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Daniel Davies MIoL
Chairman

As we approach the first anniversary of Covid-19 restrictions, I thought I would cast my eye back to my foreword to the spring 2020 edition of the *Journal.* It was a salutary experience. The foreword opened with optimism as we entered a new decade, with "plenty of exciting things on the horizon", and fondly recalled the National Training Conference (NTC) which had taken place the previous autumn.

What has transpired is something that no-one could have foreseen, in terms of the impact on our communities, particularly the elderly and vulnerable, and of course on the licensed trade. The challenges for the trade and for local authorities have been unique. The Institute of Licensing has endeavoured to be at the forefront of the response to the pandemic, not least in collating resources and being a source of timely news to keep practitioners as up to date as possible in what has seemed to be a continuously shifting environment.

Our training events continued despite the lockdown as they moved to an online experience for us all. Which then also saw our NTC in November 2020 morph into a five-day webinar event. This was well received and we are grateful to our speakers, sponsors and delegates for the continued support for our IoL training provision.

Some of the news articles have covered matters at a local level - for example, local authorities taking action against licensed premises allegedly in breach of Covid-19 regulations – and others have reported on challenges in the higher courts regarding the lawfulness of certain actions taken by the Government.

Our lead article in this issue, from Sam Karim QC, provides an assessment of the latter, including the *Dolan* challenge to the Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350) which had come into force on 26 March 2020, and a challenge to the lawfulness of Regulations which brought in the 10pm curfew which had come into force on 24 September 2020. Such challenges have not been confined to England and Wales, and in a separate article Michael McDougall covers the situation in Scotland.

Solutions to the problem of non-payment of court fees on appeals from Licensing Act 2003 decisions are examined by Gary Grant. We also have a welcome update from Sarah Clover on how the agent of change principle is becoming more prominent for licensing practitioners.

On top of this, we have a taxi licensing update from James Button and a gambling licensing update from Nick Aaron, and articles from regular contributors Julia Sawyer and Richard Brown.

Finally, a word about National Licensing Week, which is taking place from 14 - 18 June 2021. Its mission statement to, "raise awareness of licensing and its role in everyday lives", is arguably never more pertinent than now. I would urge everyone to get involved and showcase the great work you are doing at ***@licensingweek*** using ***#NLW2021***.

Institute of Licensing

JOURNAL OF LICENSING ISSUE 29

CONTENTS

Leo Charalambides FIoL
Editor, Journal of Licensing

As we begin to contemplate the first steps towards the easing of the lockdown restrictions and the tantalising prospect that all legal limits will end on the 21 June, it is worth pausing to consider what, if any, beneficial experience we retain as we move back to normal.

On 14 February the *Daily Telegraph* reported that according to Robert Jenrick, Secretary of State for Housing, Communities and Local Government, remote hearings have "been a resounding success, enabling local councils to keep going despite the restrictions and increasing access to local democracy."

Access to and participation in local democracy is, in my view, a crucial (if not *the* crucial) component of the Licensing Act 2003 and local authority licensing generally. Included in the key aims and purposes which are vitally important principal aims for everyone involved in licensing work (s 182 Guidance, paragraph 1.5) are:

- *Providing a regulatory framework for alcohol which reflects the needs of local communities and empowers local authorities to make and enforce decisions about the most appropriate licensing strategies for their local area; and*
- *Encouraging greater community involvement in licensing decisions and giving local residents the opportunity to have their say regarding licensing decision that may affect them.*

The Licensing Act 2002 (Hearings) Regulations also make provision to ensure that all those that take the time to consider an application and respond to it by representations are given the right to attend and participate in hearings (see Regs 15 and 16). A clear requirement of the Hearing Regulations is that all parties, applicants, licence holders, responsible authorities or other persons are given equal rights, from notification of hearings to rights of appeal. This is perhaps best demonstrated by Regulation 24 which provides:

> *The authority must allow the parties an equal maximum period of time in which to exercise their rights provided for in regulations 16.*

Yet when it comes to civil society, the role of other persons is often relegated to that of second-class participants, denied the right to voice their representation, treated – seemingly – as a nuisance to be curtailed and disposed of as quickly as possible. The most obvious and obnoxious example of this is the widespread practice of giving other persons the same amount of time to speak as the applicant for a premises licence. Thus, whether there are two or 22 objectors, they are required to divide and share any allotted time equally between themselves. An applicant may have 20 minutes to make his case but other persons may have as little as no more than a couple of minutes each. Their right to address the authority and enjoy equality of time to exercise those rights is sacrificed and ultimately denied.

The typical rationale offered is that other persons have similar points to make and that no benefit is gained from repetition. If we adopted this logic, the same follows with the responsible authorities – on the basis that their representations oftentimes dovetail and repeat what is said by their colleagues. In such circumstances the licensing authority does not demand that all the responsible authorities share the allotted time equally or require that one authority acts as the lead authority.

There is certainly a role to be had in ensuring that representations are relevant to the licensing objectives and the aims of the 2003 Act. There is certainly a call to leadership on the part of the person chairing the hearing – the hearing ought to take the form of a discussion led by the authority (Reg 23). Members have the power to ask any question of any party *or other person* appearing at the hearing, the only limit being relevance and materiality (*R (o/a Murco Petroleum Ltd v Bristol City Council* [2010] EWHC 1992 (Admin)). However, blunt blanket bans on participation and the meagre distribution of time and access to the hearing are no more than the crude denial of rights to participation.

While I can appreciate the wish to avoid unduly lengthy hearings, the reality is that the grant, variation or review of the terms and conditions of a premises licence could have significant impacts on local residents, businesses and visitors to an area. Those impacts could and do have an immediate impact. The difference between the impact of a premises operating as a restaurant at the weekends or a late-night bar are well understood. Impacts are often beneficial and not just burdensome and these benefits need to be explored with the rigour applied to the perceived burdens. Given the likely impacts it is worth the time and effort to fully explore the perspectives of all those with an interest in the locality of premises. Although time consuming, it has been my experience that the variety and range of different voices voicing similar concerns provides a meaningful foundation upon which to make good decisions in the public interest. Local participation and local decision making are in effect local democracy in action and ought to be encouraged.

Legal challenges to Coronavirus Regulations: where we are now and future lessons

Sam Karim QC examines how the Government's approach to reducing Covid transmission has been challenged by the hospitality sector

In response to the Covid-19 pandemic, the Government has introduced a panoply of regulations through Part 2A of the Public Health (Control of Disease) Act 1984 (Part 2A) imposing restrictions on the activities of those living and working in England.

For the hospitality industry, these restrictions have caused lengthy and devastating periods of closure, restrictions on opening times and costly adaptations to premises in an effort to operate businesses safely. This article summarises some of the significant challenges brought against the regulations introduced by the Government and seeks to inform any future restrictions that the Government will be implementing following the relaxation of the current lockdown restrictions. While it is absolutely imperative to manage the response to prevent and mitigate the spread of Covid-19, that must, it is averred, be subject to justified and proportionate responses by way of restrictions. The balance to be struck is between protecting the public and protecting the economy, which is a finely balanced exercise, hence the need for enhanced transparency in decision making and corresponding scrutiny.

Before considering the judicial review challenge mounted by the G-A-Y Group, and its effect of shifting the paradigm of the 10pm curfew to 11pm, it is necessary to consider the challenge mounted by businessman Simon Dolan, which neatly sets out the legal framework.

The Dolan challenge

On 21 May 2020, a judicial review challenge was issued by a group of claimants including Simon Dolan, the owner of a number of businesses including Jota Aviation, against the Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350), which came into force on 26 March 2020. This was the first set of regulations passed under Part 2A. With regard to the hospitality industry, they prohibited restaurants, cafes and public houses from selling food and drink for consumption on the premises. All other businesses, save for exceptions such as supermarkets, pharmacies, banks and petrol stations, were required to close. After a series of reviews and subsequent amendments over the next three months, they were repealed on 4 July 2020 and replaced by the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations (SI 2020/684).

The application raised a series of public law and human rights challenges against many of the measures introduced by the Secretary of State for Health and Social Care. These included the prohibition on leaving a place of residence without a reasonable excuse and the restrictions on gatherings in a public place. Challenges were also raised against the decision of the Secretary of State for Education to stop teaching on school premises for all children except those of key workers. For the purposes of this article, however, the focus will be on the restrictions affecting the hospitality industry. With this in mind, the notable conclusions of the courts relate to the *vires* of the regulations; the public law grounds relating to the lawful exercise of discretion, taking into account relevant considerations and irrationality; and a human rights challenge under Article 1 Protocol 1 of the European Convention on Human Rights (A1P1).

On 6 July 2020, Lewis J refused permission to bring a claim for judicial review on all grounds: see *Dolan v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin). By this time, the regulations prohibiting a person leaving home without reasonable excuse or more than two people gathering in public had been amended or replaced. Consequently, the judge found that the grounds of challenge in respect of those regulations had been rendered academic. Additionally, the court held that the grounds contending that ministers had acted outside the powers afforded to them under Part 2A, and contrary to public law principles, when introducing the regulations were not arguable. Finally, the judge held that the regulations did not *even arguably* involve a breach of the first claimant's rights under A1P1 and refused permission on this ground.

The *vires* issue

The claimants appealed against the decision. On 1 December 2020, following an oral hearing, the Court of Appeal granted permission with respect to the *vires* argument only (see *Dolan v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605). It held that in the context of what it described as a much discussed, fast-moving situation since the introduction of the regulations in March, the challenge could have been brought much more quickly. [35] As a result of the change in the regulations, the quashing order originally sought by the appellants could no longer be granted.

The appellants, however, argued that this did not meant that the claim was academic, as there was nothing preventing the court from granting a declaration or simply finding that the regulations were unlawfully made. Rejecting this submission, the court held that the claim was academic as many of the grounds raised would turn on the facts as they were at the time the regulations were made. Rather, the central question was whether the challenge could be permitted to proceed on the grounds of the public interest. The court held that it was only the *vires* arguments that did not require a detailed consideration of the facts and which remained a live issue. [36-42]

The substantive claim was retained within the court and subsequently dismissed. The arguments advanced by the appellants on this ground were distilled to a relatively narrow issue of construction: *whether the Secretary of State has the power to impose restrictions on movement and association, or requirements for the closure of premises, not only in relation to an individual or a group of persons but also in relation to the general population in England*. Contrary to the appellants' submission, the court held that this issue is not properly touched upon by the principle of legality, outlined by Lord Hoffman in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115: that fundamental rights cannot be overridden without express language or necessary implication of such an intention.

The court outlined that the amendment under Part 2A of the Public Health (Control of Disease) Act 1984 was introduced by the Health and Social Care Act in 2008 to cater for the possibility of a much greater public health response which might be needed in order to deal with an epidemic, such as that caused by SARS. The wording of section 45C(3)(c) under this part did not limit the powers of minsters to introduce special restrictions or requirements in line with those of a justice of peace. Instead, it allowed ministers to introduce some of those special restrictions and requirements through the broader powers afforded to them under section 45C. The court therefore held that Part 2A did confer power on the Secretary of State to pass the relevant regulations, and that this conclusion was not affected by the fact that he may have had the power to make the regulations under s 20 of the Civil Contingencies Act 2004. [43-78]

Public law arguments

Permission to appeal against the first instance decision in respect of both the public law and human rights arguments was refused. The court held that these grounds had become academic as the regulations under challenge had been repealed but noted that they were not properly arguable in any event.

That said, on the public law arguments, the following findings are of note.

1. The court found that the Secretary of State did not fetter his discretion by imposing five tests before the easing of lockdown could be considered. These tests were held to be an exercise of government policy as to how his discretion would be exercised. This policy did not prevent all those who disagree with the Government, including Parliamentarians and others in society, from inviting it to ease restrictions at any given time. [81]

2. The applicants also argued that the Secretary of State had failed to take into account relevant considerations relating to the uncertainty of scientific evidence about the effectiveness of the restrictions, and their impact on other aspects of the physical and mental health of the public as well as the economy. As a result, he failed to consider whether measures less restrictive than those adopted would have been a more proportionate response in restricting the spread of the coronavirus. The argument was dismissed as the Court held that:

   > *[t]his submission fails for want of an evidential foundation, without needing to travel into the question whether each of the matters identified was a legally relevant factor. The Secretary of State was well aware of all of these matters and, on the evidence before the judge, he was entitled to reach the conclusion that the Secretary of State did have regard to them.* [83]

3. In relation to the ground of irrationality, the applicants had argued that implementing the regulations for such a lengthy period was irrational: more targeted measures could have been introduced to protect the most vulnerable groups in society and the risk of overwhelming the

NHS had reduced by end of April 2020. The court exercised deference on this point. It noted that the regulations had been subsequently approved by Parliament through the affirmative resolution procedure. While this does not preclude judicial review of the regulations, the court found that it gives weight to the judgement of the executive. The court held that the executive has had to make difficult decisions in the current circumstances and drew analogy from the findings of Lord Bingham in *R v Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 CMLR 123 (a case concerning European Union law):

> *on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers.* [47]

It therefore concluded that it was:

> *impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality. There were powerfully expressed conflicting views about many of the measures taken by the Government and how various balances should be struck. This was quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suited to determination by the courts.* [84-90]

Human rights arguments

In relation to the first appellant's rights under A1P1, the Court began by outlining that Lewis J had found that there was no evidence to show that the regulations had deprived the first applicant, or anyone else, of their possessions, nor had the first claimant provided sufficient evidence to show that the regulations had involved an unlawful interference with his property. However, the court also held that:

> *[t]he margin of judgement to be afforded to the executive is particularly wide in this context, because this was a "control of use" case and not a deprivation of property case. Furthermore, the balance to be struck under this A1P1 would have to take account of the well-known measures of financial support which the Government introduced in the exceptional situation created by the pandemic.* [110]

In its analysis of the arguments raised in relation to Article 8, the Court of Appeal also highlighted the wide margin of appreciation that will be afforded to the Government when considering any interference with a qualified right:

> *In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.* [96-97]

In short, through their decisions in this challenge, the court has confirmed that ministers can use the powers afforded to them under Part 2A to lawfully make regulations implementing highly restrictive measures. When challenging the specific regulations upon human rights or public law arguments, applicants must act quickly to avoid their applications becoming academic. They must also address the evidential hurdle of establishing that the decision-maker had failed to take into account relevant considerations or had reached an irrational conclusion and may face difficulties in providing such information where there is a notable lack of data.

The courts also adopted a deferential stance in the debate surrounding the measures introduced by the regulations. It was clearly outlined that these debates are more appropriate for the political arena and the executive is to be given a wide margin of appreciation in exercising its powers under Part 2A. This seems to leave very little room to challenge measures that have had far-reaching impact on the rights and freedoms of many people within the courts.

The curfew challenge

Against the above background, in *G-A-Y Group Limited v Secretary of State for Health and Social Care* (CO/3647/2020), the claimant challenged the restrictions on the opening hours of businesses and services in the hospitality industry between 22:00 and 05:00 introduced by way of the Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020 (SI 2020/1029), which came into force on 24 September 2020 (the 10pm curfew).

Put simply, it was asserted that the Government had failed to provide sufficient reasons to justify the closure time of

10pm for many businesses on the basis that, on the face of it, the time seemed to have been arbitrarily selected and yet would risk the survival of many businesses. The claimant repeatedly sought from the Government the scientific evidence (or otherwise) behind the decision to impose the curfew, including in the letter before claim sent on 2 October 2020. No evidence was provided at this time.

The claimant asserted that, contrary to the Government's position, the curfew was counter-productive as it concentrated more people together in environments that were less Covid-secure, such as crowded public transport, rather than allowing them to remain in safer hospitality premises. On this basis, he challenged both the rationality and the proportionality of the measures introduced given the damaging impact they were having on businesses. Accordingly, at the time of the application, he sought a quashing order for the 10pm curfew regulation.

In support of this assertion, the following was relied upon:

a. In a BBC interview, the Rt Hon Michael Gove MP had stated that there was evidence that the 10pm curfew has a beneficial effect on the spread of the virus. This evidence has never been published.[1]

b. Members of SAGE openly expressed scepticism about its effectiveness. For instance:

   On 26 September 2020, two days after the measure was announced, Professor Graham Medley of the London School of Hygiene and Tropical Medicine, chair of the Scientific Pandemic Influenza Group on Modelling (SPI-M) was reported in the media as saying: "I never discussed it or heard it discussed"[2]; and

   Another member of SPI-M, the epidemiologist, Professor Mark Woolhouse of the University of Edinburgh, was equally clear the next day, stating to the journalist Andrew Marr that "there isn't a proven scientific basis for any of this."[3]

c. The SAGE 61st meeting minutes stated that "Case control studies indicate that restaurants and bars are associated with increased transmission risk", but to date these control studies were not disclosed.

d. A study in October 2020 conducted by the London School of Hygiene and Tropical Medicine, which concluded that there was "no suggestion that 10pm closure of bars and restaurants has had an effect on reducing the mean number of contacts that participants make outside home, work and school"[4]; and

e. A news article reported on 9 October 2020 by Sky News reported that as at that date, there had only been one alert on the NHS Covid-19 track and trace app sent regarding a coronavirus outbreak in a venue since its launch two weeks prior, despite the fact that the app had been downloaded 16 million times.[5] According to the article, the shadow digital minister Chi Onwurah commented that, "On the one hand, at a government briefing on local data I'm told pubs are the primary location for common Covid exposure, on the other that the contract-tracing app has only sent out one alert about an outbreak in a venue. There is a plain contradiction there."

Politicians from all parties and others sought the publication of the scientific and behavioural evidence behind the curfew decision. None was forthcoming. For instance:

1. On 29 September 2020, a letter was sent by Daisy Cooper MP for St Albans and signed by 25 MPs from six parties demanding the publication of the medical, scientific and behavioural evidence behind the decision to impose the 10pm curfew.[6]

2. Sir Keir Starmer demanded that the Government publish science behind 10pm curfew.[7]

3. In an open letter to Prime Minister from the Independent Family Brewers of Britain signed by 29 managing directors and CEOs calling for a re-think on the 10pm curfew citing a lack of scientific evidence to support it.[8]

4. The British Beer and Pub Association, a trade body for the pub and hospitality industry, alongside another trade body, the British Institute of Innkeeping, jointly issued a press release on 28 October 2020, which stated that that only 1% of over 22,500 hospitality venues surveyed by CGA

1 https://www.bbc.co.uk/news/uk-54242634.

2 https://www.independent.co.uk/news/uk/politics/boris-johnson-coronavirus-10pm-pub-curfew-sage-pandemic-b616467.html.

3 https://www.bbc.co.uk/programmes/p08sp9yz (from 6.30-7.40).

4 https://cmmid.github.io/topics/covid19/reports/comix/LSHTM-CMMID-20201019-CoMix-national_local_restrictions.pdf.

5 https://news.sky.com/story/coronavirus-contact-tracing-app-has-only-sent-one-alert-about-an- outbreak-in-a-venue-12099651.

6 https://twitter.com/libdemdaisy/status/1310862444638674944.

7 https://www.independent.co.uk/news/uk/politics/coronavirus-10pm-curfew-uk-review-boris-johnson-keir-starmer-pmqs-b860021.html.

8 https://twitter.com/ThwaitesBrewery/status/1315585147006332928.

> (a hospitality market research company) have reported test and trace incidences.[9] The press release also stated that the latest data from Public Health England shows that hospitality venues were linked to only 2.7% of the total recorded Covid-19 cases. The press release focused on concerns over the 10pm curfew that has been placed on the hospitality industry in both Tiers 2 and 3, and further states: "The evidence is clear that pubs, restaurants and hospitality venues are Covid-secure. Singling them out is simply illogical, counterproductive and grossly unfair."

The figures from Public Health England had consistently demonstrated that the number of the infections contracted in the hospitality settings are minor comparative to other sectors, totally 3% of total outbreaks. The figures also arguably demonstrated there has been a marginal difference in outbreak incidents, pre and post, the implementation of the 10pm curfew.

By the time the application was considered, the regulation had been replaced by equivalent measures under the tiered approach taken through the Health Protection (Coronavirus, Local Covid-19 Alert Level) (Medium) (England) Regulations 2020 (SI 2020/1103), the Health Protection (Coronavirus, Local Covid-19 Alert Level) (High) (England) Regulations 2020 (SI 2020/1104) and the Health Protection (Coronavirus, Local Covid-19 Alert Level) (Very High) (England) Regulations 2020 (SI 2020/1105).

On 22 October 2020, a decision was made on the papers by Lane J. The claimant was granted permission to amend his claim to challenge the regulations extant at the time. However, he was refused permission to bring a claim for judicial review on the basis that both the reasons and evidence advanced by the Secretary of State were sufficient. Emphasis was placed on the overall circumstances in which the decision was taken, and "the pressing need for the defendant to act with expedition".

Accepting the evidence adduced by the Government, the judge found that the decisions to introduce the 10pm curfew was rational. In reaching his conclusion, Lane J held that:

> *The fact that SAGE was of the view that curfews would have marginal impact did not legally compel the defendant to rule them out as a proportionate way of reducing Covid-19 transmission.*

The application for permission was renewed and the hearing was due to take place on 3 December 2020. The claimant produced a careful evidential report which indicated that the data available pointed away from the conclusion that hospitality venues were "vectors for transmission". It also did not show effective reduction in incidence rates following the imposition of restrictive measures upon the hospitality industry. The Government was therefore subjected to a strong challenge that there was a lack of evidential basis for the regulations. However, on 2 December 2020, new regulations came into force altering the 10pm curfew in Tier 1 and 2 areas to a restriction of last orders at that time, with closing time extended to 11pm (The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020/1374)). This effectively brought the judicial review to an end as the challenge had been rendered academic.

While the legal action in the *G-A-Y* case did not achieve the victory for the hospitality industry that had been hoped for, it engendered publicity and pressure on the Government which can play an important part in the checks and balances upon the measures that are introduced during this epidemic. In fact, as noted above, in the most recent changes to the regulations, where hospitality venues have been permitted to remain open, closure times have been pushed to 11pm.

It is also worthy of note that when the suitable time presents itself, a 10pm or 11pm curfew will not be pursued, it has been said. If this is accurate, it would seem that the *G-A-Y* case materially contributed to this concession.

Further changes and challenges

Challenges to the regulations continue to be raised by the hospitality industry. On 4 December 2020, Sam Morgan, representing the Birmingham Hospitality Group, announced his intention to seek judicial review of the Government's decision to close pubs in Tier 3 regions. Mr Morgan also requested the disclosure of substantial data from the Government to support its decision. And he also sought the provision of additional financial support for the businesses affected. On 7 December 2020, however, it was announced that the challenge had been paused to enable discussions between local authorities and Westminster.[10]

On 9 December 2020, the Chief Scientific Adviser, Sir Patrick Vallance, told the House of Commons Health and Science Committee that there is no hard evidence to support curfew times. Instead, the restrictions are policy decisions made by

9 https://beerandpub.com/2020/10/28/only-1-of-hospitality-venues-report-test-and-trace-incidences-as-latest-phe-data-shows-they-were-linked-to-just-2-7-of-covid-19-cases/.

10 https://www.localgovernmentlawyer.co.uk/licensing/399-licensing-news/45598-birmingham-restaurateur-pauses-tier-3-judicial-review-application-following-talks-between-local-representatives-and-westminster.

looking at the measures introduced in other countries and guided by the principles of reducing prolonged interaction in environments that also include alcohol.[11]

Conclusion

The measures being introduced in response to the coronavirus pandemic have had far-reaching effects on businesses, particularly in the hospitality sector. In their decisions thus far, the courts have shown great deference to the Government and found the power given to ministers under Part 2A of the Public Health (Control of Disease) Act 1984 to have been lawfully exercised, leaving little room for challenge. However, as the *G-A-Y* and Birmingham Hospitality Group litigations have shown, the legal challenges raised have generated a dialogue between decision-makers and those in the sector. As outlined above, the policy judgments that are exercised when introducing such measures often have to look beyond hard empirical evidence given the lack of such data. In such circumstances, it would seem to be highly desirable for decision-makers to consult those in the hospitality sector who are best placed to advise on the basis of their experience.

To this extent, it is suggested that when Government reconsiders easing the current lockdown restrictions (as defined), the following is undertaken to ensure the right balance between protecting the public from Covid-19 and protecting the economy, which should include:

- Clear and robust consultation with the hospitality industry, especially with regards to how the risks can be mitigated with regards to rapid / lateral testing.
- Transparent decision-making: while it is acknowledged that rapid decisions need to be made to grapple with the threat of Covid-19, clarity is required in relation to the status of the SAGE committee, the clinical and scientific studies or trials that are relied on, and when the decision is made, and by whom.
- Insofar as possible, to front-load work to develop equality impact assessments in relation to restrictions, which can fine-tuned at a later date; and
- To develop a hospitality taskforce (a war cabinet of sorts) to advise the Government on potential restrictions before a final decision. The taskforce should include leading individuals from the hospitality industry and be chaired by an individual who has legal knowledge of the regulatory framework.

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11 https://committees.parliament.uk/event/2369/formal-meeting/.

45 years on

The Local Government (Miscellaneous Provisions) Act 1976 has brought many positive changes to taxi licensing, though perhaps not as many as some would have liked. **James Button** reflects on a historic development

The year 1976 was a memorable one (for those old enough to either remember it, or who were even alive). Why, I hear you cry as you skim this article wondering if it is worth reading.

Well, it was an extraordinarily long and hot summer and a Minister for Drought, Denis Howell, was appointed; the Prime Minister, Harold Wilson, resigned and James Callaghan succeeded him; Concorde made its maiden commercial flight; and on 15 November, the Local Government (Miscellaneous Provisions) Act 1976 received Royal Assent. That will be 45 years ago later this year, so it seems apposite to evaluate its impact on hackney carriage and private hire licensing.

The provisions of Part II relating to hackney carriages and private hire vehicles came into effect on the passing of the Act, but of course that was only part of the story. Those provisions are adoptive, meaning that the powers were available for local authorities to adopt, the mechanism that needed to be followed was detailed in s 45, but did not take effect in the district until the adoption process was completed. Some councils moved quickly and adopted the provisions during 1977, but it was by no means seen universally as necessary to regulate private hire activity. Indeed some authorities did not adopt the provisions until the early 1990s. While this may seem surprising, it must be recognised that until the passing of s 15 of the Transport Act 1985, which took effect on 1 January 1987, hackney carriage licensing was not universal across England and Wales. There were significant areas, both whole districts and parts of districts, where there was no regulation of hackney carriages, and in those areas the 1976 Act could not be adopted.[1]

The Department for Transport now maintains that all local authorities in England and Wales have adopted the provisions, with the exception of Plymouth City Council (which uses its own local act, the Plymouth City Council Act 1975, on which the 1976 Act provisions were based). However, it is still incumbent on a local authority to be able to demonstrate adoption. This is done by means of a certified copy of the resolution adopting the provisions (and not just the resolution starting the process), copies of the notices which were published in two consecutive weeks in a local newspaper prior to the resolution, and evidence that a copy of that notice was sent to every parish or community council that existed at the time. "Substantial compliance" is satisfactory. This means demonstrating that at least some parish councils received the notice,[2] but the other requirements must be demonstrated.

Prior to this Act, there was some local control of private hire activity under local Acts of Parliament, but the 1976 Act did far more than regulate private hire services. It also amplified and expanded the law relating to hackney carriages. For example, it introduced the "fit and proper" test for hackney carriage drivers and a revised fee mechanism. It also introduced new mechanisms to create hackney carriage stands and regulate hackney carriage fares, which had previously been contained in hackney carriage byelaws.

The last 45 years have not been uneventful, both in terms of the legislation and also changes in society. Few in 1976 could have foreseen the rise of personal computing, the internet, mobile phones let alone smart phones, significant increases in urban living, vast increases in personal car ownership or the idea of global transport service providers.

In terms of the legislation, there have been significant amendments: access to police records for driver applications in 1992, subsequently replaced by CRB / DBS checks under the Police Act 1997; the requirement to carry assistance dogs introduced by the Disability Discrimination Act 1995, later replaced by the provisions of the Equality Act 2010; immediate action (suspension or revocation) against a driver's licence in 2006; immigration checks for drivers and private hire operators in 2016; and the requirement for drivers to provide mobility assistance to wheelchair-bound passengers in listed vehicles (listed by the local authority as being suitable for carrying wheelchair bound passengers) in 2017.

1 See s 45(2) Local Government (Miscellaneous Provisions) Act 1976.

2 See *Aylesbury Vale District Council v Call a Cab Ltd* [2014] RTR 30 Admin Crt.

Express powers to enable a private hire operator to subcontract to any other private hire operator (irrespective of local authority boundaries) were introduced in 2015. Prior to that, the Act always allowed subcontracting (s 56(1)), but this was seen to be restricted to between operators licensed by the same authority as a consequence of *obiter dicta* remarks in *Shanks v North Tyneside MBC*.[3] The introduction of clear legislation paved the way for the successful use of app-based booking services for private hire operators.

Case law resulting from the 1976 Act has not only affected private hire activity but also hackney carriage activity. It is well established that a private hire vehicle can be booked by anybody, by a person who is located anywhere, for a private hire journey commencing, travelling and terminating anywhere, with no required geographic link to the authority that issued those licences.[4] Hackney carriages have an inherent right to undertake pre-booked work, and there is no requirement for that to be booked via a private hire operator.[5]

The Town Police Clauses Act 1847 continues to be the basis of hackney carriage licensing and has not been amended to any great extent. Two of the most complex issues relating to hackney carriage licensing, the meaning of plying and standing for hire, and the limitation of hackney carriage numbers, have not been affected by the 1976 Act, but continue to generate confusion, uncertainty and litigation.[6]

There have been repeated and continuing calls for improvements to the legislation. These range from minor amendments to wholesale reform, but have sadly fallen on deaf ears. Hopes were raised with the Law Commission Investigation[7] (which commenced very nearly a decade ago) but have been dashed by the failure of both Westminster and Welsh Governments to act on its findings. A further flicker of optimism was raised with the creation and subsequent report of Professor Mohammed Abdul Haq's Task and Finish Group,[8] but again, Government response has been minimal, and with elastic timescales.[9]

Although there is no statutory requirement to provide guidance, the DfT (formerly the Department of Transport) has provided supporting information from the outset. Initially in the form of circulars, latterly it has issued formal guidance: *Taxi and Private Licensing: Best Practice Guidance*[10] was first issued in 2006 and updated in 2010; *Private Hire Vehicle Licensing - a Note for Guidance from the Department for Transport*[11] in 2011; and *Licensing Motorcycles as Private Hire Vehicles - a Guidance Note from the Department for Transport*[12] in 2012. Updates for all those are anticipated, although they may not be imminent. The provisions of s 177 of the Policing and Crime Act 2017 provide a statutory power to issue guidance (though not a duty) and *Statutory Taxi and Private Vehicles Standards*[13] was published in July 2020.

So what does the future hold? Although I would hesitate to predict legislative development in the next 45 years, I would be disappointed, but not hugely surprised, to discover that in 2066 hackney carriages and private hire vehicles are still regulated by the 1847 and 1976 Acts. If that is the case, it is sincerely hoped that both pieces of legislation will have been severely amended to drag them kicking and screaming into what will by then be the second half of the 21st century.

Societal development is equally hard to predict, but autonomous driverless cars are only just over the horizon, and if those are used to carry passengers, they are not regulated by the current provisions relating to private hire vehicles. Communications will only get quicker but it is hard to imagine the kind of technological advances that have been seen in the last 45 years being replicated (though I suspect that statement may come back to haunt me!).

What does seem clear is that people will still require mechanisms of transport that are convenient, comfortable, safe and affordable. Whenever the public is engaged with activity, there is need for safety regulation and that will not diminish.

So let us raise a glass to the Local Government (Miscellaneous Provisions) Act 1976, reflect on its positive aspects, identify areas in urgent need of reform and bring collective pressure to bear on Governments to respond to our entreaties.

James Button
Principal, James Button & Co Solicitors

3 [2001] LLR 706 Admin Crt.

4 *Adur DC v Fry* [1997] RTR 257 QBD; *Windsor & Maidenhead RBC v Khan* [1994] RTR 87 DC.

5 *Brentwood BC v Gladen* [2005] RTR 12 Admin Crt; *R (app Newcastle CC) v Berwick BC* [2009] RTR 34 Admin Crt; *Stockton BC v Fidler* [2011] RTR 23 Admin Crt.

6 See Chapter 8 *Button on Taxis – Licensing Law and Practice* 4th Ed Bloomsbury Professional 2017.

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

8 Available at https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-recommendations-for-a-safer-and-more-robust-system.

9 Available at https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-government-response-to-independent-report.

10 Available at https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-best-practice-guidance.

11 Available at https://www.gov.uk/government/publications/private-hire-vehicle-licensing-guidance-note.

12 Available at https://www.gov.uk/government/publications/licensing-motorcycles-as-private-hire-vehicles.

13 Available at https://www.gov.uk/government/publications/statutory-taxi-and-private-hire-vehicle-standards.

The Weddings Law consultation paper addresses modern diversity

Proposed changes to the way marriages are licensed appear to be a sensible development, and may even prove beneficial to the hospitality sector, writes **Leo Charalambides**

Weddings are highly regulated events in England and Wales. The laws that govern them (by and large the Marriage Act 1949) set out the requirements for conducting a valid marriage which include notice, location, content, attendance and the registration of a marriage. Yet these complex rules do not apply consistently to all and instead vary among different couples and communities. In response to these shortcomings, on 3 September 2020, the Law Commission published *Getting Married: A Consultation Paper on Weddings Law* setting out provisional proposals for largescale reform of the system governing weddings. Significant changes may be afoot in the context of licensing as there will no longer be a need for weddings to take place in a licensed venue.

The existing laws

In England and Wales, unlike in Scotland and Northern Ireland, couples can only choose between a civil or a religious ceremony. Unless they are having an Anglican wedding, they are required to give notice of their marriage at the register office. With the exception of Jewish, Quaker and, to a degree, Anglican weddings, ceremonies must be conducted in a place of worship or within a licensed, secular building. Couples cannot marry outdoors, not even in the garden of a licensed venue. There is no option to have a ceremony reflecting non-religious beliefs (such as humanism), inter-faith weddings are not facilitated, and couples are only able to include incidental religious content into their civil weddings. Most weddings require the presence of at least two witnesses and must be conducted in the physical presence of duly authorised persons. The requirements for registration also vary for each of the religious and non-religious groups.

As the consultation paper outlines, we are now a far more secular society and are more culturally and religiously diverse. The current laws are significantly outdated, retaining the fundamental aspects of a system dating as far back as 1836, and do not work for many. They have led some couples to sacrifice the protections of a legal marriage by simply following their own traditions or choosing not to marry at all. Others may take more costly routes such as traveling to another jurisdiction that permits their choice of wedding or by paying for two ceremonies: one that meets their requirements and another that meets their desires and beliefs.

Where this complex set of rules is not complied with, couples may not be recognised as legally married. This lack of legal status often only becomes apparent at the end of a relationship when the parties discover that they have no legal rights against each other or against their estate. The effect of such an outcome will, in practice, be felt more disproportionately by women, who are frequently the financially weaker party.

While the consultation paper was drafted before the pandemic, the pertinence of the timing of its publication is clear. As a result of the restrictions imposed in response to the current pandemic, venues have had to close, meaning many weddings have been forced to be postponed. The requirements of physical presence in a building also prevented alternative solutions, such as remote hearings, from being implemented.

The new proposal

The Law Commission's stated aim is to propose a scheme that would make weddings law simple, fair and certain, protecting both interests of the state and of individuals. It has made clear that it does not seek to propose that the government recognises other wedding ceremonies as legal forms of marriage. Instead, it seeks to offer ways in which any potential rule changes could be implemented. The proposals seek to allow all couples more freedom of choice in getting married and outlines a set of rules that would apply to all weddings. It does so by moving away from what is termed a "buildings-based" approach under the current regulations to focusing instead on the regulation of officiants.

The requirements of a valid marriage under the proposed scheme have been distilled to two elements.

The first is notice: a wedding will not result in a valid marriage if the parties fail to give notice of their intention to marry. A clear timetable is set out for the notification process with a view to enabling the necessary investigation into

any potential impediments to marriage. By protecting the interests of the state at this stage, the reforms seek to offer couples more choice in the wedding ceremony itself.

The second requirement is consent: the marriage would be formed at the point of the parties expressing their consent. The form and manner in which the couple give their consent is a choice for them, and the requirement to include prescribed words in a ceremony has been removed. The intention is to enable couples to have legally binding ceremonies which reflect their traditions or faiths.

All weddings would however be required to take place in the presence of one authorised officiant. This rule would apply equally to civil and religious ceremonies, thus requiring only one registration officer to attend the former. The proposal considers a broader range of people who could officiate a marriage, adding officiants nominated by religious and non-religious belief organisations, maritime officiants, as well as the possibility of independent officiants to the category. It would be the responsibility of the officiant to ensure that the legal requirements of the ceremony were met. The failure of an officiant to comply with their duties in officiating at a wedding would not affect the validity of the marriage but could have consequences for the officiant's continuing authorisation.

The form and validity of the marriage would not depend on where the wedding ceremony was held. A wedding would be legally permitted to take place anywhere, including in international waters aboard cruise ships registered in the United Kingdom, and there would be no requirement for pre-approval of the venue. This approach would remove the need to license a venue.

A series of issues were identified with the Marriages and Civil Partnerships (Approved Premises) Regulations 2005 (SI 2005 No 3168) that currently govern the approval of premises for civil weddings. The regulations outline rigorous approval requirements which include both standard conditions and those specific to local authorities. As the consultation paper records, they are liable to inconsistent applications, permitting greater flexibility to couples in certain areas and much less in others. They can also give rise to significant costs for all involved and risk deterring small businesses and non-commercial venues from seeking and maintaining approval.

The consultation paper also questions the need for additional approval requirements for wedding venues given the existence of laws which cover individual aspects of approval. For example, any material change of use to a structure can be addressed by existing planning law and building regulations, and where serving food and drink amounted to a licensable activity, it would require separate authorisation under licensing law.

The proposed scheme outlines that the location of a wedding would be subject to an officiant's consent. The officiant would be responsible for considering the safety, dignity and solemnity of the ceremony. In order to avoid the inefficiency of the need to approve a venue prior to each wedding, it is suggested that local authorities could maintain lists of venues that have already been assessed as suitable. Religious and non-religious organisations would be entitled to outline their own requirements as to where a wedding could take place.

Conclusion

The increased flexibility and consistency of weddings law outlined in the Law Commission's consultation paper seems to be a welcome proposal. The consultation with stakeholders on the provisional proposals closed on 4 January 2021. A final report with recommendations is due to be published in the second half of 2021. The potential benefit to the hard-hit entertainment and leisure industry could be a significant.

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Regulatory system comes under new scrutiny

The Government's review of the Gambling Act 2005 is driven by new technology's impact on betting, explains **Nick Arron**

As we settle into 2021, it can be tricky to think about much else other than Covid-19 and the ongoing challenges it presents in all areas of our lives and businesses. However, even in the midst of a global pandemic, the wheels keep turning and in December 2020 the Culture Secretary launched a wide-ranging review of the current gambling legislation. A call for evidence has been raised and will run for 16 weeks; responses must be provided by midnight on Wednesday 31 March.

It's easy to see why Government feels that a review of the legislation is necessary. There have been vast changes within the gambling industry since 2005, including technological advance such as smartphones, new product design such as apps on smartphones, as well as changes in the way products can be advertised.

The Ministerial foreword to *Review of the Gambling Act 2005 Terms of Reference and Call for Evidence*, published on 8 December 2020, states: "The Gambling Commission has broad powers to set and enforce licence conditions, but in recent years a number of high profile enforcement cases have raised concern that too many people are still experiencing significant harm. We want to look at whether our regulatory framework is effective and whether further protections are needed."

So what are the objectives of the review? Ultimately the Government wants to assess whether the balance of regulation that is currently in place is sufficient for the gambling industry as it looks and behaves today in light of the advances that we have seen in technology.

It also wants to make sure that there is appropriate protection for customers for both online and land-based activities.

Within the terms of reference and call for evidence, it is confirmed that the scope of the review is wide and that particular regard will be given to:

- The protection of online gamblers, including rules to minimise the risks associated with online products themselves, and the use of technology to support harm prevention.
- The positive and negative impacts of the advertising and marketing of gambling products and brands.
- The effectiveness of the regulatory system, including the Gambling Commission's powers and resources to regulate and keep pace with the licensed market and tackle unlicensed operators, and funding flows from the industry to the regulator.
- The availability and suitability of redress arrangements for individual customers who feel they have been treated unfairly by gambling operators.
- Children's access to Category D slot machines, the effectiveness of age controls, protections for young adults, and the age limit for society lotteries (currently available to 16 and 17 year olds); and
- The outcome of changes to the land-based sector introduced in the Gambling Act 2005, particularly for casinos, and whether they are still appropriate in a digital age.

It is also worth noting that a particular point is made that loot boxes (the subject of much media scrutiny in recent years) have not been forgotten about. There was a separate call for evidence in respect of these in 2020 and we await the outcome.

The latest call for evidence contains 45 questions, covering a number of distinct areas including:

- Online protections - players and products.
- Advertising, sponsorship and branding.
- The Gambling Commission's powers and resources.

- Consumer redress.
- Age limits and verification; and
- Land-based gambling.

Throughout the review and also in the questions raised within the call for evidence, particular attention is given to children, young people and those who are vulnerable to gambling risks.

Key questions are asked as to whether there is any evidence of the effectiveness of current measures that are in place to prevent under-age gambling in both land-based premises and online, as well as whether there is any evidence to show that there should be an increase to the threshold at which local authorities can authorise category D and C gaming machines in premises licensed under the Licensing Act 2003, with category D machines being uniquely available to play for under 18s.

Machines in pubs have the subject of enforcement action by licensing authorities in recent years, although there is little or no evidence of a real or widespread problem with regard to under-18s playing on machines in alcohol-licensed venues.

An interesting section in the call for evidence looks at the Gambling Commission and its powers and whether they are sufficient to be able to raise standards and impact upon how operators behave, and if they are, whether there is scope for these powers to be utilised in a more effective manner. The Commission has extensive powers to investigate and sanction licensees, with power to fine operators and revoke licences, which it does on a regular basis, as borne out in its personal and operating licence sanctions registers, available on the Commission's website. Millions of pounds have been paid by operators in recent years in fines and settlement agreements. Despite this there is significant political pressure on the Commission to take more regular and more draconian action.

Online gambling is the main focus of the call for evidence and there are a number of questions asked in respect of the protections in place for online players. It is noted within the call for evidence that there are concerns around the nature of the products available online and that certain products present higher risks to consumers than others in respect of problem gambling. The speed at which this area of the industry evolves is also an issue for the Government and the call for evidence addresses the need for the legislative tools to be flexible and futureproof. It is clear Government wants to be able to respond to any evolving risks such as the aforementioned loot boxes, for example.

Due to the number of areas the call for evidence encompasses, there is not enough room for me to cover all of the areas in detail, and so I will focus on the questions being raised in respect of land-based gambling.

Land-based gambling

The call for evidence acknowledges that Covid-19 has had a significant impact upon the land-based gambling industry and recognises that the true scale of its impact is currently unknown. Gross gambling yield from this sector will contract significantly during 2020 / 2021, with premises being open for a few months at best, and then with restrictions, so not all land-based gambling businesses will survive.

The review is set to look at the existing rules for land-based gambling and whether these are still relevant as we move into a much more digital world. It looks at cashless payment restrictions and their impact upon competition with online operators, as well as anonymity in land-based venues and whether removing this anonymity could impact upon self-exclusion schemes.

Casinos are a focus point for this section of the call for evidence, and both large and small casinos under the Gambling Act 2005 are to be scrutinised.

Evidence is also sought in regard to the powers of local and licensing authorities and whether they are sufficient for the regulation of gambling premises. Many readers will have a view on this subject. The evidence from the Gambling Commission's publication of licensing authority returns concerning the numbers of permits and permissions issued and premises inspections conducted suggests that current powers are sparsely utilised.

In summary, the key questions asked in the call for evidence regarding land-based gambling are as follows:

- What evidence is there on potential benefits or harms of permitting cashless payment for land-based gambling?
- Is there evidence that changes to machine allocations and / or machine-to-table ratios in casinos allowing them to have more machines would support the Government's objectives?
- What is the evidence that the new types of casino created by the 2005 Act meet (or could meet) their objectives for the sector, ie, supporting economic regeneration, tourism and growth, while reducing risks of harm?
- Is there evidence on whether licensing and local authorities have enough powers to fulfil their

responsibilities in respect of premises licenses?

- Is there evidence that we should moderately increase the threshold at which local authorities need to individually authorise the number of category D and C gaming machines in alcohol-licensed premises?

As to process, the call for evidence ends on Wednesday 31 March. During the summer (or perhaps later because of Brexit and the pandemic) the Government will publish a consultation or White Paper which reflects on the call for evidence and suggest more detailed proposals for the future of gambling regulation. Any resulting changes to the licence conditions and codes of practice will most likely require further Gambling Commission consultation. These could be implemented this autumn but full legislative changes are not likely to be implemented for another 18 months.

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Appeals and non-payment of court fees: a solvable problem

An appellant's failure to pay the court fee in good time is too often delaying the course of justice and is unacceptable, legally and morally, argues **Gary Grant**. Councils please take note

The deliciously named Lord Chief Justice Pratt once made this noble statement on appeals:[1]

> *It is the glory and happiness of our excellent constitution, that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief; for this purpose the law furnishes him with appeals....*

An alternative take came from the American humourist Finley Peter Dunne who wryly observed:

> *An appeal is when you ask one court to show its contempt for another court.*

Licensing appeals are important. They are often the difference between an operator being able to continue in business or else having to close up shop with the consequent loss of livelihoods and jobs. They may also determine the quality of life of people who live near to problem premises and suffer the consequences.

This article considers the increasingly encountered issue of licensing appeals being launched in Magistrates' Courts but delayed due to appellants failing to pay the prescribed court fee in time, or at all. The phenomenon adds to the severe delays already being experienced in the determination of licensing appeals to the detriment of the public interest. Different courts are taking different approaches to the problem, some lawful, others unlikely to be so. Some courts have adopted a pragmatic and helpful approach, others less so, and this, inadvertently, obstructs rather than promotes the efficacy of the appeal process.

Both the legal aspects and practical solutions are put forward in this article which focuses on appeals under the Licensing Act 2003, but much of the rationale will apply equally to other types of licensing appeals in the Magistrates' Courts as well.

Appealing in time

Under the Licensing Act 2003 the statutory right of appeal to the Magistrates' Court is provided by s 181 and Schedule 5.[2] The 21-day time limit to appeal a decision of the licensing authority is prescribed in paragraph 9(2) of Schedule 5 as follows:

> *An appeal under this Part must be commenced by notice of appeal given by the appellant to the designated officer for the magistrates' court within the period of 21 days beginning with the day on which the appellant was notified by the licensing authority of the decision appealed against.*

The time limit is a strict one. The court appears to have no discretion to extend this period, however good the reason may be for an appellant's failure to lodge the appeal in time.[3] It is therefore essential that the appellant serves their appeal in good time and in a valid manner (by email or post to the Court Office generally suffices).[4]

It is important to note when the clock starts ticking. Day one of the 21-day count is the day of notification itself, rather than the following day as is often the case with other statutory time limits.

Although technical arguments to the contrary have been raised, "notification" is generally accepted to refer to the date of "written" notification (including one sent by email), rather than the common, but not universal, practice of a

1 *The King v Chancellor of the University of Cambridge* ("Dr Bentley's case") (1722) 1 Strange 557, 93 E.R. 698.

2 The appeal is by way of complaint for an order: rule 34 of the Magistrates' Courts Rules 1981. Section 51 of the Magistrates' Courts Act 1980 then provides the authority for the court to summons the licensing authority in response to the appeal.

3 See *Stockton-on-Tees Borough Council v Latif* [2009] EWHC 228 at [§20-23]; and *The Queen o/a/o Essence Bars (London) Ltd v Wimbledon Magistrates' Court* [2016] EWCA Civ 63 at [§49].

4 For an example of where the High Court ruled that service of an information on a sub-contracted court security officer was invalid, see *Begum v Luton Borough Council* [2018] EWHC1044 (Admin).

licensing sub-committee to orally announce its decision at the conclusion of the hearing.[5] This makes good sense. It is usually only in the written decision that the full reasoning of the sub-committee is set out and the right of appeal indicated.[6]

In most cases, decisions can be notified within five working days of the hearing.[7] However, there are some prescribed instances where the authority must make its determination at the conclusion of the hearing, including at summary reviews and when issuing a counter-notice following a police objection to a temporary event notice.[8] In the latter cases, if time does not permit a fully reasoned written decision to be issued promptly (as it often will not), it is best practice for the council to issue by email a short written determination on the same day the hearing concludes (for example, one that simply sets out the decision and right of appeal). This short notification can, and should, then be followed up by fuller written reasons in the days that follow.

The importance of reasons cannot be overstated. In *Hope and Glory* [2011] EWCA Civ 31 at [43], the Court of Appeal observed:

> *The statutory duty of the licensing authority to give reasons for its decision serves a number of purposes. It informs the public, who can make their views known to their elected representatives if they do not like the licensing sub-committee's approach. It enables a party aggrieved by the decision to know why it has lost and to consider the prospects of a successful appeal. If an appeal is brought, it enables the magistrates' court to know the reasons which led to the decision. The fuller and clearer the reasons, the more force they are likely to carry.*

Appeal fees

Unless an appellant can show particular financial hardship,[9] licensing appeals are not free but are now cheap: a fee of £60 is payable to the court by the appellant. The power to charge fees derives from s 92 of the Courts Act 2003.[10] By virtue of s 92(8), fees payable under this section are recoverable summarily as a civil debt.

Under this enabling power, the Magistrates' Courts Fees Order 2008 (the "2008 Order") was made (and later amended). Article 2 states:

> *The fees set out in column 2 of Schedule 1 are payable in magistrates' courts in respect of the items described in column 1 in accordance with and subject to the directions specified in that column.*

Paragraph 2.3 of Schedule 1 to the 2008 Order then indicates that the fee to be taken "on commencing an appeal" under the Licensing Act 2003 is £60.

The problem of non-payment of fees

What happens if the appellant does not pay the prescribed court fee at the time of lodging the appeal? The problem is real and is being dealt with differently by different Magistrates' Courts. Some pro-active courts have been known to summarily dismiss appeals if the payment of the fee has not been made within the 21-day time limit for appealing on the basis that the appeal has "not been made in time" and so the court does not have jurisdiction to entertain it. More frequently, courts simply refuse to list the first case management hearing or even issue a summons to the respondent council, until the fee is paid, which, if it is paid at all, may be many months later (in one instance the court had still not listed the first hearing eleven months after the appeal was lodged). This contributes to even longer delays in licensing appeals being determined. This, in turn, can have a seriously detrimental impact on the public interest as reflected in the licensing objectives[11] and the council's decision, which will have sought to promote them in an appropriate and proportionate manner.

With some exceptions (for example, in summary reviews where interim steps pending appeal can be imposed on

5 Reg 34(1) of Licensing Act 2003 (Hearings) Regulations 2005 states that "Any notices required to be given by these Regulations must be given in writing."

6 Reg 29 of the Licensing Act 2003 (Hearings) Regulations 2005 requires the notice of determination to be "accompanied by information regarding the right of a party to appeal against the determination of the authority."

7 *Ibid*, reg 26(2).

8 *Ibid*, reg 26(1).

9 Under article 5 and Sch.2 to the Magistrates' Courts Fees Order 2008 a party may apply to the court for a remission or part remission of a fee, for example, if his disposable income is below a certain threshold. An application must be supported by documentary evidence and assessed by the court officer at the time the fee is payable.

10 Section 92 provides (in so far as relevant):

92 Fees

(1) The Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by–

(c) magistrates' courts.

(2) An order under this section may, in particular, contain provision as to–

(a) scales or rates of fees;

(b) exemptions from or reductions in fees;

(c) remission of fees in whole or in part.

(3) When including any provision in an order under this section, the Lord Chancellor must have regard to the principle that access to the courts must not be denied.

(8) Fees payable under this section are recoverable summarily as a civil debt.

11 The prevention of crime and disorder and public nuisance, public safety and protecting children from harm: s 4(2) of the Licensing Act 2003.

a licence at the full review hearing[12]), the decision of the council will not take effect until the appeal is determined. So, by way of example, in the case of a decision reached after a standard premises licence review[13] to reduce the operating hours of a pub whose noisy customers are causing a serious public nuisance to nearby residents, that nuisance may well continue until the appeal is determined. There is, therefore, a considerable public interest in ensuring that these types of appeals are efficiently progressed and determined sooner rather than later.

The issue is becoming more acute given that the backlog of cases waiting to be heard in the Magistrates' Courts has significantly increased during the Covid-19 pandemic and, regrettably, licensing appeals are not viewed as a high priority in court listing decisions. (This is a matter the Institute of Licensing is seeking to address with the Chief Magistrate and individual councils are, rightly, making their own representations to their local court managers with, it is reported, some sporadic success.) The first legal question to be resolved is this: if an appeal is launched within the 21-day time limit but the fee is not paid until after it has expired, has the appeal been made in time? The simple answer is "yes", although some court legal advisors have, wrongly in my view, suggested the opposite. The longer answer follows. It is somewhat technical but, as the late Lord Bingham once stated:[14]

> *Technicality is always distasteful when it appears to contradict the merits of a case, the duty of the court is to apply the law, which is sometimes technical.*

It is sufficiently apparent from the relevant statutory provisions (the "2008 Order") that a licensing appeal is commenced when the notice of appeal is served on the court. Although a fee is payable "on commencing the appeal" that fee is *not* a pre-requisite of a valid appeal.

As noted above, the fee is "recoverable summarily as a civil debt". This must mean that the fee is due only because a valid appeal has, in fact, been commenced. If the appeal were not valid then the fee could not become recoverable, because no debt would have been incurred. Put another way, this suggests that the appeal is valid when lodged and that is why the debt is owed and recoverable. The sanction for non-payment of the fee is that is can be recovered as a debt, not that the appeal is invalid.

Where the payment of a fee is a pre-requisite for any application lodged at court to be accepted as valid, then one would have expected the relevant provisions to have expressly said so. In a quite different setting, in relation to applications to a public body under The Immigration and Nationality (Fees) Regulations 2007, the consequences of failing to pay the specified fee are expressly set out:[15]

> ***Consequences of failing to pay the specified fee***
> *21.— (1) Subject to paragraph (2), where an application to which these Regulations refer is to be accompanied by a specified fee, the application will not be considered to have been validly made unless it has been accompanied by that fee.*

Another example of an express statutory provision stating the consequences of a failure to pay a court fee is provided by s 125 of the Senior Courts Act 1981. This provision directly relates to fees payable under s 92 of the Courts Act 2003 (which is the same provision that gives rise to fees payable in licensing appeals). A person may apply to a court or district registry office for a copy of a will, but only once the fee prescribed under an order under s 92 of the Courts Act 2003 is paid:

> *An office copy, or a sealed and certified copy, of any will or part of a will open to inspection under section 124 or of any grant may, on payment of the fee prescribed by an order under section 92 of the Courts Act 2003 (fees) be obtained....*

Similarly, one would have expected the statutory provisions in relation to commencing licensing appeals to have expressly stated that the appeal could not be commenced, or was not valid, until the prescribed fee was paid - if that had been Parliament's intention. But, in the case of licensing appeals, they do not and the silence points towards the opposite conclusion, namely, that the appeal is valid despite the failure to pay the court fee.

Slightly closer to the licensing regime, in the context of challenges in the Magistrates' Court to decisions made by councils in relation to business rates, the High Court in *R (o/a/o) Preservation and Promotion of the Arts Ltd v Greater Manchester Magistrates' Court & Others* [2020] EWHC 2435 (Admin) has very recently (September 2020) considered

12 Pursuant to s 53D of the Licensing Act 2003.

13 Determined under s 52 of the Licensing Act 2003.

14 In *R v Clarke* [2008] UKHL 8 at [17] (and cited by the Court of Appeal in the licensing related appeal of *R(o/a/o Essence Bars (London) Ltd v Wimbledon Magistrates' Court* [2016] EWCA Civ 63 at [49]).

15 Although this order was subsequently revoked, the replacement reg.16 of the Immigration and Nationality (Fees) Regulations 2018 states to similar effect:

(1) Where a person is required to pay a fee specified in these Regulations for an application, but fails to pay that fee, the Secretary of State may—

(a) reject the application as invalid; or

(b) request the person to pay the outstanding amount.

whether the payment of a specified fee to the Magistrates' Court outside the required period invalidated an application to the court to state a case, which is one method enabling an appeal to the High Court to get off the ground. As with licensing appeals, there was a 21-day time limit to apply to the court to state a case. In this case, the application was made in time, but the prescribed fee was only paid *after* the 21 days had expired. In the High Court, Jefford J considered the same statutory provisions relating to fees that apply to licensing appeals (ie, s 92 of the Courts Act 2003 and Magistrates' Court Fees Order 2008). She held that the appeal *had* been validly made even though the appeal fee was only paid after the 21-day time limit had expired. The Court found that the District Judge had been wrong to rule that the application was not validly made until the fee was paid.[16]

Although the same question has not been answered by the senior courts specifically in relation to licensing appeals, by reference to these analogous scenarios involving the same statutory provisions, the senior courts would most likely conclude that a licensing appeal served on the court within the 21-day period is valid even if the court fee is not paid until afterwards.

If the position were otherwise, real practical problems would arise. An appeal lodged on, say, the final day of the appeal period would be invalid even though the party appealing was making every effort to make payment of the court fee before the period expired but, as is increasingly the case, it had proved impossible to contact a court officer to make payment until the following day. Or, if the payment is made through an automated system, the appeal would become invalid because the automated system malfunctioned. It is unlikely that a senior court would find that a satisfactory position.

Practical solutions

In line with this reasoning, since a court cannot lawfully rule that an appeal is out of time simply because the fee has not been paid within the 21 days, what is to be done by courts and councils eager to progress the appeal?

Some courts refuse to issue a summons to the respondent council until the fee is paid. It is highly questionable whether a court can properly take this course, at least in relation to appeals against decisions taken at, for example, standard premises licence reviews. A court does have a discretion whether to issue a summons. However, that discretion must be judicially exercised. In the House of Lords decision *R v Manchester Stipendiary Magistrate ex p Hill* [1983] AC 328, Lord Roskill stated [at p.343]:

> *This function of a justice of the peace or of the clerk to the justices in determining whether a summons should be issued is a judicial function which must, therefore, be performed judicially. This function, in my view, cannot be lawfully delegated to any subordinate.*

The senior courts are unlikely to be sympathetic to a Magistrates' Court that delayed or refused to issue a summons to the council due to the non-payment of a court fee where an otherwise valid appeal is made by a licence holder against the council's decision following a standard (ie, non-summary) licence review. Such a decision would be contrary to the interests of justice if it has the effect of further delaying the council's review decision from coming into effect because it may lead to a further undermining of the licensing objectives, which undermines the public interest.

The position may well be different if the appellant is, for example, appealing the refusal of their own application for the grant of a new premises licence or variation, because the resulting delay in the appeal being determined primarily adversely impacts on their own commercial interests (rather than the public interest) and they are at fault for not paying the fee. The operator's remedy is a simple one – to pay the £60 court fee. So, it may not be unreasonable for the court to refuse to issue the summons enabling the appeal to proceed prior to payment of the court fee in these circumstances.

But in cases where the council wants the appeal to proceed sooner rather than later, the first step is for the council to implore their local court to continue to process the appeal and list the case management hearing (if there is one) or the full appeal (if there is not) despite the failure of the appellant to pay the court fee. There is no justification for holding up the appeal process because of the failure. It is recoverable as a civil debt if the court wishes to act. Councils should point out that any delay resulting from the court's own actions, or inaction, risks damaging the public interest, particularly if the decision under appeal is one made at a licence review.

Anecdotal evidence suggests that some unscrupulous operators are deliberately delaying the payment of the modest court fee precisely in order to further delay the moment when the council's decision takes effect (ie, if / when their appeal is dismissed or the appeal is withdrawn much further down the line). This is a particularly advantageous stratagem for an operator if the decision being challenged is one taken at a review to cut their business's operating hours or revoke their premises licence. Courts should not, albeit inadvertently, agree to promote such a stratagem by delaying the appeal process, as it is clearly not in the interests of justice to do so and risks damaging the public interest.

16 See ss 19-30.

At least one major court centre is taking a robust, pragmatic but lawful approach towards non-payment of fees in licensing appeals. Birmingham Magistrates' Court now automatically sends out standard directions on receipt of a licensing appeal. One of those directions reads as follows:

> *No action will be taken on any appeal until the court has received the appropriate fee. In the event of the fee not being paid within 14 days of receipt of the notice of appeal, the appeal will be deemed to have been abandoned.*

This would then permit the court to exercise its Case Management Powers under the Magistrates' Courts Rules 1981 to dismiss the "abandoned" appeal (we return to the underlying principles of this course further below). Other courts would be well-advised to follow Birmingham's example and councils should encourage them to do so.

Councils should also try to agree a protocol with their local court which ensures that they are sent a copy of any appeal against their licensing decisions forthwith on receipt. While it is professionally courteous for an operator to copy their notice of appeal to the licensing authority at the same time they serve it on the court (or very shortly afterwards), the law does not mandate them to do so. Decision notices could also usefully indicate the council's expectation that any appeals against the decision are served on them as well as the court. If the council is left unaware that an appeal has been lodged at the court (which is too often the case nowadays) they cannot chase up the court if and when delays in the appeal process occur.

Finally, if the court is not prepared to unilaterally issue a direction to an appellant in relation to the consequences of a failure to pay the court fee, then the council should consider applying to the court to summarily dismiss the appeal or else issue an "unless order" requiring the fee to be paid within a certain period following which the appeal will be deemed to be abandoned or otherwise dismissed. The legal principles to be applied were considered in detail by the author in an earlier article in the *Journal of Licensing* in the context of failures by appellants to comply with court directions.[17] In summary, the power to summarily dismiss licensing appeals derives from the Magistrates' Courts Rules 1981. They provide the court with wide case management powers, including powers to make directions and indicate sanctions for non-compliance.[18] Importantly, a court may "specify the consequences of failing to comply with a direction": see Rule 3(A)(7)(i). There is no reason why the consequence of continued non-payment of a court fee should not be the dismissal of the appeal.

Two High Court cases offer some support for this proposition in the context of licensing appeals. In *Almada v City of Westminster Magistrates' Court* [2010] EWCA Civ 386, the Court of Appeal (Civil Division) refused to interfere with a District Judge's decision to debar an appellant from adducing evidence at their licensing appeal in circumstances where the appellant had failed to comply with court directions, in this instance relating to service of evidence. Dyson LJ expressly confirmed that the Magistrates' Court had the jurisdiction to make the debarring order (at s13). Similarly, in *R (Saleh Uddin) v Wealden & Rother District Council* (CO-634-2019, 5 March 2019), the Administrative Court (Mostyn J), refused the appellant permission to judicially review a decision of a District Judge debarring the non-compliant appellant from adducing evidence. In his written order refusing permission (which may be of persuasive force in a Magistrates' Court even if it is not binding authority), Mostyn J approved the concept of summarily dismissing a licensing appeal for non-compliance with directions, stating:

> *The decision of the defendant [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.*

Similar principles could be utilised to justify the dismissal of an appeal where the appellant fails, or refuses, to pay the court fee, particularly where a court's direction to pay the fee by a certain date has not been complied with. This sanction would be particularly well-suited to instances where the failure to pay the fee appears to be deliberate rather than down to an innocent mistake or administrative

17 Gary Grant, *Summary dismissal of licensing appeals for non-compliance*, (2019) 24 JoL, pp 40-43.

18 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.

error by the appellant, particularly where they are not legally represented.

Conclusion

The adverse consequences of an appellant's failure to pay the court fee in good time should fall on the appellant and not the council representing the public interest. Courts should not enable further delays caused by an appellant's inaction to further hold up the determination of licensing appeals, especially at a time when the delays in hearing licensing appeals risk becoming scandalous because of the additional backlog created by the pandemic and low prioritisation of licensing matters in many Magistrates' Courts. There are practical solutions available to councils to ensure that the late or non-payment of court fees does not hold up the appeal process even more. Councils will wish to be pro-active in pursuing them.

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Contact the IoL team

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Scottish legal challenges against the Covid-19 legislation

The hospitality industry has little legal fire power to challenge government when it takes political decisions on health, says **Michael McDougall**

Recent months have left both the UK and devolved administrations in Scotland, Wales, and Northern Ireland struggling to contain a resurgence of the new variant of coronavirus. The hospitality sector has been particularly hard hit and is again all but closed given the risk presented by social interactions, especially indoors.

To manage this risk, the Scottish Government has worked its way through various measures, the consequence of which hinders the sector's capacity to operate. To date the measures include restrictions on background music, limiting household gatherings, restricting the sale and consumption of alcohol, and shortening opening times.

The severity of the restrictions – imposed through a myriad of legislation, regulations and guidance – is unprecedented. Even in wartime, the government did not seek to curtail the operation of hospitality premises – not even the sale and supply of alcohol – to such a degree.

The level of risk presented by these premises has been debated extensively, not least by officials, the trade and in the media. This has led to calls on the Government to share the evidence upon which seemingly arbitrary decisions have been based; decisions like the requirement to sell no alcohol and close at 6pm.

This article will look at the challenges that have been brought by the hospitality sector in Scotland against the implementation of Covid-19 legislation, and the Scottish Government's decision making process.

Legal challenges

Given the unprecedented situation the country found itself in, it is understandable that challenges have been slow to emerge. There has been a broad understanding that measures need to be taken to stem the tide of Covid-19. However, as time has progressed, there has been an increasing divergence of opinion on risk versus reward. There have also been the inevitable disagreements over what the law and seemingly vague terminology such as "substantial", in the context of substantial meal, actually means. There has also been tension around the proper role of guidance and its standing when it comes to enforcement. While the Government has made extensive use of guidance to set out its policy aims and how it envisages premises operating, the principal legislation does not permit local authorities to issue prohibition notices for a breach of guidance. Throughout the course of the pandemic, terms such as "rules", "requirements", "guidelines" and so on have been used interchangeably without a clear understanding of what is a legislative requirement as opposed to guidance.

There have been challenges to the regulations as they relate to employment, education and organised religion with no success.[1] Hospitality businesses south of the border have also sought to challenge similar restrictions.[2]

Definition of cafe

The now repealed The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 closed all licensed premises in Scotland's central belt with the exception of cafes.

Even before this, the policy intent was unclear, with the First Minister announcing that licensed cafes would be required to close when unveiling the proposal on 7 October 2020. However, the next day at First Minister's Questions it was confirmed: "Cafes will be able to open, whether they are licensed or unlicensed, as long as they do not serve alcohol."[3]

1 *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin), *R (Shaw v Secretary of State for Education* [2020] EWHC 2216 (Admin), *Dolan v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin), and *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin).

2 Sam Karim, *Legal challenges to Coronavirus Regulations: where we are now and future lessons,* (2021) 29 JoL, pp 4-9. (Editor).

3 https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12883&i=116434.

Cafes were to remain open to allow those living alone to meet others, albeit this was not – perhaps understandably – translated into law.

Regulation 5(1) defines a cafe as "an establishment whose primary business activity, in the ordinary course of its business, is the sale of non-alcoholic drinks, snacks or light meals, which may be consumed on the premises". The accompanying statutory guidance told operators to consider "the following key questions: a) do you serve alcohol only without food to customers?; b) does your normal hours of operation extend to 20:00?; c) do you have a range of menus (an evening menu)? If any of these apply then you are not a cafe within the definition set out in the regulations."

This meant that in order to be able to continue to trade, premises had to show that they met the definition of a cafe. Where the local authority was of the view that the premises did not satisfy this test, it could issue a prohibition notice under regulation 25, which required the business to cease trading with immediate effect. While the terms of the statutory guidance are perhaps helpful in setting out the Government's intention, the regulations did not allow a prohibition notice to be issued where the terms of the statutory guidance were breached, so the key here is the wording of regulation 5(1) itself.

Given the lack of an appeal mechanism (other than judicial review), a number of premises that were threatened with the serving of a prohibition notice by the local authority sought interim interdicts, ie, a court order stopping another party from doing something unlawful.[4] There appears to be no written decision further to the courts dealing with these interim interdicts, with decisions presumably delivered at the time. We do, however, know that when dealing with an interim interdict the court will have to satisfy itself that three separate tests are met:

1. the issuing of the prohibition notice is *prima facie* unlawful;
2. the claimant is reasonably apprehensive that without the interim interdict the other party will act unlawfully; and
3. the balance of convenience favours granting the interim interdict.

You have to sympathise with local authorities, which are working with a wide definition of cafe and face political pressure to be seen to hold to the Government's line. It appears that the Government wanted as few premises to open as possible. However, the legislation did not back this up, as the definition was so vague that it was inevitably going to be difficult to argue businesses did not meet the test.

The reprieve enjoyed by cafes was short lived – perhaps in part owing to the issues around the interpretation of cafe. The Government announced shortly thereafter that the regulations would change again.

Pre-action letter and trade consultation

In October 2020 five hospitality trade bodies served a pre-action letter on the Scottish Government with reference to a possible judicial review of the regulations. The letter called on the Government to withdraw the current regulations and consult in a meaningful way with the hospitality trade in advance of further changes as well as publishing the evidence that the Government is relying on when imposing restrictions on the trade.[5]

Failure to move from level three to level two

More recently the Scottish Government has sought to recognise local variances in the spread of Covid-19 across Scotland through the use of a framework of levels, with these restrictions coming into force on 2 November 2020 at 6am.[6] Restrictions on hospitality premises is a common theme, with the sale and consumption of alcohol prohibited in two of the five tiers and heavily curtailed in two of the remaining three.

The moving of local authority areas between levels is a matter closely watched by the public and business, especially where there is a suggestion that restrictions may be lessened. In December 2020 various hospitality businesses as well as an operator of short-term lets in Edinburgh challenged the Scottish Ministers' decision to continue the level three restrictions for the Edinburgh City Council area. The petitioners sought the suspension and reduction of this decision, which included a prohibition on the sale of alcohol and restricted opening hours of 6am to 6pm.[7]

The challenge was made at a time when Edinburgh, by some metrics, was performing better than other local authority areas with lesser restrictions. The health statistics for Edinburgh were broadly in line with those that related to lower levels. Ahead of the decision, there was widespread

4 Media reports highlighted successful interim interdicts obtained by Eusebi Deli in Glasgow and One 20 Wine Bar in Edinburgh.

5 https://www.bbc.co.uk/news/uk-scotland-54648063.

6 https://www.gov.scot/publications/covid-19-scotlands-strategic-framework/ with the authorising legislation being The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020.

7 https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020csoh98a2d47ea8898069d2b500ff0000d74aa7.pdf?sfvrsn=0.

speculation that Edinburgh would be moved down a level, with suggestions – albeit contested – that health officials had advised council leaders that the city would be brought into level two.

The test for the court was somewhat similar to the one relating to interim interdict: (1) did the petitioners have a *prima facie* case?; and (2) does the balance of convenience favour the granting of the order?

Why did the Scottish Ministers decide not to move Edinburgh into level two? Their reasoning was outlined by the First Minister in a statement to the Scottish Parliament as well as a document entitled *Coronavirus (COVID-19): allocation of levels to local authorities – 8 December 2020*.[8] While the First Minister accepted that cases and test positivity levels were below the Scottish average, she explained that "cases in Edinburgh [as well as in East Lothian and Midlothian] have risen slightly in recent days" and that the "imminence of the Christmas period" meant that Edinburgh was not moved to level two. So while the statistics were indicative of level two, there were warning signs that matters were moving in the wrong direction allied to the closeness of the festive session and the associated relaxations.

The petitioners' argument can be broadly broken down into three grounds. First, assigning Edinburgh to a level without a proper evidence base; a decision "so unreasonable that it is one that no reasonable executive could have reached if acting reasonably".[9] Second, a failure to consult with Edinburgh City Council. Third, the decision was "disproportionate and therefore [an] unlawful interference with ECHR Article 8 and 11 rights".[10]

A common thread through these grounds was the proposition that the Scottish Ministers failed to adhere to their own criteria for level setting, ie, Edinburgh's indicators were that of a level two local authority. In response, the Scottish Ministers adopted the position that the published criteria was not the definitive article when coming to a decision and instead it was only one of a range of factors to be taken into account when coming to a decision. Also, that having regard to all the factors, retaining Edinburgh in level three was not so irrational that no other body would have reached this decision.

It is important to remember that the action here is in effect an emergency one. The court is looking to see if the petitioner's case has been made out on a *prima facie* basis and whether the balance of convenience favours action. Lord Ericht set out that he "was not in a position…to come to a conclusive view as a matter of fact on whether the [Scottish Ministers] acted in defiance of their advice." However, the Scottish Ministers were "not obliged to act in accordance with the advice of their public health advisers, but were entitled to their own judgement."

This decision perhaps reveals the problem faced by those who wish to challenge the Government's approach to combatting the novel coronavirus: the decisions taken are by and large political ones. The court noted that the legislative provisions could be "voted down by the Parliament if the Parliament so wishes."[11] Therefore, there is a democratic remedy. Without evidence that the path pursued by the Government is so wrong, any challenge will struggle. The court will not interfere with political matters and will afford the Government a wide margin of appreciation, especially when dealing with such a complex and unique issue.

Restrictions as at 26 December 2020

As of 26 December 2020, in response to rising cases of Covid-19, all of mainland Scotland was placed in level four for an initial period of three weeks; essentially a lockdown, with all hospitality closed (with the exception of takeaways and home deliveries) along with non-essential retail.[12] At the time of writing, the level four restrictions have been strengthened with the public told to stay at home with exceptions only for essential purposes. Despite the commencement of vaccination programmes, the emergence of new strains of Covid-19 means that there is growing concern that Scotland will remain in lockdown for an extended period.

A key difficulty the hospitality industry has faced when seeking to challenge the Government's approach to managing risk in hospitality type premises is the pace at which the legislation changes. Given the Government's experience in trialling various strategies over the past year, it may be that the spring and summer brings some stability to the legislative framework and allows the hospitality industry time to consider its impact and the merits of any challenge, if required.

Michael McDougall
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8 https://www.gov.scot/publications/coronavirus-covid-19-allocation-of-levels-to-local-authorities-8-december-2020/

9 Para 29 of the court's decision.

10 Para 34.

11 Para 38.

12 https://www.gov.scot/publications/coronavirus-covid-19-update-first-ministers-statement-22-december-2020/.

Institute of Licensing News

It's hard to believe that when the IoL pages were written for *Journal* No.26 (this time last year), there was little mention of Covid-19, and the UK was still over a month away from its first lockdown. By the time this edition of the *Journal* is published, we will all have experienced a year of pandemic restrictions on lives and businesses in some form or another.

It has been a difficult 12 months for everyone. Many licensed sectors, including notably hospitality and taxi / private hire are fighting for survival. In other areas, demand for puppies has increased exponentially, leading to increased concerns around puppy importation and puppy farming, along with pet theft across the country. Caravan sites, zoos, hairdressers, beauty therapists, gambling premises and others have spent unprecedented portions of the last 12 months closed, and nightclubs have been unable to open their doors at all since March 2020.

The programme of vaccinations offers hope that things will start to improve at last, although it seems apparent that certain restrictions on lives and businesses will continue for some time to come. At the time of writing, we await announcements from the Government about the "Roadmap" to exit lockdown. In the meantime, there is speculation that schools will reopen from 8 March combined with some additional easing on social restrictions that currently prevent us from meeting others outside of our households or support / childcare bubbles.

For the licensed sectors, restrictions may ease more slowly, with expectations that hospitality businesses will remain closed until Easter and when allowed to open, will do so under strict restrictions on social distancing and Covid-safe rules. Tiers and curfews are not expected to be reinstated, but little more is known for sure at this stage (18 Feb 2021).

As we approach the "reopening", the IoL is hoping to work with partners to provide a series of online conferences aimed at assisting industry operators, place managers and regulators to support a much-needed recovery of our high streets and hospitality industry.

National Licensing Forum

Our work with the National Licensing Forum has seen a lot of discussion around issues facing both the retail and hospitality industries, and there have been many conversations within different groups and Government departments. The British Institute of Innkeeping, the British Beer and Pub Association and UK Hospitality have, through a collaborative "One Voice" group, been in correspondence with Kit Malthouse MP in relation to payment of the late-night levy, and burdens associated with licence conditions where the premises operation has been substantially curtailed through pandemic business restrictions. The Minister's response stated:

> *I wrote to chairs of licensing authorities in April noting that local authorities have discretion when considering non-payment or late payment of a late-night levy charge. In particular that whilst section 55A of the Licensing Act 2003 requires that the licence be suspended, it is possible to delay when a suspension takes effect. It is gratifying to learn that a number of authorities have taken that approach.*
>
> *Your letter seeks a statement allowing licensing authorities to cancel late-night levy payments which business are currently liable for. I am afraid the law does not allow payments to be cancelled or refunded, as you have asked. As I am sure you are aware, it is open to a local authority to decide to cease its late-night levy at the end of each 12-month levy period. I am informed that Southampton City Council has taken the decision to cease its levy on 31 March 2021.*
>
> *Your letter also raises an issue with licence conditions requiring the use of door staff. You highlight that, due to changes in hours and the ways in which premises are required to operate during the pandemic, the concerns which led to those conditions being made may no longer exist.*
>
> *Licensing authorities are not be able to suspend licensing conditions. In the circumstances you describe, where concerns about the licensing objectives that led to a condition being made no longer exist, I would suggest that licensing authorities may wish to consider whether to accept a minor variation to the licence. That variation might amend the condition to temporarily disapply it or remove it entirely if there were evidence that permanent changes to the operation of the premises had occurred.*

IoL Training and Events

At the end of March 2020, following the announcement of the first lockdown, the IoL along with other organisations moved swiftly to online delivery of training and events and this has worked extremely well. Regional meetings have also taken place online and we have seen attendance numbers at regional meetings increase as a result. In the case of training courses, we have had plenty of feedback, which indicates that

the ability to join training remotely has enabled some people to benefit from training that they would not otherwise have attended, predominantly due to savings on time and travel.

What will the picture look like going forward?

Online conferences, training events and meetings have been essential over the last 12 months, allowing us to maintain contact, to see and hear others and to discuss and learn together. Nevertheless, many of us crave a return to face-to-face events. We miss personal engagement, human interaction and the togetherness associated with events such as the *National Training Conference* (NTC).

The IoL will continue its programme of online training delivery for the time being, but we will also be keeping a close eye on progress to ascertain when it will be appropriate to return to face-to-face events. Online access will remain in many cases, even where the training or meeting is location-based – that way we maximise accessibility wherever possible. Some courses simply work better online and we will be able to make that judgement when there is a choice of location-based or online delivery.

National Training Conference Webinars 2020

For the first time since 1997, the NTC was held online. We were delighted to host a five-day webinar, featuring a fantastic programme of speakers across the breadth of licensing subjects. The programme was exceptional, and we are grateful to all our speakers, sponsors and delegates for their continued support for this event and the IoL generally.

With current and topical issues, including of course Covid-19 restrictions and the impact on various aspects of licensing, there is plenty to discuss.

Consultations

Northern Ireland review of alcohol licensing - The Licensing and Registration of Clubs (Amendment) Bill

In December 2019, the IoL responded to the consultation on liquor licensing laws in Northern Ireland. That consultation was more recently followed by a call for evidence on the Licensing and Registration of Clubs (Amendment) Bill.

In Northern Ireland, the county court is responsible for issuing liquor licences in its area, and there is a quota on licences for pubs and off-licences. As a result, an applicant for a new off-licence or pub licence must give up an existing licence in exchange for the new one, and the court won't grant a licence if it thinks the area has enough pubs or off-licences.

The Bill proposes a number of changes to Northern Ireland's alcohol licensing laws, including:

- Introduction of an occasional additional late-opening hour which will allow certain licensed premises houses to serve alcohol until 2am.
- An extension of drinking-up time to allow some premises to open until 3am.
- Abolishing the formerly restrictive Easter opening hours to bring it in line with the rest of the year.
- The alignment of the alcohol and entertainment licensing systems.
- Changes relating to children on licensed premises.
- Prohibition of self-service and vending machines.
- Formal approval for codes of practice on responsible retailing; and
- Changes to allow local drinks producers to sell their products directly to the public in limited circumstances.

The Licensing and Registration of Clubs (Amendment) Bill was formally introduced in the Northern Ireland Assembly on 19 October 2020. The Bill has now reached its committee stage, with the Committee for Communities having responsibility.

The committee issued a call for written evidence which the IoL has responded to, and following a request from the committee, the IoL gave oral evidence at a meeting on 18 February 2021. The IoL was represented by Stephen McGowan and Eoin Devlin from TLT solicitors, both of whom are IoL members based in Scotland and Northern Ireland respectively. The evidence from Stephen McGowan will be very relevant to the Committee as the proposed licensing arrangements have similarities in several areas with alcohol licensing in Scotland.

National Licensing Week 2021

National Licensing Week 2020 was necessarily confined to online information and social media engagement. This is set to continue for this year's National Licensing Week (NLW) which will run from 14-18 June.

NLW is a great opportunity for all licensing practitioners to celebrate the role that licensing plays in business, home and leisure, keeping people safe and enabling them to enjoy their social and leisure time with confidence.

Our NLW daily themes remain the same, with the underlying message that "licensing is everywhere":

Day 1: Positive partnerships
Day 2: Tourism and leisure
Day 3: Home and family
Day 4: Night-time
Day 5: Business and licensing

Licensing is important and so are the businesses and individuals regulated through licensing, along with the regulators tasked with monitoring and ensuring compliance with legal requirements and local conditions where applicable. The Covid-19 pandemic has simply heightened the need for partnership, collaboration and mutual understanding.

National Licensing Week is an opportunity to highlight just how many daily activities are linked to licensing and why. Please celebrate your role, your organisation and your work and share it through social media and other means. It doesn't take much to be involved. A simple blog about an aspect of your daily role in licensing gives others the opportunity to see the role through your eyes – why it's important, who it makes a difference to, and its challenges and rewards.

NLW2021 will soon be here and we hope to see plenty of social media engagement, showcasing organisations in all sectors. We welcome your ideas and more importantly your contribution in whatever form suits you to help us fly the flag for licensing practitioners in every sector across the UK.

To find out more and get involved please email NLW@instituteoflicensing.org. We look forward to hearing from you! #NLW2021 #getinvolved #licensingiseverywhere

Membership – it's time to renew

Our membership year will come to a close on 31 March, and members will be invited to renew at that point. The online renewal function will go live on 1 April, at which point existing members with full year memberships will be able to renew memberships online by logging in and going to "Manage account" and then following the instructions under "Renew membership".

The IoL team is keen to help members to renew promptly, and this is also an excellent opportunity to ensure that your IoL records (address etc) are all up to date. We will be contacting all members who have signed up for direct debit, as well as members who joined part way through the previous membership year to assist with the renewal process. Please let us know if you have any queries - the team can be contacted via **membership@instituteoflicensing.org**.

Timing is everything

The pandemic's impact on hospitality is posing tricky problems for licensing authorities looking to renew their statutory statements of licensing policy, as **Richard Brown** explains

The Covid-19 pandemic continues to be devastating for the hospitality industry. I realise that this statement risks the sort of rejoinder issued by Basil Fawlty to his long-suffering wife Sybil, to the effect that she may like to appear on Mastermind, specialist subject 'the bleedin' obvious'. Yet it is worth repeating as we approach the first anniversary of Lockdown 1, during which year many licensing authorities have been faced with reviewing their statutory Statement of Licensing Policy (SoLPs) under s 5 Licensing Act 2003. In particular, they will have wrestled with how and to what extent to account for the impact of the pandemic in their SoLPs in a way which reflects the difficult environment for the licensed trade but which also promotes the licensing objectives.

Many of these SoLPs will have included an area (or areas) designated as a cumulative impact area, subject to a Cumulative Impact Policy (CIP).[1] These concepts are described by different names and acronyms in different areas.[2] Such policies typically contain a rebuttable presumption that certain types of application will be refused. An applicant is able to rebut the presumption by demonstrating an "exception" to the policy. This is difficult to do, as the reasons advanced for why an application is an exception should be directed at the underlying reasons for having the policy. As the policy would typically have been put in place as a result of a large number of licensed premises having caused issues connected with the licensing objectives, it stands to reason that it is a high hurdle. A CIP would also usually reassure an applicant that each case is dealt with on its merits and that the licensing authority will not close their minds to an application.

During the pandemic, applicants in locations subject to a CIP may have argued that the CIP either should not apply, or should not apply with full rigour, or if it does apply then applications which otherwise would be contrary to policy should constitute an exception due to the pandemic. The obvious corollary is whether, when SoLPs fall to be reviewed and if licensed premises are either not operating at all or operating under restrictions, and so there is no cumulative impact for a period of time, this undermines the evidence for a CIP. How is this filtering through into SoLPs which fall to be renewed?

Licensing authorities will be looking at these issues in the micro - individual applications - and the macro - SoLP reviews and Cumulative Impact Assessments (CIAs). The reason why these have been a pressing issue for a large number of licensing authorities is because of the cycle of SoLP reviews under the 2003 Act and the statutory timeframe for publishing a CIA (see s 183(1) Policing and Crime Act 2017).

The 2003 Act introduced a requirement for a licensing authority not only to "determine" (s 5(1)(a)) its policy and publish a statement of that policy (s 5(1)(b) but also to consult widely. Licensing authorities were required to publish their first SoLP so as to come into force on 7 January 2005. The requirement under s 5 as enacted was for the licensing authority to determine, consult upon and publish a SoLP every three years. With a nod to s 5(4) (which required the licensing authority to keep its policy under review "and make such revisions to it, at such times, as it considers appropriate"), the three year cycle meant that most licensing authorities determined and consulted on their SoLPs in order to publish it by 7 January 2008 and then 7 January 2011.

This requirement was subsequently amended to five years by s 122(2)(a) Police and Social Responsibility Act 2011. Accordingly, those licensing authorities which had stuck to the statutory cycle were required to determine, consult upon and publish by 7 January 2016, and then 7 January 2021.

Those licensing authorities due to publish an SoLP and / or a CIA at the beginning of this year would of course been required to review their current SoLP, decide if they wanted to make any changes, gather evidence for the CIA, assess the evidence, consult on both documents, assess the responses to the consultations, decide upon any resulting changes, and seek approval from full Council[3] during the course of 2020.

1 There were 222 CIPs in the most recent Home Office figures (as at 31 March 2018).

2 For example, Special Policy Areas (SPAs), Cumulative Impact Zones (CIZs), Special Stress Areas (SSAs).

3 This is not a matter which can be delegated – see s 7(2)(a) of the 2003 Act.

That there were obvious difficulties in doing so hardly needs saying.

The problem is rendered even thornier by the requirement to publish a CIA if they wished to retain / implement a CIP. Many licensing authorities would be doing this for the first time. The concept of cumulative impact is of course now on a statutory footing, under s 141(1) and (3) PCA 2017. As of 6 April 2018, s 5A(1) of the 2003 Act enables a licensing authority to publish a CIA if it considers that the number of "relevant authorisations" is such that it is "likely" that it would be "inconsistent with the duty under s 4(1)[4]… to grant further authorisations in the area(s)". Existing CIPs "should be reviewed at the earliest practical opportunity to ensure they comply with the legislation" and in any event within three years of the commencement of the legislation, ie, April 2021, and then at least every three years subsequently. The authority must consult on its intention to publish a CIA.

Given the recommendation to undertake a CIA for existing CIPs as soon as practicable and in any event within three years of the commencement of the legislation, many authorities will therefore have in the last year published or will be planning to soon publish their first CIA under s 5A.

So how are licensing authorities dealing with the difficulties of promulgating fit-for-purpose SoLPs and CIAs?

A CIA conducted in 2020 will present a very different picture to one conducted in 2019. It is looking increasingly likely that a CIA conducted in 2021 will also present a different picture to 2019.

The overall number of CIPs has stayed fairly stable in recent years, after increases in the early part of the last decade. According to the most recent Home Office statistics, as at 31 March 2018 there were 222 CIPs in existence compared to 160 as at 31 March 2012.

In a departure from the trend, the figure is very likely to be lower when the next statistics are gathered. This can be attributed in part but certainly not entirely to the impact of Covid-19. For instance, Bristol City Council (BCC) dropped all five of the areas subject to CIPs from its new SoLP, which took effect from 1 August 2020. It should be noted that the data analysed was from 2019, although in fact BCC subsequently published a draft CIA proposing to reinstate one of the areas. Westminster City Council (WCC), meanwhile, has retained only one of its three CIPs following publication of its CIA, again based on data gathered prior to the pandemic – more on this below.

4 That is, "A licensing authority must carry out its functions under this Act ('licensing functions') with a view to promoting the licensing objectives."

In the light of the difficulties in gathering accurate data WCC, Manchester City Council (MCC), Leeds City Council and Birmingham City Council wrote to the Rt Hon Kit Malthouse MP, the Minister of State for Crime and Policing, on 19 August 2020 to request a pause in the statutory timetable.The Minister responded on 1 October 2020, expressing sympathy for the predicament but resisting the proposal to pause the statutory timetable on the basis that it would require primary legislation. He did suggest an alternative course of action:

> *…you could consider if it would be appropriate to undertake the statutory consultation on the basis that you propose to roll forward your existing statement of licensing policy in its current form and consider any representations that you receive in response. As you know, statements of licensing policy last for a maximum of five years but you are required to keep your statement under review during that period, and to make revisions if appropriate before that period has expired. You may, therefore, want to consider committing to a further review when it is feasible to do so after the pandemic has passed. You could also consider if a similar approach would be appropriate in respect of CIAs.*

Some authorities have adopted the Minister's adroit suggestion, and simply renewed their current SoLP (after, in some cases, a somewhat brief consultation period) pending life (and licensing) going back to normal, with a commitment to undertake a "proper" review in due course.

MCC is one of the licensing authorities to have taken this approach. The officer's report to the licensing policy committee explained the reasons: "Our night-time economy statistical data, which we would have relied upon for this process prior to March 2020, does not represent the reality which we are now in and it is not currently clear what the lasting impacts on the sector will be." The new SoLP differs only in terms of typos and details of responsible authorities.

Oxford City Council is taking a similar approach with its current (at the time of writing) consultation. The consultation states that:

> *the Covid-19 regulations have disrupted the usual operations of the hospitality industry throughout the year…Taking this into account and considering the significant disruption to the night time economy, Oxford City Council proposes to largely re-adopt the current Statement of Licensing Policy. However, the Licensing Authority is committed in keeping the Policy under review and to carrying out a comprehensive and considered review during 2021, if possible, taking the*

pandemic and its effects into account.

The draft SoLP states that "there is currently no formal special saturation policy (CIA), as no realistic assessment of cumulative impact has been possible." Thus, the two previous CIPs for Central Oxford and East Oxford have been dropped.

Sunderland City Council and Coventry City Council are among others to have rolled over their SoLPs.

CIPs have been removed north, south, east and west. Birmingham City Council too has rolled over its SoLP, and removed the existing CIPs in force in areas of the city. Again, the licensing authority indicated that a comprehensive SoLP and revisiting whether a CIA should be published will take place in 2021.

Other CIPs which have been removed include those in the London Borough of Merton, Bournemouth, Christchurch and Poole Council area, Hartlepool Borough Council, Trafford Council and Herefordshire Council (a unitary authority). The foreword to Herefordshire Council's SoLP sets out its reasoning:

> *…in reviewing its Licensing Policy Herefordshire Council considered whether there was still a need for a Cumulative Impact Policy in relation to Hereford City. In essence it was felt that prior to the Covid pandemic there was, but as premises are now struggling it appears the need no longer exists. However, should it be shown there is a need for such a policy in the future, it could be reintroduced.*

Westminster City Council was one of the authorities seeking a two-year moratorium on the requirements of s 5 LA03. The position it found itself in was slightly different to the licensing authorities mentioned above however, as WCC's evidence gathering for its first CIA had taken place pre-pandemic in 2019, even though it was due to be consulted on / published in line with the time frame for its SoLP, ie, 7 January 2021. Its dilemma therefore was not created by an uncertain evidence base but whether or not to implement the findings of the CIA in the light of Covid. The CIA recognised that "the patterns observed in this research may not accurately describe the fabric and dynamics of the City at the time this assessment was published."Those findings were that two parts of the West End were "conclusively characterised" as being "burdened by cumulative impact between 2017 and 2019, to varying degrees" over 12 consecutive quarters of data. The two areas were both in the West End, termed West End Zone 1 and West End Zone 2 for the purposes of the CIA. Zone 1 is broadly aligned with the existing and longstanding West End CIP (including Soho, Leicester Square and most of Covent Garden); Zone 2 is an area bordering the existing CIP. The combined area is 57% larger than the area covered by the West End CIP.

WCC's CIA and draft SoLP were put out for consultation on 12 October 2020. Impressively detailed at 154 pages and 41 pages respectively, one of their proposals was to remove two long-standing CIPs on the basis that "the evidence that these areas could confidently be characterised as burdened by cumulative impact…was not conclusive" while largely maintaining the existing West End CIP.

The draft SoLP suggested that the findings in respect of West End Zones 1 and 2 would not be implemented at this time:

> *The evidence collected…supported further policy restriction on applications, as they would likely to add to cumulative impact. However, since this evidence was compiled for the CIA, the nation has had to face Covid-19, which has created an unprecedented situation where licensed premises have had to restrict their operations significantly and footfall is outside those normally seen within these areas prior to Covid-19. Having taken into account the CIA findings, and considering the current unprecedented nature of the impact that Covid-19 has had on footfall in the area, the Licensing Authority will not seek to impose an expansion of the West End Cumulative Impact Zone or introduce the presumption of refusal to other premises use types within this zone at this time.*

In short, where the findings of the CIA might otherwise require further and / or stricter CIPs, the current position would more or less be maintained and the findings would not be implemented, although even this meant a chunk of Covent Garden falling out of the CIP. Where the findings of the CIA suggested that CIPs were not justified for two areas of the city which had been subject to CIPs (Queensway / Bayswater, and Edgware Road), the proposal was to implement these findings.

These latter areas (and a number of other areas of the city which the CIA had flagged up as areas of concern) were to be designated as a sort of halfway house between being subject to a CIP and not. Hence, a new special consideration zone (SCZ) policy was introduced in recognition that a more granular approach was appropriate to areas which did not reach the threshold of a CIP but which nevertheless gave rise to concern. It remains to be seen whether this is yet another acronym to be added to the general licensing lexicon.

WCC's SCZ Policy states that applicants:

> *should demonstrate in their operating schedule that they have taken into account local issues identified within the 2020 Cumulative Impact Assessment and should include within their operating schedule sufficient mitigation that they propose will reduce the impact of their venue and reduce the risk of failing to promote the Licensing Objectives and adding to the issues in the area.*

This halfway-house concept is not new. For instance, both MCC and Brighton and Hove City Council have taken a similar approach to areas of their cities. MCC's SoLP has two "special policies" (in the terminology of this article, CIPs) but also the Withington and Ancoats and New Islington "stress areas", which feature a broadly analogous approach to that of the SCZ.

Brighton and Hove City Council's SoLP categorises an area as a "special stress area" (SSA) and states that:

> *New and varied applications for premises and club premises certificates within the SSA will not be subject to the presumption of refusal, but operators will be expected to pay special attention when drawing up their operating schedules and to make positive proposals to ensure that their operation will not add to the problems faced in these areas.*

There is nothing to prevent a licensing authority adopting this approach, and indeed it would seem to answer some of the criticism expressed that a CIP is a blunt tool. Having a more granular approach allows more nuance and a firmer indication to applicants of what the licensing authorities' expectations are. Indeed, such an approach is also consistent with the s 182 Guidance. For instance:

> *(An applicant) must also be aware of the expectations of the licensing authority and the responsible authorities as to the steps that are appropriate for the promotion of the licensing objectives, and to demonstrate knowledge of their local area when describing the steps they propose to take to promote the licensing objectives. Licensing authorities and responsible authorities are expected to publish information about what is meant by the promotion of the licensing objectives and to ensure that applicants can readily access advice about these matters.[5] Applicants are expected to provide licensing authorities with sufficient information in this section to determine the extent to which their proposed steps are appropriate to promote the licensing objectives in the local area.[6]*

Conclusion

For those licensing authorities which took the pragmatic decision to roll over their SoLPs pending a full review and possible CIAs in 2021, it remains to be seen if the shifting sands of the pandemic response will permit for licensed premises to open in a way which even vaguely resembles normal operation. It must therefore be open to question whether such reviews and such CIAs will need to be postponed further. As licensing authorities which have a CIP but have not yet published a CIA under s 5A of the 2003 Act are required to do so by April 2021, it seems certain that more CIPs will fall by the wayside shortly. Going forward, SoLPs will be a key document in shaping recovery and all stakeholders should endeavour to respond to consultations so that a licensing authority can have the most complete picture possible on which to paint its plan for recovery.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

5 Section 182 Guidance para 8.41.
6 Section 182 Guidance para 8.47.

Transport Secretary's July 2020 Guidance on Taxis and PHVs does a disservice to officers

New Guidance suggests that a Committee / Board of councillors is the most effective method of discharging licensing functions but **Charles Holland** is unconvinced

Do committees make better decisions than officers? Is a panel of elected members more likely to deal with a case on its merits than a world-weary officer would? Do officer-level decisions give rise to perceptions of bias amongst those they regulate?

These are questions that emerge from the content of Guidance issued in July 2020 by the Secretary of State for Transport under s 177(1) of the Policing and Crime Act 2017, the Statutory Taxi & Private Hire Vehicle Standards.[1]

Whilst, axiomatically, that Guidance relates to taxis and private hire vehicles, those who (perhaps wisely) have nothing to do with these licensing regimes are encouraged to stay with this article. For the Secretary of State's views on decision-making within that regime have a wider import for all licensing and regulatory schemes.

In the Guidance, the Secretary of State recommends that local authorities operate a regulatory committee or board, a panel drawn from which should determine licensing matters: what the Guidance calls the Committee / Board model. The Guidance specifically advises *against* delegation of all matters to a panel of officers.

This recommendation runs counter to decision making currently operated by many local authorities, where officers take all decisions in relation to the giving and taking away of licences (as indeed does the largest taxi and private hire regulator in the country, Transport for London).

The Guidance

Section 177(1) of the Policing and Crime Act 2017 empowered the Secretary of State to issue guidance to public authorities as to how their licensing functions under taxi and private hire vehicle legislation may be exercised so as to protect children and vulnerable individuals who are 18 or over from harm.

By virtue of s 177(4), licensing authorities must have regard to Guidance issued. Given that this is statutory Guidance, "having regard" here means that the Guidance should be given great weight: see *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 A.C. 148 *per* Lord Bingham of Cornhill at [21] (when speaking of a statutory Code):

> *It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so.*

The Guidance is the first to be published by the Secretary of State under the statutory power to do so. It takes an approach founded on what are described as "core minimum standards". The Guidance states [1.3]:

> *Whilst the focus of the Statutory Taxi and Private Hire Vehicle Standards is on protecting children and vulnerable adults, all passengers will benefit from the recommendations contained in it. There is consensus that common core minimum standards are required to regulate better the taxi and private hire vehicle sector, and the recommendations in this document are the result of detailed discussion with the trade, regulators and safety campaign groups. The Department therefore expects these recommendations to be implemented unless there is a compelling local reason not to.*

The Guidance describes itself [2.6] as setting out a framework of policies that licensing authorities must have regard to when exercising their functions, including "developing, implementing and reviewing their taxi and private hire vehicle licensing regimes".

Much of the Guidance is indeed targeted at setting "common core minimum standards". A policy for assessment of previous convictions is set out in its appendix. Particular

1 https://www.gov.uk/government/publications/statutory-taxi-and-private-hire-vehicle-standards

factors relating to particular species of licences are also set out. There is advice on gathering and sharing information.

Section 5 deals with decision making. This section includes guidance as to how to apply the statutory fit and proper test [5.12-5.14], and the approach to be taken as to criminal convictions and rehabilitation [5.15-5.17]. So far, so uncontroversial: the setting and consistent imposition of common minimum standards is a plan by which not just children and vulnerable adults but all passengers might be protected from those who would take advantage of their role within the trade to abuse the trust reposed in them.

Advice is given on the training of decision makers [5.3-5.5]. It is sensibly suggested that [5.4]:

> *Public safety is the paramount consideration but the discharge of licensing functions must be undertaken in accordance with the following general principles:*
>
> - *Policies should be used as internal guidance, and should be supported by a member / officer code of conduct.*
> - *Any implications of the Human Rights Act should be considered.*
> - *The rules of natural justice should be observed.*
> - *Decisions must be reasonable and proportionate.*
> - *Where a hearing is required it should be fairly conducted and allow for appropriate consideration of all relevant factors.*
> - *Decision makers must avoid bias (or even the appearance of bias) and predetermination.*
> - *Data protection legislation.*

But the Guidance then goes further. It makes recommendations as to an appropriate "regulatory structure". It recommends [5.6] that local authorities "operate with a Regulatory Committee or Board" that is periodically convened to determine licensing matters, with individual cases being considered by a sub-committee. It says: "This model is similar to that frequently adopted in relation to other licensing matters". (In fact, the model is a statutory requirement for certain licensing functions, so for example under the Licensing Act 2003.) It says that "[t]o facilitate the effective discharge of the functions, less contentious matters can be delegated to appropriately authorised council officers via a transparent scheme of delegation".

The Guidance continues:

> *5.7 It is considered that this approach also ensures the appropriate level of separation between decision makers and those that investigate complaints against licensees, and is the most effective method in allowing the discharge of the functions in accordance with the general principles referred to in 5.4. In particular, the Committee/Board model allows for:*
>
> - Each case to be considered on its own merits. It is rare for the same councillors to be involved in frequent hearings – therefore the councillors involved in the decision making process will have less knowledge of previous decisions and therefore are less likely to be influenced by them. Oversight and scrutiny can be provided in relation to the licensing service generally, which can provide independent and impartial oversight of the way that the functions are being discharged within the authority.
> - Clear separation between investigator and the decision maker – this demonstrates independence, and ensures that senior officers can attempt to resolve disputes in relation to service actions without the perception that this involvement will affect their judgement in relation to decisions made at a later date.

Reasonableness and proportionality

It is unquestionable that licensing decisions must be proportionate. This has long been a common law principle. In *R v Barnsley MBC, ex p. Hook* [1976] 1 W.L.R. 1052, a market trader's licence was terminated for a single incident of urinating in a side street. All three members of the Court of Appeal were of the view that the decision should be quashed because of breaches of natural justice (see below), but both Lord Denning MR and Sir John Pennycuik were also of the view that the decision was also because of the disproportionate nature of the step of termination.

The principle of proportionality has been further embedded in licensing decisions through two statutory routes.

Firstly, s 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a convention right. Article 1 of the First Protocol (A1P1) to the convention guarantees a right of property, with case law establishing that the state may not deprive persons of or restrict the use of possessions unless legal, in the public interest, and *proportionate* to do so. It now seems well-established that the economic benefit that derives from a

licence constitutes a possession within the meaning of A1P1: see most recently *R (oao United Trade Action Group Ltd) v Transport for London* [2021] EWHC 72 (Admin) at [203-204].

Secondly, s 21 of the Legislative and Regulatory Reform Act 2006. This provides that any person exercising a regulation function to which the section applies (which, by virtue of the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 includes many licensing functions including taxi and private hire licensing) must have regard in the exercise of that function to the principles of good regulation, as follows:

a. regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent;

b. regulatory activities should be targeted only at cases in which action is needed.

Do committees have a better handle on the principle of proportionality than officers? The Guidance makes the sweeping suggestion that the Committee / Board model is "the most effective method" of discharging licensing functions in accordance with the principles it wishes decision-makers to be trained on, but fails to condescend to particulars as to why this is so in relation to proportionality.

Human rights

What of other human rights? Is the Committee / Board model more compatible with the right to a fair (civil) trial, found in article 6(1) ECHR? This provides:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

It is fairly uncontroversial that article 6(1) is engaged in licensing cases. In *Tre Traktörer AB v Sweden* (1991) 13 EHRR 309 the European Court of Human Rights concluded that there was a violation of Article 6 where a company had its licence to sell alcohol revoked by two administrative bodies. In *R (oao Royden) v Wirral MBC* [2002] EWHC 2484, Sir Christopher Bellamy QC sitting as a High Court Judge accepted (at [120]), *obiter*, that, in accordance with *Tre Traktörer*, the withdrawal of a hackney carriage vehicle licence could amount to the determination of a civil right so as to engage the fair trial rights protected by Article 6. This was mentioned without dissent by Auld LJ in *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265 at [41].

How is the Article 6 entitlement to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" satisfied?

In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295, the House of Lords held that when the Secretary of State had used his statutory powers to determine a planning application, although the Secretary of State was not himself an independent and impartial tribunal, decisions taken by him were not incompatible with Article 6(1) provided that they were subject to review by an independent and impartial tribunal which had full jurisdiction to deal with the case as the nature of the decision required, and that as the decision was one of administrative policy, the power of the High Court in judicial review proceedings to review the legality of the decision and the procedures followed was sufficient to ensure compatibility with Article 6(1).

Given that there are statutory rights of appeal against nearly all taxi and private hire licensing decisions to the Magistrates' Court, with a further appeal on to the Crown Court (save for the anomalous situation of a refusal to grant a hackney carriage proprietor's licence, where the appeal is direct to the Crown Court), then even though *neither* a local authority officer nor a local authority committee is an independent tribunal for Article 6 purposes, the existence of these appeal rights is very likely to mean that the procedure is - for that reason - compliant with Article 6. The sole taxi and private hire decision for which there is no statutory appeal (a vehicle licence suspension under s 68 of the Local Government (Miscellaneous Provisions) Act 1976) is susceptible to judicial review (see for example *R (oao Wilcock) v Lancaster City Council* [2013] EWHC 1231 (Admin)) and are Article 6(1) compliant.

By way of analogy, in *R (oao Hope and Glory Public House Ltd) v Westminster Magistrates' Court* [2011] EWCA, the Court of Appeal at [30] accepted the council's submission that the scheme of premises licensing for alcohol and entertainment was Article 6(1) compliant because of the existence of rights of appeal to the Magistrates' Court from decisions of the licensing authority.

Natural justice

The licensing function of a local authority is an administrative function: *Hope and Glory* at [41]. It is well-settled that

administrative powers which affect rights must be exercised fairly, which means in accordance with natural justice ("which after all is only fair play in action" in the words of Harman LJ in *Ridge v Baldwin* [1963] 1 Q.B. 539 at 578).

As Lord Diplock put it in *R v Commission for Racial Equality, ex p Hillingdon LBC* [1982] A.C. 779 at 787F:

> *Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision.*

The authorities distinguish, and continue to distinguish, between "administrative" and "quasi-judicial" functions (see, eg, *Hope and Glory* at [41]). It has been suggested (Wade and Forsyth, *Administrative Law* (11th edition, 2014), p 418, that this is a distinction without a difference. The editors observe:

> *It is now clearly settled, as is indeed self-evident, that there is no difference between natural justice and 'acting fairly', but that they are alternative names for a single but flexible doctrine whose content might vary according to the nature of the power and the circumstances of the case. In the words of Lord Denning MR [in R v Home Secretary, ex p Santillo [1981] Q.B. 778], "the rules of natural justice - or of fairness - are not cut and dried. They vary infinitely".*

Natural justice comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause (*nemo judex in causa sua*), and that a man's defence must always be fairly heard *(audi alterem partem*).

The rule against bias

The first of the fundamental rules of natural justice is the rule against bias. The focus is on the *appearance* of bias, rather than actual basis. The test is "whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased": *Porter v Magill* [2002] A.C. *per* Lord Hope at [103].

Impartiality is a well-established common law principle (and is also recognised in Article 6), and indications that a decision-maker lacks impartiality will be indicative of a real possibility of bias.

In *R* v *London County Council, ex p. Akkersdyk* [1892] 1 Q.B. 190 the Divisional Court required a licensing decision to be re-taken because it had been considered by a committee which included councillors "who have acted both as judges and accusers at the same time".

In *R v Barnsley MBC, ex p. Hook*, a market manager employed by the local terminated the licence of a trader to trade from the market. He was granted a further hearing before two committees, but each committee included the market manager. The Court of Appeal of its own motion took the point that these actions breached the principle of *nemo judex in causa sua*. Scarman LJ (as he then was) put particular emphasis on the fact that in licence *revocation* matters (as opposed to applications for grants): "If ever there was a case where it was imperative that the complainant or prosecutor should not participate in the adjudication, I should have thought it was this one."

The Government Legal Department's guidance for the civil service, *The judge over your shoulder - a guide to good decision making* (2018) states at [2.49]:

> *The principle of impartiality can have practical implications. For example, when statute requires that the "Secretary of State" makes a decision on an application, he (or the officials acting in his name) may require more information before making a decision. This might include some sort of technical input, or requiring inspectors to carry out an investigation. In order to ensure as much impartiality as possible, it may be necessary to have a separation between the people providing the technical input/carrying out the investigation, and the officials making the decision or submitting the matter to the Secretary of State (when his personal decision is required) This separation reduces the risk of an unsuccessful applicant claiming that the decision maker was not impartial because he was too involved in the case or had pre-determined the application.*

These principles can be imported to local authority decision making. It is plainly sensible to separate the investigating officer from the decision maker because this accords with long established principles that an investigator / prosecutor should not act as judge in his own cause.

Natural justice is a flexible concept which varies according to powers concerned and the context of the case. I have little doubt, for instance, that there is no need for separation of powers for the purpose of the issue of a vehicle suspension notice under s 68 of the 1976 Act - this, in my view, is clear from the wording of the section and the fact that such a notice is a summary process which is apposite to less serious matters which are capable of being handled swiftly: see *R*

(oao Wilcock) v Lancaster City Council at [41-42]. Ed / Charles – text seemed to have a few words missing – have I interpreted correctly in my amend?

In *Hook*, Scarman LJ agreed with commentary in *De Smith's Judicial Review* (see now [7-022 to 7-023]) that non-renewal of an existing licence is usually a more serious matter than refusal to grant a licence in the first place; as the judge pointed out, this was more so in relation to revocations. There may well be "routine" refusals where the case is so obvious that a failure to separate functions does not give rise to bias, although of course separation is the safest course.

The Guidance identifies "clear separation between investigator and the decision maker" as one specific justification for the Committee / Board model [5.7]. It says that [5.9] "unlike officers, elected members are not usually involved in the day to day operation of the service and as such do not have relationships with licence holders that may give the impression that the discharge of a function is affected by the relationship between the decision maker and the licence holder." It is suggested [5.10] that it may be more difficult to demonstrate compliance with natural justice "due to the close connection between the officers on the panel, and those involved in the operational discharge of licensing functions."

I do not see why such clear separation could not be shown by appointing separate investigating and determining officers. In my (admittedly anecdotal) experience, on occasion committee members are perceptibly less independent than officers. I have known committee members advocate for the trade rather than the licensing objectives. But there is objective support for my subjective experience: it was mentioned in the Casey Report on CSE in Rotherham that some licensing officers felt councillors were putting pressure on them in support of drivers.

Indeed, the aftermath of the CSE scandal caused some local authorities to remove their private and taxi hire functions from committees and confer them on officers, with neighbouring authorities adopting a uniform approach in this regard precisely to prevent the forum shopping which had enabled abusers to slip through the net. In advocating the Committee / Board model, the Guidance is potentially undermining the common minimum standards it seeks to impose.

The Guidance suggests that where decisions are made by committees, this "ensures that senior officers can attempt to resolve disputes in relation to service actions without the perception that this involvement will affect their judgement in relation to decisions made at a later date." I am afraid I do not understand this point. Attempts at resolution would be conducted by investigating officers in the first instance, but if sufficiently late on down the line, it would be done with the committee. I cannot see that it makes any difference that is done by a determining officer.

The Guidance suggests that as elected members are not usually involved in the day-to-day operation of the service, they do not have relationships with licence holders that may give the impression that the discharge of a function is affected by the relationship between the decision maker and the licence holder. I do not think this is necessarily right. Sufficiently senior officers may have very little day-to-day dealing with the trade. And, as I have said, committee members often have quite strong relationships with the trade.

Urgent decisions

In his review of the authorities on the flexible nature of natural justice in *R (L) v West London Mental Health NHS Trust* [2014] 1 W.L.R. 3103, Beatson L J said at [76] that there was a general recognition that considerations of urgency or confidentiality will limit what fairness requires in a particular case, and that in other contexts, the fact that the decision is a preliminary decision, or a non-dispositive one by an investigating body, has limited what is required.

In the context of urgent decisions, the Guidance backtracks, and suggests officer decisions. It says [5.11] that regardless of whether the Committee / Board model or the officer model is adopted, "all licensing authorities should consider arrangements for dealing with *serious matters that may require the immediate revocation of a licence. It is recommended that this role is delegated to a senior officer / manager with responsibility for the licensing service."*

Part of the problem is what is, in my view, a widespread misapplication of what is merely *obiter dicta* in the case of *R (oao Singh) v Cardiff CC* [2012] EHWC 1852 (Admin) to reach the conclusion that it is not possible to suspend on an interim basis pending investigation, with a full hearing to take place at a later date. I have previously argued in this *Journal*[2] that this analysis is wrong, and hopefully an authoritative decision can be obtained at some point.

In referring to the "immediate revocation" of a licence (at [5.10]) the Guidance is perhaps taking the line that immediate suspensions are unlawful. It seems to me that:

1. A decision to suspend a licence pending a full hearing, because it is non-determinative, and in

2 Charles Holland, *Open justice, agenda papers and the Licensing Act 2003* (2020) 26 JoL, pp 41 – 47.

many cases is a decision that needs to be taken quickly, is one where there can be no well-made objection to it being taken at officer level, and indeed I can countenance circumstances where it would be appropriate for an investigating officer to take the decision (so for instance where the senior officer who is normally designated to make decisions is unavailable);

2. As the Guidance recognises, a decision in serious and urgent cases to revoke a licence with immediate effect can be taken without objection by an officer, although my preference in such cases would be for an immediate suspension to permit the driver concerned to make representations before a final decision is taken.

For determinative decisions, as acknowledged above, it is plainly sensible to separate the investigating officer from the decision maker. The Guidance recommends that the decision maker is a panel of members for three reasons. I deal with these in turn.

Who makes the better substantive decisions?

The Guidance suggests that it is rare for the same councillors to be involved in frequent hearings, that they therefore will have less knowledge of previous decisions and are therefore less likely to be influenced by them.

I am afraid I do not understand the point the Guidance is seeking to make here. There are local authority councillors who hear numerous licensing applications - personally I never once thought this gave rise to any bias, nor meant that they did not determine individual cases on their individual merits. On the contrary, in my view, experienced councillors make a better job of decision making than inexperienced ones.

I am not entirely sure whether this is a suggestion that councillors may not know of the individual licence holder's history, but if it is, past conduct is in any event relevant in every case: *R v Knightsbridge Crown Court, ex parte International Sporting Club* [1982] QB 304 at 318.

It is not as if a decision about an individual taxi or private hire vehicle driver is as nuanced as a decision about a particular public house. Whether someone is fit and proper to hold a licence to convey the public is quite a different matter from the scenario described by Toulson L J in *Hope and Glory*:

> *Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on. Sometimes a licensing decision may involve narrower questions, such as whether noise, noxious smells or litter coming from premises amount to a public nuisance. Although such questions are in a sense questions of fact, they are not questions of the 'heads or tails' variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. In any case, deciding what (if any) conditions should be attached to a licence as necessary and proportionate to the promotion of the statutory licensing objectives is essentially a matter of judgment rather than a matter of pure fact.*

A decision about individuals in the taxi regime is not (or should not) be a "small p" political decision about premises in the sense described by Toulson L J. And yet that is exactly what this Guidance seems to propose. In my experience, professional licensing officers, trained in decision making, give clearer and more cogent reasons for their decisions, demonstrating (as committees often do not) an understanding of the legal test, what is relevant and what is not, proportionality and the decision-making process generally. Whilst the Guidance is in general to be welcomed, the suggestion it makes on the decision-making structure seems to undermine the consistent implementation of minimum standards that it otherwise advocates.

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Francis Taylor Building and Trinity Chambers

Using lasers safely in the entertainment industry

Lasers add glitz and glamour to many licensed events, but they have the potential to harm so their operators must follow certain guidelines, as **Julia Sawyer** explains

The word "laser" is an acronym for "light amplification by the stimulated emission of radiation".

The light produced by a laser, a form of non-ionising radiation, has a unique combination of characteristics that distinguishes laser radiation from all other light sources. The use of lasers is very popular in the entertainment industry.

Lasers produce radiation with unique properties. It is these properties that distinguish laser radiation from the optical radiation produced by more familiar sources such as the sun or the common household electric light bulb.

When the radiation emitted by a source can be detected by the eye and produces a sensation of vision, it is referred to as light. Lighting devices such as the compact fluorescent, LED or incandescent electric light bulbs produce optical radiation comprising many different wavelengths. Their light is perceived as white light, and the bulb emits equally in all directions.

The optical radiation produced for lighting is said to be highly divergent, that is the light spreads out rapidly as the observer moves away from the bulb. It is this property which allows the illumination of large areas using a single light bulb. In contrast a laser produces optical radiation over a very narrow wavelength band, so narrow that the laser is referred to as a monochromatic or single wavelength source.

If the laser emits in the visible region then the radiation is perceived as a single colour. The wavelength of a laser is usually measured in nanometres, or one-thousand-millionth of a metre and is abbreviated to "nm". The laser light energy is measured in mW (miliWatt) and Joules (1000mW = 1W = 1 J per second).

The laser also usually produces a very narrow beam which diverges, or spreads out, to only a very limited extent, with increasing distance from the source. This low divergence property means that the laser output is highly directional, forming a pencil-like beam that will still appear as a small spot when shone against a surface, even at distances of 100m or more.

There are four different classes of lasers, class 1 to 4, with class 4 being the most hazardous. The classification scheme for lasers indicates the potential risk of adverse health effects, where the higher the class number, the greater the laser radiation hazard posed by the laser. In practice, the risk also depends upon the conditions of use, exposure time and the environment. However, potential risks may or may not actually lead to adverse health effects, so with the help of classification, users may select appropriate control measures to minimise the risks.

Once a laser has been assigned to a class there are other requirements prescribed in the British Standard which should be met. These include product labelling and customer information, and may include specific engineering control features to be incorporated in the laser product depending upon the class assigned.

The British Standard BS EN 60825-1:2014 *Safety of laser products Part 1: Equipment classification and requirements* classifies laser products according to the laser beam hazard. Brief definitions are:

Class 1: Safe under reasonably foreseeable conditions of operation.

Class 1C: Safe without viewing aids; lasers are designed explicitly for contact applications to the skin or non-ocular tissue.

Class 1M: As Class 1 but not safe when viewed with optical aids such as eye loupes or binoculars.

Class 2: For visible beams only, the eye is

protected by the aversion responses, including the blink reflex and head movement.

Class 2M: As Class 2 but not safe when viewed with optical aids such as eye loupes or binoculars.

Class 3R: More likely to cause harm to the eye than lower class lasers but do not need as many control measures as higher class lasers.

Class 3B: Eye damage likely to occur if the beam is viewed directly or from shiny reflections.

Class 4: Eye and skin damage likely from the main laser beam and reflected beams. These lasers may cause fires.

Legal requirements when using a laser for entertainment purposes

The HSE guidance gives examples of "hazardous" lasers that present a "reasonably foreseeable" risk of harming the eyes and skin of workers and where control measures are needed. All use of Class 3B and 4 lasers in industry, research and education is specified as hazardous because of the potential to cause damage to eyes including blindness, burns to the skin and fire.

As part of managing health and safety at an event, the risks associated with a laser lighting display must be assessed and controlled. The assessment needs to consider what harm might be caused to people (employees, contractors, performers and the audience) and decide whether the control measures are adequate to prevent harm.

If an organisation / individual is contracted to design, install, align and operate a laser display, just as with any other contractor, they must be competent and adequately resourced to undertake the role safely and effectively.

Other duty holders involved in the production of a laser lighting display, including venues, equipment manufacturers / suppliers and installers / operators, will have health and safety duties to the extent of control each has over the equipment, work activity and workplace during installation and operation of a laser display.

There should always be clear understanding within the organising team about who will be responsible for safety matters; this is typically detailed either in the contract between organising companies or in the Event Safety Plan. There should also be systems in place to help all the relevant parties in the event to co-operate and communicate with each other and co-ordinate their work.

The hazards

Lasers emit radiation as narrow concentrated beams of light, not necessarily visible to the human eye. Their most commonly-recognised hazard is their ability to damage eyesight or burn skin, which can vary markedly according to the wavelength and power of the output. However, in some cases, other associated risks from use of the equipment may be more hazardous such as heat, dust and fumes.

If the display involves the use of hazardous lasers with high radiant powers (typically from 200mW to 40W+, ie, class 3B & 4 lasers) then action will be required to control the risk of a significant eye injury. High-power lasers with radiant powers that exceed around 500mW may also burn skin on contact and can be a fire risk.

Other hazards include outdoor laser display beams that dazzle motorists, pilots and other vehicle drivers.

The controls

The following steps need to be considered during the planning process and adequate controls put in place to minimise the risk:

- Substitution – using a non-hazardous laser, if possible.
- Competency of installer, obtaining specialist advice.
- Installation and alignment of the laser display.
- To restrict direct and reflected access to hazardous laser beams, eg, via shiny / reflective surfaces.
- If a fault occurs have an emergency shut down plan, which ensures the laser beam is not concentrated into an audience / work area where people may be harmed.
- Pre-display checks and operation.
- Planned audience participation, ie, exposure / scanning.
- Engineering design features which prevent equipment displacement / misalignment; beam enclosures, blanking plates, remote controls, controlled areas, clamps to hold material, scan

failure safety systems and emergency stop functions that terminate a display if problems occur.

- Suitable handover arrangements between a supplier / installer and display operator (if different) including information about safe operation, checks and maintenance.

- Operational controls such as crowd barriers / warning signs and stewards to keep people away from no-go areas, use of competent operators and an appropriate level of supervision to ensure safe systems of work are followed, plus well-practised emergency shutdown procedures.

- Eye protection and fire-proof gloves / overalls for those engaged in alignment and setting-up procedures.

- Following Civil Aviation Authority (CAA) guidance to ensure beams are projected away from airports and flight paths and that relevant documents are filed with the CAA.

- It is a usual condition of a premises licence to notify your local authority if lasers are going to be in use. They will need to know the type of lasers being used and the control measures that are going to be implemented to protect public safety.

- Emergency procedures in place, communicated to all relevant people, should an eye injury or burn injury occur.

What documentation should be kept

The following documentation should be kept to show that a safe management system is in place for the use of lasers and that adequate control measures are being followed to protect those working with and those experiencing lasers for entertainment purposes:

- Risk assessment detailing the control measures being followed to meet Safety of Display lasers written by PLASA (Professional Lighting and Sound Associations).

- Laser sources to be included in the fire risk assessment.

- Competency / qualifications of installer.

- Clear lines of responsibility detailing who is responsible for the installation and maintenance of the lasers.

- Notification to the local authority and CAA, if required.

- Sign-off from installer stating the lasers have been installed to the manufacturer's specification.

- Testing of the installation under controlled conditions.

- Maintenance and checks of the installation during an event by a competent person.

Additional information

Additional information can be obtained from:

Guidance for Employers on the Control of Artificial Optical Radiation at Work Regulations (AOR) 2010.

British Standard *BS EN 60825-1:2014.*

Safety of Display Lasers – Professional Lighting and Sound Associations (PLASA) guidance.

CAP736 Operation of Directed Light, Fireworks, Toy Balloons and Sky Lanterns within UK Airspace – Civil Aviation Authority.

Julia Sawyer
Director of JS Safety Consultancy

The agent of change tiger bites

Councils are increasingly rejecting development proposals that would probably have threatened the future operation of hospitality venues, as **Sarah Clover** explains

The agent of change principle is starting to bite. The concept (reinforced in the National Planning Policy Framework in para 182 in 2012) is designed to address the situation where new residential development is proposed near to hospitality venues and night-time economy sources of noise. Any resulting conflict between incoming residents and established noise-makers has typically been played out in enforcement proceedings many years later. The agent of change principle was intended to front-load the debate and mediate the outcome before it ever happens, and it is being seen, in one case after another, to be doing exactly that, with some surprising results in favour of licensed venues. The three examples considered below are instructive.

Wallingford Corn Exchange

In an appeal decision on 8 January 2021, the planning inspector upheld the refusal of South Oxfordshire District Council to grant planning permission. The developer sought to demolish parts of the building next door to the Corn Exchange in Wallingford, which is a charity volunteer-run theatre and cinema, in order to build eight flats. Both buildings were listed, but the effect of the development upon the heritage assets and the conservation area came second to the inspector's conclusions about the effect upon the living conditions of future occupants of the flats from noise and disturbance. And here, the inspector's key concern was whether potential future complaints from the proposed flats would jeopardise use of the Corn Exchange.

The council has policies in its local plan which seek to avoid adverse effects from sources of pollution, including noise, and requires that development should be appropriate for its location and offer realistic potential for appropriate mitigation of any effects.

The inspector noted that para 180 of the NPPF is also clear that developments should mitigate and reduce to a minimum the potential adverse impacts arising from noise from new development to avoid noise giving rise to significant adverse impacts on health and quality of life.

The inspector noted:

> *46. Paragraph 182 also makes clear that decisions should integrate effectively with existing businesses and where the operation of an existing business could have a significant adverse effect on new development, the applicant (or 'agent of change') should provide suitable mitigation before the development is completed.*
>
> *47. Planning Practice Guidance (PPG) sets out further detailed guidance, including relating to the agent of change principle. This includes taking into account current activities, but also those activities that businesses or other facilities are permitted to carry out, even if they are not occurring at the time of the application being made. The agent of change will also need to define clearly the mitigation being proposed to address any potential significant adverse effects that are identified. Adopting this approach may not prevent all complaints from the new residents/users about noise or other effects, but can help to achieve a satisfactory living or working environment, and help to mitigate the risk of a statutory nuisance being found.*

The inspector noted in particular that noise can constitute a statutory nuisance under the Environmental Protection Act 1990 and other relevant law. This includes noise affecting balconies and garden, where people are not shielded by any acoustic attenuation built into the fabric of their homes.

She said:

> *50. Taking the above together, noise effects can be significant, causing harm to human health and wellbeing and can constitute a statutory nuisance which would necessitate enforcement action. It is therefore critical to assess the effects of noise and disturbance upon future occupants of the proposed development and the implications for the future use of the Corn Exchange.*

She was very careful to consider the situation of the Corn Exchange as a volunteer-run venue and an important community facility for Wallingford. It opened in 1978 as a 175-seat theatre and has won awards for its regeneration, for its work as an extensive voluntary organisation and

for promoting economic prosperity. It has a diverse offer, including pantomime, musicals and dramas. It is also used by other groups and professional shows, including ballet performances, bands, touring productions, stand-up comedy, local school performances and more.

She took great note of the specification of the Corn Exchange's PA system and cinema-sound system, as well as the types of systems imported for use in live music or theatrical shows, and all the attendant acoustic musical noise as well, such as from drum kits.

There were no restrictions on the operations of the Corn Exchange, either in planning terms or in its premises licence under the Licensing Act 2003. The permitted hours extended to midnight through the week and to 01:00 at weekends, with no specific restrictions on noise levels.

There had been no record of noise complaints, and although the occupants of the flat above the Corn Exchange provided evidence to the inspector that noise levels from performances are audible on the roof terrace, they were prepared to accept the limited disturbance it caused them. There were no objections to the grant of permission from the environmental health department of the council.

The importance of the Corn Exchange to the local community in terms of its social and economic benefits was a key issue, and was largely agreed between parties. The inspector said: "It follows therefore that its use should not be prejudiced by the proposed development because of noise and disturbance."

Detailed noise assessments took place at the Corn Exchange and the appeal site. There was significant debate between the acoustic experts about the accuracy and implications of the noise readings, with argument as to what the "typical" and "exceptional" or "occasional" operating conditions were. The inspector noted:

> *60. However, broad agreement was reached in terms of the noise disturbance primarily arising from the lower frequency octave bands. In addition, it was agreed that internal design criteria for music noise levels in the proposed units to be achieved are 40 dB Lzeq, 1min in the 63Hz octave band and 30 dB Lzeq, 1min in the 125Hz octave band with a relaxation of 5 dB for non-habitable rooms.*

The inspector found that due to the juxtaposition of the Corn Exchange and the proposed flats, noise effects on future occupants would be likely to be as a result of structure-borne transmission through the wall of the proposed development.

Acoustic enhancements were proposed as part of the revised layout design and internal room layouts sought to minimise habitable rooms along the flanking wall where possible. However, the inspector was not persuaded that the technical detail provided within the mitigation strategy, as reflected in the plans, could realistically be achieved at the site, and even on the appellant's more favourable noise measurements and assumptions, she was not persuaded that the mitigation was realistic.

The appellants proposed a Grampian condition, which would prohibit development until suitable noise mitigation had been secured, and they were prepared to accept the associated risk. But the inspector was not happy with that either because she said that there were so many unknowns, even at the time of the inquiry, that she could not be confident that conditions in the future could resolve the problems.

She said:

> *68. Overall, based on the above, there would be a significant risk of harm to future occupants from noise due to uncertainties around the effects and mitigation which could not reasonably be conditioned.*

The inspector noted that the operations at the Corn Exchange as an important community asset are unrestricted, and that this was even in the context that some noise and disturbance effects were already experienced in the locality, as evidenced in the flat above. It is interesting that there was no comment or criticism about that. Developers will sometimes argue that there should be licence limitations on the premises to avoid noise breakout. This was the case in *Crosby Homes (Special Projects) Limited v Birmingham City Council & The Nightingale Club,* Birmingham Magistrates' Court [District Judge Zara, 2008]. The district judge was not persuaded by the developer in that case, in similar circumstances, that any controls should be imposed upon the night club.

The inspector said she had "considerable concern as to the effects on future occupants of the development from structure-borne noise and there is significant doubt as to whether the effects can be realistically mitigated."

Her conclusion is particularly notable:

> *76. **Adopting a precautionary approach**, I therefore consider that there is a significant risk of harm to future occupants from noise and disturbance and thus the development would not provide satisfactory living conditions. Accordingly, the development could also compromise the Corn Exchange as an established*

entertainment venue as there could be significant potential for future residents to complain in light of my findings". [Emphasis added.]

It is important to note that the Corn Exchange was separately represented at the inquiry under Rule 6 of the Inquiries Procedure Rules. This intervention by venues can be crucial to ensure that the venue's interests are properly protected.

1000 Trades

This situation was mirrored in the case of 1000 Trades, a live music venue in the Jewellery Quarter in Birmingham, in 2019. The venue's operator also instructed specialist counsel to represent them at a planning inquiry and to invoke the agent of change principle to resist the conversion of the office block next door to them into residential development. The council had historically confirmed prior approval for permitted development from office to residential at this site prior to 2016; this was at a time before the changes to permitted development required assessment of noise impact. The developer failed to implement in time and was required to seek prior approval again, post the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016. Local planning authorities were given the power under the Amendment Order 2016 to consider noise impacts concerning any permitted development.

When the developer re-applied, the council refused prior approval, and the developer appealed. At appeal, the developer claimed that their proposed mitigation works would protect their future residents, as well as the operation of the local licensed businesses. They claimed that the sound insulation would be adequate, and that, although the windows to the flats were intended to be openable, that residents would be sensible and keep them closed during times of high noise output from their musical neighbours.

The inspector disagreed. In his decision letter, he stated:

The mitigation proposed is compromised by its reliance on the actions of a third party, namely the future occupiers, which is beyond the control of either the appellant (the developer seeking to build the flats) or the council, and, consequently, the proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development.

This was entirely in line with the representations made on behalf of 1000 Trades which stated: "It is impossible to imagine a more catastrophic impact upon our business than moving from being the home of events like Birmingham Jazz to closure. 1000 Trades is at risk of this outcome if the noise mitigation measures proposed in this appeal – a risk that we feel abstract modelling undertaken by consultants cannot adequately mitigate, given the propensity for 'real world' factors to intervene."

Central to these "real world" factors are how noise would have been experienced by occupants of the flats. If the planning system had allowed the flats to go ahead, 1000 Trades would have faced the perpetual risk of noise complaints, potentially leading to the licence being revoked and disastrous interference with the business, probably leading to closure.

Flapper and Firkin

A slightly different but related issue was considered in a planning inquiry which was resolved on 2 September 2020, concerning the Flapper and Firkin, a pub and live music venue on Kingston Row in Birmingham. The venue had closed, and the council had refused to grant planning permission to the developer to convert it into 27 flats.

The inspector looked at various issues, including listed buildings and heritage assets, highway safety and the character and appearance of the area. None of these issues would have justified refusal, and the only issue which concerned him was the provision of community facilities, in particular live music venues. It is notable in this case that the premises were not even in current use - the premises had closed at the start of 2020 when the lease expired. This was not Covid related. None of this prevented the need to protect the building, and specifically its use as a live music venue.

The premises are situated on the canal, near to the city centre and while there are office buildings close by, the predominant use in the immediate vicinity is residential. So the character of the area already had a pronounced residential element to it, but this was not enough to undermine the protection afforded to the premises.

The music venue operated from a lower-ground-floor bar of the building and was exclusively used for live music. It had a capacity of 120 people with performances mainly taking place on Friday and Saturday nights. Prior to its closure, it functioned on a business model of the tenant operator working in association with band promoters, with a focus on amplified hard rock music.

Birmingham City Council's Development Plan contains planning policies which support the city's existing tourist and cultural facilities. The policies protect and promote smaller- scale venues and attractions that are an important part of creating a diverse offer. Policies also support a

diverse range of facilities and uses, including community uses and cultural facilities, and they require new residential development to be sympathetic to cultural assets, amongst other considerations.

Not all local authority development plans will have such specific policies protecting community and cultural venues, and this is something which should be considered. Specific and integrated policies which link with the licensing and environmental protection regimes are part of the "joined up thinking" which is strongly advocated. See for example, the s 182 Guidance para 14.65 which advises:

> *Proper integration be assured by licensing committees, where appropriate, providing regular reports to the planning committee.*

This inspector in this case also noted that para 92 of the National Planning Policy Framework similarly supports community facilities and guards against the unnecessary loss of valued facilities and services, particularly where this would reduce the community's ability to meet its day-to-day needs.

The appellant's main justification for the loss of the music venue was the number of alternative similar facilities. The appellant submitted evidence from surveyors highlighting the alternative premises for the presentation of live music in order to make the case that the loss of the appeal property would not be unreasonably detrimental. The reports identified premises located throughout Birmingham, recognising that the visiting public to such premises will not be restricted to local residents.

The inspector pointed out, however, that it was unclear whether those venues would actually be able to accommodate what would be displaced live music performances that would have taken place at the appeal property. The inspector was not persuaded that there would be sufficient music venues if the Flapper was lost to a different use. If the venue was not deemed, in effect, "surplus" to the provision of music venues, then its loss would be detrimental to such community facilities as it would limit their range. This was an important observation by the inspector that music venues are not interchangeable – it is not just a numbers game.

There was an argument as to whether the premises were viable anyway. The appellant did not claim that the Flapper, when it was trading, was struggling financially. The inspector was less interested in the market and economic arguments about the premises than in considerations of its value to the community and whether its loss was acceptable in principle. He was concerned that, once lost, it would be difficult to retrieve, and he considered that the policies were not so much about the protection of facilities on an individual case by case basis, but more about the protection and promotion of smaller- scale venues and guarding against unnecessary loss. He said "a strong level of protection is afforded", and that it was ultimately a matter for the decision maker.

The inspector also had to consider what planning benefits the proposed development of residential flats would offer, and he found that there were benefits, including the increase of housing provision and a contribution towards the Government's objective of significantly boosting the supply of homes, as well as aiding housing mix and balanced communities, and other benefits as well. These were not insignificant matters, and they had to be weighed in the balance, but they were not enough to overcome the single harm identified - namely loss of the venue itself. The inspector said:

> *48. In relation to the harm that arises, this concerns the provision of community facilities and, in particular live music venues. It would result in the loss of what can be considered to be a valued community facility. The venues for live music performances would be diminished and the evidence is not of a sufficient strength to demonstrate that such a loss can be satisfactorily justified. This attracts significant weight in my decision and counts against the proposal. Set against this would be the benefits that I have set out. The weight to be attached to the benefit to housing land supply would be moderate. All other benefits carry limited weight. In taking these considerations together, the harm would not be outweighed by the benefits.*

Conclusion

Other similar cases are currently under consideration, and the trend emerging is that councils are getting bolder in refusing residential development in circumstances where music and other licensed community facilities would be negatively impacted, even where more housing would be of benefit. The agent of change tiger is turning out to have teeth after all.

Sarah Clover
Barrister, Kings Chambers

ECJ Case C 663/18 – Kanavape

On 29 November 2020 the ECJ gave a preliminary ruling on a reference made by the French Court of Appeal concerning the legality of a French ban on cannabidiol (CBD) when extracted from the entire hemp plant. The ruling has the effect – while technically looking at the issue through the lens of the free movement of goods – of confirming that CBD should not be treated as a narcotic.

Background

It is wrong to simply talk of cannabis as a single product or good. Instead the plant cannabis sativa L contains a number of cannabinoids which are the group of compounds unique to the cannabis plant. CBD is one cannabinoid and is non-psychoactive (in the sense that the user does not get "stoned" from consuming it). It is mainly produced from the leaves and flowers of the cannabis plant, is widely available as a well-being supplement and forms a component of several medicinal products. Tetrahydrocannabinol (THC) is another cannabinoid which *is* psychoactive and is generally viewed as the principal 'controlled' element both across the EU and in the UK.

This case involved the sale and distribution of an electronic cigarette called Kanavape which used cartridges containing CBD oil. It was produced by a company called Catlab SAS which imported into France CBD lawfully produced in the Czech Republic from the entirety of the cannabis plant.

In 2014 the National Agency for the Safety of Health Products in France opened an inquiry into Kanavape. Its laboratory found that while the CBD content varied, the THC present was always under the legally permitted threshold. However, the product was found to not be medicinal and this led to the directors of Catlab SAS being found guilty of infringing the legislation on poisonous substances.

The directors appealed to the French Court of Appeal, their main argument being that the prohibition in the marketing of CBD made from the cannabis plant in its entirety was contrary to EU law.

This led the Court of Appeal to refer two questions to the ECJ. In its ruling the ECJ expressed the question asked in this way:

> *Although the referring court refers, in the wording of its question, to limiting 'the cultivation, industrialisation and marketing of hemp solely to fibre and seeds', it is apparent from its own explanations that the question asked can be relevant to the case in the main proceedings only to the extent that it concerns the conformity with EU law of national legislation which prohibits the marketing of CBD when it is extracted from the Cannabis sativa plant in its entirety and not solely from its fibre and seeds.*
>
> *It is therefore necessary to consider that, by its question, the referring court asks, in essence, whether Regulations No 1307/2013 and No 1308/2013 and Articles 34 and 36 TFEU must be interpreted as precluding national legislation to the extent that it prohibits the marketing of CBD when it is extracted from the Cannabis sativa plant in its entirety and not solely from its fibre and seeds.*

Law

EU law

EU legislation regulates cannabis broadly in two different ways. It is treated as an agricultural product under Regulations 1307/2013 and 1308/2013 if it meets the definition in Annex 1 of the TFEU, which lists agricultural products, as "true hemp (cannabis sativa), raw or processed but not spun; tow and waste of true hemp (including pulled or garnetted rags or ropes)".

On the other hand, cannabis is also treated as a narcotic via the EU Council Framework Decision 2004/757 and Article 71 (1) of the Convention Implementing the Schengen Agreement which refers to the Single Convention and the Convention on Psychotropic Substances 1971. This means that any narcotics drug not distributed through narrowly defined medical or scientific channels will be prevented from being imported or sold. Furthermore, member states are required to take all measures necessary to prevent and punish illegal trafficking of narcotics.

In relation to the free movement of goods, member states are entitled to adopt national measures as long as they do not hinder intra-EU trade (such as via restrictions on imports), as per Article 34 of TFEU, unless said measures can be justified by grounds of public interest which include the protection of public health (see Article 36 TFEU).

Member state law

This case focused on French law, which will be considered in a moment. But it is worth recognising the wider context of domestic law across the EU. It is a confusing patchwork of different national rules. There is broad consistency in the recognised maximum level of THC content that applies to

the legal cultivation of industrial hemp (below 0.2% THC), but there is wide disparity about the legality of the elements of the plant that can be used. For example, in Bulgaria CBD cannot be produced but can be imported and sold. In the Netherlands, the seeds and fibre of industrial hemp are legal, but products derived from the leaves and flowers are broadly not.

In France, cannabis is classed as a narcotic in its Public Health Code (Article R.5181) but the state authorises the "cultivation, importation, exportation and industrial and commercial use (fibre and seeds) of varieties of cannabis sativa" so long as the THC content remains under 0.2%.

The practical effect of this is explained in Ministerial Guidance produced by the Ministry of Justice dated 23 July 2018, which sets out:

> *The cultivation, importation, exportation and use of hemp shall be authorised only if:*
>
> - the plant comes from one of the varieties of Cannabis sativa L. provided for by the order [of 22 August 1990],
> - only the fibre and seeds of the plant are used,
> - the plant itself contains less than 0.2% delta-9-tetrahydrocannabinol.

The ruling

The issue at the heart of this case was that the CBD present in Kanavape came from the cannabis plant in its entirety rather than just from the seeds and fibres of the plant. It should be noted that this is not unusual – CBD is primarily produced from the leaves and flowers from the plant which is why the limitation in the use of cannabis plant to fibre and seeds often is, in effect, a ban on CBD.

An important preliminary observation of the ECJ on the harmfulness of CBD (at 34) was made:

> *The referring court explains that CBD does not appear to have any 'recognised psychoactive effects'. Indeed, it notes that the World Health Organization (WHO), in a 2017 report, recommended removing it from the list of doping substances, that CBD is not listed as such in the Single Convention, that the ANSM concluded, on 25 June 2015, that there were insufficient data to classify it as 'harmful' and, last, that the expert appointed in connection with the criminal inquiry giving rise to the proceedings instituted against the applicants in the main proceedings concluded that it had a '"little or no" effect on the central nervous system'.*

The issue of CBD had arisen more due to the wording of legislation (which focused on seeds / fibre) and its biological source (from the whole plant, in particular the leaves / flowers).

First the ECJ considered whether the CBD could be classified as an agricultural product under Annex 1 of the TFEU. If it could, then France's ban would be contrary to the common agricultural market regulations. The ECJ found in this case that as the CBD oil was extracted using CO2 extraction from the whole plant it did not meet the Annex 1 definition for true hemp. Therefore, the ban was not contrary to the common agricultural market regulations

This led to the consideration of whether the ban was contrary to the free movement of goods. This required the ECJ to come to a view on whether CBD could be considered to be a narcotic drug. If it was, then it could be banned without being contrary to Article 34 and 36, but if it was not, then it could not be banned on those grounds.

The ECJ firstly found that CBD was not covered by the Convention on Psychotropic Substance or by EU Council Framework Decision 2004/757 (per [64]). Therefore, the question was whether CBD was covered by the UN Single Convention on Narcotic Drugs 1961.

It is interesting to note that the ECJ did find on a "literal interpretation" of the Single Convention that CBD could be classified as a "drug":

> *According to Article 1(1)(j) of the Single Convention, the term 'drug' means any of the substances in Schedules I and II of that convention, whether natural or synthetic. Listed in Schedule I of that convention are, inter alia, cannabis, cannabis resin and cannabis extracts and tinctures.*
>
> *In addition, the terms 'cannabis' and 'cannabis plant' are defined in Article 1(1)(b) and (c) of the Single Convention as 'the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated', and as 'any plant of the genus Cannabis', respectively.*
>
> *In the case at hand, it is apparent from the information in the file before the Court that the CBD at issue in the main proceedings is extracted from the Cannabis sativa plant in its entirety and not solely from the seeds*

and leaves of that plant, to the exclusion of its flowering or fruiting tops.

In those circumstances, it is true that a literal interpretation of the provisions of the Single Convention might lead to the conclusion that, in so far as CBD is extracted from a plant of the Cannabis genus and that plant is used in its entirety – including its flowering or fruiting tops – it constitutes a cannabis extract within the meaning of Schedule I of that convention and, consequently, a 'drug' within the meaning of Article 1(1)(j) of that convention.

However, the ECJ also placed weight on the fact that the objective of the Single Convention was to protect the health and welfare of mankind. In light of this, and taking account of the absence of evidence of any harmful effects of CBD as noted at [34], the ECJ concluded (at [75] and [76]):

In the light of those factors, which it is for the referring court to verify, it must be held that, since CBD does not contain a psychoactive ingredient in the current state of scientific knowledge ... it would be contrary to the purpose and general spirit of the Single Convention to include it under the definition of 'drugs' within the meaning of that convention as a cannabis extract.

It follows that the CBD at issue in the main proceedings is not a drug within the meaning of the Single Convention.

The ECJ therefore ruled that as CBD was not a narcotic drug and had been produced lawfully in the Czech Republic, then Articles 34 (protecting free movement of goods) and Article 36 are engaged. In other words, there shall be no restrictions placed on the free movement of the CBD product unless the state can identify that a specified public interest would be prejudiced and the restriction is proportionate to the aims.

This meant that the French ban would constitute a quantitative restriction which would only be justified on public health grounds. Whether the restriction was appropriate and proportionate to protect public health was left as a question for the French courts to determine (much as the ECJ previously delegated questions relating to minimum alcohol pricing on whisky products to the Scottish courts). However, the further two observations made by the ECJ cast doubt on whether such a determination would be justified, and both relate to the practical efficacy of such a ban. The first was that such a ban would not affect the marketing of synthetic CBD ([94]) and the second was to stress that such a finding would have to be based on scientific data "to make sure….that the real risk to public health alleged does not appear to be based on purely hypothetical considerations".

While these two observations may be *obiter* they can be taken to be a clear steer from the ECJ as to what side it believes the referring court should fall.

Effect

The central finding of the ECJ – that CBD is not a narcotic drug – could have a significant ripple effect for the liberalisation of regulatory controls of CBD both in member states and non-member states such as the UK.

However, in terms of effecting change to legislation, its effect should not be overstated. The effect may be practical and political rather than directly negating legislation.

For example, in the UK CBD is already recognised, in its pure isolated form, as not being a controlled drug under the Misuse of Drugs Act 1971 and the Misuse of Drugs Regulations 2001. However, it is in practice extremely difficult to extract CBD from a cannabis plant that is not contaminated, at least to some extent, with prohibited substances including THC.

In the case of cannabis plants cultivated for industrial hemp and certain hemp products (eg, oil from pressed seeds), Home Office cultivation licences may be granted so long as the THC levels are below 0.2%. But this regime does not permit CBD oils to be extracted from the CBD rich flowers of the plant.

In the case of UK law under the Misuse of Drugs Regulations 2001, a product is "exempt" from control if the THC content in the CBD product is (among other criteria) "not designed for administration of the controlled drug to a human being or animal" and no one single component of the product (eg, a package of tablets) contains more than 1 mg of THC per pack.

It is unsafe to assume that the 0.2% THC level will be applied under the UK's currently fragmented and disparate cannabis regulatory regime, which stretches across criminal, medical, cultivation, marketing and food regulatory regimes. This makes it hard for a single judgment to affect the patchwork of regulation but the ECJ finding further reinforces calls for the need for the UK cannabis regulatory regime to be reformed to keep pace with the legalisation of cannabis products.

In an interesting recent development, in a ministerial letter dated 11 January 2021, Kit Malthouse MP, invited the Chair of the Advisory Council on the Misuse of Drugs (ACMD) to investigate and report to him in relation to specifying non-isolated CBD intended for human consumption as an exempt drug under the Misuse of Drugs Regulations 2001 by reference to the level of THC content present in the product. The

parameters the minister proposed were between a THC level of 0.1%, at most, right down to a practically unachievable 0.0001%.

The ACMD's report, and Government response, is awaited with great interest in the industry. What can be said is that there is a clear governmental wind blowing towards liberalising UK laws on CBD products that do not cause harm to individuals or have psychoactive effects and provides a boost to a potentially highly profitable UK industry.

Piers Riley-Smith
Barrister, Kings Chambers

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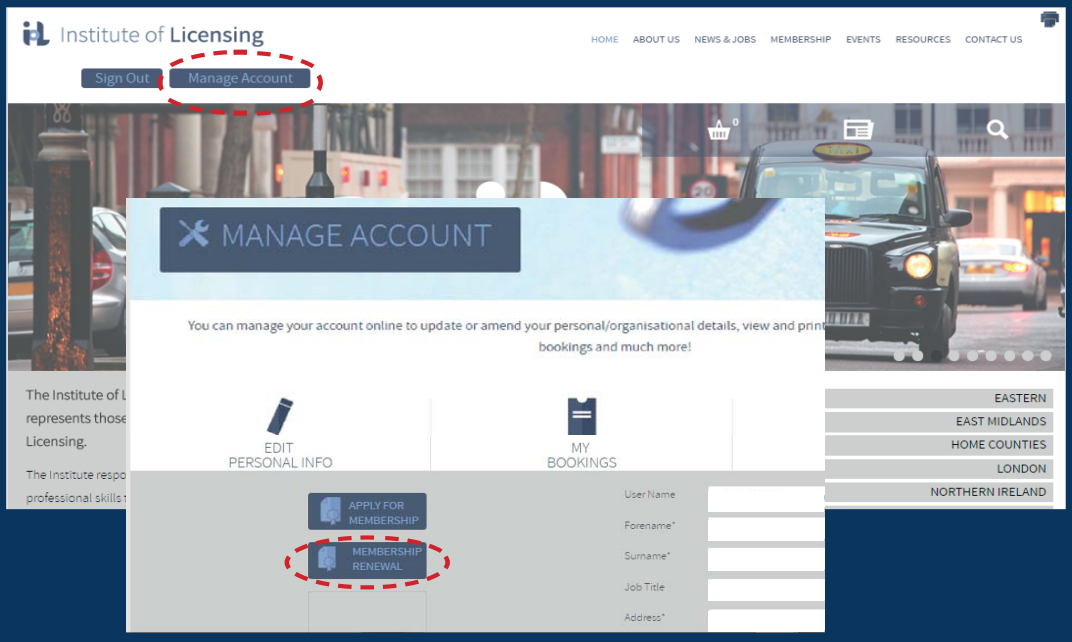

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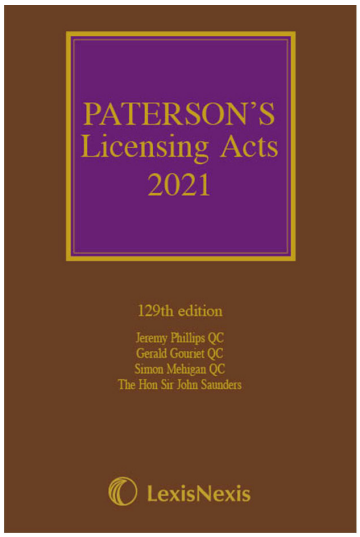
Book review

Paterson's Licensing Acts 2021



Authors: Simon Mehigan QC, David Wilson, Gerald Gouriet QC, Jeremy Phillips QC, Sir John Saunders

Publisher: LexisNexis
Price: £339.99 ***(IoL member dicsount, see IoL website)***

Reviewed by **Richard Brown**
Solicitor, Licensing Advice Centre, Westminster CAB

I am a man of simple working-from-home needs. One of my absolute requirements, though, is a well-thumbed copy of the licensing "bible", *Paterson's,* to hand. It is a testament to its comprehensive coverage that it has been the favoured tome for practitioners for so long and, deservedly, remains so. In fact, it's open right now on my window-sill at the commentary to s 16 Licensing Act 2003, next to the *de rigeur* indoor plant, the faux art deco table lamp and (naturally) the lovingly nurtured back issues of the *Journal.*

In fact, my earliest licensing memory is of the 2005 edition which adorned my supervisor's bookshelf (or, more usually, my desk) as a callow trainee, and the colour-coded post-it notes decorating the copy our opponent would deposit on the desk in the courtroom with a stentorian thud.

The 2021 edition of *Paterson's* was published on 23 October 2020. Continuing in its welcome return to the old design, it remains replete with the familiar easy-to-reference statutes, statutory instruments (SIs), guidance, and materials (also on the accompanying CD-ROM) across the whole panoply of licensing regimes, and the eminently readable, informative commentary. It also continues as one volume rather than two, which is more convenient.

What is new in this edition is, unsurprisingly, the inclusion of content pertaining to the Covid-19 pandemic. This has necessitated a first in the 148-year history of the publication – the creation of an entirely new, bespoke section.

This must have been no easy task. One shudders at the memory of the avalanche of legislation and guidance which deluged out of central Government at just the time when the general editors will have been turning their minds to the 2021 updates. The general editors have handled this Sisyphean undertaking very sensibly by including an entirely new Part 1A to the edition. The preface lays bare the scale of the task. By October 2020 there had been 254 Coronavirus-related SIs, some wide-ranging but others extremely narrow in their application (in one case, as the commentary informs, limited to a single premises).

In the face of this weight of material, it would be impossible to have covered each and every development with commentary. The general editors have been pragmatic, and sought to include each and every statute and SI up until Autumn 2020, and then provide a commentary on the main issues arising. Attempting to do otherwise would have been an impossible task foundering on the shifting sands of the response to the pandemic, and readers are reminded that they must have regard to the latest legislation or guidance applicable to the relevant area.

The new section provides a useful context for the legislation which has been enacted, and a chronological outline of developments at the time of writing. However, it is far from being simply a dry list of ever more obtusely-worded and narrowly-focused SIs. A full commentary (with the thoughts of the general editors where relevant) is provided on the implications on alcohol licensing, SEVs, Gambling, and taxis and PHVs. There is also a detailed analysis of the Business and Planning Act 2020, which is perhaps of more day-to-day applicability than many of the more obscure SIs.

Paterson's should remain a staple of the practitioner's resources. You never know when you might need it. But you will. And, when you do, the assistance it provides will be invaluable.

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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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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*.

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

CHARLES HOLLAND

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

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

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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.

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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.

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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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Sam Karim QC is a barrister who specialises in domestic and international commercial arbitration, in which he acts as counsel and sits as panel or sole arbitrator; procurement; Judicial Review and Human Rights / Civil Liberties; and the Court of Protection. He is a member of the Chartered Institute of Arbitrators and is admitted as a practitioner in the Dubai International Finance Centre (DIFC) Court.

SUE NELSON

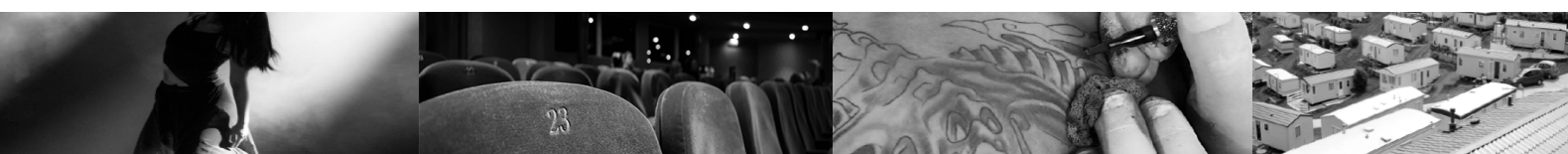
Executive Officer, Institute of Licensing

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

JULIA SAWYER

Director, JS Consultancy

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



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