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Foreword

Daniel Davies, MIoL
Chairman, Institute of Licensing

Welcome to the first edition of the *Journal of Licensing* for 2017.

I'm very much looking forward to what lies ahead this year. But I'm also still reflecting on last year, which marked such a significant milestone for the IoL – our 20th year in operation.

Over the past 20 years, the Institute has worked tirelessly towards a meaningful cause – making a positive difference to the licensed trade, including the millions who are affected by licensing each and every day. Last year, I was proud to have marked our anniversary fittingly by achieving core goals – not forgetting the fantastic events hosted by the IoL.

Despite falling in the same week as the EU Referendum, the first ever National Licensing Week (NLW) was a great success, highlighting the vital role licensing plays in everyday life. I am pleased to announce that the second NLW, which we're currently planning, will take place on 19-23 June.

Having developed close ties north of the border over many years, it was a great pleasure for me to officially announce Scotland as the IoL's 12th region. The progress since October last year has been excellent, and we look forward to working closely with Regional Chair Stephen McGowan in the coming months, and I wish him every success in the new role.

Our flagship event, the three-day National Training Conference, last year again demonstrated our ability to increase understanding and promote discussion of licensing issues, including changes and recent case law. With over 300 people in attendance, the event saw keynote speakers from across the licensing spectrum, including appearances from Sir John Saunders, a High Court Judge of the Queen's Bench Division and co-author of *Paterson's Licensing Acts*, Mirik Milan, Amsterdam Night Mayor, and Alan Miller, Chairman of the Night Time Industries Association.

In September last year, a House of Lords Select Committee held an inquiry into the Licensing Act 2003. I was honoured to represent the IoL by giving evidence to the committee on prospective reforms, in particular, the potential additional licensing objectives, such as health and wellbeing. Regardless of the outcome, the way in which we came together and took advantage of the opportunity to stand up and be heard was one of the major highlights last year.

It's for this reason that I believe we are in a strong position to fight any challenge – be it reforming the Licensing Act or battling the ongoing effects of Brexit. It's this spirit and strong voice that makes me optimistic for the rest of 2017 and beyond.

I'm strengthened in this opinion by the appointments of Philip Kolvin QC as Chair of the Night Time Commission and Sarah Clover as a specialist adviser to the House of Lords Select Committee on the Licensing Act 2003. As you all know, Philip and Sarah are key figures in the IoL, and their appointments are indicative of our reach and influence across the UK's licensing industry.

Starting with the thoughts of editor Leo Charalambides, I hope you enjoy the vast range of articles included in this edition. IoL staff and members dedicate a lot of time and effort to produce the *Journal*, and the high-quality nature of the content is always a testament to their hard work.

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WE NEED YOU

If you would like to submit an article to be considered for inclusion in a future issues of the Journal or you would like to discuss an article you would like to to write please contact us via journal@instituteoflicensing.org

Leo Charalambides, FIoL
Editor, Journal of Licensing

In the present edition our contributors and regular feature writers are already looking forward to the imminent report of the *House of Lords Licensing Act 2003 Select Committee*. The committee was appointed with the broad remit "to investigate the Licensing Act 2003". It is due to report by 31 March, after this edition had gone to press.

In its call for evidence the committee stated:

The Licensing Act 2003 was intended to provide a means of balancing the broad range of interests engaged by the licensing decisions - those of the entertainment and alcohol industries, small and large businesses, local residents and communities, policing, public health, and the protection of children from harm. Decision making under the Act was expected to balance these interests for the public benefit, rather than identifying a 'winning' or 'losing' side.

The Government said: Our approach is to provide greater freedom and flexibility for the hospitality and leisure industry. This will allow it to offer consumers greater freedom of choice. But the broader freedoms are carefully and necessarily balanced by tougher powers for the police, the courts and the licensing authority to deal in an uncompromising way with anyone trying to exploit these freedoms against the interests of the public generally.

The Licensing Act 2003 came fully into force in November 2005. If the frequency of reforms to it is any indicator, finding the "balance" has been an elusive and unrealised expectation. In seeking this balance we have now had the sometimes dubious benefit of the Violent Crime Reduction Act 2006, the great re-balancing that was the Police Reform and Social Responsibility Act 2011 and the Anti-social Behaviour, Crime and Policing Act of 2014. Part 7 of the Policing and Crime Act 2017 will attempt to clarify the issues of summary reviews, interim steps pending review and the review of interim steps.

It seems to me that, on average, every eighteen to twenty-four months some "fix" is attempted to achieve the balance. That we need such frequent fixes is a testament to the difficulties that arise in balancing the equally valid but often conflicting concerns raised in the operation of the licensing regime. As much as we might like to see licensing providing a common goal for all involved, the reality is that licensing is littered with "losers" and very often "sore losers". While the objectives are common and easily stated, the motivations of the parties are often poles apart; it is, for example, very difficult to reconcile the business needs of a premises with the amenity needs of local residents. The frequency of legislative change, reorientation of policy priorities and reviews of the regime's effectiveness (to which I have been a party) can hardly be said to have contributed to a settled climate of operation and practice.

It seems to me that within the pages of the *Journal* and at our regional and national meetings we exhaust ourselves with a consideration of the latest "fix" to the detriment of the sound and basic principles that remain at the core of the act and remain largely unchanged by the regular developments and amendments to the regime. We should concentrate on *how the regime should work*. This is most evident when we consider the role of public health as a responsible authority under the 2003 Act, and compare it unfavourably with the Licensing (Scotland) Act 2005; this does not address the question of how in practice public health ought to engage under the existing provisions, guidance and policy. The focus needs must be on how things are now and not on how they *ought* to be.

I am not suggesting that we should not review the act and its workings. We must, however, be alive to the consequences of a constant focus on how it *could* work after review and reform and not how it *does* work. Already nationally, in the regions and for the next edition of this *Journal* we are preparing to disseminate and discuss the review of the House of Lords Select Committee. In doing so we must ensure that we are not distracted from what matters, namely constant attention to ensuring good training and good practice based on an understanding of the actual regime as it now exists and not some future fantasy.

Where there's a will, there's a way – recovery of licensing costs

Cash-strapped local authorities faced with the otherwise impossible task of recovering costs ordered against insolvent or worthless companies at the conclusion of licensing appeals should consider their options against "non-parties" suggest **David Matthias QC** and **David Graham**

In May 2015, there was an incident of serious violent crime and disorder at a nightclub just off London's Leicester Square, which resulted in several people being seriously assaulted including one man being stabbed in the neck. The police applied for a review under s 53A of the Licensing Act 2003 of the premises licence which was held by a limited company. At a full review hearing before the licensing sub-committee of the licensing authority on 29 June 2015, the premises licence was revoked. On 17 July 2015, solicitors acting for the company lodged a notice of appeal with the court. As the decision-making body in question, the licensing authority was necessarily cast in the role of defendant to the appeal.

On 6 August 2015 at the case management hearing, detailed directions were given and the appeal was fixed to be heard on 12 January 2016 with a time estimate of six days. Evidence was exchanged in October 2015, and evidence in rebuttal in early November. However, on 24 November 2015 solicitors for the appellant company wrote withdrawing the appeal, which brought the appeal proceedings to an end.

By that time the respondent local authority had incurred substantial costs in order to prepare for the hearing of the appeal, and in due course on 9 February 2016 a district judge awarded the authority its costs of and occasioned by the appeal proceedings in the sum of over £39,000. In the meantime, however, a winding-up order had been made against the company in December 2015. It subsequently emerged that the company had in fact been insolvent for the previous three years, and owed creditors a net amount of around £3.7 million. In those circumstances the licensing authority's order for costs against the company in liquidation was to all intents and purposes worthless. How then - if at all - was the licensing authority to recover the sums it had spent in preparing to contest the appeal?

The above example is an illustration of the difficulties often faced by parties, particularly respondent licensing authorities, when licensing decisions are contested before the courts and orders for costs are made against appellant companies which turn out to be either insolvent or on the verge of insolvency and are simply "not good for the money". The directors, shadow directors, shareholders or other interested non-parties who were prepared to fund the appellate procedure on behalf of the company in the hope of the appeal succeeding (or merely to enable the premises to continue operating pending the conclusion of the appeal process) invariably have no appetite for meeting orders for costs made against the company if the appeal fails.

Scheme of the act

This issue arises because of the scheme of the act which intentionally split the licensing regime, so that premises used to sell alcohol had licences authorising their use as such ("premises licences"), and those actually selling alcohol had to have a "personal licence". Section 11 states that "'premises licence' means a licence granted under this part, in respect of any premises, which authorises the premises to be used for one or more licensable activities". Importantly, it is authorising the use of the premises for that purpose, not authorising the holder of the licence or any other named person to sell alcohol there. Section 111(1) provides for the individuals actually carrying on the licensable activities to apply for a "personal licence", which "authorises that individual to supply alcohol, or authorise the supply of alcohol, in accordance with a premises licence". A person can only have one personal licence at a time (by s 118) and they can use it to work behind the bar at, or manage, any number of different licensed premises, regardless of who the holders of the premises licence are. The design of the statutory scheme therefore does not assume that the premises licence holder will be the person carrying on the licensable activities. It enables someone other than the premises licence holder to actually operate the business.

The categories of person who may apply for a premises licence are enumerated at s 16. They include but are not limited to a "person who carries on, or proposes to carry on, a business which involves the use of the premises for the licensable activities to which the application relates". It is implicit in this that someone who is not currently carrying on such a business can apply for a premises licence. Nor do they have to own the premises.

Furthermore, the courts have construed "a business which involves the use of the premises…" very broadly, such that for instance an absentee rentier landlord deriving or intending to derive rents from the building or a franchisor company is eligible to apply.[1] Certain well-known fast-food franchisors centrally apply for the licences for late night refreshments at premises that are operated by franchisees, and breweries may as pub landlords apply for and hold premises licences for pubs run by tenants.

It is not a condition of the continuing validity of a premises licence that the holder must ever be involved in actually operating the business / selling the alcohol, have any proprietary interest in the land, or even, once the licence has been granted, still propose to carry on such business in future. The effect of the act is accordingly that it is possible for a premises licence to be held in the name of an individual or company with few assets of their own. They may not directly control any licensed business that operates at the premises in question or receive any share of its revenues or profits. Premises licence holders can accordingly be limited companies holding no asset of any value save for the premises licence itself. Such corporate licence holders can (and not infrequently do) make applications and file appeals against licensing decisions without having any or sufficient funds to pay the legal costs of opposing parties.

In some cases, appeals against local authority decisions can also be brought by members of the public or third-party businesses. For example, under paragraphs 2 and 4 of Schedule 5 a person who has made relevant representations against the grant or variation of a licence may appeal against a decision to grant or vary it, while under paragraphs 8 and 8A any person who made relevant representations in relation to a review may appeal a decision made on a review. Such appellants need not have any particular financial resources.

It is also, of course, possible for an appellant who does have significant revenues to become insolvent or otherwise become unable to pay legal costs during the course of litigation. This may indeed be a result of litigation, as well as commercial pressures, and may, for example, occur if a licence is suspended pending appeal as an interim step following a review of that licence. In 2015, the Government's impact assessment in connection with the Policing and Crime Bill (which received its royal assent on 31 January 2017 as the Policing and Crime Act 2017) considered 47 instances of summary reviews and found that "in the vast majority of summary review cases (45 out of 47), interim steps were imposed and in 29 out of 45 cases (64%) this involved suspension of the licence. Interim steps remained in place after the review hearing in 31 out of 45 cases".[2]

Strikingly, unlike civil appeals from the County Court of High Court to the Court of Appeal, in the case of licensing appeals to the Magistrates' Court there is no filter mechanism to weed out hopeless cases. There is an absolute right to an appeal hearing before the magistrates regardless of the merits of the appellant's case. This entitlement can potentially put the licensing authority and other interested parties to very significant expense in responding to unmeritorious appeals. Coupled with the fact that appellant premises licence holders need have no particular financial resources, the uncomfortable predicament faced by licensing authorities in particular is all too clear.

Provision for costs and how it is interpreted

It is now well-established that on an appeal to the Magistrates' Court against a licensing authority's decision, the court has full discretion under s 181(2) of the act, which provides that "a Magistrates' Court…may make such order as to costs as it thinks fit". In *Prasannan v Royal Borough of Kensington and Chelsea* [2010] EWHAC 319 (Admin) [2011] 1 Costs Lr 14 at [19] Belinda Bucknall QC commented: "Parliament doubtless had good reason for making it clear that in licensing cases where the permutations of result may frequently be very much more complex than a simple success or failure, the court has an unfettered power in relation to the costs. That being so, the court's discretion is subject only to the usual requirement that in deciding what order is just, it must take into account all relevant matters and must not take into account irrelevant matters." [3]

This position is caveated by case law in relation to public authority respondents. "Although as a matter of strict law the power of the court in such circumstances to award costs is not confined to cases where the Local Authority acted unreasonably and in bad faith", it is said "the fact that the Local Authority has acted reasonably and in good faith in the discharge of its public function is plainly a most important factor."[4] The High Court has furthermore consistently[5]

1 *Extreme Oyster v Guildford BC* [2013] EWHC 2174 (Admin) at [54]; *Hall and Woodhouse Ltd v Poole BC* [2009] EWHC 1587 (Admin) at [24].

2 Home Office, *Summary Reviews and arrangements for interim steps*, Impact Assessment number HO 0222 (22 December 2015), p.8, paragraph 25. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/499372/Impact_Assessment_-_Alcohol_Licensing_Summary_Reviews_and_Interim_Steps.pdf

3 See also, *Crawley Borough Council v Attenborough* [2006] EWHC 1278 (Admin).

4 *R(Cambridge City Council) v Alex Nestling Limited* [2006] EWHC 1374 at [11] per Toulson J (as he then was).

5 For instance, in *R(Newham LBC) v Stratford Magistrates' Court* [2012] EWHC 325 (Admin).

applied the principles set out in *City of Bradford Metropolitan District Council v Booth* [2001] LLR 151 to structure the exercise of discretion under s 64 of the Magistrates' Courts Act 1980, and this decision is applied by way of analogy when courts are exercising their discretion under s 181(2) of the Act. In the Bradford case, it was held[6] that costs need not follow the event, and:

> *Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both*
> *(i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and*
> *(ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.*

Conversely, there is no appellate guidance as to any default position for or against awards of costs in favour of successful respondents, but the general practice is to award such parties their costs.

As inferior courts created by statute, the Magistrates' Courts have no inherent powers and are creatures of the statutes that create them. This means that they only have such powers as are expressly granted to them by statute, or where the statute is silent, must by necessary implication have been intended to have been conferred in order for them to carry out their statutory functions fairly and justly.[7] Ordinarily, in civil proceedings in the Magistrates' Courts, the power to award costs is conferred by s 64(1) of the Magistrates' Courts Act 1980, which provides as follows:

> *(1) On the hearing of a complaint, a magistrates' court shall have power in its discretion to make such order as to costs—*
> *(a) on making the order for which the complaint is made, to be paid by the defendant to the complainant;*
> *(b) on dismissing the complaint, to be paid by the complainant to the defendant,*
> *as it thinks just and reasonable; but if the complaint is for an order for the variation of an order for the periodic payment of money , or for the enforcement of such an order, the court may, whatever adjudication it makes, order either party to pay the whole or any part of the other's costs.*

The effect of s 64 is firstly to prevent the magistrates from making any order relating to costs until it has adjudicated a complaint; secondly, to have no discretion to award costs against the successful party; and thirdly, to confer no power to award costs against any person other than the complainant and defendant.[8] However, subsection 64(5) states that the section is without prejudice to any other act entitling a Magistrates' Court to order a successful party to pay the other party's costs and, as we have already seen, s 181 of the act is in very much broader terms.

Orders for costs against non-parties

In our view, the power under s 181 is as broad as that conferred by s 51 of the Senior Courts Act 1981, which states:

> *(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—*
> *(a) the civil division of the Court of Appeal;*
> *(b) the High Court; and*
> *(c) any county court,*
> *shall be in the discretion of the court.*
> *[…]*
> *(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.*

Although the phraseology "such order as to costs as it thinks fit" is much more laconic than the language used in s 51 of the Senior Courts Act, in that it does not refer to incidental costs, nor to any power to determine "by whom and to what extent" costs are payable, those powers are necessarily implicit in a general power conferred on the court to make an order "as to" costs. In the same way, neither provision confers an express power to determine when any awarded sums in respect of costs are to be paid, but such power is necessary to aid the enforcement of any costs orders and so is to be implied.

Accordingly, in our view, it plainly follows from this broad discretion that, just like the High Court, the magistrates have power to order a non-party to pay the costs incurred by and awarded to a party to an appeal. The nature and scope of that power has been thoroughly scrutinised and defined in a series of cases in the upper courts with regard to the High Court making non-party costs orders under s 51 of the Senior Courts Act. As yet, however, the Magistrates' Courts have rarely been called upon to make non-party costs orders under s 181 of the Act, and no case in which they have been asked to do so has gone to the High Court by way of case stated or judicial review. Accordingly, there is, as yet, no

6 At paragraphs [23]-[26] by Lord Bingham.

7 *R(V) v Asylum and Immigration Tribunal* [2009] EWHC 1902 (Admin) at [24]-[30] *per* Hickinbottom J; *R(Chief Constable of Nottinghamshire) v Nottingham Magistrates' Court* [2009] EWHC 3182 (Admin) at [32]-[35] *per* Moses LJ.

8 On the basis that had a broader power been intended, the wording would not have been so limited.

reported decision of the High Court to confirm our view as expressed above.

In *Aiden Shipping Ltd v Interbulk Ltd*[9] the House of Lords held that s 51(1) of the Senior Courts Act 1981 was not to be read as subject to any implied limitation to the effect that costs could only be ordered to be paid by parties to the proceedings. In an appropriate case, costs can be ordered against a non-party. Delivering a speech with which all other members of the House agreed, Lord Goff said that "[c]ourts of first instance are … well capable of exercising their discretion under the statute in accordance with reason and justice".

The question then arises as to what circumstances justify the making of an award of costs against a non-party. There is a considerable body of authority from the superior courts on the question of when it is appropriate for a court to consider making a costs order against a non-party in the exercise of its power to do so under s 51(1) of the Senior Courts Act 1981. However, the more recent decisions from the Court of Appeal have emphasised that the exercise of the discretionary power in question is a task for the judge at first instance, to be undertaken in the light of the particular facts and circumstances of the case before him, and that it must not be made over-complicated by reference to authority.

In the New Zealand case of *Dymocks Franchise Systems* [2004] UKPC 39, the Privy Council set out the following general principles for the exercise of the discretion to make non-party costs orders:

> *(1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.*
> *(2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of Hamilton v Al Fayed (No 2) [2003] QB 1175 , 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.*
> *(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence… Consistently with this approach, Phillips LJ described the non-party underwriters in T G A Chapman Ltd v Christopher [1998] 1 WLR 12, 22 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation… provided that he is "a real party in … very important and critical respects": see Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation (2001) 179 ALR 406 , 414…. Some reflection of this concept of "the real party" is to be found in CPR r 25.13(2)(f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant.*

In *Goodwood Recoveries Limited v Breen* [2005] EWCA Civ 414, the Court of Appeal stated that "[w]here a non-party director can be described as the 'real party' seeking his own benefit, controlling and / or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances." In effect, this enables the corporate veil to be pierced and the limited liability of the appellate company to be circumvented.

In *Alan Phillips Associates Ltd v Terence Edward Dowling* [2007] EWCA Civ 64, Chadwick LJ approved the following statement:

> *The exercise of this jurisdiction becomes overcomplicated by reference to authority. Indeed I think it has become overburdened. Section 51 confers a discretion not confined by specific limitations. While the learning is with respect important in indicating the kind of considerations upon which the court will focus it must not be treated as a rule book.*[10]

Most recently, in *Deutsche Bank v Sebastian Holdings and Alexander Vik* [2016] EWCA Civ 23, another case in which a costs order against a non-party company director was sought, the Court of Appeal approved and adopted the Privy Council's principles in Dymocks and confirmed that in the same way that the merits of a licensing appeal are administrative rather than judicial and not subject to strict rules of evidence, so too the decision on an application for a non-party to pay costs is a summary procedure not subject to

9 [1986] A.C. 965 at 981.

10 The quotation is from *Petromec Inc v Petrolio Brasileiro SA Petrobras* [2006] EWCA Civ 1038 *per* Longmore LJ at [19].

strict rules of evidence.[11] Moore-Bick LJ, giving the judgment of the court, ruled as follows:

> *…it is necessary to bear in mind that on an application of this kind the court is not concerned with legal rights and obligations but with a broad discretion which it will seek to exercise in a manner that will do justice.*
>
> *...*
>
> *... there have been many…applications for orders for costs against third parties under a wide variety of circumstances, as a result of which it has come to be recognised… that each case turns on its own facts.*
>
> *As all three members of the court observed in Petromec v Petrobras [2006] EWCA Civ 1038) the exercise of the discretion is in danger of becoming over-complicated by authority. The decision of the Privy Council in Dymocks [2004] UKPC 39, which contains an authoritative statement of the modern law… reflects the variety of circumstances in which the court is likely to be called upon to exercise the discretion. Thus, the Privy Council has explained that an order of this kind is "exceptional" only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. Similarly, it has made it clear that the absence of a warning is simply one factor which the court will take into account in an appropriate case when deciding whether, viewed overall, it would be unjust to exercise the discretion in favour of making an order for costs against the third party. We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind.*

Conclusion

In the view of appellant companies the breadth of the power afforded by s 181 of the act as described above; and the abundance of authority from the upper courts regarding the availability of orders against non-parties under s 51(1) of the Senior Courts Act (for which in our view must be equally applicable when such orders are sought under s 181 of the Act) there is a surprising dearth of licensing cases in which costs orders against non-parties have been sought at the conclusion of appeal proceedings in Magistrates' Courts.

Indeed, we are only aware of two occasions when such applications have been made. In both cases the applications met with success. In C*ombine Leisure Limited v Bristol City Council* (3 October 2011), exercising their power under section 181(2) of the act, Bristol City Magistrates accepted the argument that the latter provision was to be read as conferring the same power as s 51 of the 1981 Act to make orders against non-parties, and ordered the sole director of the appellate company to pay a total of £73,000 in costs following the dismissal of the insolvent appellate company's appeal against an order for the revocation of its premises licence.

In the case with which we started this article (*Paper Club London Ltd v Westminster City Council*) on 13 October 2016 the City of London Magistrates' Court accepted the submissions of David Matthias QC appearing for Westminster that costs should be ordered against the former directors of the insolvent company, in order that the respondent local authority might effectively recover the costs that had been awarded against the insolvent appellant company back in February 2016. On the facts, the current liabilities of the appellant company had exceeded the assets of the company for the past four years, and the position had worsened over time. At the end of October 2012, there had been a deficit of £1,506,094, widening to £3,742,119 three years later. Although the appellant company had not been solvent, it had continued to operate without being wound up and had continued holding the premises licence for the nightclub Press. Those controlling the company would benefit from the licence if it was reinstated on appeal, but if the company lost its licence, they could wind up the company and leave its creditors high and dry. District Judge Goldspring considered the facts and the degree of culpability of each of the directors, and ordered one of the directors to pay all of Westminster's costs in the appeal, one to pay £10,000 towards Westminster's costs (on a joint and several liability basis), and relieved one of any liability.

Of course, Magistrates' Courts are not courts of record, and so there may be more instances of costs orders having been made against non-parties in licensing cases of which we are unaware, but there have certainly not been many. This is undoubtedly a jurisdiction deserving of more attention by cash-strapped local authorities, offering a possible solution when such authorities are faced with the otherwise impossible task of recovering costs ordered against insolvent or worthless companies at the conclusion of licensing appeals.

David Matthias QC and **David Graham**
Barristers, Francis Taylor Building

11 See *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624 and Philip Kolvin, Evidence and Inference, Local Government Lawyer (15 December 2010). http://localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=5408:evide

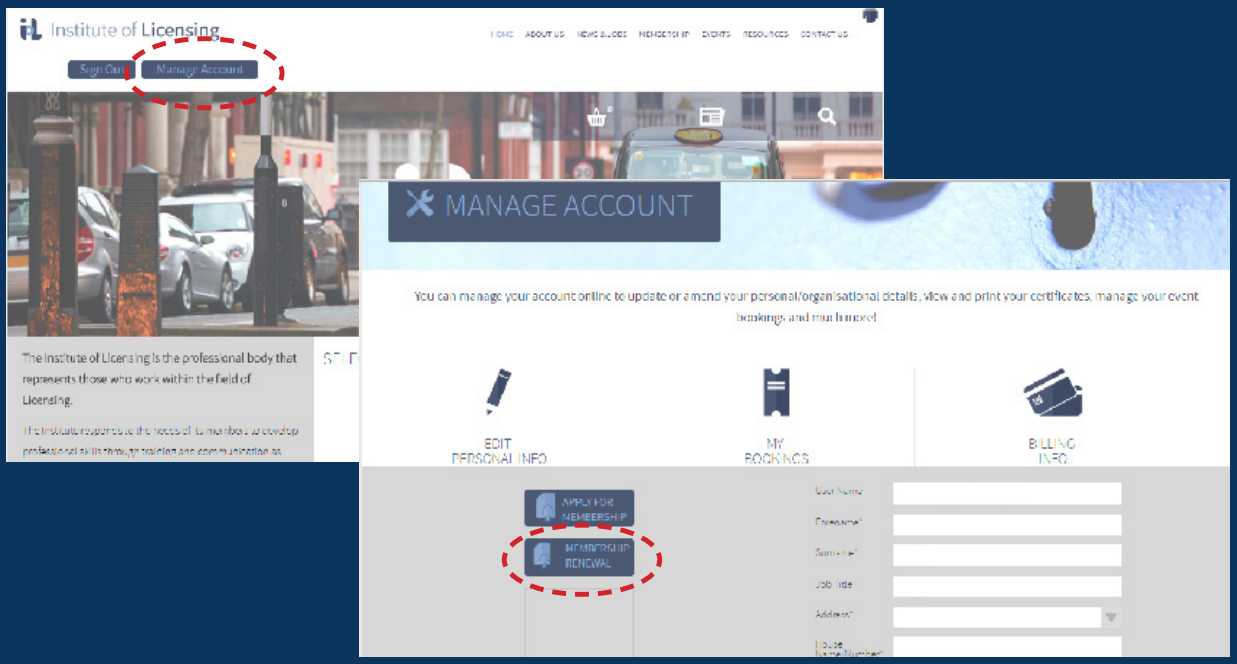
Membership Renewals

The 2017/18 membership renewal date is 1st April 2017. All Associate/Individual members and Main Contacts for organisation membership will be be sent a membership renewal email explaining how to download the invoices from the website.

If you have not yet renewed your membership you can log onto the website and go to ***Manage Account***, click on the ***Edit Personal Info*** tab and you should see a ***Memberhsip Renewal*** button as shown below.

By clicking on the ***Memberhsip Renewal*** button you will be able to renew your membership, download your invoice and pay in the usual ways.

If you do not have your website login details or you cannot access the invoice email membership@instituteoflicensing.org and one of the team will be able to assist.



Increase to Organisational membership fees

It has been agreed by the Board that the organisation membership fees will increase from 1st April 2017. The new fees are below:

	2017/18
Small (formerly Standard)	£300.00
Medium	£450.00
Large	£600.00

Paterson's Licensing Acts: a history

Jeremy Phillips, Editor in Chief of *Paterson's Licensing Acts*, explains the changes in the august publication's 125th edition, once more a single volume

Although only blessed with an institute for the past 20 years, the practice in these islands of licensing the trade in alcohol and other products has a long (if not always illustrious) history. In this brief article I attempt to explain how, over the past 145 years, the form and structure of *Paterson's Licensing Acts* has continually changed in its endeavour to serve best those who find their occupation in this lively trade.

History shows that the earliest legislation regarding the sale of alcohol was far more concerned with price, rather than the circumstances under which alcohol was sold. For example, the Assize of Bread and Ale, enacted in 1226, pegged the price of ale to the price of bread, while a national law from 1330 demanded that "none be so hardy but to sell wines at a reasonable price".[1] Accordingly, it was not until 1495 that the first statute[2] governing the conduct of ale houses was enacted, followed in 1552 by "An Act for Keepers of Ale-houses to be Bound by Recognisances".[3] The latter, it has been said, was signed by the monarch following a period of significant social unrest and at a time when it was said that "… the Government was corrupt, the Courts of Law were venal. The trading classes cared only to grow rich. The multitude were mutinous from oppression".[4] Nothing different there then.

Notable milestones in the succeeding centuries were acts of 1604 (restricting the times individuals could spend drinking in alehouses), 1606 and 1623 (imposing penalties for permitting drunkenness), the 1736 Gin Act (which aimed, with disastrous results, to achieve virtual prohibition by the imposition of penal licence fees), the 1823 Intermediate Beer Act (an attempt to encourage through tax the consumption of weaker beer),[5] the Alehouse Act 1828 (conferring on justices a discretion to grant licences to fit and proper persons and the power to close in the event of riot) and the 1830 Beerhouse Act (enabling most householders assessed to the poor rate to obtain from the Excise a licence authorising the sale of beer).

The eponymous licensing bible, which has ensured the survival of his reputation, was by no means the first publication for which James Paterson was responsible. In its review of the 7th edition of *Archbold* (for very many years itself the bible of Crown Court practitioners - and which similarly survives to the present day), the *Justice of the Peace*[6] recorded: "The editor of the present edition, *Mr Paterson*, has long been conversant with this branch of the law, and is very favourably known to the profession by several treatises previously published by him on the Fishery and Game Laws, on the Licensing and Bastardy Acts, besides being one of the editors of the *Justice of the Peace,* and a reporter of Queen's Bench. We need scarcely say, therefore, that the editorial work has fallen in good hands." [7]

While the Wine and Beerhouse Act 1869 provided that no wine or beer licences (except the innkeepers' licence) should be granted or renewed by the Excise except upon production of a justices' "certificate", it was the Licensing Act 1872 which introduced broad uniformity by requiring a justices' licence or certificate to be held in all cases where alcohol was sold by retail. It was at this point that the enterprising James Paterson of the Inner Temple[8] first settled upon the idea of publishing a personal guide to the 1872 Act to provide "his views of the leading difficulties that will arise under the new Act" and to suggest "some solution of most of them".[9]

The earliest edition of the 110 or so *Paterson's Licensing Acts* that I own (the 8th) is less than 3cm thick and sits comfortably on the palm of one's hand. It contains around 90 pages of indexes, tables and forms and a further 300 pages of statutes, liberally supplemented with nearly 500 case references and the opinions of its author. Even from the earliest editions it is readily apparent, therefore, that the principal value of the work lay in the way it assisted the reader's understanding of "domestic policy" ("extremely difficult of treatment") and

1 James Nicholls, *The Politics of Alcohol: A History of the Drink Question in England*. Manchester University Press 2009

2 *Report of the Departmental Committee on Liquor Licensing – Right Hon Lord Erroll of Hale. Cmnd 5154.*

3 Nicholls, *ibid.*

4 Froude.

5 'Order Order', Druglink Jan/Feb 2011 (Andrea Wren).

6 31 July 1875 at 491.

7 The same journal also carries an advertisement for Paterson's for sale for the very reasonable price of 6s 6d !

8 Then practising in Goldsmith's Building, very proximate to my own chambers and the location for much of the shooting of the BBC's acclaimed representation of a barrister's life in chambers: Silk, starring Maxine Peake.

9 Preface to the First edition of *Paterson's Licensing Acts* (1872). James Paterson, Esq., M.A., Barrister-at-law.

current licensing legislation (neatly described as "a group of somewhat incongruous Statutes").

The work was published biennially until 1906 by which time it had evidently established a sufficient market to justify its then publishers, Shaw & Sons, producing it as an annual publication. In my own collection the 24th edition, published in 1914, superficially appears to be of a similar size to the original work. However, closer inspection reveals that it had, in fact, more than tripled in size! The trick lay in the use of three grades of paper: ordinary, medium or thin (the latter requiring a premium of 3s 6d - or 17½p in today's money). The following year, the 1915 edition, printed on ordinary paper still measured 14 by 20cm, but was now nearly 7cm thick. This, then, was the format of the work with which I became very familiar when joining what was in those days the pre-eminent licensing firm, Cartwrights, based in Bristol, in 1980.

Until the current legislation came into force in February 2005 virtually all licences were, of course, granted and withdrawn at the sole and unfettered discretion of the local licensing justices (who had exercised that jurisdiction for nearly 500 years). The law required them to sit at least 12 times every year and to renew every justices' licence at what was known as the Brewster Sessions, which had to take place in the first fortnight of February every year. As might be imagined, this amounted in effect to a massive annual stocktake, with each petty sessional division often seeing many hundreds of licensees passing before them on each occasion. When the law changed in 1989 so as to require licences only to be renewed every three years, my own firm was regularly required to process in excess of 10,000 applications across more than 300 petty sessional divisions in just 10 working days. Good preparation for the madness that was the transitional period for the new Act!

Practice around the country was extremely varied. A lawyer representing licensees could on one day visit an obscure tiny courthouse such as that in Chipping Sodbury, where the advocates and magistrates sat around a vast stove occupying the centre of the room, while on the next day visit the grand and forbidding Victoria Law Courts in Birmingham. Here for many years the equally forbidding Bob Price held sway as the Chairman of the Bench, often seeming to delight in insisting upon the appearance before him of some director (the more senior, the better) of some national chain – or else! Common to both, however, was the ubiquitous presence of *Paterson*'s, which served as the common and shared text for solicitors, barristers, police, the clerk to the justices and sometimes even the magistrates themselves (particularly Mr Price) in advancing their respective positions.

That is not to say that *Paterson's* was not without its faults. When I was appointed as a fourth general editor in 1997 it did seem to me that the work would benefit from a thorough revision. In particular, there had been no change since its original inception as a fundamentally unstructured chronological compendium of miscellaneous statutes embracing vagrancy, seditious meetings, theatres, gaming and alcohol etc. Far better, therefore, to divide the work, which by then ran to some 3,000 pages, into appropriate sub-divisions so that anyone researching, say, the law of betting and gaming, could readily locate all of the material in one place, rather than have to trawl through the entire work. A further important change, I felt, was to reintroduce the history of licensing, which had somehow been excised in recent years on the ostensible basis that practitioners had no time for such matters, but simply needed to know the law as it stood upon publication.

Now, it will be seen, that I with Lexis Nexis (most particularly our Commissioning Editor, Jamina Ward), decided upon another significant change to reflect the changing times in which we operate. Accordingly, the 125th edition now appears once more as a single volume. As aficionados of *Paterson's* will know, this was in fact the format for the work for the first 111 editions. It was only in 1999, with the publication of increasing amounts of so-called guidance and ancillary material that an editorial decision was taken to put the alcohol, entertainment and taxi content into one volume and the betting and gaming content in another. For many years this did prove a happy development as the book continued to serve existing licensing specialities in, for example, street trading, while adding new ones such as sex entertainment and the security industry. Gambling justified a volume of its own. In recent years, however, we have noted with regret the tendency of Parliament to put ever greater reliance on secondary legislation and ministerial and similar guidance. This had led to increasing pressure on confining ourselves even to the two volume format as we have endeavoured to keep pace with the publication of additional material.

In juxtaposition with this growth in material we have naturally been aware of the increasing tendency of practitioners from all quarters to make use of the internet in ensuring that they are referring to the most up-to-date supporting materials. That generally free and up-to- date resource has, therefore, enabled us to consolidate and focus upon those elements of *Paterson's* which have traditionally been most highly valued by practitioners and the courts, namely its general commentary and authoritative footnotes, which once more can be found in a single unique volume. This makes *Paterson's* both a more portable and at the same time affordable proposition. Further changes that we hope will find favour with readers include a table of all the forms

and the majority of the additional materials previously appearing in the work, which have been moved to the usual easily searchable *Paterson's* CD. The table has then been hyperlinked on the CD to LexisLibrary, taking users directly to our online version.

To conclude, I am happy to note that *Paterson's* continues to be the principal work to which solicitors and barristers regularly refer in the senior courts as an expression of the law in this field. Increasingly it is being accessed by local authority lawyers and highly trained licensing officers. However, that does not mean that we can be complacent. We will continue to strive to ensure that the work is both relevant and accessible to all whom it might assist. On that note, one of the changes which I felt was probably most apt was the introduction on the inside cover of those sixty or so decisions of the High Court, Court of Appeal and House of Lords where *Paterson's* itself was cited as the authority for some particular proposition of law. Nothing, it seems to me, can provide a greater testimonial to the brave decision of James Paterson, MA, barrister-at-law some 145 years ago to apply his name to such a worthy and lasting enterprise.

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House of Lords Select Committee LA03 review workshops

We are running a number of workshops over the coming months that focus on the outcome of the House of Lords Select Committee's findings with regards to the review of the Licensing Act 2003. The workshops will form part of the regional training days and there will also be stand alone workshops. All the workshops will be free to members and non-members.

The workshops will be delivered by Sarah Clover who was Special Advisor to the Select Committe during the review and will be able to offer a unique perspective on the review and findings.

Workshop Dates and Venues
24 April 2017 - Bristol (South West)
12 May 2017 - Reading (Home Counties)
16 May 2017 - Cambridge (Eastern)
5 June 2017- Rushcliffe (East Midlands) (TBC)
13 June 2017- Staffordshire (West Midlands) (TBC)
14 June 2017 - Manchester (North West)
15 June 2017 - Brighton (South East) (TBC)
26 June 2017 - Port Talbot (South Wales)
3 July 2017 - York (North East) (TBC)
10 July 2017- Camden (London)

Licensing Hearings

The training day is aimed at all parties involved in licensing hearings, looking at the hearings process, the role of the parties to the hearing and of course the safeguarding issues as well.

The role of councillors and other parties at licensing hearings is pivotal to the success of licensing legislation and to licensed businesses, management of the night time economy and so much more. The core purpose of licensing is protection of the public including children and vulnerable adults.

It is important that councillors are given the tools and knowledge they require to enable them to make reasoned decisions, having regard to evidenced or reasoned representations made by parties to a hearing, and in doing so conduct the role of the licensing authority with professionalism.

The training will take place in the following two weeks
12-16 June and 11-15 September 2017

Confirmed Dates and Venues
13 June - Lancaster
14 June - Sidmouth
15 June - Doncaster

Once more locations are confirmed the courses will be on the Events page of the website, so keep checking.

Banning third party sales of dogs – is the Government barking?

The Government's proposal to extend licensing of dog sales to third parties as well as pet shops is illogical, fails to address animal welfare problems and will create complexity and confusion, argue **Sarah Clover** with **Paula Sparks** and **Sally Shera-Jones**

In February 2016, the House of Commons Environment, Food and Rural Affairs (EFRA) sub-committee launched an inquiry into the welfare of domestic pets in England.[1] This inquiry examined the effectiveness of legislation relating to dogs, cats and horses in the light of modern practices. In a report published on 16 November 2016, the sub-committee made a number of recommendations, including a total ban on all third party sales of puppies, which has not been accepted by the Government. Powerful representations have been made to the sub-committee that there was no way to permit sales of puppies through agents and pet shops, and ensure animal welfare. The Government believes the licensing regime can achieve just that. This article examines the issues.

Currently, dog breeders may sell puppies directly to the public, or pass them to third parties to do so. While it is not suggested that a chain of supply is an automatic problem, a key concern is the traffic from puppy farms which fail to meet minimum standards and seriously compromise the welfare of animals. The resulting problems are obvious, to the dogs and the people they encounter once sold. The issues and costs affect society as a whole.

The Animal Welfare Act 2006 is the primary legislation concerning animal welfare in England and Wales. Its key provisions set out principles to prevent unnecessary suffering and to ensure that the needs of an animal are met. There is no statutory duty upon local authorities to enforce the provisions of the act. This is a particular problem with the licensing of animal establishments. Dog breeding and sales in England and Scotland are further regulated by the Breeding of Dogs Act 1973 (as amended by the Breeding of Dogs Act 1991 and the Breeding and Sale of Dogs (Welfare) Act 1999). Wales has recently introduced new regulations for dog breeders,[2] which impose a tougher licensing framework than in other areas of the UK. Separate regimes exist for Scotland and Northern Ireland.

The legislation sets out a regime for local authorities to licence and inspect dog breeding and pet shop establishments, the specifics of which are locally determined. The animal licensing regime is particularly complex, and one issue identified by the committee was lack of consistency among the regulating authorities.

The intentions behind the sales provisions of the legislation were to ensure the transfer of puppies between regulated persons or to a pet owner. The Pet Animals Act 1951 requires pet shops to be licensed, and the Breeding and Sale of Dogs (Welfare) Act 1999 (s 8) requires breeders to sell puppies only from their own breeding premises or from a licensed pet shop. The sale to the public may only be made of a puppy over eight weeks but the transfer to a pet shop may be made at a younger age.

The definition of terms in these rather elderly statutes poses risks to animal welfare. Pet shops can be private dwellings, which may qualify for a licence but this presents obstacles to effective enforcement, including curtailed powers of entry. The complications are exacerbated by exemptions from authorisations in the legislation in favour of those selling pedigrees, the offspring of pet animals and animals unsuitable for showing or breeding, with the net result that the commercial sale of animals from private dwellings is largely unregulated.

The sub-committee recognised that the current legislation and licensing conditions are outdated and do not align with the overarching standards and principles established by the Animal Welfare Act, or more modern and advanced understanding of dogs' behavioural needs. The sub-committee devoted a considerable amount of time to the problem of irresponsible breeding and sales practices, which have been matters of great concern to animal welfare groups and the public in recent times. It is a lucrative market, readily exploited, and it is estimated that puppy sales could range in number from 700,000 to 1.9 million, and in worth between £100 million and £300 million per annum. This market has grown exponentially through the use of the internet, which

1 House of Commons Environment, Food and Rural Affairs Committee *Animal welfare in England: domestic pets* Third Report of Session 2016–17 Report, [2 November 2016].

2 Animal Welfare (Breeding of Dogs) (Wales) Regulations 2014.

presents yet more issues for enforcement.

In relation to problems associated with the sale of puppies, the sub-committee acknowledged that: "Witnesses had differing opinions on how to deal with current problems around the sale of animals - some called for increased regulation while others called for a ban on third party sales."

Having heard all the evidence, the sub-committee recommended a total ban on third party sales, so that "dogs should only be available from licensed, regulated breeders or approved re-homing organisations", stating in explanation that:

> *Responsible breeders would never sell through a pet shop licence holder. The process of selling through a third party seller has an unavoidable negative impact upon the welfare of puppies. It also distances the purchaser from the environment in which their puppy was bred. Banning third party sales so that the public bought directly from breeders would bring public scrutiny to bear on breeders, thereby improving the welfare conditions of puppies. It would also bring a positive financial impact to breeders, allowing them to retain money that is currently lost in the supply chain. We acknowledge that difficulties of public access, due to a rural location, security issues and diseases, may be challenging for some breeders. On balance, however, we consider it is more important that animal welfare standards are ensured across all breeders.*

Government response

The Government introduced its formal response to the EFRA report[3] with the proud boast that: "We have the best animal welfare in the world and we are a nation of animal lovers".

Concerning the specific recommendation to ban third party sales, the response stated as follows:

> *We have considered the matter very carefully including in light of the views of many welfare charities. The Government agrees that it is sound advice for prospective buyers to try to see the puppy interact with its mother. A ban on third party sales would in effect be a statutory requirement for puppies to be sold only by breeders.*
>
> *It is unclear how well such a ban would be enforced and local authorities are already under pressure to regulate the existing regime as effectively as possible.*
>
> *Given the demand for dogs there is a risk that a ban on third party sales would drive some sales underground, and welfare charities are already concerned about the number of good breeders.*
>
> *We note that a number of established welfare charities with experience and knowledge of the sector have advised against a ban on third party sales.*
>
> *We consider that such a ban has the potential to increase unlicensed breeding in addition to a rise in the sale and irresponsible distribution of puppies, and may be detrimental to our welfare objectives.*
>
> *The Government still wishes to address issues relating to the sale of dogs other than by the breeder, and we have considered other approaches. We support the robust licensing of all pet sellers including third party sellers.*
>
> *Through the Government's revision to the licensing regime anyone in the business of selling pet animals will require a licence. Local authorities will be able to ensure that animal welfare requirements are met through the regime, including the application of many of the requirements from the Model 6 Animal welfare in England: domestic pets: Government Response Conditions for Pet Vending Licensing 2013 published by the Chartered Institute of Environmental Management which will be incorporated into the regulations.*
>
> *In addition we are encouraging consumers to source dogs from reputable breeders and to see puppies interact with their mothers.*

This is, with respect, an extraordinary response, which fails to address logically the problem in issue, and betrays a fundamental lack of understanding about the operation of a licensing system.

The Government acknowledges the importance to a purchaser of seeing a puppy interact with its mother before purchase. Third party sales entirely preclude this opportunity, which might have been thought to have been definitive in the debate.

Having identified correctly that a ban on third party sales would amount to a statutory requirement for puppies to be sold only by breeders, the Government response demurs that: "It is unclear how well such a ban would be enforced and local authorities are already under pressure to regulate the existing regime as effectively as possible".

This is followed, within a few lines, with the suggestion that:

> *We support the robust licensing of all pet sellers including third party sellers. Through the Government's revision to the licensing regime, anyone in the business of selling pet animals will require a licence. Local authorities will be able to ensure that animal welfare requirements are met through the regime….*

3 House of Commons Environment, Food and Rural Affairs Committee *Animal welfare in England: domestic pets: Government Response to the Committee's Third Report* Fourth Special Report of Session 2016–17 Ordered by the House of Commons to be printed 1 February 2017: Appendix: Government Response.

A suggestion that a licensing system of pet sellers, of any shape or description, would be easier and less burdensome to a local authority to enforce than an outright ban could only have been made by those who have no hands-on experience of either. Licensing regimes work by identifying licensable activities, and categories of persons entitled to undertake them. The fewer the categories, and the fewer the exemptions and exceptions to those categories, the easier the system is to enforce. An outright ban results in a single remaining category of person, a breeder, being entitled to an authorisation to sell. Breeders are relatively easy to identify, given their relationship with the breeding dogs and puppies, and the establishments and infrastructure likely to attend that activity. Sellers, by contrast, can be anyone, in any location, with few clues to identify their legitimacy. Layers of interpretation of law necessarily involve investigation by officers and exercises of judgement, to check whether criteria have been met, which are costly to undertake, and even more costly if they transpire to be wrong, and result in appeals. It is far simpler to identify an entire class of person that is not entitled to undertake the licensable activity at all, which requires no investigation and no interpretation.

Licensing regimes are typically very dependent upon individuals from outside the regulatory authority "whistle blowing", to alert officers to transgressions. No licensing authority has the resources to conduct regular proactive investigations into potential breaches of their licensing regimes, and the majority will work on the basis that the most serious examples of breaches of the system will cause unacceptable impacts to one party or another, who might be expected to report it to the authorities for investigation and action. The more complicated the system is for the lay party to understand, therefore, the less likely it is that the desirable whistle blowing will occur, and that the licensing authority will be given maximum opportunities to act. The result is that offences go undetected, and, in the case of puppies, welfare continues to be compromised.

The notion of a licensing system for pet sellers, even on a cursory consideration, groans under the weight of expectation. Most types of licensing in other regimes concern activities which take place in public, in plain sight: for example, sales of alcohol, public entertainment, late night refreshment, gambling premises and machines, scrap metal collection and so forth. Persons likely to complain about unauthorised activity in these licensed regimes are likely to be those who have been directly impacted by it, by seeing something untoward, or experiencing the negative after-effects, of noise, disorder, smells and the like. The selling of pets, by its very nature, tends to be conducted privately, usually between small numbers of people, all concerned directly with the activity. There is little opportunity for impartial observation or extended effects on others.

An outright ban on third party sellers opens up ample opportunity for one potential party to the sale to become a whistle blower, if they are so inclined. An offer to sell a puppy made by anyone who did not appear to be, or could not demonstrate that they were a breeder, could result in a fairly uncontroversial report to the authorities. No further detail is required. If that same third party is capable of being authorised, then the issue becomes clouded. A potential purchaser, even if they wanted to conduct checks on the authority of their third party to sell, has to undertake a judgement call about the validity of the authorisation, which they will be ill-equipped to exercise. Their seller is very likely to tell them that they are authorised, whether it is true or not. It cannot be difficult to produce something that looks like a licence to the untrained eye. The further checks that would be required to verify the legitimacy of the deal are far too complicated and onerous to expect the average member of the public to undertake - whether that be attempting to check the licence against a public database (which would require the establishment of a public database, which the Government also declined to support in its response), or by making personal enquiries with the licensing authority.

The arguments made by the Government in favour of such a licensing system and against an outright ban simply do not make sense. The Government states "a ban has the potential to increase unlicensed breeding in addition to a rise in the sale and irresponsible distribution of puppies."

There is no logic in this. The lack of opportunity to pass puppies to a third party seller does not by any means make it more or less likely that a breeder would obtain their own requisite licence. A responsible breeder will do so: a responsible breeder almost certainly would not be interested in passing puppies to a third party in the first place. It might be argued that a ban on third party sales would not be effective in reducing illegitimate sales, which seems pessimistic and counter-intuitive, but quite why a ban on third parties would result in an increase in irresponsible sales and distribution is unexplained. There has been a suggestion that the nature of the concern is that if fewer puppies are available, on the basis that a ban is effective at eliminating third party sales, and supply is thereby restricted, there will be more incentive for unscrupulous and unlicensed breeders to meet the demand. This is unconvincing, and also reflects little faith in the Government's proposals to enhance the licence requirements for breeders, and bring more into the fold.

The further Government statement that "given the demand for dogs there is a risk that a ban on third party sales would drive some sales underground, and welfare charities are

already concerned about the number of good breeders" also comprises an epic failure of logic.

If "underground" means sales that are virtually undetectable, then that is effectively the status quo. Introducing a licensing system does not make the sales themselves more easily detectable, but only increases the expectation and burden upon the licensing authority. Irresponsible sellers will not bother to get licences, because the only real incentives to do so are moral compunction, and those who sell puppies in this way at the expense of the animals' welfare are likely inherently to lack it, or fear of detection, which, as established, is low. This leaves a situation whereby a minority of so-called responsible sellers obtain licences to sell puppies from so-called responsible breeders, and the rest do not – which is the very definition of operating underground – but the transgressors are almost impossible to identify and bring to justice. By contrast, a ban on third party sales might see the same transgressors selling underground, but provide a far greater opportunity to detect them when they do so, and enforce against them. The disincentive to run the risk of underground sales in the teeth of an outright ban, a far higher chance of detection, and suitable penalties if caught is much superior to any incentive to obtain a licence, and far more likely to weigh with the type of mind that is motivated to sell puppies in this way in the first place.

The Government comment about an outright ban on third party sellers reducing the numbers of "good breeders" is baffling. If this is intended to imply that a "good breeder" might need to make their sales through a third party so desperately that they would continue to do so, even though it became illegal, and that they would go under the radar themselves to achieve it, then this is a deeply unattractive argument, and one more likely to persuade the authorities that it would be more appropriate to remove the licence from such a breeder than to give one to their third party seller.

A more logical but no more attractive argument might be that breeders who are remote from their market could suffer detrimental consequences to their business if they lost ways of getting their puppies to that market. But this is the case for all businesses that choose to divorce themselves from their potential customer base, and the appropriate solution for that might be thought to be an alternative, more commercially minded business model, rather than the introduction of an ineffective, expensive and onerous licensing regime, at public expense, which poses serious risk to the welfare of the dogs that they are breeding.

The Government's explanation that the refusal to uphold the sub-committee's recommendation for a third party ban emanates from "a number of established welfare charities with experience and knowledge of the sector [who] have advised against a ban on third party sales" is perhaps the most baffling part of the equation of all. Either the advice from those welfare charities (who are not named) chimes with the explanations given in the Government response, or they were additional to them. The given explanations, as set out above, are largely unacceptable, and fail to persuade. If there are further, potentially persuasive explanations given by these charities to avoid a third party ban, then those are yet to be made public, and it might have been thought that the formal Government response would have been a good place to do it.

Licensing officers and licensing authorities generally will, no doubt, have their own strong views on whether they would prefer a system requiring them to monitor and enforce a clear-cut ban, or whether they would welcome instead a new, bespoke licensing regime for sellers of puppies, with unique criteria and exemptions, necessitating further investigation and expenditure of resources. There does not seem to have been a great deal of feedback in the EFRA consultation or consideration of recommendations from those on the ground who will be expected to implement the final outcome of this exercise, and the system that results. In these times of austerity, with no suggestion that further funding would be made available to implement such a system, this might be considered to be regrettable. The designers of the future system and the ultimate intended enforcers of it would do well to talk together first, and it seems that the time should be now.

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Proposed alterations to private hire licensing requirements

Proposed taxi legislation aimed at deregulating the sector fails to offer the safeguards passengers are entitled to, writes **James Button**, who is similarly unimpressed by the Guidance section in the taxi provisions of the new Police and Crime Act

In August last year *Tourism Action Plan* [1] was published by the Government. In the section subtitled "Commonsense Regulation" the following statement appeared:

Working in partnership with the Tourism Industry Council, we have identified four areas of regulation where progress can be made to allow tourism businesses to flourish:

- *We will seek to deregulate an element of Private Hire Vehicle (PHV) licences as soon as Parliamentary time allows. This will allow owners of hotels / attractions to collect visitors from train stations / ports of entry, without having to apply for PHV licences (operator, vehicle and driver).*

This is clearly part of the Government's aim to "reduce the burden on business", and if particular regulations and requirements are pointless then that is a laudable aim. However, when there is a clear need for the protection afforded by statutory requirements, it does beg the question of what is driving the proposal.

The aim and intention of hackney carriage and private hire licensing is public protection, as stated in *Taxi and Private Hire Vehicle Licensing: Best Practice Guidance*:[2] "The aim of local authority licensing of the taxi and PHV trades is to protect the public."

The next question is how is that public protection achieved. As we know, it is achieved (or in some cases, at least partially achieved) by requiring vehicles, drivers and private hire operators to be licensed by the licensing authority (either the local authority or Transport for London).

At its best, this will ensure that:

- All vehicles are owned by a person of the highest integrity, roadworthy and maintained to a very high standard.
- All drivers are persons of the highest integrity.
- There is a comprehensive record of the details of the passenger and the journey, obtained and maintained by another person of the highest integrity.

Even at its worst (and of course, no authority would ever be in this position):

- The vehicle will have had an inspection (however cursory) and will have been covered by insurance (at least on the day of grant of the licence).
- The driver will have had an enhanced DBS check made and their criminality and other unpleasant characteristics will have been considered by the licensing authority (although not necessarily acted upon).
- The operator will have an address where the (possibly very rudimentary) records can be inspected.

Even hackney carriages and drivers will meet this rock bottom standard, although the absence of any record-keeping requirements for journey by hackney carriage is a continuing cause of concern.

The aim behind this regulation is to enable a hirer (a passenger) to recognise a licensed vehicle by means of a plate as a minimum requirement, establish that the driver is licensed by seeing the identification badge they must wear, and allow the hirer to feel confident that the operator is also licensed (although there is no requirement to display that licence).

Removing those safeguards in any circumstances is worrying and it is difficult to see how this proposal furthers that aim. Indeed it appears to fundamentally undermine it.

1 Available at https://www.gov.uk/government/publications/tourism-action-plan.

2 See para 8. October 2006, revised March 2010, available from http://www.dft.gov.uk/pgr/regional/taxis/taxiandprivatehirevehiclelic1792.

To allow unchecked vehicles, driven by unchecked drivers, to collect people from railway stations, air and sea ports and take them to hotels and attractions will allow passengers, many of whom will be unfamiliar with either the UK or the locality, to be transported in potentially dangerous vehicles driven by potentially villainous drivers. It will be an open opportunity for criminals to exploit the absence of regulation.

"Hotel" will certainly cover the Ritz and thousands of legitimate establishments including B&Bs and guest houses, but may well cover less reputable operations including places that rent rooms by the hour. "Attraction" will also be widely interpreted. The Tower of London, Alton Towers, and so on are not in doubt, but may also include a pub or a licensed sexual entertainment venue.

Enforcement will become even harder than it is now. How will licensing authorities and the police differentiate between an unlicensed vehicle taking passengers home from a night out (illegal) and an unlicensed vehicle taking passengers to a hotel from a railway station (legal)?

In March 2014 the DfT introduced a clause in the Deregulation Bill which would allow "leisure use" of private hire vehicles outside London (although not hackney carriages). There was to be a presumption that if there were passengers in the vehicle it was working, but again, enforcement would have been severely problematic. Fortunately, the proposal was withdrawn in the face of serious criticism.

To date, the response from the DfT to the current proposal is not encouraging, so it will be essential to make serous representations if and when this proposal is contained within a bill.

Policing and Crime Act 2017 taxi provision

The Policing and Crime received the Royal Assent on 31 January 2017 and s 177 (when it comes into force) will relate to taxi licensing. It contains the following passage:

> *Licensing functions under taxi and PHV legislation: protection of children and vulnerable adults*
>
> *(1) The Secretary of State may 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.*
>
> *(2) The Secretary of State may revise any guidance issued under this section.*
>
> *(3) The Secretary of State must arrange for any guidance issued under this section, and any revision of it, to be published.*
>
> *(4) Any public authority which has licensing functions under taxi and private hire vehicle legislation must have regard to any guidance issued under this section.*
>
> *(5) Before issuing guidance under this section, the Secretary of State must consult—*
>
> *(a) the National Police Chiefs' Council,*
> *(b) persons who appear to the Secretary of State to represent the interests of public authorities who are required to have regard to the guidance,*
> *(c) persons who appear to the Secretary of State to represent the interests of those whose livelihood is affected by the exercise of the licensing functions to which the guidance relates, and*
> *(d) such other persons as the Secretary of State considers appropriate.*
>
> *(6) In this section, "taxi and private hire vehicle legislation" means—*
>
> *(a) the London Hackney Carriages Act 1843;*
> *(b) sections 37 to 68 of the Town Police Clauses Act 1847;*
> *(c) the Metropolitan Public Carriage Act 1869;*
> *(d) Part 2 of the Local Government (Miscellaneous Provisions) Act 1976;*
> *(e) the Private Hire Vehicles (London) Act 1998;*
> *(f) the Plymouth City Council Act 1975*

This is a strange idea. The DfT already issues Guidance (which it is in the process of updating at the moment) and a local authority must have regard to that as it is a relevant consideration under the *Wednesbury* principle.[3] That could easily be extended to apply to London, so at first glance it is difficult to see what this additional Guidance will achieve, particularly as it is limited in its scope to cover only children and vulnerable individuals over 18.

However, there are some indications of the Government's intentions. The Communities and Local Government Select Committee produced a report entitled *Government Interventions: the use of Commissioners in Rotherham Metropolitan Borough Council and the London Borough of Tower Hamlets* and made 14 recommendations, one of which was this:[4]

> *2. We believe that local authorities must be able to apply particular measures in relation to taxi licensing in their*

3 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 CA.

4 Para 16 available at http://www.publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/42/42.pdf

areas, such as requiring taxis to have CCTV installed, without those measures being undermined by taxis coming in from other areas. We recommend that, in order to ensure that lessons are learned from experiences in Rotherham, the Department for Communities and Local Government works with the Home Office and the Department for Transport on the preparation of statutory guidance under the Policing and Crime Bill in relation to taxi licensing. That guidance should be brought forward without delay. Once the guidance has been introduced, the Government should monitor the extent to which it ensures consistently high standards in taxi licensing across the country, and also enables local authorities to put in place and enforce specific measures which are appropriate for their local circumstances. If guidance is not able to achieve this, the Government should consider legislation.

This is referring to the situation where a particular local authority takes significant steps to improve the standard of its vehicles and drivers,[5] but is then undermined in its efforts by vehicles and drivers coming in from other areas to undertake pre-booked private hire and hackney carriage journeys.

The Government responded thus:[6]

The Government strongly agrees with this recommendation; it is essential that taxi and private hire vehicle licensing is effective across the country and that the safeguarding of children and vulnerable adults is assured. Part 9 of the Policing and Crime Bill, currently before Parliament, will enable statutory guidance on safeguarding for taxi and private hire licensing to be issued. The Bill is currently at House of Lords Committee stage, having already been through the House of Commons. The Government will consider the additional recommendation to monitor national compliance following publication of the statutory guidance.

The problems here are twofold. Firstly, since the introduction of hackney carriage licensing, a hackney carriage has been able to undertake pre-booked work not only within the district in which it is licensed, but anywhere in England or Wales.[7] A private hire vehicle can be booked from anywhere, to pick up passengers anywhere, and then travel anywhere, without any requirement to commence or end the journey in, or even pass through, the area in which the vehicle, driver and operator are licensed.[8] In addition, and of particular significance in relation to these issues, from 1 October 2015 the Government allowed a private hire operator to sub-contract a booking to any other licensed operator, without either the consent of the hirer, or even notifying the hirer of the fact that the vehicle and driver will be licensed by another authority.[9]

Secondly, is that the suggestions are only going to be contained in Guidance. While the licensing authority must have regard to that, "having regard" means taking the Guidance into account during the decision-making process, but does not mean slavishly adhering to it.[10] Unless national minimum standards for drivers, operators, vehicles and proprietors are introduced by legislation, there will remain significant variations between standards.

By the time this article is published, the DfT should have given more detail on the new Guidance, and may even have consulted upon it. It remains to be seen when it will come into force.

Quite frankly, it is difficult to see what effect this will have. All of the matters mentioned can be, and in many cases are, used by local authorities already, and (although it may be simply unfortunate wording) the limitation that this will only "protect children, and vulnerable individuals who are 18 or over, from harm" causes concern. A person is either fit and proper or they are not. They are fit and proper for any and all potential passengers, or they are not. We cannot have any form of two-tier drivers' badges, those approved to carry children and vulnerable adults and those not.

These ill-considered proposals reinforce the perception that taxi licensing law and policy is in disarray. At the time of writing (February 2017) there has still been no response by the Government to the Law Commission's proposals, which should have been made within a year from May 2014. The continual drip of minor amendments to the existing archaic

5 In this case, Rotherham MBC. As part of the council's wide-ranging response to the inquiry into CSE in Rotherham, they require all licensed vehicles to be fitted with CCTV, and the standards applied to drivers have been significantly tightened.

6 In *Government Response to the Communities and Local Government Select Committee report: Government Interventions: the use of Commissioners in Rotherham Metropolitan Borough Council and the London Borough of Tower Hamlets.* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561475/CM9345-_Select_Comittee_Response_into_Government_Intervention__Web_.pdf

7 *Britain v ABC Cabs (Camberley) Ltd [1981] RTR 395 QBD; Brentwood Borough Council v Gladen* [2005] R.T.R. 12 (Admin Crt); *R. (on the application of Newcastle City Council) v Berwick upon Tweed BC* [2009] R.T.R. 34(Admin Crt); *Stockton on Tees BC v Fidler* [2011] R.T.R. 23(Admin Crt).

8 *Adur DC v Fry* [1997] R.T.R. 257 QBD.

9 Ss 55A and 55B Local Government (Miscellaneous Provisions) Act 1976.

10 See, eg, *R. (on the application of S (A Child)) v Brent LBC* [2002] A.C.D. 90 CA.

laws suggests very strongly that there is no intention, or even appetite, within Government to address the significant shortcomings of the existing legal framework. This leaves local authorities and TfL in an increasingly difficult position. Technological and marketing advances continue apace while the legislation remains almost entirely fixed in aspic.

To pretend that fundamental deficiencies can be overcome by publishing some additional Guidance is at best disingenuous, and at worst downright dishonest. It also appears to be a cynical step to buy more time to avoid answering the difficult questions outlined above.

Assuming the Guidance comes into effect later this year, and the Government does decide to monitor national compliance (remember the only commitment at present is that "The Government will consider the additional recommendation to monitor national compliance (my emphasis) following publication of the statutory guidance") there will then be a period of possibly two years before its impact is assessed. There will then be 18 months to two years of analysis and response to that assessment and then another 18 months before any legislation to address any deficiencies can come into effect. We have no idea what the world in general or the taxi and private hire trades in particular will look like in five years' time but we can probably be fairly certain that taxi legislation will remain as it is now.

It is to be hoped that wiser counsel will prevail and a comprehensive root and branch reform of hackney carriage and private hire legislation will be undertaken as a matter of urgency.

James Button, CIoL
Principal, James Button & Co Solicitors

Events Calendar

April 2017

24th	South West Region Meeting & Training Day incl. House of Lords LA03 Review Workshop - Bristol
24th-25th	Investigation through to Trial - Birmingham
26th	Practical Taxi Licensing - Reading
27th	Preparing for a Licensing Hearing - Weymouth
27th	South East Region Meeting & Training Day - Dorking

May 2017

8th	Preparing for a Licensing Hearing - Wotton-under-Edge
9th-12th	Professional Licensing Practitioners Qualification - Birmingham
12th	House of Lords LA03 Review Workshop - Reading
16th	Now & Next - Manchester
16th	Eastern Region Meeting & Training Day incl. House of Lords LA03 Review Workshop - Cambourne
17th	Animal Welfare Licensing - Nottingham
18th	Now & Next - London
23rd	Animal Welfare Licensing - London
24th	Acupuncture, Tattoo and Cosmetic Skin Piercing - Hemel Hempstead
25th	Now & Next - Bristol

June 2017

7th	Wales Regional Meeting - Llandrindod Wells
13th	Licensing Hearings - Lancaster
14th	Licensing Hearings - Sidmouth

June 2017 cont.

14th	House of Lords LA03 Review Workshop - Manchester
15th	Licensing Hearings - Doncaster
19th	Working in Safety Advisory Groups - Birmingham
20th	An Introduction to Pocket Notebooks & Audio Interviewing - Birmingham
21st	National Training Day- Stratford upon Avon
26th	House of Lords LA03 Review Workshop - Port Talbot

July 2017

6th	North East Region Meeting & Training Day - York
10th	House of Lords LA03 Review Workshop - London

September 2017

7th	North East Region Meeting & Training Day - York
11th-15th	Licensing Hearings & Safeguarding- locations TBC
19th-22nd	Professional Licensing Practitioners Qualification Newcastle Under Lyme
26th-29th	Professional Licensing Practitioners Qualification - London

November 2017

15th-17th	National Training Conference - Stratford upon Avon

December 2017

7th	North East Region Meeting & Training Day - York

One more round for minimum unit pricing of alcohol

While the principle of minimum unit pricing of alcohol still awaits final judicial approval in Scotland, England seems to be moving towards supporting the once-dismissed policy measure, as **Josef Cannon** and **Matt Lewin** explain

> *[178.] The societal, family and personal effects of excessive alcohol consumption in Scotland are difficult to overestimate. In some comedic settings they form an unfortunate, if distorted, caricature of the Scottish character. The effect of excessive consumption on the nation's health, levels of crime and productivity is notorious and hardly needs exposition, since they are apparent in daily life, especially to those practising in the courts. According to the government, the annual cost of excessive alcohol consumption can be estimated in billions of pounds.*
>
> *The Scotch Whisky Association v Lord Advocate* [2016] CSIH 77; 2016 SLT 1141

One year ago, writing in this *Journal*, we argued that the Scottish Government's plans to introduce minimum pricing of alcohol had not been killed off by the judgment of the Court of Justice of the European Union (CJEU) in *The Scotch Whisky Association v Lord Advocate* (C-333/14).[1] The CJEU sent the case back to Scotland's Court of Session for a final determination. The Court of Session issued its judgment on 21 October 2016. The outcome? Minimum pricing is lawful – but the decision has been appealed, so the final say will be had by the Supreme Court.

The background to minimum pricing is powerfully described in the extract from the Court of Session's judgment above [178]. The policy was introduced by the Scottish Government as part of a range of measures primarily intended to reduce levels of hazardous and harmful drinking and, as a secondary outcome, to reduce alcohol consumption generally.

In 2012 the Scottish Parliament enacted the Alcohol (Minimum Pricing) (Scotland) Act 2012. In draft secondary legislation, the Scottish Government proposed to fix the minimum price per unit of any alcoholic drink sold at retail at 50p. The act and the draft secondary legislation were challenged by the Scotch Whisky Association and others representing alcohol-related interests. The most significant aspect of the challenge was whether minimum pricing was lawful under EU law, principally whether it breached Article 34 of the Treaty on the Functioning of the European Union (TFEU) which prohibits "quantitative restrictions" (or measures having equivalent effect) on trade between EU member states. In effect, it was argued that by setting a floor price below which alcohol cannot be sold, minimum pricing legislation impedes the free movement of alcoholic products by preventing the lower cost price of imported drinks from being reflected in the selling price: it potentially prevents products that are lawfully marketed in other EU member states from competing in Scotland (at least at the intended price).

It was never disputed by the Scottish Government that minimum pricing had precisely this effect. Therefore the central issue in the case became whether the measure could be justified for public policy reasons under Article 36 TFEU. If it was justified, minimum pricing would be lawful under EU law. Justification under Article 36 TFEU requires that the measure is proportionate. The test for proportionality comprises two aspects: the measure must pursue one of the objectives prescribed by Article 36 TFEU (in this case the protection of human life and health); *and* that the same objective could not be as effectively achieved by an alternative measure which is less restrictive of trade within the EU.

Neither the CJEU nor the Court of Session were especially troubled by the first aspect of the proportionality test. Minimum pricing pursued the primary aim of reducing consumption by hazardous and harmful drinkers in particular and, as a secondary aim, sought to reduce generally the Scottish population's consumption of alcohol. As such it was directed at the protection of life and health.

As directed by the CJEU, the focus of the case before the Court of Session was a comparison between minimum pricing

1 Josef Cannon and Matt Lewin, EU Court has not called last orders for minimum alcohol pricing (2016) 14 JoL p42-44.

and an increase in the level of tax on alcoholic products (taxation being a less restrictive measure). The CJEU had held that, in principle, minimum pricing was capable of being justified, but that it was for the Scottish Government to produce appropriate evidence that increasing the level of tax would not be as effective as minimum pricing in pursuing the public health objective. They adduced further evidence, mainly academic research, (the Court of Session having ruled [110-112] that it was in the interests of justice to hear up-to-date evidence notwithstanding the nature of the judicial review jurisdiction) demonstrating that minimum pricing had a direct effect on consumption amongst the less affluent sectors of the population; and also that increased taxation (the "alternative measure" comparator) was likely to be less effective.

The Court of Session accepted that evidence and concluded that increasing tax would not be as effective as minimum pricing. Its reasoning was neatly captured in para [196]:

> *The fundamental problem with an increase in tax is simply that it does not produce a minimum price ... [M]any supermarkets, in the past, sold alcohol at below cost. They have absorbed any tax increases by off setting them against the price of other products unrelated to alcohol. Cheap alcohol is perceived as a draw, lure or enticement to pull shopper into the particular retailer's premises and away from those of the competition.*

The Court of Session also observed that minimum pricing – unlike tax – targets cheap alcohol and therefore has a much more direct impact on the hazardous and harmful drinkers who tend to purchase those kinds of drinks; increasing tax would result in price rises across all kinds of drink and therefore have a less direct effect on hazardous and harmful drinkers [199], as well as affecting those who do not drink irresponsibly ("moderate drinkers") [200].

Predictably, this is not the end of the story: the Scotch Whisky Association has appealed the decision, which means that the last round will be on the Supreme Court. The wait continues until minimum pricing can finally be implemented in Scotland, almost a decade after proposals were first announced by the Scottish Government.

In England meanwhile, the wind may be changing. Back in 2013, there was great controversy when the policy was dropped by the UK Government, which cited "an absence of empirical evidence" that minimum pricing "will actually do what it is meant to do: reduce problem drinking without penalising all those who drink responsibly".

However, in December 2016, Sarah Newton, a Home Office minister, gave evidence to the House of Lords Select Committee on the Licensing Act 2003. She reiterated the Government's desire to pursue evidence-based policy making, but (in the light of the Court of Session's decision) said that the UK Government would watch the outcome of the (expected) Supreme Court appeal with interest; and that the Home Office "would consider minimum pricing if the evidence supports it".

"In principle, minimum pricing was capable of being justified, but that it was for the Scottish Government to produce appropriate evidence that increasing the level of tax would not be as effective as minimum pricing in pursuing the public health objective."

Earlier that month, Public Health England published a report commissioned by the UK Government. The report was described by PHE as a "comprehensive review of the evidence on alcohol harm and its impact in England" which was intended to "provide national and local policy makers with the latest evidence to identify those policies which will best prevent and reduce alcohol-related harm". The report demonstrated precisely what the Government had said was absent in 2013. Perhaps foreshadowing a different approach south of the border, PHE said that a combination of both minimum pricing *and* an increase in taxation is likely to be most effective in reducing alcohol-related harm: such an approach would be most likely to "lead to substantial reductions in harm", while the minimum pricing element would have a "negligible impact on moderate consumers and the on-trade" (surely the "responsible drinkers" the UK Government had in mind back in 2013).

The UK Government says that it needs evidence before it can support minimum pricing. The evidence gathered by the Scottish Government persuaded the Court of Session and may yet be ruled sufficient by the UK's highest court. The UK Government's public health advisory body says, following a comprehensive review, that the evidence supports minimum pricing. If anything, it looks like the *opposition* to minimum pricing has now reached drinking up time.

Josef Cannon, MIoL and **Matt Lewin**
Barristers, Cornerstone Barristers

Must a theatre's emergency lighting always be illuminated?

To light or not to light? That is indeed a question faced by theatre managements across the country as they struggle to interpret local authority guidance on whether distracting signs can be turned off during performance. **Julia Sawyer** turns her spotlight on the issue

Over the past few years, we have all become used to the illuminated running man signs that indicate our safest route out of the theatre. But have we become so used to them that we fail to notice their presence? And if a director or production manager were to turn them off during a performance would the audience realise?

Such questions regularly come up in the theatre world. And there are others. For example, do the lighted signs affect the artistic integrity of the performance if they are left illuminated throughout? Are theatres legally required to have them illuminated during a performance with the public attending?

No one seems sure, which suggests that current guidance is insufficiently clear for making informed decisions.

Having non-maintained or no illumination coming from the emergency exit sign is not to be confused with a blackout. The removal of illuminated running man signs alone is not the same thing.

Here are some definitions for a blackout. The first, given in *theatre.com - the beginner's guide to definitions in the theatre,* is*:*

1) *Complete absence of stage lighting. Blue working lights backstage should remain on and are not usually under the control of the board, except during a Dead Blackout (DBO), when there is no onstage light. Exit signs and other emergency lighting must remain on at all times.*
2) *The act of turning off (or fading out) stage lighting (e.g. "This is where we go to blackout").*

In *Technical Standards for Places of Entertainment (*referred to as *Technical Standards),* the definition is: "Black out switch - provision that enables the management lighting, other than escape route signs, to be extinguished during a performance, normally only for short periods."

And in the *Oxford English Dictionary:* "A moment in the theatre when the lights on stage are suddenly dimmed."

It is clear from the definitions that emergency escape route lighting should not be altered and *Technical Standards* actually states that "obscuring or switching off internally illuminated escape route signs in a theatre auditorium in order to achieve a complete blackout for production reasons is not generally approved." The key word here is *generally* and of course the norm should be that emergency escape route lighting should be illuminated whenever the public are in the theatre.

However, there might be certain times in a performance, and even maybe during all of it, when the emergency lighting would detract from one's enjoyment of the performance; where, perhaps out of the corner of your eye, you notice the running man sign rather than become totally immersed in the play before you.

As this is an issue where guidance is neither explicit nor flexible, the risk assessment process should detail the risks to the safety and health of people in the theatre if one or all the emergency exit signs are visible. It should provide adequate controls to protect people in an emergency; and the person making the risk assessment should also liaise with the enforcing authorities (fire and licensing) to check all risks have been considered and obtain their approval.

Applicable legislation and guidance

Clear escape route signs are important for ensuring the safety of the public, performers and employees in an emergency evacuation. Some people at the premises may not be familiar with the event space and may be visiting the venue for the first time.

Legislation that details what safety signage should be in place in a theatre are the following:

- Management of Health and Safety at Work Regulations 1999
- Health and Safety (Safety Signs and Signals) Regulations 1996
- Regulatory Reform (Fire Safety) Order 2005
- Fire (Scotland) Act 2005

Guidance for safety signage in a theatre is given by these documents:

- BS EN ISO 7010:2012+A5:2015 Graphical symbols. Safety colours and safety signs
- BS 5499 Safety signs
- BS ISO 3864 Safety signs, including fire safety signs
- Technical Standards for Places of Entertainment

The legislation and guidance describe the type of signs that can be used but they are not prescriptive in the type of sign that must be used. They state that emergency escape lighting can be either "maintained", which means on all the time, or "non- maintained", which only operates when the normal lighting fails. Some guidance differs in the information it provides on maintained and non-maintained and confuses blackouts with non-maintained emergency signage. But what they all agree on is that signs should be designed, provided and positioned depending on the outcome of a risk assessment of risks to health and safety and guidance and advice from the enforcing authorities (building control, fire authority and licensing officer).

When the premises licence states that it is granted subject to complying with the council's rules of management, it's very difficult for a theatre to experiment artistically as they are bound by the conditions. The rules of management state:

> *b. If essential to the entertainment and agreed by the council, lighting in the entertainment area (except for fire safety signs) may be reduced or extinguished*
> *c. Fire safety signs shall be fully illuminated at all material times.*

What controls can be added?

If not restricted by a condition on the licence, the risk assessment would need to consider what the risk would be if the running man signs were not illuminated.

It would also need to consider if any / all of the following control measures that often feature in theatre risk assessments should be applied to the internally illuminated escape route signs:

- The signs automatically return to full luminance when the normal lighting is restored.
- The light output may be reduced provided the luminance of the signs is at least 2cd/m (a suitable level of luminance for internally illuminated escape route signs is generally between 17cd/m2 and 34cd/m2).
- In the event of a power failure, the lighting to the signs is immediately and automatically restored to full luminance.
- The control of the dimming of normal and emergency lighting circuits is independent of each other.
- Means of instantly restoring the escape route sign lighting should be provided in several positions including in the control position and within the auditorium.
- Consent should be obtained from the responsible authorities before extinguishing the escape route signage lighting when the public is present in the auditorium.
- The escape route sign lighting should be restored automatically after an agreed period established with the responsible authorities.
- All the running man signs should be illuminated and clearly visible as people come in to the auditorium and take their seats.
- Paddles to be used that are held up in front of the signs. If they were to be dropped the sign would be exposed. During an evacuation, the paddles are put down and the sign is then exposed.
- The signs are covered by black cloth and Velcro fastening that can be easily and quickly removed by a nominated person positioned nearby.
- The running man signs to be covered when the audience are seated (not turned off, just covered) and a nominated person (with a torch) will be positioned nearby to be able to remove the covers in an emergency. This will be directed by the nominated person as to when and if the running man sign would be revealed (it may be that the venue does not want members of the public to exit a certain route depending on what and where the incident is). It will be the responsibility of this person to remove the cover if directed in an emergency.
- At the end of the performance the running man signs will be uncovered by the nominated person.
- Should there be an incident that requires a fire officer or first aider to get to an audience member, the lighting levels will go back to normal lighting levels including the emergency exit signage.
- The lighting control for the fire exit signs will have an independent override and can be activated by a single action from the lighting operator.
- For the duration required, the lighting operator will be accompanied by a second lighting operator, to ensure that s / he can take control in the unlikely occurrence of the first operator being incapacitated.

- The second lighting operator will be in radio contact with the nominated person so any emergency requirements can be communicated swiftly.
- There are nominated persons in the auditorium at all levels and on both sides of the auditorium. They will be present throughout the show and will remain in the auditorium. They carry torches and radios at all times.
- In the event of any evacuation being required, the usual management procedures will take effect: the show will be stopped, the fire exit signs and house lights will be illuminated and the nominated person will make an announcement from the stage, with the nominated persons directing the audience throughout the managed evacuation. The fire exit signs will be fully illuminated at all times from the point that the show is stopped to allow the nominated person to safely conduct the managed evacuation.

If a blackout was required in the theatre, then additional control measures would need to be considered on the risk assessment.

As guidance differs and each venue has specific conditions attached to their premises licence, it's no wonder that advice from the different enforcing authorities is so varied. But what needs to be remembered is that each venue and each performance in that venue is unique and what is acceptable and applicable to one may not be safe for another.

Developments in theatre technology are occurring regularly. They often allow quicker scene transitions and more control of the performance. Similarly, artistic developments can often allow audiences to experience so much more than even just a few years ago. For producers, directors and actors to make the most of these new developments, it's vital to build professional trust between the enforcing authority and venue management. Achieving this will allow fluid and dynamic risk assessment of the risks that a performance might bring. Only through such flexibility can rigid rules hindering artistic endeavour be overcome.

Julia Sawyer, MIoL
Director, JS Safety Consultancy Ltd

Document referenced for this article:
Fire Safety Risk Assessment Theatres, Cinemas and similar premises, HM Government
Technical Standards for Places of Entertainment
Theatrecrafts.com - the beginners guide to definitions in the theatre

Institute of Licensing News

National Training Conference 2016

2016 marked the 20th year of the Institute of Licensing, which was originally established as the Local Government Licensing Forum in 1996. November saw the IoL's 20th National Training Conference (NTC), held for the first time in Stratford-upon-Avon. The event was as busy as ever with the entire hotel taken up with the event and our residential delegates.

It was wonderful to welcome new speakers and regular speakers, new delegates and delegates who have attended this event for years. Stratford-upon-Avon is a beautiful town with a definite Shakespearean feel – appropriate given that the 20th annual conference came to Shakespeare's town on the 400th anniversary of his death in 1616. We were delighted to take delegates to the lovely Susie's Bar on the Wednesday night as well as organise a treasure hunt designed to get delegates out into the town.

Extracurricular activities aside, the 2016 NTC programme was as busy as ever with extra options including drop-in sessions provided to allow delegates to view the (then pending) gambling e-learning modules. With over 50 speakers during the three days and a similar number of optional sessions, our conference allows delegates to tailor the training experience to suit their areas of interest and training needs. Thursday afternoon saw Philip Kolvin QC on stage with guests Mirik Milan, Night Mayor of Amsterdam, and Alan Miller from the Night Time Industries Association. Philip has since been confirmed as the new Chair of the Night Time Commission working alongside Amy Lame, the newly appointed Night Czar for London, with a remit to develop and implement a vision of London as a 24-hour city.

It is impossible to give enough credit to all the excellent speakers who contributed to the wide-ranging programme on offer, but we are sincerely grateful to each and every one. Special thanks, too, to the sponsors of the 2016 event. Their support is essential to the conference and enables the IoL to keep delegate costs as affordable as possible.

Pictures from the NTC 16, including Bob Bennett the JAA winner and the other nominees, Elaine Moreton and Andy Eaton accepting their certificates at the Gala Dinner.

We are already in early planning stages for the 2017 NTC, which will return to the Crowne Plaza Hotel in Stratford-upon-Avon for a second year from 15-17 November 2017. Bookings are already being taken and all enquiries should be directed to: events@instituteoflicensing.org.

Jeremy Allen Award 2016

We were delighted to continue our annual award and tribute to Jeremy Allen. The award seeks to recognise licensing practitioners who "go the extra mile" in their work, and the winner of the 2017 Jeremy Allen Award was local authority licensing officer and former police officer Bob Bennett. The award was announced by James Anderson from Poppleston Allen and Daniel Davies, IoL Chairman, at the Annual Gala Dinner, a central part of the National Training Conference.

Bob was unable to attend the event, but stated in his acceptance speech read out by Daniel Davies: "I really was both surprised and humbled to be given this special award. I would like to thank everybody that supported my nomination and also offer my gratitude for their willingness to work together within the various areas of licensing to provide the best and safest services and licensing environment we jointly can.

"Truthfully, I have never thought that what I do, or the way I do it, is unusual or is any more worthy than anyone else. I have always felt that if I have to resort to formal enforcement action that maybe I have failed, as I strongly believe that it is much better to work to ensure that all parties involved understand their responsibilities and the importance of good practice.

"With so much to cover and at the same time trying to keep up to date with what changes are going on within the licensing industry, with just our small training budgets, the bulletins put out by both the Institute and by Poppleston Allen are essential and welcome; without them our work would be so much harder and I thank both organisations very much.

"The licensing team I work in is a small one and includes people who work both part time and across more than one team which, in my view, means that everybody has to go the extra mile.

"Thank you for this award which I will share with both my immediate work colleagues and those in the police and other agencies with which we work. They are a wonderful team of people, and they make my working life special."

Daniel Davies said: "Bob Bennett epitomises the sort of person that the Jeremy Allen Award was created to recognise. Beginning his career as a police officer and going on to a career as a local authority licensing officer, Bob is widely admired for his work ethic and his knowledge and enthusiasm. He also exemplifies the partnership approach between licensees and police and licensing authorities that the IoL champions. Generous with his time and his down-to-earth advice, Bob's tireless devotion to duty has helped licensees manage their premises better and raise their standards, and has assisted licensing authorities and police in resolving problems with premises without recourse to licensing reviews. Despite some serious health problems Bob has always returned to work, and at the age of 67 continues to offer sage advice and support to others. Bob is absolutely indefatigable and thoroughly deserves this award. Well done!"

Andy Eaton from Wealden and Rother Councils, and Elaine Moreton from Wolverhampton City Council were in the final three shortlisted for the award and were presented with certificates at the dinner.

Many thanks to all those who made a nomination for consideration. This award requires nomination from third parties, so everyone nominated by their peers deserves recognition. The IoL hopes to continue with Poppleston Allen to provide the Jeremy Allen Award in 2018 and beyond.

Fellows and Companions

A full list of IoL Fellows, Companions and other award winners can be found on the website under the Who We Are section of the website.

A Fellowship of the IoL is intended for individuals who have made exceptional contributions to licensing and / or related fields. Fellowship will be awarded, following nomination by two members of the Institute, to an individual where it can be demonstrated to the satisfaction of the Institute's Membership and Qualifications Committee that the individual:

1) Is a member of the Institute or meets the criteria for membership; and

2) Has normally made a significant contribution to the Institute and has made a major contribution in the field of licensing, for example through significant achievement in one or more of the following:

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

A Companionship is awarded by the Board following recommendation from the relevant Institute of Licensing committee to an individual who has substantially advanced the general field of licensing. Limited to 12 living members, those elected to Companionship must be or become Institute of Licensing members.

Nominations for consideration of Fellowship can be submitted at any time and should be emailed in the first instance to the Executive Officer: sue@instituteoflicensing.org

National Licensing Week

This year's National Licensing Week (NLW) will run from 19-23 June. The IoL established NLW in 2016 in part to mark its 20th year, but also to provide a unique platform for all licensing practitioners to celebrate the role licensing plays in business, home and leisure, keeping people safe and enabling them to enjoy their social and leisure time with confidence.

The work that goes on behind the scenes by licensees, operators and regulators is often invisible to the public until something goes wrong. NLW is a chance to change that and raise awareness across the country. It's a chance to "shout out" about the work you do on a daily basis and also a chance to celebrate and promote partnership working.

For 2016 we focused on particular licensing subjects on each day. For 2017, while retaining the underlying message that "licensing is everywhere", we are changing the daily themes to show that licensing really *is* everywhere. Proposed

themes are:

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

The aim of the week is to raise awareness on the role licensing plays in everyday life. For full details on the week please visit http://www.licensingweek.org. Last year some of our members undertook job swaps, we had lots of local activities and a great take-up via social media. This year we want to build on this to extend the reach and impact of National Licensing Week across the UK.

If you would like to get involved in this year's National Licensing Week email NLW@instituteoflicensing.org with your suggestions and we will contact you.

Consultations since November 2016

Home Office Consultation: Review of the Scrap Metal Dealers Act 2013

(closed 30 January 2017)

The Home Office undertook a review of the Scrap Metal Act 2013. The review consultation consisted of four questions looking at the impact of the legislation and key requirements within it. The IoL consulted members via an online survey to inform its response to the consultation.

The full response can be found in the website library, but in summary, survey respondents supported the retention of the act, while also identifying a need to amend, clarify and in some cases strengthen the requirements. The licensing regime was broadly seen as a step forward from the previous regime but with flaws which should be addressed.

Consultation responses showed concerns around difficulties associated with some of the provisions, a lack of resources, and poor interaction between relevant bodies, all of which undermine the current system. Although crime statistics relating to scrap metal theft have reduced, some considered that the reduction in value of scrap metal may have contributed more to the decline than the legislative requirements.

House of Lords Select Committee Review of the Licensing Act 2003

2017 promises to be an interesting year for licensing practitioners, particularly with the findings from the House of Lords Select Committee Review of the Licensing Act 2003 due for release in the early part of the year. The review asked a number of questions, and it will be interesting to see the conclusions, particularly on the question of additional licensing objectives focusing on the promotion of public health. The IoL consulted its members on the questions raised in the review and there were some very strong views in some cases, for example:

- 85% said the existing licensing objectives are the right ones, but views were very split on the question of a further objective to promote health and wellbeing.
- A majority feel that the Late Night Levy and Early Morning Restriction Orders are ineffective.
- There was a strong feeling that licensing and planning policy should be more closely integrated.
- Many feel there is inadequate training of police officers in relation to licensing law and police powers.
- There were very mixed feelings on any move to implement minimum pricing.

The IoL will take full advantage of its national and regional structure in keeping members up to date with the results of the review and examining the implications of any changes recommended. The regional structure of the IoL now covers the whole of the UK, with the individual regions holding meetings across the year, and IoL members can access any of those meetings to listen to key speakers, and perhaps even more importantly, to network with other licensing practitioners, discussing ideas, issues and local areas of interest.

Training and events

Gambling E-learning courses

The Institute of Licensing and Gambling Commission have jointly launched an E-learning module on gaming machines. The module is the first of three designed to help licensing authorities (LA) and other co-regulators improve their understanding of gaming machines and the local regulation of gaming machines.

Module one aims to provide an introduction on the topic of gaming machines and will cover:

- The role of LAs in the regulation of gambling
- What is a gaming machine
- The various types of gaming machines

Subsequent machine modules will cover:

- The physical aspects of a machine and how they work
- Machines notices and signage requirements
- The illegal siting of machines and how to take regulatory action

We also intend to develop modules on areas other than gaming machines.

As the gaming machines sector is a diverse and complex one, this training is only designed to give a basic introduction. The IoL is accrediting this course with 0.5 hours CPD, which is based on the suggested amount of time it should take a person to complete the module. To undertake the module please go to: www.instituteoflicensing.org/ELearning.aspx

Other courses

The training plans for the Institute of Licensing for the year ahead include the ever popular Professional Licensing Practitioners course, where delegates can get an accredited qualification; other popular training days such as Acupuncture/Tattoo and Piercing and How to Inspect Licensed Premises; and new courses such as Working in Safety Advisory Groups and Introduction to Pocket Notebooks and Audio Interviewing. If you would like to discuss a training requirement not met by our advertised courses please get in touch by emailing: training@instituteoflicensing.org

Also coming to an IoL region near you soon: Licensing Hearings Training and updates from the House of Lords Licensing Act 2003 Review.

Please look out for more details of all these events on our website.

Regional Officer Focus

Duncan Collings, East Midlands Region

I was asked some years ago by the Chair of the East Midlands Region and Board Trustee David Lucas if I would consider joining the Regional Committee. Knowing David for many years I agreed and I have been the Secretary for our region since. Although the East Midlands are not the largest region over the last few years we have developed into one of the most active.

We hold three meetings each year and at each of these we have at least three quest speakers speaking on a wide variety of topics. As Secretary I assist organising speakers and promoting the meetings through the region and the general administration involved on the day. We are very fortunate that we have some great venues for our meetings using a local casino that also, on one occasion, provided free tuition on the tables after the event!

Our region is fortunate in that we have an events officer in Walati Rathore who I work with very closely in obtaining guest speaker. In the past as well as licensing lawyers we have covered topics such as the Immigration Service, LGA, Home Office, Local Alcohol Actions areas, Taxi Safeguarding training, and many more. We are always looking for different subjects to educate our members.

Being Secretary puts me in touch with colleagues from all parts of the licensing family from police to lawyers and other local authority licensing officers. As the Senior Licensing Officer for Rushcliffe Borough Council, which sits on the southern edge of Nottingham, the role of Secretary has given me so many contacts it certainly enhances my day to day work.

Recently we have been involved in highlighting a local case of a taxi driver who fell asleep at the wheel after working long hours and killed a motorcyclist. The inquest was held in late October and the Coroner requested the Institute to highlight the case which we did via a presentation at our regional meeting.

Being the Secretary I have also been able to organise training events for the Institute at our Council Offices. These have been very successful and it has the added bonus of providing our staff with free places in return for hosting the event.

The regional committee also meet up to discuss the years programme and most attend the annual regional officers training day in June followed by a few beers with colleagues before the National Training day the following day, an absolute must for committee members to attend. During each year we have the AGM which I organise as part of one of our meetings.

I find the role both fulfilling and enjoyable and look forward to the future.

Regulatory compliance levy is here

The Government has introduced a new apprenticeship scheme which will include an apprenticeship levy on employers. From April 2017 any employer with an annual pay bill of over £3 million will have 0.5% of it taxed. This money will be held in a digital account by HMRC and can only be used to meet the training cost of apprentices. If these funds are not utilised by the employer within a two-year period, they will be reclaimed by Government for public use.

The Institute of Licensing has been working as part of a steering group to develop a Level 4 apprenticeship standard for a regulatory compliance officer (RCO) – this has been approved by the Department for Education. The RCO Trailblazer Steering Group includes over 30 employers and key stakeholders. The group is chaired by Rob Taylour, Derbyshire County Council, and supported by Regulatory Delivery, Department for Business, Energy & Industrial Strategy, the Chartered Institute of Environmental Health, the Chartered Trading Standards Institute, the Institute of Licensing and the National Association of Licensing Enforcement Officers (NALEO). The new standard sets out the knowledge, skills and behaviours required by RCOs across the public and private sectors.

As the first nationally recognised apprenticeship standard in regulatory compliance, it will ensure apprenticeship training is relevant and beneficial to the future of the regulatory compliance profession. It will also help boost opportunities for people starting out in the regulatory compliance profession and will help support the growth of the regulatory compliance workforce nationwide.

The apprenticeship standard

The standard sets out the knowledge, skills and behaviours required to become an RCO. The standard was written to be suitable for an apprentice working in a local authority, national regulator and or a business setting. The scheme should take approximately two years, will be suitable for young people aged 18 or over (but ultimately this would be for an employer to determine), would be a Level 4 qualification (ie, equivalent to a foundation degree) and would be generic in the first year, but would be flexible enough to include legal requirements in whichever setting the apprentice was based. The standard for the RCO agreed by the steering group embodies the principle-based core competencies found in the regulators' development needs analysis self-assessment tool and includes:

- Assessing the extent to which a business meets the requirements of the law and / or relevant audit standards.
- Working with businesses to help them comply with relevant legislation in their sector and / or meet the requirements of private standards - eg, the International Organisation for Standardisations (ISO).
- Providing information, guidance and advice to businesses on how to comply with legislation or meet audit requirements in their sectors.
- Collecting and analysing business data to build a picture of business compliance.
- Conducting risk assessments and highlighting hazards which may result in non-compliance by the business.
- Auditing and monitoring business compliance in relation to the regulations which apply to a specific sector.
- Writing reports following inspections or audits.
- Liaising with businesses / regulators to resolve any issues of non-compliance.
- Managing relationships with businesses and providing customer service.
- Dealing with complaints from consumers and other businesses and investigating them.

Advice was sought from members of the steering group as well as the professional institutions and other interested parties including representatives of universities and other training organisations. Following the Skills Funding Agency guidance, the proposed standard was submitted towards the end of July and was approved by the Minister in September 2016. The approval letter also informed the group that the RCO apprenticeship scheme has been given an indicative funding cap of £6,000. This means that the cost of training and assessing apprentices over the two-year period is expected to be approximately £6,000 per apprentice, although it is possible (and is expected) that this figure might be revised upwards on appeal.

The next steps - assessment plan

The next step is to determine how the apprentices will be assessed as having met the requisite standard of skills, knowledge and behaviours. Again, after much discussion it was decided that the EPA should consist of three main elements: a series of multiple-choice questions; a simulated observation of professional practice; and portfolio of evidence combined with a professional discussion.

The proposed assessment plan for the RCO apprenticeship scheme was submitted towards the end of November and we are currently awaiting feedback from the National Apprenticeship Team. The Institute of Licensing will keep IoL members informed of progress.

Keeping the night-time economy fun and safe

Drinkaware Chief Executive **Elaine Hindal** explains how the Drinkaware Crew are reducing vulnerability on a night out

Recent headlines about nightclub closures across the country would suggest the night-time economy is on the decline but according to the Association of Licensed Multiple Retailers, one third of all town centre turnover is generated after 5pm.

It's no wonder then that maintaining their thriving night-time economy is a priority for many town centres, as is making sure that customers, the majority of them 18-24 year olds, are reducing their potential risk from alcohol-related harm.

Research for alcohol education charity Drinkaware shows that despite the overall alcohol consumption rate falling for 18-24 year olds in the UK, 60% students in this age group said in a recent survey they enjoyed going out to get drunk.[1]

For the last two years Drinkaware has been running the Drunken Nights Out campaign, a major component of which is their on-the-ground intervention, Drinkaware Crew. These are trained individuals who work in large clubs and venues to help support the welfare of young adults on a night out. Working in pairs, Drinkaware Crew mingle with customers to promote a positive social atmosphere and provide assistance to those who may be vulnerable as a result of excessive alcohol consumption.

This assistance can include helping people who are lost to find their friends, supporting someone who is being harassed, or simply providing a shoulder to cry on. Drinkaware Crew work with other members of staff, such as security and first aid, to ensure customers have a happy, fun evening where the risk of alcohol harm is minimised.

The overall aim of Drinkaware Crew is to reduce the harm and costs associated with excessive drinking among young adults in the night-time economy.

The scheme was successfully piloted in Nottingham in 2015, providing much needed support to venues. Our project partners there said it had been valuable as it helped customers remain safe but also freed up managers and security staff to keep the venue operation running effectively.

Drinkaware Crew is currently active in 14 venues, and five more may soon follow. In September it went live in South Wales for Freshers' Week, supporting several student union operations. Last year South Wales had a major issue with student safety following two serious sexual assaults. Introducing Drinkaware Crew helps prevent any recurrence and shows that responsibility for student welfare is taken seriously.

Drinkaware Crew staff report they regularly deal with vulnerability issues before they escalate. We know that small interventions make a big difference – so staff carry water, sick bags and ever-popular lollipops, which help keep the noise down when people leave venues.

Drinkaware's own data collected from ten venues between November 2015 and July 2016 showed staff offering 1,542 cases of emotional support, 1,247 cases of physical support and 271 cases of providing support outside the venue to ensure people got home safely.[2] They're also stepping up the 'stay with your pack' messaging on social media, the idea being that if you're going to enjoy your night out, you should do so safely.

This is just one of many effective awareness campaigns across the country that are helping to minimise alcohol harm. But alongside them, we all need to play a part by enjoying drink responsibly and encouraging others to do so too.

Elaine Hindal
Chief Executive, Drinkaware

1 Drinkaware commissioned research: ICM interviewed 2,004 students online between 30 July and 12 August 2015.

2 Drinkaware's data logs from 10 venues between November 13 2015 and July 4 2016.

Licensing: the European Union and Brexit

Extricating ourselves from European-made law will present opportunities to redefine some aspects of UK licensing, and disaffected operators and local authorities may soon start lobbying for regulatory changes that better accommodate their interests, suggests ***Charles Streeten***

There is something mildly ironic in the fact that it was only relatively shortly before the people of the United Kingdom voted to leave the European Union that EU law really began to leave a firm imprint on licensing practice.

Unlike public procurement or environmental law, licensing is perhaps not traditionally regarded as an area where practitioners are frequently called upon to deploy EU law expertise. However, in recent years cases such as C-333/14 *Scottish Whiskey Association v Lord Advocate and The Advocate General for Scotland* and C-316/15 *Hemming v Westminster City Council* have demonstrated the considerable importance EU law can have in this field. While those cases have now been (at least to a large degree) resolved, the question on the horizon is what role, if any, established EU jurisprudence, or *acquis communautaire* as it is known to EU lawyers, will have in future. This article surveys the role of EU law in licensing to date and examines the options for the United Kingdom going forward.

EU law and licensing

European Union law has always had some relevance to licensing practitioners. Leaving aside the importance of the free movement of services to online gambling operators, the familiar concept of deemed grant, which (subject to certain exceptions) results in the automatic grant of an authorisation to provide a service (ie, a licence) if an application has not been determined within the specified timeframe, arises from EU law as transposed by the Provision of Services Regulations 2009.

Until recently, the effect of EU law on "conventional" licensing practice has not been under the spotlight. However, in case C-333/14 *Scottish Whiskey Association* EU law provided a legal basis for attacking the Scottish Government's policy of imposing a minimum price on each unit of alcohol sold. This, it was argued constituted a measure "having equivalent effect" to a quantitative restriction on imports to the United Kingdom from other EU countries. The Court of Justice of the European Union (CJEU) accepted (at [21]-[25]) that the effect of imposing a minimum unit price is that it will inhibit producers in other EU countries from taking advantage of the free market to export alcohol produced cheaply in their own country and that it was therefore in contravention of Article 34 of the Treaty on the Functioning of the European Union (TFEU).

However, the CJEU referred back to the Court of Session the issue of whether or not such a measure was justified under the derogation from Article 34 TFEU contained in Article 36. To be justified the measure must be a proportionate measure seeking to achieve the legitimate objective, in this case the protection of human life and health.[1] The Scottish Court of Session has since held that it is not possible to secure that legitimate objective by any less restrictive measure than minimum unit pricing and upheld the lawfulness of the Scottish Government's policy.

Licence fees

In C-316/15 *Hemming* the CJEU has taken a more activist approach. The history of the litigation is long and complex. For present purposes it is crucial to note the terms of the reference to the CJEU. In *R (Hemming) v Westminster City Council* [2015] UKSC 25 the Supreme Court held unanimously that what it calls schemes of Type A, where an applicant is charged a fee covering the formalities of processing a licence application at the time when that application is made, and a further fee covering the cost of the running and enforcement of a licensing scheme upon that application being successful, are lawful. Lord Mance said in unambiguous terms:

> *Westminster City Council's appeal should in my view succeed to an extent entitling it to a declaration that a scheme of type A is and would be consistent with regulation 18 of the Regulations and article 13(2) of the Directive.*

This remains good law. The jurisdiction of the CJEU is determined by the ambit of the questions referred to it. Regardless of the proceedings before the CJEU, the lawfulness of a Type A scheme is established and could only be overturned if the Supreme Court itself were to reconsider the issue. There is no suggestion that it should do so and even

1 Discussed in Josef Cannon and Matt Lewin's article on page 22.

following the decision of the CJEU in *Hemming* all parties are agreed that the Supreme Court should issue a declaration to the effect that Type A schemes are lawful. Local authorities should be in no doubt: they can charge for the cost of running and enforcing the licensing regime, as long as they do so after an application for a licence has been granted.

In relation to Type B schemes, where both elements of the fee are charged at the same time, the CJEU has now made clear that these schemes fall foul of Directive 2006/123/EC (the Services Directive) and are unlawful. In the course of doing so the CJEU observed at [48] that:

> *It must be noted at the outset that whether the fee payable by an applicant is refundable when his licence application is rejected has no bearing on ascertaining whether there is a charge within the meaning of Article 13(2) of the Services Directive.*

The significance of that statement may be debated in future litigation. As stated above, in relation to Type A schemes the Supreme Court's decision is authoritative. It should also be noted that in his opinion to the court, Advocate General Wathelet made a series of observations regarding the compatibility of Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 including raising questions over the justification for limiting the number of authorisations for the provision of sexual entertainment and restricting such authorisations to a one year time period. He stated at [49]:

> *Even though those considerations do not fall within the scope of the questions referred for a preliminary ruling, they show that Schedule 3 to the 1982 Act, adopted more than 20 years before the Services Directive and not updated by the 2009 Regulations, raises problems of compatibility with the Services Directive other than those expressly mentioned in the main proceedings.*

While these observations undoubtedly provide food for thought and may well generate future litigation, the issues raised were not argued before the Advocate General and the weight a domestic court will give to his obiter comments remains to be seen.

Regardless, the Advocate General's comments demonstrate the potential future importance of EU law in a licensing context. There can be little doubt that he was throwing down a gauntlet for future litigation in this field.

Brexit

Almost exactly one month before the Advocate General published that opinion, however, the people of the United Kingdom voted in favour of leaving the European Union. The subsequent litigation culminating in the decision of the Supreme Court in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5 has made clear that Parliamentary assent is required for the UK's exit from the EU. The Supreme Court held by a majority of 8-3 (Lords Reed, Carnwath and Hughes dissenting) that exiting the EU would make a fundamental change to the UK's constitutional arrangements by cutting off the source of EU law and removing some existing domestic rights of UK residents. As such, a notification of the UK's intention to leave the European Union pursuant to Article 50 of the Treaty on European Union cannot be effected by the Executive using the Royal Prerogative and requires Parliamentary legislation.

The Withdrawal from the European Union (Article 50) Bill is now passing through Parliament. Assuming that bill is approved, the Government will be under a duty to issue an Article 50 notification by 31 March 2017. Issuing a notification pursuant to Article 50 has no immediate impact. It simply starts a two year countdown until the UK must leave the EU. I have written elsewhere regarding the possibility of revoking an Article 50 notification and will not repeat those arguments here.[2] The remainder of this article therefore examines what the United Kingdom's options are outside the European Union and the relevance of such an outcome for the licensed trades.

The options on exiting the EU are often described as "soft" and "hard" Brexit, although in reality this oversimplifies the range of different scenarios facing the United Kingdom. The hardest of Brexits would take place if, absent extension of the time limit, two years after the UK has issued an Article 50 notification no deal had been struck with the EU, either on the terms upon which the UK is to leave the EU or on future trade between the two parties. At that point the guillotine will fall, severing the UK and the EU. While all of the legislation transposing EU law into English law would remain in force, it would become a matter for the UK courts to determine what, if any, weight to give to existing decisions of the CJEU when interpreting that legislation. Though many commentators refer to this resulting in a reversion to World Trade Organisation (WTO) rules, there are at least potential significant consequences in relation to the UK's international trading position. The WTO Agreement is a mixed agreement, meaning that the UK is a party to that agreement both in its own right, and by virtue of its membership of the EU. Articles XXI and XXII of the WTO agreement include certain preconditions of membership including the submission of schedules of concessions and commitments. These were submitted by the EU and, absent a customs union with the EU, it is doubtful whether the terms of UK's membership of

2 C. Streeten, *Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?,* U.K. Const. L. Blog (13th Jul 2016).

the WTO would remain valid.

In practice, however, such a hard Brexit is unlikely. There appears to be little political will (domestically or from other EFTA members) for the UK to join the European Free Trade Association (EFTA) and remain within European Economic Area (EEA). The most likely way forward appears to be a bilateral treaty with the EU, which would be governed by public international law. While the administrative and political obstacles to negotiating such a treaty (or series of treaties) should not be underestimated, if the Government pursues this route then the nature and extent of future changes will all be up for negotiation. In this regard, the licenced trades will need to make sure their voices are heard through political lobbying if they are to achieve their objectives. Different industries are likely to have differing concerns. Those involved in the production and export of alcohol might focus on the free movement of goods, while those in service industries who rely on the provision of low-cost migrant labour from the Continent may be more concerned to preserve (in so far as possible) the free movement of persons.

On a domestic level the change to the law will probably be gradual. In *Bullmer v Bollinger* [1974] EWCA Civ 14 Lord Denning famously referred to "an incoming tide" of EU law "flowing into the estuaries and up the rivers". It will take a very long time, if it is even possible, to turn back that tide in any meaningful sense. The common law and European law have become deeply enmeshed. At present, the Government's approach appears to be to enact a bill repealing the European Communities Act 1972 but giving interim effect to relevant European legislation. Henry VIII clauses will then enable ministers and their departments to revoke EU law. So the slow process of unpicking the two legal systems will begin. This, again, will present an opportunity for the licensing world to lobby for a system of regulation which meets its needs. In particular, questions regarding the appropriate approach to the regulation of the provision of services are likely to arise. If there are elements of the present regulatory regime with which those in either local government or the licensed trade are dissatisfied, the inevitable glut of post-Brexit secondary legislation may provide an opportunity to push for change.

Charles Streeten, MIoL
Barrister, Francis Taylor Building

House of Lords ponders over its licensing verdict

A full gamut of views on the licensing process, many of them contradictory, was expressed to the House of Lords Select Committee looking into the workings of the 2003 Licensing Act, including those of **Richard Brown**. What the peers made of them we will know shortly

Half of the people can be part right all of the time
Some of the people can be all right part of the time
But all of the people can't be all right all of the time
I think Abraham Lincoln said that.
Bob Dylan, *Talkin' World War III Blues,* 1963

I wrote in my last article of the call for evidence issued by the House of Lords Select Committee set up to conduct post-legislative scrutiny of the 2003 Licensing Act. The article covered the elements of the call for evidence pertaining to the engagement of residents in the regime.

The call closed on 2 September 2016, and the committee has now finished hearing oral evidence and has progressed to the reporting stage. Its report is due to be completed by the end of March this year.

I was lucky enough to be asked to give evidence in person to the select committee. My musings on the experience are set out below. The nature of the evidence before the committee leads inexorably to the conclusion reached by Bob Dylan via Abraham Lincoln.

I was apprehensive. I had watched Sir Philip Green's infamous performance in front of the Business, Innovation and Skills Select Committee and the Work and Pensions Select Committee, and the memory would not leave me as I wended my way through the hallowed corridors. For some reason, I also recalled my second day as a trainee solicitor, dispatched from Holborn to the Royal Courts of Justice for a bankruptcy hearing, a sink or swim moment towards which I floated with apprehension combining inexorably with adrenaline to create a toxic mix of chemicals which ultimately rendered me, temporarily, mute. As a bare minimum, I decided, I would at least best Sir Philip by refusing to spill any beverages on the desk and refrain from calling out any of my stentorian inquisitors for staring at me.

My fears were ill-founded, and it was a very interesting and beneficial experience. The Lord Chairman went out of her way to welcome the participants. It was obvious that a lot of thought had gone into the questions, and the members of the committee were clearly extremely well-informed. I thoroughly enjoyed relaying my experiences and thoughts, for what they are worth, on behalf of Citizens Advice Westminster. My colleagues on the panel (Dr Alan Shrank and Councillor Carol Davies of National Organisation of Residents' Associations and Patricia Thomas, a resident of London Borough of Camden) were individuals and representatives with vast experience of the licensing process. Ms Thomas has attended and spoken at many hearings in Camden involving the cumulative impact policy which pertains to Camden Town. She also found the opportunity to put her views on the record to such an august and clearly knowledgeable group to be extremely valuable in allowing those with actual experience at the sharp end of the process from a resident's perspective to have their experiences and evidence included as part of the committee's scrutiny of the act.

The report will make various recommendations to the Government. It is possible, perhaps, to deduce from some of the themes of questioning how the committee is thinking. Reading the oral transcripts, a clear pattern emerges as similar topics pop up time and again. For example, a great deal of time was spent examining the disjunct between planning and licensing regimes.

The range and number of written responses to the call for evidence is impressive, as is the breadth of experience of those who subsequently gave oral evidence. There were no fewer than 172 written responses, including a number of additional responses following on from oral sessions. By way of comparison, the Select Committee on Social Mobility received 138 written responses to its own call for evidence. Even the Select Committee on the Long-Term Sustainability of the NHS received only 17 more responses than did the Licensing Act 2003 Committee.

Those who submitted a written response include local authorities, town councils, the British Medical Association,

public health bodies, police forces, policing and crime commissioners, barristers, solicitors, licensing forums, lobby groups, trade organisations, charities, representative bodies, licensing officers and many more. The committee heard 20 sessions of oral evidence from a similarly wide cross-section of stakeholders, and were faced with a correspondingly wide range of views. Taken together, the written and oral evidence amply demonstrates the widely conflicting views of stakeholders and the extremely difficult job which the committee has in delving in to the morass of views expressed before drawing their conclusions and making recommendations to the Government.

One of the written responses had expressed a fear that "no doubt most of the representations you receive will come from the trade". Surprisingly, this was not the case. There were numerous responses which could be said to have come from "local residents" [1] - individuals who would like to participate more and / or have more of a say in the licensing regime. There were responses from individuals who had had (mainly bad) experience of the licensing process and from residents' associations, some with vast experience of licensing. The overwhelming view of the local resident written responses was that the system was weighted heavily in favour of applicants / the trade in general. This was a theme of the oral evidence too.

Unsurprisingly, this was not a unanimous view and it is axiomatic that the trade responses took the contrary view. The variety of responses (both in terms of the source and of the content) starkly illustrates the wide range of interests and the extent to which the economy – and therefore society as a whole - is impacted by licensing issues.

The committee seemed particularly interested in examining the nexus between planning and licensing, public health, general views as to whether the system is working and, towards the end of the programme of sessions, why so many stakeholders were dissatisfied with the process, particularly from a trade standpoint, when according to Home Office figures 97% of licence applications are granted, and there are very few appeals against the grant of applications for licences. In fact, from figures quoted in the oral evidence, there were more appeals against review application decisions than against grant / refusal of licences, despite there being the small matter of approximately 20,000 fewer of the former than the latter. [2] In any event, perhaps these themes give a clue as to what issues the final report will address.

In some cases, views expressed were simply diametrically opposite. The oral evidence, unsurprisingly, revealed a veritable chasm on some issues between the views of the local resident consultees and the views of trade bodies and *de facto* trade representatives in other sessions. Dr Shrank's view was that the act had dealt residents a "raw deal", particularly the way hearings are dealt with. This was a view shared by an eminent licensing silk. The latter's view was contradicted by someone on the same panel of witnesses, whose experience pointed to the regime being "firmly balanced toward the residents". This view was in turn shared by the other trade witnesses.

The hoary old issue of what constitutes evidence in a licensing hearing raised its head on a number of occasions before the committee.[3] A proper understanding of what evidence is in a licence hearing, can at least reassure objectors that their well-founded concerns as to the "likely effect" of an application are being given their proper weight (necessarily involving an element of prediction). And are not being summarily undervalued by an over-zealous legal adviser.

On the other hand, there were areas of broad consensus. Local authority decision-making was seen as consistent only in its inconsistency. A perceived inconsistency in decision-making is not necessarily indicative of a major problem, or indeed any problem at all. Local issues and agendas may interact with the duty to consider each case on its merits in a way which produces decisions in neighbouring local authority areas that may give rise to a frustration for the trade but which are perfectly legitimate and, indeed, paradigmatic outcomes of the process. On the other hand, if it is a case of a local authority's statutory policy being misapplied or applied intermittently, that may be a valid cause for concern for any or all of the parties. It is this sort of nuance into which the committee must delve.

Ultimately, it is vital for a licensing practitioner to be able to see both, or more likely, all sides of the argument and be able to appreciate all sensible views, no matter which side they are acting on.

I am sure that the *Journal*'s broad church readership, whatever their perspective, is awaiting the publication of the committee's conclusions with bated breath.

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1 By which I mean those who visited the matter from the perspective of an objector.

2 According to the most recently available figures, for 2013-14, reported to the committee by Andy Johnson, Head of Alcohol at the Home Office.

3 I plan to revisit this issue in more detail in a future article.

POCA shocker: unforeseen effects of the Proceeds of Crime Act 2002

A draconian law with severe financial penalties is aimed at criminals but unwary licensed trade operators may find themselves caught up in its scope, warns **Charles Holland**

The Proceeds of Crime Act 2002 (POCA) does not appear to have pinged across the radars of many licensing practitioners. A search for the act on the IoL's website produces zero hits; a thumb through of back issues of the *Journal of Licensing* draws another blank; consult *Paterson's Licensing Acts* and you will find only a handful of footnoted references to a single Crown Court decision of 2011.

To the uninitiated, POCA is for gangsters, drug dealers and money launderers. Serious criminals - so other people, or other people's clients. Not something for licensors to worry about it.

However, perhaps not for much longer. Recent appellate case-law, a growing realisation by regulators of the potential applicability of POCA to their roles and the increasing encroachment of crime in a wide sense into licensing,[1] are conspiring to bring POCA applications into matters that previously might have been disposed of within a "pure" licensing environment.

POCA is the latest iteration of a regime with the stated purpose of ensuring that criminals do not profit from their crimes. It is intended to send a strong deterrent message.[2] It is deliberately designed to be severe.[3]

It brings the prospect of draconian financial orders, applied for without warning, imposed by judges with no discretion to refuse to do so, with payment encouraged by terms of imprisonment in default and a raft of enforcement powers.

In the licensing field, the risk is not confined to the organisers of illegal raves, underground gambling den bosses and others who simply ignore the necessity for licenses. *Au contraire,* established, bona fide and ostensibly reputable operations such as high street bars, takeaways and social clubs can find (and have found) themselves on the receiving end of POCA applications.

In any situation where breaches of the licensing regime have occurred, practitioners should consider whether there is a POCA risk, and advise accordingly. On the other side of the fence, regulators should appreciate (if they do not already) that there is a fearsome (and potentially profitable) weapon in their armoury.

Confiscation orders

A confiscation order does not provide for "confiscation" in the sense that a schoolboy recently deprived of a copy of *Razzle* would understand. Nor is it a fine. Rather, it is an order for the payment of a sum of money designed to deprive a defendant of the benefit gained from criminal conduct, whether not that benefit has been retained, within the limits of his available means. So, if the benefit has been done away down the boozer, it matters not: if there are assets in the defendant's hands, that sets the upper limit of a potential order at the time it is made (but watch out lottery winning defendants, they can come back for more).

Although early legislation was confined to drug trafficking offences, the regime has been extended to cover general criminal conduct. A conviction (and for a confiscation order, there has to be a conviction) for any criminal offence brings into play the possibility of a confiscation order. This includes summary only offences.[4]

Judicial discretion is largely absent. So, *per* Lord Walker:

> *The Crown Court no longer has any power to use its discretion so as to mould the confiscation order to fit the facts and the justice of the case, even though a confiscation order may arise in every kind of crime from which the defendant has benefitted, however briefly. The Crown Court has encountered many difficulties in applying POCA's strict regime. Many of the complexities and difficulties of confiscation cases, arising from the extremely involved statutory language, would undoubtedly be avoided if a*

1 As opposed to crime directly arising from the licensable activity (such as alcohol related disorder). See by way of example paragraphs 11.27-11.28 of the guidance issued under s 182 of the Licensing Act 2003 and *East Lindsey District Council v Hanif* [2016] EHWC 1265 (Admin).

2 *Per* Lord Walker in *R v Waya* [2013] 1 AC 294 at [2] citing Lord Steyn in *R* v. *Rezvi* [2003] 1 AC 1099 at [14].

3 *Per* Lord Walker in *R v Waya* at [21].

4 As confirmed in *Sumal & Sons (Properties) Ltd* v. *Newham LBC* [2012] EWCA Crim 1840 *per* Davies L.J. at [16].

measure of discretion were restored, but whether to restore it, and if so in which form, is a matter for Parliament and not for the courts.[5]

The process is instigated upon prosecutorial request. This is either upon conviction in the Crown Court, upon committal by the magistrates to the Crown Court for sentence, or, crucially in the licensing context, at the point of conviction in the magistrates, when the prosecutor can ask for the defendant to be committed to the Crown Court with a view to a confiscation order being made. If the prosecutor asks, the magistrates have no discretion but to commit the defendant.[6] And the prosecutor does not have to give notice to the defendant of his intention to make such a request.[7]

Here is a potential trap for the unwary. A licensing breach, a licensing review, but also - for some reason - a prosecution? Perhaps (see below) for four or more separate offences? Is there much harm to pleading guilty, and being sentenced to what will probably be nominal fines? Well, potentially yes, because POCA could be waiting in the wings. Following conviction it will be too late to argue the prosecution itself was an abuse of process or - obviously - to mount a defence to the charges that hitherto were not seen as worth the fight.

Note also that prosecutors have a financial incentive in the confiscation process because under the Home Office's Asset Recovery Incentivisation Scheme (ARIS) they take a cut of the proceeds recovered (18.75% as prosecutor and a further 18.75% if they also investigated the offence).

Once asked, the Crown Court has no discretion but to proceed.[8] The first question it must consider is whether the defendant has a criminal lifestyle. For the uninitiated one might imagine this involves looking at the defendant's lifestyle: Tony Montana's household being funded on state benefits. But no, it has nothing to do with lifestyle. Like many things in POCA, the test is mechanical and easily satisfied. There are three routes to the Crown Court finding the defendant to have a criminal lifestyle: [9]

(1) He can be convicted of a specified offence.[10] This includes the offences you might imagine would be specified (so drug trafficking, money laundering, counterfeiting etc), but there also some surprises. So, for example: importing a psychoactive substance with intent to consume it; copyright offences, including making or dealing in unauthorised decoders contrary to s 297A of the Copyright, Designs and Patents Act 1988; unauthorised use of a trade mark under s 92(1), (2) or (3) of the Trade Marks Act 1994.

(2) If the offence of which the defendant is convicted "constitutes conduct forming part of a course of criminal activity". Conduct forms part of a course of criminal activity if the defendant has benefited from the conduct in question in the sum of at least £5,000 (in Scotland, the equivalent threshold is only £1,000) and, in the proceedings in question, he has been convicted of four or more offences constituting that conduct (or he has been convicted within the last six years on two separate occasions of similar offence). So, watch out for a summons with four or more counts, and check for antecedents. And, if you are a prosecutor, you might want to pick your charges carefully.[11]

(3) If the offence is committed over a period of at least six months and the defendant has benefitted from the conduct which constitutes the offence. Again the benefit (widely defined as being not just the benefit from the offence but benefit from any other conduct which forms part of the course of criminal activity which constitutes the offence of which the defendant is convicted) must be at least £5,000 (£1,000 in Scotland).

All factual questions as to benefit are decided on the balance of probabilities.[12]

If the court decides that the defendant does have a criminal lifestyle then it must go on to decide whether he has benefited from his general criminal conduct. For this, the s 10 assumptions apply. It is presumed that money and assets that have passed through the defendant's hands or come under his control in the last six years is his benefit from general criminal conduct unless he shows otherwise[13] or there would be a serious risk of injustice if making that assumption.[14] So defendants with complex and intricate financial affairs watch out; indeed rich people may want to think carefully about holding lots of licences.

5 *R.* v. *Waya* at [4].

6 S.70(2) POCA.

7 *Sumal & Sons (Properties) Ltd* v. *Newham LBC* at [23].

8 S.6(1) POCA 2002.

9 S.75 POCA 2002.

10 There is a list in Schedule 2 of the Act.

11 As the leading textbook, *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime* quite candidly puts it: "... the selection of charges is crucial to the shape of the confiscation case. A prosecutor faced with extensive assets but limited criminality will be seeking to charge offences which are either Schedule 2 offences or those from which £5,000 worth of benefit has been obtained".

12 S 6(7).

13 S 10(6)(a)

14 S 10(6)(b).

If the court decides the defendant does not have a criminal lifestyle, then instead it should consider whether the defendant has benefitted from the particular criminal conduct, that is, from the offences he has been convicted of and any others taken into consideration.

The confiscation order is arrived at by finding the benefit (be it from the general or particular criminal conduct as applicable), valuing it, and then valuing the available amount. The recoverable amount in which the order will be made is the value of the benefit subject to a cap of the available amount (which can be varied if there is a later change in financial circumstances).

POCA provides a very loose causal test for "benefit". A person benefits from conduct "if he obtains property as a result of or in connection with the conduct".[15] In further wide drafting, property is obtained by a person "if he obtains an interest in it".[16]

A confiscation order may, legitimately and proportionately:[17] (1) require the defendant to pay the whole of a sum which he has obtained jointly with others; (2) require several defendants each to pay a sum which has been obtained, successively, by each of them; and / or (3) require the defendant to pay the whole of a sum which he has obtained by crime. This is justified on the basis that otherwise criminals would reduce or avoid liability by essentially asserting that "fings ain't wot they used t'be in the old crime game": the margins in the cocaine business are being squeezed, the prices of bribes are going up, and they got done over by their associates, etc etc. Benefit is therefore typically assessed as turnover rather than profit, and what a civil lawyer might consider to be "double counting" is not a bar to the making of an order.

Regulatory offences

Early suggestions that regulatory offences are in some special cosy POCA-free category have now been firmly scotched by a series of Court of Appeal decisions.

Firstly, in *R v Del Basso,*[18] the enterprising Mr Del Basso, a property developer who had also become chairman of Bishop's Stortford Football Club, saw a way of rescuing the club's financial fortunes by running a park and ride business from its grounds (being handily placed at the end of Stansted Airport's runway). Alas, planning permission was not forthcoming for this operation, but, unbowed, the business carried on despite a flurry of enforcement notices. Rejecting Mr Del Basso's appeal against a confiscation order in the sum of £760,000, Leveson LJ endorsed[19] the trial judge's remarks that:

> *Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers.*

Secondly, in *Sumal & Sons (Properties) Limited v Newham LBC*[20] the Court of Appeal rejected an argument that regulatory offences were in some sort of special category. It held that whether or not an offence was "regulatory" was not the issue. Rather it was "the terms of the statute or regulations creating the offence, read with the terms of [POCA] and set out in the context of the facts of the case". Here the defendant landlord had rented a property in an area where selective licensing applied without troubling to obtain a licence. The confiscation order was quashed on the basis that the statute expressly provided for rent to be payable notwithstanding a failure to licence, and gave powers to the tribunal to make a rent recovery order. The receipt of rent was not, therefore, obtained "as a result of or in connection with criminal conduct".

Then thirdly came the combined appeals of *R v McDowell* and *R v Singh*[21] in 2015. Each defendant was to all intents and purposes a legitimate businessman, conducting a lawful business, but in breach of regulatory provisions.

Mr McDowell was an arms dealer based in Henley. He had arranged for the sales of aircraft and ammunition from China to Ghana. The Trade in Goods (Control) Order 2003 makes it an offence to be knowingly concerned in the supply of such goods, but this is subject to an exception for those granted licences by the DTI, authorising what would otherwise be a prohibited act. Mr McDowell's company applied for and obtained a licence. Alas, it did so half way through the transaction in question, and the licence did not have retrospective effect. As the commission was paid in instalments, about half was received before a licence was in place. Mr McDowell was found guilty of offences contrary to the 2003 Order, and, in dealing with the prosecution's request for a confiscation order, the trial judge found the benefit to be a little over £2.5million, and, Mr McDowell having assets available of £292,499.60, he was ordered to pay that latter sum.

Mr Singh ran a catalytic converter recycling business in

15 S 76(4).

16 S 84(2)(b).

17 *R* v *May* [2008] A.C. 1028, *R* v *Waya* [2013] 1 A.C. 294 at [26].

18 [2010] EWCA Crim 119.

19 At [46].

20 [2012] EWCA Crim 1840.

21 [2015] EWCA Crim 173.

Leicester. At the time, the provisions of the Scrap Metal Dealers Act 1964 required him to register with the local authority as a scrap metal dealer. He omitted to do so, was prosecuted and pleaded guilty to an offence under the 1964 Act. Upon committal to the Crown Court he was fined £350 and made subject to a confiscation order of £176,218.11, being the amount he had available, and being less than the benefit assessed at £965,838.84.

In hearing the appeals together, the Court of Appeal said that *Del Basso* and *Sumal* demonstrated the importance of identifying the criminal conduct of the offender at the first stage of assessment. Pitchford LJ said: [22]

> *It is not sufficient to treat "regulatory" offences as creating a single category of offence to which POCA is uniformly applied. We respectfully agree with the conclusion of the court in Sumal that the question whether benefit has been obtained from criminal conduct must first depend upon an analysis of the terms of the statute that creates the offence and, by that means, upon an identification of the criminal conduct admitted or proved. It may be that, as in Sumal, the wider statutory context of the offence will assist to answer the critical question: what is the conduct made criminal by the statute—is it the activity itself or is it the failure to register, or obtain a licence for, the activity? In our judgement, there is a narrow but critical distinction to be made between an offence that prohibits and makes criminal the very activity admitted by the offender or proved against him (as in Del Basso) and an offence comprised in the failure to obtain a licence to carry out an activity otherwise lawful (as in Sumal).*

This "narrow but critical" distinction was then demonstrated by the Court's decision, which was to reject Mr McDowell's appeal but allow that of Mr Singh. The 2003 Order prohibited the transaction engaged in by Mr McDowell. Having a licence was an exception to the prohibition. As Mr McDowell did not have a licence for the first half of the transaction, his acts to that point were prohibited, and he obtained a benefit as a result. Mr Singh, on the other hand, carried on in business as a scrap metal dealer in contravention of a requirement to register with the local authority. His criminal conduct was not carrying on in business as a scrap metal dealer; it was failing to register as such. The benefit he had obtained from carrying on in business was not as a result of or in connection with his criminal conduct.

Applying McDowell and Singh to Licensing Act offences

Section 136(1)(a) of the Licensing Act 2003 provides that it is an offence to carry on a licensable activity on or from any premises otherwise than under or in accordance with an authorisation. It is apparent that this is a *McDowell* type offence rather than in the *Singh* category. The activity itself is criminal unless it is permitted by the authorisation. And, of course, if there is an authorisation but the activity is not conducted in accordance with it (so if a condition is breached), the activity is still criminal.

It is not difficult to see the far reaching-consequences of this. CCTV hard-drive broken down? Condition on the premises licence that recordings be kept for 28 days? Then some carefully chosen charges and a subsequent request for a confiscation order, and things could get very expensive. If nothing else, the potential consequences make it all the more important to limit conditions on a licence to those that are precise, proportionate and achievable.

Proportionality

The harshly robotic operation of POCA has been mitigated to an extent by the Supreme Court's decision in *R v Waya*. It held that POCA had to be read subject to the provisions of Article 1 of the First Protocol of the European Convention on Human Rights, and that it was the responsibility of the trial judge to refuse to make an order if and in so far as it would be disproportionate to do so. This ruling has since been expressly incorporated into POCA by an amendment to s 6(5).

The Supreme Court was at pains to suggest this was not discretion by the back door. There might be a confiscation order arrived at under POCA regime which the judge did not like, and would not make if he had discretion, but if it was not disproportionate, he would have to make it.

The difficulty of knowing both what the benefit is and whether an order was correspondingly disproportionate was demonstrated by the findings in *Waya,* a mortgage fraud case, where the trial judge, the Court of Appeal, the majority of the Supreme Court and the minority came up with four different assessments of benefit.

Of interest in licensing is the discussion in *Waya* as to the possibility that an order relating to turnover rather than profit might be held to be disproportionate in an "unlawful trading case". Lord Walker gave an example [23] of :

> *... the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. He ought no doubt to be punished and, depending on the harm done and the culpability demonstrated, maybe severely, but whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration.*

This passage came too late for Mr Del Basso (who had

22 At [34].

23 At [34].

only benefited from a quarter of the sum he was ordered to pay), but was seized upon by Mr McDowell, on the basis that he had incurred disbursements in Ghana as part of the deal to sell jets there. However, the evidence he gave of the expenses paid to his "business partner" in that country was sketchy, and the Court of Appeal said even if, in principle, it was prepared to countenance quantifying benefit in terms of profit rather than turnover, he had not discharged the burden of proof.

Abuse of process

Prior to the recognition that proportionality applied to the POCA regime, the absence of judicial discretion had lead to abuse of process applicants, often finding favour with Crown Court judges who otherwise have no choice but to make what they saw as unfair orders. *Waya* may result in fewer such applications, but it is still a possible line of defence for practitioners to consider.

Of encouragement to defendants is *R v Adaway (Glen),*[24] a trades description case where the authority's written policy was not to prosecute save in cases of fraud or deliberate statutory breaches. There was no evidence that Mr Adaway's conduct was either fraudulent or deliberate. The Court of Appeal quashed his conviction on the basis that the prosecution was oppressive and should have been stayed, and gave a strong warning to the institution of prosecutions for "strict liability trades descriptions offences" outwith a policy. There seems to be no reason why that principle should be confined to trades description offences.

Of discouragement to defendants is *Wandsworth LBC v Rashid* [25] where *Adaway* was somewhat dismissively confined to its facts, the Divisional Court stating that the underlying principle was that it was for prosecutors to decide when to prosecute, and that they were not required to go through each of the other possible courses of action in order to justify that decision. A similar view as to prosecutorial discretion was taken in *Sumal*, which also confirms that discretion is engaged both to prosecute and to seek a confiscation order.[26]

Written policy is commonplace in licensing, and indeed is required in the Licensing Act 2003 and Gambling Act 2005 regimes. Furthermore, by virtue of s 22 of the Legislative and Regulatory Reform Act 2006, any person exercising a regulatory function must have regard to the provisions of the Regulators' Code 2014, which provides for published service standards. What is less commonplace is policy that deals with the thorny question of the extent to which a desire to obtain a confiscation order (and indeed the desire to obtain a share of the proceeds of that confiscation order) should motivate the decision to prosecute (for without conviction there can be no confiscation order). It is a moot point whether the deliberate framing of charges to bring defendants within the criminal lifestyle provisions is an abuse.

Conclusion

Experience shows that if regulators are given powers, they tend to use them. So, when the amendments providing for summary reviews were made, it was intended that there would only be handful each year. There are scores.

No doubt there are plainly individuals who set out to breach licensing laws for profit, who would richly deserve to be deprived of their gains through a confiscation order. They may be individuals who have not been unduly troubled by lesser enforcement measures.

But the sheer breadth of the powers, the relentless mechanics of the act, the lack of judicial discretion, and the prospect of financial advantage for regulators brings with it a concern that POCA may feature in matters where - as with *Singh* - the breaches of the legislation were entirely inadvertent, easily rectifiable and did not result in any identifiable harm to anyone. While *Singh* fell on the right side of the "narrow but critical distinction" identified by Pitchford LJ, on the same facts today, under the provisions of the Scrap Metal Dealers Act 2003, he would be liable for an order, and, absent any abuse of process stay, confined to arguing about whether he should be surrendering turnover or profit on the basis of proportionality.

The courts have said that it is not for a defendant to complain that the prosecutor is taking a sledgehammer to crack a nut.[27] But for both the interests of justice to the individual, and the wider social and economic benefit that arises from business people running their without undue regulatory interference, it can only be hoped that POCA is restricted to cases where it is use is justified.

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24 [2004] EWCA Crim 281.

25 [2009] EWHC 1884. An appeal where only the local authority was represented.

26 See also *R v Shabir* [2008] EWCA Crim 1809.

27 *Sumal* at [21].

Changes to operating licence fees and the gaming machine review

The Gambling Commission's response to consultation on fee proposals and social responsibility measures with regard to gaming machines are assessed by **Nick Arron**

The Department for Culture, Media and Sport (DCMS) and the Gambling Commission held a joint consultation between July and September 2016 on potential changes to Commission fees to take effect from April 2017.

There were three main options considered and the key features of the option preferred by the DCMS and the Commission were:

- An average reduction of fees by 10% to reflect efficiencies achieved in the Commission's operating costs.
- The retention of a fee band structure, but with the introduction of bands based on gross gambling yield (GGY) instead of number of premises for non-remote betting, bingo and arcade operators, and in the case of non-remote 2005 Act casinos, instead of the size of premises.
- The introduction of additional fee bands to allow for more gradual fee increases and encourage the growth of small businesses.

The other main options for consideration were to make no changes to the current fee levels, or to reduce annual fees for each operator by a flat 10%.

In practice, the Commission predicted that the proposed changes would result in approximately 1,900 operators seeing a reduction in their fees, no change in fees for around 1,000 operators and fee increases for fewer than 100 operators.

The Commission published its response to the consultation on 21 December 2016. The paper outlines the changes to take effect from April 2017 and includes some amendments to the initial proposal.

One of the significant changes from the existing fee structure is the shift to GGY-based fee categories for non-remote betting, bingo and arcade operators.

GGY is calculated as A + B + C, where:

A = the total amount paid to the licensee by way of stakes in connection with activities authorised by the licence during the relevant period.

B = the total of any other amounts (exclusive of VAT) that will otherwise accrue to the licensee directly in connection with activities authorised by the licence during the relevant period (eg bingo participation fees).

C = the total amount that will be deducted by the licensee for the provision of prizes or winnings in connection with activities authorised by the licence during in the relevant period.

The Commission will be writing to operators prior to the implementation of the fee changes to confirm their GGY, which will be based on an operator's most recent annual regulatory return or, in the case of operators that submit returns quarterly, the previous four regulatory return submissions.

This aspect of the proposal was met with serious concerns from the non-remote bingo sector, with more than 35 bingo operators expected to receive significant increases in fees under the original proposal. In response, the Commission has amended the proposal to introduce an additional fee band for bingo and Adult Gaming Centre operators by separating the originally proposed band for operators with GGY of £750,000 to £2million into two bands of £750,000 to £1.25million and £1.25million to £2million. Those in the £750,000 to £2million band will pay an annual fee of £2,050, instead of the originally proposed £3,055.

In addition, the thresholds for the two highest bands in the bingo and AGC sectors have been reduced from the proposed GGY of £300million (band E3) and £500million (band E4) to £225million and £325million respectively. According to the Commission, this is "to ensure that costs are spread more proportionately among the largest operators".

Within its response, the Commission notes that although 35 bingo operators would receive significant fee increases

under the original proposal, around 150 bingo operators would receive fee reductions, with the smallest bingo operators at social clubs and holiday parks set to benefit from the GGY-based structure.

Furthermore, the Commission anticipates that for those bingo operators subject to an increase, their new annual fee as a percentage of their GGY will be between 0.08% and 0.13% for regional bingo operators and between 0.09% and 0.27% for those operators currently in fee category A.

The Commission is aiming to realign the proportionality of its cost recovery with these fee changes and is of the view that most of its costs are attributable to *thematic* work, citing examples such as investigation of new gambling products, advising Government on gaming machines and monitoring developments in anti-money laundering. These costs are in contrast to the costs of other work such as direct compliance and enforcement, which the Commission says are relatively fixed.

Justifying the move to GGY for non-remote operators, the Commission claims that the amount of thematic work generated by an operator is more appropriately linked to the volume of gambling an operator generates than it is to the number of licensed premises in an operator's estate. The Commission is also of the view that the volume of gambling generated by an operator is the "main driver of risk to the licensing objectives, and therefore of the Commission's regulatory effort".

The Commission also highlighted the need to realign costs with respect to GGY in the remote betting sector in particular. It considers the current fees to be too low to recover a fair proportion of its costs from large remote betting operators given the amount of thematic work driven by those operators. There will therefore be fee increases for a number of medium or large-sized remote betting operators, but there will be significant fee reductions for many smaller operators.

The Commission acknowledged the cost benefits inherent in the economies of scale involved in regulating larger operators and intends to reflect this by reducing the fee as a percentage of an operator's GGY as they move up the fee bands.

Another significant change to be brought in from the proposals is the introduction of new "host" operating licences. These are aimed at gambling software licensees that also provide facilities for gambling by making their games available directly to customers of remote casino, bingo and betting operators, but do not contract with those customers. From April 2017 these operators will no longer be required to hold a full operator's licence as well as the software licence; instead they will need a host licence.

The host licences will be subject to fees based on GGY, but the fees will be lower than those for the corresponding full licences. This reflects the Commission's view that hosts require less regulatory effort as they are not contracting directly with, or managing the accounts of players, but still play a role in supporting the licensing objectives by providing facilities for gambling.

For the purposes of calculating GGY, hosts should take account of any payments they receive from the B2C operators they contract with, and the B2C operators will take account of the amount they receive after making any agreed payments to the host.

Review of gaming machines and social responsibility measures

Since the last *Journal*, the DCMS issued a call for evidence on the review of gaming machines and social responsibility requirements across the gambling industry. The review was launched on 24 October 2016 and ended on 4 December 2016.

The wide ranging review asked for comments on:

- The maximum stake and prize limits for gaming machines across all premises licensed under the Gambling Act 2005.
- The number and location of permitted gaming machines across all licensed premises.
- Social responsibility measures implemented to protect players from gambling-related harm, which included whether there is evidence on the impact of gambling advertising and whether the right rules are in place to protect children and vulnerable people.

The Government stated that the review will include a closer look at the issue of category B2 gaming machines (more frequently known as fixed odds betting terminals (FOBTs)) and specific concerns about the harm they cause, to players and to communities.

The Government's published objective is to understand whether current allocations of gaming machines strike the right balance between socially responsible growth and the protection of consumers and the communities in which the machines are allocated.

Following this, the Government will consider the proposals, which are then likely to be the subject of a consultation process with stakeholders, to begin in the spring of 2017.

Many in the sector believe the current £100 stake permitted on B2 gaming machines will be reduced at the conclusion of the consultation.

New Chairman of the Gambling Commission

Last, but most certainly not least, the Gambling Commission has a new Chairman, Bill Moyes, who took over from Philip Graf in September 2016, just prior to the publication of the last *Journal.* The appointment by the Culture Secretary Karen Bradley, is for a term of five years.

Bill Moyes also serves as Chair of the General Dental Council, which regulates dental professionals in the UK and he has previously held positions as Director General and Executive Director of British Retail Consortium, and held non-executive directorships with the Legal Services Board, the Priory Hospital Group and the Office of Fair Trading.

Nick Arron
Solicitor, Poppleston Allen

David Inzani
Trainee solicitor, Poppleston Allen

Ivey v Genting Casinos UK Limited T/A Crockfords Club

One of the world's top poker players had his winnings of £7.7 million withheld when the casino decided he was cheating. Various subsequent court cases have debated what constitutes cheating and although the latest judgment has gone in favour of the casino, **Charles Streeten** suggests there is still such uncertainty that the case may yet reach the Supreme Court

Vladimir Kramnik, the chess grandmaster and world champion, once said that a player senses beauty when he creates situations "which contradict expectations and the rules" but succeeds in mastering the situation. In the context of gambling, however, this raises a difficult question: can you cheat at a game if you don't think you're breaking the rules?

It seems strange, on the face of it, to think so. Cheating carries a great deal of stigma; an individual's reputation and standing within the gambling community will be greatly diminished if they are found to be a cheat. Is that stigma the mark of dishonesty? Cheats are often said to be "caught", "exposed" or "rumbled", which implies that they are sufficiently aware of their wrongdoing to have gone to the trouble of concealing it. To many, dishonesty and cheating seem inextricably entwined. Nevertheless, the Court of Appeal's decision in *Ivey v Genting Casinos UK Limited T/A Crockfords Club* [2016] EWCA Civ 1093 clarifies that while dishonesty may be a sufficient condition for cheating to have taken place, it is not a necessary one.

R v Ghosh [1983] 1982 EWCA Crim 2 established a two-part test for dishonesty in a criminal context. The first limb of the test is objective and requires that the conduct alleged was dishonest according to the standards of ordinary and reasonable people. The second limb of the test is subjective and requires that the individual who carried out that conduct knew that (judged objectively) their conduct was dishonest. The question before the court in Ivey was whether cheating, as outlined by s 42 of the Gambling Act 2005, necessarily involved such dishonesty.

Section 42 of the act creates a criminal offence of cheating. Subsection 3 states:

> *Without prejudice to the generality of subsection (1) [which creates the offence of cheating] cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with (a) the process by which gambling is conducted, or (b) a real or virtual game, race or other event or process to which gambling relates.*

The effect of the act is not therefore to attempt to define cheating, merely to specify deception and interference as two examples of it. The natural and ordinary meaning of the word cheating remained a matter for the court.

In her leading judgment, Arden LJ concluded that cheating did not necessarily involve dishonesty for several reasons. Firstly, it would be strange for the act to mention deception as an example of cheating if dishonesty was already built into its meaning. Secondly, the act states that cheating can "consist of" interference, which does not imply any dishonesty. Interference, without more, can be cheating. Thirdly, it is possible to imagine cheating without dishonesty: using insider information to gamble, for example, while believing that it is fine to do so.

If insider trading is a form of non-dishonest cheating, then what do other forms look like? At this stage the facts in *Ivey* require consideration.

The effect of the court's decision has been that Phil Ivey, a world-renowned poker player and professional gambler, cannot recover £7.7million in casino winnings because he has been found to be a cheat, albeit an honest one.

Ivey is an advantage player. Advantage players are highly skilled professional gamblers who exploit innate characteristics of a game to gain an advantage over the house. Card counting in blackjack is a well-known example, whereby one watches the dealing of a blackjack deck for long enough to get a rough idea as to when high cards are likely to be dealt next.

The particular "advantage" which Ivey exploited is a technique known as "edge-sorting" in a game of punto banco – a variant of baccarat. Cards are dealt face down. Punters choose whether or not to bet on them. Cards are then turned face up. Edge-sorting is a strategy that relies on tiny manufacturing defects in the designs on the back of playing cards. Normally one cannot tell which way up a card is from the back because its design is perfectly symmetrical.

If the design is flawed, however, it is possible to discern certain card backs as facing up and certain ones as facing down thanks to an odd line in the design. Ivey noticed that Crockfords was using a badly designed deck of cards at the punto banco table. Sensing an opportunity, Ivey asked the dealer to rotate certain cards while they were face up before they were shuffled in the deck. The automatic shuffler kept these rotations intact and, after doing this for a long time, Ivey and his accomplice were eventually able to tell which card was likely to come out of the shuffler by looking at the top of the deck. It is important to note at this point that the rules of punto banco are silent on edge-sorting and there was no consensus as to whether it was a legitimate practice.

Donning the guise of a superstitious player, Ivey also asked for permission to play with the same deck and the same dealer throughout his game. Crockfords granted these requests, presumably being used to catering to the superstitions of high-rollers. The strategy gave Ivey a small edge on the house that he eventually converted into £7.7 million. As Susanna FitzGerald QC explained[1], at first instance Mitting J held that Ivey had cheated but had not done so dishonestly. Ivey believed that he had beaten the house in a legitimate way and therefore he did not believe that what he had done was dishonest according to the standards of ordinary and reasonable people. In his mind, his feat was a coup to be proud of. The High Court held that the absence of Ivey's dishonesty was not determinative of the question whether he had cheated, either by deception, interference, or some other way.

Ivey misled Crockfords into thinking that he was a superstitious player when he was not. Crockfords argued that this dissemblance amounted to deception, which the act gives as an example of cheating. The trial judge disagreed. He held that feigning superstition was "legitimate gamesmanship" and did not amount to deception "of such a kind as to vitiate the gaming contract", though the gamesmanship was highly material to cheating in this case. Arden LJ expressed no opinion on this finding but Tomlinson LJ disagreed with it, holding that Ivey did deceive Crockfords and thereby cheated.

Tomlinson LJ distinguished between playing up to a perception, which is gamesmanship, and creating one, which is deception. Ivey did the latter and used it to persuade the staff "to do what they otherwise would not have done" – let Ivey play with the same deck and the same dealer and rotate the cards at his request. Ivey's deception lay in misleading the staff as to his reason for wanting the cards turned. It was, in Tomlinson LJ's words, "an elaborate charade" that amounted to deception.

The distinction between the views of Tomlinson LJ and Mitting J turns on the breadth of meaning attributed to "gamesmanship". Undoubtedly, the concept of gamesmanship should be shielded from an overly expansive definition of cheating. Sportsmen often practise small deceptions on each other, pretending not to have played in a while after taking lessons every weekend for the last two months or intentionally making a mistake so as to suggest inexperience. It is accepted that such psychological manoeuvres are not cheating, even if they do not live up to the high-minded ideals encapsulated by the rather Victorian concept of "sportsmanship". "Cheat" is a stigmatic label that should not be applied to small dissemblances that frequently occur. On the other hand, Parliament may not have intended to give gamesmanship such a wide berth. The act specifically mentions deception as an example of cheating and it is clear that Ivey was aiming to deceive the casino by pretending to be superstitious. It is difficult to avoid the conclusion that deceptive gamesmanship is cheating under the act when the face of the act makes clear that deception is a sufficient condition for cheating.

The thrust of Arden LJ's judgment, however, concerns interference rather than deception. She held that Ivey cheated by interfering with the game. The wording of the act stresses that cheating may consist of interference. Arden LJ explains that "interference is a word describing a particular result and is neutral as to the mental state with which it is done". She gives three main reasons for her conclusion that Ivey interfered with the game and that this interference amounted to cheating. Firstly, Ivey "changed the nature of the game dramatically by altering the odds through edge-sorting". These odds "formed the basis on which [Crockfords] held themselves out as willing to play the game of punto banco". Secondly, Ivey physically interfered by causing the position of the cards to be changed from that which they would normally have been in. Thirdly, edge-sorting skill is not an accepted determinant of success in punto banco. Arden LJ thus distinguished Ivey from the Canadian case of *R v Zalis* [1995] OJ No. 20, in which the Court of Ontario held that card counting in blackjack was not cheating. Card counting is a matter of observing and remembering and does not require any physical interaction. Card counting also requires mathematical skill, which is an accepted determinant of success in blackjack. Punto banco, however, is "a game of pure chance" in which each player's moves are forced by the cards. Skill is not an appropriate path to victory in such a game.

The words "without prejudice to the generality" and "may"

1 Susanna FitzGerald QC, Greyhounds, high rollers and poker aces - never a dull moment in court when the stakes are high. (2016) 14 JoL, p4-8.

in subsection 3 demonstrate that interference is no more than an example of conduct that could constitute cheating under the act. It is the ordinary meaning of "cheat" that determines whether or not someone cheated, by interference or otherwise. As Arden LJ explains, the ordinary meaning of "cheat" is a matter of common sense and, put simply, her view was that Ivey went too far.

The problem with common sense is that it does not always clearly point to one conclusion, especially in novel circumstances such as edge-sorting in punto banco. It is not clear that altering the odds of an outcome should ipso facto change the nature of a game. It is, for example, perfectly possible legitimately to change the odds of a game of skill by practising. Similarly, card counting at blackjack also causes "the position of the cards to be changed from that which they would normally have been in". Card counters change their decisions whether to draw another card or stick with the hand they have on the basis of their card counting. Ivey did not physically interact with the game any more than a card counter. Ultimately, the finding that Ivey cheated is contingent upon the view that punto banco is a game of pure chance and is as Tomlinson LJ put it a "brain dead" game. The problem is that, as Arden LJ herself points out and as Lord Wilberforce held in *Seay v Eastwood* [1976] 1 WLR 1117 at 121, the forms of games of chance or skill and chance can be so varied that they defy neat classification.

It is against this background that Sharpe LJ writes her powerful dissenting judgment. She points out that given the definition of cheating in the civil and criminal contexts is the same, the nature of the offence created by s 42 requires consideration. She refers to the fact that s 42 does not create a strict liability offence and that it is therefore necessary to determine the *mens rea* for the offence of cheating. This, she says, must be dishonesty by virtue of the natural and ordinary meaning of the word and because she finds the suggestion that someone can be guilty of the criminal offence (in effect) of "honest cheating" at gambling to be a startling one which is not mandated by the language of the statute itself.

There is, of course, a principle of statutory construction militating against doubtful penalisation and as Sharpe LJ points out, if a nebulous definition is given to cheating "there may be real difficulties in deciding whether conduct (such as advantage play) can properly be regarded as cheating, and on which side of the line particular conduct should fall". As Sharpe LJ argues, "the scope of the liability should be clear" and dishonesty must be a requirement of cheating "for the criminal law in this area to be sufficiently certain and workable".

It seems commonsensical that players should at least have some means of knowing whether or not they are cheating. The accepted determinants of a game should not, by and large, be for the court to infer but for the rules of the game to state. Otherwise there is a risk of imposing a criminal sanction against players who do not use accepted determinants of success and adding rules that the game did not originally have. The rules of punto banco are express. They do not say anything about edge-sorting. Arden LJ's approach threatens to confuse gamesmanship with rule-breaking by deeming that players have cheated by not playing a game in the way that the court thinks it should properly be played and imposing a criminal sanction for doing so.

Adopting Arden LJ's formulation, it may become difficult for members of a jury (or judges) to agree on whether someone has cheated when their only guidance on the meaning of cheating is that it means "what it ordinarily means". Gut feeling is too vague and too easily influenced by contextual considerations, such as how much one likes or dislikes casinos, to be the basis for a criminal offence. It is possible, therefore, that in ruling there is no dishonesty requirement for cheating, the Court of Appeal has left the question whether or not Ivey cheated sufficiently open to merit consideration by the Supreme Court.

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with additional material provided by
Oliver Lawrence
Student

National Training Day
Stratford-upon-Avon - 21 June 2017

The aim of the training day is to provide a valuable learning and discussion opportunity for licensing practitioners to increase understanding and to promote discussion in relation to the subject areas and the impact of forthcoming changes and recent case law. Delegates can choose to stay the night before, joining us for a barbeque and boat trip - a great way to network.

The programme is online and includes the following speakers:
Daniel Davies - IoL Chairman
Philip Kolvin QC, Cornerstone Barristers & Chair of Nighttime Commission
Peter Marks, CEO Deltic Group & Toby Smith, CEO Novus Leisure
James Button, James Button & Co
Sarah Clover, King's Chambers
Susanna Fitzgerald QC, One Essex Court
Gary Grant, Francis Taylor Buildings
Home Office
Gambling Commission

The Institute of Licensing accredits this training for 5 hours CPD.

Training Fees

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Non-member - £305 + VAT

The non-member fee includes complimentary membership for 2017/18.

National Training Conference
Stratford-upon-Avon - 15-17 November

The Institute's signature event, the National Training Conference takes place annually in November comprising a three day residential training programme covering all of the major licensing related topics in addition to training on the niche areas of licensing. The days are themed to ensure there is always a training topic that will be of interest to delegates.

BOOK BEFORE 31 AUGUST 2017 TO RECIEVE EARLY BIRD BOOKING DISCOUNT

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Both training events are online and can be booked through the Events page of the website www.instituteoflicensing.org

Spinning a website

We are in a particularly benign season. The slaughter of pheasant and partridge has been put on hold until the autumn; Valentine's Day promoted the sending of cards and flowers to loved ones (but woe betide him who forgot); and legal directories invite us to sing each others' praises, for later publication in journals of inestimable importance.

All is not perfect, however. Rumours abound (though I am certain they are fake-news) of pacts between barristers and solicitors, mutually to wax lyrical about each other. A dangerous arrangement, should it exist. If even only a half-decent accolade were given by the barrister who received in exchange "he prepares his cases well", then he must surely have an action in breach of contract, if not defamation. There is also, if I may say so, something rather gross in the annual launch of these directories, when lawyers of all descriptions can be seen, like so many Gollums, clutching the precious book to their chests. But it is what happens next that I find truly unpalatable, and which spurs me to write this article: the most extravagant and exaggerated praise that can be culled from the various reviews is cut-and-pasted into the lawyers' self-congratulatory web sites – with their endless lists of testimonials and links to yet more of the same.

Theatre audiences learnt long ago to look askance at billboards that shout enthusiastic praise. Famously in the 60s a hostile review of *The Student Prince* ended with the sardonic sentence: "A lone voice from the gallery cried 'This is what we want'." Thereafter, and for the run of the show, a billboard outside the box-office quoted the *critic* as saying "This is What We Want!" More recently, the *Daily Telegraph* compared a stage adaptation of *The Shawshank Redemption* unfavourably with the original. The review described the film as "a superbly gripping, genuinely uplifting prison drama", but said the play was "inferior in almost every respect". The billboard outside Wyndhams Theatre lifted the praise for the film, and quoted it as though it applied to the play.

The EU stepped up to the plate as long ago as 2006, in an attempt to curb these and similarly reprehensible (albeit amusing) excesses in self-promotion. Directive 2006/114/EC militates against misleading and comparative marketing practises. It applies not just to theatre billboards, but *a fortiori* to lawyers' websites and newsflashes. But to judge from the tsunami of such material that has flooded my computer screen in the last twelve months, there is no great appetite for enforcement of the Directive against over-boastful lawyers.

Michael Wolkind QC, however, came under fire last month for the content of his website. The Bar Standards Board found that he had "behaved in a way likely to diminish the trust and confidence which the public placed in him or in the profession in that his website contained the statement that [he] was widely recognised as the UK's top murder barrister…". The phrases "widely recognised" and "widely regarded" are so imprecise as to be invulnerable to effective challenge. Perhaps for that reason their use is ever more widespread – to the point where some areas of legal expertise seem able to accommodate a significant number of practitioners, every one of whom is "widely regarded" as the leader. In an earlier criminal appeal (2015), Lord Thomas CJ commented that Mr Wolkind's website surprised him as to its "content and tone". Criticism of the website's *tone* is important: it is a stand-alone complaint, independent of whether the content is misleading or false.

I have a good deal of sympathy for Wolkind: he was introduced to self-promotion on the web by an old school friend who had computer expertise; it is easy to see how things could get out of control under the proselytising encouragement of an IT evangelist. Wolkind has accepted that he had been "too enthusiastic" and "praised [himself] too much". His soul-searching sets an example to any of us who have fallen into the temptation of lifting single sentences from *The Legal 500* and *Chambers Directory*, and piling them one upon another in a shameless gush of hyperbole. I plead guilty to having trespassed into that territory in my youth (or possibly later). I desisted after becoming increasingly uneasy about surrendering my self-respect to self-promotion.

It is not only the purple-prose website that brings our profession into disrepute, but also the selective newsflash, presenting an indifferent or even bad result as though it were a stellar victory, or heralding a wayward Magistrates' Court decision as though it were Supreme Court authority. To have resisted the revocation of a licence on a review brought by the police may look impressive in an internet blog - but only if certain details are held back, eg that the licence was made subject to commercially crippling conditions, or the premises were sold at a knock-down price the day after the hearing.

Lawyers can hardly be said to hold an enviable position in the public esteem. These ever-more unseemly websites sink us even lower; and while they may encourage some short-term trade, in time they will defeat their own purpose, being universally mistrusted and ignored.

Gerald Gouriet QC
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Winning the food fight

Competition in the eating-out sector has never been fiercer as consumers demand the novelty and top-quality offers that smaller operators seem better able to provide than their big chain rivals, reports **Paul Bolton**

In the ever-changing marketplace, food's role in bringing customers into your outlet cannot be underestimated. We've seen many wet-led outlets fall by the wayside in recent years, while food-led venues remain stable (and are in positive growth in the managed sector). Eating out is still an important part of our culture and we're queueing up for the novelty and experience of exciting new outlets. But with the competition so fierce and more choice than ever, how do operators attract and retain an increasingly fickle consumer? CGA Peach recently produced a report with Barclaycard called *Looking for Tomorrow's Growth* to answer some of these questions. It pulls together consumer and industry-side measures including Brand Track, Coffer Peach Business Tracker and the AlixPartners Market Growth Monitor.

The report focuses on managed operators and explains how bigger brands are now suffering from the huge growth in small managed groups, particularly operators between 25-99 sites. There's been a 30% increase in this sector, which includes brands such as Five Guys, Wahaca and Franco Manca. These companies are huge threats to the big groups such as Pizza Express or Nando's as they raise the bar in terms of consumer experience.

With new food options all over the place, a real problem for operators is loyalty. Only 28% of consumers are extremely likely to return to a brand and just 27% can be defined as brand advocates. To respond, operators must focus on the loyalist. Here, trust is crucial and the best way to drive trust is through consistency in food and experience. Being fresh, friendly, honest, reliable, clean and providing a quality offer all count for a lot with the average loyal consumer, as do generosity, authenticity and being fun, exciting and cool.

Millennials are anything but loyal, but they are important as they go out more often. One-third of millennials spend at least £100 a month on food out of home and one in four considers themselves to be among the first to visit new food and drink venues. This group still turns to friends, family, co-workers and the internet for recommendations, so social media allows operators to connect with them. But this makes it even more important for operators to be on top of their game; millennials are more likely than other generations to stay away from a brand because they have heard bad things about it. Therefore, it is vital to learn what motivates millennials to visit, what drives their loyalty and what turns them off.

There are plenty of reasons to be cheerful in an uncertain economy. Barclaycard found that spending growth is up 10% for pubs and 14% for restaurants in the year 2016 to June, compared to just 1% for supermarkets. The majority of consumers will still spend money on food away from home. Business leaders' optimism is returning after an initial post-Brexit slump. There's a low unemployment rate and income is increasing. But the issue for operators is that they've got to be good, as consumers are harder to impress than ever before.

Paul Bolton
Senior Client Manager, CGA Strategy

Download the report for free @ http://www.cgapeach.co.uk/downloads/lookingfortomorrowsgrowth

Book Review

Paterson's Licensing Acts 2017
Editor in Chief: Jeremy Phillips
General Editors: Simon Mehigan QC, Gerald Gouriet QC and the Hon Mr Justice Saunders
Lexis Nexis Butterworth, 2017
£373.75

Reviewed by **Ben Williams**, barrister, King's Chambers

Paterson's Licensing Acts is undoubtedly the leading textbook authority on licensing and this year it reaches a landmark 125th edition, complete with accompanying CD which contains the full text of the book and is fully searchable for quick and ready ease-of-use. It has reverted to a convenient single volume publication consolidating the core areas of licensing: alcohol, refreshment and entertainment (including sex establishments), taxis, the Security Industry Authority (SIA), street trading and gambling.

As a licensing reference book it is second to none. The introduction quickly brings the reader up to speed on common law and legislative developments since the previous edition. Thereafter, each chapter covers a practice area and takes you steadfastly through the legal framework before offering a unique and comprehensive commentary.

There remains no place for lesser known areas such as zoo licensing, guns and scrap metal, although that does not detract from what can only fairly be described as a comprehensive licensing textbook.

From a practitioner's point of view, the inclusion of a dedicated taxi licensing chapter complements *Button on Taxis* and provides the reader with a clear understanding as to recent issues that have beset licensing authorities including child sexual exploitation, licence fees and the Deregulation Act 2015.

Also welcome is the helpful chapter dedicated to door supervision and the SIA. This provides a clear explanation of the governing regime without getting bogged down in the huge quantity of materials which have previously been published. For that practical and operational understanding, the reader is helpfully guided to the SIA official website.

As always, the alcohol and gambling sections are exceptionally detailed and a must-read for any dedicated practitioner. Given the requirement among practitioners to be kept fully up-to-date with case law development, the mid-year CD update provided to all registered purchasers is most welcome.

There is a further section dedicated to the process of appeals and civil procedure, with particularly helpful guidance on the procedure for judicial review and stating a case as well as specific analysis of Magistrates' Court appeals. This practical guidance is invaluable to the reader, as it is often unclear which route of appeal is most appropriate in a particular case.

In my view, this edition is the most comprehensive and user-friendly to date. It is undoubtedly a sound investment and I, for one, would highly recommend it.

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