NUMBER 25 NOVEMBER 2019

Journal of Licensing

The Journal of the Institute of Licensing

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Institute of Licensing

Journal of Licensing ISSN 2048-9110

Journal of Licensing

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This issue shall be cited as (2019) 25 JoL.

Daniel Davies MIoL
Chairman, Institute of Licensing

Welcome to the Autumn 2019 edition of the IoL's *Journal of Licensing* – a bumper edition, to coincide with the National Training Conference (NTC) taking place on 20-22 November.

The NTC is the IoL's signature event and has become one of the touchstones of our intention to be an inclusive organisation for the benefit of a wide range of stakeholders in every conceivable form of local authority licensing regime. I am incredibly proud of how the event has grown year on year to become the wonderful success story it is today. This year is expected to be, again, a sell-out. At the time of writing, all residential places have been sold, and only a few day delegate places remain.

Our aim is for the NTC to be an invaluable learning, discussion and networking opportunity for licensing practitioners. As usual, we have a stellar cast of speakers who can claim with justification to be leaders in their fields. They range from QCs and highly regarded licensing solicitors to council officers and senior industry figures. The breadth of topics covered at the conference means that there is hopefully "something for everyone" at any given session. As usual, we will be hosting a black-tie gala dinner on the Thursday evening. This year the event has a 1920s theme, so make sure your Charleston is in working order.

We are not, however, resting on our laurels. We are always keen to improve and grow the NTC. Suggestions as to how the event can become even better going forward are always welcomed. One development we have instituted this year is to increase the number of what might otherwise be termed "keynote" speakers. These speakers have been selected for the wide-ranging experience they individually and collectively bring to bear. I do hope that these sessions provide an interesting and thought-provoking experience for delegates.

On this note, I turn to this issue of the *Journal.* The content of this edition dovetails with a number of topics to be examined during the NTC. One of the strengths of the IoL is the diversity of points of view on topical issues. For instance, this edition sees our lead article from David Matthias QC & Charles Streeten scrutinising the details of cost capping orders by considering who can apply to have their costs capped with a protective costs order. We then have a stimulating article from Matt Lewin and Ruchi Parekh, examining the public sector equality duty (PSED) in the context of licensing, while the *Journal* editor, Leo Charalambides, will present his perspective during a session at the NTC. And why, asks Ben Williams, can public interest immunity (PII) not be utilised in taxi licensing cases (and, by extension, other areas of licensing)?

Charles Holland's article is a real treat, as he ventures through the looking-glass of fee-setting regimes across licensing, and, in asking whether fee-setting regimes are fit for purpose, finds a surreal landscape full of contradictions and inconsistencies. This article is exactly what the *Journal* aspires to be: a go-to resource for those seeking weighty, authoritative and much-needed analysis of complex and topical issues.

The IoL's commitment to covering the whole gamut of local authority licensing even extends to looking at potential developments in the years to come. Legalisation or decriminalisation of cannabis is even more of a political football than alcohol licensing. Julia Sawyer examines what impact legalisation may have on the entertainment industry. The mind naturally turns from this to the question of whether, one day, licensing of cannabis could become a reality in the years to come. Perhaps a topic for a future article – watch this space(d).

We also of course have our regular feature articles from James Button, Nick Arron and Richard Brown.

I look forward to seeing many of you at the NTC. I hope you enjoy this latest issue of the *Journal,* and perhaps the content will provide the basis for some lively discussion over coffee and drinks.

Institute of Licensing

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Leo Charalambides FIoL
Editor, Journal of Licensing

"Sexual harassment in public places - on public transport, in bars and clubs, in online spaces, and at university, in parks and on the street - is a routine and sometime relentless experience for women and girls."[1] This arresting statement heads the summary to the report by the House of Commons Women and Equality Committee titled *Sexual harassment of women and girls in public places* (October, 2018). In its focus on the night-time economy, the report concludes that "sexual harassment is the norm" [123].

The report states that: "Ensuring that women and girls have the freedom to enjoy being out at night, to go to bars and clubs and travel safely home without being harassed or assaulted is the responsibility of everybody including central government, the police, local authorities, bars and venues and transport agencies" [138]. It recommends, *inter alia*, that the s 182 Guidance to the Licensing Act 2003 should be amended to require all licensed premises to have a policy to respond to and eliminate sexual harassment, including training for licensees and taxi drivers [141].

Furthermore, local authorities are encouraged to conduct a gender equality impact assessment before setting policies on sexual entertainment venues (SEVs) *and* when considering licence applications and renewals. It is suggested that SEV polices and conditions should make it clear that licences will be withdrawn in the event of evidenced harm to women in and around SEVs.

In Scotland, guidance published by the Scottish Government in March 2019 on the licensing of sexual entertainment venues referred to a definition of violence against women and girls which includes "commercial sexual exploitation, including prostitution, lap dancing, stripping, pornography and human trafficking".[2]

The Scottish Government was responding to concerns that licensing SEV encouraged unhealthy attitudes to women and therefore damaged society as a whole.[3] It also accepted, on the one hand the freedom of adults to engage in legal activities and employment, and on the other its duty to promote - "through all relevant means" - gender equality and actions that tackle out-dated attitudes which denigrate or objectify particular groups or individuals.[4]

As I have frequently argued, there seems to me to be a requirement to carefully consider the nature, extent and scope of sexual entertainment with a view to exploring whether and if so how such entertainment enhances and celebrates sex, sexuality and gender as well as whether it objectifies, denigrates and exploits.

Following allegations of discrimination at night clubs in London's West End, the City of Westminster established a Task Group to report into inclusion within the evening and night- time economy. The Task Group's report was published, in October 2019. The discrimination complained of was not only based on the protected characteristics defined in the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation) but related to other factors such as physical appearance. Curiously, neither the Westminster Task Group nor the Scottish Government had regard to the work and reports of the House of Commons Women and Equalities Committee.

Even within groups with protected characteristics, complaints in respect of harassment and discrimination arise. This August the BBC reported that eight black and Asian people who identified as lesbian, gay, bisexual or transgender had issues with staff in and around Manchester's Gay Village during the Pride festival. They reported that they

1 House of Commons Women & Equalities Committee, *Sexual harassment of women and girls in public places*, 10 October 2018, p 3.

2 Scottish Government, Air Weapons and Licensing (Scotland) Act 2015, Guidance on the Provisions for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres, March 2019. Paragraph 20.

3 *Ibid*, para 18.

4 *Ibid*, para 19.

were refused entry to bars, were not served in clubs and had staff follow them. According to the BBC report the chief executive of Manchester Pride was said to be "angry" but not "surprised".[5]

The guidance from the Scottish Government and the reports from the House of Commons Women and Equality Committee and the Westminster Task Group encourage us to think about the role of licensing in terms of the public sector equality duty and inclusion within our day-time, evening and night-time economies. The reports detail good practice such as the *Zero Tolerance Premises Guide* developed by Canterbury City Council and the *Women's Night Safety Charter* being promoted by the Mayor of London and Amy Lamé, the Night Tsar for London.

The reports equally highlight examples of industry initiatives and practices. The role of trade and industry should not be underestimated; their involvement in the reduction and elimination of single use plastics (in particular plastic straws) demonstrates the effectiveness of a galvanised and focused industry response.

Ultimately the reports encourage the development of policies, partnership and training - key features that characterise and inform the IoL whether at our regional meetings, the national conference or in the *Journal*. I'm certain that there is a lot more to be thought and said on the issues highlighted in these reports.

5 https://www.bbc.co.uk/news/uk-england-manchester-49491431

NLW 15-19 June 2020

National Licensing Week

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Costs protection in public law and the *We Love Hackney* case

A crowdfunded appeal against Hackney's proposed change of licensing policy has led to clarification on who can apply to have their costs capped with a protective costs order. **David Matthias QC** and **Charles Streeten** explain the issues at stake

Claims for judicial review are not the same as other civil litigation proceedings. Public law concerns more than the straightforward resolution of disputes between two individuals. All public law cases engage (to varying degrees) the question of the public interest. It is for this reason that the procedures which govern claims for judicial review are distinct from those governing general civil litigation. In judicial review, oral evidence is the exception rather than the rule, there is no requirement for "disclosure", and public authorities are under a duty "to play with their cards face up on the table".[1]

When it comes to costs, however, there is high authority for the proposition that the general rule (see CPR 44.2(2)(a)), namely that costs follow the event (*M v Croydon LBC*[2] per Lord Neuberger). However, this can create some tension. As the Court of Appeal put it, in the landmark case of *R (Corner House) Research v Secretary of State for Trade and Industry*,[3] "access to justice is sometimes unjustly impeded if there is slavish adherence to the normal private law costs regime". Furthermore, the courts now recognise that there will be cases in which no individual has a direct interest, but where there is a clear public interest in the legality of a decision being determined. Take, for example, the proposed challenge to the grant of a licence to BAE Systems to cull birds in a special protection area. Nobody could be said to have a direct or personal interest in whether or not the birds were culled, but there was a clear public interest in the court ruling on whether or not the licence was lawful, and so the RSPB brought a claim.[4]

Faced with this tension the courts developed what was called a Protective Cost Order (PCO). The effect of a PCO was to limit the costs liability of a party to a claim for judicial review. The extent of that protection varied. In some cases the claimant's cost risk was completely excluded, but more usually the risk would be limited to a specified sum. The correct approach to making these orders was settled in *Corner House.* Following an extensive analysis of the authorities both in this jurisdiction and the Commonwealth, the court held as follows:

> 1. *A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:*
>   *i) The issues raised are of general public importance;*
>   *ii) The public interest requires that those issues should be resolved;*
>   *iii) The applicant has no private interest in the outcome of the case;*
>   *iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;*
>   *v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.*
> 2. *If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.*
> 3. *It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.*

This formulation became the classic exposition of the law and was frequently applied by the courts at first instance.

However, more recently an increase in public awareness, fuelled to a degree by the rise of social media together with the potential to cap the cost risk in litigation, has resulted in a marked increase in the amount of nominally "public interest" litigation. At the same time methods of raising funding for litigation were modernised. With the rise of websites like CrowdJustice, claims with sufficient public support were given the ability to raise money through online crowdfunding.

This carried with it both pros and cons. On one level, a growth in the number of claims would suggest an improvement in access to justice and increased levels of legal scrutiny, a collateral effect of which may be improved administrative decision making. Conversely, it is important

1 *R v Lancashire County Council ex p. Huddleston* [1986] 2 All ER 941.
2 [2012] 1 WLR 2607 at [52].
3 [2005] EWCA Civ 192 at [28].
4 *RSPB v DEFRA* [2015] EWCA Civ 227.

to ensure that legal oversight does not morph into excessive legalism. The law should facilitate good administrative decision-making, not frustrate the ability of public authorities to carry on the business of government and administration efficiently. Moreover, it is well known that the public purse is and has for some time been under considerable pressure. Local authorities in particular face pressing budgetary constraints. It is plainly in nobody's interest for precious public money to be spent defending hopeless or unnecessary litigation. The availability of crowdfunding is not *per se* demonstrative of a good cause; in 2018 there was a crowdfunding campaign to assist Kylie Jenner, of *Keeping Up with the Kardashians* fame, with her quest to raise the last few million dollars she needed to become the world's youngest billionaire! A major potential problem that results from the crowdfunding of litigation is that the individuals funding the cause can hide their identity. This increases the potential for abuse. For example, a large corporation could use an impecunious claimant to bring a claim, and then fund that claim through a series of donations funnelled through a crowdfunding site, effectively cloaking its identity with a view to avoiding the risk of a non-party costs order being made against them should the litigation fail.

In response to these changes, Parliament put what it termed "costs capping" in judicial review claims onto a statutory footing. Sections 88 and 89 of the Criminal Justice and Courts Act 2015 created a statutory test for making an order "limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings."

Under s 88(6) the court only has the power to make a costs capping order (CCO) if: (1) the proceedings are public interest proceedings; (2) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings; and (3) it would be reasonable for the applicant for judicial review to do so. Public interest proceedings as defined by s 88(7) depend upon three criteria being satisfied; namely that: (1) an issue that is the subject of the proceedings is of general public importance; (2) the public interest requires the issue to be resolved; and (3) the proceedings are likely to provide an appropriate means of resolving that issue. In addition, s 88(8) specifies matters to which the court must have regard in determining whether proceedings are public interest proceedings. These include: (1) the number of people likely to be directly affected if relief is granted to the applicant for judicial review; (2) how significant the effect on those people is likely to be; and (3) whether the proceedings involve consideration of a point of law of general public importance.

Section 89 concerns the matters that the court must take into account when deciding whether to make a CCO, and deciding upon which terms a CCO is to be granted. The matters include the financial resources of the parties to the proceedings, including the financial resources of any person who provides or may provide financial support to the parties, the extent to which the applicant for the order is likely to benefit if relief is granted, the extent to which any person who has provided or may provide the applicant with financial support is likely to benefit if relief is granted, whether the applicant's legal representatives are acting free of charge, and whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

As is apparent from the above, the statutory costs capping regime is a development of the judge-made *Corner House* criteria, somewhat narrowing those criteria with a view to avoiding potential abuses of the regime. In doing so, it sought to rebalance the factors relevant to determining whether a public authority should be required to defend a decision in court, without the possibility of recovering its reasonable costs if successful.

Two recent cases under the 2015 Act gave an indication regarding the court's approach to the new costs-capping regime. The first was the decision in *R (Hawking) v Secretary of State for Health and Social Care.*[5] The claimants, Professor Stephen Hawking together with a group of medics with a strong connection to the NHS, challenged the lawfulness of a policy concerning health commissioning across the NHS. By the time permission for judicial review was granted the claimants had secured in excess of £180,000 through crowd funding, with their own costs being estimated at £115,000 - £140,000. The defendant resisted a CCO, arguing that the proceedings were not public interest proceedings and that in any event, because of their own significant financial resources, the claimants were not entitled to a CCO. Cheema-Grubb J disagreed. She made a CCO limiting the claimants' liability to £80,000 and the defendant's reciprocal liability to £115,000. In doing so, she said:

> *Although the claimants are self-selected, that is almost inevitable in circumstances such as these. They seek to represent the public in a claim which has been granted permission to proceed, so it is reasonably arguable, and they are prepared to meet a substantial degree of costs on the part of the defendants by raising money through crowdfunding. There is no doubt that they are a responsible group of professional or retired professional people… it seems to me that this is just the sort of case in which a judicial review costs capping order should be harnessed and it is unreasonable to expect the claimants to bear the*

5 [2018] EWHC 989 (Admin).

burden of a high degree of financial risk.

The second was the case of *R (Beety) v Nursing and Midwifery Council.*[6] This was a challenge by way of judicial review to the extent of the insurance required by a self-employed midwife providing care during the process of childbirth. The defendant estimated its cost of defending the claim at £250,000. Ouseley J held that the litigation amounted to public interest proceedings. He found that the claim directly affected only a small group of midwives, but that the effect on them was severe. However, he additionally found that the claim would also severely affect a large number of individuals who might wish to use the service of such midwives and on this basis found that the claim was of general public importance. As to the quantum of the order, Ouseley J noted that the defendant had a substantial income of £80 million a year, reserves of £41 million, a surplus of £10 million for the relevant year, and insurance cover for litigation up to £250,000 (subject to a modest excess). By contrast, the claimant had raised £25,000 through crowd funding and a further £50,000 from other sources. In light of this, Ouseley J imposed a cap of £25,000 on the claimant's liability and a reciprocal £65,000 on the defendant's liability.

R (We Love Hackney Limited) v London Borough of Hackney

It was against this legal background that the "We Love Hackney" litigation took place. We Love Hackney (WLH) claimed originally to be an association of local residents and business owners who campaigned in support of the borough's night-time economy and, in particular, the London Borough of Hackney's proposed changes to its statement of licensing policy (SLP). However, shortly before it brought its claim for judicial review against the London Borough of Hackney, WLH incorporated and became a limited company with a share capital of £10. WLH Limited had three directors. One was Matthew Saunders who since 2017 had been Director of Property, Campaigns and Communities in an enterprise owned by Jonathan Downey. Mr Downey was also a director of WLH Limited. As the High Court said of Mr Downey:

He is recorded on the Companies House website as being the director of six other companies. The registered address for the claimant is the same address as five of those other companies including Street Feast Ltd. Street Feast consists of food markets and bars which operate after 10pm. The Street Feast concept launched outdoors in Dalston Yard (which has twelve bars). It has since then extended to a total of five markets including the well- known Dinerama in Shoreditch (which has six bars). Mr Downey claims that the defendant's core hours policy has caused him to change his mind about opening a further large outdoor market which (it seems) would have sold alcohol beyond midnight. It is plain that he has a significant commercial interest in the defendant's licensing policies.

The third director was the Hon. Griselda Erskine – "a successful chef, cookery writer and television presenter".

WLH Limited brought the claim for judicial review in order to challenge Hackney's decision to adopt a new statutory SLP. In particular, it objected to two particular aspects of the revised SLP. Firstly, the decision to amend the core hours policy so that alcohol could no longer generally be sold after midnight on Fridays and Saturdays, and secondly the extension of the Shoreditch special policy area (SPA) and the retention of the Dalston SPA. The essential challenge related to whether the council had had sufficient regard to the public sector equality duty in formulating its SLP.

WLH was not press-shy. It sought to crowdfund the litigation, publishing its challenge through the local and national press, and with a concerted social media campaign. It met an initial crowdfunding target of £20,000 and then set a further stretch target of £53,000, which it did not meet. At the same time as it brought its claim for judicial review it applied for a CCO.

Hackney opposed the grant of permission and resisted the application for a CCO in its acknowledgement of service. At the same time it made a counter-application, seeking security for its costs of the proceedings. Security for costs applications are not common in public law claims. However, there is no reason in principle why they should not be made in circumstances where the court has jurisdiction to make an order for security, including where the claimant is a company and there is reason to believe that it would not be able to pay the defendant's costs if ordered to do so.[7]

Permission for judicial review was granted by Lavender J. However, he refused WLH's application for a CCO and listed Hackney's application for security for costs to be dealt with at a preliminary hearing. WLH renewed its application for a CCO and Lieven J ordered that both matters should be dealt with together at the preliminary hearing.

That hearing took place before Farbey J on 17 April 2019. In her judgment,[8] following a full day of argument, Farbey J dismissed WLH's application for a CCO and granted Hackney's application for security, ordering WLH to pay

6 [2017] EWHC 3579 (Admin).

7 CPR 25.13(1)(b) & 13(2)(c).

8 *R (We Love Hackney Limited) v London Borough of Hackney* [2019] EWHC 1007 (Admin); [2019] Costs LR 463.

security for Hackney's costs in the sum of £60,000. The judgment is important. It demonstrates clearly that the court is not impressed by attempts to shield challenges brought to serve private commercial purposes behind the corporate veil and to cloak them in the guise of public interest litigation.

The judge held that the proceedings were not public interest proceedings. First, she held that while local issues framed by reference to local government policy *may* in principle raise issues of general importance, in essence the arguments presented here were specific to the facts of the present case. In particular, she dismissed WLH's submission that the claim was "probably the most important licencing case since *Hope & Glory*" saying "it is difficult to discern any general principle of law on which the parties disagree". As she explained,

> *Mr Kolvin [appearing on behalf of WLH] submitted that the application of equality law to licensing decisions is a novel area upon which there is no direct legal authority. I was told that this is the first case in the High Court to raise what Mr Kolvin called the intersection of licensing law and the PSED. I was nonetheless left unclear at the end of Mr Kolvin's submissions as to what general or important point of law would fall to be determined by the judge hearing the present claim.*

She then turned to the number of people likely to be directly affected by any relief granted. The claimant relied upon investors, workers and users of night-time venues in the borough to suggest that the number of people directly affected would be very high. Again, Farbey J disagreed. She said:

> *Mr Kolvin no doubt described a large number of people. However, the group or groups to which he referred are amorphous and somewhat protean. I do not think that the statutory words "likely to be directly affected" are apt to include anyone who works in licensed premises, or who goes for a late night drink, or who wishes at some stage in the future to invest in licensable activities in Hackney… I am not persuaded on the evidence before me that any section of the community – whether residing, investing, working or socialising in Hackney – speaks with a uniform voice about the effects of the SLP. I am not bound to give this factor decisive weight and, in my judgment, the difficulties in delineating and measuring the direct effect means that it should count for less than other statutory factors.*

Having found that the claim did not constitute public interest proceedings, the judge went on, in any event, to consider what the effect of not making a CCO would be. She noted that civic society benefits from the expression of public views to those who make decisions on the public's behalf, which may legitimately be expressed in hard-fought campaigns. However, in light of WLH's own campaign material she said she had "some sympathy for Mr Matthias's submission [on behalf of Hackney] that this is an industry-driven campaign with the resources to resurrect some form of challenge against the defendant if the present case does not proceed". Even working on the basis that the claim would be withdrawn in the absence of a CCO, Farbey J held that that would not be a reasonable course of action. As she put it,

> *A number of well-resourced individuals have chosen to litigate the claim via an impecunious company which has taken possession of funds donated by members of the public. Given their individual and cumulative financial resources, I infer that the directors and other backers do not want to fund the litigation beyond the level of third party support, rather than that they are incapable of doing so. I do not accept on the evidence before me that the claimant would be forced to withdraw the claim through impecuniosity. In my judgment, absent any compulsion to withdraw through impecuniosity, it would not be reasonable for the claimant to withdraw its application for judicial review.*

Finally, Farbey J considered the question of access to justice. The claimant had submitted that it would be denied access to justice in a claim worthy of the grant of permission to apply for judicial review. The judge rejected that argument and in doing so helpfully encapsulated the effect of the CCO regime. As she said:

> *… the submission fails to recognise that Parliament has in the legislation struck the balance between (on the one hand) access to justice in public interest cases and (on the other hand) the risk to the public purse should unsuccessful claimants be unable to pay the costs of successful defendants. The suggestion that those well-resourced individuals who drive the litigation will, in the absence of a CCO, be denied access to justice is not realistic*

Having dismissed the application for a CCO, the judge considered the question of security for costs. Having first recognised that the court has the power to award security for costs in public law claims and that no special or particular principles apply, Farbey J addressed the question of whether or not it would be in the interests of justice to make an order for security for costs. She concluded:

> *I accept Mr Matthias's submissions. For similar reasons as above, I have concluded that the claim would not be stifled: it has successful and resourceful backers who have the funds to provide security and to enable the claim*

to continue. The further contention that the defendant has deliberately acted to frontload its costs to stifle an arguable claim lacks any foundation. On the other side of the scales, the defendant may incur substantial costs in these proceedings with no realistic prospect of recovery in the event that the claim for judicial review were to be successfully resisted. There is therefore a risk of injustice if no order is made. In the circumstances, it is just to make an order.

Conclusion

This is an important decision for public authorities to be aware of. There are three key points. The first is that public authorities should be wary of attempts by litigants to confer public interest status on their litigation through publicity. It is a well-known aphorism that what is interesting to the public is not necessarily in the public interest. Savvy claimants with media connections may well be able to generate a level of press interest in, and public support for, a claim. That does not mean that the litigation constitutes public interest proceedings, and public authorities need to be wary of this distinction. Secondly, it is increasingly common for claimants to incorporate in order to protect the identity or resources of the individuals driving or backing this litigation. Critical to Hackney's success was the very considerable investigative work undertaken into the background to the litigation, the directors of WLH Limited, and the true motivation and financial resources of those driving the claim. Presenting a clear evidential picture in this regard can pay considerable dividends. Finally, applications for security for costs are underutilised in public law proceedings. Where a claim is brought by an impecunious shell company, a public authority should not allow the litigation to continue at considerable public expense without doing all it can to protect its position as to costs in the event that the claim is dismissed. In the WLH claim, the claimant did not subsequently provide the security that had been ordered, with the result that its claim was struck out. By successfully opposing WLH's claim for a CCO and successfully securing an order for security for its own costs, Hackney brought the litigation to a timeous end.

David Matthias QC and **Charles Streeten**
Barristers, Francis Taylor Building

IoL Events Calendar 2019 / 2020

November 2019
20 - 22 National Training Conference

December 2019
5 West Midlands Region Training Day
5 East Midlands Region Training Day
5 North East Region Training Day
9 Animal Licensing - Hemel Hempstead
10 Home Counties Region Training Day
11 North West Region Training Day
11 South East Region Training Day
19 Scrap Metal Dealers Act - Farnborough

January 2020
20 Licensing Fees - Nottingham
22 Caravan Licensing - Guildford

February 2020
3 Licensing Fees - Southampton
5 Licensing Fees - Maidstone
5 Wales Region Training Day
13 Licensing Fees - Huntingdon
28 Licensing Fees - Warrington
tbc Public Safety at Events

March 2020
10 - 13 Professional Licensing Practitioners Qualification - Preston
17 - 20 Professional Licensing Practitioners Qualification - Nottingham

May 2020
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Do quantity restrictions increase cross-border taxi activity?

In the highly contentious area of cross-border taxi activity, **James Button** asks whether the approach some authorities take in limiting the number of hackney carriages they will licence actually exacerbates the problem

There is considerable concern about widespread cross-border activity by hackney carriages and private hire vehicles. This has extended in recent years from vehicles being used in neighbouring districts[1] to widespread use of vehicles many miles from the licensing authority in which the licences are issued.

Attempts to limit this activity by hackney carriages have led to some authorities introducing "restricted use policies" which have had some limited success, but an attempt by Knowsley Metropolitan Borough Council to limit private hire use in a similar fashion failed.[2]

Although the Department for Transport held two well-attended workshop sessions earlier in the summer to discuss the possibilities and practicalities of some form of ABBA restriction (A to B and B to A)[3] for private hire vehicles (and there seemed to be little consideration of any equivalent restriction for hackney carriages), there is no indication that there will be any legislation to introduce such a restriction in the near or even short-term future.

This leads to a question of whether the approach that some authorities take in limiting the number of hackney carriages that they will licence actually exacerbates the problem.

Some 25% of local authorities place a numerical limit on the overall number of hackney carriages that they will licence,[4] based on the provisions of s 37 Town Police Clauses Act 1847, which was amended by s 16 Transport Act 1985.[5]

As a consequence of that amendment, and the transfer of taxi licensing responsibilities from the Commissioners to local authorities, s 37 must be read as follows:

> *The [district council] may from time to time licence to ply for hire within the [district or hackney carriage zone], . . . 'hackney coaches or carriages of any kind or description adapted to the carriage of persons . . . [and] the grant of a licence may be refused, for the purpose of limiting the number of hackney carriages in respect of which licences are granted, if, but only if, the person authorised to grant licences is satisfied that there is no significant demand for the services of hackney carriages (within the area to which the licence would apply) which is unmet.*

This is usually referred to in shorthand as the "significant unmet demand test" and it is well established that this must be demonstrated by means of an independent survey which should not be more than three years old.[6] Provided the council has such a survey, it can then defend a policy that limits hackney carriage numbers.

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1 Hackney carriage and private hire licensing is a district council function. This includes councils styled as districts, boroughs and cities in England, unitary authorities in England (however they are styled) and county councils and county borough councils in Wales (also unitary authorities).

2 See *R (on the application of Delta Merseyside Ltd) v Knowsley Metropolitan Borough Council* [2018] LLR 526 Admin Crt and (2018) 21 JoL.

3 The ABBA concept would restrict a private hire hiring to either commencing in or ending in the district in which the vehicle, driver and operator were licensed. This would allow private hire vehicles to be booked to undertake a journey to a remote destination (eg, from a person's home to an airport in a different district) and also allow a pre-booked return journey. It would prevent any hirings to be undertaken by a private hire vehicle which did not meet that requirement, ie, working wholly remotely from its licensed area.

4 A further group of authorities require any additional hackney carriage to be a wheelchair accessible vehicle (WAV), but those are not an overall restriction.

5 This is a strange amendment. Instead of actually changing the wording of s 37 of the 1847 Act, s 16 states:

The provisions of the Town Police Clauses Act 1847 with respect to hackney carriages, as incorporated in any enactment (whenever passed), shall [(subject to section 161 of the Equality Act 2010)]1 have effect—

(a) as if in section 37, the words "such number of" and "as they think fit" were omitted; and (b) as if they provided that the grant of a licence may be refused, for the purpose of limiting the number of hackney carriages in respect of which licences are granted, if, but only if, the person authorised to grant licences is satisfied that there is no significant demand for the services of hackney carriages (within the area to which the licence would apply) which is unmet.

6 See eg, *R v Brighton Borough Council, ex p Bunch* [1989] COD 558.

It is important to realise that a numerical limit on hackney carriages is simply a policy decision by the authority. Anyone is entitled to make an application for a hackney carriage over that additional number, provided they have a suitable vehicle.[7] It will then be for the council to consider whether to depart from its policy, and if it decides not to do so, it will then rely on the independent survey to justify that decision on any subsequent appeal to the Crown Court against that refusal.[8]

The effect of such a policy is to prevent new entrants to the hackney carriage trade in any such district. This is identified by the Department for Transport in the current Best Practice Guideance[9] which states at [48]:

> *In most cases where quantity restrictions are imposed, vehicle licence plates command a premium, often of tens of thousands of pounds. This indicates that there are people who want to enter the taxi market and provide a service to the public, but who are being prevented from doing so by the quantity restrictions. This seems very hard to justify.*

There are various reasons cited by local authorities to restrict hackney carriage numbers. These include: preventing congestion; reducing pollution; maintaining high standards of vehicles; and lack of rank space. While these may be factors, it is worth questioning whether a relaxation of the restrictive numbers policy would allow more local business people to enter the hackney carriage trade. Many of those may already be involved in the hackney carriage and private hire industry as drivers or private hire proprietors, but cannot develop their businesses within the hackney trade in their "home" district.

Although some will be content to continue with private hire licences granted by the "home" district, others may engage in "licence shopping" to find other authorities which provide licences which are possibly cheaper, easier to obtain because standards are lower, quicker to obtain or any combination of those factors. This will deprive the "home" authority in which they are resident of their entrepreneurial spirit, while potentially increasing the use of vehicles licensed elsewhere to the detriment of that "home" district.

The "home" district will have no control over the standards of those vehicles or drivers, ages, emissions or other enforcement powers. Action can (and should) be taken against any vehicle that is unlawfully standing or plying for hire, but the case law makes it quite clear that pre-booked activities by either a private hire vehicle or a hackney carriage can take place anywhere in England or Wales.

It is impossible to limit such activity, so surely it is in the interests of such authorities to encourage licensees to use hackney carriages and private hire vehicles that they licence, which meet their standards, and against which they have enforcement powers?

The authority could require new vehicles to be wheelchair accessible, low emission, and maintained to a high overall standard. In addition, the drivers would be determined to be fit and proper persons by the "home" authority's standards, which in the absence of national minimum standards, could also be seen as being desirable.

If an authority does decide to consider this course of action, it would need to consult the existing hackney carriage proprietors, but no unmet demand survey would be required as there would be no need to defend any refusal to grant an additional hackney carriage proprietor's licence.

There would no doubt be opposition to such an approach, but there is also significant opposition to the use of out of district vehicles, so it is worth considering which is actually the lesser of two evils.

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7 *Key Cabs Ltd T/A Taxifast v Plymouth City Council* [2008] LLR 68, Admin Ct.

8 An appeal against a refusal to grant a hackney carriage proprietor's licence lies directly to the Crown Court by virtue of s 7 Public Health Acts Amendment Act 1907.

9 *DfT, Taxi and Private Hire Vehicle Licensing: Best Practice Guidance* (October 2006, revised March 2010) available at http://www.dft.gov.uk/pgr/regional/taxis/taxiandprivatehirevehiclelic1792.

In appeals, a little knowledge need not be a dangerous thing

What should a licensing committee do when it has confidentially-obtained information on taxi drivers which suggests they are not fit and proper to hold a licence – but feels obliged not to reveal this sensitive knowledge to the applicants? There is a way round it, says **Ben Williams**

Licensing law is, in many ways, an area that has slipped through the cracks of the general law and very slowly developed its own way of doing things. Licensing appeals do not have a set procedure provided for in statute or elsewhere. A common question asked by new practitioners, and indeed judges hearing an appeal, is “Is this a criminal or civil procedural matter?” The answer is, of course, neither.

Putting procedure to one side, it is also true that there are few indefatigable principles that govern the determination of licensing appeals. *Hope & Glory* confirms that the test on appeal is “is the decision wrong?”; *McCool* dictates that hearsay evidence is admissible; and *Chorion* shows that courts must apply the relevant licensing authority’s policy. Outside of such core principles, it is difficult to pin down any universal legal truths in licensing law and as a result it is difficult to know what to do when someone wants to try something new.

As has been set out in many previous articles in this journal, one of the real contemporary issues in licensing is that of information sharing. A narrow but highly sensitive issue is what a council does with information provided from an external source where such information is provided on the proviso that it cannot be disclosed to the individual to whom it relates. That was the issue at the heart of the Crown Court case of *Rotherham MBC v XYZ.*

The background to this matter was that Rotherham had revoked a driver’s combined private hire and hackney licence. The driver appealed to the Magistrates’ Court and was successful in winning back his licence. The council appealed that decision to the Crown Court and as part of its appeal asserted that it had relevant information to the determination of the appeal that could not be disclosed to the driver. The council submitted that this information should be used by the court and protected by the principle of public interest immunity (PII).

The principle of PII is one that has its origins in civil proceedings and is based on the concept that there may be material in the possession of one party that if disclosed to another party would be harmful to some overarching public interest. In order to prevent such harm, the party in possession of the material can apply to the court for a ruling that the material should not be disclosed, in other words that the material should benefit from PII.

The need for such a principle in licensing is perhaps obvious when one thinks about the following situation in the taxi context:

a. The council receives information that a licence holder has “been involved in incidents of a criminal nature”;
b. The council must then approach that evidence as a fair-minded decision-maker and consider whether or not the information is worthy of credence;
c. Having done so and come to the conclusion that it is, the council must then consider what that information says about the suitability of the driver to be a licence holder;
d. If it is the council’s view that it means he is not a fit and proper person to hold a licence, the council must take action against the licence, otherwise they would be in breach of their duties and would not be upholding the objectives of the licensing regime; however
e. The council have been told by the source of the evidence that they cannot disclose the information to the driver, so what does it do?

The answer that Rotherham came up with was to apply to the court for PII.

There is no higher judicial authority on whether this can be done in the licensing context, so when the case came before the Recorder of Sheffield he had to determine both the principle of whether it was applicable and, if so, how it was to be applied. In his own words, the questions calling for decision were:

(1) Can PII be claimed in this form of appellate proceedings in the Crown Court in a licensing appeal?
(2) If so, what are the principles that govern the decision?

The judge answered the first question yes, and consequently

moved to answer the second question. This case therefore provides a guide to any local authority, that wishes to put information before a court but withhold it from a licence holder. Practitioners should note that this is a Crown Court judgment and as such is not legally binding judicial authority and that the driver has appealed to the High Court, so there may be further legal developments on this matter in the near future. Notwithstanding, it is a weighty, persuasive authority, given the standing of the Honourable Recorder.

In answering the first question the judge's starting point was to acknowledge the nature of the proceedings in which the issue had arisen. This was a licensing appeal under the 1976 Act against the revocation of a driver's licence. Whether or not the driver was a fit and proper person was central to the outcome of the appeal. The council and the court must revoke the licence "if they have good reason to adjudge the licence holder no longer is a fit and proper person".

Further, the court acknowledged, "We are of the view that public safety is an overarching consideration of the licensing authority and this court upon appeal. That is a broad term, but one which is readily understood by anyone who is required to make this sort of decision." Recognition of these principles was then central to the remainder of the decision made in the case. Throughout the judgment there are repeated references back to the requirement that a driver is fit and proper, and that public safety is the overarching concern of the taxi licensing regime.

Having provided the context to the regime within which the legal question was being raised, the judge then considered the practical implications of the decision. This mirrored his approach during the hearing of the matter when he mooted the analogy, that if a council could not withhold certain information then it would be tantamount to nailing a sign to the door of the council offices requesting that people do not provide them with pertinent information to their licensed drivers unless it could be disclosed to the driver. That was something the court evidently thought was nonsensical.

This then led the court to consider the crux of the matter: namely, what does a council do if it has material in its possession that is relevant to whether a licensed driver is fit to be a licensed driver but it cannot make that information publicly available? The judge commented:

> *The local authority cannot ignore the material. It is submitted the only way it can be properly considered is by utilising PII. This occurs in every other sort of judicial proceedings and there are now well-known safeguards for consideration of such material. The court is the custodian, guardian and arbiter of fairness in this respect as in relation to every other aspect of the proceedings before it. The court is very alive to the duty imposed upon it by Article 6 of the convention.*
>
> *It would, indeed, be a curious phenomenon if material could be withheld from a taxi driver on PII grounds who was being prosecuted in the Crown Court for a crime, but the same material could not be the subject of PII in the same court sitting in its appellate capacity in a licensing case.*

Here we see another of the recurring themes in the judgment, the role of the court in upholding the rights of the driver, namely, "the court is the custodian, guardian and arbiter of fairness". The court is not a passive participant in proceedings of this nature (or indeed any proceedings); it has an active role to play and that role can and does include ensuring that fairness to all parties is achieved so far as is possible. In large part because of this recognition that the court can manage the rights of the parties, the conclusion followed that PII could be claimed in a licensing hearing:

> *PII is not merely a procedural rule. There are procedural rules in several jurisdictions as to how it is handled and processed, but that is not to be confused with the key legal principle which has its foundation in public policy and is also recognised by statute, that certain material may be withheld from another party to the proceedings, but made available to the court, providing it can be properly adjudged that disclosure of the material would be harmful to the public interest. It is for the court to adjudge the issue.*

The court seemed to have little difficulties in answering the first question in the affirmative, ie, that PII can be claimed in a taxi licensing appeal. The real issue was how it is claimed, and what are the rules and procedures that would / should govern such an application. This was the subject of the second question in the case.

HHJ Richardson QC in his judgment recognised that there was no statute which governed what procedure could be followed but rightly acknowledged that this was not an uncommon situation for the court to find itself in and where such a situation arose, the courts had proven themselves adept in identifying and applying appropriate solutions. Here the court found assistance from the House of Lords in *R v H & C* [2004] 2 AC 134. This was a criminal case which gave an overview of the competing interests engaged when an application for PII is made in a criminal trial. The discussion of the House of Lords in that case demonstrates that there is not a one size fits all answer to the question of what is necessary to ensure fairness in a case where a PII application is made. In the *XYZ* judgment HHJ Richardson QC used the

R v H decision as a base from which to suggest a nine-step approach to be used when considering an application for PII in the taxi licensing context:

1. *The court must start its consideration of a claim for PII from the key principle that open and fair justice ordinarily demands that there must be disclosure to all parties of relevant material sought to be advanced in a case.*
2. *That key principle must not be the subject of derogation lightly or without the most rigorous examination of the material sought to be withheld on the grounds of PII.*
3. *The court must examine the nature and context of the proceedings, in particular the issue that has to be decided by the court (the statutory or regulatory framework). In the context of this appeal the nature of the appellate proceedings, the duty placed upon the decision maker (that is the local authority).*
4. *The court must examine the material carefully and in detail. That would normally be executed in a private hearing.*
5. *The court must secure a clear statement as to what public interest is engaged and how it would be injurious to the public interest if the material should be made openly available to the other parties.*
6. *The court must enquire if there is a mechanism by which the interest of open justice can be achieved, short of complete non-disclosure, perhaps by giving a general indication as to nature of the material as opposed to specific details. Can the public interest be protected by a proportionate and less draconian disclosure of generic information?*
7. *The court must in the final analysis ask itself if there is a real risk of serious injury or prejudice to a public interest if full disclosure is made to the other parties.*
8. *If the answer to (7) is in the affirmative then the claim to PII must be accepted providing it has considered and ruled out any less draconian mechanism envisaged by paragraph (6).*
9. *The court must approach all these issues with the principle of minimum derogation firmly in mind.*

The purpose behind these rules is that they are designed to find an appropriate balance between the rights of the driver to have a fair trial, which would ordinarily require that they knew all of the information which was being relied upon against them, and the duties of the council to ensure that drivers are fit and proper people. That second part is key: in the judgment, having set out the above nine steps, the judge stated: "In this appeal and in these type of appeal we are – albeit in a court – considering an issue of licensing. That is, of course, important, but we are not finding facts which may result in the removal of a child from a parent or hearing a criminal case." That is relevant, because it is a factor to take into account when considering whether the withholding of information is proportionate given the right to a fair trial.

The remainder of the judgment is concerned with the application of these steps to the decision at hand and, considering all the publicly available information, to determine whether or not the council was wrong to revoke the appellant's licence. Ultimately, the conclusion of the court was that the council was not wrong to revoke the licence and the court found that to be the case even if the PII material were ignored.

This case remains the subject of a case-stated appeal to the High Court so the situation may well change. However, for now there is a great utility in the decision, as it should give councils the confidence to interact with the various authorities and bodies which provide them with information about drivers and give them some reassurances that, where there are issues of particular sensitivity, there is a way forward which can be used to prevent information from being revealed to drivers and the public at large.

The case is not a definitive guide on what to do in a situation where PII is engaged. Perhaps most notably, it is obviously concerned with what to do in the court setting rather than at first instance when councils themselves will have to deal with the matter. There are a small number of councils which already have in place a specific policy and associated procedure for dealing with applications / reviews where there are issues of PII, but they are very much in a small minority. The lack of an adopted procedure should not prevent a council from being willing to go down the PII route; there is sufficient flexibility in the law and most local policies to allow it to be dealt with when it arises.

It is a sensitive issue, however, and is one that should be treated as such and the utmost care must be used when dealing with it. Drivers have a right to a fair hearing, and where there is to be derogation from a fully open hearing then that derogation must be by the minimum amount required.

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When is a residents' group not a residents' group?

The *We Love Hackney* case highlights what **Richard Brown** describes as "the inherent difficulty of balancing a potentially ruinous costs order in judicial review proceedings with the principle of access to justice", with the added twist of a residents' group not actually being what it seems to be

"Free to those who can afford it. Very expensive to those who can't." *Withnail, Withnail and I.*

"In England, justice is open to all - like the Ritz Hotel." Sir James Matthew

Our esteemed editor wrote in his editorial to Journal 24 of the ongoing (at the time) litigation involving a group, We Love Hackney Limited (the claimant), and London Borough of Hackney (the defendant).

I forget now to what Withnail was alluding with his aphorism in the timeless 1987 film *Withnail and I*. Nevertheless, it seems to me to encapsulate the thorny issue of costs and access to justice, with which the High Court had to grapple in *R (on the application of) We Love Hackney Limited v London Borough of Hackney*[1] - namely, the inherent difficulty of balancing a potentially ruinous costs order in judicial review proceedings with the principle of access to justice. The litigation has since concluded, with the claimant withdrawing its judicial review following an unsuccessful application by the claimant for a costs capping order (CCO) and a successful application by the defendant for a security for costs order (SCO), meaning that the claimant would need to pay a significant sum into court on account of the defendant's costs if it (the claimant) was unsuccessful.

At first glance, a campaign group being forced to withdraw a judicial review claim having been denied costs protection would seem to endorse the cynical bents of such widely differing characters as Withnail and Sir James Matthew.

The issues arising in the abortive claim are of interest to practitioners for a number of reasons. Firstly, the claimant averred that the defendant had not had regard to the public sector equality duty (PSED) set out under s 149 of the Equality Act 2010 in the context of statutory policy-making under the Licensing Act 2003 Act (the 2003 Act), and therefore the decision prejudiced those who have "protected characteristics" under s 149 of the 2010 Act. Secondly, the CCO sought by the claimant effectively required the High Court to make an assessment of the extent to which a challenge to a local authority's policy in these circumstances - ie, those who have "protected characteristics" under s 149 of the 2010 Act - was of "general public importance". Thirdly, the background and motivations of the claimant came under scrutiny in the context of the application for a CCO.

Background to the judicial review proceedings

The litigation stemmed from changes to the defendant's statutory statement of licensing policy published on 18 July 2018 under s 5 of the 2003 Act, following consultation.

The proposals set out in the consultation issued by the defendant sought to retain a special policy area (SPA) for the Dalston district, extend the size of the SPA for the Shoreditch area and introduce a "core hours" policy.

The consultation ran from 6 November 2017 to 12 January 2018. The results of the public consultation were overwhelmingly against the adoption of the new policy, or at least the above elements of it. No fewer than 680 responses were received.

According to the consultation report,[2] the We Love Hackney campaign ran from 5 to 12 January 2018. The report noted that 73 responses were received between 6 November and 4 January, with 607 responses being received in the final week, during the campaign. Of course, if one is an inveterate procrastinator like myself, one may have delayed one's response for entirely other reasons. Nevertheless, the campaign was clearly highly effective in mobilising support.

It is fair to say that the proposals were not universally popular. Nevertheless, the policy was approved unanimously by full council.

1 [2019] EWHC 1007 (Admin).

2 [2019] EWHC 1007 (Admin) para 9

The claimant sought a judicial review of the decision. The grounds were: i) that the LGBTQ+ community would be prejudiced by the changes (the PSED point); and ii) that the documentation on which councillors relied "did not fairly address competing views" and failed to draw attention to material and relevant considerations.[3]

The claimant was (by the time of the judicial review proceedings) an impecunious limited company, with a share capital of £10. The claimant had crowdfunded to cover its own legal costs. This naturally furrowed the brows of the defendant, which worried that in the event of successfully defending the proceedings, a costs award in its favour would essentially be meaningless.

Permission to apply for judicial review was granted on the papers by Lavender J - ie, there was no hearing. The permission stage is a means of filtering out hopeless claims. The grant of permission means that a claimant's case is "arguable". However, the learned judge decided that the proceedings were not "public interest proceedings" and refused to make a CCO. The claimant renewed the CCO application at an oral hearing, which also considered the defendant's concomitant application for a SCO.

Costs capping orders

Judicial review proceedings can be very expensive. CCOs have developed as a partial solution, in certain types of proceedings, to reconcile the dichotomy of under-resourced litigants and the principle of access to justice - to strike a balance to ensure that individuals and groups are not prevented from challenging decisions made by public bodies due to lack of funds, and conversely that decisions of public bodies should be subject to appropriate scrutiny. This problem is at the heart of the famous adage attributed to Sir James Matthew, a 19th century Irish judge, that "justice is open to all – like the Ritz Hotel". Under a CCO, access to justice is, if not quite "free", then certainly much cheaper, for those who cannot afford it. It can still of course be very expensive to those who can.

A CCO is "an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings".[4] As might be expected, this liability should not be removed (be "free") for those who can afford to pay. CCOs were put on a statutory footing only relatively recently when, in 2016, ss 88-90 of the Criminal Justice and Courts Act 2015 (CJCA) came into force. A similar costs protection regime had existed before, based on principles established in case law.[5]

Section 88 CJCA sets out the requirements for making a CCO:

> *(6) The court may make a costs capping order if it is satisfied that-*
> *(a) the proceedings are public interest proceedings,*
> *(b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and*
> *(c) it would be reasonable for the applicant for judicial review to do so.*
> *(7) The proceedings are "public interest proceedings" only if—*
> *(a) an issue that is the subject of the proceedings is of general public importance,*
> *(b) the public interest requires the issue to be resolved, and*
> *(c) the proceedings are likely to provide an appropriate means of resolving it.*
> *(8) The matters to which the court must have regard when determining whether proceedings are public interest proceedings include—*
> *(a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review,*
> *(b) how significant the effect on those people is likely to be, and*
> *(c) whether the proceedings involve consideration of a point of law of general public importance.*

Further, s 89 sets out other matters to which the court must have regard when considering whether to make a CCO:

> *(1) The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include—*
> *(a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;*
> *(b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;*
> *(c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;*
> *(d) whether legal representatives for the applicant for the order are acting free of charge;*

3 *Ibid* para 9.
4 CJCA s88(2).
5 *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192

> *(e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.*[6]

The background and formation of a party is important in the context of a CCO application. For even if the court does consider the issues to be of "general public importance" it would still only make a CCO if various other criteria were met, including whether the judicial review would be withdrawn if a CCO was not made and, crucially, whether it would be reasonable for the claimant to withdraw on this basis, ie, whether the claimant had other means of financing the proceedings of which it would be reasonable to expect it to avail itself.

A 'group of residents' or a 'residents' group'

It will be noted that s 89(1) of CJCA includes consideration of *inter alia* "the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties" and "whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally".

The claimant has been variously described as a "community campaign group"; a "community group"; a "residents' group"; a "group of local businesses and Hackney residents"; a "not for profit company set up by local residents"; and a "resident community group". Its members self-identify as "a group of Hackney residents".[7] In the judicial review proceedings, the claimant's evidence was that "We Love Hackney Limited" was "an association of local residents and business owners".[8] Most if not all of the main protagonists of the claimant lived in the borough and so to this extent at least could be described as a "residents' group". But what was their main motivation? And does it matter? Plainly, residents are equally entitled (although not, perhaps, equally likely) to campaign in favour of the night-time economy as against. Whether or not the claimant was a genuine "residents' group" was neither here nor there in terms of the substantive claim; it was only in the context of the CCO that it came under scrutiny.

Many residents' groups - whether formal or informal, incorporated or not incorporated, constitution or no constitution, recognised by their local authority or not - purport to "represent" "residents". Their mandate to do so should always be examined and weighed accordingly, against the other views expressed. The problem is that "residents" are, to borrow a splendid phrase from the judgment in *We Love Hackney*, "amorphous and somewhat protean".

There is plainly a public interest in civil society being able to challenge, in appropriate circumstances, what they see as unsound administrative decisions made by public bodies without the threat of a ruinous costs order.

"Civil society" can be thought of as being the "third sector" of society, outwith government and (crucially) commerce.[9] It is of course beyond doubt that civil society benefits greatly from organised groups and campaigns setting out views from a section of the community on matters of public interest. It seems that the learned judge in the We Love Hackney case was far from persuaded that the claimant was genuinely a "residents' group" in the sense that would be understood within a definition of civil society, ie, that the driving force of the group did not also include, to a greater or lesser extent, commercial interests.

Whether this is fair or not is impossible to discern without access to the background documentation. It is clear that thousands of residents expressed support for the claimant's aims. It is equally clear that many did not. As ever, the vast majority expressed no view whatsoever. It is into this latter void that the licensing authority's judgment in the exercise of its licensing functions must tread.

There was clearly a groundswell of support for the claimant's campaign, as can be seen by the consultation responses, support on social media and financial contributions to the crowdfunding campaign.

Lavender J had found at permission stage the proceedings were not "public interest proceedings" and that even if they were, the threshold for a CCO would not be met as "the claimant was formed by, among others, wealthy individuals who have a commercial interest in the litigation".[10]

It is clear that Farbey J was similarly minded when the matter came before her on 27 March 2019. Essentially, the court was asked by the claimant to look at the matter widely - that there was an issue of "general public importance" because it was the first High Court case to examine the PSED in the context of licensing. On the contrary, the court looked at the matter narrowly - the PSED was plainly engaged but only in the context of this particular licensing policy. Therefore the "public interest" did not "require any issue of public importance to be resolved".[11]

The judge also looked behind the claimant company, and what she found did not persuade her that the threshold for a CCO when having regard to the factors in s 89(1) had

6 CJCA s89(1).

7 http://www.welovehackney.org

8 [2019] EWHC 1007 (Admin) para 18.

9 https://www.weforum.org/agenda/2018/04/what-is-civil-society/

10 [2019] EWHC 1007 (Admin) para 11.

11 [2019] EWHC 1007 (Admin) para 44.

been reached. The disclosure duty is wide-ranging.[12] Such information should include "assets or income or other monies which a party might be able to obtain or has an expectation of coming into possession of…".[13]

The judge noted the crowdfunding by which the claimant proposed to fund the proceedings. The learned judge commented, several times, that at least some of the directors had a commercial interest in the proceedings. She noted rather caustically that "well-resourced individuals have chosen to litigate the claim via an impecunious company which has taken possession of funds donated by members of the public". She accepted that civic society benefits from such campaigns, but pointed out that the claimant's own response to the consultation "refers to the defendant's failure to minimise the regulatory burden on businesses". Accordingly, the learned judge expressed "some sympathy" for the defendant's position that this was an "industry-driven campaign" backed by "well-resourced individuals".[14]

I'm sure that many stakeholders will be watching the situation in Hackney with interest, particularly those licensing authorities which will soon be reviewing their own statements of licensing policy and will need to demonstrate that they have discharged their "public sector equality duty". It is important to note that the *We Love Hackney* case did not provide any guidance one way or the other on this; whether the defendant had in fact had "no regard" to the PSED was a question which remained unanswered. The judge simply decided that the case did not raise any point of law of "general public importance", due to it being limited to the defendant's formulation of its own policy. Likewise, the learned judge stopped short of stating unequivocally that the claimant was motivated largely by business interests. Nevertheless, the make-up of the claimant raises interesting questions for our understanding of what exactly is a "residents' group".

As for Hackney itself, the ramifications of significant changes to policy of the type feared by the claimant and its supporters can take years, or even decades, to manifest. It seems that Withnail's most famous declamation would still find succour in Hackney for some time to come: "I demand to have some booze!"

Richard Brown, MIoL
Solicitor, Licensing Advice Service, Westminster CAB

12 See also s88(5)(b).
13 *R (Harvey) v Leighton Linslade Town Council* [2019] EWHC 760 (Admin).
14 [2019] EWHC 1007 (Admin) paras 49 & 52.

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Making licensing accessible for communities

Public health officials in Cheshire and Merseyside have been working hard to get more members of the community involved in licensing, as **Paul Duffy** explains

Revised guidance issued under s 182 of the Licensing Act 2003[1] highlights a number of key roles for the Act aside from the promotion of the licensing objectives. These include:

- Protecting the public and local residents from crime, anti-social behaviour and noise nuisance caused by irresponsible licensed premises.
- Providing a regulatory framework for alcohol which reflects the needs of local communities and empowers local authorities to make and enforce decisions about the most appropriate licensing strategies for their local area.
- Encouraging greater community involvement in licensing decisions and giving local residents the opportunity to have their say regarding licensing decisions that may affect them.

Despite the obvious focus on community involvement above, levels of reviews brought by community members are very low (only 41 in 17/18) and are decreasing over time.[2] Although this is only one way in which the public can become involved in the licensing process, it is likely indicative of the generally low levels of engagement.

The Institute of Alcohol Studies (IAS) report *The Licensing Act (2003): Its Uses And Abuses 10 Years On*[3] highlights this lack of engagement, pointing out that it has probably not improved during the first 10 years of the Act. Although there is some evidence of efforts to improve engagement, they are sparse and one area of improvement that could be pursued is on-line resources that are more easily navigable.

The report highlighted problems in supporting community members to make appropriately structured approaches to licensing authorities. There was also a lower level of engagement in less affluent communities.

Incidentally, it should also be noted that there would appear to be a divergence of opinion on the value of community involvement in licensing with some trade and legal professionals querying its value given the paucity of community interventions to date.

This tone is echoed through the Community Engagement in Local Alcohol Decision-making (CELAD) study produced by the London School of Hygiene & Tropical Medicine and the NIHR School for Public Health Research. In their summary of the literature, its authors noted that engagement of the community in decision making can be successful but that there is often a disconnect between community expectations and likely outcomes in terms of scale of influence and timeliness. However, the potential for less obvious benefits of engagement was highlighted, for example greater linkage between communities and local government laying the groundwork for future influencing of decisions.

The CELAD study highlighted a lack of clarity for community members on decision-making processes as a key barrier for their engagement. Sometimes there was professional reticence to offer this support in case it was seen as soliciting complaints.[4]

Project context

Alcohol misuse across Cheshire and Merseyside (C&M) costs around £994 million each year (£412 per head of population).[5] Of these costs, only £218 million are direct costs to the NHS. Health harm from alcohol is a significant issue for C&M.

1 Home Office (2018) Revised Guidance issued under section 182 of the Licensing Act 2003 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705588/Revised_guidance_issued_under_section_182_of_the_Licensing_Act_2003__April_2018_.pdf

2 Home Office (2018) Alcohol and late night refreshment licensing England and Wales 31 March 2018. https://www.gov.uk/government/statistics/alcohol-and-late-night-refreshment-licensing-england-and-wales-31-march-2018

3 IAS (2016) *Licensing Act 2003: Its uses and abuses 10 years on* http://www.ias.org.uk/What-we-do/IAS-reports/Licensing-Act-2003-Its-uses-and-abuses-10-years-on-Documents.aspx

4 Reynolds, J; McGrath, M; Halliday, E; Smolar, M; Hare, S; Ogden, M; Medhi, S; Holmes, J; LaFortune, L; Popay; J; Lock, K; Cook, P; Egan, M. (2019). *Identifying Mechanisms to Engage the Community in Local Alcohol Decision Making*. Insights from the CELAD Study. NIHR School for Public Health Research.

5 PHE (2013) Cost of Alcohol in the North West reports. Available on request to author

Given evidence linking alcohol availability and alcohol related harm,[6] in 2016 work started under the umbrella of the Cheshire and Merseyside Public Health Collaborative (Champs) to examine ways of influencing availability to reduce harm. One strand was to promote community engagement in licensing.

The starting principle for the work building on evidence outlined earlier and on expert opinion locally was that communities are for the most part unaware of their rights in terms of the Licensing Act 2003, and even if they are aware the processes involved can appear intimidating. An audit of licensing websites across the nine local authorities in C&M confirmed indications from the IAS report. Aside from a small number of notable exceptions, websites were not designed to support community members to take action. Issues included unclear navigation, missing or limited information on current applications, lack of easily available public registers and no guidance specifically for community members wishing to make representations, provide intelligence to licensing authorities or ask for reviews of licenses.

A working group of licensing officers, public health leads and public health marketing specialists came together with the aim of raising community awareness around licensing, and through this, increase community participation. This aim is in line with a key recommendation from the CELAD study to make on-line information about licensing processes more accessible for the public. The group comprised myself, Shane Knott (Liverpool City Council), Dave Watson (Warrington Borough Council), Adam Major (Champs Public Health Collaborative), Louise Williams (Public Health England North West), Ian Canning (Liverpool City Council), Tricia Cavanagh (Wirral Council), Holly Dixon (Hitch Marketing) and Gary Wootten (Hitch Marketing).

Process

Work had already started on Wirral to develop a resource for community members based on Alcohol Focus Scotland guidance[7] taking into account the differences in English legislation. The draft was further developed by the working group. The key elements that the group wanted to communicate in as simple language as possible were:

- What is controlled by the Act.
- What are the licensing objectives.
- What is the role of the community.
- When and how communities can raise concerns or objections.
- What is the process once objections have been raised.
- What counts as good evidence.

To ensure that we had a community view on the resource, views were sought from a number of community groups in Wirral and Liverpool. For example, in Liverpool, three community organisations in the Anfield and Everton wards were approached in order to understand their experiences of using the licensing process to address concerns about alcohol within their community.

A focus group was also conducted at the existing Police Community Action Group Meeting in the same area, with members of the public and representatives of local community organisations present. The focus group aimed to understand levels of awareness about licensing, barriers to engaging with the licensing process, and what other information they felt they needed to help them to do this. A draft of the guidance document was explored with the group, and their feedback was incorporated into a further version of the resource.

It was also critical to have professional buy in to the resource so views were sought from public health leads and licensing leads across C&M. Dave Watson, Public Protection Unit Manager, Warrington Council, commented: “We recognise the need to actively promote the licensing objectives in a way that protects the public and which addresses local need. This was an excellent opportunity to work collaboratively with public health colleagues from across the region. We hope that the resource will help to strengthen the public voice in decisions that may affect them and to ultimately shape future policies alongside the views of other stakeholders”.

There was final oversight of the resource by a local authority legal advisor.

An independent social marketing organisation supported finalisation of the resource and created a website for the content www.alcohollicensing.org.uk. In brief the resource covers:

- Key facts about alcohol licensing.
- Key terminology in as plain English as possible.
- Practical tips for making representations and collecting evidence.
- Who to approach to discuss licensing issues and contact details for licensing authorities.
- Outlines of various stages of the licensing process and what to expect.

6 PHE (2016) The Public Health Burden of Alcohol and the Effectiveness and Cost-Effectiveness of Alcohol Control Policies An evidence review. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733108/alcohol_public_health_burden_evidence_review_update_2018.pdf

7 Alcohol Focus Scotland (2018) Alcohol licensing in your community *How you can get involved*. https://www.alcohol-focus-scotland.org.uk/media/133477/Community-licensing-toolkit.pdf

Next steps and desired outcomes

The key outcome for the resource is for there to be public and professional awareness of it so that it can be used to increase the amount of community engagement with licensing in their locality. There are a number of key audiences:

- Members of the public and community organisations to help them to navigate the licensing process and raise concerns.
- Elected members and other community leaders who are called upon to represent residents at licensing hearings or may support them in making complaints.
- Licensing officers, public health professionals, and community advocacy services to ensure they are aware of the toolkit, can promote it and can signpost to it.

The resource will be promoted through a number of routes:

- Links on existing local authority licensing websites to the new dedicated community site.
- Promotion through local authority and other partner organisations, social media feeds and health and wellbeing directories where they exist.
- Promotion via Council for Voluntary Services and Citizens Advice Bureau in C&M including briefings for their staff.
- Cascade via environmental health chief officers across C&M and via directors of Public Health.

While the resource was developed for C&M and there is some locality specific information, the principles are more widely applicable. We hope that the resource will be useful for other areas and will be promoted more widely by:

- Sharing on relevant KnowledgeHub forums on licensing with over 650 members.
- Cascading via the national regulatory network managed by Department for Business Energy and Industrial Strategy.
- Presentations for PHE's national licensing network.
- Sharing with PHE alcohol leads across England so that they can share with local areas they link with.

Consideration will also be given to incorporating a summary of the resource and links into the relevant on-line PHE guidance https://www.gov.uk/guidance/alcohol-licensing-a-guide-for-public-health-teams.

For the evaluation of the resource, a number of routes will be explored:

- Website analytics to understand the traffic on the website, popular sections, locations of people accessing it etc.
- Working with licensing departments to monitor whether they see an increase in the number of enquiries, intelligence or representations from community sources.
- Qualitative work with key partner agencies (eg, CAB) and community groups involved with development of the resource to ascertain how easy the resource is to understand, how useful it is in assisting members of the public to engage in the licensing process, and how effective the advice is in empowering citizens to influence local licensing decisions that concern them.

Paul Duffy
Public Health England (North West)

2020 Dates for the Diary

National Licensing Week
15 - 19 June 2020

Summer Training Conference
17 June 2020

National Training Conference
11 - 13 November 2020

Cost-benefit analysis result will not please every local authority

A planning inspector's recent decision to prioritise the economic benefits of a new bar over its social impact has put the cat amongst the pigeons, as **Sarah Clover** explains

The disconnect between planning and licensing continues to cause ructions. One of the key factors resulting in the dramatic conclusions of the House of Lords Select Committee in 2017 concerning the relationship between licensing and planning was the evidence given to them by councils and residents, namely that the approval of licences and planning permissions was not joined up. Residents in particular could not understand how premises could obtain planning permission when they were refused a licence, or vice versa. The committee could not understand it either. One of the problems is the lack of co-ordination between the different departments of local authorities, which is an issue being addressed elsewhere.

Meanwhile, the authorisation of hospitality-focused premises forges ahead in the planning field, in circumstances that will cause intrigue, if not consternation among many licensing departments, councils and the police. This, however, is the new reality that must be grappled with. Coupled with the recent changes in permitted development in use class conversion, licensing practitioners must continue to recognise the differences in approach between licensing and planning and devise new strategies to minimise impacts, maximise benefits and bridge the gaps.

In a planning appeal recently concluded in Headingley, Leeds (20 May 2019), a planning inspector was asked to reconsider a decision by the council to refuse planning permission for a Class A4 drinking establishment. He identified the main issues in the appeal as the effect on the amenities of local residents and visitors to the area with regard to noise, disturbance, anti-social behaviour and crime. The inspector found as a fact that: " It is more likely that customers of a venue focused predominantly on drinking, compared to a restaurant, would result in more comings and goings to the premises as a larger proportion of patrons would be transient, visiting other such premises in the area. Furthermore, it would also seem likely that a greater proportion of patrons would stay until closing time."

The proposed capacity for the premises was 500 people, which was a significant increase on the premises' previous capacity.

Local residents had already complained that the previous use of the venue as a restaurant had given rise to anti-social behaviour. The inspector noted, however, that he had not been given "evidence of such direct conflicts", so he declined to conclude that the previous use had given rise to "unacceptable harm" to the living conditions of immediately surrounding residents.

He said:

A greater number of drinking patrons arriving and leaving, particularly late at night, would be likely to increase the potential for disturbance at the entrance to the premises. It is not certain that it would add to numbers in the area overall, but it may contribute to the area becoming a more popular drinking destination. It would extend the area of the town centre that is currently used by such customers and this may increase the numbers of patrons in the nearby streets as changes to the patterns of movements through the area to visit other establishments and to get home may occur. If more persons are accepted into this property for drinking purposes than was formerly the case, I accept that this would be likely to add to the concerns raised with regard to noise, disturbance, anti-social behaviour and crime in the area.

The inspector was clearly not suffering from rose-tinted illusions. He took into account the West Yorkshire Policy Headingly Cumulative Impact Report 2018, notwithstanding the fact that it was not a planning policy document. He specifically acknowledged the "considerable weight of evidence" that noise, crime and anti-social behaviour was linked to drinking establishments. He noted that the area had specific issues because of the student population, and he accepted that these issues taken together went beyond the impacts of a "normal" town centre night-time economy. He found, as a result, that the proposal was contrary to the policies of the council's development plan, including those supporting residential amenity and promoting safe and secure places, and the prevention of crime.

However, he also found that the proposal would bring a number of benefits to the local economy, including local employment opportunities and the provision of an additional

destination for visitors to the area. This, he found, accorded with other policies in the development plan promoting viability and vitality of the local economy and the provision of additional social, cultural and entertainment facilities. It would also bring vacant premises back into use, which had been the object of unsuccessful marketing efforts to find a restaurant operator. The inspector gave significant weight to these factors. He concluded that there was clear policy support for directing a use such as this to a town centre location. He also found additional policy support for the economic activity and investment that would result, bringing vitality to the town centre.

The inspector had overtly found the evidence compelling in relation to the concerns with the over-concentration of drinking establishments in the area, and the noise, anti- social behaviour and crime that results, and which he specifically found had "persisted for many years". He said he gave this significant weight in the planning balance. He said: "In this respect, the proposal would represent a retrograde step that would conflict with the amenity and crime prevention policies of the development plan."

However, he also found that the previous restaurant had contributed, to some degree, to the same problems previously, and that "this type of activity will continue, in close proximity to this property, with or without this venue".

He had no evidence that any alternative use was likely for these premises: they were likely to remain vacant in the absence of this planning permission. He found the economic benefit of the building's productive re-use weighed heavily as well. He said that if the property remained empty, while it might minimise the impact on the local environment, "it will make no contribution to the economy and will have a negative impact with regard to the perception of the area. The proposed use is likely to result in investment and economic activity."

However, he was in no doubt that bringing the premises back into use would be likely to contribute to what he called the "over-provision" of drinking establishments and would contribute further to the harmful impacts of anti-social behaviour and crime. These factors were not lost on him.

He concluded the matter in this way: "Although finely balanced, I do not find that the scale of the additional contribution that this proposed use would make to the existing concerns and the policy conflict in relation to seeking to create safe and secure environments would be sufficient to outweigh the benefits of returning this property to an economic use and the policy support for such uses in designated locations."

He therefore allowed the appeal and granted planning permission for the A4 bar use.

This is a very interesting decision, which clearly balanced the competing arguments for and against the introduction of new licensed premises into night-time economies, and came down in favour of the premises and the local economy. Economic considerations are equally relevant in licensing as in planning as the dicta of Toulson LJ in *Hope & Glory*[1] made plain at [42]:

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

Thus, it can be seen that economic considerations in decision-making for licensed premises are neither new, nor restricted to the planning regime.

This planning appeal decision may be regarded as an indicator of the priorities of decision-makers in certain quarters in times of economic uncertainty for the nation. It certainly stands in stark contrast to the attitudes of many responsible authorities and regulators in the licensing field which give priority to the impacts that they fear such premises may bring. This decision is a timely indicator that the arguments are not all one way, and that the considerations in any given case must be weighed extremely carefully. This is a decision that will, no doubt, be drawn to the attention of appeal tribunals in both the licensing and the planning arena.

Sarah Clover
Barrister, Kings Chambers

1 *R (on application of Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court and Others* (2011) EWCA Civ 31.

Institute of Licensing News

National Training Conference 2019

This issue of the *Journal of Licensing* coincides with our National Training Conference (NTC), which will take place on 20-22 November, when we return again to the Crowne Plaza in Stratford-upon-Avon. The programme is as comprehensive as ever with over 70 sessions delivered by expert speakers in every field of licensing, from regulatory, industry and private practice backgrounds.

Our event has grown phenomenally over the years, driven by the time, commitment and energy of speakers, the support of sponsors enhancing the engagement opportunities at the event while allowing us to maximise the value to delegates, and of course the commitment and loyalty of delegates – some of whom have attended the event year on year now for a decade or more.

As always, the NTC programme covers a huge range of licensing and related subjects and boasts an impressive range of speakers from industry, local authority, police and the legal world. We also enjoy the support of more sponsors than ever – some long-term partners with the IoL and others, new to the event. Our grateful thanks to everyone for making this event such a success, as well as a pleasure and privilege to facilitate. Thanks also to the hotel's staff, who have worked closely with the IoL team to ensure the event runs smoothly.

Consultations

Cosmetic treatments in England

In September, the IoL and the Chartered Institute of Environment Health jointly consulted members in relation to the current regulatory regime for special treatment licensing. This is in preparation for the new All-Party Parliamentary Group (APPG) on Beauty, Wellbeing and Aesthetics which will launch an inquiry into the current regulation of cosmetic treatments in England.

Social and Economic Impact of the Gambling Industry Committee – call for evidence

The IoL responded to the call for evidence from the Social and Economic Impact of the Gambling Industry Committee. IoL members were surveyed, which revealed a variety of views.

The IoL response noted that industry operators have a valuable role to play in supervising activities within licensed premises, and helping to identify potential problem gambling and vulnerability, as well as being equipped to offer support and signposting. Licensed premises provide a social hub and a controlled environment which is completely lacking in online gambling. There were consistent themes in the responses concerning online gambling, advertising, and the difficulties of identifying problem gambling and subsequent provision of support.

The costs of problem gambling to individuals can be catastrophic, affecting personal and professional lives to a great extent, which in turn has a wide impact on the economy with potential housing, benefits and health services costs.

Mental health issues triggered through or exacerbated by problem gambling are potentially far reaching and extremely difficult to identify unless help is sought. Public attitudes to gambling addiction must be addressed; this has been achieved to a great extent in relation to mental health in recent years, with significant benefit to sufferers and society as a whole.

That said, there are definite social benefits with licensed premises providing social networking opportunities, and low-level gambling featuring in many community events as well as playing a part in charity fundraising (lotteries etc).

There were significant concerns that gambling advertising and the growing involvement of gambling with sports is effectively normalising or even glamorising gambling. The availability of gambling online and via social media compounds the problem, and there is a lack of education for children and parents. In summary, there is an urgent need to address the advertising of gambling and accessibility, and also to increase significantly education in all areas.

Welsh Government White Paper on public transport

The Welsh Government consulted in December 2018 on its proposals to legislate for reforming the planning and delivery of local bus services and licensing of taxis and private hire vehicles. The IoL responded to the consultation, which closed on 27 March 2019.

The IoL response supported the need for national minimum standards, cross border enforcement, a national database and information sharing, but opposed proposals to create a Joint Transport Authority to take responsibility for taxi and private hire licensing in place of the existing local authority licensing regime. The response noted that through the Institute of Licensing Wales Region and the AWLEP, the Welsh local authorities have a strong network in place and are ideally set up to continue to increase collaborative working.

On 16 July 2019, First Minister Mark Drakeford announced that "Ministers will continue to work on plans to modernise

the licensing system for taxis and private hire vehicles – but the Welsh Government will not legislate in this area during this Assembly term."

Welsh Government consultation on animal licensing (third party sales)

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

On 19 June 2018 the Minister for Environment, Energy and Rural Affairs, Lesley Griffiths, announced her commitment to explore options of banning commercial third-party sales of puppies and kittens in Wales. A twelve-week public consultation on the banning of third-party sales of puppies and kittens was launched on 19 February 2019 and closed on the 17 May 2019. The IoL response to the consultation supported a ban on third-party sales in the interests of consistency across England and Wales.

Responses to the consultation showed overwhelming support for a ban, and on 18 July 2019, Lesley Griffiths confirmed that the third-party sales of puppies and kittens will be banned in Wales.

Plans for a ban will now be put to a full public consultation, which will look into the details and impacts of a ban, as well as amendments to breeding regulations to improve animal welfare conditions at breeding establishments.

National Licensing Week

The 4th National Licensing Week (NLW) initiative took place in June 2019, providing another opportunity to raise awareness of the many different forms of licensing, and to celebrate all that goes on behind the scenes by regulators, private practice and industry practitioners. NLW provides a fantastic opportunity to raise public awareness on important issues. This year we took the opportunity to raise awareness of Lucy's Law, using a series of #wheresmum posters, and also reminded everyone of the County Lines campaign (Home Office and Crimestoppers) and the IoL's guidance on suitability for taxi and private hire licensing (mirrored to a great extent in the DfT draft statutory guidance).

We continue to see some fantastic examples of organisations and individuals participating in NLWeek, via social media campaigns, general knowledge quizzes, public awareness guides produced by local partnership groups, roadshows and information surgeries, a celebratory NLW party in Nottingham, job swaps, and increasing engagement through social media before, during and after the week itself.

2020 will be the 5th National Licensing Week. It will be a chance for everyone to showcase their business and work within licensing. It is also a fantastic opportunity for wider networking and engagement through partnership working.

It doesn't take much to be involved. A job swap could be fun, interesting and very worthwhile in getting a deeper appreciation of the work others do and the challenges they face. But, equally, a simple blog about an aspect of your daily role in licensing gives others the opportunity to see the role through your eyes – why is it important, who does it make a difference to and what are the challenges and rewards.

We are committed to continuing NLW and hope to see more and more engagement, activities and showcasing of organisations in all sectors. We welcome your ideas and more importantly your contribution in whatever form suits you to help us fly the flag for licensing practitioners in every sector across the UK.

For more information and to get involved with #NLW2020, email NLW@instituteoflicensing.org.

Training and events

We have been as busy as ever with training and events this year. Our taxi conferences in Sheffield and Swindon proved popular and presented an excellent opportunity to hear from the DfT, NPCC and DBS as well as expert speakers across all subjects bringing their experiences and perspectives to the table.

Our basic and advanced taxi courses were launched this year, brought to you by the IoL in association with *Button Training*. The courses proved very popular and we hope to announce dates and venues for 2020 shortly.

We continued the discussions around safeguarding in Doncaster and Taunton, hearing from the Centre of Expertise on child sexual abuse (CSA Centre), CYP First, Sheffield Safeguarding Children Board and Barnardo's, alongside IoL President James Button and Editor of the *Journal of Licensing* Leo Charalambides, all discussing the ongoing issues around safeguarding and the strong connections with local authority licensing regimes including SEVs and taxi / private hire licensing. The intention of the conferences was to highlight the role that licensing can and should play in safeguarding.

The "Animal licensing – where are we now" courses have also been popular, showing there is still a lot to discuss, and we are progressing the development of our Animal Licensing Inspectors course, working with City & Guilds.

Police and councillor training development is also progressing well, and we hope to have more news on both courses shortly.

Lotteries, stake reductions and inquiring Lords

Consultation on the minimum age for playing National Lottery games, FOBT stake reduction and its impact on betting shops and a new House of Lords Select Committee for gambling are the topics assessed in this issue by **Nick Arron**

In July the Department for Digital, Culture, Media and Sport (DCMS) issued a consultation on the minimum age for playing National Lottery games.

The current minimum age for playing National Lottery games is 16, which was set in 1994. The National Lottery has a special status in that its main purpose is to raise money for good causes. At the time of setting the age limit it was also recognised as being different to other gambling products and therefore lower risk. Three of the distinctions given were that the cost of play was small for a small chance at winning jackpots, it would not easily encourage repetitive play, and there would be different regulation with player protection built in.

The consultation acknowledges that since the award of third National Lottery licence in 2009 there have been significant changes to the way in which players interact with national lottery games, notably the growth in online gambling together with the development of online and mobile platforms.

The current licence to run the National Lottery is due to expire in 2023 and the Gambling Commission is in the process of designing the competition to award the next National Lottery licence. The DCMS consultation states that the start of the new licence period is an opportune time to review the policy framework for the National Lottery in order to ensure that it is fit for the future.

The Government's main objectives when looking at the minimum age for National Lottery games are:

- To ensure that young people are protected from the potential risks of gambling related harm.
- To maintain the National Lottery's special status as a low risk product and is distinct from commercial gambling; to ensure that it remains attractive to the player base; and that it continues to support good causes in the future.
- To respond to the trends in technology and player behaviour and future proof the National Lottery for the life of the next licence.
- To ensure that there is a clear position regarding the minimum age to play National Lottery games for the upcoming bidding process for the fourth National Lottery licence competition.

The consultation indicates that there is no evidence that the playing of National Lottery games by 16 and 17 year olds has any significant risk of harm. It does however specify that there is evidence from the latest combined Health Survey which suggests there is slightly higher risk of problem gambling from some National Lottery games than others, with the risk of harm being slightly higher for scratch cards than for draw-based games. The distinguishing feature of scratch cards is that they are an instant-win game rather than a draw-based game. The consultation identifies that the relative proportion in total sales revenue of instant win games, especially scratch cards, has increased.

With this in mind, the question has been raised as to whether making all National Lottery games available to those under the age of 18 remains appropriate.

The following options are put forward for consultees to consider:

1. Do nothing, retain the minimum age of 16 for all National Lottery games.
2. Raise the minimum age to 18 for National Lottery instant win games (ie, scratch cards and online instant win games).
3. Raise the minimum age to 18 for all National Lottery games.

The consultation ended on 8 October. It will be interesting to see the outcome of the consultation and whether the Government decides to make any changes, as any changes implemented as a result of this consultation may have an impact on other types of lotteries in the future.

FOBT stake reduction and its impact on betting shops

You will, of course, need no reminder that the maximum permitted stake for category B2 machines was reduced from £100 to £2 from 1 April this year. Five months on, how are betting shops faring and have we seen the reduction in problem gambling within betting shops as was intended? When the stake change was introduced, the Gambling Commission estimated that premises numbers would decline by approximately 25% within a year.

The impact of the stake reduction has been a mixed story so far with some operators seeing a significant fall in revenue, which has led to the closing of large numbers of betting shops, but other operators flourishing.

In July, William Hill announced it "has entered into a consultation process over plans to close around 700 licensed betting offices" and that it anticipated a large number of redundancies. It added: "Subject to the outcome of the consultation process, shop closures are likely to begin before the end of the year."

But at the same time, GVC Holdings, the owner of Ladbrokes and Coral, raised its profit forecast following a better than expected performance in its betting shops. The company had previously stated in its 2019 interim results report that it expected to close up to 900 shops in the next two years. Another operator, Scotbet, has been struggling following the overhaul of the FOBTs, going into and then being bought out of administration and announcing that 11 of its 41 shops are to close.

We have also seen a new entrant into the UK market in the form of the Irish operator Boylesport. Having operated there without FOBTs it has a focus on bookmaking and as such the FOBT change will have much less impact upon its business model.

So what next for betting shops? The full impact of the FOBT changes has yet to be seen as operators are still catching their breath and looking at other opportunities. Bookmakers may shift their focus back to betting and there may also be opportunities for those in the arcade sector as FOBT players are likely to move over to B3 machines within the arcades. Players may also migrate to B3 machines in the betting shops themselves, and it is worth noting that the Gambling Commission sent a clear message that it is looking closely at player protection on other high street machines including B3 and B1.

The Commission has also made it clear that it is monitoring closely operators' plans to manage the stake cut to ensure that any changes and developments to the product are done so with a focus on customer safety.

It is too early to say if the FOBT stake reduction has reduced problem gambling: time will tell on this point as further data is collated over the coming months.

House of Lords Select Committee

Gambling, in its various forms, has been in many a headline over the past few months, with the industry coming under further political scrutiny. I would therefore be remiss if I were to not mention the appointment of the Select Committee on the Social and Economic Impact of the Gambling Industry by the House of Lords. A call for evidence was published on 1 July 2019 and the select committee is looking at a number of issues including:

- The current state of the industry.
- Developments in gambling habits.
- The industry's contribution towards research, education and treatment of problem gamblers.
- Whether the Gambling Act 2005 needs to be updated to reflect the significant changes in technology.
- If gambling operators should have a legal duty of care to their customers.
- The effectiveness of the voluntary levy.
- Whether changes should be made to the statutory regime governing the National Lottery.
- How decisions should be made about regulating gambling advertising.

Another question posed by the Select Committee is whether children should be allowed to play games machines including fruit machines, pushers and cranes. Many operators of family entertainment centres will have undoubtedly given their submissions in response to the consultation and will keeping a keen eye on the consultation findings which the committee must publish by 31 March 2020.

In addition to the above, certain sectors of the gambling industry have been looking at some of the specific concerns being raised in respect of access by children to category D cash pay-out machines. *Coinslot* reported that at the July 2019 EGM, BACTA's members "agreed to evaluate its code of conduct which would tell customers that players on low stake cash pay-out fruit machines must be aged 16 or over unless accompanied by an adult." According to the BACTA website articles, there will be a trial of the proposed measures and then a further meeting to discuss the results before a vote on whether to amend the code of conduct.

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PSED & licensing: the next frontier?

Two recent developments in Sheffield and Hackney should make local authorities consider the wider implications of their licensing decisions, as **Matt Lewin** and **Ruchi Parekh** explain

The Public Sector Equality Duty (PSED) has been in force for almost a decade. In a nutshell, it is a duty which requires all public authorities to promote equality positively rather than merely avoid discrimination. Its purpose is to ensure that public authorities consider equality as part of their day-to-day business. It requires public authorities to appreciate that their decisions can affect different groups in different ways and that this may require a change of approach. In this way, it is hoped, public authorities can make a vital contribution to a more equal society.

Since coming into force, the PSED has not been a major topic of discussion among licensing practitioners and rarely features as a significant issue when making licensing decisions. However, campaigns in Sheffield and Hackney have, with varying degrees of success, challenged the way in which licensing authorities consider the equality implications of their decisions. In this article, we will look at what the PSED is and how it works in practice, how the duty has been interpreted by the courts, the Sheffield and Hackney cases and the lessons for licensing practitioners.

What is the PSED?

Section 149 of the Equality Act 2010 provides that, in order to comply with the PSED, public authorities must have "due regard" to the need to achieve three equality objectives:

(a) eliminating unlawful discrimination, harassment and victimisation;

(b) advancing equality of opportunity between people who share a "protected characteristic" and those who do not; and

(c) fostering good relations between people who share a protected characteristic and those who do not.

These equality aims must be considered *before* the public authority makes its decisions – and apply equally to setting general policies or making determinations in individual cases.

The "advancing equality of opportunity" aim itself involves three actions:

(a) removing or minimising disadvantages suffered by people due to their protected characteristics;

(b) taking steps to meet the needs of people from protected groups where these are different from the needs of other people; and

(c) encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

Section 149 states that compliance with the PSED may involve treating some people more favourably than others.

There are nine "protected characteristics": age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

How does the PSED work in practice?

There is no single method for complying with the PSED and the requirements of the duty will vary according to the nature of the decision being made.

In all cases, the public authority needs an adequate evidence base of equality information. Collecting equality information helps the authority to identify what impact a proposed decision may have on people with protected characteristics and to make decisions which promote the equality objectives. Public consultation is clearly a vital tool for gathering information as well as engagement with equality organisations, stakeholders, representative groups and service users.

Before the decision is made, the decision-maker needs to understand the potential impact of their decisions on people with different protected characteristics and to identify potential mitigating steps to reduce or remove adverse impacts. Many authorities will produce an "equality impact assessment" (EqIA), especially for more strategic decisions which are likely to affect larger groups of people. It is not necessary to produce an EqIA in every case, but they can be helpful in focusing on the requirements of the PSED and for demonstrating compliance with the duty.

The extensive case law on the PSED emphasises that it is not a duty to achieve a particular outcome: what is required is that the decision-maker has conscientiously considered the three equality aims; it is for the decision-maker to balance the equality implications of a decision against other relevant

considerations, giving whatever weight to the equality implications is appropriate. Hence the PSED is a duty to have "due regard" to the equality aims.

PSED in the courts

The higher courts have considered the application of the PSED in a number of cases, with the decisions of the Court of Appeal in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 and *Brown v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) still relied on as the leading judgments. In summary, the following principles can be distilled:

- The decision maker must be aware of the duty to have "due regard" to the relevant matters.
- The duty must be fulfilled at the time when a particular policy or decision is being considered.
- The duty must be exercised in substance, with rigour and with an open mind; it is not a "box-ticking" exercise.
- It is a continuing duty.
- It is good practice to keep records demonstrating consideration of the duty.
- The duty requires decision makers to be properly informed, which in some cases will require further consultation by the public body with appropriate groups.
- Provided there has been a rigorous consideration of the PSED, a court will not interfere in matters of what weight was given to the equality considerations.

It is worth noting that the leading decisions involved macro-level policy-making, such as the ministerial decision to close a national fund supporting independent living by disabled persons (in *Bracking*). The courts have since confirmed that the precise application of the PSED is highly context specific and that, for example, a matter of national policy will engage very different considerations from that of a decision of a local authority housing officer which directly affects just one individual (eg, *Powell v Dacorum Borough Council* [2019] EWCA Civ 23).

Before turning to the specific context of licensing, it is useful to consider how the courts have approached PSED considerations in the planning sphere, where there has been an increase in PSED-based challenges to decisions of both local authorities and the Secretary of State. Most recently, in *R (Buckley) v Bath and North Somerset Council* [2018] EWHC 1551 (Admin), a local authority's grant of outline planning permission was quashed for failing to have "due regard" to the PSED. In that case, outline permission had been granted to demolish and redevelop part of a residential estate without due regard being given to the impact on elderly and disabled residents who would lose their existing adapted homes.

R (Harris) v Haringey LBC [2010] EWCA Civ 703 is a further example of a successful challenge, based on s 71 of the Race Relations Act 1976 (a precursor to the PSED), wherein the Court of Appeal quashed the grant of planning permission for redevelopment of a site in an area with business units and homes predominantly occupied by members of ethnic minority communities. The court held that while the officer's report to committee expressed concern for the future of displaced market traders, there was no focus on the substance of the statutory duty.

The Sheffield and Hackney cases

While PSED considerations have not featured prominently in licensing decisions in the early years of the duty coming into force, the Sheffield and Hackney cases highlight a considerable shift in that regard.

Sheffield City Council has twice had to concede claims for judicial review against decisions in 2016 and 2017 to grant a sexual entertainment venue (SEV) licence to Spearmint Rhino on Brown Street due to failures to comply with the PSED. SEV licences, which must be renewed annually, are now often fiercely opposed by local residents and campaigners on the grounds that SEVs promote the sexual objectification of women and that they encourage harassment (and worse) of both female performers and women in the local community. Frequently, these objections are dismissed out of hand as being based on "moral grounds".

That phrase, and the dismissive attitude towards it, derives from the case of *R (Christian Institute) v Newcastle City Council* [2002] LLR 701, in which Collins J emphatically rejected the argument that the licensing authority could take into account the "moral case" against sex establishments when considering whether or not to grant them a licence under Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982:

> *It is the effect on the locality and on those living nearby which has to be taken into account and that is the distinction which is drawn. Thus, straightforward objections on the ground that sex shops should not be allowed to exist have no part to play in my or a local authority's consideration of the case. Whether I approve or disapprove is nothing to the point. Whether the local authority approves or disapproves is equally nothing to the point, except insofar as the provisions of paragraph 12 are applicable.*

That approach subsequently made its way into the Home Office's guidance on SEVs and into numerous local statements of licensing policy.

However, when viewed against the equality aims of the

PSED, that approach now appears to be highly questionable, if not unlawful. Indeed there is a persuasive argument to be made that:

(a) (where there is objective evidence to support the allegation) SEVs may promote harassment and victimisation of women living and working in the locality;

(b) the presence of an SEV in the urban environment frequently makes women feel threatened or uncomfortable, which undermines the objective of advancing equality of opportunity between women and men; and

(c) it is inherent in the business of an SEV that women's bodies are objectified and commoditised, which undermines the objective of fostering good relations between women and men.

The PSED requires licensing authorities to engage with these arguments, to consult people affected by the SEV industry in order to gather a sound evidence base and to make decisions which take into account the equality implications of granting or refusing a SEV licence.

Just as we were submitting this article, Sheffield announced that Spearmint Rhino's SEV licence had been renewed, though the council is still to publish a full notice with its reasons. Given the judicial review challenges in 2017 and 2018, and the continued opposition to the club's operation, it is expected that the reasons will contain at least some engagement with the PSED implications of the council's decision.

Unlike Sheffield, where the PSED challenges focused on an individual decision of the council, the challenge brought against the London Borough of Hackney has highlighted how the PSED plays out in the context of policy-setting.

Hackney adopted a new statement of licensing policy (SLP) in July 2018. The draft SLP, when consulted on in late 2017, received an overwhelmingly negative response, in particular to a new core hours policy which would generally authorise licensable activity until midnight at the weekends, and to a proposal that the Shoreditch Special Policy Area (SPA) would double in size.

In October 2018, a local campaigning group was granted permission to apply for judicial review of the decision to adopt the SLP, in part based on an alleged breach of the PSED. In this case, the argument was that the decision failed to take into account the impact on young and LGBTQ+ people. However, earlier this year, the claim was struck out due to the group's failure to comply with a court order requiring the payment into court of £60,000 (as security for the council's costs in the event that the challenge failed).

The competing pressures on local authorities in relation to the night-time economy are well illustrated by the results of a survey of local authorities last year by the Local Government Information Unit: 88% of respondents stated that they viewed their night-time economies as "a way of supporting local business and job creation" while, at the same time, 72% said that their biggest night-time economy challenge was anti-social behaviour and crime.

Young adults are, for obvious reasons, more likely to be affected by policies relating to the night-time economy than other age groups: not only do they make up a significant proportion of customers of night-time venues, the night-time economy is a significant source of employment for young people.

Additionally, there is now a wealth of evidence demonstrating a worrying reduction in the number of LGBTQ+ venues, especially in London, where research published by UCL revealed a reduction from 121 to 51 venues between 2006 and 2017. UCL's research concluded that LGBTQ+ venues were not only places of entertainment but "important spaces for education and intergenerational exchange ... in which diverse gender identities and sexualities are affirmed, accepted and respected. These were sometimes described as 'safe spaces'. ... Where they are found, safe spaces are extremely valuable to the LGBTQ+ communities who use them."

In diverse and vibrant night-time economies such as in Hackney, restrictive licensing policies could affect different protected groups in different ways and licensing authorities will need to account conscientiously for such factors when making their decisions.

Conclusion

While the Sheffield and Hackney judicial reviews did not proceed to full hearings, the PSED is likely to feature more frequently in the licensing sphere – whether in decision notices or judicial review claims. It is perhaps only a matter of time before the courts will have an opportunity to wade in and provide more definitive guidance on how the PSED is to be applied by licensing authorities.

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Life, the universe and everything: Can sense be made of fee regimes?

As well as *Hitchhiker's Guide* parallels, there is something of an *Alice in Wonderland* quality to licensing fee setting suggests **Charles Holland** as he searches for clarity and consistency down a myriad of judicial rabbit holes

Like dark matter, fees are found throughout the licensing universe. The most rudimentary scheme requires applications to be processed and licences to be issued. In many regimes, regulators conduct resource-intensive enforcement activities against both licensed and non-licensed entities. All this has to be paid for. The charging of fees to applicants and licence-holders has long been the first port of call for recoupment of those expenses.

A unified theory?

Fees found in the universe are not without their quirks and idiosyncrasies. As I shall reveal, *current* Government Guidance on fee setting for scrap metal dealer's licences is based on case law reversed four years ago by the Supreme Court - at what continuing cost to ratepayers, one wonders? And it has been ever thus: the annual fee for a licence to be authorised to keep one dog remained unchanged between 1887 and 1985: seven shillings and sixpence, or 37½p, equivalent (at today's prices) to a reduction over that period from £49.55 to £1.14.

The dog licence regime, abolished long after the point when it had cost more to administer than it raised in revenue, was an example of a licensing scheme where the fee was fixed by central government. As was pointed out by the claimants in the recent case of *R (Rehman) v Wakefield Council* [2018] EWHC 3664 (Admin), this is not the only model. It was suggested, with judicial concurrence [10-11], that four categories of fee regime existed:

(1) Where no fee can be charged (eg, for street collections under the Police, Factories, &c. (Miscellaneous Provisions) Act 1916).

(2) Where only fixed fees can be charged (eg, under the Licensing Act 2003, as prescribed in the Licensing Act 2003 (Fees) Regulations 2005, and under the Gambling Act 2005).

(3)Where the regime only permits specified expenditure to be recouped (as the claimants suggested was the case for fees for private hire driver's licenses under s 53 of the Local Government (Miscellaneous Provisions) Act 1976).

(4)Where the regime gives the regulator a wide discretion to charge a reasonable fee (as the claimants said was the case for sex licensing and street trading).

In *Rehman*, the council had contended that that there was a general principle that licensing schemes should be self-funding. The judge at first instance, HHJ Saffman (sitting as a Deputy High Court Judge), was not persuaded that there was any such general principle [15, 17]. He expressly refused to rule whether the particular regime in question ("taxi" licensing under the 1976 Act) was itself self-funding. The council has appealed to the Court of Appeal, with a hearing listed for December 2019, and I understand it seeks to pursue that issue there.

The struggle to find overarching sense in the fee system continues to strain the brains of many learned licensors. Will a combined fee theory emerge? Or is it simply a tale, full of sound and fury, signifying nothing?

Powers to be exercised for the purpose for which they were conferred

In *R (oao David Attfield) v Barnet LBC* [2013] EWHC 2089 (Admin) the plucky Mr Attfield, a solicitor and a resident of East Finchley, judicially reviewed his local council's decision to increase the cost of resident parking permits from £40 to £100, and visitor parking vouchers from £1 to £4. By s 45 of the Road Traffic Regulation Act 1984, the local authority had power to designate parking places on the highway, to charge for their use and to issue parking permits for a charge.

Mr Attfield's case was that the price hikes were unlawful because their purpose was to generate a surplus, beyond the monies needed to operate the parking scheme. The local authority's plan was to use the surplus to meet projected expenditure for road maintenance and improvement, concessionary fares and other road-transport costs; yet s 55 of the 1984 Act requires income from the parking scheme to be kept in a separate account, with year-end surpluses to be applied to specified highways and transport purposes.

Lang J agreed with Mr Attfield that this was unlawful: parking charges could not be deliberately set in order to raise surplus revenue for other transport purposes. In reaching her decision, Lang J set out a helpful review of general principles applying to the fee charging powers of local authorities.

The starting point (see *Attfield* at [38]) is that a public body must exercise a statutory power for the purpose for which the power was conferred by Parliament, and not for any unauthorised purpose. An unauthorised purpose may be laudable in its own right, yet still unlawful. The issue is not whether or not the public body has acted in the public interest, but whether it has acted in accordance with the purpose for which the statutory power was conferred. Where a statutory power is exercised both for the purpose for which it was conferred and for some other purpose, the public body will have acted unlawfully unless the authorised purpose was its dominant purpose.

In *R v Tower Hamlets LBC, ex p. Chetnik Developments Ltd* [1988] AC 878, 872 Lord Bridge of Harwich expressly approved the analogy drawn in *Wade & Forsyth's Administrative Law* that:

> *Statutory power conferred for public purposes is conferred as it were on trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.*

Determining the purpose for which the statutory powers were conferred

How does the court identify the purpose for which the statutory powers were conferred? Lord Nicholls of Birkenhead summarised the approach in *R. v Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd* [2001] 2 AC 349, 396:

> *No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose: "the policy and objects of the Act" in the oft-quoted words of Lord Reid in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, 1030. The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context, and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation.*

No taxation without representation

Where a public body uses its discretionary powers to levy taxes, the courts will strike down demands which are unauthorised by statute. In *Vestey v Inland Revenue Commissioners* [1980] AC 1148, 1172 Lord Wilberforce said:

> *Taxes are imposed on subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.*

In *Congreve v Home Office* [1976] QB 629 (another challenge brought by a plucky solicitor) the Court of Appeal held that demands for an additional £6 against those who had renewed their TV licence early in order to avoid a well-trailed price hike were unlawful. In the words of Lord Denning MR at 652:

> *They were made contrary to the Bill of Rights. They were an attempt to levy money for the use of the Crown without the authority of Parliament: and that is quite enough to damn them: see Attorney General v Wilts United Dairies Ltd (1921) 37 TLR 884 (CA), (1922) 38 TLR 781 (HL)*

Wilts United Diaries itself concerned a charge of 2d per gallon as a condition of the grant of a licence to purchase milk. The sums raised were to be paid into the National Exchequer. Referring to the Bill of Rights 1689, which had declared "That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegall", Atkin LJ said at 886:

> *... there can be no doubt that this statute declares the law that no money shall be levied for or to the use of the Crown except by grant of Parliament. We know how strictly Parliament has maintained this right - and, in particular, how jealously the House of Commons has asserted its predominance in the power of raising money.... In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorized the particular charge.*

He added, at 887:

> *It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back*

the sums paid, as money had and received to his use.

Scrutton LJ had said:

It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the executive, but in my view the clearest words should be required before the courts hold that such an unusual delegation has taken place. As Wilde C.J. said in Gosling v Veley (1850) 12 QB 328 , 407: "The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it."

The doctrine of *ultra vires* and its boundaries

Private persons may do anything they choose which the law does not prohibit. Their freedoms are not conditional upon some distinct and affirmative statutory justifications. But for public bodies, the rule is the opposite. Any action which a public body takes must be justified by positive law: see *R v Somerset CC, ex p. Fewings* [1995] 1 All ER 513 at 524F *per* Laws J (as he then was). If a public body (such as a local authority or any other statutory body) carries out an activity which is not authorised by statute (whether directly or by implication), its actions are said to be *ultra vires* and unlawful.

An unduly rigid application of the *ultra vires* rule would hamper the actions of statutory corporations. The common law developed a principle that it was acceptable for a statutory body to do "whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised" *(Attorney-General v Great Eastern Railway Co (*1880) 5 App.Cas. 473 at 478).

For local authorities, this common law rule is now codified by s 111(1) of the Local Government Act 1972. It provides:

Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.[1]

In *McCarthy & Stone Developments Ltd v Richmond upon Thames* LBC [1992] 2 A.C. 48, a property developer challenged a £25 charge imposed by the council (as local planning authority) for giving pre-application advice. The planning regime only made provision for the charging of fees for planning applications. By reason of the principle in *Wilts United Diaries*, it was common ground that to make the charge, the council needed further statutory authority, and that this could only be found in s 111(1), either in its express words or by necessary implication.

The House of Lords held that it was clear that the consideration and determination of planning applications was a function of the council, but the giving of pre-application advice, although it facilitated, and was conducive and incidental to that function, was not of itself a function of the council. It was therefore clear that the giving of pre-action advice was permitted under s 111(1) and was not ultra vires. However, going further and charging for that advice was, in the words of Lord Lowry (with whom the rest of the House of Lords agreed), "at best, incidental to the incidental and not incidental to the discharge of the function". Neither express words in nor necessary implication from s 111(1) could permit the charge. The council's argument that the provision of the advice was akin to a discretionary service (as opposed to one it was duty-bound to provide) did not change the position, nor did the fact that the council could state on a "take or leave it" basis that it was willing to provide the advice (as that would conflict with Wilts United Diaries insofar as it made no difference to the unlawfulness of an unauthorised tax if persons agreed to pay it).[2]

In general, licensing fees cannot raise general revenue

In *R v Manchester City Council, ex p King* (1991) 89 LGR 696, a challenge was brought to the council's decision to increase its street trading licence fees from £169 to £1,500-2,500 pa. The relevant statute (Local Government (Miscellaneous Provisions) Act 1982, Schedule 4, paragraph 9) provided that a council "may charge such fees as they consider reasonable for the grant or renewal of a street trading licence or street trading consent".

The council argued that its fiduciary duty to "maximise" its revenue empowered it to set fees at a level it considered to be a market rate. In rejecting this argument, the Divisional Court held that it was unlikely that Parliament intended general

1 Functions in s 111(1) embraces all the duties and powers of a local authority, the sum total of the activities Parliament has entrusted to it: *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1 at 29B-F.

2 With the passage of s 93 of the Local Government Act 2003 (as amended by s 3 of the Localism Act 2011), local authorities may now charge for providing certain discretionary services (including pre-planning application advice), but *McCarthy & Stone Developments* remains good law as to the approach to be taken to determining whether the imposition of a charge is indeed calculated to facilitate, or is conducive or incidental to, the discharge of a function.

revenue purposes to be served by the implementation of a street trading licence provision, and in the absence of any express statutory authorisation, the fees had to relate to the budgeted costs of operating the scheme, rather than being set at whatever level the market would bear. Roch J said at 709-710:

> *The fees charged … must be related to the street trading scheme operated by the district council and the costs of operating that scheme. The district council may charge such fees as they reasonably consider will cover the total cost of operating the street trading scheme or such lesser part of the cost of operating the street trading scheme as they consider reasonable. One consequence of the wording used is that, if the fees levied in the event exceed the cost of operating the scheme, the original position will remain valid provided that it can be said that the district council reasonably considered such fees would be required to meet the total cost of operating the scheme.*

Ex p King was relied on in the parking case of *Cran v Camden LBC* [1995] RTR 346, where McCullough J held that the requirement imposed on local authorities by s 55 of the Road Traffic Regulation Act 1984 to use a year-end surplus from the parking account for other transport purposes did not, in the absence of any words which suggested Parliament had authorised a taxation raising provision, allow a local authority to set parking charges with regard to the manner in which s 55 would permit surpluses to be spent.[3]

It was common ground in the *Hemming* litigation *(R (Hemming) v Westminster City Council)* that the council was not permitted to make a profit from the sex establishment licensing scheme.[4] The no-profit rule was applied to the licensing scheme for houses in multiple occupation in *R (Gaskin) v Richmond on Thames LBC (No.1)* [2017] EWHC 3234 (Admin) at [32].[5]

Obiter approval of the principle can also be found in the recent decision of Ouseley J in *R (LPHCA Ltd t/a Licensed Private Car Hire Association) v Transport for London* [2018] EWHC 1274 (Admin) at [12]. That case involved the Private Hire Vehicles (London) Act 1998, which - on its face - contains no fetter on the power of Transport for London (TfL) to prescribe fees to applicants and licence-holders (s 20). Ouseley J held that in fact the Parliamentary intention in the 1998 Act was the same as that found in the provincial legislation (the Local Government (Miscellaneous Provisions) Act 1976)), the fee-setting discretion in London being “neither broader nor narrower”. So, to use the categories identified in *Rehman*, Ouseley J saw no distinction between (a) an unfettered power, (b) a category 4 scheme, and indeed (c) a category 3 scheme (which was what the claimants in *Rehman* contended the 1976 Act was).

Self-funding regimes

If licensing regimes cannot make a profit, is it permissible for them to be run so they do not make a loss? in other words, so that they do not have to be subsidised by others (such as by council tax and ratepayers where the licensing authority is a local authority)?

Following the passage of the Local Government (Miscellaneous Provisions) Act 1982, schedule 2 of which contained adoptive provisions for local authorities to regulate sex shops, eleven applications for judicial review by sex shop operators came for hearing before Forbes J. The lead case was *R v Birmingham City Council, ex p. Quietlynn Ltd* (1985) 83 LGR 516, but the important one on the issue of fees was *R v Westminster City Council, ex p Hutton.* The statute provided that “An applicant for the grant, renewal or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority”. Hutton was one of a group of sex shop operators which challenged Westminster’s increase of the annual fee from £5,000 to £11,000. The council had adopted a policy that the ratepayers, insofar as was reasonable, should be relieved of the burden of subsidising the sex establishment licensing regime. Hutton did not contend that this policy was wrong, nor that the council had done anything other than embark on a serious attempt to isolate the costs attributable to the control of sex establishments.

Whilst *ex p King* forbade profit-making schemes, it clearly sanctioned self-funding ones (“such fees as they reasonably consider will cover the total costs of operating the street trading scheme”). Judicial approval to the correctness of the concession in *Hutton* was given by the Court of Appeal in *Hemming* [2013] EWCA Civ 591 at [13].

As already mentioned, in *R (Rehman) v. Wakefield Council*, HHJ Saffman was unpersuaded [15-17] that Hutton and Hemming supported the conclusion that there was a general principle that licensing regimes were self-funding, and declined to make any determination as to whether this was the case for the scheme in question [18]. However, some authority can be found for the proposition that licensing schemes not only *may* be self-funding, but that they should be self-funding: in other words, that they *should* not be subsidised by the ratepayer.

3 *Cran* was followed in *Djanogly v Westminster City Council [*2011] RTR 9 and in Attfield (above), the latter case expressly following *Ex p King*.

4 See the first instance decision at [2012] EWHC 1260 (Admin) at [24, 27] and in the Court of Appeal at [2013] EWCA Civ 591 at [50].

5 I return to this case in more detail below when looking at surpluses and enforcement costs.

In *R v Tower Hamlets LBC*, ex p. *Tower Hamlets Combined Traders Association*, unreported, 19 July 1993 (CO/629/93), Sedley J (as he then was) considered the street trading fee regime found in s 32 of the London Local Authorities Act 1990. He held (at 40) that "the purpose of the legislation … is to ensure that the cost of running street markets falls, but falls fairly, upon traders". In reaching this view he said (at page 16) that:

> *The budgetary exercise required of a local authority under section 32 is a part of its larger duty to administer its funds so as to protect the interests of what is now the body of council tax payers. The broad object of section 32 is to enable the council to break even over time on its market trading account so that no special burden is transferred to the general fund. ... The council remains under an obligation to balance the market trading books.*

This was notwithstanding s 32(1) providing that the council "may charge such fees … as they may determine and as may be sufficient to cover in whole or in part the reasonable administrative and other costs in connection with their functions under this Part of this Act, not otherwise recovered".

Sedley J's formulation was adopted by Leveson J (as he then was) in *R (West End Street Traders) v Westminster CC* [2004] EWHC 1167 at [35], a case which involved similar (but not absolutely identical) provisions in s 22 of the City of Westminster Act 1999. Leveson J rejected a submission made on behalf of traders who were complaining of the level of fees that Westminster was not obliged to recoup its costs in their entirety. He was not persuaded by reliance on Roch J's observation in *Ex p. King* that the judgement of what was a reasonable fee "for the purpose of recouping in whole or in part the costs of operating the street trading scheme" was for the local authority, pointing out that this was a challenge to fees set at a commercial rate rather than at cost. It is not entirely clear why that should have been a distinguishing feature.

An interesting and currently open question in the light of these two authorities is whether a local authority is permitted to subsidise the cost of a regime for the wider benefit of the community - for instance to encourage street markets, perhaps in a particular part of its area.

Year on year surpluses and deficits

One line of challenge taken by the claimant in *Hutton* was that the fee for the year in question (1984-85) was based on global costs of administering the sex establishment licensing scheme which included a sum representing a shortfall in fee income against administration costs for the previous year (1983-84).

Whilst Forbes J accepted that to carry forward deficits from one year to the next may result in anomalies when considering the effect of that process on applicants for grants or renewal of what were annual licences, with no certainty that money would be extracted from those who "morally" ought to pay, he found that this was of no import in the context of local authority finance, where statutory accounts were structured on the basis that shortfalls in one year must be carried into the next. Where the fees were based on an annual budget, the only sensible way to fix the level of charge was to take one year with another. He held that there was nothing in the requirement of reasonableness which drove him to conclude that the fee must in some way reflect, with any particular accuracy, the benefit which applicants may or may not derive. Given that the unchallenged policy decision was that no part of the costs should fall on ratepayers, that necessarily imported the concept that in calculating the cost, the authority would have to bear in mind any deficit from the last year's operations.

In R (Cummings) v Cardiff CC [2014] EWHC 2544 (Admin), which concerned the setting of fees in the taxi licensing regime, it was conceded by the local authority that it should have taken into account surpluses in previous years [7]. This is a concession that would seem to flow from the approach in *Hutton* and the no-profit rule in *ex p King*. Hickinbottom J (as he then was) made a declaration that:

> *A local authority when determining hackney carriage and private hire licence fees under section 53 and 70 of the Local Government (Miscellaneous Provisions) Act 1976 must take into account any surplus or deficit generated from fees levied in previous years in respect of meeting the reasonable costs of administering the licence fees as provided by sections 53 and 70.*

Some caution might need to be adopted in relation to this declaration: it did not flow from contested argument, and its wide wording ("A local authority") is despite only one local authority being party to the proceedings. The safest course, it is suggested, is to treat "*must* take into account" as meaning "must consider" rather than "must refund or recoup". It is too prescriptive to require that a deficit in Year 1 must be recouped in the fee setting exercise in Year 2: there could be all sorts of valid justifications why this should not be done.

R (Gaskin) v Richmond upon Thames LBC (No.1) [2017] EWHC 3234 (Admin) concerned the local authority licensing scheme for houses in multiple occupation (HMOs) under Part 2 of the Housing Act 2004. Section 63 of the Act permits the local authority to require applications to be accompanied by a fee fixed by it, and expressly provides that in fixing the fee, the authority may take into account all costs incurred by it in

carrying out its functions under the parts of the Act relating to HMO licensing and management orders (which may be made by local authorities where they consider that it is necessary to do so to protect, *inter alia*, the health, safety or welfare of persons occupying HMOs). Mr Gaskin raised various challenges to the fee of £1,799 demanded of him in 2014 on renewal of his five year licence including (a) that it was the same fee charged on a grant and (b) that the authority had reserves of between £63,000-75,000.

Giving the judgment of the Divisional Court, Bean LJ rejected both these grounds of challenge. Evidence was called on behalf of Mr Gaskin from Mr Offord of the National Landlords Association to the effect that it was to be expected that renewal applications would cost substantially less than grants. The local authority disputed this, submitted that on a five year licence scheme there was little variance between the costs incurred in respect of newly granted licences as opposed to renewals, as the bulk of the costs relating to enforcement and inspection. Bean LJ said [32] even if Mr Offord was right, s 63 "expressly permits the council in fixing fees … to take into account all costs incurred in carrying out their functions under the relevant part of the 2004 Act". It was not unlawful to charge the same for renewal as an application. As for the surplus, the local authority was entitled to retain funds in its licensing account to meet the budget and overheads of administering the scheme [33].

Cross-subsidisation

The taxi licensing regime is, as is well known, a "two tier" system, involving two types of distinct vehicles, hackney carriages and private hire regimes. In the hackney carriage tier, drivers and vehicle proprietors are licensed; in the private hire tier, the licensed entities are drivers, vehicle proprietors and operators. There are therefore five categories of licence.

The fee setting powers within the Local Government (Miscellaneous Provisions) Act 1976 do not distinguish between these five categories. Rather there is a split between (a) drivers and (b) vehicle proprietors and private hire vehicle operators.

As to drivers, s 53(2) provides:

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

As to vehicle proprietors and operators, s 70(1) provides:

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

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

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

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

In *Cummings*, it was conceded by the council at [7] that there should be no "cross-subsidisation" between the various categories of licence. Hickinbottom J made a further declaration, on the basis of this agreed position, that:

A local authority must keep separate accounts for and ensure when determining hackney carriage and private hire fees under section 53 and 70 of the Local Government (Miscellaneous Provisions) Act 1976 that any surplus accrued under each of the hackney carriage and private hire licensing regimes, and between each licence within those regimes, are only accounted for and taken into account within the regime under which they have accrued and a surplus from one licensing regime shall not be used to subsidise another.

This declaration has since been prayed in aid by licensing consultants seeking to recover fees by particular limbs of the taxi trade on the basis of the provision of unlawful cross-subsidies. As a declaration given on the basis of a concession, it of course carried only persuasive weight. It is perhaps difficult to reconcile the need for five separate accounts when the Act expressly looks at driver fees and vehicle and operator fees in aggregate, and there is plain benefit to the individual elements of the trade that other elements are regulated, as well as overlap between enforcement tasks.

However, judicial approval for the concession in *Cummings* can now be found in the May 2018 decision of *R (LPHCA Ltd t/a Licensed Private Car Hire Association) v Transport for London* [2018] EWHC 1274 (Admin). This concerned a challenge to increases in the fees charged by TfL for London PHV operator's licences, one of the claimant's grounds being that

the increases constituted a cross-subsidy from London PHV operators to the hackney carriage regime and PHV drivers and vehicle proprietors.

It was common ground between LPHCA and TfL that cross-subsidisation was unlawful across the five strands of fees. [11] Ouseley J regarded this as correct, "although the case law is quite thin" [11]. He referred to the concession in *Cummings* as "a considered concession by leading counsel, accepted by Hickinbottom J"[13]. He went on:

[14] In my judgment, there is no power to use the fee charging provision in order to act as a market regulator. A cross-subsidy would be a form of market regulation, which the licensing system cannot be used to achieve, in the absence of an express power. There is no power to refuse a licence because an authority might wish to encourage black cabs over private hire or vice versa, or because there were so many drivers and vehicles that fewer made a living than was thought desirable. The fee structure cannot be used to the same end, as between black cabs and private hire.

[15] Nor can the licensing system be used to raise revenue from one strand of private hire licences to favour another strand of private hire licences, say, to favour drivers over operators: it would be unlawful to structure licence fees on the basis that all the costs of enforcement should be borne by operators and not by drivers, for whatever reason, or to appeal to some imagined public sentiment about who should pay. And by the same logic, the simple words of the Act mean that the contribution of the operators of varying sizes must equally avoid cross-subsidy from the larger ones to the smaller ones or vice versa. The fee contribution to the overall costs attributable to private hire licensing, including compliance checks and enforcement, must on that same basis be apportioned to operators, drivers and vehicles in some manner, where perfection is not attainable, which reflects their respective contributions to the costs.

[16] This is all inherent in the statutory language enabling fees to be charged for the application for and grant of a licence, and the basis upon which such applications may be refused. It is a licensing function, not a competition or market regulation power, or one which permits one form of operator or driver or vehicle to be favoured over another, or to favour drivers at the expense of operators on the grounds, stated or implied, that one but not the other may be a corporate body. Still less is it a revenue raising power.

On the evidence, Ouseley J was not persuaded that the increases in operator fees had subsidised the drivers and proprietors of PHVs and black cabs. Licensing, compliance and enforcement tasks between the streams overlapped to a very large extent [10] and he was not persuaded that explicit apportionments TfL had made in apportioning costs between operators and the rest of the trade [64] constituted a cross-subsidy [67-69]. The application was dismissed largely because of a lack of evidence pointing to the contrary: the LPHCA had been "making bricks without straw" [74]. He wryly (and accurately) observed [70]:

It is unlikely that any methodology, data, or judgment on such an apportionment would meet either approval amongst all licence streams or be beyond criticism, let alone one which could produce a perfect fit between fees and costs.

In *Rehman*, heard in December 2018, *Cummings* was described by HHJ Saffman (at [31]) as "authority for the proposition that there can be no cross-subsidy between different work streams". It is clear from the judgment that this was not an issue between the parties (see [32-33]). It does not appear that *LPHCA* was cited to the court in *Rehman*.

So far as I am aware, there has been no reported case where issues of cross-subsidisation were the subject of adversarial argument between the parties. The closest is perhaps the parking cases of *Cran, Djanogly* and *Attfield*, although these involve a prescriptive regime which explicitly permits cross-subsidisation in the case of surpluses that happen to arise. Given the increasing trend of *Cummings*-based fee challenges, it is not impossible that the point might actually be litigated yet.

Costs of enforcement and the Provision of Service Regulations 2009

Under domestic law, it was uncontroversial that regulators were permitted to reflect the costs of enforcing the licensing system in the fees which it charged, including enforcement against unlicensed actors. As Roch J said in *King* at 710:

[Local authorities] may take into account the costs which they will incur in operating the street trading scheme, including the prosecution of those who trade in the streets without licences.

In *Hutton*, Forbes J noted at 517 that it was not in dispute that there could be self-financing provision of:

… administrative machinery not only for processing licensing applications but also for inspecting premises after the grant of licences and for what might be called vigilant policing of establishments within the city in order to detect and prosecute those who operated sex establishments without licences.

Westminster's practice, as recorded in *Hutton*, was to charge applicants for sex shop licences a fee made up of two parts, one related to the administration of the application and non-returnable, and the other (considerably larger) for the management of the licensing regime and refundable if the application was refused.

In *Hemming*, it was contended that the charging of the second limb of the fee had become unlawful as a result of the making, under s 2 of the European Communities Act 1972, of the Provision of Services Regulations 2009 to give effect to Parliament and Council Directive 2006/123/EC of 12 December 2006 on services in the internal market (OJ 2006 L376, p 36).

Regulation 18 of the 2009 Regulations provides:

(2) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must not –

(a) be dissuasive, or
(b) unduly complicate or delay the provision of the service.

(3) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must be easily accessible.

(4) Any charges provided for by a competent authority which applicants may incur under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme and must not exceed the cost of those procedures and formalities.

Under Regulation 4:

"authorisation scheme" means any arrangement which in effect requires the provider or recipient of a service to obtain the authorisation of, or to notify, a competent authority in order to have access to, or to exercise, a service activity …

Both the High Court (Keith J [2012] EWHC 1260 (Admin)) and the Court of Appeal ruled that, by virtue of Regulation 18(4), Westminster was now no longer entitled to reflect the costs of enforcing the licensing regime against unlicensed operators in the fee.

Westminster took a fresh line of argument in the Supreme Court (where HM Treasury and a considerable number of regulatory and professional bodies intervene), contending that Regulation 18 was only concerned with charges made in respect of authorisation procedures and their cost, and placed no prohibition on a licensing authority from charging a fee for the possession or retention of a licence, which fee had to be proportionate (by reason of overarching provisions in the Directive) but which could be set at a level enabling the authority to recover from licensed operators the full cost of running and enforcing the licensing scheme, including the costs of enforcement and proceedings against those operating sex establishments without licences, an argument that the Supreme Court accepted (*R (Hemming v Westminster City Council (No.1)* [2015] UKSC 25 at [17]).

In *Hemming (No.1)* the Supreme Court drew a distinction between schemes of Type A and Schemes of Type B. Schemes of Type A involve charging a fee to cover the cost of processing the application at the time of application for the grant / renewal of a licence, and then subsequently charging a further fee for the running and enforcement of the regime if the application is successful. Schemes of Type B involve charging both the application fee and the fee for the running and enforcement of the scheme at the time of application, with the latter fee being refundable in the event that a licence is refused. The Supreme Court referred to the Court of Justice of the European Union the narrow question of whether charges resulting from a scheme of Type B were lawful.

In C-316 / 15 *Hemming*, decided in 2016 [2018] AC 650 the CJEU held that it was not lawful to charge a fee for the running and enforcement of the licensing regime at the time of submitting the application, even if that fee was refundable.

In *R (Hemming v. Westminster City Council (No.2)* [2017] UKSC 25 the Supreme Court held at [9-12] that the Type B scheme operated by Westminster was only defective in so far as it required payment up front at the time of the application of sums to cover the costs of running and enforcing the scheme. That was a limited invalidity and did not require the whole scheme to be invalidated, and the money which Westminster had refunded to the claimants following the Court of Appeal's ruling should be repaid to it.

R (Gaskin) v Richmond on Thames LBC (No.2) [2018] EWHC 1996 (Admin) was the second part of Mr Gaskin's challenges to the fee of £1,799 demanded of him in 2014 when he applied to renew his HMO licence. This second part was confined to Mr Gaskin's contention that the HMO licensing regime fell within the ambit of the Provision of Services Regulations 2009 and that therefore the local authority's fee for renewal, calculated as it was on the basis of including a significant contribution to the costs of management and enforcement of the regime on a non-refundable basis, was unlawful.

Giving the judgment of the Divisional Court, Hickinbottom

LJ concluded that the regime did fall within the Regulations (the issue being whether or not HMO landlords were providing a service) and that, on the basis of an eventual concession by the local authority, the fee demanded was therefore unlawful.

Richmond had restructured its fees since the 2014 demand made to Mr Gaskin - its current application form provides for what is a Hemming Type A scheme:

> *…. applicants for an HMO licence will need to pay the first part payment with the application (based on the number of rooms being let – see table below). This is the "fee on application". An additional "fee on grant of licence" is payable just before the licence is granted.*

This raises an interesting question on the construction of s 63(3) of the Housing Act 2004, which, in setting out the sum total of local authority's fee raising power in relation to HMOs, provides in relation to applications for a licence:

> *The authority may, in particular, require the application to be accompanied by a fee fixed by the authority.*

Is the requirement for payment of a further fee if the application is successful within s 63(3)? Does the authority have power to require the payment of a further fee following the application?

Identical or similar provisions are found in other licensing and regulatory regimes, including the selective licensing of residential accommodation in the 2004 Act, s 87, caravan site licensing under the Caravan Sites and Control of Development Act 1960, s 3(2A), the regulation of solicitors by the Law Society under the Administration of Justice Act 1961, s 9 and in the Scrap Metal Dealers Act 2013, Schedule 1, paragraph 6(1) ("An application must be accompanied by a fee set by the authority").

In relation to scrap metal dealer licensing, Schedule 1, paragraph 6(2) goes on to provide that "in setting a fee under this paragraph, the authority must have regard to any guidance issued from time to time by the Secretary of State with the approval of the Treasury". The most recent guidance is dated 12 August 2013, so after the Court of Appeal's decision in *Hemming*, but before its reversal by the Supreme Court. The guidance, which is shown as current on gov.uk website,[6] asserts:

> *The licence fee cannot be used to support enforcement activity against unlicensed scrap metal dealers. Any activity taken against unlicensed operators must be funded through existing funds.*

I am aware that numerous local authorities do not charge enforcement fees for scrap metal dealers' licences, perhaps on the basis of this out-of-date guidance. It is noteworthy that Richmond takes the same attitude to scrap metal dealers licence fees as it does to HMO licensing: a Part A scheme is run.[7]

Given the potential difficulties identified by the intervenors in *Hemming (No.1)* it seems a safe bet that any court would strive to give a purposive interpretation of "accompanied by". One approach may be to have an application form which has to be "accompanied by" (1) money now in relation to the application charge; and (2) a promise to pay money more conditional upon the grant of the application (or agreement that no licence will be furnished save on the production of more money).

The search for the answer to life, the universe and everything

To a weary licensing practitioner, the Local Government (Miscellaneous Provisions) Act 1976 sometimes feels as if it was drafted by Lewis Carroll. Just for a laugh, the great humourist incorporated two different fee charging provisions, one for drivers (s 53(2)) and the other for vehicle proprietors and private hire operators (s 70(1)). These are set out above, and form part of the battleground on which *Rehman v Wakefield* is currently being fought.

It has been suggested by some, including *Button on Taxis* (4th edition, paragraph 4.11), that the local authority power to set driver's licence fees to "such a fee as they consider reasonable with a view to recovering the costs of issue and administration" excludes from the fees that can be charged to drivers the costs of enforcement, since enforcement is not "administration".

A contrary view would be that "administration" here refers to administration of the entire licensing scheme, including enforcement, which was certainly the sense in which that word was used in the report of Hutton. It makes no sense that provincial drivers should somehow be exempt from enforcement costs in a scheme where (as was accepted in LPHCA) there is significant overlap between the different limbs of the trade.

Some sit on the fence, the General Editors of *Paterson's Licensing Acts 2019* pointing out in paragraph 2.54 that "… until the matter is resolved by the High Court it remains

6 https://www.gov.uk/government/publications/scrap-metal-dealer-act-2013-licence-fee-charges.

7 https://richmond.gov.uk/scrap_metal_dealers_registration.

uncertain whether the recovery of enforcement costs as part of a driver's licence fee is or is not lawful" - a comment that HHJ Saffman in *Rehman* dryly found at [28] to be "not particularly helpful from where I am sitting".

In *Rehman* it appears that the local authority took the same approach as that suggested in Button, namely that enforcement costs could not be recovered against drivers under s 53(2), and instead sought to recover those enforcement costs against vehicle proprietors and PHV operators: see [19]. HHJ Saffman rejected that approach [22]. Whether the Court of Appeal will consider what must be an obiter but nonetheless key question of whether s 53(2) fees cover enforcement costs (Wakefield not seeking to recoup any fees on this basis) remains to be seen.

Those who seek to make sense of the fee universe will no doubt be watching the case with as keen an interest as Loonquawl and Phouchg awaited the Ultimate Answer from Deep Thought. Will it be 42?

Charles Holland
Barrister, Trinity Chambers & Francis Taylor Building

Licensing Fees

There exists a significant amount of confusion as to how taxi licence fees are to be lawfully calculated.

A large question mark currently exists over whether enforcement fees are to be included at all following the High Court judgment in *Rehman v Wakefield Council.*

As that matter proceeds to the Court of Appeal Leo Charalambides & Ben Williams of Kings Chambers, ask the question as to what may be lawfully included in the calculations of fees, on which licence such fees are to be incorporated into and what the rules are generally about setting fees.

Also considered will be the general principles around other licensing regimes and the associated fees.

Dates and locations

20 January 2020 - Nottingham

3 February 2020 - Southampton

5 February 2020 - Maidstone

13 February 2020 - Huntingdon

28 February 2020 - Warrington

For more details and to book your place visit
www.instituteoflicensing.org/events

What impact might legalising cannabis have on hospitality?

As cannabis becomes increasingly accepted across the UK, **Julia Sawyer** looks at how other legislatures have dealt with its usage and spotlights the issues our law makers must consider

Cannabis, also known as marijuana among many other names, is a psychoactive drug from the cannabis plant used for medical or recreational purposes. The main psychoactive part of cannabis is tetrahydrocannabinol (THC), one of the 483 known compounds in the plant, which includes at least 65 other cannabinoids.

Cannabis can be obtained legally in the UK with a prescription for medicinal use, but it is illegal otherwise possess to use recreationally. In Canada in October 2018 the federal Cannabis Act came into effect, which made Canada the second country in the world to legalise the cultivation, possession, acquisition and consumption of cannabis and its by-products, Uruguay being the first.

Canada permitted the medical use of cannabis in 2001; the UK permitted this in November 2018. In the UK prior to 2004 cannabis was classified as a Class B drug. In 2004 it was re-classified a Class C drug with less severe penalties, and in 2009 it was re-classified again back to Class B. The reason for the re-classification and the main concern in relation to legalising this drug is the risk that it causes to people's mental health.

In the UK currently, it appears there is more acceptance of recreational drug usage, in particular cannabis. Some authorities are adopting a lighter touch when they find someone in possession of the drug. It has been debated whether legalising the recreational use of cannabis in the UK would increase the number of people suffering with mental health issues, placing further strain on an already stretched health service. A further issue under discussion is whether it would increase safety risks for licensed premises managers; and if so, whether taxing cannabis would pay for these new running costs.

Cannabis became illegal in the UK in 1928 under the Dangerous Drugs Act of 1920. Despite its illegality, data from the Home Office reportedly shows that there has been a steady rise in cannabis usage over the years.

Cannabis is a Class B drug, meaning that it is illegal to possess, use or distribute. The current maximum sentence for possession of the drug is five years' imprisonment and / or an unlimited fine. For supplying, an individual could face a maximum of 14 years. Police can issue a warning or on-the-spot fine if they catch someone with a small amount, generally less than one ounce, and if it is deemed for personal use.

For a cannabis product to be considered medicinal it must meet three requirements:

- It needs to be a preparation or product which contains cannabis, cannabis resin, cannabinol or a cannabinol derivative.
- It is produced for medicinal use in humans.
- Is a medicinal product, or a substance or preparation for use as an ingredient of, or in the production of an ingredient of, a medicinal product.

The THC can give users a "chilled out" feeling but it can also cause hallucinations and make people feel paranoid and panicked. It is normally smoked but can also be eaten and comes in three main forms:

- Hash - a lump of resin.
- Marijuana - the dried leaves and flowering parts of the female plant.
- Oil - a thick honey-like substance.

What are the health effects of smoking cannabis?

NHS research suggests that cannabis is a relatively low risk drug with only around 10% of its users developing an addiction. In contrast, research estimates that 32% of tobacco users will become addicted and 15% of alcohol users will become addicted. Furthermore, there have been no cases recorded in the UK where death was caused as a direct consequence of cannabis use.

According to the NHS, regular recreational cannabis use increases the risk of developing a psychotic illness, such as schizophrenia. This risk is higher if it is used by teenagers and younger people as the drug interferes with development of the still-growing brain.

Effects of using the drug can include a feeling of happiness and relaxation but it can also make users feel sick, faint and sleepy and cause memory loss. Withdrawal symptoms can include mood swings, restlessness and difficulty sleeping.

In recent years, various stronger types of cannabis, grown for their higher concentration of the main active ingredient THC, have invaded the street market. It is argued by some that cannabis with high levels of THC can lead to people developing psychiatric issues.

According to the Royal College of Psychiatrists, there is sufficient evidence to show that people who use cannabis, particularly at a younger age, such as around the age of 15, have a higher than average risk of developing a psychotic illness, including schizophrenia or bipolar disorder.

Controls

The Government has stated it has “no intention” of reviewing cannabis’s classification, saying “there is strong scientific and medical evidence that cannabis is a harmful drug which can be detrimental to people’s mental and physical health.” It added that any debate about the medicinal benefits of cannabis-based medicines did not extend to illicit possession.

Many countries, and regions or states within those countries, have varying local laws and rules on what is permitted and what is not in relation to smoking drugs. In some countries there are severe penalties for being found in possession of cannabis for recreational use but not so in others. In Canada, each region has interpreted the new law in its own way and put in place their own bylaws and rules around smoking cannabis. In some regions of the country, they still do not permit smoking of cannabis in public places. Some festivals / events have provided separate smoking areas for cannabis, such as a fenced off, closed area, a nominated space, similar to cigarette smoking areas, where they permit the public to “toke up”. Some have guidelines for what you can bring, which is often limited to pre-rolled joints as opposed to loose leaf buds, edibles, concentrates or other products.

These legislatures have all given consideration to how children or others should be protected from the smoke and most do not permit smoking in front of the stage. Some regions of Canada do not allow it in the main event space but do permit the public to smoke in the campsite areas as they consider that to be a private area rather than a public area. Smoking in reserved entertainment events or sporting events has not been permitted. Some authorities have stated that cannabis can only be smoked in a public place if it is purely for medical purposes (and medical documentation is available as proof).

Some festival policies in Canada state: “This festival is hosting a designated smoking area where patrons will be able to bring a small quantity of ‘personal use only’ cannabis, but they’re limiting each person to a maximum of three pre-rolled joints or blunts. Make sure to leave any loose-leaf buds, edibles, oils or other products at home or you will be denied entry.” There is no consistency in the bylaws that have been adopted across Canada.

If the recreational use of cannabis is ever legalised in the UK, there would be much debate over whether the police would then have additional resources. Additionally, there would be many who would argue that legalising a product for recreational use that is known to be a risk to health would not be promoting the protection of children from harm or ensuring public safety. In the next issue we hope to consider in depth the legalisation of cannabis. Issues that would need to be considered if cannabis were to become legal for recreational use include the following:

- NHS funding if mental health issues increase.
- The impact of cannabis on driving: would there be a cannabis driving limit similar to drink driving and would this result in an increase in driving accidents?
- Rules on sourcing and quality, ie, who could purchase it, who would be licensed to sell it, etc.
- Who would monitor and enforce its manufacture and sale.
- The age limit for recreational purposes.
- When organising an event / festival, where would smoking cannabis be permitted, if at all, and how would children be protected.
- Definitions would need to be agreed for “in private use” and for “in public use” and what constitutes a “public place”.

If our Government takes as long as Canada did in legalising cannabis for medicinal purposes, it may take them until 2035 to consider legalising it for recreational purposes. By then there should be enough data on the impact it has had in Canada to provide a reasoned argument for or against recreational cannabis.

Julia Sawyer
Director, JS Consultancy

Local authorities should discern the true outcome of *Hemming*

Although the law is not clear cut, taking a robust stance in the face of a private claim for restitution can bear fruit, suggests **Charles Streeten**

It is almost a decade since Timothy Martin Hemming and his licentious comrades in arms first challenged the fees charged by Westminster City Council for sex licences in Soho. Since then, attacking the fees local authorities have historically charged for the grant or renewal of sex establishment licences, under Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, has become something of a cottage industry.

There is a common misconception that these claims are undefendable. Anecdotal evidence suggests that some local authorities have even settled putative claims for five and six figure sums, on occasion without first taking external legal advice.

At the root of the widespread misunderstanding is the folklore that Mr Hemming succeeded in his claim against Westminster City Council. True it is that at first instance, the High Court accepted Mr Hemming's claim in full and that Westminster did not appeal some of the findings regarding the unreasonableness of the fees it had charged. Those findings, however, were fact specific, and that is where Mr Hemming's success ends. Following the conclusion of proceedings, the Supreme Court ordered Mr Hemming and the other claimants to pay Westminster's costs of both hearings in the Supreme Court, and their costs in the Court of Appeal. This leaves no doubt that Westminster was the successful party in all of the appellate proceedings. Following that order, the matter will be remitted back to the Administrative Court for quantification, but the principle established by the Supreme Court is that Mr Hemming must pay back to Westminster the restitution originally paid to him, the total quantum of which is approximately £1 million.

As the Hemming litigation itself demonstrates, robustly defending restitution claims tends to be economically rewarding for local authorities facing such challenges.

This article gives a thumbnail sketch of what will often be the first line of defence to a private law claim for restitution against a public authority; namely, strike out.

Under Part 3 of the Civil Procedure Rules (CPR), the court has the power to strike out a claim (or part of it) where: (a) the statement of case discloses no reasonable grounds for bringing or defending the claim; or (b) the claim is an abuse of the court's process.

The second limb is of particular relevance in the context of private law claims for restitution. In *O'Reilly v Mackman* [1983] 2 AC 237 the court established that, as a general rule, it is an abuse of process to seek to establish that actions by a public body infringe rights which are entitled to protection under public law by way of a private law "Part 7 Claim" rather than by way of judicial review, under CPR Part 54. This is known as the principle of procedural exclusivity.

CPR Part 54 governs claims for judicial review challenging decisions, actions, or failures to act by public authorities. A claim must be brought promptly and, in any event, within three months of the decision challenged. It is important to note that, under s 31(4) of the Supreme Court Act 1981 (as amended), restitution is one of the remedies available on a claim for judicial review.

The basis for striking out a private law claim for restitution where no judicial review has been brought is therefore that it offends against the principle of procedural exclusivity, depriving public authorities of the protections they are guaranteed under CPR Part 54.

The issue arose in the very first Hemming case. In *R (Hemming) v Westminster City Council* [2012] EWHC 1260 (Admin) Keith J held at [12]:

> *I have no doubt that the primary focus of the restitutionary claim is to challenge the equivalent of "a public law… decision" ie the Council's failure to determine a licence fee for the relevant years. Accordingly, if the restitutionary claim is to proceed, it must be treated as a claim for judicial review (because Part 7 proceedings would have amounted to an abuse of the court's process). On that basis, the question of the claimant's failure to bring the claim within the time limit for claims for judicial review has to be addressed.*

In so finding, he took into account the remarks in *Woolwich Equitable Building Society v IRC* [1993] AC 70 and *British Steel*

Plc v Customs and Excise Commissioners (No. 1) [1997] 2 All ER 366 which suggested it *might* be possible to bring a claim seeking restitution for unjust enrichment without the need to establish illegality on the part of a public authority by way of judicial review. However, he found that those decisions pre-dated the amendment of the CPR and Supreme Court Act in 2004, as a result of which, restitution is available as a remedy in judicial review. Keith J relied upon and approved the decision of Plender J in *Jones v Powys Local Health Board* [2008] EWHC 2562 (Admin). He held that in order to determine whether the claim is in substance "asserting an entitlement to a subsisting right in private law, which 'may incidentally involve the examination of a public law issue' or whether the 'primary focus' or 'dominant issue' is to challenge a public law act or decision". In *Hemming*, there were special circumstances relating to Westminster's pre-litigation conduct which persuaded Keith J to extend time (see para 48). However, those circumstances were specific to the facts, relating as they did to Westminster's responses to requests for information. Generally, Keith J's ratio in *Hemming* was that bringing a claim for restitution under Part 7 is an abuse of process.

It should be noted, however, that on appeal (see [2013] EWCA Civ 591) Beatson LJ made expressly obiter remarks suggesting that the time limit in judicial review should not apply to claims seeking restitution against public bodies.

There is, therefore, something of a divergence in the authorities. If the claim for restitution is brought in the county court, then the decision in *Hemming* is binding. However, the High Court is neither required to follow the previous decisions of the High Court nor the obiter remarks of the Court of Appeal. The matter thus needs to be addressed from first principles.

In *Richards v Worcestershire CC* [2017] EWCA Civ 1998, Rupert Jackson LJ distilled two general principles at [65]. They are that: (i) the exclusivity principle applies where the claimant is challenging a public law decision or action and (a) his claim affects the public generally or (b) justice requires for some other reason that the claimant should proceed by way of judicial review; and (ii) the exclusivity principle should be kept in its proper box. It should not become a barrier to citizens bringing private law claims, in which the breach of a public law duty is one ingredient.

In distilling those principles, Rupert Jackson LJ relied heavily upon *Clark v University of Lincolnshire and Humberside* [2000] WLR 1988, in particular at [34]-[39].

It is in light of those matters that claims for restitution against public authorities should be judged. Applying the principles in Clark my view is that seeking to establish, through a private law claim, that fees charged many years previously by a public authority are unlawful and should be repaid is an abuse of process.

Firstly, and as I have already mentioned, CPR 54.5 requires that a claim for judicial review should be brought promptly and in any event within 3 months. Many of the restitution claims against public authorities seek to challenge the reasonableness of the fees set by local authorities up to 8 years after those fees were charged. The challenge brought is neither prompt not within three months. The effect of allowing a claim in private law, would be to give claimants an unjust procedural advantage. That is by definition abusive.

Secondly, the nature of the claims brought and remedies sought against public authorities in relation to licence fees militates against permitting those claims to continue. In order to establish that the fees were unlawful the operators seeking restitution tend to argue that those fees were either unreasonable or disproportionate and to seek a declaration to that effect. The restitution claimed is predicated on the court making a declaration of unlawfulness. In *Clark* Lord Woolf pointed out at [36] that where the court is being asked to perform a reviewing function, this is a factor suggesting the claim is abusive.

Thirdly, claims for restitution which challenge the reasonableness of past licence fees affect the public generally. These are not cases where the operator had a private legal relationship with the local authority governed by a contractual agreement or some other private law instrument. The claims are a front on challenge to the reasonableness or proportionality of fees set. This affects not only the individuals bringing the claim, nor even just sex shop owners, it also affects the public generally, in whose interest local authorities operate the sex licensing regime.

For these three reasons, and others which will turn on the facts of the case and sometimes rely on a somewhat more in depth analysis of the law of restitution, there is a strong argument that private law restitution claims which seek to challenge the legality of past licence fees are abusive and should be struck out.

Practical experience supports this view. In *Darker Enterprises v Slough Borough Council*, a private law claim for restitution, HHJ Sarah Richardson struck out the particulars of claim relied upon by Darker in a claim for restitution against Slough Borough Council on the basis that, as pleaded, the case amounted to a challenge to a public law decision or action that affects the public generally. In that case she gave Darker an opportunity to file better and further particulars

but confined the ambit of any further particulars to a claim in restitution for money paid.

Subsequently, and in light of this judgment, Darker brought a county court claim for restitution in excess of £100,000 against Bristol City Council. The council took a robust stance and applied to have the claim struck out, with the proceedings, including the question of strike out, first being transferred to the High Court. On 19 January, His Honour Judge Cotter QC made an order transferring the claim to the High Court and listing the council's strike out application for hearing. In light of that order, Darker withdrew its claim, rendering it liable to pay all of Bristol's costs incurred to date.

These cases are clear examples of the effectiveness of strike out as a mechanism for resisting private law claims for restitution against public authorities which are, in truth, public law challenges. That is so, even though the law is not at present clear cut. What is clear is that taking a robust stance in the face of a claim for restitution can bear fruit. Even if the claim is not struck out, there are other defences which local authorities should consider advancing and upon which they should take advice. Otherwise, public authorities risk paying considerable sums from the pocket of the ratepayer.

Charles Streeten
Barrister, Francis Taylor Building

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Sexual entertainment venues present conundrum to councils

New Guidance linking sexual entertainment to a culture of violence against women contrasts strongly with Scotland's licensing regime for sexual entertainment. **Michael McDougall** and **Leo Charalambides** examine the issues

The question of whether sexual entertainment venues (SEVs) should be subject to their own bespoke licensing regime has been the subject of much debate in Scotland for many years. On 26 April 2019 upon the commencement of s 76 of the Air Weapons and Licensing (Scotland) Act 2015 amending the Civic Government (Scotland) Act 1982, the Scottish Government addressed the matter with the creation of a standalone licensing regime for SEVs. The amendments, in many respects, mirror the SEV regime for England and Wales in the Local Government (Miscellaneous Provisions) Act 1982 (as amended by the Policing and Crime Act 2009).

The Scottish regime distinguishes itself from that in England and Wales by requiring local authorities to have an SEV policy; to pre-determine the appropriate number of SEVs for their area and for each relevant locality; SEV licensing objectives (including the objective of the reduction of violence against women); and the requirement to have regard to Scottish Government Guidance.

In advance of the implementation of this legislation the Scottish Government published Guidance on the Provisions for Licensing of Sexual Entertainment Venues and Changes to Licensing of Theatres.[1]

It is anticipated that the new legislation could potentially impact around 20 premises.[2] This assessment is based upon a definition of SEVs that is concerned with lap-dancing and similar venues. The definition of an SEV, however, is far wider and includes other types of sexual and adult entertainment venues. The impacts are likely to be far wider than initially anticipated.

Background

The current legislative position reflects the recommendations set down in a report issued by the Adult Entertainment Working Group back in 2006 which proposed that SEVs be licensed for the purposes of providing sexual entertainment.[3]

The same report also highlighted concerns around the risk of inadvertent censorship of artist performances and the need to tackle gender-based exploitation. These recommendations were not taken forward as the Scottish Government at that time considered such premises to be adequately regulated under the existing licensing regime for the sale of alcohol.[4]

A second unsuccessful proposal to licence SEVs (specifically for the purposes of providing sexual entertainment) came in 2010 from Sandra White MSP who sought to introduce a licensing regime as part of the Criminal Justice and Licensing Bill during its passage through the Scottish Parliament. While the Scottish Government supported the amendment, it ultimately failed owing to concerns around dual licensing[5] and the lack of proper scrutiny as the amendments were introduced at second stage of the Bill.[6]

The aforementioned concerns about dual licensing were set aside following the decision in *Brightcrew v City of Glasgow Licensing Board*.[7] In this case, the City of Glasgow Licensing Board's efforts to use the liquor licensing regime to impose conditions relating to adult entertainment were struck out. The Inner House found that the liquor licensing regime was to be used exclusively for regulating matters flowing from the sale of alcohol. This meant that any sexual entertainment taking place within SEVs going forward would be unregulated.

In light of the *Brightcrew* decision, the Scottish Government came to the view that:

1 Scottish Government, March 2019, https://www.gov.scot/publications/guidance-provisions-licensing-sexual-entertainment-venues-changes-licensing-theatres/ (the Guidance).

2 SPICE Briefing, Air Weapons and Licensing (Scotland) Bill: Local Government Licensing, 12 November 2014.

3 Scottish Executive 2006, https://www.gov.scot/Publications/2006/04/24135036/0.

4 Paras 12 and 13 of the Guidance.

5 Namely that there would be licensable activities taking place on a premises that would be authorised by both a premises licence under the Licensing (Scotland) Act 2005 and any sexual entertainment licence further to the amendments being then proposed.

6 See Official Report of the Justice Committee on 11 May 2010 and Official Report of the meeting of the Parliament on 30 June 2010.

7 [2011] CSIH 46 [26].

it [is] appropriate that sexual entertainment venues should be licensed in order that the risk of adverse impacts on neighbours, general disorder and criminality is reduced and both performers and customers can benefit from a safe, regulated environment. Central to this proposal is the belief that local communities should be able to exercise appropriate control and regulate sexual entertainment venues that operate within their areas.[8]

The new regime

The 2015 Act creates an overarching framework for the licensing of SEVs, and amends and extends the 1982 Act's existing sex shop provisions to apply to SEV licence applications. Scotts law now recognises two types of sex establishment: sex shop and sexual entertainment venue.

Key definitions (which mirror the provisions in England and Wales) are as follows:

- SEV means "any premises at which sexual entertainment is provided before a live audience for (or with a view to) the financial gain of the organiser".[9]
- Audience means "includes an audience of one".
- Sexual 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)."

Given that the regime for SEVs is discretionary, a licensing authority will have to pass a resolution should it wish to license SEVs. Authorities are expected to consult prior to passing any resolution. The Scottish Government's Guidance sets out factors that an authority will be expected to look at prior to resolving to license SEVs.[10] Following a resolution to adopt, the authority must prepare and publish an SEV policy statement[11] and determine the appropriate number of SEVs for its area and for each relevant locality.[12] In preparing the SEV policy a local authority must "consider the impact of the licensing of sexual entertainment venues in their area" having particular regard to the following SEV licensing objectives:

- Preventing public nuisance, crime and disorder.
- Securing public safety.
- Protecting children and young people from harm.
- Reducing violence against women.[13]

This policy, along with any Guidance issued by the Scottish Ministers,[14] will inform how the licensing authority carries out its functions in relation to SEVs. The policy needs to be reviewed from time to time.[15] The requirement to have an SEV policy statement along with the SEV licensing objectives is absent from the regime in England and Wales where sex establishment policies are not required by the legislation and there are no SEV licensing objectives.

Additionally, the local authority must determine the appropriate number of sexual entertainment venues "for their area and for each relevant locality" and publish such determination.[16] This determination is likely to be included in the SEV Policy. Paragraph 9(5)(c) of Sch 2 permits a local authority to refuse an application where "the number of [SEVs] in the relevant locality at the time the application is made is equal to or exceeds the number which the local authority consider is appropriate for the locality."

The grounds for refusal reflect the existing terms of the 1982 Act in relation to sex shops whereby the licensing authority may have regard to the fitness of the applicant, the number of SEVs in the locality and issues arising from the (proposed) operation of the SEV such as the impact on the character of the locality.[17]

How the existing grounds of refusal in para 9 of Sch 2 will interact with the additional requirements to have regard to Scottish Government Guidance, local SEV policies, pre-determination of appropriate numbers and the SEV licensing objectives remains to be seen. In *R v Peterborough City Council, ex p Quietlynn* (1985) 85 LGR 249 (a sex shop case considering the English and Welsh regime) the Court of Appeal held that (i) what was "the relevant locality" was a question of fact to be decided on the particular circumstances of a particular application; (ii) that the local authority had to look at the premises for which a licence was sought and consider the area surrounding them and had to decide the appropriate number of sex establishments for that area or whether the character of that area was such that it was inappropriate to grant a licence for a sex establishment; (iii) that the expression "locality" carried no connotation of precise boundaries; and (vi) "the relevant locality" did not have to be a clearly pre-defined area, but that an entire town, or the whole of a local administrative area was too large to be "the relevant locality" within the meaning of the Act.

8 Para 10, Air Weapons and Licensing (Scotland) Bill, Policy Memorandum.
9 Civic Government (Scotland) Act 1982, s 45A(2).
10 Para 32 of the Guidance.
11 Civic Government (Scotland) Act 1982, s 45C.
12 Civic Government (Scotland) Act 1982, Sch 2, para 9(5A).
13 Civic Government (Scotland) Act 1982, s 45C.
14 Civic Government (Scotland) Act 1982, s 45B.
15 Civic Government (Scotland) Act 1982, s 45C(5)(a).
16 Civic Government (Scotland) Act 1982, Sch 2, para 9(5A).
17 Civic Government (Scotland) Act 1982, Sch 2, para 9(5).

Some challenges

A number of licensing authorities have already embarked upon consultations on whether SEVs should be licensed. Authorities will have to grapple with issues such as:

Definition of SEVs

When considering SEVs the focus has tended to be on lap dancing clubs and similar premises, ie, premises benefiting from a premises licence under the 2005 Act with permission via the operating plan for adult entertainment. However, the regime's definition of sexual entertainment potentially captures other types of premises such as fetish clubs and saunas.[18] Ultimately it will be for the police - as the enforcing body - to take action should they be of the view that unlicensed activity is taking place.

The licensing objective of reducing violence against women

While the morality of lap dancing is irrelevant in a licensing context,[19] the Guidance notes that authorities are to have regard to the definition of violence against women and girls - as set out in Equally Safe, Scotland's strategy for preventing and eradicating violence against women and girls - which includes "commercial sexual exploitation, including prostitution, lap dancing, stripping, pornography and human trafficking".[20]

The Guidance therefore seems to be presenting authorities with a difficult - if not impossible - balancing act. On one hand the Scottish Parliament has created a standalone licensing regime for sexual entertainment (therefore signalling it is to be regarded as a legitimate activity) and on the other has indicated through its Guidance document that sexual entertainment is potentially linked to and plays a role in the perpetration and promotion of a culture of violence against women.

A balance between these seemingly opposing positions may be resolved by a closer engagement with the actual sexual entertainment and an examination of whether the proposed entertainment celebrates sex and sexuality or seeks to exploit it.

Existing operators

Given that SEVs have until recently been granted license to trade by virtue of their liquor licence, any decision not to issue a SEV licence under the new legislation going forward will likely lead to SEVs closing down currently trading businesses.

On the one hand, it could be argued any such closures will simply be the result of authorities now being able to have regard to issues that the decision in *Brightcrew* had previously prevented them from properly enforcing. On the other hand there will inevitably be concern within the industry that the new regime could be used to close down a business that some find morally repugnant.

The Guidance makes clear that the authorities need to be particularly careful in considering what to do with existing businesses, including the need to consider any potential ECHR infringement considerations such as the right to peaceful enjoyment of possessions.[21] That said, it is recognised that licensing authorities will have a wide discretion when dealing with a licensable activity. Established case law in England and Wales confirms the principle that there can be no expectation of annual renewal (see *R vWandsworth LBC, ex p Darker Enterprises Ltd* [2001] LLR 338 and *R (o/a Thompson) v Oxford City Council* [2013] EWHC 1819 (Admin) [50]).

The case of *Thompson* [50] reviewed the existing authorities and summed up a number of general principles in respect of sex establishment licensing:

1. Local authorities are granted a very wide statutory discretion to decide whether or not a licence should be granted (per Collins J in *R v Newcastle Upon Tyne City Council ex p The Christian* Institute (unreported), 5th September 2000) at [17].
2. Local authorities can take into account "any strong body of feeling in the locality" which objects to the existence of a sex shop there (although this does not include moral objections to its activities) (per Collins J in *The Christian Institute* (supra), at [21].
3. The legislation expressly contemplates that the circumstances in which a license has been granted or renewed may change and there can be no expectation of annual renewal (per Turner J in *Darker Enterprises.*
4. Local authorities have "a very broad power to make an evaluative judgment" whether the grant of a licence would be inappropriate having regard to "the character of the relevant locality" (under criteria (d)(i)).[22] This imports "a significant evaluative power" at two levels: first, in assessing whether the grant or renewal of the licence would be "inappropriate" (a very broad and general concept); and, secondly, in assessing the character of the

18 A matter highlighted by Professor Hubbard and Edinburgh City Council as part of the Consultation to the 2015 Act.

19 See *Gerry Cottles Circus v City of Edinburgh Council* [1990] SLT 235.

20 Paras 20 to 22 of Guidance and https://beta.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/

21 Para 27 and 45 of the Guidance.

22 See Civic Government (Scotland) Act 1982, Sch 2 para 5(d)(i).

relevant locality (which, again, involves questions of fact and degree and local knowledge which import, at that level also, a broad power of evaluative judgment to be exercised by the local authority) (per Sales J in *R (KVP ENT Limited) v South Bucks District Council* [2013] EWHC 926 (Admin), at [12]).

5. There is no radical conceptual divide between the first two criteria under sub-paragraph (d), ie, (i) "the character of the relevant locality" and (ii) "the use to which any premises in the vicinity are put".[23] Criteria (i) is a concept calling for "a compendious and general evaluative judgment to be made by the authority", having regard to a range of factors which may be relevant to that question, including not least the use to which properties within the relevant locality happen to be put. Criteria (ii) simply provides an additional ground for refusal if, e.g., it cannot be said that it would be inappropriate to grant a licence given the general character of the locality, but the use of particular premises within the vicinity does give cause for concern, viz. e.g. a church, or primary school (per Sales J in *KVP ENT* Limited, at [21] and [23]).

6. Considerations inherent in paragraph 12(3)(d) were intended by Parliament to be considerations for the local authority's own evaluative judgment, subject only to this court's supervisory jurisdiction on a claim by way of judicial review (per Sales J in *KVP ENT Limited* at [15]). This follows from the omission of a statutory right of appeal to the magistrates in relation to sub-paragraph (d) (see above).

Conclusion

Discussion around the implementation of the SEV regime in Scotland is far from settled. The debate is set to continue as local licensing authorities consult on adoption, develop local SEV policies and begin to process and determine applications.

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Leo Charalambides
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23 See Civic Government (Scotland) Act 1982, Sch 2 para 5(d)(ii).

Summer Training Conference 17 June 2020

The Institute's Summer Training Conference changes location for 2020 and is being held at the gorgeous Crewe Hall Hotel, Cheshire.

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There is a residential option for this event for the night of 16 June. Residential places are limited so book early.

The event will take place during National Licensing Week.

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Case note: Aldemir v Cornwall Council

Alcohol and entertainment

Administrative Court (Case Stated)
Swift J

Magistrates' Court acting pursuant to its appeal jurisdiction under s 181 Licensing Act 2003 have the power to make non-party costs orders, but advance notice of any application for such an order should be given to the respondent.

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

Decision: 13 September 2019.

Facts: Eden Bar Newquay Limited (EBNL) was the premises licence holder of premises owned by Memet Aldemir. Mr Aldemir leased those premises to EBNL (whose sole shareholder and director was his brother). Mr Aldemir owned the fixtures and fittings; he was employed by EBNL as general manager; he was also the designated premises supervisor.

Following a review, the licensing authority revoked the premises licence on 25 April 2018. EBNL appealed, that appeal being heard on 19-21 November 2018.

Following the decision to revoke, EBNL had applied to transfer the premises licence to Max Leisure Limited, a company of which Mr Aldemir was the sole director. The licensing authority refused to grant that that application; Max Leisure Limited appealed that decision, but then withdrew that appeal. A new arrangement was then said to have been put in place the day before the appeal hearing commenced, whereby Mr Aledmir was said to have leased the premises to Newquays Limited (Newquays) and sold that company the fixtures and fittings and goodwill of the bar. It was suggested that this transaction to Newquays of itself now meant that the decision to revoke should be overturned.

The District Judge was highly critical of Mr Aldemir's conduct at the premises both before and following the decision to revoke, as well of the Newquays transaction, which she was not convinced was genuine. Mr Aldemir was present at the appeal hearing but chose not to give evidence, on the basis that this would be "inappropriate" given the arrangements made with Newquays.

The District Judge dismissed the appeal on 21 November 2018. The Council applied for costs against Mr Aldemir, both in relation to the EBNL appeal and the appeal withdrawn by Max Leisure Limited. No notice had been given to Mr Aldemir that a costs application would be sought against him personally. Mr Aldemir was not in court for the handing down of judgment; the solicitor for EBNL was. The District Judge refused to grant any substantive adjournment so Mr Aldemir could be give notice of the application and an opportunity to respond. Instead EBNL's solicitor was allowed 15 minutes to take instructions from Mr Aldemir by telephone. The District Judge then granted the orders sought.

Mr Aldemir appealed by way of case stated.

Points of dispute: (1) Whether s 181 Licensing Act 2003 conferred a power to make a non-party costs order. If so, (2) whether a fair procedure was followed in making the orders against Mr Aldemir. If so, (3) whether it was reasonable to make a costs order against Mr Aldemir and (4) were the total costs reasonable.

Held: (1) The court did have jurisdiction to make a costs order against a non-party. The wording of s 181(2) of the Act, which provides that the court "may make such order as to costs as it thinks fit", was framed in the widest of terms and that although, unlike s 51 of the Senior Courts Act 1981 did not expressly refer to a power to determine "by whom" costs were paid, that power was inherent in any power to make any costs order at all. The prescriptive nature of Schedule 5 as to who were the parties to an appeal made no difference, and indeed, as confirmed in *R (Chief Constable of Nottinghamshire Police)* v. *Nottingham Magistrates Court* [2011] PTSR 92, the magistrates had an implied power to allow third parties to participate in appeals.

(2) The District Judge had not followed a fair procedure. Where a third party costs order was sought it was important that the principles of natural justice were applied. Whilst there was no need for anything elaborate, nor any hard and fast rules, in most - if not all - cases it would be good practice for the grounds on which a non-party costs application was made to be reduced to writing; for those grounds to be provided to the respondent to the application in advance; and for the application to be heard and determined only after the non-party had had the chance to consider the same and respond to them.

(3) As a fair procedure had not been adopted, the costs orders were set aside and remitted for reconsideration. The re-determination should be in accordance with the principles formulated by the courts in the context of non-party costs applications under s 51 of the Senior Courts Act 1981: in particular in the decision of the Privy Council in *Dymocks Franchise Systems (NSW) PTY Ltd v Todd* others [2004] 1 WLR 2807 per Lord Brown at paragraphs 25-28; and as further considered by the Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc.* [2014] 4 WLR 17 *per* Moore-Bick LJ at paragraphs 15-22, 30-31, and in particular 61-62. The two applications made against Mr Aldemir should be determined independently of each other.

(4) A costs order that provided for higher hourly rates than those paid by the Attorney General to panel counsel for civil work outside London did not entail any error of law.

Appeal allowed, costs orders set aside and remitted back to the District Judge for redetermination.

Charles Holland
Barrister, Trinity Chambers & Francis Taylor Building

Book review

A Pub Tenant's Guide to the Pubs Code etc Regulations 2016

Author: Tariq Phillips
Publisher: Self-published
Price: £59.95

Reviewed by **Duncan Craig,** *Barrister, Citadel Chambers*

If it wasn't for The Supply of Beer (Tied Estate) Order 1989, or the Beer Orders as it came to be known, it is highly doubtful I would be writing this book review.

My first job, at the Whitbread Beer Company, was created simply because of the anticipated epic growth in free trade beer volumes as a consequence of the Beer Orders. This was a conscious step by the government of the day to constrain the largest pub owning companies (Bass, Allied, Grand Metropolitan, Whitbread, Courage and Scottish & Newcastle) by forcing them to sell off significant portions of their estate in an effort to make the pub market more competitive and tip the balance of power a little away from pub landlords and towards their tenants.

None of these aims came to pass, of course, and instead, the unintended and most significant consequence of the Beer Orders was in fact the creation of the huge pub-owning property companies that have dominated the pub landscape for the last 25 years.

A more recent legislative attempt to rein in the current largest pub-owning companies that were spawned by those Beer Orders (Greene King, Admiral Taverns, Punch Taverns, EI Group, Star Pubs and Bars, Marston's) was forthcoming in July 2016 when the Pubs Code Regulations came into force - and Tariq Phillips, a commercial property law solicitor, has produced a guide aimed at pub tenants in an attempt to navigate them through the opportunities and challenges that this legislation presents them with, in his *Pub Tenant's Guide to the Pubs Code Regulations 2016*.

In brief terms, what the Pub Code provides, following certain trigger events (significant price increases, rent review, lease renewal, a foreseeable significant impact on trade) is for pub tenants to be able to become "free of tie", notwithstanding the fact that the current agreement with their pub owning company precludes them from so being; that is to say, they become free to purchase their wet products, most significantly beer, from their supplier of choice, rather than directly from their pub owning company, which tends to supply those products at much higher prices than is available in the open market.

In most instances, going free of tie is a significantly more profitable outcome for the tenant, but given that means the pub-owning company is worse off, and this highly structured requirement has been imposed by legislation, it is key that tenants follow the procedures within the prescribed process swiftly and correctly and don't allow the economic imbalance between them and their pub owning company to frustrate their intentions. This book is a hugely useful tool in helping pub tenants achieve all that.

Over its 100-odd pages, it systematically sets out for pub tenants if and when they will become eligible for this scheme (or if they are excluded entirely), the steps they are required to take within the process, and the options that are available to them once they have followed those steps. At various points it suggests a number of helpful and relevant tips, and provides various option for tenants to take at different points within the process - along with explanations about the pros and cons of each of those choices.

It also explains the likely cost for tenants in exercising their rights under the code in straightforward and easy to follow terms, both in terms of professional fees and their repairing obligations under their lease. The book is replete with acronyms, but this is unavoidable in what is a hugely jargonistic field within the licensed trade (and there is a helpful glossary at the beginning of the book).

I have a few minor criticisms of the book: it fails to adequately explain in simple (and practical) terms what a "qualifying investment" is; it suggests tenants should write to their landlords on a without prejudice basis prior to the procedure commencing, but I'm not sure that would always be the correct approach; there is a section that deals with price increases (one of the foregoing triggers to commence the process) which contains algebraic formulae that are as mystical and indecipherable to this writer as those contained within the mandatory conditions on premises licences; and there is also the somewhat fanciful suggestion that tenants maintain and update three-year micro-economic projections as part of their ongoing business plan in anticipation of this exercise being open to them.

This easy to follow book should be seen as essential guidance, within an exercise which could very well be the determining factor in their pub's ongoing viability.

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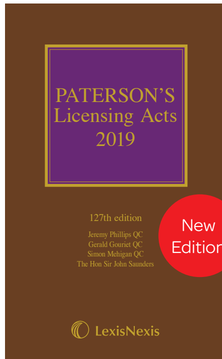

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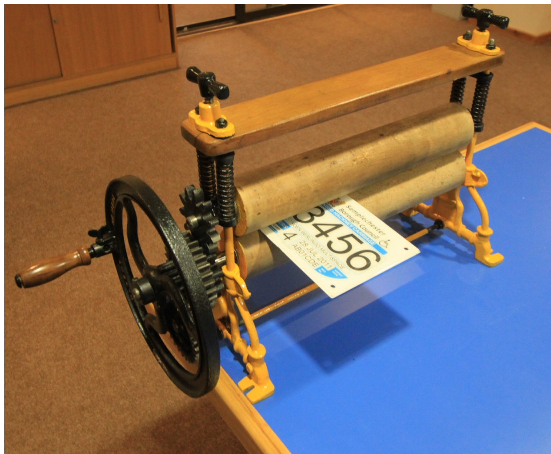

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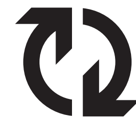

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NICK ARRON

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.

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

Barristers, Kings Chambers

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

PAUL DUFFY

Public Health England

Until recently, Paul Duffy worked for the North West region of Public Health England. PHE is an executive agency of the Department of Health and Social Care, and a distinct organisation with operational autonomy. Its role is to protect and improve the nation's health and wellbeing and reduce health inequalities. It employs 5,500 staff (full-time equivalent), mostly scientists, researchers and public health professionals.

MATT LEWIN

Barrister, Cornerstone Barristers

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

MICHAEL MCDOUGALL

Solicitor, TLT

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.

RUCHI PAREKH

Barrister, Cornerstone Barristers

Ruchi has an LLM from Harvard Law School, where she was awarded a Public Service Fellowship, and an LLB (First Class Honours) from the LSE, where she won several prizes including two for best overall performance in the year. Ruchi was awarded the Stephen Chapman Scholarship from Inner Temple. Ruchi's previous experience includes human rights litigation in domestic courts in eastern Europe and southern and eastern Africa, and the European Court of Human Rights.

CHARLES STREETEN

Barrister, Francis Taylor Building

Charles is a barrister specialising in public and EU law who regularly appears in the High Court and Court of Appeal. His licensing experience includes acting for local authorities, police forces and private operators across the country. He has acted for Itsu, Fabric nightclub and Westminster City Council, for whom he appeared as junior counsel before the Court of Justice of the European Union in *Hemming*. His work on Brexit has been widely published.

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.

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 MATTHIAS QC

Barrister, Francis Taylor Buildings

David Matthias QC, FCIArb was called in 1980, took Silk in October 2006, and is a Fellow of the Chartered Institute of Arbitrators. David acts for a wide range of individual, corporate and local authority clients, specialising in judicial review, licensing, commercial litigation and arbitration, planning and compulsory purchase, local government, rating and environmental law. He was one of the first to embrace the opportunities afforded to clients by the Direct Public Access scheme.

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.

BEN WILLIAMS

Barrister, Kings Chambers

Ben's practice has a strong emphasis on Regulatory Law and procedure. Increasingly Ben is asked to advise at an early stage of investigation as well as deliver specialist advice on best practice within varied regulatory fields. He regularly prosecutes and defends health & safety and trading standards matters throughout the country, and is experienced in abatement notices including statutory appeals against such notices. He advises a large number of local authorities on policy implementation and enforcement.

Institute of Licensing

INSTITUTE OF LICENSING

NUMBER 25 NOVEMBER 2019

JOURNAL OF LICENSING

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