the Institute's mailing list. The *Licensing Flash* typically assimilates licensing-related news stories which make the local or national press, with handy links to the press reports. Of course, given that the media exists in a world where a licence review form is a "dossier", an application is a "bid", a suggestion is a "vow" and an expression of concern becomes "residents' fury", it is necessary to look beyond this if searching for proper context. Doing so can dig up useful information.

Licensing Flash is an invaluable resource, particularly for those, such as myself and, I suppose, local authority practitioners, who work largely within one local authority area. Given the number of local authority areas in England and Wales, and that the legislation allows for a degree of autonomy in for example how a hearing is conducted, there are bound to be small differences across the areas. A private practice lawyer working across different local authority areas may become attuned to the subtle differences in a way which others may not. Nevertheless, no authority is perfect and it behoves us all to be aware of how other authorities do things. Examples of good practice, and bad practice, can inform and inspire. Here ends my paean to *Licensing Flash*.

One recent news story I was led to by the licensing flash was a licence review undertaken by residents. This immediately piqued my interest, as in my experience (which I appreciate from conversations with others is not necessarily reflected nationwide) residents do not undertake a licence review lightly, and that to do a licence review properly and effectively is to commit considerable time and effort, and some consider it to be an almost Sisyphean task. I have yet to encounter a resident who did not have something they would otherwise rather be doing than sit in a council chamber or committee room trying to ensure a peaceful night's sleep.

Many people have their own view about who comes out of the licensing process better: that an authority favours residents; or certain residents groups; or the trade in general; or is in thrall to the honeyed tones of specific lawyers; or blindly follows the advice of the police; or ignores everyone and, in one of the few well known judicial staples from the mists of time which has stayed with me from law school, goes off "on a frolic of their own".[1] This diversity of views can sometimes be expressed in the context of the same case.

1 See, eg, the judgment of Mrs Justice Black in *R (on application of Daniel Thwaites plc) v Wirral Magistrates' Court and Others* (2008) EWHC 838 (Admin).

In trying to ensure that residents are fully engaged with the process, I am particularly interested in those who feel that residents are favoured. The recent *Licensing Flash* report perhaps gives a different perspective.

A local paper reported on a licence review undertaken by residents under s 51 of the Licensing Act 2003. The review followed the grant of a variation of a premises licence for a pub permitting a terminal hour of up to 4am. This had, perhaps not surprisingly in a residential area, allegedly caused a number of problems. Surely residents had objected? Surely they had attended the hearing, or been represented, and had a full role to play?

The review application referred to residents not being able to attend the licence variation hearing due to holiday commitments; that they had arranged representation "which was approved" but were not allowed to speak. My enquiring mind / inherent nosiness led me to query the circumstances of the grant some months earlier. What I discovered underlines the importance of residents' views being taken fully into account - with a hearing being adjourned to allow this if necessary - to ultimately save time and money in the long run.

It was evident from the background papers that the variation application had been submitted over the summer period, when many residents were away. Fair enough - applicants can't simply not apply for licences over summer or Christmas in case residents are away. A few residents had nevertheless managed to submit "relevant representations". They could not, however, attend the hearing.

Two residents had sought to overcome the impediment of their non-attendance by asking a third party to represent them. This representative was duly in attendance at the hearing. According to the decision minutes, the applicant's representative seemingly was not happy that he had not been made aware that no residents would be present, nor that two of them would be represented by a third party. The applicant's representative felt that the applicant would not be able to question the representations or seek any clarifications.

The applicant's representative was asked if he "would accept representations being made by [the third party] as long his comments were restricted to the issues raised by [the residents]…and no new information was introduced". The applicant's representative (perhaps counter-intuitively in the light of the previous submission) felt this would not achieve anything because the councillors had the written representations in front of them and could "read them and refer to them as necessary".

Unfortunately, the residents' representative was then told that he would not be allowed to participate in the proceedings, although he could observe. He raised the question of whether he could refer to an issue in respect of the "blue notice". He was told that he could not, as new information could not be considered. Unsurprisingly, he decided to leave the meeting at this point.

On the available information in the public domain, this situation was manifestly unfair to residents. It also acts as a useful refresher on the relevant provisions of the Licensing Act 2003 (Hearings Regulations) 2005.

Regulation 21 empowers the authority to determine the procedure to be followed at a hearing, subject to the provisions of the regulations. A number of these are relevant to the facts set out and, if followed, would perhaps have led to both a fairer outcome being reached and being seen to be reached.

Firstly, a licensing authority could simply have adjourned the hearing under Regulation 12 which provides the power for a licensing authority to adjourn a hearing "where it considers this to be necessary for its consideration of any representations or notice made by a party".

Secondly, it is irrelevant whether an applicant has been made aware (a) which residents are attending, or whether none of them are; and (b) that residents are being represented by a third party. As per Regulation 8(1), a party shall "give to the authority within the period of time provided for…a) whether he intends to attend or be represented at the hearing".

Thirdly, although the residents' representative was told that he would not be allowed to speak, Regulation 15 states that "subject to regulations 14(2)[2] and Regulation 25,[3] a party may attend the hearing and may be assisted or represented by any person whether or not that person is legally qualified". Fourthly, an applicant's representative view on residents being represented by a third party and whether they "accept" that third party's "role in the hearing" is also entirely irrelevant. So, for that matter, is a licensing authority's opinion. Regulation 8(2) refers to a request for permission to be given to the authority for any other person *other than the representative* to appear at the hearing, eg, a witness.

Fifthly, where residents are represented, an applicant's representative is able to question the representations and seek clarification, because their views are being represented

2 The right for the licensing authority to exclude members of the public from all or part of a hearing if it is on balance in the "public interest" to do so.

3 The right for the licensing authority to require anyone behaving in a "disruptive manner" to leave the hearing.

by proxy. As per Regulation 16, the applicant's representative could only have asked questions of the residents if given permission by the authority to do so. Regulation 23 suggests that such permission shall only be given where the authority considers that it is "required for *it* to consider the representations…" (my emphasis). Cross-examination, while certainly having a place, should in my view be used sparingly. There is an inherent tension between this more adversarial dynamic and the direction in Regulation 23 for the hearing to take "the form of a discussion led by the authority". There should never be a danger of the discussion being "led" by the applicant (or, of course, by police, residents, the legal adviser etc). In the absence of permission for cross-examination, the authority should take on a more inquisitorial role (see commentary in *Paterson's* p777). How they can do this without residents present and without hearing from their representative is unclear.

Sixthly, the information about the "blue notice" was contained in the residents' representation and so was not "new information". As such, the information (which pertained to whether the application had been advertised correctly) was within the ambit of Regulation 19, which directs the authority to disregard information which is not relevant to their representation, and Regulation 18 concerning new / additional documentation.

How the residents felt about all this must be surmised as it is not recorded in the documentation in the public domain. One suspects that they would not have been enamoured with the process in this instance. The potentially deleterious effects of residents being, or feeling, excluded from proceedings is threefold. Firstly, the decision may not be as robust and "appeal proof" as it could be; secondly, residents may not feel it is worth their while to raise their concerns again; thirdly, it can simply end up in a review application further down the line which takes up much more resources, time and money for the authority and an applicant than ensuring that residents could play a proper role in proceedings in the first instance – even if that required an adjournment.

My experience representing residents suggests that where residents have access to proper advice and their participation - individual and / or collegiate - is enabled to ensure a more level playing field, they take away from the process much more understanding of an applicant's position, of the reasons for the licensing sub-committee's decision, and of the way in which that decision is reached. Although anecdotal, the fact that a very small number of licence reviews I have assisted residents with have been reviews of a licence or variation granted by the licensing authority *ab initio* (ie, as opposed licences carried over under the transitional provisions of Licensing Act 2003) speaks to the value of a robust, transparent and fair decision-making process that is seen to be so.

Of course, applicants and their representatives have every right to take an approach to residents' evidence and views as robustly as they see fit, within the regulations. But they should think carefully about stymieing the exposition of the proper concerns of residents. It can come back to haunt them further down the line.

Richard Brown MIoL
Solicitor, Licensing Advice Project, Westminster CAB

Institute of Licensing Pages

Membership renewal reminder

All our membership renewals were sent out before April, and a big thank you to all who have renewed and paid. If you have not received yours, please email: membership@instituteoflicensing.org.

It's more important than ever that memberships are renewed promptly this year due to GDPR so please help us to ensure our records are up to date. To view the benefits of membership, view our member benefits pages: http://www.instituteoflicensing.org/member_benefits.html

For subscription payments, we have various ways to pay, including telephone card payments and annual direct debits. For either of these please contact our Financial Controller, Caroline Day, on 0845 287 1347 or via email: accounts@instituteoflicensing.org

The team will continue to work hard to increase member benefits and to provide the best membership service possible. We are always open to suggestions for improvements, which can be emailed to: membership@instituteoflicensing.org

Consultations

Department of Transport Statutory Guidance Draft (Taxi and Private Hire Licensing)

The DfT consulted on its long-awaited Statutory Guidance (draft version) in February 2019. IoL consulted members via an online survey and a meeting of the Taxi Consultation Panel was convened to discuss the IoL response and also to look at other developments in taxi and private hire licensing. These included the findings and recommendations in the report published by the Minister's Task and Finish Group chaired by Professor Abdel-Haq, and the ongoing concerns around information sharing under police common law disclosure arrangements.

A response to the consultation was submitted on 22 April. The main points made via the IoL response were:

1. To support the need for training for all parties involved in the licensing system (noting the IoL development work in this area), and also those involved in the Appeals system.
2. Supporting the need for enhanced DBS checks not only for drivers but also for operators (and their staff) and vehicle owners.
3. The need for a national database, noting that NR3 take-up is incomplete (illustrated via IoL survey) and also that NR3 does not include suspensions as a result of legal advice. There is a potential side issue where local authorities allow licence holders to surrender their licences to avoid a suspension / revocation.
4. Support for national minimum standards.
5. Support for cross border enforcement arrangements – noting that this will require careful consideration and will be infinitely easier where there are national minimum standards. There will likely be a question of funding – particularly relevant for areas where there is a high level of operation by vehicles licensed by other authorities.

CCTV

The Draft Statutory Guidance refers to CCTV in vehicles and on this, the IoL response stated that it was clear from our survey responses and more widely, that not all local authorities are comfortable with the position on CCTV systems within vehicles. The response reads:

- There are concerns about the licensing authority being the data controller for such systems (one respondent points out that this is not the case for licensed premises CCTV systems), while other licensing authorities take the opposite view and consider it essential that they are the data controller.
- That said, there is no other licensing regime which puts an individual (the driver) in such complete control of member(s) of the public. We consider that local authorities would benefit from clear and detailed guidance about the legal position with such systems, including what the policy requirement can / should be in relation to audio and visual recordings, data retention, data control, and the ability to override or switch off the system.
- We are aware that the last point (the override / switch off) is currently under dispute and we await the outcome. We note that the legal position (stated through case law) is that once a vehicle is licensed as a hackney carriage or private hire vehicle it is a licensed vehicle 24 hours a day, 7 days a week for the duration of the licence regardless of its use. All of the requirements of the licence are therefore effective at all times, including the requirement that the vehicle can only be driven by a licensed driver. If the owner (presumably a licensed driver) wishes to use it for private purposes, they do so in the knowledge that it is licensed. In cases where the vehicle is subject to requirements for CCTV recording, this would be the case at all times when the vehicle is in use. The driver would not be able to remove the vehicle licence plate or do anything else to contravene the licence requirements – why should there be an exception for any

requirement for CCTV recordings?

Previous Convictions Guidance

We were pleased to note that the inclusion of the annex of convictions replicated to a great extent the IoL's Suitability Guidance (endorsed by LLG, LGA and NALEO).

That said, there was significant support via the survey and the TCP for the IoL Suitability Guidance to be incorporated in its entirety; and in particular to make it clear that licensing authorities should consider all information to hand when considering the suitability of an applicant (this will not always be in the form of a conviction).

In the IoL response, we recommended a wider approach which encourages and empowers licensing authorities to use all information, intelligence, complaints etc, when considering the suitability of an applicant.

Common Law Police Disclosure

Finally, the IoL response highlighted the current content within the Draft Guidance in relation to Common Law Police Disclosure (CLPD), which stated (Paragraphs 2.51 to 2.53):

> The new procedure provides robust safeguarding arrangements while ensuring only relevant information is passed on to employers or regulatory bodies. We would therefore strongly recommend that licensing authorities maintain close links with the police to ensure effective and efficient information sharing procedures and protocols are in place and are being used.

We referred to ongoing communications as a result of concerns raised by IoL members about the arrangements under CDPD, which in many cases are far from satisfactory. We had previously provided evidence in the form of survey reports which show that there is a great deal of inconsistency in relation to information sharing, and there are many instances where failure to share relevant information in a timely fashion (or at all) has undermined the ability of licensing authorities to take action to protect the public through the licensing regime. Dialogue is ongoing with NPCC and DBS on this.

Wales Government White Paper re taxis and private hire

The Wales Government consulted in December 2018 on its proposals to legislate for reforming the planning and delivery of local bus services and licensing of taxis and private hire vehicles.

A previous consultation, which closed in September 2017, had accepted the majority of the recommendations from the Law Commission report[1] in 2014, with further attention given to some matters including the big question of whether retaining the current two-tier arrangement (hackney carriages and private hire operating under different rules) would in fact outweigh the potential benefits of adopting a single-tier approach. That consultation document acknowledged that there are many arguments in favour of single tier, not the least being that this arrangement would be more easily understood by the travelling public. There was no suggestion at that point that local authorities would no longer retain responsibility for the taxi licensing function.

The consultation in December 2018 made no reference to the previous discussions and instead presented four proposals concerning taxi and private hire licensing:

- National Standards
- Cross border enforcement
- Information sharing
- Joint Transport Authority (to be licensing authority for Wales in place of the existing local authorities)

National Standards

The IoL response supported the need for national minimum standards and gave a number of suggestions about matters which might be included in considering what the standards should be, but referred to the recommendations of the Minister's Task and Finish Group which suggested that the standards should be drafted by a panel of regulators, passenger safety groups and operator representatives, and should then be subject to detailed consultation and reviewed in light of the responses received.

Cross Border Enforcement

The IoL supported the proposal that local authority officers should have the power to take action against vehicles (and drivers) operating in their area regardless of the licensing authority for that vehicle / driver. We noted that this will require careful consideration and guidance will need to be very clear. A further consideration relates to costs and funding, particularly where one area is very popular and may therefore end up with significantly more enforcement work than other areas, without necessarily benefitting from higher income through licensing.

Information sharing

The IoL response strongly supported the need for a national database and information sharing.

Joint Transport Authority (JTA)

The IoL response opposed this proposal.

1 Available at https://www.lawcom.gov.uk/project/taxi-and-private-hire-services/

We noted that the report from the Task and Finish Group (TFG), *Taxi and Private Hire Vehicle Licensing - Steps towards a safer and more robust system,* considered the single licensing authority model in London with TfL holding responsibility for taxi and private hire licensing across the 33 districts within Greater London - and felt that this model might work in some other areas. As a result, the TFG recommended that "large urban areas, notably those that have metro mayors, should emulate the model of licensing which currently exists in London and be combined into one licensing area. In non-metropolitan areas, collaboration and joint working between smaller authorities should become the norm." IoL noted that Wales is not a large urban area. It is over 8,000 square miles of mixed localities including remote rural villages and busy urban areas. Taxis provide a lifeline to those in remote areas, particularly in the absence of a strong public transport service. Local accountability, local conditions and local regulation are important in the interests of the travelling public and to maintain service provision in the more remote areas. Through the IoL Wales Region and the AWLEP, the Welsh local authorities have a strong network in place and are ideally set up to continue to increase collaborative working.

There was no consideration or information in the consultation document as to how a JTA would work, or the impact on the taxi industry or the population of Wales. In conclusion, the IoL response stated that we consider that this part of the consultation is lacking in any detail or substance and badly flawed. We strongly recommend that it is not progressed.

Wales Government consultation on Animal licensing (third party sales)

The Wales Government consulted on the issue of third-party sales of puppies and kittens in February 2018, and an IoL response was submitted in May.

The IoL response noted that while there had been some support for a robust licensing system in England as an alternative to a ban on third party sales, the underlying concerns intrinsically linked to third party sales including transportation, premature separation etc (as listed above) remained a high priority. Overall, the IoL response supported a ban on third party sales in the interests of consistency across England and Wales as it will set a clear regime with the same requirements across the area.

In addition, the IoL response noted that public awareness is critical, with whistle-blowing a significant intelligence source for unlicensed activities, and a ban on third party sales is easily understood and has few grey areas. In contrast, where some third party sales are licensed and legitimate and some are not, the participating members of the public are very unlikely to "whistle blow" – because they would not be in a position to understand the licensing regime. Full copies of all of the consultation responses are available via the website.

Jeremy Allen Award nominations

We are delighted to continue the Jeremy Allen Award, now in its ninth year, in partnership with Poppleston Allen Solicitors.

This is annual opportunity to nominate colleagues working in licensing and related fields, in recognition of exceptional commitment, energy, passion and achievements.

Nominations for the 2019 award are invited *by no later than 1 September 2019.* The criteria are shown below and we look forward to receiving nominations from you. Please email nominations to info@instituteoflicensing.org and confirm that the nominee is aware and happy to be put forward.

Award criteria

The award is a tribute to excellence in licensing and will be given to practitioners who have made a notable difference by consistently going the extra mile. The award criteria is available on the IoL website: https://www.instituteoflicensing.org/Jeremy_Allen_Award.aspx

The annual award seeks to recognise individuals for whom licensing is a vocation rather than just a job. Everyone nominated for this award should feel very proud that others have recognised their commitment and dedication. Previous winners of the Jeremy Allen Award are:

2018 – Stephen Baker
2017 – Clare Perry
2016 – Bob Bennett
2015 – Jane Blade
2014 – Alan Tolley
2013 – David Etheridge
2012 – Jon Shipp
2011 – Alan Lynagh

This award is a tribute to the life and professional career of Jeremy Allen, whose dedication to partnership working and best practice in licensing made him one of the most respected and popular figures in the industry. Jeremy sadly passed away shortly after becoming Chair of the Institute of Licensing, and we are pleased and proud to support this award by Poppleston Allen as an ongoing tribute to him.

Fellow and Companion nominations

In addition to the Jeremy Allen Award, the IoL has a Fellowship category for members following nomination and award.

Fellowship is intended for individuals who have made exceptional contributions to licensing and /or related

fields; Companionship is intended for individuals who have substantially advanced the general field of licensing.

Fellowship will be awarded, following nomination by two members of the Institute, to an individual where it can be demonstrated to the satisfaction of the Institute's delegated committee that the individual:

is a member of the Institute or meets the criteria for membership; has made a significant contribution to the Institute; and has made a major contribution in the field of licensing, for example through significant achievement in one or more of the following areas:

- Recognised published work.
- Research leading to changes in the licensing field or as part of recognised published work.
- Exceptional teaching or educational development.
- Legislative drafting.
- Pioneering or taking a leading role in licensing initiatives or developments leading to significant changes or having a significant impact.

It is stressed that Fellowship is intended for individuals who have made exceptional contributions to licensing. Nominations are welcomed at any time and should be emailed to **info@instituteoflicensing.org**

All awards are presented annually at the Gala Dinner during the IoL's National Training Conference, which this year is at the Crowne Plaza Hotel, Stratford-upon-Avon on the evening of Thursday 21 November.

National Licensing Week

National Licensing Week started in 2016 as a means of highlighting and promoting the importance of licensing in everyday life. The theme for 2016 was "Licensing is everywhere" and nationally we have had teams of people getting involved. There were job swaps from Government Departments, local authorities and the trade. The Gambling Commission organised a national day of action and there was much social media activity from all sides promoting the week.

Building on the success of the last three years, this year's National Licensing Week was again held over five days, from 17 to 21 June 2019, with each day focusing on activities that reflect the wide reach of licensing in everyday life:

- Day 1 – Positive Partnership
- Day 2 – Tourism and Leisure
- Day 3 – Home and Family
- Day 4 – Night time
- Day 5 – Business and Leisure

A big thank you to everyone who contributed to this important initiative, and we look forward to planning and progressing NLW2020.

If you didn't get a chance to get involved this year, start thinking about what you could do next year – this is the biggest chance to showcase your organisation and how/ where licensing fits in.

IoL Training and Events

2019 is proving to be another exceptionally busy year for IoL training courses and event. We were delighted to launch a series of basic and advanced taxi licensing courses in association with Button Training Ltd. These courses are proving very popular this year and we will be rolling out further courses on an annual basis.

Our ever popular Professional Licensing Practitioners Qualification courses have been held across the country again this year, with upcoming courses in Leeds and London in September, and South Wales in October book online via: **https://www.instituteoflicensing.org/Events.aspx**

Summer Training Conference 2019

The IoL's Summer Training Conference took place during National Licensing Week on Wednesday 19 June at the DoubleTree by Hilton Oxford Belfry Hotel. A huge thank you goes to our speakers who delivered an excellent training day for all concerned, sponsors who supported the event and of course our delegates for joining us.

National Training Conference 2019

The IoL's signature event, the National Training Conference (NTC) returns to the Crown Plaza Hotel in Stratford-upon-Avon again this year from 20-22 November.

The NTC programme is, as usual, a comprehensive programme with sessions covering the whole range of licensing topics, delivered by an extensive range of excellent speakers. The programme is designed to enable delegates to tailor their individual training package to suit their interests and training needs.

The days are themed to ensure there is always a training topic that will be of interest to delegates. The programme can be viewed by clicking the Learn More button on the Events page of the website.

We are always happy to have suggestions and ideas for sessions and speakers, and feedback on how we can continue to improve the event generally is also very welcome. This is a fantastic event to organise and participate in and we look forward to welcoming new and regular delegates for three

packed days of discussion debate and unrivalled networking.

The Early Bird Discount ends on 31 August so be sure to book your place now.

Event queries and booking requests should be directed to **events@instituteoflicensing.org** When emailing to book your place, please include details of how many days and nights you wish to book, and provide a purchase order number if you use a purchase ordering system.

Sue Nelson
Executive Officer, Institute of Licensing

IoL Events Calendar 2019 / 2020

August 2019

8 East Midlands Region Meeting & Training Day - Nottingham

tbc South West Regional Meeting & AGM - venue tbc

September 2019

3 West Midlands Region Meeting & Training Day - Solihull

5 North East Region Meeting & Training Day - York

4 & 5 Zoo Licensing - Yorkshire Wildlife Park (Doncaster)

9 Taxi Licensing (Advanced) - West Bridgford

11 Taxi Licensing (Advanced) - Basingstoke

11 North West Region Meeting & Training Day - Accrington

17 Taxi Licensing (Advanced) - Taunton

17-20 Professional Licensing Practitioners Qualification - Leeds

18 Home Counties Region Training Day & AGM - venue tbc

20 London Region Meeting & Training Day - venue tbc

24 Taxi Licensing (Advanced) - Preston

24-27 Professional Licensing Practitioners Qualification - London

26 Taxi Licensing (Advanced) - Harlow

October 2019

2 Safeguarding through Licensing - Doncaster

8 Taxi Conference - Swindon

15 Safeguarding through Licensing - Taunton

22 - 25 Professional Licensing Practitioners Qualification - Wales

November 2019

20-22 National Training Conference

December 2019

5 West Midlands Region Training Day - venue tbc

5 East Midlands Region Training Day - venue tbc

5 North East Region Training Day - venue tbc

11 North West Region Training Day - venue tbc

11 South East Region Training Day - venue tbc

February 2020

tbc Public Safety at Events

March 2020

17-20 Professional Licensing Practitioners Qualification - Nottingham

Bespoke - As well as offering training open to all we provide bespoke training courses which can be delivered at your organisation. The training courses would be for your employees / councillors etc and closed to general bookings. For more information and to obtain a quote please email your requirements to **training@instituteoflicensing.org**

Soundscape and licensing – the best of both worlds?

Against the backdrop of rapid urbanisation, can we really have it all - vibrant, exciting 24/7 cities, yet restorative places when and where we need them? Soundscape practitioners say "yes". **Lisa Lavia** explores this fundamentally new approach to urban planning

In common discourse, noise and sound are often used synonymously. However, sound is a physical phenomenon defined by the *Oxford English Dictionary* as "vibrations that travel through the air or another medium and can be heard when they reach a person's… ear." Noise, by contrast, is a perceptual judgement made by the hearer, either consciously or subconsciously, of *unwanted* sound. Equally, a person may judge the same sound either "pleasant" or "annoying", for example, depending on various factors including: the sound's interference with or conduciveness to activities such as work, play or relaxation; congruence of the sound in context; the meaning ascribed by the hearer to the sound; and / or the hearer's ability to control the sound's volume, length or abeyance.

This is because sound affects people emotionally, physically and biologically in everything that they do. The ways in which people judge, classify or ascribe meaning to sound is a cognitive function of the brain, as opposed to the mechanical function of hearing. Thus, sounds can evoke a range of human emotions - making people laugh, cry, smile, shout, reminisce and more. These reactions can be experienced either subconsciously or consciously, on a continuum in line with the hearer's emotional response, to the sound in context.[1]

Definition of soundscape

For planners, designers and practitioners, the human response to sound has been defined by the International Organisation for Standardisation (ISO) in the world's first soundscape standard as 'the [physical] acoustic environment as perceived or experienced and/or understood by a person or people in context'.[2] Specifically, the standard describes: "Examples of factors that may influence the interpretation of auditory sensation [ie, hearing] include: attitude to the sound source and to the producer of the sound, experience and expectations (including cultural background, intentions or reason for being at a place), as well as other sensory factors, like visual impression and odour; and examples of factors that may influence the responses to an acoustic environment [ie, the context] include: time of day, lighting and weather, emotional state, psychological and physiological resources to deal with the situation, perceived ability to control one's exposure to sounds, as well as personal activities and those of others."[3]

The City of London in its Noise Strategy 2016-2026[4] features soundscape management as a requirement for certain aspects of local development and management of the built environment (see more below). The policy elaborates on the definition of soundscape using concepts in the European Landscape Convention[5] by drawing analogies between soundscape and landscape, stating that:

> *Landscape is regarded as both a perceptual construct and a physical phenomenon and has been defined in the European Landscape Convention as 'an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors'. Landscape can take a geographical form, or be a system of physical components, or be a place for recreational activity, or a determinant or reflection of culture (eg, a landscape painting), or the component of an activity such as landscape planning. A parallel description of soundscape would become – the acoustic environment of a place, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors.*

Soundscape versus conventional noise control methods

Soundscape uses a variety of multi-disciplinary methods to measure and assess the perception by people of the physical acoustic environment regardless of the sound source. These may include a combination of social, physiological, psychological, design and engineering methods.

1 Amplifon (2019). *The impact of sound on the brain.* Available at: http://www.amplifon.ie/resources/impact-of-sound-on-the-brain/. Accessed 30.05.19.

2 International Organisation for Standardisation (2014). ISO 12913-1:2014 Acoustics — Soundscape — Part 1: Definition and conceptual framework. Geneva: ISO.

3 *Ibid.*

4 City of London (2017). Noise Strategy 2016-2016. London: City of London Corporation.

5 Council of Europe (2000). European landscape convention. Florence: European Treaty Series.

This is a departure from conventional acoustic assessment and measurement methods wherein noise is measured using decibels and the effects on people predicted through various calculation methods. Decibels are a unit of measurement that reflect certain aspects of sounds and, typically, in environmental noise management, include weighted adjustments with the aim of predicting the human response to the noise source(s). While traditional methods may also be augmented with survey, design, physiological, and psychological data collection, this is not a requirement and methods can vary widely amongst practitioners, if used at all.

The City of London's noise policy articulates the role of soundscape management as distinct from noise control and abatement, explaining in s 5.3 that: "The management of soundscape overlaps with, and arguably embraces and develops the better established but narrower concept of environmental noise management… [in which] sound is conceived as a waste product to be removed and reduced where necessary… soundscape [practice] treats sound largely as a resource to be protected and enhanced where appropriate so as to contribute to an improvement in human quality of life".[6]

Pragmatically, as the use of soundscape methods is still relatively new, some practitioners use a combination of methods from both soundscape and noise control engineering and triangulate the findings to achieve a more holistic understanding of the effects on people from a single noise source or the wider acoustic environment.

Traditionally, noise nuisance laws have been primarily concerned with controlling noise at source and abatement techniques. The *de facto*, if unintended, consequence of this approach has been a dampening of the requirement or incentive to adopt holistic design techniques. Decades of managing environmental noise in this way has resulted in increased noise problems in the built environment because people don't simply respond to sound, loud or otherwise, based on levels. A simple illustration of this concept is a dripping tap which can be highly annoying though not very loud, while a loud entertainment event can be perceived as very pleasant and desirable for those choosing to attend it yet highly disturbing to those trying to work or sleep nearby.

Soundscape practice, while still in the early stages, aims to address such dichotomies by establishing harmonised research, evidence and methods to accurately assess and predict the human response to sound in context. Soundscape seeks to do this by taking a holistic and creative approach to designing "shared space" acoustic environments which consider the acoustic character and ambience of places, and the effect on people, at the outset of the design process. This approach is akin to that used for effective land use planning and mixed-use developments. In the case of urban planning, the need for better solutions for designing the acoustic environment is crucial lest we live in cultural "deadzones" or "noise prisons".

While some may surmise that noise pollution is the inevitable by-product of urbanisation, soundscape proponents disagree.[7] Noise pollution in the built environment is the result of planning and design issues, not the inability of practitioners to solve the problems.

Ultimately, as summarised by the Institute of Acoustics, "avoiding noise problems in the built environment is not as simple as controlling for noise levels… a holistic approach that considers the difference between the purely physical quality of sounds – for instance the frequencies, tonal characteristics and decibel levels – building upon existing noise control methods and the human perception of sound is necessary."[8]

Soundscape standardisation

In 2009 the International Organisation for Standardisation (ISO) convened the world's first international standardisation committee on soundscape: ISO Technical Committee 43, Sub-Committee 1 on Noise, Working Group 54. ISO TC43/SC1/WG54 *Perceptual assessment of soundscape quality* has since published two interntional standards: ISO 12913-1:2014 – Acoustics – Soundscape – Part 1: Definition and conceptual framework;[9] and ISO/TS 12913-2:2018 - Acoustics – Soundscape – Part 2: Data collection and reporting requirements.[10] Part three of the series, ISO/DTS 12913-3 – Acoustics – Soundscape – Part 3: Data analysis,[11] is, at the time of writing, in committee undergoing development. The British Standards Institution (BSI), the national standards body for the UK, holds the convenorship of the international soundscape working group, putting the UK at the forefront of the development of soundscape standards globally. The two published international soundscape standards have also

6 City of London (2017). Noise Strategy 2016-2016. London: City of London Corporation.

7 Lavia, L., Dixon, M., Witchel, H.J., Goldsmith, M., (January 2016). *Applied Soundscape Practices*. In J. Kang & B. Schulte-Fortkamp (Eds.), *Soundscape and the Built Environment*. London, UK: CRC Press. Pages: 243 – 301.

8 Institute of Acoustics. (2018). Soundscaping Briefing Note for MHCLG. June 2018. Prepared by Peter Rogers, Lisa Lavia, Jian Kang. Milton Keynes: IOA.

9 International Organisation for Standardisation (2014). ISO 12913-1:2014 Acoustics — Soundscape — Part 1: Definition and conceptual framework. Geneva: ISO.

10 International Organisation for Standardisation (2018). ISO 12913-2:2018 Acoustics — Soundscape — Part 2: Data collection. Geneva: ISO.

11 ISO/DTS 12913-3 – Acoustics – Soundscape – Part 3: Data analysis: Geneva: ISO.

been adopted into British standards as BS ISO 12913-1:2014[12] and PD ISO/TS 12913-2:2018.[13]

Brief overview of soundscape in EU and UK policy and guidance

Against the backdrop of soundscape standardisation, responsible authorities are increasingly recognising the value of soundscape practice in policy and guidance.

The European Environment Agency in its *Good practice guide on quiet areas*[14] s 3.2 identifies soundscape as an indicator in the selection criteria for quiet areas, stating in s 7.1 that "most of the currently used sound-level meters do not have the capacity to separate the sound-pressure levels of noise sources from the sound-pressure levels of wanted sounds… this supports the observation that there is a need for new approaches towards measuring the acoustic quality of quiet areas, which move beyond sound-pressure levels. Soundscape is one such new approach."

While the EEA's guidance is in regard to the management of quiet areas, it clearly acknowledges the strength of soundscape's application for designing areas of good acoustic quality to support the intended use of places.

In the UK, Westminster City Council updated its noise policy in 2010 to include a "Noise and soundscape management framework".[15] The policy, still referenced as current on its website, highlights the benefits of good acoustic design in s 3, table 1, stating that "improving the overall quality of the sound environment is more than just about noise levels… there is considerable scope to enhance the sound environment by considering the role of positive sounds".

Similarly, the Mayor of London identified the benefit of soundscape management in the London Plan[16] (2016), policy 7.15 "Reducing and managing noise, improving and enhancing the acoustic environment and promoting appropriate soundscapes". The policy overtly links soundscape management with planning decisions by stating the need for development proposals that seek to manage noise by "improving and enhancing the acoustic environment and promoting appropriate soundscapes".

Referenced within the London Plan is *Sounder City: the Mayor's Ambient Noise Strategy for London*[17] (2004), wherein policy 78 states: "The Mayor will urge London Boroughs and others with responsibilities for open spaces and public realm management to consider the need for frameworks for managing soundscapes… [including] … exploring designation of Areas of Relative Tranquility or Special Soundscape Interest".

The City of London Corporation formally designated soundscape management as part of its Noise Strategy 2016-2026[18] in which chapter 5 "Protecting and enhancing the acoustic environment and soundscape", section 5.2, states the City's overall aim: "To protect, and where possible enhance, the acoustic environment and soundscape in suitable parts of the City in such a way that any measures will contribute to an improvement in health and quality of life and wellbeing for residents, workers and visitors."

Elaborating further, the City's policy recognises the value in protecting and enhancing the unique nature of the City's sonic identity as distinct from simply stopping noise, stating: "The soundscape of the City is an inherent part of the overall character of the Square Mile… it impacts directly on residents, workers and visitors… its management is just as important as the visual landscape yet it is sometimes not even considered by architects and wider design teams and we would like this to change."[19]

Building on the momentum of the preceding policies, the Welsh Government has become the first to enact a *national* soundscape policy. The requirements of good acoustic design and soundscape management have been explicitly linked in both the noise and planning policies in Wales.

The Noise and Soundscape Action Plan 2018-2023[20] is the Welsh Government's central noise policy document, and has been produced collaboratively with local authorities and other public bodies. In the policy's Ministerial Forward, Hannah Blythyn AM, then Deputy Minister for the Environment, underscored the change in approach required to improve soundscape management in Wales, directly linking this to public wellbeing, stating: "We need to create appropriate soundscapes, meaning the right acoustic environment in the right time and place… towns and cities… should therefore contain a variety of soundscapes appropriate to the land use… there should not be a one-size-fits-all urban soundscape… any more than every street and

12 British Standards Institution (2014). BS ISO 12913-1:2014 Acoustics – Soundscape - Definition and conceptual framework. London: BSI.

13 British Standards Institution (2018). PD ISO/TS 12913-2:2018. Acoustics – Soundscape – Data collection. London: BSI.

14 European Environment Agency (2014). Good practice guide on quiet areas. Luxembourg: European Union.

15 City of Westminster (2010). Westminster Noise Strategy 2010-2015. Available at: https://www.westminster.gov.uk/noise-strategy. Accessed 30.05.19.

16 Greater London Authority (2016). The London Plan. London: GLA

17 Greater London Authority (2004). Sounder City – The Mayor's Ambient Noise Strategy. London: GLA.

18 City of London (2017). Noise Strategy 2016-2016. London: City of London Corporation.

19 *Ibid.*

20 Welsh Government. (2018). Noise and soundscape action plan 2018-2023. Cardiff: Crown copyright.

building should look alike… over the coming years, I expect public bodies in Wales to start thinking less in terms of pure noise mitigation and more in terms of creating healthier soundscapes for our communities."Echoing this sentiment, in a written statement Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs,[21] confirmed the aim of the new Planning Policy Wales Edition 10[22] (PPW) is not "business as usual" but rather that it "ensures planning decisions consider all aspects of well-being and deliver new development which is sustainable and provides for the needs of all people… promoting placemaking with a view to achieving sustainable places." The Minister's statement ends with a distinct call to action, stating that "planners must, once again, become creators of better places, rather than regulators of others proposals."Soundscape is embedded throughout PPW. In s 3.23 it states that: "The compatibility of land uses will be a key factor in… creating appropriate soundscapes which are conducive to, and reflective of, particular social and cultural activities and experiences, particularly in busy central areas of towns and cities."[23]

The expectation the Welsh Government exhibited through these policies is clear: change needs to happen and to do so requires creative thinking and a willingness to explore and embrace new solutions. To support this process the Welsh Government will be producing a series of Technical Advice Notes (TANs) to provide guidance that sits behind the new policies. The importance of a framework for practical implementation was noted in the consultation response from the Institute of Acoustics, which stated: "Although the [Noise and Soundscape Action Plan 2018-2023] introduces the concept of soundscape into Government policy, it is important to recognise that this should be regarded as a first step… there is the scope for more guidance."[24]

Soundscape principles within local and devolved government policies in the UK sit firmly within the UK Government's overarching policy, the Noise Policy Statement for England (NPSE),[25] which sets out the long-term vision in s 1.6 to "Promote good health and a good quality of life through the effective management of noise within the context of Government policy on sustainable development."In s 1.8, "Guiding principles of sustainable development", the NPSE clarifies that its vision and aims "should be interpreted with regard to the Government's sustainable development strategy", including "ensuring a strong, healthy and just society by meeting the diverse needs of all people in existing and future communities, promoting personal wellbeing, social cohesion and inclusion, and creating equal opportunity for all".

In s 2.3 the NPSE explains that the aim of noise management through the Environmental Protection Act 1990 has been to minimise noise "as far as reasonably practical", which in some cases gives rise to the "defence of 'best practicable means' in summary statutory nuisance proceedings". Countering the issues that can arise from considering noise either in isolation or too far along in the development process, the NPSE in ss 2.6-2.7 states that "noise should be properly taken into account at the appropriate time" in order to avoid subsequent noise issues when "cost effective management of noise isn't considered at an early enough stage."Crucially, in s 2.8 the NPSE states its aim that "existing [local and national] policies could be reviewed (on a prioritised basis), and revised if necessary, so that the policies and any noise management measures being adopted accord with the vision, aims and principles of the NPSE." This is a strategy that, as discussed earlier, is being proactively implemented by local and national policy makers where possible, given adequate understanding of the options and local support.

Soundscape and licensing

Balancing the objective of the Licensing Act 2003[26] in part 4, section (2)(c) to "prevent public nuisance" in respect of noise with that of the National Planning Policy Framework (NPPF)[27] (2019), section 170 (e) requirement of "preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of noise pollution" is a cause of ongoing concern for developers and venues. While the adoption of the agent of change principle within the NPPF may provide greater opportunity for new developments, any benefits it may afford can only be realised if soundscape management through good acoustic design is both achievable and practicable.

Whether for new or existing developments, soundscape principles as described provide the framework for flexible, proportionate and effective design measures for venues and developers. Soundscape methods can support licensing objectives through offering viable creative solutions to solving and designing out noise problems via both planning and licensing regimes.

According to the Mayor of London, to help achieve

21 Welsh Government. (2018). Written Statement: Publication of Edition 10 of Planning Policy Wales. Available at: https://gov.wales/written-statement-publication-edition-10-planning-policy-wales. Accessed at 30.05.19).

22 Welsh Government. (2018). The Planning Policy Wales, Edition 10. December 2018. Cardiff: Crown copyright.

23 *Ibid.*

24 *Ibid.*

25 Department for Environment, Food and Rural Affairs. (2010). Noise Policy Statement for England. March 2010. Defra. London: Crown copyright.

26 The Licensing Act. (2003). England and Wales. Available at: https://www.legislation.gov.uk/ukpga/2003/17/pdfs/ukpga_20030017_en.pdf. Accessed 30.05.19.

27 Ministry of Housing, Communities & Local Government. (2019). National Planning Policy Framework. February 2019. London: Crown copyright.

this, "soundscape design may encompass the reduction or elimination of certain sounds (ie, 'noise abatement'); preservation of certain sounds (ie, 'soundmarks' that distinguish a place as unique or valued); and / or the combination and balancing of sounds to create or enhance an attractive and stimulating acoustic environment (for example, analogous to the sound engineering of products)."[28] This latter point is being achieved through a variety of design options based on for example, but by no means limited to: types of materials, the shape of buildings and street furniture, green spaces, the use of water features and variations in urban morphology.

Conclusion

Soundscape practice measures and assesses the human response to sound in context. This knowledge can be used to inform design principles and specifications at the outset of new or existing developments to ensure good acoustic design is "baked in" to projects. By doing this, effective placemaking can deliver the joint requirements of vibrant cultural and commercial offerings alongside areas where people can also live and work, while still enjoying the necessary peace and restorative aspects needed to promote good health and wellbeing.

Soundscape presents a new creative palette for practitioners from which to design for local specifications and requirements. By applying existing best practice from soundscape research and practice, one building at a time and one venue at a time, the evidence base will expand and new precedents for what is achievable will be set.

We are not starting from zero. Policymakers support soundscape principles. Research is ongoing. Practitioners are continually expanding their skills in order to adopt and utilise the tools. Soundscape is set to stay because it provides crucial answers to increase well-being in the built environment through holistic design of our towns and cities.

Lisa Lavia
Managing Director, The Noise Abatement Society

28 *Greater London Authority. (2004). Sounder City – The Mayor's Ambient Noise Strategy. London: GLA.*

Stake reductions for B2 gaming machines will have consequences

Half of the country's betting shops may close as a result of the recent stake reductions for B2 gaming machine, leading to many gamblers going online, suggests **Nick Arron**

Since the last *Journal* we have seen important developments in relation to gaming machines, with the nail in the coffin of B2 gaming machines and a call for evidence focusing on B3 gaming machines.

On 1 April 2019 the Gaming Machine (Miscellaneous Amendments & Revocation) Regulations 2018 came into force. The regulations reduced the stake permitted on the Category B2 gaming machine, predominately found within betting shops, from £100 to £2. This brought an end to the long-running debate about the harm caused by the B2 gaming machines, or fixed odd betting terminals as they are more often named in the media.

In recent years, the B2 gaming machines have been subject to widespread concern from politicians, the media and sectors of the gambling industry. The £100 stake and particularly the roulette games, in the minds of many, led to widespread problem gambling and issues of violence and disorder within betting shops. This debate has now largely come to an end.

The background to the stake reduction began on 21 October 2016, when the Department for Digital, Culture, Media and Sport (DCMS) issued a call for evidence regarding maximum stake and prizes of gaming machines across all premises licensed under the Gambling Act 2005, the number and location of gaming machines across all licensed premises, and social responsibility measures to protect players and communities from gambling-related harm. The real focus of the call for evidence was the B2 gaming machine.

Following this call for evidence, the Gambling Commission issued a consultation in October 2017 with hard proposals for reducing the stake on the B2 machine. Responses to the consultation by the industry, regulator and health groups suggested stakes be cut to somewhere between £50 to £2. In May 2018, the DCMS published its response to the consultation with proposals for changes to gaming machines and social responsibility measures. In the response, the Government confirmed it would be reducing the stake on B2 gaming machines from £100 to £2, with the aim of reducing harm for those most vulnerable by reducing the ability to suffer high session losses, while also targeting the greatest proportion of problem gamblers and mitigating risk for the most vulnerable players for whom even moderate losses might be harmful.

The most recent gambling industry statistics from the Gambling Commission, from March 2018, show 8,406 betting shops in Great Britain, 1,606 licensed arcades (this is both adult gaming centres and family entertainment centres) and 181,309 gaming machines in licensed gambling premises (this includes casinos, bingo, betting shops and arcades, but does not include gaming machines in pubs or other venues holding permits). Of those machines, 32,956 were Category B2 gaming machines.

Betting shops are permitted to operate up to four gaming machines of either category B2, B3, B4, C or D. Although the B2 machine remains a permitted machine category, the stake reduction is likely to result in the end of the roulette-style games. They are by far the most popular game on B2 machines. Instead, game developers will focus on slot-style games on B3 gaming machines.

The impact of the stake reduction on the bookmaking industry is likely to be significant. Estimates vary but bookmakers believe that up to half of betting shops could eventually close as players move to alternative gambling products or cease playing. We have already seen the number of betting shops start to decline. Many punters are expected to go online for their betting and gaming.

This may be an opportunity for the arcade industry. Some bookmakers have already begun to convert their betting shops into adult gaming centres. Ladbrokes has converted a handful of its shops into arcades and BACTA, the gaming machine industry body, has championed the future of arcades in light of the B2 stake reduction. This may also be an opportunity for bookmakers to refocus back on betting.

The hope is that we should also see a decline in problem gambling in betting shops.

Gambling Commission call for evidence

The regulator's focus, and the media spotlight, have now shifted to online gambling and to some extent to the B3 gaming machines which are found in arcade and bingo and casino premises, as well as betting shops.

The DCMS in its response to the gaming machine consultation on proposals for changes to gaming machines and social responsibility measures announced in May 2018 the reduction in the stake of B2 gaming machines. The response also referred to the risks posed by other Category B gaming machines, and welcomed steps taken by the Commission to take forward proposals to improve player protections on B1 and B3 machines, including measures such as time and spend limits for players, which are already in place on B2 gaming machines.

Thus in February this year we had the Gambling Commission's call for evidence regarding player protections on Category B Gaming Machines, which closed on 16 May.

Within the call for evidence the Gambling Commission refers to incentives for the industry to demonstrate a commitment to enhance the effectiveness of player protections on Category B gaming machines. The incentives are:-

- Potential to use player data to understand patterns of play and offer a more personalised customer experience.
- Prospect of changes to stake, prizes and machine allowances where the industry can demonstrate that it can manage the risk of gambling related harm effectively.
- Opportunity to focus on what works and pre-empt a more direct regulatory intervention, which could in turn mandatory controls for a review of key game characteristics such as speed of play.

The Gambling Commission went on to refer to two concerns, namely:-

1. Efforts to develop a clear framework to trial meaningful controls have been inconsistent and, in some instances, non-existent.
2. The risks associated with Category B3 Machines have been acknowledged by some but not all sections of the industry.

The focus on category B3 machines can be tracked to their availability and speed of play. Category B3 machines are sited in arcades, bingo halls, betting shops and casinos. As of 1 April this year the Category B3 machines were offered the same maximum stake levels as B2 but at eight times the speed of play, and currently the B3s do not have the same level of built-in player protection. B2 machines have the facility within the games for the customer to set limits on the amount of time they play or the amount they spend. The Gambling Commission's call for evidence refers to these limits and it is likely that they will be introduced within the B3 machines.

The call for evidence also refers to the possibility of introducing tracked play across category B1, B2 and B3 machines. This would provide data to allow operators to potentially identify players at risk of harm more effectively, and enable them to monitor interventions that they implement. It would also give players access to gambling management tools, potentially including where play is across multiple sessions.

The industry is concerned with the projected costs of implementing such a system as currently the technology does not exist across B1, B2 and B3 machines to facilitate tracked play. Gaming machines are set to remain at the forefront of gambling regulation for some time to come.

Licence conditions and codes of practice requirements

On 7 May this year the Gambling Commission introduced amendments to its licence conditions and codes of practice for remote-operating licence holders.

The new rules aim to make gambling safer and fairer by requiring licensees to:

- Verify, as a minimum, the name, address and date of birth of customers before allowing them to gamble.
- Ask for any additional verification information promptly.
- Inform customers, before they can deposit funds, of the types of identity documents or other information that may be required, the circumstances in which the information may be required, and how it should be supplied to the licensee.
- Take reasonable steps to ensure that information about customers' identities remains accurate.

Until 7 May gambling businesses had been allowed 72 hours to complete age-verification checks, although operators could not permit customers to withdraw winnings until the age-verification process had been completed. This is no longer permitted.

The new rules ensure that a customer's age must be verified before they can deposit money or gamble.

The Gambling Commission will also require that a customer's age must be verified before they are able to access free-to-play versions of any online games. While free-to-play games are not technically gambling as there is no prize involved, the Commission has stated that there is no reason why such games should be made available to children on a licensee's website, as there is potentially a risk of harm.

The amendments have been designed to help to protect children and vulnerable individuals and reduce the risk of crime associated with gambling.

Nick Arron
Solicitor, Poppleston Allen

Competency in aerial performers

The daring young man on the flying trapeze may well fly through the air with the greatest of ease – but equally he might one day fall. **Julia Sawyer** considers the steps to be taken in order to minimise that risk

How do you assess whether an aerial performer is competent? How do you judge whether such an individual has sufficient skill on a flying trapeze – or a static trapeze, a doubles trapeze, aerial hoops, ropes and silks or when performing acrobatics - to ensure that neither they nor the public are put at risk?

Defining competency is a subjective matter. *The English Oxford Dictionary* defines it as "the ability to do something successfully or efficiently." Whereas *The Cambridge English Dictionary* says competency is "an important skill that is needed to do a job."

The Health and Safety Executive has its own definition: competence is "the combination of training, skills, experience and knowledge that a person has and their ability to apply them to perform a task safely. Other factors, such as attitude and physical ability, can also affect someone's competence."

Many performers want to push boundaries; they want to try new things that will wow the audience. Inevitably this will involve an element of risk. The management of that risk needs planning and consideration and part of that risk management process will include looking at competencies of the performer.

The inadequate management of competence generally has contributed to disasters, fatalities, personal injuries and ill health in all walks of life. This article specifically looks at the competencies required for aerial performers and what should be considered when assessing the risk in relation to the training and experience that such a person has.

Legal requirements

If aerial activity is planned as part of a performance, the competency of the performer(s) will be carried out as part of the risk assessment process. In relation to competency the Management of Health and Safety at Work Regulations 1999 specifies at Regulation 13:

> Every employer shall, in entrusting tasks to his employees, take into account their capabilities as regards health and safety.
>
> *(2) Every employer shall ensure that his employees are provided with adequate health and safety training—*
> *(a) on their being recruited into the employer's undertaking; and*
> *(b) on their being exposed to new or increased risks because of—*
> *(i) their being transferred or given a change of responsibilities within the employer's undertaking,*
> *(ii) the introduction of new work equipment into or a change respecting work equipment already in use within the employer's undertaking,*
> *(iii) the introduction of new technology into the employer's undertaking, or*
> *(iv) the introduction of a new system of work into or a change respecting a system of work already in use within the employer's undertaking.*
> *(3) The training referred to in paragraph (2) shall—*
> *(a) be repeated periodically where appropriate;*
> *(b) be adapted to take account of any new or changed risks to the health and safety of the employees concerned; and*
> *(c) take place during working hours.*

Section 2 (2)(c) of the Health and Safety at Work etc, Act 1974 states that an employer must ensure:

> *The provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;*

Section 3 (1) provides:

> *It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.*

Regulation 5 of the Work at Height Regulations 2005 states:

> *Every employer shall ensure that no person engages in any*

activity, including organisation, planning and supervision, in relation to work at height or work equipment for use in such work, unless he is competent to do so, or if being trained, is being supervised by a competent person.

In *Managing for Health and Safety* (HSG65), the "Plan, Do, Check, Act" approach shows how to achieve a balance between the systems and behavioural aspects of management. Planning for a performance would assess what training and experience the performer has in order to determine what type of rehearsal and training needs to take place. Then it suggests the training would be supervised and monitored by an experienced and qualified person (it would need to be explained how this person is considered experienced and qualified) to determine if further rehearsal or training or modifications to the change in the design of the performance space needs to take place. The competence of a person needs to be continually monitored and assessed throughout a performance.

There is no legislation or formal standard that states you must have a specific qualification to be able to carry out aerial work. Determining competency of an aerial artist has to be risk assessed. The assessment should take into account qualifications, experience, medical fitness, emotional behaviours, any known medical conditions that may affect working at height and where the performance is going to take place. Competency is only part of the risk assessment process as there are many technical aspects to consider, such as the structure and the equipment / material being used to carry out the aerial activity, but this article is concentrating purely on the competency aspect.

Guidance and other considerations

The level of training attained is an important component of establishing competency but is not sufficient on its own. For example, consolidation of knowledge and skills through rehearsing is a key part of developing competency.

Competency can be affected by complex activities that are not carried out very often, by emergency situations during a performance and by emotions on the day.

To help achieve the right level of competency, there are various study courses leading to qualifications for prospective aerial performers. There is a Foundation Degree in Circus Arts; a BA Hons Degree in Circus Arts, which help a person to develop a broad range of skills required as a professional circus artist; BTEC Level 3 qualifications that follow on from GCSEs; and an Extended Diploma in Contemporary Circus and Physical Theatre.

Numerous organisations provide training and theory sessions in relation to aerial work. There are also organisations which support development, training, teaching and creation in the field of circus arts.

It should never be assumed that a person who states they are a "circus performer" is more qualified to carry out aerial work than an actor who has received site-specific training from the basic upwards, has rehearsed and has been continually assessed. No matter what someone's job title, if you don't know them and you are thinking of employing them to carry out a high-risk work activity that could place them and others at risk, then rigorous assessment and competency checks must be carried out and, following that, control measures and monitoring should be done to ensure the risk has been minimised to as low a degree as is reasonably practicable.

An aerial artist may be able to show they are competent to use the equipment to perform at height (such as trapeze, swings, silks, etc) but mistakes are made. Our emotions and physical fitness change and can affect our work ability. If someone has been doing a particular task for some time, they can become careless or complacent and take bigger risks.

The person managing the performance must be focused and make sure the performers are always aware of the risks they're undertaking - and why, therefore, control measures need to be followed. With high risk activities, such as aerial performances, the assessment needs to consider behavioural attitudes, particularly when the performance take place over a long period of time.

When someone is working / performing at height, the standard control measure is for performers to wear clip-on harnesses to arrest any fall. However, some performers feel this restricts their movement and causes a higher risk. If so, the performance's artistic director should be able to design "safe landing" areas into the set.

Sometimes the aerial artist may want to work at height at their own risk, without protection measures. Here, the employer or the insurer, through the risk assessment process, would determine whether that is an acceptable risk to take and it should be made clear in the contract who is liable. However, if they are flying above an audience or others and if there is no mechanism in place to prevent that person from falling on to a member of the public or another performer, the consequences can be catastrophic. It is surely not worth taking the risk.

Julia Sawyer
Director, JS Consultancy

Summary dismissal of licensing appeals for non-compliance

Local authorities should be prepared to fight fire with fire when faced with difficult appellants abusing the appeal system, says **Gary Grant**

A court may not permit one litigant to sit and compel the other to stand,one to speak all his desires and the other to be brief.

The Jewish Talmud

In order to ensure that licensing appeals are conducted in a manner that is fair to all parties, and remain focused on the real issues, once a Magistrates' Court has received a notice of appeal (or complaint) it will generally list the case for an early case management hearing (CMH or first appearance). At this CMH the date of the full appeal hearing will be set down. The court will also give a series of directions, ideally agreed beforehand by the parties. Those directions will include deadlines by which each party must serve their witness statements, and any other evidence upon which they rely, on the other. Occasionally, the exchange of evidence is directed to be performed at the same time (ie, mutual exchange). But the more sensible direction is for "sequential exchange" where the appellant (usually, but not always the aggrieved operator) is directed to serve their evidence first. The respondent (usually the local authority), now it is aware of the exact case it has to meet on appeal, responds to that evidence with its own.

But what happens if the appellant refuses to play ball and fails to serve their evidence on time or at all?

In many licensing appeals, including those arising from decisions taken by a licensing authority in *standard* reviews of premises licences under the Licensing Act 2003,[1] as well as appeals against the refusal to renew or to revoke sexual entertainment venue (SEV) licences under the Local Government (Miscellaneous Provisions) Act 1982,[2] the licence holder is entitled to continue trading until his appeal is determined by the Magistrates' Court.[3]

During this appeal period substantial profits can be made by operators while the months pass by awaiting the final appeal hearing. However, it also means that the decision of the local authority, one taken in the wider public interest, does not bite.

This means that there can be a compelling commercial motive for aggrieved operators to appeal local authority decisions even if they do not intend to pursue that appeal through to a final appeal hearing. A similar motive may encourage certain operators to string out those appeals for as long as possible. The legal costs of doing so are often dwarfed by the operating profits that stand to be made. (What's more, at the conclusion of those proceedings it is fairly common for appellant companies to conveniently dissolve in an effort to avoid the costs consequences altogether, leaving the increasingly straitened public purse to pick up the bill.)[4]

One major sign that an appellant is "playing the system" comes when they fail to comply with a Magistrates' Court's direction to serve their evidence on the respondent local authority by a certain date. Polite enquiries as to its whereabouts are met with silence, elusiveness or prevarication (or, alternatively, an excuse pulled straight from "the dog ate my homework" drawer).

With the full appeal hearing generally many months away, what should the local authority do? What can they do? The question arises because licensing appeals in the Magistrates' Courts fall between two procedural stools. The Criminal Procedure Rules (Crim PR) do not apply because these are not criminal proceedings.[5] The Civil Procedure Rules (CPR) do not apply because they do not apply to Magistrates' Courts.[6]

If the CPR did apply, then the answer would be simple. In response to the failure of an appellant to comply with court directions, a civil court has the express power to strike out a claim where "there has been a failure to comply with a rule,

1 See s 52(11) Licensing Act 2003. The position is different with summary reviews.

2 See para 27(9) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982.

3 Indeed, in the case of SEV appeals, the operator can continue to trade even after the Magistrates' Court appeal is determined pending a further appeal to the Crown Court.

4 This is why, in appropriate cases, local authorities should consider making applications for a costs order, jointly and severally, against individual director(s) of a corporate appellant in addition to the appellant itself.

5 See Crim PR, 2.1

6 See s 1(1) Civil Procedure Act 1997. The CPR only govern the practice and procedure to be followed in (a) the civil division of the Court of Appeal; (b) the High Court; and (c) the County Court.

practice direction or court order".[7] But there is no such express power available to a Magistrates' Court. However, both the High Court and Court of Appeal have previously noted that although the CPR are not applicable in the Magistrates' Courts, in certain circumstances its provisions can be "a good guide to what is necessary and proportionate".[8]

Practitioners should also note that the Magistrates' Courts Rules 1981 apply to licensing appeals in the Magistrates' Courts. They provide the court with wide case management powers, including powers to make directions.[9] Importantly, a court may also "specify the consequences of failing to comply with a direction": see Rule 3(A)(7)(i).

Two cases, both licensing appeals, serve to highlight two different but legally permissible approaches taken by Magistrates' Courts when faced with appellants who failed to comply with court directions. Both serve the interests of respondent licensing authorities and should act as a cautionary tale for recalcitrant appellants.

The Almada approach

In the Magistrates' Court

Mr Almada ran a nightclub in London. In 2005 his application to extend his licensing hours was refused by Westminster City Council. He appealed to the Magistrates' Court.

On 21 April 2006 the district judge gave standard directions for the conduct of appeals at this time in the relevant Magistrates' Court. The first direction was that the parties were to exchange a full bundle including legal authorities relied on, witness statements of any witnesses to give evidence in person at the appeal hearing and any other document in support. The directions stated that that was to be done seven clear days before the hearing before the district judge. Various other directions were also given with regard to the lodging of documents with the court. Direction 9 provided: "At the appeal hearing, evidence in chief of any witness called in person, to be by consideration of the witness statement, unless the leave of the court is given."

However, Mr Almada did not comply with any of these directions. Westminster Council was in a position to do so but did not exchange its witness statements with Mr Almada because he was not in a position to exchange with them. Westminster Council arrived at court on 10 December 2008 with its witness statements and its witnesses and bundles of evidence. Mr Almada had instructed a solicitor who attended court on 10 December. The case was due to start at 10.30 am. Mr Almada did not arrive at court until 11.20 am. Apparently, he had an important meeting with his bank which, he later assured the judge, had to take place before he could attend court.

By the time he had arrived at court he had already been debarred by the district judge from giving or calling any evidence in his licensing appeal. The solicitor for Mr Almada had said that the council could work out roughly what Mr Almada would say. The judge said that may or may not be true, but it was not fair and could not be done with any certainty. He said that he could perhaps adjourn the proceedings, but that would involve wasting a day and a half or possibly two days of court time, adding:

> *The court should be slow to take such a cavalier approach to its resources. If something unexpected happened it would be different. Here we have a client who cannot be bothered to take the necessary steps. He indeed has a cavalier attitude and has behaved in a contemptible manner. Given that, I cannot say that I will be justified in granting an adjournment to hear Mister Almada's evidence. I cannot say Westminster would not be prejudiced by Mister Almada's actions. Given the nature of the failure and the nature [of] the prejudice, I bar him from calling any evidence at his own appeal.*

The hearing then proceeded. Westminster called its evidence, including a local resident who complained of nuisance arising from a private party which Mr Almada had permitted to take place in his premises. Mr Almada had no notice about this evidence and he was prevented from giving evidence himself to answer those criticisms.

The appeal took more than one day, during which the council was able to call its evidence, but Mr Almada was not able to call any evidence on his behalf. Unsurprisingly, his appeal was dismissed and an application for judicial review was brought, challenging the decision of the district judge to bar Mr Almada from giving evidence himself and calling the witnesses on his behalf.

In the Court of Appeal[10]

The case eventually came before the Court of Appeal. Dyson LJ (as he then was) refused to overturn the district judge's ruling and stated:[11]

> *…I might well not have made the order that the district*

7 See CPR 3.4(2)(c).

8 See *R(Cleary) v Highbury Corner Magistrates' Court* [2006] EWHC 1869 at [34] *per* May LJ, noted without criticism in the Court of Appeal licensing case of *The Queen (o/a/o Essence Bars (London) Ltd v Wimbledon Magistrates' Court* [2016] EWCA Civ 63 at [36], *per* Beatson LJ.

9 See r 3A Magistrates' Courts Rules 1981, SI 1981/552, for the court's case management powers. R.3(2) provides the power to make directions.

10 *Almada v City of Westminster Magistrates' Court* [2010] EWCA Civ 386, *per* Dyson LJ.

11 Ibid at [13].

judge made. I might well have allowed Mr Almada to give evidence and take a chance that it would not be necessary to grant an adjournment to the council, which would imperil the two-day hearing. But, the question for me is whether the decision that was reached by the district judge was one which was reasonably open to him. In my judgment it was. The fact that licensing proceedings may have been conducted informally in the past seems to me to be immaterial. Mr Glen [Counsel for the Appellant] accepts that the court had jurisdiction to make the direction that he did and had jurisdiction to make the debarring order that the judge made. Mr Glen's point is that there was a wrong exercise of jurisdiction in this case. For the reasons I have given, I do not agree and I refuse this application.

The *Almada* case thus provides clear authority for the contention that a Magistrates' Court can, in appropriate circumstances, debar appellants from giving evidence when they have failed to comply with a court direction to serve their evidence by a certain date.

The Chilli Tree approach

In the Magistrates' Court

The Chilli Tree restaurant in Bexhill-on-Sea was twice inspected by Sussex Police and Home Office Immigration Officers, in October 2017 and again in January 2018. In the first visit, three workers without the right to work in the UK were discovered. On the second visit, two illegal workers were found, including the same individual found working at the restaurant on the previous visit. Some staff were being paid little or no wages but instead had their visa application fees or other expenses paid by the restaurant owner. Additionally, a 15 year old girl was found working behind the bar without the necessary child employment licence in place.

The licensing authority, acting as a responsible authority, applied to Rother District Council to review the Chilli Tree's premises licence. The restaurant's owner, Mr Uddin, turned up at the review hearing in May 2018 with a bundle of documents he had failed to disclose in line with the council's direction that he must do so at least three days before the review hearing. The licensing sub-committee considered the evidence to be irrelevant and, in any event, served too late to be fairly admitted. Mr Uddin made various complaints about the constitution of the licensing sub-committee and the lawfulness of the two immigration inspections. Nevertheless, his premises licence was revoked.

Mr Uddin appealed this decision to the Magistrates' Court and continued operating in the meantime. Additional evidence became available suggesting Mr Uddin had behaved inappropriately towards a 15 year old female employee. The appeal was first listed in Hastings Magistrates' Court for a CMH on 1 August 2018. Although Mr Uddin later claimed to have been present in the court building, he failed to attend court when called by the usher. The CMH was re-listed for 15 August 2018 when Mr Uddin attended unrepresented. The two-day appeal hearing itself was fixed for the end of November 2018. Directions were given by the court to enable the appeal to be prepared efficiently. These included a direction that Mr Uddin serve a document summarising the legal and factual issues in the appeal by 29 August and serve all his evidence on the council by 12 September. Despite warning letters sent by the council to Mr Uddin clearly warning him of the potential consequences of non-compliance with these directions, the appellant failed to serve either the summary of issues or any of his evidence by the deadlines set down or, indeed, at all. Instead he sent the council a long-list of largely irrelevant disclosure requests.

Rother District Council had the matter listed before District Judge Szagun sitting at Hastings Magistrates' Court on 26 September 2018, some two months before the full appeal hearing was due to be heard. They applied to the district judge to summarily dismiss the appeal and proposed the following procedure, which the court followed, to ensure procedural fairness and compliance with the principles approved by the Court of Appeal on the conduct of licensing appeals in *Hope and Glory* [2011] EWCA Civ 31:[12]

1) The court considers the council's written evidence, but limited to the original application for review and Rother District Council's (comprehensive and well-reasoned) decision notice.

2) Since Mr Uddin had produced no evidence, he had nothing to place before the court.

3) The original applicant for the review, Rother District Council's licensing officer, was in court and swore on oath as to the truth of the contents of the original review application.

4) Mr Uddin could question the licensing officer.

5) Both parties were permitted to make oral submissions to the court on issues of fact and law, although the burden of demonstrating the council's decision "is wrong" lay on Mr Uddin as the appellant.

The court was referred to the "strike out" powers available under the CPR and the *Almada* case (summarised above). The council submitted that it was right and just that the

12 It is worth noting that the earlier *Almada* decision was decided shortly after the High Court decision in *Hope and Glory* but *before* that latter decision was approved by the Court of Appeal.

Magistrates' Court should effectively manage its own processes in the interests of justice, particularly in licensing cases where a wider public interest was engaged.

Having followed the summary procedure proposed by the council, the district judge dismissed Mr Uddin's appeal and so the revocation of the Chilli Tree's premises licence took immediate effect. She also ordered Mr Uddin to pay the council's costs to date in full.

In the course of her oral judgment, and during argument, the district judge noted that Mr Uddin had a track record of failing to comply with directions made in the interests of justice and designed to ensure an efficient hearing of the appeal. He appeared to be using the statutory appeal process primarily as a stratagem to permit his restaurant to continue to sell alcohol in the interim period until the full appeal was heard. He had conspicuously failed to demonstrate his intention to properly pursue his appeal through to the final hearing scheduled for November 2018. The council had put Mr Uddin on clear notice that if he did not comply with the court's directions they would apply to summarily dismiss the appeal on this occasion. Mr Uddin should have instructed lawyers to assist him to prepare for the appeal (as both the court and council had previously recommended) and he could not simply rely on his self-representation or claims of impecuniosity as an excuse to ignore court directions.

In the High Court[13]

Mr Uddin subsequently applied for permission to judicially review the decisions of both Rother DC and the district judge. In the High Court, Mostyn J refused permission on the papers and described the application as "totally without merit". In his written order, Mostyn J stated:

> *1. This is a manifestly abusive application. Although the claimant challenges the decision made by the defendant [Rother District Council]on 1 June 2018 that decision was superseded by the decision of District Judge Szagun on 26 September 2018 summarily to dismiss the appeal on the ground that there had been a flagrant failure by the claimant to comply with the appeal court's case management directions. Although the claimant seeks to challenge the district judges' decision he does not cite the Hastings Magistrates Court as a defendant. This is a fundamental flaw.*
>
> *2. The decision of the defendant [Rother District Council] was well-reasoned and unlikely to be capable of challenge. Therefore, the court required the claimant to specify the legal and factual basis for his appeal by 29 August 2018 and to file all his evidence by 12 September 2018. This he failed to do. The defendant therefore applied for a debarring order. This was listed for 26 September 2018. Still the claimant failed to comply with the directions and failed to furnish any good reason for his default at the hearing. It became plain that the claimant was using the appeal process as a filibuster to allow him to continue selling alcohol. A debarring order (i.e. an order summarily dismissing the appeal) was therefore inevitable. In Prince Abdulaziz v Apex Global Management Ltd & Anor [2014] UKSC 64, [2014] 1 WLR 4495, the Supreme Court upheld a debarring order made for failure to comply with a disclosure order. It was not disproportionate in that case to make the debarring order where the defendant persisted in failing to make simple disclosure and had showed that he had no intention to do so. So here.*

Additionally, Mostyn J made an order that Mr Uddin could not request a re-consideration of the refusal of permission at an oral hearing.[14]

Conclusion

Many local authorities are faced with appellants who appeal adverse licensing decisions without any real intention of pursuing that appeal through to a final hearing in the Magistrates' Court. (Alternatively, if the requisite desire is present, then they lack either the means or ability to pursue it in compliance with court directions.) They often do so for the commercial gain that will flow from being able to operate in the lengthy interim period between the council's decision and the full appeal hearing being determined.

However, where appeals are pursued with a flagrant disregard to court directions, both the *Almada* and *Chilli Tree* cases demonstrate that local authorities are not powerless. They can and should take a robust and pro-active stance in bringing those proceedings to a swift and successful end. This in turn ensures the council's original decision will take effect sooner rather than later and the costs of preparing for a full appeal hearing can be avoided. Local authorities should be prepared to fight fire with fire when faced with difficult appellants abusing the appeal system and ignoring court directions at the expense of the wider public interest.

Gary Grant
Barrister, Francis Taylor Building

13 CO-634-2019.

14 Pursuant to CPR 54.12(7). Mr Uddin was also ordered to pay the council's costs.

Should licensing be used to regulate Airbnbs?

There may be a good public interest case for licensing short term lets but there are a number of practical difficulties as **Michael McDougall** explains

The popularity of short term lets - driven primarily by the emergence of online platforms such as Airbnb and booking.com - has generated considerable opprobrium from the community groups and politicians. Concerns largely stem from two main issues: (1) the perceived misuse of housing stock, ie, housing is available for short term lets and not to address housing shortages; and (2) anti-social behaviour issues flowing from their use.

Unsurprisingly given Edinburgh's burgeoning tourism industry and in particular the attraction of its various festivals, the issue of short term lets has come to a head with demands being made that the Government introduces some form of regulation. The Corporate Policy and Strategy Committee of Edinburgh City Council has recommended that the Council "…request that the Scottish Government introduces a discretionary licensing system for operators of short term lets".[1] Four Edinburgh MSPs[2] have written to the Minister for Local Government, Housing and Planning calling for the introduction of a licensing system for short term lets.

To date, the Scottish Government has only committed to dealing with these concerns by way of amendments to impending planning legislation,[3] albeit other measures have been implemented that deal with the issue of second home ownership such as allowing local authorities to remove council tax discounts on second homes.

What are the problems?

To understand whether the amendments to the planning regime will resolve these concerns one must consider the problems associated with short term lets. While there is a great deal of literature dealing with the economic and societal impact of short term lets,[4] evidence of anti-social behaviour and crime and disorder is less well documented. Notwithstanding this there is a public perception that such properties disrupt the equilibrium of residential areas given the competing interests of visitors[5] versus residents. Less reported yet more concerning are reports that short term lets are being used as "pop-up brothels".[6]

Current position in Scotland

Provided that neither alcohol is sold nor supplied on the premises nor shared by three or more tenants who aren't members of the same family as their main residence, then no licence is required.[7]Notwithstanding this, the owner of a short term let will have to consider the following:

- Do the title deeds of the property allow it to be used as a short term let?
- Is the planning permission suitable for the use? While at the moment there is no change to the use class, some planning authorities do have particular policies to deal with such developments.[8]
- Appropriate insurance cover.
- Does the property comply with the Scottish Government's Fire Guidance for Premises with Sleeping Accommodation?[9]

That said, there appears to be a trend where properties are being let without the above being considered. This prejudices residential amenity.

Proposed solution

It is proposed that short terms lets would become a new licensable activity by means of a statutory instrument introduced by the powers set out in s 44 of the act. This has been done in respect of houses in multiple occupation,

1 http://www.edinburgh.gov.uk/download/meetings/id/58043/item_72_- short_term_letting_in_edinburgh at para 3.25.

2 https://drive.google.com/open?id=106eq1E6F98ncq9zaAaUTiZs7lHCRNIyG

3 The Planning (Scotland) Bill is currently being considered by the Scottish Parliament. As part of the Stage 2 debates guarantees were given to Andy Wightman MSP that "the effects on long term communities of houses and flats being used for short term letting" would be addressed albeit regard had to economic benefits of tourism.

4 https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf and https://www.epi.org/publication/the-economic-costs-and-benefits-of-airbnb-no- reason-for-local-policymakers-to-let-airbnb-bypass-tax-or-regulatory-obligations/

5 https://www.eveningtimes.co.uk/news/12790090.residents-told-to-protest-over-rented-party-flats/ and https://www.theguardian.com/technology/2016/sep/17/airbnb- nuisance-neighbours-tribunal-ruling

6 https://uk.reuters.com/article/airbnb-trafficking/exclusive-airbnb-vows-to-tackle-sex- trafficking-in-rental-homes-idUKL8N1Q6597

7 See Licensing (Scotland) Act 2005 and Housing (Scotland) Act 2006 respectively.

8 https://www.heraldscotland.com/news/17315548.scots-estate-agent-loses-bid-to- lift-ban-on-airbnb-lets/

9 https://www.gov.scot/publications/practical-fire-safety-guidance-existing-premises- sleeping-accommodation/

booking offices, and skin piercing and tattooing.[10] The selling of knives etc was made a licensable activity by the Custodial Sentences and Weapons (Scotland) Act 2007.

Scottish Development Circular 6/1983 at Appendix A notes that this s 44 allows the Government to react to developments in "trade or entertainment" and to licence these "where necessary on grounds of crime protection, environmental health, or protection of public safety".

Furthermore, it narrated that these "powers…will be used only where broad public consensus exists that control or standardisation is necessary to protect the public and the [Scottish Parliament] will consider each for a s 44 Order carefully on its own merits."[11] In short, licensing should only be used where there is an evidential basis that licensing the activity will cure the mischief in question - and where that mischief is relevant in the context of the 1982 Act.

Usefully, this activity can be left as optional, meaning that local authorities will only need to licence short term lets if they see a need to do so. For example, cities with a vibrant tourist industry may see a need to consult on introducing this licence type.

An alternative course of action is licensing - albeit potentially controversial - short term lets through the public entertainment licence provisions. Such a licence is required for a "place of public entertainment" meaning "any place where members of the public are admitted or may use any facilities for the purposes of entertainment or recreation".[12]

The licensing authority publishes a resolution setting out what it considers to be relevant forms of entertainment. This flexibility has been used by licensing authorities across to Scotland to licence activities such as sunbeds, saunas and gymnasiums. The sheriff in *Bannatyne's Health Club (Aberdeen) Ltd v City of Aberdeen Licensing Board*[13] found that given there is "…no definition of 'public entertainment' in the relevant statute it was open to the board to decide, looking at the information before them, whether or not the facilities on offer at the pursuers' and appellants' club would be appropriately classified as entertainment." It remains to be seen whether a licensing authority explores this approach.

Is it the right approach?

The problems associated with short term lets are varied and complex. If such properties are to be licensed then there must be an understanding of what ills can be tackled by licensing this activity. Concerns relating to whether it is an appropriate use of the housing stock and the impact on the nature of an area are typically matters better dealt with by way of the planning regime. Whereas the 1982 Act's preamble sets out that: "[a]n Act to make provision as regards Scotland for the licensing and regulation of certain activities; for the preservation of public order and safety and the prevention crime…" and accordingly, it can only be used to tackle issues arising from short term lets that fall within this scope.

Given the lack of evidence of anti-social behaviour it may that the strongest argument for licensing short term lets may be the public safety issues that may arise from the power imbalance between the landlord and the tenant. These short term lets will be booked by parties who make little in the way of enquiries as to the safety of the property. A licensing system will make sure that such properties comply with the relevant safety standards. The role of a modern licensing system should not be to deter the licensable activity but instead to encourage the licensable activity to be carried out to a specific standard. This trend is reflected elsewhere in the Housing (Scotland) Act 2006 where provision is made for various types of notice whereby the licensing authority can require works to be done.

While there may be a statable case that the licensing of short term lets may be in the public interest, there are a number of practical difficulties. Although the political concern is directed towards lets that are managed by way of an online booking system, the definition proposed would capture a wide spread of businesses and organisations such as bed and breakfasts, hotels, hostels etc. Therefore thousands of businesses will be seeking a licence for the first time. For example, a small two bed, bed and breakfast will now have to apply for a licence. Perhaps counter-intuitively, platforms such as Airbnb will not be captured by the licensing system.

Michael McDougall
Associate, TLT LLP

EDITOR'S NOTE: Apologies to Scott Blair who should have been cited as the author of the article *New Proposals for regulating breeding of popular pets* for the *Scottish law update* (2019) 23 JoL pages 32-35.

10 Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Order 1991/1253, Civic Government (Scotland) Act 1982 (Licensing of Booking Offices) Order 2009/145, and Civic Government (Scotland) Act 1982 (Licensing of Skin Piercing and Tattooing) Order 2006/43. Note that HMO licensed has since been removed from the ambit of the 1982 Act.

11 11 Scottish Development Department Circular 6/1983, Appendix A, paragraph 2.113- 2.114.

12 Section 41 of the 1982 Act.

13 2000 S.L.T. (Sh Ct) 187

Surrendering taxi licences

Although legal ambiguity exists over whether taxi drivers can unilaterally surrender their licences, **James Button** believes common sense and logic, not to mention the new national register, suggest self-termination should not be permitted

Can a taxi driver (hackney carriage or private hire) surrender his or her driver's licence?

At first glance, this may not seem a particularly difficult or important question. Why would there be any prohibition on an individual who has been granted a taxi driver's licence deciding that he or she no longer wants to hold that licence, and surrendering it to the local authority or Transport for London?

However, in recent months it has become an important question because of the introduction of the National Register of Refusals and Revocations (NR3). This initiative introduced by the LGA in association with the National Anti-Fraud Network allows local authorities (including TfL) to record the details of drivers' licences that they have either revoked, or refused to grant. The register can be checked by other local authorities when an application is received, and if the register shows an entry, contact can be made to establish what the circumstances were that led to the initial decision.[1]

It has become clear that some drivers who are facing a potential sanction against their licence are surrendering the licence before the local authority can take revocation action. This would prevent the local authority making an entry on NR3, and potentially allow that individual to apply for a driver's licence to another authority, with the second authority then probably being unaware of the history with the earlier authority.

It seems to have been generally accepted that a driver can surrender a licence, but is this correct? All taxi legislation is silent on the point.[2]

That might suggest that there is no prohibition on surrendering a taxi driver's licence. However, that can be contrasted with provisions in other licensing legislation where the right to surrender a licence is specifically stated.

Under the Licensing Act 2003, a premises licence can be surrendered in accordance with the provisions of s 28; a personal licence can be surrendered in accordance with the provisions of s 116; and a club premises certificate can be surrendered in accordance with the provisions of s 81.

Additionally, a premises licence under the Gambling Act 2005 can be surrendered in accordance with the provisions of s 192.

It may appear that the right to surrender was only felt necessary where licences did not need renewing, but it can be seen that that is not the case.

Under older legislation, a street trading licence and a street trading consent can be surrendered at any time under the provisions of para 5(3) and 11 (respectively) of Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982. These licences and consents only last for a maximum of a year. Interestingly, no similar surrender provisions exist under Schedule 1 in relation to sex establishment licences.

As the taxi legislation does not specifically permit surrender of a driver's licence, yet other legislation does, it suggests that there is in fact no right to surrender a driver's licence. This probably makes sense, because there is no continuing financial liability placed upon a driver during the currency of the licence. The licence fee must be paid on the grant of the licence (s 53 Local Government (Miscellaneous Provisions) Act 1976), and if the driver no longer wishes to use the licence, it can simply expire at the end of its term.

The alternative view is that as there is no reference to surrender in taxi legislation, there is no prohibition on doing so. Ultimately the question would have to be determined by the High Court. In the absence of any decision on the point, and with the existence of surrender provisions in other legislation, it is strongly suggested that a driver's licence cannot be surrendered.

Returning to the question of the impact on NR3, for this database to serve its purpose of protecting the public and the trade from unacceptable drivers obtaining licences in other districts, unscrupulous drivers must not be allowed to circumvent the provisions by surrendering their licence

1 Details of NR3 can be found at https://www.local.gov.uk/topics/licences-regulations-and-trading-standards/new-national-register-taxi-and-private-hire

2 Both outside or within London. This includes the following principal pieces of legislation: Town Police Clauses Act 1847; Local Government (Miscellaneous Provisions) Act 1976; London Hackney Carriage Acts 1831, 1843, 1850 and 1853; Metropolitan Public Carriage Act 1869; London Cab Act 1896; London Cab and Stage Carriage Act 1907; London Cab Act 1968; and Private Hire Vehicles (London) Act 1998.

ahead of any revocation or non-renewal decision being taken.

To reinforce this, local authorities must not allow surrender of licences, and must take the enforcement action (revocation or non-renewal) that they see fit when a person is no longer considered to be fit and proper to hold the licence.

A driver cannot compel a local authority to accept a surrender of the licence. The authority can simply say that there is no mechanism to surrender and the licence remains extant. Even if the driver does not accept that position, and returns his or her badge and paper licence to the authority, the licence still remains in force. There is no right of appeal against any decision not to accept the surrender of a driver's licence, and the only challenge would appear to be judicial review.

When the authority does take action against a driver's licence (revocation or refusal to renew), the right of appeal against that decision will be triggered and the Magistrates' Court (and subsequently the Crown Court) can determine whether the decision of the authority was correct.

Within those rights of appeal lies an obvious problem. There may be local authorities who see accepting a surrender of a driver's licence as a cheap and easy way out of a difficult situation. The driver is no longer licensed by them and therefore they have effectively washed their hands of him or her. They will not have to justify any decision to revoke or not renew the licence before any independent tribunal (the Magistrates' Court and the Crown Court) and will not incur the costs of any such appeal. It is hoped that no local authority would take this approach, and even if it were to do so, the driver may still be functioning in its district. Without an entry on NR3, is quite likely that that particular driver would obtain a licence with another (possibly neighbouring) authority and then undertake pre-booked work within the authority in whose area he or she was previously licensed.

Local authorities must accept that it is part of their responsibility to protect the public within the taxi licensing regime across England and Wales, to take robust action against unacceptable drivers, and record that action on NR 3.

An inability to surrender a driver's licence will not impact upon the honest driver. There is no continuing liability and the badge and licence can simply sit in a drawer until expiry. It is therefore difficult to see how or why anyone would wish to challenge a decision by authority not to accept driving licence surrenders.

It remains to be seen what the overall impact of NR3 will be, but it would be seriously weakened if surrender of drivers' licences becomes widespread.

James Button CIoL
Principal, James Button and Co.

Phillips' Case Digest

TAXIS AND PHVs

Supreme Court
JUSTICES: Lord Kerr, Lord Reed, Lord Carnwath, Lord Hughes, Lord Lloyd-Jones

Legality under the Human Rights Act 1998 of an Enhanced Criminal Record Certificate ("ECRC") under section 113B of the Police Act 1997

R (AR) v Chief Constable of Greater Manchester Police [2018] UKSC 47

Decision: 30 July 2018

Facts: In January 2011, AR was acquitted of rape by the Crown Court. He was a married man with children, of previous good character, and a qualified teacher, but was working at the time as a taxi driver. Following his acquittal, he applied for an ECRC in the course of an application for a job as a lecturer. The ECRC was issued with details of the rape charge for which he had been tried and acquitted. AR objected to this disclosure on the basis that there had been no actual conviction and it failed to give a full account of the evidence given and how the jury came to its conclusion. The judge and the Court of Appeal dismissed AR's appeal against the disclosure, holding that it was reasonable, proportionate and no more than necessary to secure the objective of protecting young and vulnerable persons.

Point of dispute: (i) whether the admitted interference with AR's rights under article 8 of the European Convention of Human Rights ("ECHR") due to the disclosure was justified. (ii) what was the proper role of an appellate court in reviewing a judge's finding of proportionality under the ECHR.

Held: (i) The leading authority on the operation of the ECRC regime is the Supreme Court decision in *R (L) v Comr of Police of the Metropolis* [2010] 1 AC 410 ("L's case"). In L's case, the ECRC disclosed details of alleged inadequate parental supervision by the applicant of her child. It was held that although article 8 was engaged, the essential issue was whether the disclosure was a proportionate interference with her private life, and that in the particular circumstances of the case, the significance of the information in respect of the risk to children outweighed the prejudicial effect of the disclosure on the applicant's employment prospects (ii) On the issue of the proper role of the appellate court in approaching proportionality, Lord Carnwath noted that the purpose of the appeal is to enable the reasoning of the lower court to be reviewed and errors corrected, not to provide an opportunity for parties to reargue the same case. The question in relation to the standard of review is whether the judge erred in principle or was wrong in reaching the conclusion which he did.

TAXIS AND PHVs

Administrative Court
His Honour Saffman Sitting as a Deputy Judge of the High Court

Which costs may be taken into account in setting the licence fee

Rehman v Wakefield Council [2018] EWHC 3664 (Admin); [2018] 12 WLUK 707

Decision: 5th December 2018

Facts: On 24 January 2018 the Local Authority decided to approve the fee to be charged from 1 February 2018 for a vehicle and operators' licence in respect of private hire vehicles and hackney carriages. In setting the fee in respect of the licence the Local Authority took into account as *" costs in connection with the control and supervision of hackney carriages and private hire vehicles",* the costs of enforcement relating to (inter alia): speeding, smoking in the taxi, dressing inappropriately, parking badly, using mobile phones, carrying excess passengers, not permitting the carrying of an assistance dog, inappropriate dress and various uncivil and/or illegal conduct ("the Activities").

Point of dispute: whether the decision should be quashed on the basis that the inclusion of these costs was unlawful.

Held: i) clear that Section 70(1)(c) relates to the supervision and control of hackney carriages and private hire vehicles , not the supervision and control of the drivers. The enforcement steps in relation to the Activities clearly relate to the activities of the driver, not the vehicle and therefore ought not to have incorporated. (ii) *R (on the application of Cummings) v Cardiff City Council* [2014] EWHC 2544 (Admin) is apposite in this context because it is authority for the proposition that there can be no cross-subsidy between different work streams.

TAXIS AND PHVs

Administrative Court
The Right Honourable the Lord Burnett of Maldon Lord Chief

Justice of England and Wales The Honourable Mr Justice Supperstone

Whether actual or apparent bias by reason of the judge's husband's financial relationship with Uber.

R. (on the application of United Cabbies Group (London) Ltd) v Westminster Magistrates' Court [2019] EWHC 409 (Admin); [2019] 2 WLUK 359

Decision: 26 February 2019

Facts: In 2012 TfL granted Uber a five-year London PHV operator's licence. In 2017 Uber applied to renew its operator's licence for five years. TfL was investigating various matters of concern. It granted a four-month licence to expire on 30 September 2017. On 22 September 2017 TfL advised Uber that a decision had been made that Uber was not a fit and proper person to hold a London PHV operator's licence. Uber appealed to Westminster Magistrates' Court. the Chief Magistrate handed down a written judgement on 26 June 2018, finding that (inter alia): "whilst [Uber] was not a fit and proper person at the time of the Decision Letter and in the months that followed, it has provided evidence to this court that it is now a fit and proper person within the meaning of the Act." On 18 August 2018 *The Guardian* newspaper published an article entitled "Judge in Uber's London legal battle steps aside over husband's links to firm" and on 11 September 2018 an e-mail was sent on behalf of the judge to counsel for Uber and others informing them that the judge did not know of any connection between Lord Arbuthnot and Uber at the time of the appeal hearing, but that she had recused herself from future cases involving Uber.

Points of dispute: (i) whether decision tainted by actual or apparent bias by reason of the judge's husband's financial relationship with Uber. (ii) did the judge act ultra vires and unlawfully in granting the licence having made no finding of fact that Uber was a fit and proper person.

Held: i) The list of tenuous connections fell well short of evidence of links that would begin to give a fair-minded observer even pause for thought. It reminded the court of the old song with the lyrics "I danced with a man who danced with a girl who danced with the Prince of Wales". Para 25 of *Locabail* gave some examples of relatively close connections or potentially coincident interests that could not give rise to apparent bias. They illustrate the reality that suggestions of apparent bias must have substance such as to trouble the fair-minded observer. The ground of challenge was not made out. (ii) The judgment read as a whole demonstrated that the judge understood that the test she had to apply was that set out in section 3(3)(a) . She had to be satisfied that at the time of the decision Uber was a fit and proper person to hold the licence for which it had applied. Uber had provided evidence that it was fit and proper and it was obvious that the judge had accepted that evidence as she had then immediately gone on to indicate that the licence would be granted.

GAMBLING

Gambling Commission
Regulatory Panel

Sanction where breach of Operating Licence conditions.

Gambling Commission v Daub Alderney

Decision: 13 November 2018

Facts: Licence condition 12.1.1.1 required an operator to conduct an assessment of the risks of their business being used for money laundering and terrorist financing. The licence condition has been in force since October 2016. Commission Officials found when they completed a corporate evaluation in June/July 2017 that the appropriate risk assessment was not in place. The Licensee was also required to put in place and implement the measures described in Parts 2 and 3 of the Money Laundering Regulations 2007 (superseded by the 2017 Regulations) insofar as they relate to casinos. Commission Officials found that the Licensee had substantially failed to do so. Licence condition 12.1.1.2 & 3 required licensees to have appropriate policies, procedures and controls to prevent money laundering and terrorist financing and to ensure such policies, procedures and controls were implemented effectively, kept under review and revised appropriately. Again, officials found that at the time of the corporate evaluation the licensee had failed to comply. Social Responsibility Code 3.4.1 requiring policies and procedures for customer interaction had not been fully complied with. In each of these matters the Licensee indicated that it was working with external advisors to make improvements to its policies and procedures. The Panel accepted that the Licensee had undertaken several actions to rectify these failings since the Commission's Corporate Evaluation in June 2017 to July 2017.

Point of dispute: None. The failings were accepted.

Held: given the seriousness of the licence breaches it was appropriate to: (i) issue the Licensee with a warning under section 117(1)(a) of the Act (ii) impose the following additional licence conditions to the Licensee's operating licence under section 117(1) (b) of the Act requiring the Licensee to: (a) appoint an appropriately qualified Money Laundering Reporting Officer who holds a Personal Management Licence (PML); in appointing the MLRO to ensure the individual must undertake annual refresher training in anti-money

laundering and be able to evidence this to the Commission (b) ensure that all personal management licence holders, senior management, and key control staff undertake outsourced anti money laundering training. All such staff must undertake outsourced refresher training annually thereafter the Licensee continues to segregate funds as per Licence condition 4.1 at a level of 'medium' as defined by our guidance (c) continue its review of the effectiveness and implementation of its anti-money laundering (AML) and social responsibility (SR) policies and procedures, and in addition engage external auditors, whose appointment and terms of reference must be agreed with the Commission, to sample the reviews that have been carried out to provide additional assurance as to the findings. The Commission required the outcome of the review and subsequent action plan to implement any recommendations to be reported to the Commission by the person who assumes responsibility for this action, and that the Commission would have access to all the documents relating to the work (d) the Panel also agreed that it was appropriate to impose a financial penalty under section 121 of the Act and that it was appropriate for the Licensee to pay a financial penalty of £7,100,000.

LOCAL AUTHORITY

Administrative Court
Lewis J

Public Sector Equality Duty ('PSED') applied to the exercise by a local authority of its core statutory functions.

R (on the application of Buckley (on behalf of Foxhill Resident's Association)) v Bath and North East Somerset Council [2018] EWHC 1551 (Admin)

Decision: 20 June 2018

Facts: Curo Places Limited ("Curo") applied for outline planning permission to demolish up to 542 homes and make provision for up to 700 new homes. There were currently 414 affordable homes within the application site and these would be replaced by 210 homes, resulting in a loss of 204 affordable homes.

Points of dispute: (1) was the outline planning permission invalid because the defendant failed to comply with the public sector equality duty imposed by section 149 of the 2010 Act? (2) - (4) [were planning considerations]

Held: (1) the defendant did not in fact have due regard to the impact on the elderly and disabled persons of granting an application which might lead to the demolition of their existing homes, failing specifically to address or have regard to the impact on groups with protected characteristics, in particular the elderly and the disabled, of the loss of their existing home. These were matters relevant to the discharge of the public sector equality duty which the relevant decision-maker needed to have due regard to but which were not drawn to the decision-maker's attention. In the circumstances, there was a failure to discharge the duty imposed by section 149 of the 2010 Act. The grant of outline planning permission on 30 November 2017 was unlawful and that outline planning permission will be quashed.

Jeremy Phillips QC, FIoL
Barrister, Francis Taylor Building

Phillip's 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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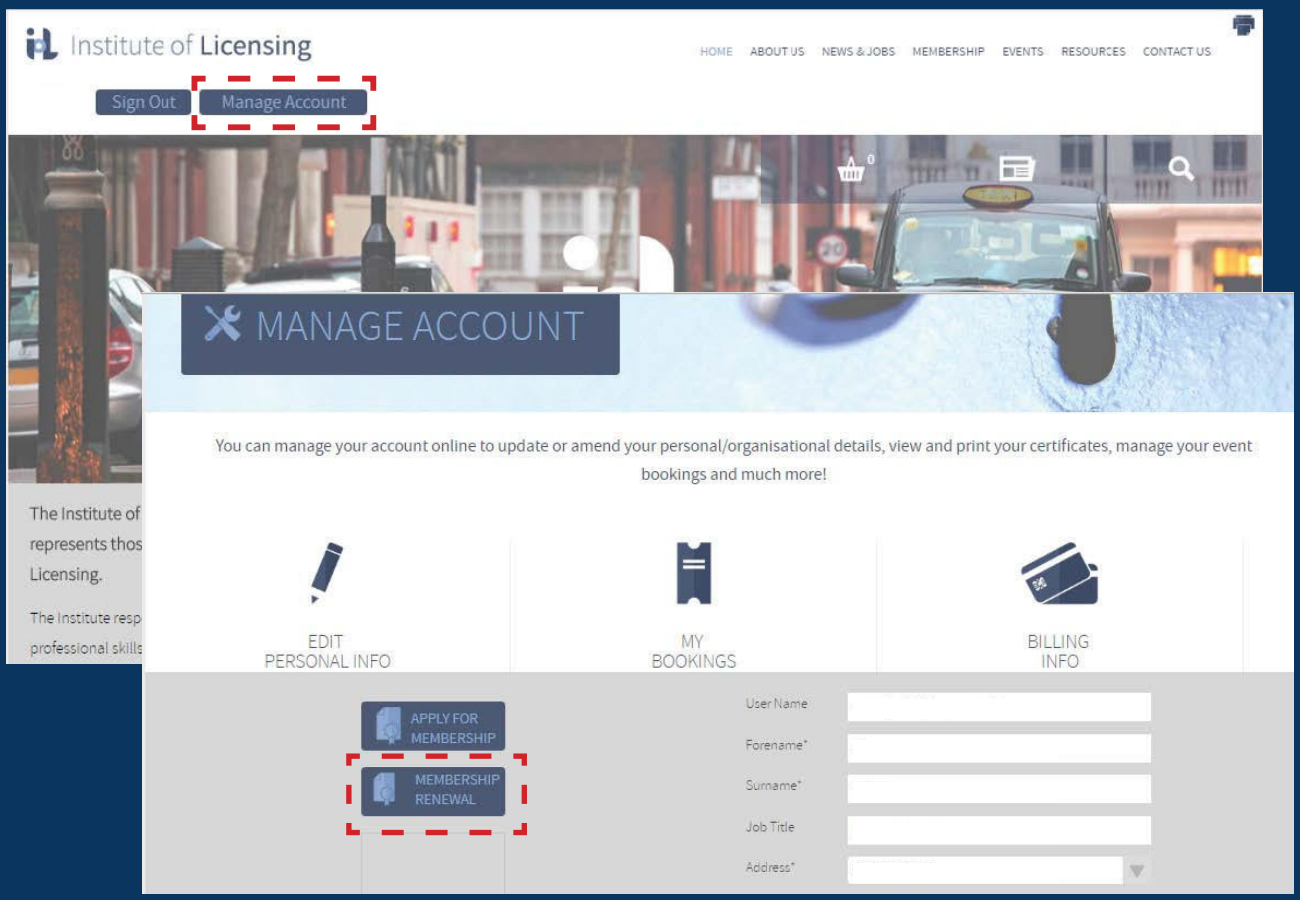

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JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

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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.

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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.

LEO CHARALAMBIDES
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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.

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.

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John accepts instructions in all areas of Chambers' work. As such, his practice encompasses Administrative & Public law, Planning & Environmental law, Information law, Inquests & Inquiries, Licensing and Housing.

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Lisa Lavia is Managing Director of the Noise Abatement Society. She has actively participated in the development of international soundscape standards and pioneered their uptake in the UK through campaigning, training, outreach and research EH 1_2 committee on Transportation Noise, and as an Affiliate Member of the Institute of Acoustics.

SUE NELSON
Executive Officer, Institute of Licensing

Sue joined the IoL as Executive Officer in October 2007, following a number of years as voluntary Company Secretary. Sue is heavily involved with the National Training Days and National Training Events 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.

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.

JAMES BUTTON
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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*.

JOSEF CANNON
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Josef's practice at the Bar focuses on licensing, town and country planning, regulatory work and property including social housing. He acts for and advises a wide range of local authorities, the licensed trade, private and social landlords, developers, regulatory bodies and private individuals. Called to the Bar in 2002, he also has experience of regulatory work.

REBECCA CULLUM
Stonegate

Rebecca has been Licensing Manager at the Stonegate Pub Company since 2016. She has been involved in the late-night entertainment industry all her working life, beginning her career with Luminar Leisure, where she worked for 12 years, before moving to the Deltic Group for four years and then joining Stonegate three years ago.

CLARE EAMES
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Clare is a Partner at Poppleston Allen, joining the London Office in 2006. She has over 20 years of licensing experience, including seven years in licensing at McLellans Solicitors and two years as a Legal Director at JD Wetherspoon, overseeing licensing transition under the Licensing Act 2003. She is Secretary of the IoL London Region.

GARY GRANT
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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.

MICHAEL MCDOUGALL
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Michael is a licensing solicitor at TLT, where he is an Associate. He has represented a broad range of operators at various licensing boards. He was previously Assistant Clerk at Glasgow City Council and is a member of the Law Society Licensing Sub-committee.

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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*.

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