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Registered Address: Institute of Licensing
Ridgeway
Upper Milton
Wells
Somerset
BA5 3AH

Email: news@instituteoflicensing.org
Visit: www.instituteoflicensing.org

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Daniel Davies MIoL
Chairman

I write this as the Government has just announced that "Freedom Day" – aka the long-awaited day when all remaining Covid-related restrictions are lifted – will be delayed by four weeks owing to the increased prevalence of the Delta variant. This is another blow to an already ailing hospitality industry.

So 19 July is now the day earmarked for a return to normality. This will be welcomed by all those involved in the various regimes of licensing for premises and activities whose businesses have been closed and / or not operating to their full extent for much of the last 15 months. By the time you read this, you will know whether it has indeed come to pass. Meanwhile, the hospitality industry and practitioners of all ilks have continued to keep on keeping on as best they can. Remote hearings have continued to facilitate the determination of licence applications. From 12 April, pubs, bars and restaurants could open for outdoor service and then on 17 May for indoor service, subject to rules on serving seated customers only and tables of six etc. Crucially, there was no requirement for the infamous "table meal".

In an unfortunate irony which perhaps only these Isles could produce, the 12 April re-opening coincided with an almost vindictive spell of cold weather including snow in many parts of the country. That, despite this, the public huddled under coats, blankets and umbrellas to both partake of the food and drink on offer and support the businesses underlined the crucial position of hospitality to the life of the nation. I hope that National Licensing Week, which ran from 14-18 June, emphasised this too.

Charles Holland, who will be well-known to readers, has provided our lead article with our Editor Leo Charalambides for the Summer 2021 edition. The piece examines the extent and scope of the sexual entertainment sector.

Our other articles are equally edifying. For instance, Sarah Clover and Constanze Bell analyse one of the more curious impacts of the Covid pandemic on legal process, reaching back to Magna Carta. Leo Charalambides applauds the initiative of Westminster City Council in affording the Public Sector Equality Duty prominence in the City Council's recently published Statement of Licensing Policy.

In keeping with our broad church approach, we have a taxi licensing update from James Button and a gambling licensing update from Nick Aaron, and articles from regular contributors Julia Sawyer, Michael McDougall and Richard Brown. *Phillips' Case Digest* also makes its annual appearance.

We also see a welcome return of the Northern Ireland update, provided by Eoin Devlin and Orla Kennedy.

There are many reasons to look forward to the coming months. In a reminder of how far the Institute has come as an organisation, a number of landmark anniversaries are around the corner – for more details see the IoL news section. This is a reminder of the work of many members in developing and growing the Institute. A significant part of that is the work put in to stage the National Training Conference. Turn to page 32 for an exciting and very welcome update on this!

This has hopefully brought some positivity back, and we keep our fingers crossed that all goes to plan and 19 July is indeed "Freedom Day".

Institute of Licensing

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Leo Charalambides FIoL
Editor, Journal of Licensing

Despite New Labour's best efforts to get us eating and drinking in the Continental style, we remain stubbornly British in our drinking habits. The ever-expanding arsenal of police powers or multiple re-balancing exercises in favour of local communities appears to have done nothing to stem our thirst to get wasted at the pub. It seems ironic then that it is under Boris' Brexit Tories that, driven by the lash of the Covid-19 pandemic, *al fresco* eating and drinking has taken such a great leap forward.

The Business and Planning Act 2020 introduced a streamlined and cheaper route for businesses such as cafes, restaurants and bars to secure a pavement licence to place furniture on the highway to sell food and drink from and for its customers to use. The scheme is temporary, and is set to expire on the 30 September 2021.

The Secretary of State for Housing, Communities and Local Government, Robert Jenrick, has been a vocal advocate for pavement licencing, having written to local authority leaders on two occasions this year alone promoting *al fresco* dining. On 15 April he wrote, "It is in the public interest that local residents can socialise in a licensed and controlled environment outside, where Covid-19 risk are lower." He further stated, "I would encourage you to redouble your efforts to promote the use of these provisions with your local hospitality businesses. … We need your support to ensure the measures are known, made use of and not impeded unnecessarily – jobs and enterprise depend on it. I would urge you to show pragmatism and proportionality at all times, doing everything you can to help businesses prosper again."

A draft statutory instrument has now been laid before Parliament making provision to amend the duration of the temporary scheme to extend from 30 September 2021 to 30 September 2022 – the second wave of pavement licencing peaks expected over the summer months, football match days, bank holidays and the Christmas period.

There is discussion that the pavement licensing regime could / should be adapted and adopted on a permanent basis. Across the Channel, Parisian authorities have published guidance suggesting that cafes, bars and restaurants which set up short-term terraces to facilitate more outdoor drinking and dining could do so every summer and, in some cases, remain permanently. It is even suggested that existing designated parking spaces could be re-assigned either for the summer or on an annual basis so that a licensed premises could move its trade outdoors.

Here in the UK many local authorities are looking afresh at their use of the public realm and considering what powers they have to promote and encourage the use of outdoor spaces for leisure and hospitality. As a result, our familiar urban landscapes are being transformed by the impact (and response) to the Covid-19 pandemic.

It remains to be seen if *al fresco* dinning is finally coming home. For now at least the word on the street is: "Come what may / *Al fresco* dining / Here to stay ! / ?"

It is not just *al fresco* dining that has dramatically increased during the Covid-19 pandemic: so-called "dark kitchens" providing consolidated food preparation centres and delivery centres transporting food, drink and groceries have become a part of our "new normal" dining regime.

The City of Westminster has recognised that takeaway and delivery services (from restaurants, dark kitchens and delivery centres) are likely to continue, which can create additional impacts on the licensing objectives under the Licensing Act 2003. Westminster has issued a consultation to revise its statement of licensing policy vis-à-vis the delivery of alcohol and / or late-night refreshment to customers at home or in their workplace.

The suggestion is to introduce two new policies. The first will focus upon the licensing authority's approach to businesses wishing to provide a delivery service for alcohol and / or late-night refreshment – either operated by themselves or a third party – which is ancillary to the use of the premises, eg, as a restaurant. The second will be for businesses operating as delivery centres, where the primary use will be to provide a delivery service that includes alcohol and / or late-night refreshment to customers at home or their workplace.

It is clear that local authority licensing regimes covering street trading, tables and chairs, alcohol and entertainment will all need to continue to adapt and respond to our new normal.

No sex discussions please, we're British

Defining the extent and scope of the sexual entertainment sector and deciding how it should be regulated requires a grown-up conversation, suggest **Leo Charalambides** and **Charles Holland**

> *Most of the problems created by New York City's booming sex industry result from the city's reluctance to treat it as an industry. Everybody concerned wants to deal with it as a problem in constitutional law or moral philosophy. This high-toned approach leads to some very elegant arguments and some splendid emotional speeches, some of them entertaining, some edifying and all useless.*

So argued columnist Russell Baker in a 1976 *New York Times* article ("No Biz Like Sex Biz"[1]), where he called for the zoning of sex shops on the basis that, as an industry, the commercial sex sector posed many of the problems common to other "relatively messy industrial operations", and that it should be recognised and regulated as such.

The regulatory approach seeks to steer a course between the Scylla of allowing the commercial sex industry unfettered freedom to do what it wishes, whatever the local consequences, and the Charybdis of illegality, with the inevitable driving "underground" that prohibition results in. Regulation is the pragmatic response. It is alive to both the rights of those who wish to participate in the industry, and those who fear harm from it.

Such is the controversy attached to "commercial sex" that the very concept of its regulation is not without debate. Different jurisdictions have taken differing approaches as to what particular sectors to regulate. In England and Wales, government has long shied away from any regulatory intervention in certain sectors of the sex industry because of political fears of being perceived to approve of them. The regime is however becoming more mature: piecemeal legislation has been replaced by a national scheme, which is making increasing regulatory inroads into the regulation and safe provision of commercial sex.

This article considers the construction of "relevant entertainment" for the purposes of the existing sexual entertainment venue regime. Should it be narrowly constructed so as to only encompass lap-dancing and similar entertainment? Or is the definition wider? There is no decided authority on the point. The approach of different local authorities varies considerably. Research in 2012 by Professor Phil Hubbard and Dr Rachela Colosi has shown that local authorities have applied the definition of sexual entertainment venue to at least six gay night clubs, two burlesque / variety venues, one sex-on-premises encounter and a swinging (swingers) venue.[2] So, what is the approach that should be taken?

The Local Government (Miscellaneous Provisions) Act 1982

When introduced, the first national sex licensing scheme, contained in the Local Government (Miscellaneous Provisions) Act 1982 ("the 1982 Act"), dealt only with sex shops and sex cinemas.

Eminently regulatable sectors such as brothels or escort agencies did not get a look in, and this remains the case today.

A proposed amendment that the 1982 legislation should encompass "sex encounter premises" (such as the peep shows of Soho) was not adopted by Parliament. Such premises (now labelled "sex encounter establishments") only became licensable in London with the passage of an amending Act in 1986.

The emergence of lap-dancing

Exemptions firstly found within that legislation and then within the liberalising provisions of the Licensing Act 2003 rendered this further incursion completely academic: by 2005 any strip club could avoid the need for specific regulation *per se* by the expedient of holding a premises licence under the 2003 Act.

UK operators had by then cottoned onto the US concept of lap-dancing (where bespoke performances are provided to individual customers rather than to an audience as a whole)

1 https://www.nytimes.com/1976/12/14/archives/no-biz-like-sex-biz.html.

2 See: Phil Hubbard & Rachela Colosi, *Determining the Appropriateness of Sexual Entertainment Venues*, (2013) 5 JoL, page 4.

and the ease of providing such a venue under the existing regulatory scheme. It could be asserted that repurposing a nightclub as a lap-dancing club would enhance the promotion of the four statutory licensing objectives. There was little that licensing sub-committees could do to give effect to strongly-held local objections that such venues were inappropriate for the locations they repurposed into.

Sexual entertainment venues

The most effective reaction to this was the introduction of the Sexual Encounter Establishments (Licensing) Bill by Dr Roberta Blackman-Woods MP. The positive response to this private member's bill prompted the government to propose amendments to the 1982 Act in what became the Policing and Crime Act 2009. This made amendments to the 1982 Act which, where adopted by them, allow local authorities to regulate the new creature of a "sexual entertainment venue" (SEV).

SEV: statutory definition and the focus on "relevant entertainment"

An SEV is defined as follows (paragraph 2A of Schedule 3 of the 1982 Act):

> *(1) In this Schedule "sexual entertainment venue" means any premises at which relevant entertainment is provided before a live audience for the financial gain of the organiser or the entertainer.*
>
> *(2) In this paragraph "relevant entertainment" means –*
>
> *(a) any live performance; or*
> *(b) any live display of nudity;*
>
> *which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).*
> *…*
>
> *(12) For the purposes of this paragraph relevant entertainment is provided if, and only if, it is provided, or permitted to be provided, by or on behalf of the organiser.*
>
> *(13) For the purposes of this Schedule references to the use or any premises as a sexual entertainment venue are to be read as references to their use by the organiser.*
>
> *(14) In this paragraph –*
> *"audience" includes an audience of one;*
> *"display of nudity" means –*
>
> *(a) in the case of a woman, exposure of her nipples, pubic area, genitals or anus; and*
> *(b) in the case of a man, exposure of his pubic area, genitals or anus;*
>
> *"the organiser", in relation to the provision of relevant entertainment at premises, means any person who is responsible for the organisation or management of –*
>
> *(a) the relevant entertainment; or*
> *(b) the premises.*
>
> *"premises" includes any vessel, vehicle, or stall but does not include any private dwelling to which the public is not admitted;…*
>
> *and for the purposes of sub-paragraphs (1) and (2) it does not matter whether the financial gain arises directly or indirectly from the performance of nudity.*

The 2009 Act made corresponding amendments to the provisions of the Licensing Act 2003, removing "relevant entertainment" under the SEV scheme from "regulated entertainment" under the more general 2003 Act scheme. This avoids an overlap of regimes for the same entertainment.

Home Office Guidance issued at the time of the new legislation[3] made it clear that the focus was on lap-dancing clubs, although what mattered was whether the relevant entertainment fell within the definition of the Act, rather than the label applied to it:

> *2.3 While local authorities should judge each case on its own merits, we would expect that the definition of relevant entertainment would apply to the following forms of entertainment as they are commonly understood:*
>
> - *Lap dancing*
> - *Pole dancing*
> - *Table dancing*
> - *Strip shows*
> - *Peep shows*
> - *Live sex shows*
>
> *2.4 The above list is not exhaustive and, as the understanding of the exact nature of these descriptions may vary, should normally only be treated as indicative. Ultimately, decisions to licence premises as sexual entertainment venues shall depend on the content of the entertainment provide and not the name it is given.'*

3 Sexual Entertainment Venues, Guidance for England and Wales, (March, 2010).

How the net has been cast in practice: swingers venues and fetish clubs

Some local authorities have considered the definition of "relevant entertainment" to be sufficiently wide to go beyond lap-dancing as it is commonly understood.

In addition to a lap-dancing club run on conventional lines by Spearmint Rhino (although not without being the catalyst for challenges based on the Public Sector Equality Duty and other equalities concerns), Sheffield City Council's other licenced SEV venue is a swingers venue, La Chambre, which boasts a sauna, swimming pool, torture garden and playroom.

Swingers venues typically provide an environment and dedicated spaces for consenting adults to explore their sexuality with other like-minded consenting adults. They typically, but not exclusively, cater to heterosexual clienteles. Frequently licensed to supply alcohol, they provide a range of facilities including changing rooms, steam and / or sauna rooms and other wet areas, themed rooms and so-called private restrooms and play areas; some of these restrooms and play areas are private and closed from general view; others are open and accommodating. These venues often promote and encourage various degrees of nudity and / or facilitate fetish attire and practices. They are often described as "sex-on-sex" venues, meaning that consenting adults will enjoy sexual intimacy of varying degrees with varying degrees of privacy and varying degrees of visibility to other patrons. The majority of such venues will have codes or conduct or event rules which range from dress code to appropriate sexual etiquette. A night out, whether it's to the local pub, restaurant or sex club, ought to be regulated in the public interest to ensure a good night out for all.

Lambeth London Borough Council has required its gay fetish venues to be licensed as SEVs. This included the well-known Hoist (now closed due to the retirement of the operators) which hosted a Berlin-style dungeon and fetish events which made provision for sexual recreation by patrons on the premises.

This is in contrast to the neighbouring borough of Southwark, home to the long established gay nightclub XXL (now closed due to redevelopment of the site), which housed a large "dark room" for sex-on-sex activities. Southwark London Borough Council eschewed any formal acknowledgement of the dark room's existence, and made no provision for the licensing or any other regulation of this large public sex area.

Consistency is sometimes missing within individual local authority areas. Whilst - as has been noted - Lambeth LBC considered gay fetish venues to be licensable as SEVs, it did not consider that the same requirement extended to saunas, the operators of which had strongly opposed suggestions to the contrary.

Sauna venues are typically gay venues, providing a wet environment and dedicated space for consenting adult to explore their sexuality with other consenting adults. The basic format is to have changing facilities for patrons and guests to leave their clothes in a secure locker. Patrons are given a towel and invited to enjoy the wet facilities which include steam rooms, saunas, and hot tubs. A key *tell* as to the sexual nature of a sauna are adverts that explicitly give the number of persons that can be accommodated in a hot tub. Some saunas have rest- / playrooms. A site visit will usually reveal the provision of condoms and lubrication and a dry common room which typically streams pornographic videos on television monitors. Some saunas are licensed to supply alcohol.

The operation of saunas has been a matter of concern to regulators owing to deaths occurring on premises. Such is the concern of the Central Licensing Unit of the Metropolitan Police that they have convened and run a Safer Sauna Network for police, local authorities and operators (the work of this group has been delayed by the impact of the Covid-19 pandemic).

Across England and Wales the recognition of saunas as sexual entertainment venues varies from one local authority to another. Given the high incidences of fatalities there is a strong public interest in ensuring proper regulation and management at these venues.

A broad definition

The potentially broad scope of what might be an SEV is demonstrated by the Home Office guidance in respect of spontaneous entertainment, which considers that even this may be licensable (at [2.10]):

> *Where activities that would otherwise be considered to involve the provision of relevant entertainment take place, but are not provided for the financial gain of the organizer or entertainer, such as a spontaneous display of nudity or a lap dance by a customer or guest, the premises will not be considered a sexual entertainment venue by virtue of those circumstances alone. This is because the relevant entertainment must be provided for the financial gain of the organizer or entertainer.* ***However, it should be noted that an organizer may be considered to have provided the entertainment where he has permitted the activity to take place, whether expressly or impliedly.***

Some premises have promoted amateur strip nights whereby customers and guests would compete for a cash prize. Premises promote the contest via advertising and prizes, facilitating a stage area with accessories such as a pole and a master of ceremonies or host. One venue ran an amateur "porn idol" competition over several years. The provision of such facilities certainly expressly or impliedly encouraged live performances and / or live nudity, and is highly likely to be licensable as "relevant entertainment".

Whilst commentators agree that the definition is wide,[4] the question has yet to be directly addressed by the courts.

Guidance issued under s 182 of the Licensing Act 2003 has introduced the term "adult entertainment" in the context of the licensing objective of promoting the protection of children from harm:

> *2.23 … Moreover, conditions restricting the access of children to premises should be strongly considered in circumstance where … adult entertainment is provided …*
>
> *2.24 It is also possible that activities, such as adult entertainment, may take place at certain times on premises but not at other times. For example, premises may operate as a café bar during the day providing meals for families but also provide entertainment with a sexual content after 8.00pm. It is not possible to give an exhaustive list of what amounts to entertainment or services of an adult or sexual nature. Applicants, responsible authorities and licensing authorities will need to consider this point carefully. This would broadly include topless bar staff, striptease, lap-, table- or pole-dancing, performances involving feigned violence or horrific incidents, feigned or actual sexual acts or fetishism, or entertainment involving strong and offensive language.'*

"Adult entertainment" is neither a concept under the 2003 Act, nor a type of entertainment within the categories of regulated entertainment which s182 goes on to give guidance on in Chapter 16. The inference from both this and the statutory exclusion of SEV-qualifying "relevant entertainment" from the 2003 Act is the changes wrought in 2009 had the effect of shifting **all** relevant entertainment to the 1982 Act.

We now turn to look at the elements of the definition in detail.

"Live performance"

The definition of relevant entertainment is disjunctive and is either "any live performance" or "any live display of nudity". There is no definition of "live performance". Given the disjunctive definition, the live performance does not need to incorporate nudity. In the absence of any definition it cannot be assumed that this is restricted to a professional performer or professional entertainer. Paragraph 2A makes no reference to a performer or entertainer but throughout focuses on the "relevant entertainment" – it is the content of the entertainment and not the persons providing the live performance and / or nudity that is of primary importance. As has been noted, the Home Office SEV Guidance envisages circumstances where the live performance can arise from a customer or guest where the organiser has permitted the activity to take place, whether expressly or impliedly [2.10].

The performative element has to be widely constructed given that its impact – that is whether it can be reasonably assumed to be sexually stimulating to any member of the audience – can be visual but may also be verbal or by other means (s 2A(2)). Noteworthy too is that the intention of the person providing the live performance is not indicative; rather it is the impact on any member (but by no means all or even a majority, it can be merely one person) of the audience.

Fetishism provides an example of a performative presentation that frequently will not involve nudity, yet constitutes adult entertainment. This was the view taken in 2019 by Manchester City Council in respect of the 10th "Annual Rubber Men" gathering in Manchester's Gay Village. The City Council contacted all the venues that were advertised as taking part, warning them that consensual sexual activities involving rubber fetishists were not permitted on licensed premises.

By way of contrast with the other two types of sex establishment, a sex cinema must be used to a "significant degree" for the exhibition of moving pictures (para 3(1)), while a sex shop must be used to a "significant degree" (para 4(1)). There is no such quantitative bar in respect of SEV, for either live performance or live nudity. Rather the opposite obtains in that in assessing the impact of the relevant entertainment, the assessment is in respect of any member of the audience, which can be just one person. The bar is set very low.

Case law has confirmed that the discretionary element of decision-making (para 12(3)) confers a very wide discretion on whether or not a licence should be granted (*per* Collins J in *R* v. *Newcastle Upon Tyne City Council ex parte The Christian Institute* [2001] LGR 165 at [17] and in *R (on the application of Thompson)* v. *Oxford City Council* [2013] EWHC 1819 (Admin) at [50]. It seems that the components of "relevant

4 See: Philip Kolvin QC, *Sex Licensing* (2010) at [3.6]: that *it is plain that the legislators have tried to make the definition* [of relevant entertainment] *as wide as possible. … , there is very little by way of commercial sexual activity which would not be covered*, and *Manchester On Alcohol & Entertainment Licensing Law*, 4th Edn., 2017 at para 5.3.44 (page 232).

entertainment" are correspondingly widely defined to meet local requirements and circumstances.

"Live display of nudity"

The definition of relevant entertainment is disjunctive and is either "any live performance" or "any live display of nudity". The "display of nudity" in the case of a woman, means the exposure of her nipples, pubic area, genitals or her anus. In the case of a man, this means the exposure of his pubic area, genitals or anus. The definition is not restricted to a professional performer or professional entertainer. Paragraph 2A makes no reference to a performer or entertainer but throughout focuses on the "relevant entertainment" – it is the content of the entertainment and not the persons providing the live performance and / or nudity that is of primary importance. The definition is widely drafted to include "any" nudity. The Home Office SEV Guidance envisages circumstances where the live nudity can arise from a customer or guest where the organiser has permitted the activity to take place, whether expressly or impliedly (para 2.10).

Once more, the nudity element is to be widely constructed in that the impact – that is whether it can be reasonably assumed to be sexually stimulating to any member of the audience – can be visual but may also be verbal or by other means (2A(2)). Noteworthy too is that it is not the intention of the person providing the live nudity that is indicative but the impact on any member (but by no means all or even a majority) of the audience.

There was at one point a past fad of venues making provision for entirely naked discos and dance parties. Some local authorities deemed such venues – subject to the frequency exception – as SEVs, whereas others did not. A determinative factor between an SEV and a genuine social naturist event was whether provision was made to facilitate and encourage sex-on-sex activities between attending consenting adults (typically indicated by the promotional material, the provision of rest- and play-rooms and materials such as condoms and lubricant).

"Audience"

The live performance and / or live nudity must be provided for before a live audience which can be an audience of one who must be watching, listening or otherwise attending or engaged with the live performance and / or live nudity.

The *Concise Oxford Dictionary* defines the "audience" as a "whole group of listeners or spectators", suggesting more than one person.

The 1982 Act however extends the ordinary and natural definition of audience to include an audience of one. This clearly engages and encompasses those commonly understood forms of entertainment that are provided in the non-exhaustive list by the Home Office Guidance in para 2.3 where the relationship is usually, but not always, one-to-one.

Can an "audience" be transitory? *Keep Street Live Campaign Ltd v London Borough of Camden* [2014] EWHC 607 (Admin) concerned a challenge to the council's adoption of a policy for busking in its area under Part V of the London Local Authorities Act 2000. One ground was that the definition of 'busking' which was said to be too wide, providing insufficient clarity and certainty. Patterson J stated:

> *43.Street entertainment is a performance art. Given the nature of street entertainment it would be impossible to come up with an absolute definition. The art will, in any event, evolve so any definition needs to be sufficiently flexible to cover the development. There will be, as the Defendant conceded, occasional cases that fall on the wrong side of the line. However, absolute certainty is not the text.*
>
> *44. The Claimant's examples of whistling, singing or telling a joke to another person are not, in my judgement examples of entertainment in a street. A dictionary definition of entertainment is "a form of activity that holds the attention and interest of an audience, or gives pleasure and delight". The pleasure and delight when the entertainment is in a street, a place to which the public have access, is not just for the performer but to a wider audience. The audience may be passing along the street and be transient or it may gather to observe and enjoy but the objective of "entertainment in a street" is to provide entertainment by way of a performance to others. The use of the statutory phrase carries its ordinary meaning as commonly applied in everyday language.'*

If an audience "may be passing along the street and be transient" for the purposes of licensing busking under the London Local Authorities Act 2000, the position may well be similar for the purposes of the 1982 Act.

A common feature of SEVs, including lap-dancing and similar venues, allows for persons to move from area to area within a venue. Different areas may make provision for different types of live performance and / or live nudity; an audience member is thus often transitory. Indeed, in the context of lap-dancing venues it will be observed that the lap-dancing is often the culmination of a live performance which in fact starts with hostesses and dancers engaging and encouraging patrons to purchase the more "private" lap-

dance. The lap-dancers hosting and circulating in the bar area are arguably as performative as the lap-dance itself. Likewise the lap-dance is often times visible to the transient audience members: for example in those venues where the private booths are required to have semi-transparent division or in the London Borough of Camden, which does not allow any division or segregation of its dance areas.

Sex-on-sex venues often make arrangements for so-called mazes and play areas which encourage static and transient exhibitionism either of nudity or sexual performances. There may be nooks and equipment to promote exhibitionism and space for voyeurs to stop, gather and stare. It would seem that sex clubs and their operation confirm that *All the world's a stage, / And all the men and women merely players*!

Where live displays or nudity and / or live performance are presented (either by the persons or by the design and layout of the venue) so as to have the potential for a person to stop, stand and stare at their leisure, then that person so doing is an audience, howsoever transient.

"Organiser"

The definition of organiser and the role of the organiser in respect of the relevant entertainment is often overlooked. Thus at Sch 3 para 2A(12) it states that "relevant entertainment is only provided if, and only if, it is permitted to be provided, by or on behalf of the organiser". That suggests references to the use of any premises as a sexual entertainment venue are to be read as references to their use by the organiser (para 2A(13)). The organiser, in relation to the provision of relevant entertainment at premises, means any person who is responsible for the organisation or management of (a) the relevant entertainment or (b) the premises (para 2A(14)).

The Home Office SEV Guidance provides (para 2.9) that: "The 'organiser' must be someone who is in a position of authority over the provision of the relevant entertainment …". Again, at para 2.10 the SEV Guidance provides that "it should be noted that an organiser may be considered to have provided the entertainment where he has permitted the activity to take place, whether expressly or impliedly".

Financial gain

For the purposes of relevant entertainment, financial gain is ignored (2A(2)). In so far as financial gain is relevant it does not matter whether the financial gain arises directly or indirectly from the performance or display of nudity.

Assumption of sexual stimulation

The live performance and / or the live display of nudity *must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience*. This makes it clear that it is not the intention of the organiser or the person providing the performance or display of nudity that matters but rather the impact upon an audience. This is an objective assessment and does not need proof that a person was indeed stimulated, merely a reasonable assumption.

Neither the Act nor the SEV Guidance provides any guidance as to what may amount to sexual stimulation. It is for the local authority to judge each case on its merits (SEV Guidance, para 2.3). This assessment might be informed by the design of the premises, the layout, lighting, facilities, targeted clientele, advertising and promotional material. This is equally likely to be the case in respect of fetish venues, swingers clubs, and other sex-on-sex premises.[5]

The correct approach

An assessment and determination of "relevant entertainment" must inform the basis for any SEV determination. The discretionary "suitability" criteria for a refusal (Sch 3, para 12) are only properly engaged in the full context of the actual relevant entertainment, the suitability of the applicant, the suitability of the premises vis-à-vis the relevant entertainment, the suitability in relation to the use of premises in the vicinity and the character of the locality.

The exercise of assessing relevant entertainment is not unknown to the courts. The case of *Willowcell Ltd v Westminster City Council* (1996) 160 JP 101 concerned the holder of a public entertainment licence who claimed that a coin-operated peep show which displayed women gyrating and caressing themselves to music (greater sums of money granted displays of increasingly explicit content) was dancing and consequently did not require a sex encounter establishment licence. The Court of Appeal held that peep show performances did not constitute dancing and the premises should be licensed as a sex encounter establishment. Ward LJ held that this display was not to be *public dancing or music of other entertainment of the kind* because it involved lewd sexual displays; this was a matter of fact and degree involving a spectrum comprising at one end the *Folie Bergers* (where dance is enhanced by the titillation of some nudity) to the extreme of *lonely dark cubicles* for voyeuristic display. The middle of the spectrum is occupied by striptease where *the exotic is beginning to shade into the erotic*.

The assessment of relevant entertainment is not static, as Patterson J acknowledged in the context of street entertainment in *Keep Street Live Campaign* at [43], quoted above.

5 See: Phil Hubbard & Rachela Colosi, *Determining the Appropriateness of Sexual Entertainment Venues*, (2013) 5 JoL, page 4 (at page 5).

It would seem to us that relevant entertainment is not a static but is an equally evolving concept.

In 2019, the Scottish Government legislated to apply very similar provision in respect of SEVs in Scotland[6] – the definition of "relevant entertainment" is identical to the 1982 Act, as are the discretionary grounds for refusal. The Scottish regime distinguishes itself by adding SEV licensing objectives, which include the objective of reducing violence against women[7] and a requirement to have regard to Guidance[8] issued by the Scottish Government. Paragraph 20 of the Scottish Guidance includes a definition of violence against women and girls which includes *commercial sexual exploitation, including prostitution, lap dancing, stripping, pornography and human trafficking*. The Scottish Guidance recognises that there is a conflict between this objective and the licensing of SEVs (para 21).

The resolution of this conflict requires a closer engagement with the extent and scope of relevant entertainment and *perhaps* whether the proposed entertainment celebrates sex and sexuality and promotes equality or continues to objectify and exploit sex and sexuality.[9] It is noteworthy, for instance, that the feminist groups that have headed a dedicated and focused campaign in respect of Spearmint Rhino in Sheffield do not object to La Chambre, which seems to facilitate relevant entertainment between consenting adults on an equal basis.

It will always be a matter of determining each case on its own merits and characteristics.

Such considerations also engage the Public Sector Equality Duty (s 149, Equality Act 2010) but such matters have yet to be fully tested and have not received full judicial consideration – all the Sheffield litigation was settled between the parties.

PSED and wider equality considerations are equally engaged by our attitudes to sex clubs. Typically, they are tolerated and encouraged to operate under or outside the scope of local authority recognition and regulation. While many local authorities will privately acknowledge the operation of sex clubs in their areas they nonetheless operate a policy of *don't ask don't tell*! This is of great disservice and great disrespect to consenting adults with alternative sexual lifestyles. Concerns rooted in outdated modes of morality and fears of public opinion conspire to limit and silence mature debate, discussion and acceptance of these venues.

Conclusion

Many local authorities in terms of policy and practice typically seek to regulate lap dancing and similar establishments but no wider. Increasingly, regulators are confronted by venues which have operated – some for considerable periods of time – below the level of scrutiny as attitudes to sex and sexuality have altered. For example, the London Borough of Tower Hamlets has a policy addressed to lap-dancing and similar venues yet also hosts Boudoir (a heterosexual swingers venue) and Backstreet (a gay sex club that was recently recognised as an asset of community value). Neither of these venues is licensed as an SEV and both operate entirely without relevant regulation.

Sex-positive venues that promote sexual activities between consenting adults are increasingly visible (for example, Killing Kittens, Torture Gardens and Klub Verboten). It is becoming apparent that such venues cater for marginalised communities of self-regulating consenting adults which promote diversity and social inclusion by their increased visibility. They have a social value that is greater than the events that they promote and organise.

We are long overdue an adult and mature conversation about the real extent and scope of sexual entertainment in our local authority areas. In these recent times of the Covid-19 pandemic our failure to grapple with the definition of a sexual entertainment venues has put people and communities at risk where non-lap-dancing sex clubs have continued to operate in contravention of the requirement to close SEVs with the consequence of associated public health risks.

It seems to us that a mature and broad application of the definition of the relevant entertainment at sexual entertainment venues is legally sound and in the wider public interest.

Leo Charalambides
Barrister, Francis Taylor Building & Kings Chambers

Charles Holland
Barrister, Francis Taylor Building & Trinity Chambers

6 See s 76 of the Air Weapons and Licensing (Scotland) Act 2015 amending the Civic Government (Scotland) Act 1982.

7 Civic Government (Scotland) Act 1982, s 45C(3)(a)(iv).

8 Civic Government (Scotland) Act 1982, s 45B(7): Scottish Government, *Air Weapons and Licensing (Scotland) Act 2015: Guidance on the Provision for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres*, March 2019.

9 See Michale McDougall and Leo Charalambides, *Scottish Law Update: Sexual entertainment venues present conundrums to councils*, (2019) 25 JoL, pp 46 – 49, at 48.

Waiting or standing for hire – it makes all the difference

Private hire vehicles and hackney carriages that work far away from the district in which they are licensed continue to cause problems for local authorities and taxi drivers. But despite conflicting interpretations, the law is actually very clear, as **James Button** explains

There have been reports that North Yorkshire Police is to take action against Uber drivers in the City of York, where Uber does not hold an operator's licence.

One report, on the *YorkMix* website, states:

North Yorkshire Police looks set to take action to remove out of town Uber drivers who attempt to operate illegally in York.

Wendy Loveday, the chair of the Private Hire Association, has told YorkMix she has had meetings with a senior officer.

Police now agree with her that as Uber doesn't hold a local licence for York it is breaking the Local Government (Miscellaneous Provisions) Act 1976 (Section 46). This says: "No person shall in a controlled district operate any vehicle as a private hire vehicle without having a current licence under section 55 of this Act."

Wendy Loveday says that North Yorkshire Police took legal advice after she pointed this out. She says it means that Uber drivers from out of town should not *be picking up fares in the city because they do not hold a proper licence to work here.*

Uber was stripped of its licence in December 2017 when the City of York council gambling, licensing and regulatory committee voted by seven to three, with two abstentions, not to renewed it.

York was the first authority to flat out deny Uber clearance to operate on its streets.

YorkMix *understands that officers on the streets will be briefed to engage with any Uber (or other out of town operators) drivers that they suspect to be breaching Section 46 of the 1976 legislation. They will advise them of this law and ask them to leave York immediately.*

Wendy Loveday says it means that they can legally bring a customer into York, from say Leeds, but once here they have to turn round and go back to the area where they hold a licence to operate. "They were found to be not fit and proper to operate in York. I just can't stand by while a massive company like Uber behave in the way they are doing by just ignoring all of the rules. These are rules that every other driver in York has to follow."

A North Yorkshire Police spokesman said: "North Yorkshire Police is working with City of York Council on this matter, as taxi licensing and licensing enforcement sits with local authorities rather than the police. As part of our work to support City of York Council and our local communities, our officers will engage with Uber drivers if they are seen in the city. Any breaches will then be dealt with appropriately."

Is this a correct interpretation of the law? Should other police forces be taking similar action? Is action available to local authorities in similar circumstances?

The Local Government (Miscellaneous Provisions) Act 1976 s 46(1)(d) states:

No person shall in a controlled district operate any vehicle as a private hire vehicle without having a current licence under s 55 of this Act.

A licence under s 55 is a private hire operator's licence. It is well established that a private hire journey / hiring carrying passengers can only be undertaken by a licensed private hired vehicle, driven by a licensed private hire driver where the booking has been made with a licensed private hire operator in advance of that hiring (the journey with the passenger) commencing. This is made clear by s 56 (2) which states:

(2) Every person to whom a licence in force under section 55 of this Act has been granted by a district council shall keep a record in such form as the council may, by

> *condition attached to the grant of the licence, prescribe and shall enter therein, before the commencement of each journey [emphasis added], such particulars of every booking of a private hire vehicle invited or accepted by him, whether by accepting the same from the hirer or by undertaking it at the request of another operator, as the district council may by condition prescribe and shall produce such record on request to any authorised officer of the council or to any constable for inspection.*

Those three licences (private hire operator, private hire vehicle and private hire driver) must have been issued by the same authority. That requirement was first made clear in *Dittah v Birmingham City Council* [1993] RTR 356 and confirmed in both *Shanks v North Tyneside Borough Council* [2001] L.L.R. 706 and *Milton Keynes Council v Skyline Taxis and Private Hire Ltd* [2018] L.L.R. 73.

Case law has clarified that a private hire booking can be accepted by an operator for a hiring / journey carrying passengers which commences anywhere, travels anywhere and terminates anywhere. There is no requirement for the hiring / journey to commence in, pass through or finish in the district in which those licences were issued – see *Adur District Council v Fry* [1997] RTR 257.

In addition, the decision of the High Court in *Windsor and Maidenhead Royal Borough Council v Khan* [1994] RTR 87 allows a private hire operator to advertise their services anywhere, again not simply within the district in which the licence was issued.

It is also vital to recognise that a private hire vehicle and driver is entitled to park lawfully to await the next booking provided by the operator. That does not have to be within the district in which the licences were issued, and a parked private hire vehicle does not commit the offence of standing for hire. This was confirmed by the High Court in *Reading BC v Ali* [2019] RTR 31.

Where does that leave the situation alleged to be taking place in York? Uber does not hold a private hire operator's licence issued by York City Council. It does hold private hire operator's licences issued by other authorities nearby (including Leeds). Provided the booking is made by Uber through its operator's licence, and is then fulfilled by a private hire vehicle and private hire driver licensed by the same authority that licensed Uber as an operator, that journey will be lawful.

It is also important to recognise that any private hire operator (in this case Uber) can subcontract a booking to another private hire operator licensed anywhere in England, Wales, Greater London or Scotland using the provisions contained in ss 55A and 55B of the 1976 Act. That would enable the booking made via Uber licensed in Leeds to be subcontracted to an Uber-licensed driver in Manchester and enable a Manchester private hire vehicle driven by Manchester private hire driver to undertake a hiring / journey in York.

One of the big questions that has been asked in relation to Uber is whether it is genuinely acting as an operator, or whether it is simply facilitating a booking to be made directly with the driver. If it is the former, Uber is acting lawfully; if it is the latter each driver will be acting illegally.[1]

Licensing authorities that have investigated the way in which the Uber system works have been satisfied that the booking is made via Uber as an operator and is then passed, via the app, to the driver. Those authorities include Manchester, Leeds, Birmingham, and of course Transport for London. Provided that is the case, then it is not illegal for a Leeds-licensed driver working for Uber to be in the district of York.

However, the judgment of the Supreme Court in *Uber BV and others v Aslam and others* [2021] UKSC 5 reveals that Uber argued that it was merely a booking agent and that the contract was made between the passenger and the driver. This argument was rejected by the Supreme Court in its unanimous judgment and that element is contained in para 46 to 49. It is necessary to consider that in its entirety. The judgment of the Supreme Court was given by Lord Leggatt:

> *46. It is an important feature of the context in which, as the employment tribunal found, Uber London recruits and communicates on a day to day basis with drivers that, as mentioned earlier: (1) it is unlawful for anyone in London to accept a private hire booking unless that person is the holder of a private hire vehicle operator's licence for London; and (2) the only natural or legal person involved in the acceptance of bookings and provision of private hire vehicles booked through the Uber app which holds such a licence is Uber London. It is reasonable to assume, at least unless the contrary is demonstrated, that the parties intended to comply with the law in the way they dealt with each other.*
>
> *47. Uber maintains that the acceptance of private hire bookings by a licensed London PHV operator acting as agent for drivers would comply with the regulatory regime. I am not convinced by this.*

1 See "The Wandering Driver" in Philip Kolvin's article *Beyond regulation: controlling app-based private hire operators* (2020) 28 JoL 4, p 6.

References in the Private Hire Vehicles (London) Act 1998 to «acceptance» of a private hire booking are reasonably understood to connote acceptance (personally and not merely for someone else) of a contractual obligation to carry out the booking and provide a vehicle for that purpose. This is implicit, for example, in section 4(2) of the Act quoted at para 31 above. It would in principle be possible for Uber London both to accept such an obligation itself and also to contract on behalf of the driver of the vehicle. However, if this were the arrangement made, it would seem hard to avoid the conclusion that the driver, as well as Uber London, would be a person who accepts the booking by undertaking a contractual obligation owed directly to the passenger to carry it out. If so, the driver would be in contravention of section 2(1) of the Private Hire Vehicles (London) Act 1998 by accepting a private hire booking without holding a private hire vehicle operator›s licence for London. This suggests that the only contractual arrangement compatible with the licensing regime is one whereby Uber London as the licensed operator accepts private hire bookings as a principal (only) and, to fulfil its obligation to the passenger, enters into a contract with a transportation provider (be that an individual driver or a firm which in turn provides a driver) who agrees to carry out the booking for Uber London.

48. Counsel for Uber sought to resist this interpretation of the legislation on the basis that the legislation was enacted in the context of "a long-established industry practice" under which PHV operators may merely act as agents for drivers who contract directly with passengers. Uber has adduced no evidence, however, of any such established practice which the Private Hire Vehicles (London) Act 1998 may be taken to have been intended to preserve. I will consider later two cases involving minicab firms which were said by counsel for Uber to show that the courts have endorsed such an agency model. But it is sufficient to say now that in neither case was any consideration given to whether such an arrangement would comply with the licensing regime. The same is true of cases also relied on by Uber (along with a notice published by HMRC in 2002) which are concerned with how VAT applies to the supply of private hire vehicles. That material in my view has no bearing on the issues raised in these proceedings.

49. It is unnecessary, however, to express any concluded view on whether an agency model of operation would be compatible with the PHV licensing regime because there appears to be no factual basis for Uber's contention that Uber London acts as an agent for drivers when accepting private hire bookings.

This case concerned the London legislation, and for comparison with the 1976 Act, s 2(1) of the Private Hire Vehicles (London) Act 1998 states:

> *No person shall in London make provision for the invitation or acceptance of, or accept, private hire bookings unless he is the holder of a private hire operator's licence for London (in this Act referred to as a "London PHV operator's licence").*

This is the equivalent of s 46(1)(d) of the 1976 Act.

Section 4(2) of the 1998 Act states:

> *(2) A London PHV operator shall secure that any vehicle which is provided by him for carrying out a private hire booking accepted by him in London is—*
>
> *(a) a vehicle for which a London PHV licence is in force driven by a person holding a London PHV driver's licence; or*
> *(b) a London cab driven by a person holding a London cab driver's licence.*

This is the equivalent of s 46(1)(d) of the 1976 Act.

This supports the view accepted by local authorities that the Uber booking system meets the requirements of the 1976 Act, and the continued existence of Uber's London private hire operators' licence under the 1998 Act (following refusal to renew and then an agreed position on appeal).

Assuming that interpretation is correct, then in the light of the case law currently applicable, it is difficult to see how a local authority or the police can turn away or order private hire vehicles licensed by other authorities to leave if they are simply waiting in an area in which they are not licensed for pre-bookings to be communicated to the driver.

However, it must be emphasised that if the evidence shows that those vehicles are standing for hire, then an offence is committed under s 45 Town Police Clauses Act 1847, which states:

> *45.* ***Penalty for plying for hire without a licence***
> *If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage, or during the time that such licence is suspended as hereinafter provided, or if any*

person be found driving, standing, or plying for hire with any carriage within the prescribed distance for which such licence as aforesaid has not been previously obtained, or without having the number of such carriage corresponding with the number of the licence openly displayed on such carriage, every such person so offending shall for every such offence be liable to a penalty not exceeding level 4 on the standard scale.

It is important to appreciate that it is not simply the driver that commits an offence in the circumstances; the proprietor of the vehicle is committing an offence too. In situations where the proprietor is a different person from the driver, or is a limited company, local authorities would be well advised to consider prosecution of that proprietor as well as the driver. On conviction I would also expect the "home" authority which licensed the offender to take action against the driver and vehicle licences, but unfortunately that is not always the case.

There is also a widespread belief that it is the authority that licensed the vehicle and driver that has to prosecute under s 45. That is simply not true. The offence is committed within the district where the activity took place. As neither the driver nor the vehicle has a licence to stand for hire within that district (hackney carriage licences), the authority within whose geographic area the offence was committed can prosecute under s 45.

There is no doubt that both private hire vehicles and hackney carriages that are working a long way away from the district in which they are licensed are causing a significant problem. There are difficulties over enforcement of vehicle and driver standards (although as noted above clear criminal activity can be dealt with), and the local licensees feel that they are suffering from what they regard as unfair competition.

The position that we have arrived at is a result of several senior court cases which, when read together, lead to the conclusions drawn above. It may be that a future case will clarify the position comprehensively.

Of course, that would be no substitute for new legislation governing hackney carriages and private hire vehicles. There have been calls for new legislation for well over 30 years, but successive governments have failed to grasp the taxi law nettle. The Law Commission investigation (which started a decade ago) proved a false dawn; the Task and Finish Group report fell largely on deaf ears. The Government's parsimonious commitment to change (a national database, national enforcement powers and national minimum standards) is dependent on Parliamentary time with apparently no political commitment to find that time. The omens are not good.

That leaves local authorities with the task of undertaking enforcement action where that is available and otherwise soldiering on with legislation better suited to horses and carriages than pollution-free high-tech vehicles managed by increasingly sophisticated technological systems.

In conclusion, in my view, the approach apparently being proposed by North Yorkshire Constabulary in York is incorrect, and Uber drivers can still be used by the public in York.

James Button
Principal, James Button & Co Solicitors

Covid and the curious case of the organised pseudolegal commercial argument litigants

Pseudolaw is increasingly being invoked by people who feel conventional laws – including Covid restrictions – do not apply to them. Although easy to dismiss as a bizarre phenomenon, pseudolaw litigants are regularly wasting court time and **Sarah Clover** and **Constanze Bell** caution that lawyers and their clients should not be complacent about their potential impact

As lockdown in various forms has persisted, the pandemic has had a severe impact on the licensed trade and related sectors. Stories of businesses which have sought to avoid coronavirus restrictions and remain open and trading have appeared in the news. Many of those business owners have sought to rely on Magna Carta,[1] claiming that they do not consent to the "unjust" coronavirus regulations and that consequently they are without legal effect.

Where does this pseudolaw phenomenon come from?

In the case of in *Meads v Meads 2012 ABQB 571*, the Associate Chief Justice in the Court of Queen's Bench of Alberta (AC J Rooke) analysed a category of vexatious litigant he collectively labelled as Organized Pseudolegal Commercial Argument litigants ("OPCA litigants").

AC J Rooke observed that OPCA litigants do not express any stereotypical beliefs other than a general rejection of court and state authority; nor do they fall into any common social or professional association. Their arguments and claims emerge in all kinds of legal proceedings in Canada and around the world.

AC J Rooke noted OPCA litigants are distinguishable as a group by virtue of the following six commonalities:

- A characteristic set of strategies (somewhat different by group) that they employ.
- Specific but irrelevant formalities and language which they appear to believe are (or portray as) significant.
- The sources, typically commercial, from which their ideas and materials originate.
- A belief that ordinary persons have been unfairly cheated or deceived as to their rights and that this cheating justifies breaking "the system" and retaliating against "their oppressors".
- A belief in immunity from obligations.
- Holding highly conspiratorial perspectives, but there is no consistency in who is the alleged hidden hand.

AC J Rooke commented: "This category of litigant shares one other critical characteristic: they will only honour state, regulatory, contract, family, fiduciary, equitable, and criminal obligations if they feel like it. And typically, they don't".

The vast majority of encounters between the courts and OPCA litigants are not reported. OPCA strategies are disruptive, inflict unnecessary expenses on other parties, and are ultimately harmful to the persons who appear in court and attempt to rely on them. OPCA litigants are invariably unsuccessful and their positions dismissed, typically without written reasons. Nevertheless, their litigation abuse continues.

A community of individuals, whom the judge referred to as "gurus", claim that their techniques provide easy rewards; for example, one does not have to pay tax or pay attention to traffic laws; or you can make yourself independent of state obligation and unilaterally force and enforce demands on other persons, institutions and the state.

Gurus make pseudo-legal proclamations that they know, and can provide on payment, secret principles and laws, hidden from the public, but binding on the state, courts, and individuals. Any lack of legal success by the OPCA litigant is, of course, portrayed as a consequence of the customer's failure to properly understand and apply the guru's special

1 See BBC News article, *Covid lockdown: Why Magna Carta won't exempt you from the rules*, 6 March 2021.

knowledge.

The OPCA community includes a number of subsets that the learned judge called "movements". Each movement includes persons who have adopted similar alternative histories and hold generally compatible beliefs. Movements include de-taxers, freemen-on-the-land[2] and sovereign men or sovereign citizens.[3]

OPCA documents frequently include atypical language and terminology that can indicate OPCA affiliation. Documents frequently refer to the litigant as having a particular status or characteristic, including:

- A flesh and blood man (this has many variations).[4]
- A freeman-on-the-land or a freeman.
- A free will full liability person.
- A sovereign man, sovereign citizen or sovran.

That the litigant:

- Is a person or a natural person, but not a corporation.
- Is not a person.
- Was created by God.
- Is only subject to a category of law, typically natural law, common law, or God's Law.
- Is an ambassador.
- Is a member of a fictitious nation-state or aboriginal group.
- Represents or is an agent or secured party for a similarly named individual or thing.
- Is a private neutral non-belligerent.

Most of these items are strong indicia of OPCA litigants.

Identification that a country or state is a corporation is a clear indication of OPCA affiliation. A litigant with documents of this kind will typically be using the "everything is a contract" OPCA scheme.

Many OPCA documents mention certain obsolete, foreign or irrelevant legislation, including:

- Magna Carta.
- Versions of legislation other than the current legislation.
- Bills of Rights.
- The 1931 Statute of Westminster.
- Reliance on *Black's Law Dictionary*, particularly an obsolete version of it.

OPCA litigants also often stress the relevance of and quote from the Bible, usually the King James version.

OPCA litigants frequently deny that a court has jurisdiction or authority over them. That emerges in a number of ways:

- A direct denial that the court has authority over the litigant.
- Identification of some physical elements of the courtroom or court dress that indicates the court is a military or admiralty court.
- A statement or declaration that:
  i. the litigant is only subject to a specific category of law, most often expressed as "natural law" or "the common law";
  ii. the court is restricted to certain domains of law, usually legislation, military law, and/or admiralty law;
  iii. the court is only a "de facto" court or the judge is only a "de facto" judge;
  iv. a declaration that the litigant only takes a certain step "without prejudice" or "without consent to restriction" to the litigant's rights;
  v. a declaration that the litigant's presence or participation is "under duress".

2 See, by way of example, the case of Paul Brittain, who claimed that he did not consent to a ruling by Stockton Council's planning department that he should remove a balcony from his home, on the grounds that he was a so-called freeman-on-the-land and did not recognise legal entities such as courts and local councils. *Ingleby 'man on the land' who didn't consent to council's authority hit with court bill'. Teesside Gazette Live*, 24 January 2021.

3 Sovereign citizen theory, which maintains that the individual is independent of the state, is seen as a domestic terrorism threat by the FBI in the USA. See: *Domestic Terrorism, The Sovereign Citizen Movement,* FBI website, 13 April 2010. URL: https://archives.fbi.gov/archives/news/stories/2010/april/sovereigncitizens_041310/domestic-terrorism-the-sovereign-citizen-movement.

4 A man in Fife told the Kirkcaldy Sheriff Court in February that he did not recognise its authority, saying - according to Dundee's *Courier* newspaper: "I am a living man, the blood flows, the flesh moves - I wish for remedy". *Magna Carta defence fails for Fife man convicted of driving offences. The Courier*, 4 February 2021.

A common OPCA litigant argument is that some form of declaration may defeat state and court authority. This concept is closely associated with the sovereign man and freeman-on-the-land movements, but also emerges in other contexts. This "immune by declaration" group often draws an arbitrary line between "statutes" and "common law", and says they are subject to "common law", but not legislation. Of course, the opposite is true. The common law is law developed incrementally by courts, and is subordinate to legislation: statutes and regulations passed by the national and provincial governments. OPCA litigants who claim only to be subject to the "common law" do not appear to mean the current common law, but some historic, typically medieval, form of English law, quite often Magna Carta. Some argue that Magna Carta operates in a constitutional manner and invalidates legislation.

A second common OPCA litigation category is grounded in a belief that all legally enforceable rights require that a person agree to be subject to those obligations.[5] This strategy takes two closely related forms:

1. Every binding legal obligation emerges from a contract.
2. Consent is required before an obligation can be enforced.

In this way the OPCA litigant denies that a unilateral obligation can arise from legislation. Some OPCA litigants argue they have opted out of legislated obligations. Others simply claim consent is required, otherwise legislation is a set of optional guidelines.

Another OPCA approach is to argue that a court or government actor is a corporation and therefore only has the rights of a corporation. The result is a claim that legislation has no more special meaning than any unilateral declaration.

A claim that the relationship between an individual and the state is always one of contract is clearly incorrect. Aspects of that relationship may flow from mutual contract (for example, a person or corporation may be hired by the government to perform a task such as road maintenance), but the state has the right to engage in unilateral action, subject to the allocation and delegation of government authority.

5 An example is Steven Todd of Reps Gym in Preston who told the magistrates and then the Crown Court on appeal that he was entitled to open his gym, in defiance of Coronavirus Regulations, because he was a "freeman" and bound only by the common law, which could be summarised as "Do No Harm". He said he was not in a contract with the Government, but did admit that he had accepted a Government Covid business recovery loan. *Lancashire Live, Preston gym owner fears jail after staying open during lockdown*, 20 April 2021.

The part of Magna Carta that UK OPCA activists have been citing to claim immunity from coronavirus legislation is Article 61.[6] Twitter has featured prominently in pseudo-legal misinformation with tweets erroneously pronouncing "If you own a business and display article 61 of the Magna Carta in your window you can't be fined or forced to close your business".

Magna Carta was, of course, a charter guaranteeing English political liberties and signed by King John on June 15, 1215, under pressure from his rebellious barons. Magna Carta was declared null and void by the Pope on the grounds it interfered with the authority of the King. Following this it was then reissued in various forms, resulting in a further version issued in 1225. The contents of Magna Carta were placed on the statute book in 1297.

Three clauses of the 1225 Magna Carta remain on the statute book today (13, 39 and 40); clause 1 remains part in force. Clause 13 defends the liberties and rights of the English Church; another confirms the liberties and customs of London and other towns; but clauses 39 and 40 are the most famous:

> *No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.*
>
> *To no one will we sell, to no one deny or delay right or justice.*

These clauses gave all free men the right to justice and a fair trial. However, "free men" comprised only a small proportion of the population in medieval England. The majority of the people were unfree peasants known as "villeins", who could seek justice only through the courts of their own lords.

Clause 61 granted powers to "assail" the monarch and "seek redress" to 25 specific barons in order to keep the provisions of Magna Carta, but these powers were not granted to the population at large. Within a year of being written, this clause was removed from subsequent versions of Magna Carta (the 1216 version or the 'final' version in 1225).

Magna Carta is sometimes regarded as the foundation of democracy in England. In fact, most of its terms applied only to a small proportion of the population in 1215, and

6 See, by way of example, the case of Sinead Quinn, Hair Salon owner / manager from Oakenshaw. BBC News article, *Covid lockdown: Why Magna Carta won't exempt you from the rules,* 6 March 2021.

the implementation of the charter in subsequent centuries remained open to the interpretation of the courts. Magna Carta has consequently acquired a special status as the cornerstone of English liberties. This is despite the fact that the vast majority of its clauses have now been repealed, or in some cases superseded by other legislation such as the Human Rights Act 1998.

Magna Carta retains enormous symbolic power as an ancient defence against arbitrary and tyrannical rulers, and as a guarantor of individual liberties. Indeed, its use as a tool to resist coronavirus regulations and legislation is a testament to its place in the public imagination and enduring historical power.

While this detailed background is not necessary to manage and resolve OPCA litigation, it can provide a very useful context to a judge, particularly one who is less familiar with OPCA language and strategies. The reasons in *Meads v Meads* provide a useful point of departure. In many instances it should be possible to assign an OPCA strategy or concept to an identified category, followed by dismissal, or other appropriate sanction(s), on that basis. The authors consider that the OPCA phenomenon is here to stay for the foreseeable future and part of the legal landscape. Lawyers will need to become familiar with common pseudo-legal concepts.

OPCA arguments have emerged prominently during the Coronavirus restrictions, and are commonly linked to arguments that Covid-19 is not as prevalent or deadly as the Government has regulated for. While not a phenomenon specifically linked to or restricted to licensing *per se*, it is certainly seen within that context, and many local authorities have had experience of OPCA litigants in one way or another. It is a useful area to understand, as it can appear baffling upon first encounter, and the proponent's dogged adherence to these beliefs can be hard to comprehend. A working knowledge of how the OPCA litigant operates is of great assistance to a judge, who may not have encountered OPCA language and strategies, and may spend unwarranted time trying to unravel what is going on. This style of litigation is here to stay and has become part of the legal landscape. Rapid recognition of it when it arises, and robust rebuttal with correct analysis, may help to control it.

Sarah Clover
Barrister, Kings Chambers

Constanze Bell
Barrister, Kings Chambers

Remote hearings re-visited

With on-line hearings by now a well-established part of the licensing process, **Richard Brown** considers what are the factors in favour and against virtual meetings, and poses the question of whether or not they should continue

Public participation in and access to local authority meetings is a fundamental part of the local democratic process. Local people have a right to have their views heard, and elected representatives have to be accountable to the electorate for their decisions.

Likewise, a licensing sub-committee meeting is a crucial part of the licence process for Licensing Act 2003 (LA03) applications (and of course Gambling Act 2005 and Local Government Miscellaneous Provisions Act 1982 applications too). Each participant (ie, members determining the application, their legal adviser, officers, responsible authorities, applicants and their legal representatives and "other persons" and their legal advisers) has a role to play and a wider responsibility to ensure that the hearing is, and is seen to be, a fair and transparent process for all parties, and in accordance with the rules of natural justice.

When the Government mandated a nationwide lockdown in March 2020 public participation in and access to local authority meetings was inevitably compromised. Physical attendance was obviously no longer possible, although a number of local authorities had already made proceedings of meetings available to watch via a live stream. Under the Local Government Act 1972, all those taking part in a council meeting should be physically present in the place where the meeting is taking place.[1] Readers may recall some debate at the time as to whether hearings held under LA03 are subject to the provisions of LGA 1972. The consensus was that they are not, not least because of the secondary legislation dealing specifically with procedural matters.[2]

There had been reports of difficulties in listing hearings or, in at least one case, a licensing authority refusing even to accept applications. Other authorities were putting into place measures to enable the licensing regime to function as smoothly as possible. *Pour encourager les autres,* the IoL prepared a protocol to assist licensing authorities in complying with their obligations and duties during the pandemic.

Any doubts there may have been about the lawfulness of remote LA03 hearings were put to bed by secondary legislation under s 78 of the Coronavirus Act 2020 which enabled local authority meetings to take place remotely. The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 (SI 2020/392) (the "remote hearings Regulations") came into effect on 4 April 2020, with an end date of 7 May 2021.

As a result, remote or virtual hearings – with the inevitable teething problems – swiftly became the norm across the country, and have inveigled their way into the public psyche.[3]

As the pandemic continued, concern was expressed that the legislation would expire before it was safe or practical for local authority meetings to be reconvened in person. A case was brought jointly by Hertfordshire County Council, Lawyers in Local Government and the Association of Democratic Services Officer (with the Local Government Association and the National Association of Local Councils amongst the interested parties) seeking a declaration or declarations that (I paraphrase) the language of LGA 1972 was wide enough that meetings could continue to take place remotely (either entirely remotely or in a hybrid meeting where some are physically present but others are remote).[4]

The claim failed. In a judgment[5] handed down on 28 April 2021 the High Court refused to grant the declarations sought by the claimants and held that:

> *The Secretary of State was correct in November 2016 and July 2019 to say that primary legislation would be required to allow local authority "meetings" under the 1972 Act to take place remotely. In our view, once the Flexibility Regulations cease to apply, such meetings must take place at a single, specified geographical*

1 See Schedule 12.

2 Licensing Act 2003 (Hearings) Regulations 2005.

3 Most notably, the famous Handforth Parish Council Zoom meeting.

4 The "updating approach" to statutory construction.

5 *Hertfordshire County Council & Ors v Secretary of State for Housing, Communities And Local Government* [2021] EWHC 1093 (Admin).

> *location; attending a meeting at such a location means physically going to it; and being "present" at such a meeting involves physical presence at that location. Leading licensing lawyers have reiterated that the judgment and the falling away of the remote hearings regulations does not affect the ability of licensing authorities to continue to hold remote licensing hearings if they wish, for the same reasons as before.*

So far, so straightforward. We can all carry on as before. What, though, of the actual efficacy of remote hearings, in comparison with in-person hearings? The judgment in the *Hertfordshire* case touched on this:

> *We recognise that there are powerful arguments in favour of permitting remote meetings. But, as the consultation documents show, there are also arguments against doing so.*[6]

So, what are the factors in favour and against, particularly in the context of licence hearings whose efficacy we have now had over a year to gauge. Perhaps the question is not *can* they continue, but *should* they continue.

My experience of remote hearings over the past year has been largely positive. However, I have tried to stretch beyond the anecdotal into a wider evidence base. The competing arguments have been rehearsed both before and during the pandemic,[7] in the context both of local authority meetings and criminal and civil justice in the courts. Of course, analysis of the latter must be presaged with the caveat that licensing hearings are not criminal or civil judicial hearings. Nevertheless, the requirements of natural justice dictate that licensing authorities should strive for best practice in the conduct of their hearings, and many of the factors below are relevant to licensing hearings. The pros and cons, and the experiences of remote hearing participants, are strikingly consistent and much of this is applicable to licence hearings.

The consultation referred to by the High Court was *Connecting Town Halls: Consultation on allowing joint committees and combined authorities to hold meetings by video conference,* which took place in November 2016, although the outcome was not published until June 2019. The consultation sought views on proposals to give local authorities operating joint committees, and combined authorities, but not councils as a whole, the ability to hold formal meetings using video conferencing facilities.

Having considered the consultation responses received, the Government's view was that enabling joint committees and combined authorities to hold meetings by video conference would add to town hall transparency, and "potentially encourage a greater degree of participation in these meetings which are the cornerstone of local democracy". This point is in my view one of the compelling arguments in favour of remote hearings continuing in a licensing sphere – I have definitely noticed public participation increasing with access to remote hearings.

The pros and cons identified by respondents to the consultation will be familiar to those with experience of remote licence hearings. They included:

- Savings on travel time and expense for council officers, councillors, and members of the public.
- Increased public participation, since individuals would no longer be discouraged from participating due to extensive travel.
- Increased public input into council decision-making and enhance local democracy.
- Local government would become more accessible and transparent.

On the flip side of the ledger:

- The cost of investment required in the necessary technology may exceed any costs savings in travelling expenses.
- Practicalities of using video-conferencing technology and of holding meetings in multiple locations. For example, would each local authority be required to provide facilities for a member of the public to watch or participate in proceedings remotely?
- Difficulties picking up visual cues and reading body language.
- Agreement on what to do when technology fails.
- Data security requirements of the video-conferencing link.

When I first examined the topic of remote hearings in the

6 Paragraph 90.

7 See, eg, 'Coronavirus (Covid-19): The impact on courts' https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51903.htm#_idTextAnchor000; and the Justice Committee's report on Court and Tribunal Reform in 2019 which concluded that:
'We remain concerned that the use of technology in courts and tribunals may not always be tailored to the needs of the most vulnerable users of the justice system.'

Journal of Licensing (2020) 27 JoL, I mentioned a consultation carried out by the Legal Education Forum (LEF) in 2020 at the request of the Civil Justice Council in response to Covid-19, including the use of remote hearings. The consultation sought views on a range of issues such as what is working well about the current arrangements; which types of cases are most suited to which type of hearings and why; how does the experience of remote hearings vary depending on the platform that is used; how do remote hearings impact on the ability of representatives to communicate with their clients; how do remote hearings impact on perceptions of the justice system by those who are users of it; and what has been the impact of current arrangements on open justice. All are matters which I imagine have crossed the minds of those involved in licence hearings.

At the time of writing that article, the outcome of the review had not been published but it has now. The review identified that satisfaction with remote hearings flowed from:

- Agreeing with the outcome of the hearing.[8]
- Not experiencing technical difficulties.
- Participating in a video hearing (compared to an audio hearing).
- Having greater experience of remote hearings.
- Participating in a hearing at the start of the pandemic and participating in a hearing that did not involve a litigant in person.
- Enforcement hearings, appeals and trials were less likely to be experienced positively than interlocutory hearings.

The LEF reported that 71.5% of more than 1,000 lawyers surveyed described their experience with remote hearings as positive or very positive. This apparently rosy perception is somewhat undermined by a subsequent statement that *"… the majority of respondents felt that remote hearings were worse than hearings in person overall and less effective in terms of facilitating participation - a critical component of procedural justice. Respondents also found remote hearings to be more tiring to participate in than physical hearings, particularly those that proceeded by video."*

The main reason given for the feeling that remote hearings were inferior was the "the impact that video hearings have on the ability to communicate with clients and other legal teams. Respondents felt that dialogue was less fluent when hearings proceeded by video, and that it was less easy to gauge reactions and respond appropriately." These are all aspects which I imagine practitioners experience in connection with licence hearings; I certainly have.

Although there were over 1,000 responses from lawyers, the study received only 11 complete responses from lay users of the civil justice system. The LEF suggests that there is an "urgent need to capture the types of management information that facilitate the conduct of research into the experience of lay users and litigants in person." The jury is still out, as it were.

The review's authors conclude – in common with other sources[9] – that these findings suggest that remote hearings should be reserved for matters where the outcome is likely to be less contested, where the hearing is interlocutory in nature and for hearings where both parties are represented.

Among the experiences of lay users which could be divined from the limited responses from organisations and individuals with experience of working with and advocating for court users were: lack of access to technology and resources needed to effectively participate in remote hearings; and insufficient devices to both participate in the hearing and communicate with others, ie legal advisers, creating barriers to effective participation.Similarly, the LEF review references a survey carried out by Lawyers in Local Government in June 2020 seeking views on the continuation of remote meetings: 88% were in favour, with 75% supporting the continuation of hybrid meetings. Those in favour of continuation referred to efficiency savings, the protection of vulnerable participants, increased democratic participation, the beneficial impact upon the climate and the reduction in expenditure and time savings, particularly in authorities covering large geographical areas. Some respondents, however, said that particular types of meetings – such as full licensing committee meetings – should not be held remotely. Whether this is shorthand to include licensing sub-committee meetings is unclear.

Digital inclusion

The findings of the LEF and other studies also tally remarkably well with the experiences of my colleagues at Citizens Advice Westminster who work with a wide range of vulnerable clients and clients who experience problems with "digital inclusion", in a diverse number of areas. Digital inclusion or, rather, exclusion, is a problem which advisers at

8 That is, stating that audio hearings were effective because the outcomes received did not differ in their view from the outcome they would have received in person.

9 For example, https://www.barcouncil.org.uk/resource/four-bars-statement-on-the-administration-of-justice-post-pandemic.html

Citizens Advice Westminster encounter regularly, whether it is access to the internet or difficulties with using technology. The organisation has sought feedback from clients as to their experiences with court proceedings during the pandemic.

On the whole, the feedback from the clients about connecting to hearings and tribunals has been positive. They report that the court usher often calls the client beforehand and sends log in details. Clients have got used to digital technology and adapted well. There have been a few issues in relation to documents and service of documents, although whether this would have been remedied by an in-person hearing is unclear.

The feedback has been emphatically that the success of the hearing depends on the computer literacy of all parties involved. Vulnerable clients who are representing themselves often need support at the outset in understanding how the hearing will be conducted on the day. Clients need support in understanding when they need to present their case and when they need to ask questions. Judges need to provide an explanation throughout the proceedings to ensure that the unrepresented lay person client faces no barriers during the hearing.

Going forward

Interestingly, a joint statement from the Faculty of Advocates of Scotland, the Bar Council of England and Wales, the Bar of Ireland and the Bar Council of Northern Ireland urges more caution than perhaps might be expected following the LEF findings, stating that "careful consideration is needed before any decision is taken to employ remote hearings more widely, once Covid-19 is behind us." Among the reasons given were:

- *Experience shows that judicial interaction is different and less satisfactory in remote hearings from that experienced in "real life" with the result that hearings can be less effective at isolating issues and allowing argument to be developed.*

- *The diverse and complex needs of our clients must be protected and their participation must be safeguarded. By its nature, a remote and automated system will only degrade the valuable human interaction that should be at the heart of meaningful and open access to justice.*

Most of these aspects are germane to a remote licence hearing, and indicate elements which can usefully be included in local authorities' procedures to improve the experience for all parties (including of course unrepresented applicants).

These "human" elements are particularly pertinent to licence hearings, which involve a consideration by the licensing sub-committee of a range of competing views. Anecdotally, I have often found that the relative formality of an in-person hearing, particularly if it is the first time applicant and objectors have met or been in the same room, can engender a greater mutual understanding of each other's respective positions. It also focuses minds more around compromise. There is greater scope for discussion, debate and agreement during hearings. These are elements which are lost when a hearing is held remotely. Set against that is the fact that interested parties are more likely to be present in the first place at a remote hearing. There is perhaps a greater emphasis on setting out one's position in writing prior to the hearing, which focuses attention on the relevant outstanding matters. Travel time and therefore cost is saved for applicants. And of course, the inevitable mute / unmute problems can add a moment of levity which puts the parties at ease.

Conclusion

There are many positives arising from remote licence hearings, increased public participation being key. Remote hearings certainly still have a role to play, whether fully remote or hybrid, and there is no reason why licensing authorities' obligations and duties under LA03 should be compromised by hearings taking place remotely where appropriate. It is however important, post-pandemic, to look at how a licence hearing will take place on a case-by-case basis. There will be perfectly sound reasons why applicants, responsible authorities and residents may wish a hearing to take place in person and where a hearing in person will be a more effective way of determining an application.

Local authorities deserve a big hand for the way that they have adapted to circumstance, although a certain parish council in north Cheshire may be relieved they can meet again in person and beyond the prying eyes of social media.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

Councils need to wake up to their public sector equality duty responsibilities

The public sector equality duty is crystal clear but many local authorities still seem unaware of its implications for their licensing decisions. They should follow the lead set by Westminster County Council, whose new licensing policy update shows the way discrimination against all minority groups must be tackled, as **Leo Charalambides** explains

The public sector equality duty (PSED) is a broad duty designed with the purpose of integrating considerations of equality and good relations into the day-to-day business of public authorities.[1] It requires public authorities to have "due regard to the need to":

> *a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;*
>
> *b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
>
> *c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*[2]

The relevant protected characteristics are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.[3]

However, despite its all-encompassing nature, the PSED has been noted to be one of the duties "left by the wayside" in local authority decision-making.[4] This may be the case because, read on its own, the duty is framed in such words that "can lead to no more than formulaic and high-minded mantras"[5] without requiring specific conduct of a local authority. Such lack of specificity in any given area of public authority decision-making will offer little to measure compliance with the duty by.

Section 149 of the Equality Act 2010 goes on to provide some further detail on the steps that can be taken to meet the duties to have regard to the need to advance equality of opportunity and to foster good relations between persons with different protected characteristics.[6] The PSED has also been considered by the courts on a number of occasions, which has enabled a series of principles to be developed providing much needed content as to its requirements.[7] *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 provides a useful summary of these principles [25]:

> *(1) As stated by Arden LJ in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.*
>
> *(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home*

1 https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty.

2 Section 149(1) Equality Act 2010.

3 Section 149(7) Equality Act 2010.

4 https://docs.wixstatic.com/ugd/241720_ebc556491d104821a3faa6842fe19fcc.pdf.

5 *Hotak v Southwark London Borough Council* [2015] 2 WLR 1341.

6 See s 149(3): *Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard in particular, to the need to – (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low*. Also s 149(5): *Having regard to the need to foster good relations between persons who share a relevant characteristic and persons who do not share it involves having due regard, in particular, to the need to – (a) tackle prejudice, and (b) promote understanding.*

7 See *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 [25].

Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

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

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

i. The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii. The duty must be fulfilled before and at the time when a particular policy is being considered;

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

iv. The duty is non-delegable; and

v. Is a continuing one.

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

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in R (Meany) v Harlow DC [2009] EWHC 559 (Admin) at [84], approved in this court in R (Bailey) v Brent LBC [2011] EWCA Civ 1586 at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89–90]

"[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due

> *regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):*
>
> *'….the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'*
>
> *[90] I respectfully agree…."*

In *Hotak v Southwark London Borough Council* [2015] 2 WLR 1341, the Supreme Court emphasised that:

> *the equality duty is "not a duty to achieve a result", but a duty "to have due regard to the need" to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act.*

The exercise of the duty is therefore driven by the need for the decision-maker to be aware of the impact of their decision on equality objectives. In different contexts, the specific requirements of the duty will vary. The courts will not seek to scrutinise the decision that has been made, but instead consider whether a public authority has borne its duty in mind in the process of its decision-making. An important feature of the PSED, therefore, is the need to demonstrate that the duty has been discharged. From an evidential point of view, this requires a decision-maker to record the steps they have taken in seeking to meet the statutory requirements.[8]

The *Sheffield* and *Hackney* cases

The s 182 Guidance issued under the Licensing Act 2003 at paras 14.66 & 14.67 provides:

> ***Promotion of equality***
> *14.66 A statement of licensing policy should recognise that the Equality Act 2010 places a legal obligation on public authorities to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation; to advance equality of opportunity; and to foster good relations, between persons with different protected characteristics. The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.*
>
> *14.67 Public authorities are required to publish information at least annually to demonstrate their compliance with the Equality Duty. The statement of licensing policy should refer to this legislation, and explain how the Equality Duty has been complied with. Further guidance is available from [the] Government Equalities Office and the Human Rights Commission.*

While the PSED has been recognised in guidance, its application to licensing policies has received little – if any – consideration by the courts. In 2016, campaigners sought a judicial review of Sheffield County Council's decision to renew the annual licence of a sex entertainment venue (SEV) on the basis that the policy under which it was granted failed to address the PSED. In fact, the policy published by the council in April 2011 made no reference to the duty. Jefford J granted permission on this basis and found that there was no direct evidence that the council had exercised its duty to have due regard to equality objectives. Concern was also raised as to the manner in which complaints regarding the SEV were dismissed as being moral objections.

Before the matter was heard, Sheffield City Council went on to implement a revised policy in relation to SEVs. It dealt with its PSED and recognised that representations that SEVs contributed to the objectification, victimisation and harassment of women had to be considered on an equalities basis. These considerations weighed into the balance of the final decision that was taken, with reasoning given to that effect.[9] The council subsequently settled the judicial review claim out of court. The settlement came with a formal acknowledgement that it had failed to comply with the PSED when granting a new licence to the SEV.[10]

In *R (on the application of We Love Hackney Ltd) v London Borough of Hackney* [2019] EWHC 1007 (Admin), the claimant sought judicial review of Hackney Council's decision to revise its licensing policy and adopt an approach of "core hours" in a special policy area (SPA) which would include Shoreditch and Dalston. The core hours policy stated that alcohol could no longer generally be sold after midnight on Fridays and Saturdays. A rebuttable presumption was also put in place that late-night licences would be refused for venues in the SPAs unless they could prove that there would be no cumulative negative impact in those areas other than

8 *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB).

9 https://docs.wixstatic.com/ugd/241720_ebc556491d104821a3faa6842fe19fcc.pdf.

10 https://www.localgovernmentlawyer.co.uk/licensing/399-licensing-news/38697-council-concedes-in-strip-club-policy-legal-challenge-over-equality-duty-failure

that which is currently being experienced.[11] The claimant, a not-for-profit set up by local residents, argued that the early closure of bars and clubs in Hackney would have a disproportionate impact on the LGBTQ+ community as these venues offer important cultural spaces. The litigation came to an end when the claimant's application for a cost-capping order was dismissed and the defendant's application for security for costs was allowed.

While the matter did not make its way before a judge, bringing this action garnered a response from Hackney Council for the campaigners. On 18 July 2019, the full council adopted the revised statement of licensing policy (SLP). This set core hours on Friday and Saturday to midnight and allowed later opening hours subject to risk assessment and demonstration of robust measures to mitigate those risks.

However, when considering the application for judicial review in the Hackney Council case, Lavender J noted that "[o]n their written statements of case it is difficult to discern any general principle of law on which the parties disagree".[12] It seems that the duty in itself is well-established. The question instead is what the duty to have due regard requires of the local authority in this context.

The *Hackney* and *Sheffield* cases are indicators that the PSED law is clear but local authorities are yet to engage with it fully. In both cases, when faced with legal action, both local authorities came to accept that they were falling short of the PSED in their licensing policies and amendments were made accordingly.[13] However, in its recently updated policy, Westminster City Council has engaged with its PSED so as to keep fully abreast of developments.

Westminster City Council SLP

In its updated SLP, which is to be operative from 7 January 2021, Westminster Council has outlined the licensing requirements with respect to entry policies adopted by bars and clubs.

> *B30. But there is more we can do through our role as a Licensing Authority to ensure our city is open and accessible to all. It is unlawful for any venue to discriminate against anyone based on race, sex, sexual orientation, age or any of the protected characteristics under the Equality Act 2010. However, equality and inclusion for us extends beyond this. We have experienced discriminatory policies that refuse admittance to venues simply because someone may not be the right 'look' or 'fit'. Discriminatory policies such as these are inherently damaging to the individual, our wider community, as well as our economy. In addition, it actively harms the interests of licensed premises and the licensed industry.*
>
> …
>
> *B34. There is no one size fits all approach to making a venue inclusive, and each operator will need to make an assessment of its own practices and policies. However, the following are common and best practice examples that could be adopted:*
>
> - *Inclusive and transparent policies (for example admittance policies may clearly stipulate adherence to a dress code and refusal if someone presents as intoxicated; however they must not prevent admittance based on perceived attractiveness, size, or against any of the protected characteristics).*
> - *Robust complaints procedures that make it easy for customers who feel they have been discriminated against to raise their concerns and understand how this will be investigated or managed.*
> - *Accessible venue layouts that make venues welcoming.*
> - *Comprehensive training on equality and inclusion for all staff. It is important that any training is regularly refreshed.*
>
> …
>
> *B36. In practice this means that the council through the Licensing Process will identify applicants that do not provide sufficient information on how they are promoting equality and inclusivity, and could make a representation to require that the applicant address the issue or explain to members of the Licensing Sub-Committee why they have not done so.*

In framing an approach to equality in a broad manner the council has engaged with the different forms that unlawful discrimination can take, which can often be less apparent. Policies which require patrons to look a certain way in order to gain entry, for example, often have their roots in sex discrimination or racial discrimination. By seeking

11 https://www.localgovernmentlawyer.co.uk/licensing/399-licensing-news/40114-campaigners-given-green-light-to-pursue-judicial-review-over-revised-statement-of-licensing-policy

12 *R (on the application of We Love Hackney Ltd) v London Borough of Hackney* [2019] EWHC 1007 (Admin) [40].

13 https://www.localgovernmentlawyer.co.uk/licensing/399-licensing-news/38697-council-concedes-in-strip-club-policy-legal-challenge-over-equality-duty-failure

transparency in entry policies from venues, and requiring them to list the bases on which someone can be excluded, the SLP reduces the possibility of covert reasons for exclusion. For reasons that fall outside a venue's stated policy, those excluded will be given an opportunity to raise a complaint.

This SLP is reflective of the scope of impact that the PSED can have in licensing policies where the duty is proactively engaged with. While many local authorities do now expressly recognise their duties under the Equality Act, and state that they have been cognisant of the PSED in their policy creation, a statement is unlikely to insulate them from challenge if their policies do not evidence this commitment. As those affected become increasingly aware of the PSED, and the obligations it creates for local authorities, it will be increasingly necessary to demonstrate how equality objectives have been weighed in the balance of any decision that is taken.

Leo Charalambides
Barrister, Francis Taylor BUilding & Kings Chambers

Ifsa Mahmood
Pupil barrister, Kings Chambers

Minimum unit pricing under review again, and so too alcohol's role in lap-dancing clubs

Michael McDougall casts his eye over recent licensing developments in Scotland, and looks forward to the resumption of normal life

First of all, I would like to take a moment to pass my well wishes from the Scottish region of the IoL to all our licensing friends across the UK. I hope that, at some point in 2021, we can meet again in the real world.

The last few months have, as ever, been hectic in the world of licensing law, and not simply as a result of the ongoing impact on licensed businesses as a result of corona law restrictions. The law, regulations and guidance arising from the pandemic have been covered with some aplomb in these pages and beyond. In this Scottish update I will (for the most) try to focus on some other developments.

Fresh calls for MUP to be raised

Journal readers will be aware that Scotland has had a minimum price per unit of alcohol (MUP) since 2016, when it was set at 50p. Since the law came into force, there has been a seemingly unrelenting stream of academic studies and papers about the efficacy and "success" of the legislation.

These ongoing studies are all part of a wider "grand experiment" as the MUP law is itself subject to a sunset clause – specifically, s 2 of the Alcohol (Minimum Pricing) (Scotland) Act 2012. This clause requires the Scottish Parliament to "call in" MUP and review it by way of a presentation of a report to ministers about the effect on groups of persons, on society writ large, and on licence holders and alcohol producers. In the days running up to the Scottish general election in May 2021, alcohol pressure group Alcohol Focus Scotland campaigned for the MUP to be raised to 65p, on the basis that there was an apparent promise to review the level and that the 50p rate, three years in, did not account for inflation.

My personal view is that any attempt to meddle with the parameters of the grand experiment is folly. The courts were clear that the experiment should be allowed to run precisely because of the "back stop" of the sunset clause; and based precisely on the outcomes which were presented as being proposed to be achieved by alcohol modellers based on 50p. We are presently half way through the grand experiment. It must be allowed to run its course on the parameters under which it has been approved by the court. But with three more years of studies and reports yet to come, one can see that further calls will be made after every report.

None of the fun of the fair

As has been reported in these pages before, the Scottish Parliament Local Government Committee has been scrutinising a Private Members Bill laid by Richard Lyle MSP which featured the proposal of creating a bespoke licensing system for travelling fairs, outwith the scope of the Civic Government (Scotland) Act 1982. The committee heard evidence from the Showmen's Guild amongst various others in March 2021 but ultimately stated it was unable to move it forward in the time pre-election and so the matter was punted to the legislative long grass. The committee identified a number of other issues that it had with the proposed legislation including reduced notice periods. If time had allowed, such issues may have been capable of exploration and taken forward by way of amendment. As matters stand, it looks like the Funfair Licensing Bill has come to a close.

Short-term lets

The Scottish Government put forward a proposed new licensing regime under the Civic Government (Scotland) Act 1982 which would see short-term let premises require a civic licence. The proposed regulations were met with significant opprobrium from the trade associations and key stakeholders such as Airbnb. In April 2021 the regulations were essentially abandoned, as a result of the trade criticism but perhaps also because of legal and technical issues which had been raised by stakeholders such as the Law Society of Scotland. The Government dropped the regulations and said they would revisit after the election in May 2021. It remains to be seen when, if, and in what format those regulations will

resurface. A separate but linked law on planning restrictions was, however, carried forward.

Tax and "conditionality"

As in England and Wales, HMRC is pushing Scottish authorities to get behind the use of the civic licensing system to ensure certain licence holders are properly registered with the tax authorities. This would, at its simplest, mean amending the Civic Government (Scotland) Act 1982 to create an additional step for applicants and for licensing authorities to present and vet tax registration. This is subject to a much wider complex consultation as part of a pattern of linked consultations which are due to conclude in July 2021. It will be interesting to see how this is proposed to sit with Scots law, and Scots licensing law, which is subject to separate jurisprudence on the use of licensing law for non-licensing ends.

Night-Time Industry Association serves pre-action letter on Scottish Government

In April, the Night-Time Industry Association (NTIA) lodged a formal pre-action letter to a proposed judicial review of the regulations pertaining to the Scottish "Levels" system under which nightclub and other premises are not entitled to open at all, even under the proposed Level 0, and therefore, unlike England and Wales, such premises have no proposed opening date. NTIA says the Scottish Government should examine less intrusive measures, and has asked for sight of the evidence which has led to this position as a part of the pre-action letter.

Caravan licensing review

The Scottish Government is looking into the Scottish system for caravan park licensing and completed a public consultation in February 2021. The current system is a much-maligned set up which has spread mushroom-like across numerous pieces of legislation. There are significant concerns that the system is not working, neither for licensing authorities and regulators, nor residents and users of static mobile homes and caravans. Commentators have suggested that the rights of stakeholders would be better protected by a system which moves away from some of the anachronisms of older legislation as well as better interplay with surrounding law and regimes such as the relevance of planning permission. It remains to be seen what the next steps will be following this call for evidence.

Rentincome Ltd v City of Aberdeen Licensing Board 2020

There are few liquor licensing appeals in Scotland to report on in the last year or so, for obvious reasons. The last case of any note is *Rentincome Ltd v City of Aberdeen Licensing Board* (Unreported, Aberdeen Sheriff Court, 19 February 2020). This case relates to the revocation of a lap-dancing venue's premises licence following allegations which include claims of a serious assault by a steward on a customer. The appellant was successful in overturning the revocation on interim recall having regard to the test of "balance of convenience" and the financial imperative of trading against non-trading. The licensing board tried to argue that the premises was entitled to trade without the provision of alcohol. However, the sheriff was having none of that, dismissing it as "unrealistic" that such a late-night business could be traded viably without selling alcohol. The wider impact was therefore a relevant consideration for the balance of convenience.

Michael McDougall
Associate, TLT LLP

Institute of Licensing News

Happy Anniversary!

This is a special year for the IoL with several milestones:

10th Anniversary

The Jeremy Allen Award and the Journal of Licensing were both launched 10 years ago in November 2011.

25th Anniversary

The Local Government Licensing Forum was formed 25 years ago in 1996. This year's National Training Conference (2021) will be the 25th NTC since the initial NTC in Easingwold in 1997.

Thanks to our Journal Team

We have seen 30 excellent *Journal* editions over the last 10 years thanks to our dedicated Editorial Team, regular feature authors, contributing writers and our advertisers.

There are so many who have contributed tirelessly to this fantastic publication, and we are sincerely grateful to you all. In particular, an enormous thank you to:

The Editorial Team

- Leo Charlambides: Editor since the Journal was launched in 2011 – 30 editions have taken shape under his guiding hand.
- Andrew Pring: Deputy Editor, copy editor and proof reader.
- Richard Brown: Deputy Editor and contributory author.
- Charles Holland: Deputy Editor and contributory author.
- Julia Sawyer: Deputy Editor (2011-2018)
- Natasha Roberts: Assistant Editor

Regular feature authors

- Gambling: Nick Arron
- Interested party: Richard Brown
- Taxis: James Button
- Northern Ireland: Eion Devlin / James Cunningham
- Sotland: Michael McDougall / Stephen Mcgowan / Caroline Louden
- Public safety & event management: Julia Sawyer
- Case digest: Jeremy Phillips
- CGA statistics: Jon Collins (2011 - 2017)

and also to all of our many regular contributors **we thank you all**.

In the pages of the July *Journal* last year, we talked about the hospitality (and particularly the pub) industry facing its biggest existential threat ever with reports at that time that as many as 30,000 pubs and restaurants might be lost as a result of the Covid-19 pandemic and the lockdowns in early 2020.

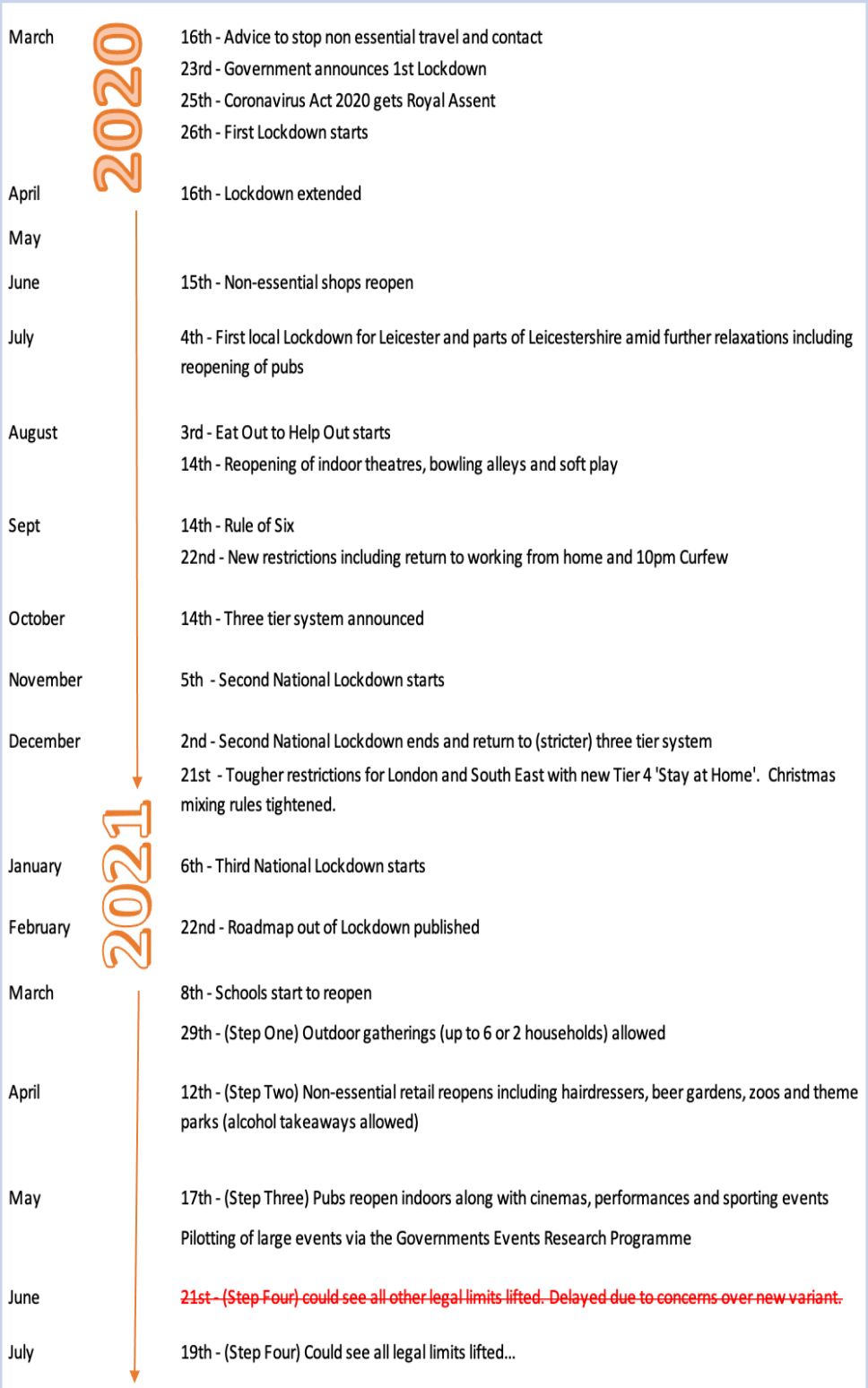
The initial lockdown was relaxed in June, with schools reopening from 1 June, and non-essential shops from 15 June. The reopening of pubs on 4 June coincided with the first of the local lockdowns initially in Leicester and parts of Leicestershire, followed by the last of the relaxations on 14 August which saw the reopening of indoor theatres, bowling alleys and soft play areas.

The summer respite, combined with the Eat Out to Help Out scheme was swiftly followed by the “rule of six” and short-lived curfew in September, the new three-tier system for England in October and then, amid spiralling infection and fatality rates and growing concern about the impact on the NHS, a second lockdown in November for four weeks, followed in December by the last-minute clamp down on freedoms over Christmas period, and ultimately the return to the third national lockdown in January.

Since March, we have followed the Government Roadmap announced in February and at the time of writing, we were all waiting to hear whether the final relaxations would go ahead on 21 June - as we all know this has been delayed until 19 July amid concerns over new variants, balanced against the benefits from the extraordinary vaccination programme across the UK (over 72 million doses at the time of writing).

In the meantime, the hospitality industry is now open with requirements for table service, and the rules on contact allowing up to six people or two households, and with events restricted to 50% of capacity for up to 1,000 people for indoor events, and 50% of capacity up to 4,000 people for outdoor events. Nightclubs and SEVs remain closed pending the delay of Step Four relaxations.

In the meantime, there are serious concerns within hospitality about a wide range of issues. These include the impact of Covid on the licensed sector, staff shortages in hospitality and security, issues around licence conditions imposed in relation to the original business model which is now significantly different as a result of Covid measures, and the churn in hospitality businesses with many closures and take-overs resulting in a loss of established relationships and experienced business operators.



In a message to our members, our Chairman, Daniel Davies, pointed out that a recent Portman Group / LGIU poll indicated that almost all councils (92%) believe that the night-time economy will play an important role in preventing the decline of high street retail. There is now significant concern about the long-term impact of the pandemic on town and city centres, and the House of Lords Covid-19 Committee has launched an enquiry and a call for evidence on the matter.

In his message, Daniel emphasised the importance of partnership working and paid tribute to the ability of our regulatory members to facilitate true partnerships saying:

We know from IoL events and publications, our local authority and police members are expert, engaged and pragmatic. And that pragmatism is needed now more than ever. The gains made from true partnership could be the difference between success and failure for your high streets and public spaces. Be that flexibility on licence conditions as operators reopen in new, often temporary, formats, understanding when issues arise as the sector emerges from enforced hibernation (with the hustle and bustle that returns also) or proactive investment to support the operating environment (eg, Liverpool's Without Walls initiative).

…Re-opening safely presents a management challenge to operators and regulators alike. That challenge can best be met by true partnership working… A partnership is a two-way street…

One way or another, it seems certain that 2021 will be another challenging year for us all. Working together will make everything more achievable.

Reopening and Recovery webinars

We have had pleasure of organising a series of webinars in collaboration with Best Bar None and other organisations including UK Hospitality, BBPA, National Pubwatch, NexStart, and many more. The original plan to facilitate "half a dozen or so" sessions has been significantly overtaken with well over 20 sessions to date.

The aim of the sessions was to provide information, opinions and advice for licensing practitioners around many different topics. We have covered risk assessments of licensed premises, pavement licensing and off-sales, compliance and enforcement, premises licence conditions, the reopening of festivals and events, staff training in hospitality venues,

the position in Scotland and Wales. And reaching wider still, international experts gave their insights in the "Seven Chapters" of the "Global Night-time Recovery Plan".

The webinars have been freely available online via Zoom (with the exception of the Scotland webinar which was hosted on Microsoft Teams) and have been an excellent vehicle to bring people together to share their experiences and thoughts on the future recovery of the licensed sector. At the time of writing, well over 2,000 attendees have joined the webinars, and there is scope for future sessions on a more ad hoc basis to look at emerging issues as they arise.

News from the Board

Most positions within the IoL Board are elected locally by our regional members. Each of the 12 regions has an elected Director (who may also be the regional chair), and those Directors are then IoL Company Directors. Additional Board members are co-opted by other members of the Board as a result of their particular skills and expertise. Certain roles within the Board, including the Chairman, Vice Chairmen, Committee Chairmen and Financial Director, are all subject to election by the Board and work on a three-year term.

Myles Bebbington took the decision to step down as Vice Chairman at the end of his (then current) term in February this year, although we are delighted that he remains as Regional Director for the Eastern Region and Chair of our Management, Organisation and Development Committee (MOD). Myles is one of our longest serving Board members having originally started when he was elected as Chair of the Eastern region in 2003. Notably, the Eastern Region was the first region established under the Local Government Licensing Forum (LGLF) in 1996.

Myles has been (and continues to be) a tremendous asset to the IoL in all his roles, and our grateful thanks to him for acting as Vice Chairman alongside Gary Grant for the last 9 years.

John Garforth was elected to replace Myles as Vice chairman, maintaining the local authority perspective, alongside Gary with his legal expertise. John is a long-term Board member having originally joined the Board following his election as North West Regional Chairman and Director in 2007. He took a break from official IoL roles in 2013 but returned in 2016 when he was elected as Regional Director alongside Regional Chairman Kay Lovelady.

Following the Board election, Daniel Davies said: "The Institute of Licensing is extremely fortunate in the commitment and hard work shown by all Board members, key contacts and regional volunteers. Myles Bebbington has served as Vice Chairman for many years now and we are sincerely grateful to him for that commitment and unwavering support. John is an extremely experienced local government licensing practitioner and a long-term Board member, and I look forward to working with him in his capacity as National Vice Chairman alongside his existing role as Director for the North West Region."

Meetings, Training and Events

National Training Conference 2021

2020 saw the first online National Training Conference, held over five days via zoom, with superb speakers and excellent attendance numbers. It was a pleasure to run, and to see so many familiar faces online, but we missed seeing everyone in person and we have had lots of people asking when we can return to the normal format, so we're so pleased to confirm that plans are underway to return to Stratford-upon-Avon in November for the IoL's 25th Conference.

This will be one of the first of our training events to return to a face-to-face format. The majority of our training courses will continue to be held online until at least the autumn, and will be carefully reviewed post-autumn to ensure that the training delivery suits the needs of delegates and trainers.

There is no doubt that a proportion of our training delivery will remain online. There are many benefits to online training including the savings on time, travel (and in some cases accommodation), but there are equally significant advantages to face-to-face learning with others in a group with the ability to network, discuss experiences and share ideas more freely.

Our regions are also carefully considering their options going forward, and it is likely that we may see a mix within the regions where some meetings are held remotely and others face to face. There may even be an option to have hybrid arrangements at certain meetings and events - all the factors will be carefully considered when we are able to plan ahead more easily.

Membership

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

The 10th Jeremy Allen Award

Last year, having made the difficult decision to hold the November Training Conference online, we took an equally difficult decision with Poppleston Allen to cancel the 2020

Jeremy Allen Awards, due to the fact that without the Conference Gala Dinner we would lose the opportunity to present the Award in person, and we could not do it justice online.

So this year will now mark the 10th Jeremy Allen Award, and nominations are now open (details are on our website).

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

Nominations are invited **by no later than 1 September 2021.** The Award criteria are:

a) Local authority practitioners in positively and consistently assisting applicants by going through their licence applications with them and offering pragmatic assistance / giving advice.
b) Practitioners instigating mediation between industry applicants, local authorities, responsible authorities and / or local residents to discuss areas of concern /to enhance mutual understanding between parties.
c) Practitioners instigating or contributing to local initiatives relevant to licensing and /or the night-time economy. This could include for example local Pubwatch groups, BIDS, Purple Flag initiatives etc.
d) Practitioners using licensing to make a difference.
e) Regulators providing guidance to local residents and / or licensees.
f) Practitioners' involvement with national initiatives, engagement with Government departments / national bodies, policy forums etc.
g) Practitioners provision of local training / information sharing.
h) Private practitioners working with regulators to make a difference in licensing.
i) Responsible authorities taking a stepped approach to achieving compliance and working with industry practitioners to avoid the need for formal enforcement.
j) Regulators making regular informal visits to licensed premises to engage with industry operators, to provide information and advice in complying with legal licensing requirements.
k) Regulators undertaking work experience initiatives to gain a more in depth understanding of industry issues or industry undertaking work experience initiatives to gain a more in-depth understanding of regulatory issues.
l) Practitioners embracing and developing training initiatives / qualifications.
m) Elected councillors promoting change within local authorities / industry areas. Showing a real interest and getting involved in the licensing world.

We look forward to receiving nominations from you. Please email nominations to info@instituteoflicensing.org and confirm that the nominee is happy to be put forward for consideration.

Fellowship

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

Join your region!

If you would like to get involved in your region or find out more about who your Regional Officers are visit the homepage of our website **www.instituteoflicensing.org** and select your region from the list on the right hand side.

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- NORTH EAST
- NORTH WEST
- SCOTLAND
- SOUTH EAST
- SOUTH WEST
- WALES
- WEST MIDLANDS

Reform of licensing laws in Northern Ireland

Licensing laws in Northern Ireland are moving into line with those of mainland Britain, much to the relief of the local hospitality sector as **Eoin Devlin** and **Orla Kennedy** explain

In October 2020, the Licensing and Registration of Clubs (Amendment) Bill was introduced in the Northern Ireland Assembly – a welcomed step towards the long-awaited reform of current legislation, which has remained relatively unchanged for the last 25 years.

Over these years, there has been a consistent call by the hospitality sector for a more flexible and modern licensing framework. The need for this reform has been heightened by the pandemic, which has left many businesses closed and unable to trade for prolonged periods of time.

The Department of Communities has described the Bill as a balanced package of measures aimed at providing vital support for the hospitality industry. It says the Bill will assist the sector in supporting tourism, whilst tackling alcohol misuse and promoting responsible consumption.

In welcoming the introduction of the Bill, then Communities Minister Carál Ní Chuilín said:

> *This Bill will now move through the legislative process and be scrutinised by Assembly colleagues, but I hope it gives those in the industry assurance that we are working to modernise the sector. I appreciate that we are currently working our way through the Covid crisis but I am confident that the Bill will provide a more flexible licensing framework that will undoubtedly assist the sector to rebuild following the Covid crisis, when our society can operate under more normal circumstances. "This Bill has attempted to strike a balance between recognising the role licensed premises have in their local community as places to socialise and as providers of employment, alongside ensuring protections are in place to help tackle the harms that alcohol can cause in our society.*

With such significant reform on the horizon, it is important to consider how the proposed changes differ to the current legislation, the potential impact this will have on the hospitality sector and whether the framework brings Northern Ireland (NI) more in line with other jurisdictions on these islands.

Key proposals of reform

The current legislation for liquor licensing in NI is governed by the Licensing (Northern Ireland) Order 1996. However, due to changing social habits together with the rising importance of tourism in NI, it was recognised that reform was needed to respond to these changes and ensure a more modern framework that reflects the current landscape.

The Bill proposes a number of changes to NI's liquor licensing laws. Among the key proposed changes for the sector are:

Changes to permitted hours

Under the current law, the normal trading hours for licensed premises are 11.30am to 11.00pm on Monday to Saturday and 12.30pm to 10.00pm on Sundays and Christmas Day.

Certain licensed premises that provide food or entertainment may apply to the court for late opening hours to allow them to open until 1.00am on Monday to Saturday and 12.00am on Sundays, with a 30 minute drinking up time.

In contrast, the Bill provides for the introduction of an occasional additional late opening hour, which will allow certain licensed premises to serve alcohol until 2.00am.

The Bill also provides for an extension of drinking up time from 30 minutes to one hour, which will allow some premises to remain open until 3.00am on Friday and Saturday nights.

The new Bill also proposes to increase the number of occasions for late opening in small pubs from 20 per year to 85 per year.

Changes to Easter opening

Currently, late opening hours (from 11.00pm to 1.00am) in pubs and other licensed premises is restricted over the Easter holiday period. The trading

hours for licensed premises on the Thursday and Saturday before Easter Sunday must end at midnight, and on Good Friday licensed premises are only permitted to sell alcoholic drinks between 5.00pm and 11.00pm.

Off-sales are not permitted at all on Easter Sunday.

The Bill proposes to abolish these restrictive rules and bring Easter opening in line with the rest of the year.

Major events

Under the current law, the sale of alcoholic drinks on unlicensed premises is only permitted using an occasional licence. Therefore, permitted hours are restricted to 11.30am to 1.00 am on weekdays and 12.30pm to midnight on Sundays.

In terms of the off-sales of alcoholic drinks, this is not permitted under an occasional licence. This has caused difficulty for major events held in NI such as the 148th Open at Royal Portrush, Irish Open, the MTV European Music Awards and Giro D'Italia.

In recognition of the importance of major events in developing the tourism industry in NI, the Bill will allow the Department to designate an event as a "special / major" event and to subsequently vary the permitted hours and allow certain off-sales at the event.

The Department under this provision will have the power to apply the provisions to NI as a whole or to specific areas.

New category of licence for local producers such as breweries and distilleries

Under current licensing law, a liquor licence can be granted to 12 categories of premises, not including local breweries, cideries and distilleries.

Therefore, local producers of alcoholic drinks are only permitted to sell their produce directly to the public if they obtain a licence for a bar or off-sales. Due to the need to acquire and surrender an existing licence during the court process in Northern Ireland in order to be granted a bar or off-sales licence, the costs can be extremely prohibitive for small breweries and distilleries. Those producers who do not hold a licence must rely on third parties to sell their products, which impacts on their profits.

To support the growth of these businesses and in recognition of their contribution to the hospitality sector, the Bill proposes a new category of licence for premises such as breweries, cideries and distilleries. This will allow local drinks producers to sell their products directly to the public in limited circumstances for consumption off the premises.

In addition, local producers will be able to provide a sample free of charge during a tour of the premises.

New rules about display of licence

The Bill will introduce a number of requirements for the conduct of licensed premises. meaning that restaurants and guest houses will have to display licence conditions at all times in the premises.

The Bill also proposes an offence for non-compliance with this requirement, with the holder of a licence being liable on summary conviction to a fine and three or four penalty points attaching to the licence.

New rules around alcohol advertising

The current law is silent on the advertising of alcoholic drinks by supermarkets and off-sales premises. The proposed restrictions contained in this Bill will:

- Prohibit advertising of alcoholic drinks within the vicinity of the premises.

- Restrict advertising materials relating primarily to alcohol products to the licensed area of a supermarket, and prevent supermarkets and off-sales premises from advertising alcoholic drinks offers anywhere other than within the licensed area of the premises.

- Loyalty schemes will no longer be allowed to give points for the purchase of alcohol, and any rewards will not be permitted to be exchanged for alcohol.

Prohibition of self-service and vending machines

The current law is silent on self-service alcohol facilities and alcohol vending machines. The Bill proposes to amend the law to prevent the sale of alcoholic drinks via self-service means and vending machines.

Changes to requirements of body corporates

Under the current law, there is no requirement for a director of a corporate body holding a liquor licence to notify the court they have been convicted of a criminal offence.

It is proposed that changes to the directorship of a

body corporate must be notified to the courts as is the case for individual licensees.

Therefore, any change to directorship must be notified to the police and court in Northern Ireland within 28 days.

Formal approval for codes of practice on responsible retailing

The Bill gives the Department power to approve new industry led codes of practice and failure to adhere to these codes may impact on renewal applications or new applications for licence holders.

Comparison to other jurisdictions

At present, the licensing framework in NI does not conform with other jurisdictions on these islands, which in turn places NI at a disadvantage when it comes to tourism and the hospitality sector.

For example, there are no restrictions on permitted opening hours during the Easter holidays in Scotland, England and Wales. Undoubtedly, these restrictive Easter opening hours deter potential tourists from visiting NI during this period. Reform is necessary to abolish these restrictive opening hours and show that NI and the hospitality sector are open for business during the Easter period.

Furthermore, in Scotland, England and Wales there are no nationally-set permitted opening hours for licensed premises. Instead, responsibility for liquor licensing is held at local authority level such as by licensing boards in Scotland and licensing authorities in England and Wales. There is no blanket approach for permitted opening hours and instead each premises must declare its intended opening hours in an operating plan or schedule. Thereafter, the relevant licensing body will consider the application and determine whether to grant those hours, based on local circumstances.

As such, it is a welcomed development that the new reform of liquor licensing in NI will ease the current permitted opening hours and allow additional time for premises to sell alcohol. This will be an added bonus for the hospitality sector as it attempts to rebuild sales following the pandemic. Calls have been made for reforms to go further and move to a council-based system of licensing, like in England, Wales and Scotland, and move away from the current court model.

Another welcomed development introduced by the Bill is the power for the Department to designate an event as a "major event" and to subsequently vary the permitted hours and allow certain off-sales at the event. It was clear in the run up to the 148th Open held at Royal Portrush in July 2019 that the current licensing law does not cater for major events and that reform is needed so as not to deter tourism in this jurisdiction moving forward.

Similar reform was introduced in Scotland, England and Wales nearly two decades ago. In Scotland, the Licensing (Scotland) Act 2005 permits a licensing board to make a **"**determination**"** to grant extensions for licensing hours for events of a local or national significance. In England and Wales, s 172 of the Licensing Act 2003 permits the Secretary of State to make an order (a licensing hours order) extending licensing hours in respect of events of "exceptional international, national or local significance". Therefore, this particular provision will ensure that NI is on the same footing as the rest of these jurisdictions in terms of liquor licensing for major events.

Conclusion

Overall, the modernisation of liquor licensing legislation in NI will no doubt provide a welcome uplift to the hospitality sector at a time when it is attempting to map out a road to recovery following the pandemic.

This much-needed reform brings the NI licensing framework closer in line with the rest of these islands, which will hopefully result in increasing tourism to the jurisdiction and bring added support to the hospitality sector so that licensed premises throughout NI will be able to benefit from the changes.

The Bill is currently being examined at committee stage. Having provided evidence on behalf of the IoL, it is clear to us that the committee is carefully scrutinising the Bill. They have heard from a wide range of industry bodies, religious groups, the NI police service and other authorities and are taking their views into consideration. We expect the committee to propose a number of amendments to the Bill and await with interest the outcome of that process.

Subject to any amendments, the Bill will become law this autumn.

Eoin Devlin
Legal Director, TLT Solicitors

Orla Kennedy
Solicitor, TLT Solicitors

What is a ‘table meal’?

The precise definition of a table meal, hazy at the best of times, took on fresh urgency but became little clearer during the pandemic. In the interests of clarity, your legal maître d’, **Richard Brown,** talks us through the terminology menu

> *You cannot get dinner at the Moon Under Water, but there is always the snack counter where you can get liver-sausage sandwiches, mussels (a speciality of the house), cheese, pickles and those large biscuits with caraway seeds in them which only seem to exist in public-houses.*
>
> *Upstairs, six days a week, you can get a good, solid lunch—for example, a cut off the joint, two vegetables and boiled jam roll—for about three shillings.*
>
> *George Orwell, Evening Standard February 1946.*

George Orwell’s famous paean to his favourite pub notwithstanding, the question of what constitutes a “table meal” and variations thereof in a pub are usually confined to a council chamber where people in suits earnestly debate whether the food offer at a premises seeking a premises licence under Licensing Act 2003 (LA03) is sufficient to merit a distinction between a food-led premises and a drink-led premises. The topic is a feast only for pedants rather than sustenance for the masses; I, for one, have never suggested to my wife that rather than cooking, we pop out for a quick table meal.

Phrases frequently used include “table meal”, “substantial table meal”, “substantial food” etc. Very few if any meaningful and practical definitions are available nor could they be, given the esoteric nature of the nation’s eating habits. LA03 is of no great assistance (see below). Given the importance of the concept of the table meal to licence applications it is perhaps surprising that case law on the topic is scant, and not a lot of help can be gleaned from these judicial crumbs.[1]

The question exploded into the public consciousness in late 2020 with the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (the 2020 Regulations). Or, rather, from opaque Government prognostications on the same. No experts were needed, it seemed, when Michael Gove could confidently assert that a scotch egg was a “substantial” meal, shortly after he had opined that it was not. His parliamentary colleague Robert Jenrick, not as far as I am aware a licensing practitioner, weighed in with his view that a Cornish pasty only counted if it came with sides. In any event, banner headlines in the red tops and arch Op-eds in the broadsheets conveyed the subject to the populace. Licensing was in fashion, and the debates practitioners have every week at sub-committee hearings were being played out in the national media. It was only a shame that it did not coincide with National Licensing Week.

Where the Regulations had sought to provide a framework and ensuing guidance clarity, confusion reigned. *Plus ca change,* many would have thought. But behind the jokes about scotch eggs and Cornish pasties were very real and important questions about what licensed premises could and could not do in the crucial pre-Christmas trading period. It was a vital question for stakeholders (and, perhaps, steakholders?).

General principles

Care clearly needs to be taken with the definition of a table meal so as to properly understand the actual legal requirements set out in the 2020 Regulations. Before moving to those Regulations, it is necessary to take a look at what LA03 says on the matter. The overarching definition, for what it is worth, is at s 159:

> *‘Table meal’ means a meal eaten by a person seated at a table, or at a counter or other structure which serves the purpose of a table and is not used for the service of refreshment for consumption by persons not seated at a table or structure serving the purpose of a table.*

Surprisingly, this actually adds meat to the definition in Licensing Act 1964 where the definition of a table meal is that it is eaten by a person seated at a table (s 201).

The concept of a table meal is also mentioned in the context of the statutory offences in LA03 relating to alcohol and children:

> *Section 149(5), in the context of purchase of alcohol by or on behalf of children except for consumption ‘at’ a*

1 The two most frequently referenced are *Timmis v Millman* [1965] Crim L R 107 and *Solomon v Green* [1955] – see below for discussion on these cases.

table meal

Section 150(4), in the context of the offence of knowingly consuming alcohol on the premises, except for consumption 'at' a table meal

Section 153(2), in the context of prohibition of unsupervised sales by children except for consumption 'with' a table meal, in part of the premises used only for the service of table meals and 'as an ancillary' to a table meal.

Moving on to the 2020 Regulations, para 16(2) sets out what constitutes a table meal for the purposes of the those Regulations:

The meal is such as might be expected to be served as the main midday or main evening meal, or as a main course at either such meal.

Sub-paragraph 16(2) of the 2020 Regulations perhaps purposely avoids too precise a definition; attempting to particularise the extent and scope of a table meal is counter-productive when it is, literally, a moveable feast. Inevitably a table meal will depend on any number of objective and subjective factors to be determined on a case-by-case basis but will include consideration of the particular premises, the particular operation and the particular patrons. These can be distilled into a number of operating principles:

- A table meal is served to seated patrons who consume the meal on the premises.
- A table meal is served to lawful gatherings.
- A table meal needs to be assessed according to broad inclusive criteria that make allowance for regional variance, socio-economic circumstance and are reflective of diversity.

A labourer's sausage roll or a cheese and pickle sandwich is as much a table meal (for the purposes of the pint which accompanies it) as a carefully-curated sous-vide multi-course tasting menu with foams, jus and consommés, and the paired wines specially selected by the sommelier which accompany it. Eating out (in a Covid safe way) as a respite from the Covid restrictions should be available to the persons of all incomes not just those who can afford a three-course white tablecloth "substantial meal"; it cannot have been the Government's intention to afford the luxury of a pint and a meal only to the rich or those not on a diet.

Any purported objective criteria must be balanced against personal freedom and informed by the operator's knowledge of its patrons. We must be wary of snap-shot judgements that fail to fully contextualise the table meal. For many, a table meal is about sharing food either by way of a number of small dishes or a sharing platter: pizza is as much a meal for the many as it is for the individual.

A table meal is an activity that involves, food, drink, conversation (ideally), and dwell time. An experienced operator is able to identify those with the intention to merely drink and those who are enjoying drink as part of a Covid-safe table meal experience. A table meal is an experience that will vary from person to person, place to place, and time of day, week and season. A table meal can include ordering drinks, considering the food options, ordering, enjoying a drink while waiting for a meal, eating and drinking with the meal, perhaps ordering more food and indeed enjoying drink after the conclusion of the main course. This may be the reasoning informing the decision of the court in the case of *Solomon v Green* [1955] which according to the Westlaw Digest records that the words "at a meal supplied at the same time" in the relevant legislation did not mean that the intoxicants had to be delivered to the customer only side by side with a meal or a part thereof. Thus, the horror stories (if not apocryphal) of customers not being served a drink until their food arrived were wholly unnecessary.

Paragraph 16(2) is concerned with the service of alcohol with a table meal and not the sale of a table meal. Table service in sub-paragraph (2) may be contrasted with the sale of alcohol in sub-paragraph (1). Thus, the table meal may be supplied by an external catering business or local delivery service for seated consumption on the premises – this may offer a vital avenue to some of the most hard-hit businesses. It follows that the amount of money spent on the table meal in the premises and recouped by the operator is not a legitimate factor in assessing a table meal and compliance with the exemption restriction. In these circumstances operators are strongly encouraged to conduct an appropriate risk assessment to ensure that the table meal has been ordered for delivery and for consumption on the premises. They may wish to consider facilitating the ordering and delivery to ensure compliance.

Paragraph 16(2) is a densely worded definition but can be broken down to four simple exemplars:

- The table meal is such as might be expected to be served as the main midday meal; or
- The table meal is such as might be expected to be served as the main evening meal; or
- The table meal is such as might be expected to be served as a 'main course' at the main midday meal; or

- The table meal is such as might be expected to be served as a 'main course' at the main evening meal.

Furthermore, para 16(4) provides that the table meal is a meal eaten by a person seated at a table. There is in any event a distinct restriction requiring all food and drink for consumption on the premises to be ordered by and served to seated customers (para 15) at appropriately distanced tables.

These clear regulatory parameters have unfortunately been somewhat undermined by the Government's guidance to restaurants, pubs, bars and takeaway services, which states at para 2.2 (our emphasis):

> *From 14 October, pubs and bars in Very High Alert areas must close unless they operate as if they were a restaurant. This means serving* ***substantial*** *meals, like a main lunchtime or evening meal.*

This guidance note introduces the addition of the non-regulatory concept of a "substantial meal". This is plainly wrong, misleading and unhelpful and undermines common efforts to reach a practical working operating model.

'As might be expected' – but by whom?

Sub-paragraph 16(2) of the 2020 Regulations is worded so as to invite what might be objectively expected by the "fair-minded and informed observer", traditionally the average man on the Clapham Omnibus. We now, however, recognise that the venerable Victorian gentleman from the Clapham Omnibus is now a passenger among many within a diverse and inclusive company. Any expectation purporting objectivity must, in my view, be tempered by an acceptance of relevant socio-economic and regional considerations.

A focus upon individual plated traditional meals such as Orwell's "meat, and two veg" fails to appreciate cultural differences and changing habits. For many, a table meal is a shared experience of many small plates or one large platter. In so far as regulators attempting to construct abstract pre-determined parameters as to what constitutes a table meal, they will need to be mindful to have due regard to the Public Sector Equality Duty (Equality Act 2010) in forming an objective view. It will not pay to be too prescriptive. Enforcement officers should channel the "man on the Clapham omnibus" rather than the "officious bystander".[2]

Compliance with the requirements falls on the shoulders and expertise of experienced operators. It might be that discretion is the better part of valour and the modern legal maxim of "I know it when I see it" (*Jacobellis v Ohio* 378 US 184, 197 (1964)) should be adopted rather than pre-determined and inevitably arbitrary criteria.

Caution must be exercised when scouring case law for assistance. The oft-mentioned case of *Timmis v Millman*[3] is cited as authority for the proposition that a sandwich with pickles and beetroot constitutes a substantial table meal – but this is not correct. The question before the court was whether the meal (over which there was no argument or controversy) was taken in a place set apart for the service of table meals (see also the Scottish case *of M'Alpine v Healy* [1967] JC 11 which makes reference to *Timmis v Millman* [1965] but also in the context of whether the lounge part of the hotel was "usually" set aside for the service of table meals). The case is neither authority for the definition of a table meal then or now.

In practice, pre-determined arbitrary criteria as to the content and composition of a table meal, the amount of alcohol that may be consumed with that table meal or as part of that table meal experience, or the amount of dwell time spent eating and drinking as part of the table meal experience are crude and unhelpful. Fortunately, what little case law there is on the topic supports this view – see *R v Liverpool Licensing Justices, ex p Tynan,*[4] where it was held that the question of alcohol being "ancillary" to a meal refers to the sort of meal which it must be *bona fide* intended to provide, rather than, eg, assessing spend on food as a proportion of the overall turnover.[5] The caveat is, again, that the case was decided under repealed legislation.

Proportionality

In common with accepted jurisprudence, the Tier 3 Regulations made pursuant to s 45C and in particular ss (3)(c) of the Public Health (Control of Disease) Act 1984 require that when imposing a restriction or requirement by virtue of s 45C(3)(c) that restriction or requirement is proportionate to what is being sought to be achieved.[6]

The restaurant, pubs and bars guidance issued by the Government sets out the key objective at para 2.2 to manage interactions at the venues resulting from food and drink, the overall aim being "for the purpose of reducing public health risks" (para 6.4 of the Explanatory Memorandum to the Tier 3 Regulations). The service of alcohol with a table meal is a part of that aim which includes the restrictions on the quantity and composition of the gathering, the use of face masks and the reduction in capacity resulting from Covid safe measures such as the requirement for table seating. The

2 See *Healthcare at Home Ltd v Common Services Agency* [2014] UKSC 49 per Lord Reed for an analysis of the passengers on the apocryphal omnibus.

3 [1965] Crim L R 107.

4 [1961] 2 All ER 363.

5 See *Patersons* 2020p 569.

6 See s 45D(1).

disproportionate focus upon the precise composition of a table meal is to miss the wood for the trees. An assessment of how the premises *is in fact operating* (a significant part of which would certainly include an assessment of the food provision) is necessary.

Ultimately, it is a matter of proportionality as to what constitutes the consumption of alcohol with a table meal.

The reader of Orwell's *The Moon Under Water* is hoping by the end of the piece to be informed where this apotheosis of a public house may be found, only to discover that it does not exist. Perhaps we too are looking for something which doesn't exist. The best we can do is the closest approximation, and we echo Orwell in asking that if anyone does find it, please let us know.

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

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A must for all councillors who are part of the licensing decision making process, providing an introduction for those who are new to the role and a refresher for more experienced councillors. The course covers - Taxis and private hire licensing, Licensing Act 2003, councillor conduct, hearings (Licensing Act and Taxi / private hire licensing), decision making, appeals and costs and licence conditions.

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13th September 2021

Keep up to speed with the new trends, case law and methodology, with our updated course which consolidates best practice and new advice and explains the current trends found in many salons and parlours across England and Wales.

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2, 8, 9 & 14* September 2021 (*14 September London specific)
23, 28 & 30 September & 4 October 2021
23, 25, & 30 November & 6 December 2021

2021 The training will focus on the practical issues that a licensing practitioner will need to be aware of when dealing with the licensing areas covered during the course (See Agenda for full details). The training is ideally suited to someone new to licensing, or an experienced licensing practitioner who would like to increase or refresh their knowledge and expertise in any of the subject matters.

Responsible Authority Licensing Training

27 September 2021

Online training course

This one-day training course is aimed at Responsible Authority officers and will give them a good overview of the Licensing Act 2003, and the role of Responsible Authorities when considering and responding to licence applications or requesting review of existing licences

Are CO_2 monitors an effective way of assessing air quality?

Ensuring staff and building inhabitants are safe from viruses and other air-borne infections has never been more important. But what's the most effective method, and what does the law prescribe? **Julia Sawyer** explains

With the global Coronavirus pandemic continuing, indoor air quality and the effect it has on a person's health continues to be analysed. The virus can persist on respiratory droplets or aerosols that can be transported to different areas by air currents and survive in environments with insufficient air-refresh rates. Scientists worldwide have been looking at ways in which the risk of spreading the virus indoors can be reduced by assessing the air quality and putting the appropriate control measures in place.

We know that maintaining good air quality is important for building and environmental health. As well as being implicated in reducing employee productivity, poor indoor air quality can often be used as an indicator of a working environment with a high risk of spreading disease and viruses.

An employer or person in control of an indoor space is legally required to ensure it is safe for people to use.

The Health and Safety at Work, etc Act 1974 requires employers to provide a safe place of work. Part of section 2 (2) states:

> *(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;*
>
> *(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.*

Specifically, the Workplace (Health, Safety and Welfare) Regulations 1992 detail what an employer must do in relation to the provision of adequate ventilation in the workplace, Regulation 6 covers general workplace ventilation:

> *Effective and suitable provision shall be made to ensure that every enclosed workplace is ventilated by a sufficient quantity of fresh or purified air.*
>
> *Enclosed workplaces should be sufficiently well ventilated so that stale air, and air which is hot or humid because of the processes or equipment in the workplace, is replaced at a reasonable rate.*
>
> *The air which is introduced should, as far as possible, be free of any impurity which is likely to be offensive or cause ill health. Air which is taken from the outside can normally be considered to be 'fresh'. However, air inlets for ventilation systems should not be sited where they may draw in contaminated air (for example close to a flue, an exhaust ventilation system outlet, or an area in which vehicles manoeuvre). Where necessary, the inlet air should be filtered to remove particulates.*
>
> *In many cases, windows or other openings will provide sufficient ventilation in some or all parts of the workplace. Where necessary, mechanical ventilation systems should be provided for parts or all of the workplace.*
>
> *In the case of mechanical ventilation systems which recirculate air, including air-conditioning systems, recirculated air should be adequately filtered to remove impurities. To avoid air becoming unhealthy, purified air should have some fresh air added to it before being recirculated. Systems should therefore be designed with fresh-air inlets, which should be kept open.*
>
> *Mechanical ventilation systems (including air-conditioning systems) should be regularly and adequately cleaned. They should also be properly tested and maintained to ensure that they are kept*

clean and free from anything which may contaminate the air.

Regulation 6 also states:

The fresh-air supply rate should not normally fall below 5 to 8 litres per second, per occupant. When establishing a fresh-air supply rate, consider the following factors:

- *the floor area per person*
- *the processes and equipment involved*
- *whether the work is strenuous.*

Having adequate, effective ventilation assists in reducing the risk of spreading Covid-19. Even with other controls in place such as social distancing, frequent hand washing, increased cleaning regimes, use of face coverings / transparent barriers, etc., employers should still consider the risk from airborne transmission of the virus from aerosols in poorly ventilated indoor spaces, particularly if individuals are in the same room together for an extended period of time. Ventilation should be an integral part of an employer's risk assessment for a robust Covid-19 risk mitigation strategy for all multi-occupied public buildings and workplaces, and it should be considered as an important part of the hierarchy of risk controls.

How an area is ventilated is just one of the factors you are required to consider as part of the risk assessment, other areas to consider in relation to ventilation:

- Making sure infected workers (or any visitors with Covid-19 symptoms) do not come into the workplace.
- Limiting the number of people in an area.
- Thinking about activities that increase deeper breathing (including singing, physical exertion and shouting).
- Workers spending less time in occupied areas.

Ventilation

There are different ways that a workspace can be ventilated:

- Natural ventilation, which relies on passive air flow through windows, doors and air vents that can be fully or partially opened.
- Mechanical ventilation using fans and ducts to bring in fresh air from outside.
- A combination of natural and mechanical ventilation, for example where mechanical ventilation relies on natural ventilation to maximise fresh air.

The workplace will need to be assessed to decide if the ventilation is adequate and effective.

This could involve:

- Looking to see if there is any mechanical ventilation or natural ventilation such as open windows, doors or vents etc.
- Checking that mechanical systems provide outdoor air, temperature control or both. If a system only recirculates air and has no outdoor air supply, the area is likely to be poorly ventilated.
- Identifying areas that feel stuffy or smell badly.
- Considering the use of gas monitoring devices, such as carbon dioxide (CO_2) monitors.

Oxygen is breathed in, and carbon dioxide exhaled. Outdoors, CO_2 levels usually range from 350-450 parts per million (ppm) but are higher in areas with very heavy traffic. Indoor CO_2 levels are therefore generally higher than outdoors, and typically vary between 400 and 1,200 ppm. Levels are affected by the number of occupants in the room, the activity levels of occupants, the amount of time occupants spend in the room and the ventilation rate.

By measuring indoor CO_2 levels, a ventilation system can be maintained by finding the balance between the carbon dioxide that humans produce and a "dilution effect" as ventilation systems operate. The CO_2 content is used to identify and control the amount of fresh air per person in a room. By using the known difference between indoor and outdoor CO_2 concentrations, and by monitoring indoor concentrations of carbon dioxide, ventilation performance can be assessed.

CO_2 monitors

Checking CO_2 levels can help to assess if ventilation is adequate. CO_2 concentrations recorded will depend on multiple parameters including: the occupants and their activities, variations in building type, ventilation provision, air permeability, weather and external CO_2, the sensor accuracy and calibration, other CO_2 sources and the positioning of the sensors.

To get the most representative reading sensors should be located in the occupied zone of a space, away from doors, windows and vents and at least 0.5 m away from people. If a space has additional filtration or air cleaning measures to control virus spread (eg, high efficiency particulate air (HEPA) filter or Ultraviolet (UV-C) devices) then CO_2 measurements will not account for these measures and may indicate a

higher risk than is present in the space.

Models and practical experience indicate that measurement of CO_2 is a useful indicator to identify poor ventilation in the context of airborne transmission but may not be necessarily an indicator of sufficient ventilation to fully mitigate transmission.

In a space with more than 20 occupants, a CO_2 concentration routinely greater than 1,500 ppm (absolute level) is considered to be an appropriate marker to indicate poor ventilation or overcrowding regardless of the size of a space and is therefore likely to be associated with a higher risk of transmission. Spaces where CO_2 cannot normally be kept under 1,500 ppm are suggested as the highest priority for mitigation.

Settings where there is likely to be enhanced aerosol generation, for example through singing, loud speech or aerobic activity, may pose a substantially higher risk. Ventilation rates should aim to maintain CO_2 below 800 ppm and the duration of exposure below one hour. Even this may be insufficient to fully mitigate transmission, and other measures may need to be introduced.

Use of CO_2 as an indicator for ventilation effectiveness is more difficult in spaces with lower numbers of occupants (<20) because of the increased influence of individual variations in CO_2 generation rate; so any measurements in spaces with lower occupancy should be treated with caution.

Measurement of CO_2 cannot account for other mitigation strategies such as filtration, UVC air cleaning or the use of face coverings; these strategies remove the virus from the air but not CO_2.

Although it is recommended that priority is given to poorly ventilated spaces, improved ventilation in other spaces may also be beneficial. Longer term actions to maintain CO_2 below 1,000ppm may further reduce transmission risk as well as more widely improve indoor air quality for the health of occupants.

Air quality

The Chartered Institute of Building Services Engineers (CIBSE) recommends ventilation rates of 8-10 l/s per person in an office type setting (this satisfies the Workplace Regulations), which corresponds to a CO_2 concentration around 1,000ppm. In communal areas such as offices, a value around 1,000ppm is widely regarded as an indicator of sufficient per person ventilation rates to provide perceived good indoor air quality.

The principle promoted by CIBSE and the Scientific Advisory Group for Emergencies (SAGE) is to dilute the infectious material and quickly remove airborne pathogens from a space in order to reduce opportunities for surface deposition or inhalation by others. The risk increases as the concentration of pathogens in the air increases.

SAGE says modelling shows that “exposure to aerosols approximately halves when the ventilation rate is doubled”. For offices and business premises, this means taking steps to increase both the supply of outside air and the rate of exhaust ventilation as much as is reasonably possible while minimising, or eliminating, the recirculation of air.

In addition, for spaces with mechanical ventilation CIBSE recommends starting the ventilation system at least an hour before occupancy and continuing to run the system for at least an hour after everyone has left to help purge the space of aerosols.

Similarly, for ventilation systems where the rate of fresh air supply is controlled to maintain a minimum CO_2 level, CIBSE recommends changing the CO_2 set point to a lower value to maximise the flow of outside air.

Another important CIBSE recommendation is to stop the recirculation of air between spaces and rooms occupied by different groups of people, unless recirculation is the only way of maintaining adequate levels of outside air to these spaces. Systems with thermal wheels should be inspected by a competent person to assess any risk of air leakage from the exhaust flow into the supply air and to adjust the system to eliminate any transfer which could carry viral material into the supply airstream.

Providing effective ventilation is more of a challenge in older buildings, as systems may not have been designed in line with current ventilation standards or have been extended and altered over time.

CIBSE’s general advice is that ventilation rates should be increased as much as reasonably possible without compromising thermal comfort.

In poorly ventilated spaces with high occupancy where it is difficult to increase ventilation rates or reduce occupancy, it may be appropriate to consider installing air cleaning or ultraviolet light disinfection devices.

Unfortunately, unlike social distancing and hand washing, ventilation requirements cannot easily be prescribed in one simple approach that everyone can follow. Each scenario has to be considered on an individual basis to determine the level of ventilation needed. One size does not fit all. An

example would be comparing a theatre auditorium with a small office in a pub. Adapting the ventilation in many environments is challenging due to the reasons given above and simply installing a CO_2 monitor is not the only solution as the relationship between CO_2 and the infection risk of Covid-19 is less well explored than relationships with indoor air quality. But it certainly could form part of a Covid-19 risk mitigation strategy.

Sensors for monitoring air quality in buildings are an emerging method for control of viruses and rely on many different parameters to be accurate. It is important that people do the simple things to improve ventilation, such as opening windows, adjusting capacities of a workspace, etc, before investing in detectors or spending money in other air quality monitoring ways.

Julia Sawyer
Director, JS Consultancy

Further reading:

The Chartered Institute of Building Services Engineers' CIBSE Covid-19 Ventilation Guidance is available: website: www.cibse.org/coronavirus-covid-19/emerging-from-lockdown.

The Government's Scientific Advisory Group for Emergencies (SAGE) has published detailed guidance in The Role of Ventilation in Controlling SARS-CoV-2 Transmission.

Third party costs: a cautionary tale

For some time, it has been the exception rather than the rule for third parties to seek to be joined as parties but recently the police have been keen to get in on the act. **Sarah Clover** points out, however, that three can sometimes be too much of a crowd

One of the early dilemmas when the Licensing Act 2003 regime was still newly minted concerned who could be a party to an appeal. Schedule 5 of the Act would seem to be fairly comprehensive as far as conferring appeal rights goes, but in the early days, residents in some quarters were particularly assiduous in exploring their new-found licensing powers, and they claimed that they had rights, under the ECHR if nothing else, to join in appeals as parties.

Responsible authorities were less enthusiastic about joining someone else's appeal, although they occasionally wanted to launch one of their own. In the event, however, the question of who could join an ongoing appeal between an appellant and a respondent council was resolved in the case of *R (Chief Constable of Nottingham) v Nottingham Magistrates Court* [2009] EWHC 3182 (Admin), led by Nottinghamshire Police.

Moses J rejected an argument that any party not specifically identified in schedule 5 had an inherent right to join an appeal. He said:

> *31. The statute must be construed in the context of the Magistrates' Courts Act and the rules. Under both the Licensing Act and the Magistrates' Courts Act and the rules, the authority [licensing authority] is made a Respondent, but the absence of any reference to making those a party who were hitherto parties before the Licensing Sub-Committee is striking. Moreover, the changes made by the Licensing Act 2003 included the repeal of the Licensing Act 1964. By s 22(3) of the 1964 Act objectors were granted the right to appear. That right has been repealed. I would, for my part, therefore reject the submission that there is any implied right on those either interested parties or the responsible authority to appear, or to be represented.*

"We take the view that there was merit in the police seeking to join the proceedings at the time that they did. However, thereafter, much of the work that they did was duplicating that of the council."

Moses J also rejected any argument based upon the "inherent jurisdiction" of the Magistrates' Court to join parties:

> *[35] What Lord Reid and Hickinbottom J teach is that tribunals and magistrates do have power to control and regulate their own procedure, so as to ensure the effective resolution and determination of those functions imposed upon them by the statute in play. There is nothing inherent about that power. It is a power which the statute impliedly confers in order to achieve a statutory objective, which it is the tribunal in question's responsibility to fulfil.*
>
> *[36] In the instant case it was up to the magistrate to determine how best he could achieve the objectives which he was obliged to pursue and how to reach a fair result. In particular, he had to bear in mind the different considerations in relation to interested parties and responsible authority. He had to bear in mind that there was a need to protect the applicant from the undue burden of duplication of argument, and also bear in mind that he did have the power to protect a party, such as the applicant in this case, against the unnecessary incurring of costs, should the appeal fail.*

Moses J concluded that there was, therefore, a wide discretion for the magistrates to join parties to a licensing appeal in circumstances where they felt that they needed to do so in order to discharge their obligations under the Act, and said:

[39] The power of a magistrate to permit a responsible authority, or an interested party, is, however, only fettered by the objectives which the statute requires the magistrate to achieve, a just resolution of the appeal in furtherance of the objectives in s4 of the Act and the policy of the licensing authority in question.

However, with this wide power came some serious responsibilities, particularly to protect the appellant. There were some heavy caveats within the judgment about joining extra parties, and none more so than the cautionary *dicta* on costs.

Moses J said:

[37] There is no obligation upon the magistrates to order more than one set of costs, and where there has been duplication magistrates ought not to award costs which have been thrown away and could have been saved by one set of observations. But he would also have to bear in mind that the burden on an applicant may not just be financial, but a burden in effort and time should there be unnecessary duplication.

[38] He would also have to bear in mind that the decision in relation to the appeal as to the licence, or as to conditions in the licence, is not a decision similar to that which he would be accustomed to resolving in the course of ordinary litigation. There is no controversy between parties, no decision in favour of one or other of them, but the decision is made for the public benefit one way or the other in order to achieve the statutory objectives.

Typically, licensing appeals proceed between two parties, the decision maker and the aggrieved subject of the decision. Very often these appeals are resolved by way of negotiation and consent orders, which can occur relatively late in the proceedings. Since the *Nottingham* case, it has been the exception rather than the rule for third parties to seek to be joined as parties – until, that is, more recent times. There now seems to have developed a fashion for the police in particular to seek to be joined in licensing appeals as an independent party, separately represented. The source or cause of this phenomenon is not entirely clear, and it is certainly counter-intuitive during times of austerity and restricted public funds, and yet it has become notably prevalent.

This trend may now be reversed following events in the Birmingham Magistrates' Court on 17 May 2021.

Two licensed premises lost their licences as a result of summary reviews and full reviews, in which the licensing sub-committees revoked the licences in both cases for failures to comply in October 2020 with Coronavirus Regulations. Neither venue ever opened again.

Both premises catered particularly for the BAME community. The public sector equality duty (PSED)[1] was raised in both cases and the sub-committees were invited to consider the impact of their decisions on persons with protected characteristics. In both cases the premises asked the licensing sub-committee to have regard to the PSED, the exercise of which is a matter for the decision maker, that is the licensing sub-committee itself.[2] The police asserted that it was they that were being accused of racism, and sought to engage on that basis. While the police are undoubtably subject to the PSED in these cases, the focus was upon the conduct of the licensing authority and how it approached the PSED. The decision to revoke was made by the licensing authority and not the police.

The premises challenged their respective summary review interim suspensions on appeal on the basis that the licensing authority had approached breaches of the Coronavirus Regulations and the summary reviews incorrectly. The magistrates rejected the appellants' arguments to this effect in December. On the same day, the magistrates considered the directions for the full appeals, and the police also made their application to be joined as a separate party in each case. The primary argument for the police doing so at that stage was the "reputational" issue allegedly raised by the PSED argument. The appellants resisted on the basis that the police could make any points they wished to make in the context of giving evidence as the council's witnesses, as normal. The appellants also highlighted *Nottingham* and their grave concerns as to duplication of costs, in cases where the businesses had already been lost, and there was no income from them. The police acknowledged the case, but pressed their application for joinder, and the magistrates acceded and granted the police status as a separate party.

The PSED point was withdrawn by both appellants in March. One appellant withdrew their appeal entirely in April, and the other in May. Costs were agreed with the council by consent in the sum of approximately £5,000 per appellant. The police submitted their costs application in the sum of approximately £6,000 per appellant. The appellants resisted these costs in full, on the basis that they were duplicated with the council, and the matter went to court to be argued.

1 Equality Act 2010, s 149.

2 See *R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158*; [2009] PTSR 1506; also *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 and in particular paragraphs [25] and [26] for a summary of the key principles.

The magistrates awarded £500 each, on the basis that the police case had indeed duplicated that of the council. The justices's reasons stated as follows:

> *We take the view that there was merit in the police seeking to join the proceedings at the time that they did. However, thereafter, much of the work that they did was duplicating that of the council.*

This case speaks to the cautionary dicta of Moses J, quoted above and restated here:

> *[37] There is no obligation upon the magistrates to order more than one set of costs, and where there has been duplication magistrates ought not to award costs which have been thrown away and could have been saved by one set of observations. But he would also have to bear in mind that the burden on an applicant may not just be financial, but a burden in effort and time should there be unnecessary duplication.*

The lessons to be drawn from these proceedings include the careful consideration that needs to be given by third parties as to whether their interests really do require separate cases and representation, with the high price tag that this can sometimes engender. But even if there is some justification for being joined in, the key point is that the party should remain assiduous in monitoring whether the work that they are undertaking thereafter really is bespoke to their issues, and necessary, or whether it is mere duplication. If the latter then, win or lose, it is likely to be an expensive undertaking.

Sarah Clover
Barrister, Kings Chambers

Gambling Commission prepares for changing of the guard, while government probes into its role

Life may have been returning to normal for punters up and down the land but those who run and regulate the sector are facing potentially major changes, says **Nick Arron**

As I am writing this, adult gaming centres, casinos and bingo halls are striving to be ready to reopen to the public on 17 May 2021 (betting shops having been open for a few weeks now). Inevitably there will be some bumps along the way as premises reopen, but I hope by the time you read this the land-based gambling industry will be up and running.

It has been a tough year for the gambling industry, with most high-street operators closed. And it's been an eventful year for the Gambling Commission too.

Gambling Commission challenges

In March, Neil McArthur, Chief Executive of the Gambling Commission, resigned from his position. Neil has been with the Commission for nearly 15 years, firstly as in-house counsel and since 2018 as CEO. His departure was sudden and apparently unplanned. The Commission is currently looking for an interim chief executive. Bill Moyes, the current chairman, is to step down later this year, and the Commission proposes that the new chairman will then appoint a permanent chief executive. With the leadership of the Commission evolving, it will be interesting to see where the future chief executive and chairman direct the regulator. Previous changes at the helm have led to changes in focus, for instance during Sarah Harrison's tenure and the Commission's lean towards the consumer.

There are also outstanding questions on the role of the Commission. It is one of the topics of the DCMS review of the Gambling Act 2005, with the DCMS asking for evidence as to whether the Commission has sufficient powers of investigation, enforcement and sanctioning to effect change in operator behaviour and raise standards; or, if existing powers are considered to be sufficient, is there scope for them to be used differently or more effectively by the Gambling Commission. So the Commission's very status within gambling regulation is currently under review by its sponsoring department in government. And this at a time when the regulator comes under regular fire from politicians, the media and licensees.

Affordability

We have seen the Commission consult on significant proposals regarding affordability, which would require operators to satisfy themselves that players and punters can afford to gamble to the levels they propose. There is some suggestion that the Commission was looking at the requirement to check affordability for stakes in the low hundred pounds. This has been a difficult concept for many to process and accept, and there are reports of 13,000 responses to the Commission consultation, a number of which are from punters and players unhappy with proposed restrictions on their freedom to spend their own money. At the time of writing, there are reports within the press that the DCMS is itself now considering stepping in and bringing affordability into the wider review of the Gambling Act 2005. With the apparent ferocity of some of the concerns on affordability, this may be welcomed by the Gambling Commission.

Football Index

You will have seen reports on the failure of Football Index, and the huge sums of money owed to its customers. The collapse has been the biggest failure in the gambling industry for many years, and has again drawn into question the role of the Gambling Commission.

Following concerns about the operator the Commission began a formal review of BetIndex Limited (t/a Football Index) under s 116 of the Gambling Act on 20 May 2020. The focus of the review was to address issues in relation to the betting aspects of the product. At that stage the Commission stated that there were no grounds to suspend the operating licence.

In March this year, however, the Commission suspended the operating licence as it had concerns activities may have been carried on that did not accord with conditions of the licence, and that Football Index might not be suitable to carry on with licensed activities.

This engagement differs from the majority of previous Commission enforcement activity as the focus is on whether Football Index treated consumers fairly and kept them fully informed of developments which impact them. Previous Commission engagements have focused on crime, money laundering and failure to protect the vulnerable.

The BetIndex product allowed customers (called traders) to place bets (shares) on the future performance of footballers. A bet lasts for three years during which time they accrue dividends. After three years the bet expires, meaning that customers lose their stake and any right to further dividends. The product evolved to enable customers to buy and sell bets with prices fluctuating according to demand. We now understand the model was flawed.

Football Index has gone into administration and it remains to be seen how much money the customers will claw back. There are a number of resulting actions imminently expected, including litigation on behalf of the customers and a government investigation.

The industry is starting to feel the effects of the fallout, with the Commission approaching similar operators to better understand their business models, in an attempt to prevent lightning striking twice. We expect new operating licence applications for similar betting models to receive much greater attention from the Commission in the future.

The effect of the challenges currently facing the Commission are being felt in its interaction with licensees and licence applicants. The Commission has recently changed the advice it provides to applicants on the time it takes to determine an application, now stating that it could take up to six months. Previously the Commission estimated 16 weeks.

On 1 April 2021, the Gambling Commission published its new three-year corporate strategy, which sets out the Gambling Commission's focus as it continues to strive to protect the public and players from harm from gambling. The strategy included the expected references to priority areas including the three licensing objectives, along with ensuring effective management and optimisation of returns to good causes from the National Lottery. The Gambling Commission also published proposals on improving gambling regulation, with references to developing its staff, managing its resources more efficiently, evaluating the impact of its work and better harnessing technology.

DCMS call for evidence

The deadline for the DCMS review of the Gambling Act 2005 passed on 31 March 2021, concluding a 16-week call for evidence. The Government is now assessing the evidence presented with the aim of setting out conclusions and proposals for reform in a white paper later this year. We understand that the aim was to propose some changes by the summer, with implementation potentially in autumn. It remains to be seen whether this timetable will be followed, given the other significant legislative requirements of Government, not least relating to the pandemic. But we can say that there is political will to make changes to gambling regulation, and it is a topic regularly discussed in the Houses of Parliament.

The white paper will include more detailed proposals, subject to consultation before implementation. These could be changes to the act itself or the statutory instruments, or changes to the licence conditions and codes of practice. One change we are expecting is a limit on stakes and prizes when gambling online, particularly in relation to gaming and slots.

Of interest to local authorities would have been answers to questions in the review on land-based gambling, and the effectiveness of current measures to prevent illegal underage gambling, and on evidence as to whether licensing and local authorities have enough powers to fulfil their responsibilities in respect of premises licences. Statistics on licensing authority use of the power to inspect and review gambling licenced premises suggest that the existing powers are underutilised, but the matter has now entered the realms of politics rather than regulation.

There has also been much discussion regarding the introduction of an industry ombudsman. In my view it is hard to justify the additional cost and burden of such a role for the land-based gambling industry, when you consider the very small number of complaints from land-based businesses. There are more complaints online, however, so perhaps the proportionate approach would be to adopt an ombudsman for online gambling only.

Nick Arron
Solicitor, Poppleston Allen

A new approach to licensing hemp

A recently published report, *Pleasant Lands*, co-ordinated by third-sector drug policy reform organisation Volteface, offers a solution to what it calls 'draconian, pointless' hemp legislation. **Gary Grant**, barrister, co-wrote the report with solicitor **Robert Jappie**, **Lily Temperton** of Hanway Associates and **Liz McCulloch** of Volteface. Below are key extracts

Industrial hemp cultivation is permitted under licence in the UK and farmers are able to process the seeds and stalks for a defined commercial use, such as producing hemp seed oil, textiles and building materials. Yet despite unprecedented global expansion hemp remains classified as a niche crop in the UK - with cultivation estimated at only 800 hectares annually, a tiny fraction compared to the US or Australia.

The primary obstacle that is stopping the UK from unleashing the potential of industrial hemp is the licensing regime that prohibits farmers from harvesting the whole plant. The leaves and flowers of the hemp plant must be disposed of and cannot be used for any purpose, including to extract CBD (or cannabidiol, an active ingredient of cannabis).

UK regulators have supported the ongoing growth of the CBD market by providing a pathway for wholesale CBD companies to secure novel food authorisation, advising that any company which had not made a valid application to the Food Standards Agency by 31 March 2021 would have its products removed from UK shelves.

However, as the licensing regime inhibits domestic CBD production, this regulatory pathway only helps the overseas companies who import their products into the UK. It is nonsensical that the Home Office provides a regulatory pathway for these overseas CBD companies, but excludes British businesses from participating in a market which has a current market value of £300 million in the UK. This is expected to grow to a £1 billion market by 2025.

The Home Office can amend its current guidance, without the need for primary or secondary legislation, to permit industrial hemp cultivation licences to be granted that do not require the green material to be discarded and permit the whole plant to be processed (by the cultivator or another business) to enable CBD to be extracted.

A legal pathway

Allowing hemp farmers to harvest the whole plant, and wholesale hemp flower for extraction, is a pragmatic policy goal that would increase UK hemp cultivation and the value of hemp crop, and nurture a domestic CBD extraction industry. With this aim in mind, Volteface sought legal avice and argued:

> *The Home Office can amend its current guidance, without the need for primary or secondary legislation, to permit industrial hemp licences to be granted that do not require the green material of the hemp plant to be discarded, and permit the whole plant to be processed by the cultivator, or another business, to enable CBD to be safely extracted.*

This change can be made without legislation due to the existing discretionary powers that sit with the Secretary of State for the Home Department to authorise drug activities that would otherwise be unlawful, including the production, supply and possession of controlled drugs as well as the cultivation of cannabis plant.

Section 7 of the Misuse of Drugs Act 1971 (MDA) provides the Secretary of State (SoS) with extensive powers to make regulations:

> *a. That exempt such controlled drugs as may be specified in the regulations from the prohibition on importing, exporting, producing, supplying or possessing those drugs.*

> And,

> *b. To "make such other provision as he thinks fit for the purpose of making it lawful for persons to do things which...it would otherwise be unlawful for them to do", in so far as it relates to the production, supply and possession of controlled drugs or the cultivation of cannabis plants.*

Volteface argue that "it is this primary power that enables the SoS to bring in a licensing regime, and adapt it, in order to promote new policy objectives" and it is s 30 of the MDA that enables the "SoS to design any licensing scheme that is thought proper to meet policy aims (so long as it is legally rational and proportionate) and charge fees".

The principal relevant regulations made under the enabling provisions of the MDA are the Misuse of Drugs Regulations 2001.

Regulation 5 provides for "licences to be issued by the SoS, in a scheme administered by the Home Office, which may authorise certain drug-related activities which would otherwise be unlawful, in so far as the person acts in accordance with the terms of that licence and in compliance with any conditions."

Regulation 12 provides the broad discretion to the SoS to licence the cultivation of cannabis or hemp plants as follows:

> *Where any person is authorised by a licence of the Secretary of State issued under this regulation and for the time being in force to cultivate plants of the genus Cannabis, it shall not by virtue of section 6 of the Act be unlawful for that person to cultivate any such plant in accordance with the terms of the licence and in compliance with any conditions attached to the licence.*

Thus, due to the scope of these powers, the Home Office licensing framework relies on "discretionary guidance issued to provide some clarity and steer to applicants on the approach the Home Office is likely to take when considering and determining applications for a hemp cultivation licence" (see Home Office "Factsheets").

Volteface's legal arguement is that "it is this policy, expressed only in guidance and not law, which currently prohibits British farmers from extracting CBD in an isolated form from the green material, or wholesaling it to others to do so" and this guidance "can readily be amended, or completely re-drafted, by the Home Office to meet any new policy aims set down by the SoS without the need for primary or secondary legislation (in so far as the new guidance furthers the objectives of the underlying law in a rational and proportionate manner)".

Policy makers should consider whether secondary legislation could provide legal certainty to an emerging industry. However, the enabling provisions within the Misuse of Drugs Act 1971 would permit the Secretary of State to make regulations that would achieve the same policy aim as legislation.

Recommendations

Industrial hemp licence

In order to permit extraction and whole sale of hemp flower under an industrial hemp licence, whilst ensuring the necessary safeguards are in place, we would recommend that the Home Office consider implementing a licensing regime that follows this basic framework:

a. A single industrial hemp licence may be granted on application to the Home Office (or other suitable regulatory body);

b. The application must stipulate which one or more of the following licensable activities is intended to be carried on by the applicant:

   i. The cultivation of hemp;

   ii. The processing of the non-green and / or green material (as indicated) for specified commercial purposes (eg, to produce fibre or seed-oil or for CBD extraction);

   iii. The wholesale supply of the non-green and / or green material (as indicated) to other businesses for the purposes of processing for specified commercial purposes (so long as the other business holds any necessary authorisation or licence);

   iv. The possession and processing of the non-green and / or green material (as indicated) by businesses who did not cultivate the hemp itself.

Depending on the licensable activity, or activities, that the applicant proposes to carry on, the licence can be appropriately, robustly and proportionately conditioned to safeguard against any perceived risks. For example, conditions could be added to the licence to ensure that any THC extracted during the CBD extraction process is safely disposed of and there are sufficient security arrangements in place at a processing plant and in transit to it.

If the regulator is concerned that the expected standards are not being met by a licence holder, then the licence can be reviewed and, ultimately, revoked following a hearing before an appropriate tribunal to ensure procedural fairness.

This approach – one unitary industrial hemp licence with varied specific licensable activities permitted under its authority – has the advantage of simplicity and flexibility.

It permits licences to be proportionately conditioned to suit the different risks involved between the different types of licensable activities.

A graduated level of application fees could also be introduced depending on which of the licensable activities are proposed to be carried on and the size of the business involved.

CBD extraction licence – points to consider

In relation to applications for a new type of industrial hemp licence that permits the extraction of CBD, as outlined above, five points should be considered:

1. Processors should be licensed to handle the controlled parts of hemp, extract cannabinoids and dispose of extracted THC and other controlled cannabinoids.
2. Secondary legislation that specifies in law what is permissible under the new licensing regime would offer more legal certainty to the industry and encourage investment. In other developed countries, commitment to hemp and CBD has been accompanied by legislative reform.
3. Allowing hemp seed varieties with a THC percentage above 0.2% and up to 1% would improve the health of the plant and increase the yield of CBD per acre, and would not affect the end product, which could still have undetectable levels of THC present. This would allow the UK to compete with other non-EU countries, which are not bound by EU registered seed varieties, and would support the UK to become a hub of research and development.
4. The Agriculture and Horticulture Development Board should consider industrial hemp as leviable crop and provide advice to farmers on this basis.
5. Industrial hemp cultivation should be considered as a "public good", due to the environmental benefits that a thriving hemp industry would bring, notably a highly efficient carbon sink and its use as a sustainable building material. On this basis, British hemp farmers should be entitled to subsidies, as laid out in the 2020 Agricultural Bill.

Conclusion

This report has outlined the environmental, economic and agricultural benefits of amending licences related to hemp policy. Not only are the economic and environmental benefits of these amendments to industrial hemp licenses clear, they are simple and uncomplicated for the UK Home Office to implement in that they do not require a change in the law. As discussed, the enabling provisions within the Misuse of Drugs Act 1971 would permit the Secretary of State to make regulations by way of statutory instrument that will achieve the same policy aim.

Moving the THC cap from 0.2% to 1% would not make hemp or CBD products psychoactive, and these recommendations should be regarded as entirely separate to the broader recreational cannabis discussion. The UK finds itself at a critical juncture for the UK hemp and CBD industries.

Allowing the harvesting and processing of the flower would allow both to flourish and thrive. The current set up gifts a significant competitive advantage to international companies that operate within more rational regulatory frameworks. Legal and policy experts agree that these changes would enable UK businesses big and small to benefit our future national economy in a way that is just, rational and fair.

This report proposes that the UK government follow the footsteps of countries such as Switzerland, by amending policy and licensing to ensure that British farmers benefit from this multi-million pound industry. During post-covid recovery, the UK must encourage growth industries that are environmentally friendly, create rural jobs and help to level up non-metropolitan communities.

Leo Charlambides
Barrister, Francis Taylor Building & Kings Chambers

Phillips' case digest

STREET TRADING

Queen's Bench Division, Administrative Court
HHJ David Cooke (sitting as a Deputy Judge of the High Court)

Challenge to policy on types of goods to be sold

R (on the application of Poole) v Birmingham City Council [2021] EWHC 1198 (Admin)

Decision: 7 May 2021

Facts: The claimants challenged the decision of the Council on 3 November 2020 to adopt the Birmingham City Council Street Trading Policy 2020 ("the Policy"), which for the first time set out "the criteria and guidance that [the Council] will use as the regulatory framework for street trading". The Policy dealt in particular with the making of applications for consents, the conditions that applicants would have to meet, the considerations the Council would take into account in deciding whether to grant a consent and how it would deal with competition between applicants, i.e. situations where there was more than one applicant for a particular "pitch" or more applications for pitches in one street or area than there were available pitches. 3. The challenge was wide ranging but centred on one of twelve "Key considerations when assessing an application" set out in section 8 of the policy, which is headed "Selling the right goods", and within that to the following wording:

> *"The types of goods allowed to be sold will be considered on a pitch by pitch basis and specified on the consent. The quality of goods and innovative approach will be considered…*
>
> *Innovative products refers to goods that are not readily available within the High St market place…"*

The claimants asserted that the Innovative Products Criterion" ("IPC") offended various requirements of the Provision of Services Regulations 2009, introduced to give effect in the UK to Directive 2006/123/EC of the EU and in particular constituted a criterion that was not "justified by an overriding reason relating to the public interest" contrary to Regulation 15 and/or amounts to an "economic test" of a type prohibited by Regulation 21 of those Regulations.

Point of dispute: Whether the new policy was lawful

Held: Ground 1: was the IPC in breach of Regulation 15? The court found that the IPC was "proportionate" to the aims of the Policy. Ground 2: Was the IPC is in breach of Regulation 21 (by granting of authorisation subject to an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority, contrary to Regulation 21(1)(e), and by creating an indirect involvement of competing operators in the granting of authorisations, contrary to Regulation 21(1)(f))? Held: any connection between a competitor's actions and the outcome of an application is too remote and fortuitous for it to be considered that it is involved, even indirectly, in the making of the decision. Ground 3: The IPC was unclear and dissuasive. Held: it would be overinterpreting the Regulations and the Directive to require an absolute degree of certainty in advance as to the outcome of an application, such as the claimants in effect contended for. Ground 4: The general conditions are not reasonably necessary and Ground 5: The IPC is contrary to the statutory purpose of the 1982 Act. The last two grounds were taken together. Held that there was no foundation for such a statement of purpose whatever in the 1982 Act itself. On the contrary, the powers and discretion it created were expressed in entirely general terms.

TAXIS AND PHVs

Westminster Magistrates' Court
Tanweer Ikram (Deputy Senior District Judge)

Appeal against decision of TfL not to renew London private hire vehicle operator's licence (PHV) held by Uber London Ltd

Uber London Ltd v Transport for London
[2021] LLR 150

Decision: 28 September 2020

Facts: In November 2019 Transport for London ("TfL") determined not to renew the London private hire vehicle operator's licence held by Uber London Ltd ("Uber"), having decided that Uber was not a fit and proper person to hold the licence. Uber appealed to the magistrates' court, contending that the law required a different test to be met which is whether the decision is now wrong. It was Uber's case that since the refusal of the licence it had taken action and addressed the concerns raised, and that it was now a fit and proper person supported by a substantial body of evidence. London Taxi Drivers Association ("LTDA") were not a party to the appeal but were joined as an interested party by a

previous decision of the Chief Magistrate.

TfL were concerned about: (i) Regulatory breaches since June 2018. (ii) Assurance Reports failing to recognise the importance of some of the breaches and that they were insufficient to have confidence in ULL's systems. (iii) A report from "Cognizant" commissioned by TfL concluding that ULL's IT Service Management rated below the standard that would be expected of a company in its position, as regards 'Change Management Systems' and 'Release Management'. Further, since the November decision, TfL has come to learn of additional matters of concern: (i) significant delays by ULL in deactivating three drivers who committed sexual assaults against passengers, (ii) further piecemeal explanations of the root cause of the driver photo fraud issue, (iii) inaccurate and inconsistent data in ULL's Assurance Reports which, in turn, requires further analysis and verification by TfL, (iv) further regulatory breaches as set out in the February 2020 and May 2020 Assurance Reports, and (v) data management issues, particularly a data outage of ULL's systems in April 2020.

Points of dispute: whether the admitted improvements made were sufficient to outweigh the admitted historic failings.

Held: Whilst, public confidence in the licensing regime is a clear consideration and some breaches in themselves could be just so serious that their mere occurrence was evidence that an operator was not fit and proper, this was not one of those cases. The court had to weigh ULL's record on breaches of regulations and impact on public safety against the impact of Programme Zero in reducing the occurrence of breaches. It would also take into account (i) improvements in ULL's Board oversight, including a key new appointment and their understanding of regulatory breaches (ii) no evidence of concealment or 'cover up' on the part of ULL as regards the driver photo fraud issue and (iii) ULL's record of engagement with TfL and clear improvements in communication. Further, ULL's changes had plugged the gaps identified by Cognizant. Despite their historical failings, the court found ULL, now, to be a fit and proper person to hold a London PHV operator's licence.

The appeal was allowed, with a PHV operator's licence granted to Uber for a period of 18 months and subject to agreed conditions. Uber ordered to pay TfL's costs in the sum of £374,770.

TAXIS AND PHVs

Supreme Court
Lord Reed P, Lord Hodge DP, Lady Arden, Lord Kitchin, Lord Sales, Lord Hamblen and Lord Leggatt SCJJ

Whether Uber drivers' 'workers' providing personal services to second appellant, and if so, what periods constituting their 'working time'. Obiter dicta on legality of operating model.

Uber BV v Aslam
[2021] All ER (D) 89 (Feb); [2021] UKSC 5

Decision: 19 February 2021

Facts: Uber BV, was a Dutch company which owned the rights in the Uber app. Uber London Ltd ("Uber London"), was a UK subsidiary of Uber BV which, since May 2012, had been licensed to operate private hire vehicles in London. The third appellant, Uber Britannia Ltd, was another UK subsidiary of Uber BV which held licences to operate such vehicles outside London (appellants collectively referred to as 'Uber').

The respondents were, at the relevant times, licensed to drive private hire vehicles in London and they performed driving services booked through the Uber app. A test case was brought before the employment tribunal (the ET), concerning their employment status. For the purpose of the decision which had given rise to the present appeal, the ET limited its consideration to two test claimants, even though at the time of the ET hearing, there were about 30,000 Uber drivers operating in the London area and 40,000 in the UK as a whole.

Individuals approved to work as drivers were free to make themselves available for work by logging onto the Uber app, as much or as little as they wanted, and at times of their own choosing. They were not prohibited from providing services for, or through, other organisations, including any direct competitor of Uber operating through another digital platform. Drivers could also choose where within the territory covered by their private hire vehicle licence they made themselves available for work. They were not provided with any insignia or uniform and, in London, they were discouraged from displaying Uber branding of any kind on their vehicle. Drivers whose acceptance rate for trip requests fell below a set level (which according to evidence before the ET was 80%) received warning messages reminding the driver that being logged into the Uber app was an indication that the driver was willing and able to accept trip requests. Uber also operated a 'driver offence process' to address misconduct by drivers.

Before the ET, the respondents claimed rights under the National Minimum Wage Act 1998 ("NMWA 1998") and associated regulations to be paid at least the national minimum wage for work done, rights under the Working Time Regulations 1998 ("the 1998 Regulations"), which

included the right to receive paid annual leave and, in the case of two claimants, a right under the Employment Rights Act 1996 ("ERA 1996") not to suffer detrimental treatment on the grounds of having made a protected disclosure. Such rights are conferred by the legislation on 'workers'.

The term 'worker' was defined by ERA 1996 s 230(3) to mean: "an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertook to do or perform personally any work or services for another party to the contract whose status was not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."

The ET held that the respondents were 'workers' who, although not employed under contracts of employment, worked for Uber London under 'workers' contracts', within the meaning of limb (b) of the statutory definition. The ET further found that, for the purposes of the relevant legislation, the respondents were working for Uber London during any period when they (and other claimants) (a) had the Uber app switched on, (b) was within the territory in which he was authorised to work, and (c) was able and willing to accept assignments. In so ruling, the ET made a number of findings about standards of performance which drivers were expected to meet and actions taken where they failed to meet those standards. For example, the ET found that a 'Welcome Packet' of material issued by Uber London to new drivers included numerous instructions as to how drivers should conduct themselves, such as to be 'Polite and professional at all times', and to 'Avoid inappropriate topics of conversation' and not to 'contact the rider after the trip has ended'.

The Employment Appeal Tribunal (the EAT) and the Court of Appeal, Civil Division (by a majority), dismissed Uber's appeal against the ET's decision.

Points of dispute: Whether the ET had been entitled to find that drivers whose work was arranged through the Uber app worked for Uber under workers' contracts and, accordingly, qualified for the national minimum wage, paid annual leave and other workers' rights.

Held: The ET had been entitled to find (on the facts found[1] in the present case), that the respondent drivers were 'workers' who worked for Uber London under 'worker's contracts' (per s 230(3) ERA). In dismissing Uber's appeal the Supreme Court held that that had been the only conclusion which the ET could reasonably have reached. Accordingly, it affirmed the conclusion of the EAT, and that of the majority of the Court of Appeal, that the ET had been entitled to decide both questions in the workers' favour. Further, the court held that the ET had not erred in finding that: (i) periods during which its three conditions were met constituted 'working time' for the purpose of the 1998 Regulations; (ii) drivers' working hours should be classified as 'unmeasured work', and (iii) the respondents' working hours were not 'time work'.

[1] It should be noted that no evidence was adduced at the hearing in the ET in 2016 that there was at that time any other app-based PHV transportation service operating in London or that drivers logged into the Uber app were as a matter of practical reality also able to hold themselves out as at the disposal of other PHV operators when waiting for a trip. No finding was made by the ET on this subject. It was in these circumstances that the Supreme Court did not consider that the ET was wrong to find that periods during which its three conditions were met constituted "working time" for the purpose of the 1998 Regulations.

REHABILITATION OF OFFENDERS

Court of Appeal (Civil Division)
The Master of The Rolls Sir Terence Etherton, The Vice-President of the Court of Appeal (Criminal Division) Lord Justice Fulford and Lord Justice Hickinbottom

Effect of the Rehabilitation of Offenders Act 1974 ("the 1974 Act") on whether a decision-maker was entitled to take into account a person's spent convictions and/or the conduct underlying such convictions

Hussain v Waltham Forest London Borough Council
[2020] EWCA Civ 1539

Decision: 19 November 2020

Facts: The landords of 36 residential properties had their applications for property licences under Parts 2 and 3 of the Housing Act 2004 refused (or in some cases had their licences revoked) by the local housing authority. A number of the licensees had spent convictions. The Upper Tier Tribunal had found that: (i) On a proper construction of the 1974 Act the FTT might receive and take into account in its determination of the Applicant's appeal, evidence or submissions dealing with relevant conduct of a rehabilitated person, including conduct which had been treated under the criminal law as an offence and resulted in a conviction which was now spent; (ii) The correct legal test to be applied to an application by the Respondent to the FTT under s. 7(3) of the 1974 Act to rely upon the convictions, offences or sentences of the Applicants was that laid down in the provision itself, as explained by the Court of Appeal in Dickinson v Yates (unreported, 27 November 1986) (see [150] to [157] above). There was no

justification for the Upper Tribunal to strike out material falling within the scope of s. 4(1) which might be the subject of such an application by the Respondent; (iii) Decisions by a local housing authority under Parts 2 or 3 of the 2004 Act to grant or refuse applications for a licence, or to revoke such a licence, involved "proceedings before a judicial authority", as defined in s.4(6) of the 1974 Act.

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

Held: In its judgment a 'senior' Court of Appeal held that: (i) Section 4(1)(a) of the 1974 Act does not include any proscription with regard to evidence of conduct constituting any spent convictions. (ii) A local housing authority's consideration and determination of a grant or revocation of a licence under Part 2 or 3 of the 2004 Act involved "proceedings before a judicial authority" for the purposes of sections 4 and 7 of 1974 Act; so that such an authority has the power under section 7(3) to disapply section 4(1) and admit evidence of a spent conviction if it is satisfied that justice cannot be done without admitting that evidence. The appeal was refused.

GAMBLING

Queen's Bench Division
Gavin Mansfield QC (sitting as a deputy judge of the High Court)

Contract. no concluded agreement reached between the parties about bonuses or incentives.

Puharic v Silverbond Enterprises Ltd
[2021] EWHC 351 (QB)

Decision: 19 February 2021

Facts: The Claimant was a Croatian businessman and an experienced gambler, a "high-roller" or VIP gambler. He played in casinos internationally and his preferred game was roulette. The Club owned and operated a casino known as the Park Lane Club in Mayfair, London. Over five nights in May 2015 the Claimant played roulette at the Club and won £1,240,900. He was paid his winnings, but claimed in addition a bonus or incentive of 0.9% of his table turnover when he played roulette. He said the Club orally offered and he accepted the offer by playing. The claim amounted to £243,518.59, 0.9% of his total turnover of £27,057,621. The Club denied that there was any contract as to bonus/ incentives and disputed the Claimant's account of what was said.

Point of dispute: Whether there was a concluded agreement in the terms claimed.

Held: The problems with the Claimant's case were too many and too strong. The judge had particular regard to the fact that the Claimant's evidence was significantly at odds with his own pleaded case and that the available documentary evidence was inconsistent with the agreement now alleged by the Claimant. Prior discussions between the parties concerning a possible bonus were no more than an invitation to treat. The parties did not intend that a contract would come into effect simply by the Claimant starting to play in the Club. Further discussion and agreement were necessary. The claim would be dismissed.

GAMBLING

Queen's Bench Division
Mrs Justice Foster DBE

Contract. Winnings in respect of an online game. Consumer Protection Act 2015.

Green v Petfre (Gibraltar) Ltd (trading as Betfred)
[2021] EWHC 842 (QB)

Decision: 17 April 2021

Facts: Claimant played 'Frankie Dettori's Magic Seven Blackjack' online as hosted by the Betfred. After 5 ½ hours betting chips to the value of £1,722,500 were recorded on screen as his winnings. However, when the claimant attempted to withdraw the winning chips into his cash account with Betfred he was unable to do so. Subsequently, the company informed the claimant that there had been

a glitch in the game and that could not be paid out. The claimant relied on cl 2.4 of the Terms and Conditions: "Customers may withdraw funds from their account at any time providing all payments have been confirmed." The claimant sought summary judgment, alternatively to strike out Betfred's defence and recover the winnings, to which he contended he was entitled. Betfred argued that the terms of the contract between the parties excluded it from liability as there had been a defect in the game and due to that defect, cl 5 of the End-User License Agreement ("EULA"), to which the claimant had also agreed, also entitled Betfred not to pay out.

Points of dispute: Whether Betfred could rely upon (a) the clauses pleaded (b) the doctrine of common mistake.

Held: The wording of the clauses relied on by Betfred was obscure and unclear. The EULA had the appearance of a standard form of software licence agreement and did not make any attempt at reference to voiding a bet or avoiding a contract with consequences such that an apparently unimpeachable win. Clause 4.4 of the Terms and Conditions was just not apt to cover the circumstances of the present case. In all the circumstances, the wording of each of the clauses relied on was inadequate, as a matter of the natural meaning of the language in context, to exclude liability to pay out the claimant's winnings. Further, it was well established at common law that, if one condition in a set of printed conditions was particularly onerous or unusual, the party seeking to enforce it had to show that the particular condition was fairly brought to the attention of the other party. In the present case, the manner in which the relevant clauses had been presented and the failure adequately to have drawn them to the claimant's attention meant that the three purported exclusions, even had they been effective to exclude liability, had not been incorporated in the contract between the parties.

In addition, the Consumer Rights Act 2015 required that, as between a trader such as Betfred and a consumer such as the claimant, terms and notices had to be transparent and be fair. The clauses in question failed to meet the statutory obligation of fairness. The doctrine of mistake was inapplicable to the present facts.

REMOTE HEARINGS

Queen's Bench Division, Administrative Court
Dame Victoria Sharp, P. and Mr Justice Chamberlain

Remote hearings in England after the pandemic

Hertfordshire County Council and others v Secretary of State for Housing, Communities and Local Government
[2021] All ER (D) 23 (May)

Decision: 28 April 2021

Facts: Until March 2020, local authorities, by long-established custom and practice, conducted their meetings - in person - i.e. with the participants gathering to meet face-to-face at a designated physical location and the observers coming to the same location. Council buildings are configured to allow in-person meetings. In the case of principal authorities, there are bespoke council chambers and formal meeting rooms with seats for the chair, elected members, council officers, members of the public and press. In the case of other authorities, there are other established arrangements and facilities for in-person meetings. Until very recently, there was a consensus that the legislation, as it applied in England, did not permit remote meetings – i.e. those where not all of the participants are in the same physical location. On 25 March 2020, in response to the Covid-19 pandemic, Parliament passed the Coronavirus Act 2020 ("the 2020 Act"), s 78 of which authorised the making of regulations to make provision for (among other things) the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings. This expressly included provision for persons to attend, speak at, vote in, or otherwise participate in, local authority meetings without all of the persons, or without any of the persons, being together in the same place. But the provision was limited in application to local authority meetings required to be held, or held, before 7 May 2021.

Points of dispute: Whether the Local Government Act 1972 permitted remote meetings in England when the Flexibility Regulations cease to have effect. The answer is not likely to impact on local authorities in Wales or Scotland, which are subject to different legislative regimes

Held: The Secretary of State was correct in November 2016 and July 2019 to say that primary legislation would be required to allow local authority - meetings under the 1972 Act to take place remotely. Once the Flexibility Regulations cease to apply, such meetings must take place at a single, specified geographical location; attending a meeting at such a location means physically going to it; and being present at such a meeting involves physical presence at that location. The court recognised that there were powerful arguments in favour of permitting remote meetings. But, as the consultation documents show, there were also arguments against doing so. The decision whether to permit some or all local authority meetings to be conducted remotely, and if so, how and subject to what safeguards, involves difficult policy choices on which there is likely to be a range of competing

views. These choices have been made legislatively for Scotland by the Scottish Parliament and for Wales by the Senedd. In England, they are for Parliament, not the courts. The claim would be dismissed.

Postscript

92 After the judgment was circulated in draft, it was pointed out that to the court that it had not determined the question whether a meeting which is required by the 1972 Act to take place in person is — 'open to the public' or — 'held in public' if the only means by which the public are permitted to access it are remote. There was brief reference to the meaning of these phrases in submissions, but the court was not asked to determine the question now raised. However, it decided nonetheless to permit the parties to address it separately on it in the light of our conclusions on the meaning of — 'meeting', — 'place', — 'present' and — 'attend' in the 1972 Act. [93] Accordingly, it would give directions for the parties to make submissions on this point before making a final order in this case

COSTS

Queen's Bench Division, Administrative Court
Mr Justice Bourne

Case stated of decision to order the City Council to pay the respondent's costs in full

Bristol City Council v Abdul Choudhury
[2020] EWHC 3044 (Admin)

Decision: 22 October 2020

Facts: The appellant appealed by way of case stated against an award of costs at Bristol Magistrates' Court. The case concerned a decision by the appellant, Bristol City Council, refusing to renew the private hire licence held by the respondent, Abdul Choudhury. The respondent appealed against that decision and on 3 July 2019 the Magistrates allowed his appeal. On that date they also decided in principle that they would order the appellant to pay the respondent's costs of that appeal. On 14 October 2019 they further decided that the amount payable would be £3,726.12.

Points of dispute: (1) Whether time should be extended for the filing of the notice of appeal (a Notice also containing an application to extend time was filed on 6 March 2019, some 18 days late). (2) If it had such a power, was it reasonable to make such an order in this case?

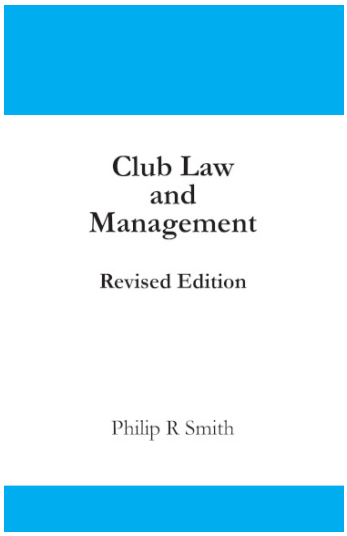
Held: (1) As regards the first question, the court declined to order relief from sanction and the appeal is out of time. (2) Addressing the second question nonetheless, the court held that the justices had concluded that the LA's concerns, in light of the facts, were not a reasonable basis for refusal. That was an assessment of the facts which it was for them to make, a point reinforced by the absence of any appeal on the facts by the local authority to the Crown Court. It revealed no error of law or principle which would make good an appeal by way of case stated. Further, that assessment also provides a sufficient basis for the costs order. The Magistrates have shown an awareness that it would be incorrect to award costs merely "because we had come to a different decision than the appellant". They expressly found that there had been "unreasonableness" in the appellant's decision making and that paying his own costs would cause the respondent "significant financial hardship". The appeal would be dismissed.

Jeremy Phillips QC, FIoL
Barrister, Francis Taylor Building

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

Book Review

Club Law and Management, Second Edition



Author: Philip R Smith
Price: £10.00

Reviewed by **David Lucas**, *Licensing consultant, Lucas Licensing*

Books dealing with the law and management of members' clubs are very rare. The topic is considered in some of the specialist works on licensing but not in detail.

Philip Smith (Lord Smith of Hindhead) has previously produced not one but two books concerning members' clubs. Philip has been immersed in the world of members' clubs since he joined the Association of Conservative Clubs in 1987, subsequently becoming the Secretary / Chief Executive of the Association in 1999. He is also Chairman of the Committee of Registered Clubs' Associations.

The first edition of *Club Law and Management* was published in 2008. In 2017, together with Charles Littlewood, Philip published *Questions and Answers on Club Law and Management* which incorporated questions and answers that had appeared in the Conservative Clubs Magazine.

The revised second edition of *Club Law and Management* was published in 2020 and deals mainly with the operation of a private members' club under a club premises certificate.

The book is divided into two parts. The first part contains sections that deal with many of the legal aspects of club management, including:

- Licensing Act 2003.
- Licensing (Scotland) Act 2005.
- Betting and gambling in club premises.
- Committee, officers and membership.
- Employment.
- Health and safety.
- Rules and regulations and other legislation affecting members' clubs.
- Meetings.

The second part of the book is a new addition containing a "how to" section dealing with some of the commercial and financial issues concerning the operation of a members' club. This section has been written by Paul Chase, an industry expert.

This book helps to fill the void identified at the outset of this review and will be a worthwhile acquisition for anyone involved in the administration of members' clubs, particularly when a copy can be acquired for an extremely modest outlay.

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BTEC Level 3 Certificate for Animal Inspectors (SRF)

Dates are confirmed for the Autumn 2021 cohorts starting in September 2021.

Each course has 5.5 allocated training delivery days, delivered online via Zoom (until Covid-19 conditions allow otherwise), and we will utilise pre-recorded video footage to assist learners in their understanding of the inspection requirements for different licensed premises types, which in turn will promote learning and give support to learners when following up with their own inspection assignments.

The course meets the requirements for the updated animal welfare legislation published in 2018 and as long as delegates are enrolled before 21st October 2021 and have at least one year of experience in licensing and inspecting animal activities businesses, the individual can continue to inspect premises until completion of the course.

Delegates have 12 months from the start of the course to submit all assignments.

MORE INFO: info@instituteoflicensing.org
BOOK ONLINE: www.instituteoflicensing.org/events

Course Units

- **Unit 1** - Legislation, Regulation and Statutory Guidance
- **Unit 2** - Inspecting Premises That Hire Out Horses
- **Unit 3** - Inspecting Premises That Sell Animals as Pets
- **Unit 4** - Inspecting Premises That Are Used for Dog Breeding
- **Unit 5** - Inspecting Premises That Keep or Train Animals for Exhibition and Premises That Keep Dangerous Wild Animals
- **Unit 6** - Inspecting Premises That Arrange and Provide Dog and Cat Boarding

Testimonials

'The informative Animal Inspectors Course from the Institute of Licensing provides inspecting officers with the knowledge and tools to ensure high animal welfare standards at their local licensable animal activities premises.

'The course sensibly balances direct tuition with necessary practical assessments'

'The course content for each licensing activity is detailed and thorough and the learning resources provided for each unit are excellent.

'Both tutors are vastly experienced which shows with the examples of good and bad practice used to illustrate the different activities. And they encourage questions and sharing of experiences throughout.

'The assessment methods are a good mixture of theory based questions and practical assignments based on our own inspections so this can be fitted in with our routine work. I'm a first time Zoom and Moodle user, but the administration was explained very well and the experience has been trouble-free.

'I would recommend this course to colleagues as it is an efficient and effective way to learn and earn the required qualification.'

moodle

We use our online learning platform (Moodle) for the course which gives learners access to all course materials and resources online.

Moodle enables communication between learners within their cohort group, and individually with course tutors, and will be used for the submission of assignments and feedback following assessment and verification.

JOURNAL OF LICENSING - CONTRIBUTOR PROFILES

NICK ARRON

Solicitor, Poppleston Allen Solicitors

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

RICHARD BROWN

Solicitor, Licensing Advice Centre, Westminster CAB

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

LEO CHARALAMBIDES

Barrister, Francis Taylor Building & Kings Chambers

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

DANIEL DAVIES

Chairman, Institute of Licensing

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

GARY GRANT

Francis Taylor Building

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

ORLA KENNEDY

Solicitor, TLT Solicitors

Orla qualified as a solicitor in 2018 and has worked at TLT since 2019. Orla represents clients in a broad range of liquor licensing matters. In addition, she also has considerable experience in contentious matters and often attends Court to deal with Hearings, Reviews, and Applications.

MICHAEL MCDOUGALL

TLT Solicitors

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

JEREMY PHILLIPS QC

Barrister, Francis Taylor Building

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

CONSTANZE BELL

Barrister, Kings Chambers

Constanze has a varied public law, planning and environmental law practice. She is "up and coming" in the field of planning law (Chambers & Partners 2020) and a "leading junior" in regulatory and licensing law (Legal 500 2020). Constanze is one of the "Highest Rated Planning Juniors under 35" (2020 & 2019 Planning Resource Planning Law survey).

JAMES BUTTON

Principal, James Button & Co

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

SARAH CLOVER

Barrister, Kings Chambers

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

EOIN DEVLIN

Solicitor, TLT Solicitors

Eoin is a Legal Director with TLT in Belfast and has worked with TLT since 2015. Eoin advises supermarkets, restaurant businesses, catering companies and hoteliers on a range of licensing matters. In addition to handling liquor licensing and any subsequent hearings, he also advises on entertainment and associated licensing with local Councils.

CHARLES HOLLAND

Barrister, Trinity Chambers & Francis Taylor Building

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

DAVID LUCAS

Licensing Consultant

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

SUE NELSON

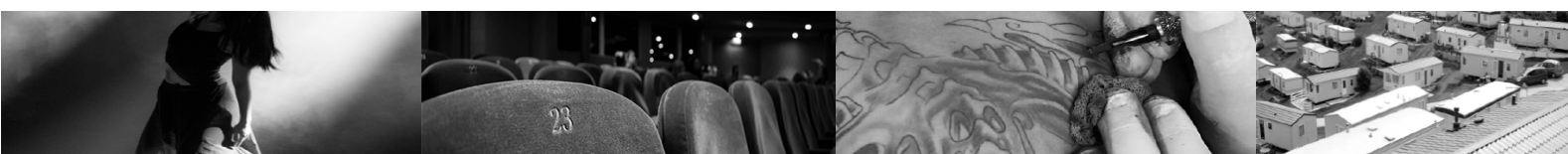
Executive Officer, Institute of Licensing

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

JULIA SAWYER

Director, JS Consultancy

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



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