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IN THIS ISSUE

A practical approach to evidence and decision making
by Leo Charalambides

The life of the lap-dancing operator - shed no tears
by Ranjit Bhose QC and Josef Cannon

The IoL matters: my personal reflections
by Jon Collins

Child sex exploitation – the challenge for the hospitality industry
by Tim Leeson

The 2003 Act: better for the trade than local authorities
by Jon Foster

Reducing the harm of shisha smoking in Westminster
by Richard Williams

Opinion: Legally illegal
by Sarah Clover

Phillips' Case Digest
by Jeremy Phillips

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Daniel Davies
Chairman, Institute of Licensing

Welcome to the second edition of the *Journal of Licensing* for 2016. As members will already be aware, this is our twentieth anniversary year. As part of our celebrations, in June we launched our first ever National Licensing Week, which raised public awareness of the many ways in which licensing touches the lives of ordinary people in their everyday activities. Licensing has to balance the need for public protection with the desire of ordinary people to enjoy public entertainment, eating and drinking, travelling by taxi, staying in a caravan park or getting a tattoo. Licensing is how we square that circle.

It's fair to say that the week was successful and its activities were well-received. We adopted a broad approach to increase public awareness of the many ways in which licensing impacts on daily life, and perhaps next year we may adopt a more targeted approach and focus on different aspects of licensing. A huge thank you to our staff and stakeholders whose hard work and planning contributed to the success of National Licensing Week.

In June we also held our annual National Training Day – again, a huge success. And thanks once again to our staff for organising this and for the many erudite sessions from our expert contributors.

Staying with the theme of how licensing is everywhere, you only have to look at the articles in this edition of the *Journal* to understand how licensing underpins public protection and touches the body politic at some of its most sensitive points. The hugely important issue of child sexual exploitation actually engages many different aspects of licensing, from taxis to alcohol-licensed premises, but the article in this edition focuses on the challenges facing the hotel trade in recognising and responding to the misuse of hotel rooms for this kind of exploitation.

The article on reducing the harms of shisha smoking in Westminster touches on an issue where cultural sensitivities are engaged, and licensing has to balance the freedom to engage in this activity with the harm to public health from the use of tobacco-based smoking products.

The article on the life of the lap-dancing operator addresses the difficult balance between allowing freedom to engage in sexual entertainment and the moral objections to it from residents and councillors. The need to apply annually for sexual entertainment venue licensing renewal certainly makes it difficult for operators to justify investments which are so clearly at risk from adverse licensing renewals conducted so frequently, and the article explores whether these regulations are in fact discriminatory.

There's also a very interesting leading article by our editor, Leo Charalambides, on what constitutes good evidence when a licensing submission is being considered. It should certainly provoke much thought as to whether the duty to promote the four licensing objectives is as fully addressed as it should be when an application is being considered.

I'd like to mention two other articles: our regular commentary on public safety, which focuses this time on the public health risks associated with saunas and spas. And also, a reflective piece from Jon Collins, my immediate predecessor as chairman of the IoL. Not to be missed!

Further details about the National Licensing Week and National Training Day will follow in our November edition. Altogether, this edition is, I believe, a stimulating and thought-provoking read and a tribute to the ongoing commitment to the IoL of the many members who contribute to the *Journal* and our staff who are working so hard to make this, our twentieth anniversary year a success.

Content

Foreword *Daniel Davies*	1
Editorial *Leo Charalambides*	3
A practical approach to evidence and decision making *Leo Charalambides*	4
Taxi licensing: law and procedure update *James Button*	10
The life of the lap-dancing operator - shed no tears *Ranjit Bhose QC & Josef Cannon*	13
Opinion: Legally illegal *Sarah Clover*	16
Gambling licensing: law and procedure update *Nick Arron*	18
The IoL matters: my personal reflections *Jon Collins*	20
Public safety and events management review *Julia Sawyer*	22
Child sexual exploitation – the challenge for the hospitality industry *Tim Leeson*	26
The 2003 Act: better for the trade than local authorities *Jon Foster*	30
Institute of Licensing News	33
Reducing the harm of shisha smoking in Westminster *Richard Williams*	37
The interested party *Richard Brown*	38
Scottish licensing law and procedure update *Niall Hassard*	41
CGA statistical snapshot *Paul Bolton*	44
Book Reviews	45
Phillips' Case Digest *Jeremy Phillips*	47
Index of cases	50
Directory	55

Leo Charalambides
Editor, Journal of Licensing

Concerns over review, amendment and reform are an ever present agenda in the licensing world. In issue 13 of the *Journal* Jon Foster provided a spirited opinion on the report by Christopher Snowdon for the Institute of Economic Affairs, *Drinking Fast and Slow*.[1] The IEA report has been just one of many considering the impact and effect of ten years of the Licensing Act 2003. In similar, yet wider vein, our members will have also read the Local Government Association report *Rewiring Public Services, Rewiring Licensing* (January, 2014) which called for a review of all licensing legislation, from alcohol to zoo licensing, to determine what can be scrapped, amended or consolidated.

In the present issue there is more on the review and reform agenda. Jon Foster provides an outline of the conclusions of his study on behalf of the Institute of Alcohol Studies, *The Licensing Act (2003): its uses and abuses 10 years on*. His report is also reviewed in this issue by Dr Paul Lehane, the Head of Food, Safety & Licensing of the London Borough of Bromley. As with *Rewiring Licensing,* the Institute of Alcohol Studies makes a number of suggestions for reform including locally set fees and the introduction of a health and well-being objective and minimum unit pricing and further.

Reviewing the licensing objectives of the Licensing Act 2003 is not just limited to the "hot topics" of health and well-being, minimum unit pricing and locally set fees but has attracted the attention of the music and entertainment industry. Tom Kiehl, the Director of Government & Public Affairs for UK Music, has suggested a fifth licensing objective for the "promotion of cultural activity and inclusion" to counter the perception that local authorities view live music as a public order issue.

For me, one of the key features of Jon's study is his involvement with the Institute of Licensing. Whatever our views on Jon's conclusions it seems to me significant that engagement with the Institute of Licensing is at the heart of Jon's methodology. He has interviewed many of our members, attended our regional meetings and our national training conference, and will do so again. There is in his approach an implicit recognition that the Institute hosts the pre-eminent forum for discussion and examination of licensing matters. This is indeed a timely compliment in this, our special anniversary year. The IoL is not the only licensing forum but it is certainly unique in its cross-party membership. This wide and varied membership is reflected in our chairmen over the past twenty years, and it is with great pleasure that this issue of the *Journal* includes the personal reflections of our previous Chair, Jon Collins. It will be noted that in the last issue Philip Kolvin QC gave his reflections on his "love affair with the IoL" (a theme added to by Jane Blade in the IoL pages of the current issue); and the November issue will contain the reflections of our current Chair.

It is to be hoped that our varied membership will continue to inform and enliven the review and reform agenda. On 25 May, 2016 the House of Lords appointed a committee to consider and report on the Licensing Act 2003. The committee has been appointed and met in private to consider the terms and questions for the call for evidence. The first session for oral evidence is 5 July, 2016. A report is expected in March 2017. I've no doubt that many of us will want to respond to the House of Lord's review of the 2003 Act, with multiplicity of views and opinions that we regularly exchange.

Finally turning to debate in print, Gary Grant opined in the last but one *Journal* that "local communities should have their say in SEV licensing, but a fairer system needs to be introduced to better protect the legitimate rights of operators".[2] In the current issue Ranjit Bhose QC and Josef Cannon respond and invite us to "shed no tears for your friendly, local SEV operator". We are extremely fortunate as an organization that we include so many people willing to share, exchange and challenge their views freely and openly. Long may the debates, discussions, disagreements and assents continue.

1 See (2015) 13 JoL, pages 21 – 22.

2 See Gary Grant, Opinion, *Kafka and sex licensing*, (2015) 13 JoL, pages 36 – 37.

A practical approach to evidence and decision making

Good evidence is essential for the authorities to evaluate when assessing a licence submission, and **Leo Charalambides** argues that unless the applicant has addressed every aspect of the risk-assessment required by guidance, then they will not be able to look favourably on the application

It seems that one of the most common concerns of all parties involved in licensing is the question of what constitutes "good evidence"; the quantity, quality and relevance of "evidence" is a constant, reoccurring and seemingly inconclusive discussion. In this paper I hope to present some practical answers to this debate.

Some preliminaries

Firstly, the licensing objectives: an evaluation of "good evidence" cannot be made without a proper appreciation of the full extent and scope of the four licensing objectives - these remain "a paramount consideration at all times".[1]

It occurs to me that all too often applications, representations, discussions at hearings and decisions themselves demonstrate an incomplete appreciation of the extent and scope of the four licensing objectives. I do not intend to examine the extent and scope of the four licensing objectives directly within this article. Instead, I wish to highlight their self-evident importance and encourage those of us that work within licensing to familiarise ourselves not only with new and recent developments but also refresh our knowledge and understanding of the fundamentals. I will however highlight a couple of considerations, which in my view are key.

The extent and scope of the four licensing objectives are not static but are to be understood in the context of the current legislative arrangements. In my view the *re-balancing* of the Licensing Act 2003 by the Police Reform and Social Responsibility Act 2011 represents a watershed in the approach that we bring to any examination and practical application of the four licensing objectives. The 2011 Act signals a significant shift in the attitude of Parliament and consequently upon the aims and objects of the 2003 Act. This shift – the re-balancing – is demonstrated by paragraph 1.5 of the s 182 Guidance:

> *… the legislation also supports a number of other key aims and purposes. These are vitally important and should be principal aims for everyone involved in licensing work. They include:*
>
> - *Protecting the public and local residents from crime, anti-social behavior and noise nuisance caused by irresponsible licensed premises;*
> - *Giving the police and licensing authorities the powers they need to effectively manage and police the night-time economy and take action against those premises that are causing problems;*
> - *Recognising the important role which pubs and other licensed premises play in our local communities by minimizing the regulatory burden on business, encouraging innovation and supporting responsible 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; and*
> - *Encouraging greater community involvement in licensing decisions and giving local residents the opportunity to have their say regarding licensing decisions that may impact upon them.*

The practical effect of the re-balancing of the 2003 Act was to highlight and promote the wider public interest; it is this wider public interest concern that ought, in my view, to guide an examination of the parameters and application of the four licensing objectives. This, in turn, informs our understanding of good evidence.

Finally, other legislation (eg, The Health Act 2005) and wider policy may also have an impact on our understanding of the objectives. Most recently this has occurred following on the *Safeguarding Agenda* that has greatly impacted on our understanding and application of the "promotion of the protection of children from harm" objective.

Further, we must have a proper regard to the nature of the

1 Section 182 Guidance, para 1.4.

decision making under the 2003 Act. In *Taylor v Manchester* the court recognised that "evidence of the actual or potential impact of the licence on individuals may be relevant to the various strands of public interests involved".[2] Thinking on the licensing objectives focuses upon the meaning of "crime and disorder", "public safety", "public nuisance" and the "protection of children from harm"; we often fail to properly appreciate or give weight to the key concepts of "promotion" or of "promoting the prevention".[3] We overlook the test for relevant representations which is concerned with the "likely effect of the grant … on the promotion of the licensing objectives".[4] These likely effects are a focus upon the actual or potential impacts of the grant of the premises licence and not just of the licensable activities.

Essentially the Licensing Act 2003 seeks as far as possible to identify risks. Such risks should not be limited to the eventuality of such a risk but the probability of an event happening and the likely impact of this event. Good evidence is thus not limited to actual impacts but also to the probability of likely impacts – this requires an evaluative approach.

My third preliminary point is concerned with the evaluative approach or evaluative judgement. In this context I will first say that our traditional adversarial approach may not always be helpful. In *R (on the application of the Chief Constable of Nottinghamshire Police) v Nottingham Magistrates' Court*) the court noted that the District Judge "would also have to bear in mind that the decision in relation to the appeal as to the licence, or as to conditions in the licence, is not a decision similar to that which he would be accustomed to resolving in the course of ordinary litigation. There is no controversy between the parties, no decision in favour of one or other of them, but the decision is made for the public benefit one way or the other in order to achieve the statutory objectives".[5] This applies with equal force to the local councillors of the licensing sub-committees.

The evaluative nature of decision making and the implicit assessment of risks has been accepted by the Court of Appeal in *Hope & Glory* where the test is simply formulated: "Licensing decisions … involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. … [this] is essentially a matter of judgement rather than a matter of pure fact".[6] Here, too, we find a signpost to risk assessment, evaluative judgement and an acceptance that it is not just "pure fact" but rather actual and potential risks.

My final preliminary point is to consider the role of discussion and of inquisition. We are familiar with the assertion that licensing is "a discussion led by the authority and cross-examination shall not be permitted unless the authority considers that cross-examination is required"[7] and also that "Members of the authority may ask any question of any party or other persons appearing at the hearing" [8] (reg 17). This is a wide remit that is rarely exercised to its fullest extent. In *R. (on the application of Murco Petroleum Ltd.) v. Bristol City Council* the court held: "There is no need for me to draw the parameters to the information the sub-committee could ask about. Relevance and materiality are obviously central considerations."[9] (Emphasis added.)

The planning context provides useful guidance on the nature of our discussions at licensing sub-committee hearings in our town halls. In the case of *Dyason v Secretary of State for the Environment and Chiltern District Council* Lord Justice Pill observed: "The danger is that the 'more relaxed' atmosphere could lead not to a 'full and fair' hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector."[10] Effective questioning by local councillors is, in my view, one of the most effective ways of elucidating and scrutinising evidence.

Source of evidence

It seems to me that the most important and useful source of evidence is perhaps one that is the most often overlooked and under-appreciated – the applicant.

The s 182 Guidance at paragraphs 8.33 – 8.39 gives advice in respect of *Steps to promote the licensing objectives*. These paragraphs merit close attention and are reproduced here in full:

> *8.33 In completing an operating schedule, applicants are expected to have regard to the statement of licensing policy for their area. They must also be aware of the expectations of the licensing authority and the responsible authorities as to the steps that are appropriate for the promotion of the licensing objectives, and to demonstrate knowledge of their local area when describing the steps they propose to take to promote the licensing objectives. Licensing*

2 [2012] EWHC 3467 (Admin), para [23].

3 Licensing Act 2003, s 4(1) and s 52(3).

4 Licensing Act 2003, s 18(6)(a), s 35(50)(a) and s 72(7)(a).

5 [2009] EWHC 3182 (Admin), para [38].

6 *R (on the application of Hope & Glory Public House Limited) v The City of Westminster Magistrates' Court & Ors* [2011] EWCA Civ 31, para [42].

7 Licensing Act (Hearings) Regulations 2005, reg 23.

8 Licensing Act (Hearings) Regulations 2005, reg 17.

9 [2010] EWHC 1992 (Admin), para [31].

10 (1998) 75 P & CR.

authorities and responsible authorities are expected to publish information about what is meant by the promotion of the licensing objectives and to ensure that applicants can readily access advice about these matters. However, applicants are also expected to undertake their own enquiries about the area in which the premises are situated to inform the content of the application.

8.34 Applicants are, in particular, expected to obtain sufficient information to enable them to demonstrate, when setting out the steps they propose to take to promote the licensing objectives, that they understand:

- *the layout of the local area and physical environment including crime and disorder hotspots, proximity to residential premises and proximity to areas where children may congregate;*
- *any risk posed to the local area by the applicants' proposed licensable activities; and*
- *any local initiatives (for example, local crime reduction initiatives or voluntary schemes including local taxi-marshalling schemes, street pastors and other schemes) which may help to mitigate potential risks.*

8.35 Applicants are expected to include positive proposals in their application on how they will manage any potential risks. Where specific policies apply in the area (for example, a cumulative impact policy), applicants are also expected to demonstrate an understanding of how the policy impacts on their application; any measures they will take to mitigate the impact; and why they consider the application should be an exception to the policy.

8.36 It is expected that enquiries about the locality will assist applicants when determining the steps that are appropriate for the promotion of the licensing objectives. For example, premises with close proximity to residential premises should consider what effect this will have on their smoking, noise management and dispersal policies to ensure the promotion of the public nuisance objective. Applicants must consider all factors which may be relevant to the promotion of the licensing objectives, and where there are no known concerns, acknowledge this in their application.

8.37 The majority of information which applicants will require should be available in the licensing policy statement in the area. Other publicly available sources which may be of use to applicants include:

- *the Crime Mapping website;*
- *Neighbourhood Statistics websites;*
- *websites or publications by local responsible authorities;*
- *websites or publications by local voluntary schemes and initiatives; and*
- *on-line mapping tools.*

8.38 While applicants are not required to seek the views of responsible authorities before formally submitting their application, they may find them to be a useful source of expert advice on local issues that should be taken into consideration when making an application. Licensing authorities may wish to encourage co-operation between applicants, responsible authorities and, where relevant, local residents and businesses before applications are submitted in order to minimise the scope for disputes to arise.

8.39 Applicants are expected to provide licensing authorities with sufficient information in this section to determine the extent to which their proposed steps are appropriate to promote the licensing objectives in the local area. Applications must not be based on providing a set of standard conditions to promote the licensing objectives and applicants are expected to make it clear why the steps they are proposing are appropriate for the premises.

It will be observed that the s 182 Guidance here sets out some very clear and emphatic expectations of the applicant. These paragraphs provide key pointers to the sources of evidence that are relevant to a determination of "what is to be regarded as reasonably acceptable in the particular location" – the *Hope & Glory* test. It is expected that an applicant ought to be able to provide answers to these paragraphs. Additionally, an established operator, responsible authorities, local councillors and local people should also be able to provide evidence within the guidelines established by these paragraphs in the s 182 Guidance.

Most importantly, it seems to me that paragraphs 8.33 – 8.39 of the s 182 Guidance answer the question posed in *Murco*: namely, what are the parameters to the information that the sub-committee could ask about? Without setting any limit, the s 182 Guidance provides a framework to what is relevant and material within the licensing regime. My recent lectures and training seminars focus upon the importance of these paragraphs to councillors: the framework is, in my view, of the highest value in securing good evidence.

Good evidence

In this section of the article I will consider in sequence the key stages that ought to be followed by the licensing sub-committee to secure good evidence for the execution of its evaluative judgment when it retires to reach a decision.

The operation of the premises including but not limited to the

proposed licensable activities

Firstly and fundamentally, the applicant or the existing operator should identify how the licensable activities will be used or are being used within the full context of the use and operation of the premises. The impact of ballroom dancing is different to that of a rave. A gastro-pub has a different impact to that of a karaoke bar. It is not, in my view, correct for the likely effects of the grant of the premises licence to be determined solely by the licensable activities in the abstract: they must be considered within the actual and practical use. Such use may vary throughout different times of the year, days of the week, and across times of the day. Evidence of the full use and operation of the premises is best obtained from the applicant or (in the case of variation or a review) the existing operator.

It is common and uncontroversial to have regard to the actual and practical use of a premises to determine the likely effects of the grant of a premises licence. The most common example is that of restaurants and other food-led venues. Food, save for late night refreshment, is not a licensable activity and yet it is of paramount importance in assessing the likely effects of the grant of a premises licence authorising the sale of alcohol.

An operator needs to be fully aware of the full use and operation of premises so as to fully and effectively gauge his / her own risk posed to the local area by his / her application (see para 8.34, s 182 Guidance). It is the operator that is able to provide the initial (if not the best) evidence of his / her actual operation in full. It is the impact that will be the subject of argument. Likewise local councillors must have a clear understanding of the full use and operation of a premises as the foundation of their own evaluation. Direct questions to the operator provide good evidence of the use of the premises and also the consideration that an operator has given as to the risks associate with that operation.

The controlling mind

Secondly, who is in charge of the premises? It seems to me crucial to identify the person or persons that will have overall control of the premises and are responsible for their use, operation and management.[11] It seems to me that the role and designation of the Designated Premises Supervisor (DPS) is exulted in our considerations far beyond its merits. It is often overlooked that the DPS remains no more than an employee, subject to his employer. The s 182 Guidance acknowledges that "the mere removal of the designated premises supervisor may be an inadequate response to the problems presented".[12] The practice and policy of a premises is largely determined by the person / s in control of the premises; it is their understanding (along with that of the DPS or other relevant staff) that is crucial. I would also urge councillors to ask questions of applicant directly.

Physical characteristics of the premises

Third, what are the physical characteristics of the premises? This is an obvious but often overlooked source of good evidence. The starting point must always be the proposed or actual use of the premises. Mindful of this use we turn to the premises itself, its entrances and exits, fire escapes, its windows and doors, outside areas (waiting, smoking, car parking, garden areas and so on), number of levels, capacity (not limited to fire safety but also practical capacity such as covers or seats), the layout of the building (lobby areas, acoustic lobby, double doors, window glazing and so on), the configuration of the premise (location of tables and chairs, seating areas, entertainment areas), the location of plants, machinery and other facilities, the location of cloak rooms, first aid rooms, storage and so on.

By way of trite example, a premises with an outdoor area will have a different impact to one without. Furthermore, we need to be aware of the temporal effect: a premises without air conditioning will have one impact in the winter and quite another in summer. Here again it is the applicant that one turns to. He / she should have the full specification of his / her premises and have considered the physicality of the premises in relation to the proposed and actual use. It takes no great leap to accept that the nature of the premises will have an impact upon the likely effects. It thus follows that a careful examination of the premises, plans, photos, expert reports (eg, acoustic reports) and direct evidence by the operator is a valuable source of good evidence.

Vicinity

Fourthly, quite simply what other premises neighbour the premises, and to what use are these premises put? And, crucially, what are the likely effects of the proposed actual use of the licensed premises in the context of its immediate vicinity? The impact of a 24-hour off-licence situated next door to an all-night snooker hall may be different to one located next to a residential block. Similarly, the impacts of licensed premises, for example, offering late night refreshment, opposite a bus stop, taxi stand or residential premises will vary.

Such impacts ought not to be considered just in the context of the night-time economy but throughout the day, and can include the role of street furniture, open spaces and other operations and, in particular, entertainment facilities (such as betting shops, amusement arcades, sports clubs and other recreational facilities) as well as social and civic

11 *Retrobars Wales Ltd v Bridgend Borough Council* [2012] EWHC 3834 (Admin).

12 Section 182 Guidance, para 11.22.

uses (transport hubs, medical and social services and other civic uses). Finally, the s 182 Guidance reminds us to have particular regards to residential premises and areas where children may congregate (para 8.34).

In this way the evidential picture builds from the use of the premises, the people responsible for the operation, the premises itself and the vicinity in which it is located – all these factors address the Court of Appeal test of what is to be regarded as reasonably acceptable in the particular location.

Locality

Fifthly, there may be circumstances where the consideration of the vicinity invites a consideration of the wider locality. This is to be assessed on a case-by-case basis, dependent on the particulars of the location. For example, a premises in a rural setting may require wider geographical consideration than one located in a dense commercial urban environment. Hereto, the situation of a premises within the context of a local high street, costal promenade etc may invite wider considerations.

Here, too, the applicant ought, in my view, to be the primary source of information. An appreciation of the proper wider locality and its general nature is significant. It allows for a proper assessment of the likely effects.

Experience suggests that the residential assertion that the area is exclusively or primarily residential is rarely an accurate assessment of the true position.

I am of the view that this structured approach of looking at operation, premises, vicinity and locality ought to form the preliminary questioning of all parties, applicant, responsible authorities and other persons so as to place subsequent "impact" views and arguments in their proper context.

Local initiatives

The most important of local initiatives is the consideration of any particular strategies and policies contained in the local statement of licensing policies. Statements of licensing policies are increasingly more detailed and have greater regard to licensing strategies and not just cumulative impact policies. It is expected that an applicant has regard to these and addresses them in his / her application. For the applicant to demonstrate an awareness of all local initiatives, including local crime reduction initiatives, and voluntary schemes such as local taxi-marshalling, street pastors, super strength etc, is a demonstration that the applicant has regard not just to the physical environment but also the policy environment of local licensing arrangements.

It also seems to me that the local resources and services might provide useful information contributing to a clear locality profile. Police provision is routinely considered. The provision of emergency medicine and ambulances is increasingly referred to. But this is an incomplete picture. Chief amongst these further concerns ought to be the transport profile: the provision of taxi ranks and services, night bus services, and in London the role of the night tube. Other matters will arise according to the nature of the locality.

The level of due diligence of an applicant's risk assessment based upon a proper examination of the relevant facts of a locality provides one way of assessing how the diligent applicant will promote the licensing objectives in practice. Paragraph 8.36 of the s 182 Guidance is explicit in recognising that enquires about the locality will assist the applicant to determine the steps that are appropriate for the promotion of the licensing objectives. These steps are set out in the applicant's operating schedule.

Operating schedule

Understandably, many operating schedules will seem to be set out in fairly standard and expected terms. However, the clear invitation is to use the operating schedule to demonstrate that the risks associated with the proposed use and operation of the premises in the context of its full use and also location can be mitigated by appropriate conditions. Such steps may include effects of smoking, noise management and dispersal (see para 8.36) - matters all associated with the consequences of the operation and not just with licensable activities.

Further, rather than a mere list of proposed conditions, "applicants are expected to make it clear why the steps they are proposing are appropriate for the premises"[13] and "where there are no known concerns to acknowledge this in their application".[14] This approach requires not just a list of "standard" and expected conditions but a demonstration that the applicant has considered the application in the context of the locality and directly addressed this in the operating schedule.

Conclusion

It seems to me that a proper discussion, firstly, with the applicant concerning the use of the premises, the extent of licensable activities, the premises, the vicinity, the locality physically and policy framework is a sure way to secure the evidential basis upon which to address the likely risks or impacts of a particular application of premises. It seems to me right that this conversation first happens with the applicant or operator for it is the applicant or operator that is strongly urged to risk assess the proposed operation within the fullest

13 Section 182 Guidance, para 8.39.

14 Section 182 Guidance, para 8.36.

understanding of the particular locality. It seems to me that licensing sub-committees ought to be very wary of applicants that fail to demonstrate their engagement with the guidance contained in paragraphs 8.33 to 8.39. These paragraphs not only set out the expectations but also provide guidance on relevant resources to assist the applicant - sources of expert advice and publically available resources.[15]

It is no criticism to state that responsible authorities and other persons engage the licensing regime with professional and personal agendas. It is no criticism to state that the police are keen to promote the prevention of crime and disorder but are also mindful of their wider social responsibilities. The potential tension between the role of a proper, wider agenda and focus upon the promotion of the licensing objectives is demonstrated by the care with which Public Health England has developed policies, training and on-going support to public health professionals for effective participation in the licensing regime. It seems to me that local councillors ought to adopt the framework suggested by paragraphs 8.33 – 8.39 equally with responsible authorities and other persons. Have the responsible authorities and other persons properly assessed the nature of operation? Has there been an assessment of the premises, the vicinity and the locality? Are the responsible authorities and other persons aware of the local initiatives? Are the representations thus generally made out or do they properly address the likely effect and impacts of this particular application, at this particular time (ie, the date of determination), at this particular location?

Focused and properly considered applications ought to be matched by focused and considered representations. Finally, this approach to evidence is also useful for reviews. What is the actual use and operation of the premises? Who is responsible for its operation? The nature of the premises, vicinity and locality etc. Then, in the context of this evidential foundation, the impacts, any concerns and suitable remedies can be fully explored.

Good evidence has always been available to licensing sub-committees. It may be summed up with the simple catch phrase: Say what you see.

Leo Charalambides, FIoL

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15 Section 182 Guidance, paras 8.73 & 8.38.

Events Calendar

September 2016

8th	London Region Training Day, Camden
TBC	Scrap Metal Licensing, South West
TBC	Scrap Metal Licensing, London
16th	Scrap Metal Licensing, Matlock
19th	Licensing Hearings & Safeguarding, Stoke-on-Trent
20th	Licensing Hearings & Safeguarding, Taunton
21st	Licensing Hearings & Safeguarding, London
22nd	Licensing Hearings & Safeguarding, Ely
23rd	Licensing Hearings & Safeguarding, York
27th	Professional Licensing Practitioners Qualification - Licensing Act 2003, London
28th	Professional Licensing Practitioners Qualification - Sex Establishments, Street Trading, Scrap Metal Dealers

October 2016

5th	Professional Licensing Practitioners Qualification - Gambling Act 2005, London

October 2016 *cont.*

6th	Professional Licensing Practitioners Qualification - Taxis, London
12th	Wales Regional Training Day, location TBC
14th	Now & Next, Huntingdon

November 2016

16th-18th	National Training Conference, Stratford-upon-Avon
24th	Now & Next, London

December 2016

1st	London Region Training Day, Camden
9th	South West Region Training Day, Bath
15th	Licensing: Government Strategy & Future Changes, London
TBC	Safeguarding , Manchester and Bristol

January 2017

26th	Safeguarding, London

Changes to immigration law will affect licence approval system

A new immigration act is set to make it illegal to grant licences to illegal immigrants, and the enforcement costs for local authorities are likely to lead to higher taxi licence fees across the board, says **James Button**

In a way it has been a quiet period for taxi licensing, and you might breathe a sigh of relief. "Nothing to see here, move along" might seem to be the suggestion. However, there is certainly a very important change coming over the horizon, and by the time you read this, it should be on the statute books and we might have an implementation date.

The Immigration Bill currently before Parliament will introduce new sections to taxi legislation relating to the right to work (currently contained in Clause 37 and Schedule 5, but this may change before the act is finally passed). Only persons with a right to remain in the UK and work in the UK can be granted and then retain either a driver's licence (both hackney and private hire) or a private hire operator's licence.

The bill contains five sets of additional sections, because not only are there alterations to the Local Government (Miscellaneous Provisions) Act 1976 for England and Wales, there are similar alterations for the legislation across the rest of the UK: to the London Hackney Carriages Act 1843, Metropolitan Public Carriage Act 1869 and the Private Hire Vehicles (London) Act 1998 in respect of London; (unusually, as this act is often overlooked) to the Plymouth City Council Act 1975 in respect of Plymouth; to the Civic Government (Scotland) Act 1982 in respect of Scotland; and to the Road Traffic Offenders (Northern Ireland) Order 1996 and the Taxis Act (Northern Ireland) 2008 in respect of Northern Ireland.

As the impact of the provisions are identical, this article will concentrate on the England and Wales provisions (words in italics indicate the new legislation).

Disqualified persons

New sections 79A and 79B will be inserted into LG(MP)A 1976, which will detail those who are disqualified from holding any hackney carriage drivers or private hire licence by reason of immigration status, and explain the meanings of immigration offences and immigration penalties.

79A Persons disqualified by reason of immigration status

(1) For the purposes of this Part of this Act a person is disqualified by reason of the person's immigration status from carrying on a licensable activity if the person is subject to immigration control and—

(a) the person has not been granted leave to enter or remain in the United Kingdom; or

(b) the person's leave to enter or remain in the United Kingdom—

(i) is invalid;

(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise); or

(iii) is subject to a condition preventing the person from carrying on the licensable activity.

(2) Where a person is on immigration bail within the meaning of Part 1 of Schedule 10 to the Immigration Act 2016—

(a) the person is to be treated for the purposes of this Part of this Act as if the person had been granted leave to enter the United Kingdom; but

(b) any condition as to the person's work in the United Kingdom to which the person's immigration bail is subject is to be treated for those purposes as a condition of leave.

(3) For the purposes of this section a person is subject to immigration control if under the Immigration Act 1971 the person requires leave to enter or remain in the United Kingdom.

(4) For the purposes of this section a person carries on a licensable activity if the person—

(a) drives a private hire vehicle;

(b) operates a private hire vehicle; or

(c) drives a hackney carriage.

Section 79B will define what is meant by "immigration offence" and "immigration penalty".

All new applications (and renewals) for drivers' licences will be subject to this as a consequence of a new subsection introduced to s 51. This will mean that in addition to being a "fit and proper person" an applicant for a driver's licence must not be disqualified from holding a licence as a result of their immigration status. Section 51 (1) will read (*new words in italics*):

> **51 Licensing of drivers of private hire vehicles**
> (1) Subject to the provisions of this Part of this Act, a district council shall, on the receipt of an application from any person for the grant to that person of a licence to drive private hire vehicles, grant to that person a driver's licence:
> Provided that a district council shall not grant a licence—
> (a) unless they are satisfied —
> (i) that the applicant is a fit and proper person to hold a driver's licence; and
> *(ii) that the applicant is not disqualified by reason of the applicant's immigration status from driving a private hire vehicle; or*
> (b) to any person who has not for at least twelve months been authorised to drive a motor car, or is not at the date of the application for a driver's licence so authorised.

In addition, the new s 51(1ZA) will require the local authority to have regard to Guidance issued by the Secretary of State (presumably for the Home Office, but that is not made clear in the Bill).

> *(1ZA) In determining for the purposes of subsection (1) whether an applicant is disqualified by reason of the applicant's immigration status from driving a private hire vehicle, a district council must have regard to any guidance issued by the Secretary of State.*

There are then identical provisions in respect of applicants for private hire operators licences under the proposed s 55(1)(b) and s 55(1A).

Driver's licence duration

A new s 53A will be inserted into LG(MP)A 1976 covering applicants for drivers' licences who only have a limited time to remain in the UK. This will prohibit the local authority from granting a licence beyond the period of permission to remain, and it can be for a shorter period.

> ***53A Drivers' licences for persons subject to immigration control***
> *(1) Subsection (2) applies if—*
> *(a) a licence within section 53(1)(a) or (b) is to be granted to a person who has been granted leave to enter or remain in the United Kingdom for a limited period ("the leave period");*
> *(b) the person's leave has not been extended by virtue of section 3C of the Immigration Act 1971 (continuation of leave pending variation decision); and*
> *(c) apart from subsection (2), the period for which the licence would have been in force would have ended after the end of the leave period.*
> *(2) The district council which grants the licence must specify a period in the licence as the period for which it remains in force; and that period must end at or before the end of the leave period.*

If the applicant has an extended leave to remain, the local authority cannot grant a licence for more than six months, but again it can be for a shorter period – s 53A(3) & (4).

Operator's licence duration

Identical provisions in relation to operators' licences will be contained in a new s 55ZA covering applicants for operators' licences who only have a limited time to remain in the UK. As with drivers, local authorities will be unable to grant a licence that would continue beyond that limit of leave to remain in the UK, but the authority can also grant a licence for a shorter period under s 55ZA(2). The same provisions are repeated in relation to extended leave periods under s 55ZA(4).

Lapse of licence

For both drivers and operators, if the person loses the right to remain in the UK during the currency of a licence, the licence ceases to have effect. This is covered by s 53A(5) for private hire drivers and s 53A(6) for hackney carriage drivers, and s 55ZA(5) for operators.

Return of licence

In relation to both drivers and operators, the licence (and badge for drivers) must be returned within seven days of the expiry of the licence – s 53A(7) (drivers) and s 55ZA(7) (operators). The same applies where the licence ceases to have effect due to the loss of the right to remain in the UK, and the licences must again be returned within seven days – s 53A(8) (drivers) and s 55ZA(8) (operators).

Offences

In any case where the licence has either ended or ceases to have effect, failure to surrender it within seven days is an offence under s 53A(9) (drivers) and s 55ZA(8) (operators). In both cases the maximum penalty on summary conviction is a fine not exceeding Level 3 on the standard scale, and there is also provision for a continuing daily penalty of £10 for each day after conviction. Those fine levels can be altered by the Secretary of State under s 53A(10) (drivers) and s 55ZA(9) (operators).

Conclusions

It remains to be seen how this will work in practice. To a large extent this will depend on the requirements contained within the Guidance, and how clearly that Guidance is worded.

What is clear is that it will require more work on the part of local authority staff to ascertain the ability of the applicant to either be granted or retain a licence. As those costs would appear to be associated with "issue and administration", that additional expenditure can be recovered via drivers' and operators' licence fees under ss 53 and 70 of the 1976 Act. As those additional costs must be levied across all licensees (it would not be lawful to charge an additional amount to those who have to prove their immigration status), this will lead to an increase in licence fees for all drivers and operators.

It is also peculiar that there are no similar requirements placed on applicants for proprietors' licences. This sends an unfortunate message that the Government has no concerns about illegal immigrants owning hackney carriages or private hire vehicles. As that is highly unlikely to be the case, it would be simple to extend these provisions to cover proprietors under s 37 of the Town Police Clauses Act 1847 in respect of hackney carriages and s 48 of the 1976 Act in respect of private hire vehicles.

James Button, CIoL
Principal, James Button and Co

The life of the lap-dancing operator - shed no tears

Contrary to what a previous *Journal* author has claimed, lap-dancing operations are not discriminated against unfairly but rather, argue **Ranjit Bhose QC** and **Josef Cannon**, they are treated just as is any other potentially harmful activity

In his article *Kafka and Sex Licensing*, Gary Grant[1] argued that the statutory scheme of annual sex entertainment venue (SEV) licensing is discriminatory, Kafka-esque, grossly unfair and in need of urgent reform. However, a closer inspection of the scheme and of the particular features of lap-dancing's place in society suggests otherwise. The law may not be perfect (which law is?) but your SEV operator is hardly a modern-day Josef K, warranting human rights campaigns fronted by Joanna Lumley or urgent ministerial statements in Parliament. To the contrary, your SEV operator goes into the game by choice, knowing the risks, to make a buck. Sympathy should be in short supply.

Grant's premise is that the present scheme allows for the livelihoods of SEV operators to be ripped from beneath them even though they have "done nothing wrong and harmed nobody"; that those doing the ripping may have been "appointed by the person leading the campaign to close his business down"; that the initial complaints to an annual renewal are from persons unknown and unidentified; and that there is no right to appeal to the magistrates by way of re-hearing. We address these points in turn.

Harm

Lap-dancing venues are not harmless. Grant says – with some justification – that they tend not to give rise to problems of crime, disorder and public nuisance, all types of harm well-known to licensing practitioners. But these are by no means the only types of harm. Government specifically recognised this, when holding that the approach of the Licensing Act 2003 (LA03) to harm – identifying the four licensing objectives to which all decisions must be directed – was insufficient to address the particular issues posed by lap-dancing. The Ministerial Foreword to the Home Office's *Sexual Entertainment Venues: Guidance for England and Wales* says this:

> *In September 2008, the previous Home Secretary announced the Government's intention to give local people greater say over the number and location of lap-dancing clubs in their area. This followed a consultation with local authorities which highlighted concerns that existing legislation did not give communities sufficient powers to control where lap-dancing clubs were established.*
> *In order to address these concerns, section 27 of the Policing and Crime Act 2009 reclassifies lap-dancing clubs as sexual entertainment venues and gives local authorities in England and Wales the power to regulate such venues as sex establishments under Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982.*
> *These new measures, which take effect on 6th April 2010 in England and on 8th May in Wales, will, if adopted by local authorities, give local people a greater say over where and how many lap-dancing clubs open and operate in their neighbourhoods.*
> *These are important reforms to further empower local communities…*

As such, the shift of regulation of SEVs from LA03 to the 1982 Act resulted from the recognition that while SEVs tended not to give rise to LA03 "harm", nonetheless they gave rise to other concerns which were not adequately addressed under that act. SEVs can cause harm to various interests: the most obvious is children. Very few would suggest that such a venue would be appropriate by a school even if (the usual argument) they are not open during school hours. Religious buildings, too, have a reasonable expectation that an SEV will not pop up next door. The same is true of residential areas. In each case, the particular location of the SEV has the potential to cause harm. Harm includes inappropriateness of location.

It is no answer to say, as Grant does, that SEVs provide lawful entertainment to many, and are popular. They only provide a lawful means of entertainment when situated where no harm is threatened or caused – hence the task of the licensing sub-committee in each case. If their particular location or manner of operation threatens or leads to harm, the application or renewal should be refused and the activity will not be lawful. Grant's main comparators – Morris-dancing, opera and modern art – are unregulated precisely because they do not cause or threaten harm (although fully

1 (2015) 13 JoL, p37-38

decked-out Morris-men bearing down on you while dancing to an accordion is never a pretty sight). The very reason lap-dancing is regulated at all is because it has the potential to cause harm in this extended sense.

Decision-makers and the right to appeal

In *The Trial* the entire court process is obscure, including the identity of the judges and on whose behalf they sit in judgment. In England and Wales, SEV licensing decisions are made by elected members of local authorities. Their names are public, circulated in advance. Even if appointed to the licensing committee by their party leader they are bound by the Code of Conduct, protecting against bias. Any appearance of bias or predetermination is challengeable by way of judicial review (see, for example, the failed attempt in *R (Thompson)* v *Oxford CC* [2013] EWHC 1819 (Admin)). An appearance of bias alone is sufficient to found a successful challenge – see (in the context of councillors) *Condron v NAW* [2007] LGR 87. The position is no different to any other licensing or planning decision. Only the most jaundiced would argue that councillors do not seek to undertake their functions, to the best of their ability, fairly.

In any event, Grant's critique misses the point of Kafka's tale – that an *arbitrary* exercise of judicial or quasi-judicial power is a bad thing. The protection under the 1982 Act against arbitrary decision-making is the availability of judicial review – the casting of an independent eye over the impugned decision, not for its substantive correctness but for its propriety. That is a crucial safeguard, making the statutory scheme Article 6 ECHR compliant (and no operator has ever even tried to argue to the contrary). This was not available to poor Josef K – who would have *won* on JR principles!

Grant's complaint is that locally-elected members may be able to decide where in their administrative area it might be inappropriate to have an SEV, having regard to the character of the locality (for example). He is right: *that is the very point*. But they must decide this within the usual bounds of public law decision-making, avoiding acting arbitrarily or capriciously, or with even the appearance of bias. If they stray, judicial review beckons.

As Sales J said in *R (KVP Ent Ltd) v South Bucks DC* [2013] EWHC 926 (Admin), when speaking of decisions about the character of a locality:

> *12 …a local authority has 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. That imports a significant evaluative power for the local authority at two levels: first, in assessing whether the grant or renewal of the licence would be "inappropriate" — which is a very broad and general concept; and, secondly, in assessing the character of the 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.*

The point is that the discretion is broad, and exercised by those with knowledge of the important factors – what happens where in the locality, what that character is. If the decision-makers stray, the aggrieved operator has his High Court remedy. This was expressly recognised in KVP:

> *15 … the inference from this is that Parliament plainly intended to provide that the considerations inherent in paragraph 12(3)(d) were considerations for the local authority's own evaluative judgment, subject only to the supervisory jurisdiction of this court.*

The absence of a right of appeal by way of rehearing is intentional – because the considerations under sub-paragraphs 12(3)(c) and (d) to Schedule 3 to the 1982 Act are *intended* to be quintessentially "local" decisions of a broad evaluative nature. They are self-evidently apt for the local decision-maker. It is difficult to see why an appeal as of right (as under LA03) to un-elected, unaccountable magistrates, would be any more fair. It would be no more than a "second bite of the cherry" at persuading a different decision-maker to come to a different decision on that broad evaluative judgment.

Anonymity

An objector to the grant or renewal of an SEV licence may do so in writing. The "general terms" of that objection must be given to the operator in advance and they have a statutory right to address the sub-committee before any decision is made. The objector is not, however, given a right to be heard, which is both a prejudice to them and a benefit to the operator. True it is that the complainant's identity is not passed to the operator, but anonymous unattributed hearsay is frequently relied upon in all courts, extensively so in cases of injunctions against anti-social behaviour and harassment – serious cases involving serious rights and responsibilities. Not only are courts and sub-committees well-versed in treating such hearsay evidence with caution, but rare is the case where an SEV application results in objections which are not spoken to by a ward councillor or where objectors are not happy for their identities to be disclosed. Grant's complaint against anonymity is overblown.

Discriminatory?

Running an SEV is potentially highly lucrative. If it wasn't, they wouldn't exist. Cristal is not sold cheap and the

entertainment is cost-neutral, with dancers usually paying the operator a cut of their lace-gartered earnings, and music invariably being pre-recorded only.

As any entrepreneur will tell you, high reward and high risk tend to be connected: you weigh up the pros and cons of a high-risk venture and if the potential rewards are sufficiently high, decide whether to take a punt. Running an SEV is no different. It is high-risk because it is tightly regulated; it is tightly regulated because of its high potential to cause harm. Central to the tightness of this regulation is the system of annual licences with no presumption of renewal. Authorities are specifically entitled – indeed obliged – to look again, year on year. Even where the character of the locality itself has not changed from one year to the next, it may be lawful to refuse to renew. In *R (Bean Leisure Trading A Ltd) v Leeds City Council* [2014 EWHC 878 (Admin), the change was not the locality but the publication of a new SEV policy which sought to clear SEVs from its historic centre. This is not discrimination. It is an entirely justifiable exercise in local democracy.

Conclusion

So, we say, do not shed tears for your friendly, local SEV operator. He has taken his chances with his eyes open. And if the sad day does come when his application to renew is refused, still shed no tears: with the placement of a few discrete tassels, a non-licensable "Burlesque Club" is born (as was the case in Oxford). The only tears are the tears of Cristal slipping down the side of a champagne flute as the money is counted.

Ranjit Bhose QC
Barrister, Cornerstone Barristers

Josef Cannon
Barrister, Cornerstone Barristers

Legally illegal

Legislating to ban a harmful product such as poppers can be a very tricky business, and sometimes so tricky linguistically that Parliament is forced to concede defeat. **Sarah Clover** drafts an alternative bill

I have been reading a lot recently about how poppers are going to be "made legal". This is faintly annoying. Poppers were legal, are legal, and, so far as we can tell, always will be legal: their status in the legal canon remains stoically unaltered.

Poppers are on a long list of things that I knew nothing about and would probably never have had any reason to become aware of but for my job (like tin ingots, Morgan sports car brakes and great crested newts). Poppers, as the whole of the licensing world is now well aware, make a popping sound when opened, and, although marketed primarily as room odourisers, are generally inhaled by persons who really have no further interest thereafter in what the room smells like.

The precise effect of poppers on the body has become the subject of slightly obsessive interest as the Government has struggled to decide whether to include them in the proud work known as the Psychoactive Substances Act. The title alone of this magnum opus was the subject of much anxious consideration – the object of the exercise being to legislate against the products that have become colloquially known a "legal highs". The problem with this is that you can't continue to refer to said products as legal highs when you are in the very process of outlawing them. That would make them illegal legal highs, and would have upset the criminal judiciary very much.

So the challenge has been how to define, describe and ultimately ban legal highs. There was much back-patting and rolling of cigars, I am sure, when the total range of the substances under suspicion was neatly encapsulated by their universal capacity to produce a "psychoactive effect" – namely, by "stimulating or depressing a person's central nervous system, affecting the person's mental functioning or emotional state". By this definition, my husband, all three of my children and both dogs are psychoactive substances, and so, as the Government quickly found, are very many other surprising and, indeed, utterly predictable things as well. Such as alcohol. Nicotine. All drugs. Church incense. And almost the entire Yardley product range. (Other 60s perfumery items are available. Still. Probably.) Those unfortunate unwanted stimulatory taggers-on were neatly and promptly dealt with by making them exemptions, which is an elegant legislative solution, I think. Define a category of items as being illegal and then make a long list of things that are in that category and meet that definition but are not illegal. What confusion could possibly result? In fact, it would probably make life easier if we always legislated like that – nice and wide, with a long list of exemptions. How about my starter for ten:

The Bad Things Act 2016

Section 1. It shall hencetoforward and forevermore be illegal to make, sell, produce, supply, knit, lick or profit from a bad thing.

Interpretation

Section 2. For the purposes of the act, "bad thing" means anything which is primarily intended for a bad purpose and no good shall come of it.

Schedule 1

Exemptions

For the purposes of this Act, and generally, the following shall not be regarded as a Bad Thing.

(a) Candyfloss
(b) Leather
(c) Creosote
(d) Shoes for cats, etc, etc.

And already – so much to debate. So many fist fights in the draftspersons drafting rooms.

But the Government thought it was nearly there with legal highs. Psychoactive substances were out there, ready to be consumed, and they could be consumed in alarmingly passive ways: "For the purposes of this Act a person consumes a substance if the person causes or allows the substance or fumes given off by the substance to enter the person's body in any way".

It is a sobering thought to realise that we all undoubtedly "allow" fumes given off to enter our bodies and thereby satisfy the terms of this section every time we get on a crowded tube train on a warm day.

Still, all was well until a bright spark pointed out that the rather vague and all – encompassing thing that psychoactive

substances do to the mind, emotions and central nervous system was the very thing that poppers don't do. Poppers do lots of things – it is quite eye-brow raising, in fact, to learn about all the things that they can actually do (which does not, incidentally, necessarily include scenting your room). But it turns out they can achieve all of these wonders without once troubling the parts of the body that the PSA has been chosen to focus on. I suppose the Psychoactive Substances and Peripheral Vasodilatory Products Act 2016 would be too much to cope with (and, indeed, even saying it might produce a psychoactive effect on the emotions, which would be ironic and unfortunate). It would be easier to refer to the "Substances That Do Things To You Act", but I think we can all agree that my forte does not lie in legislative draftsmanship.

So, for the time being, it appears most likely that poppers will not be outlawed. This has caused a flurry of unwarranted excitement amongst those who have fallen foul of their friendly neighbourhood responsible authorities by selling them. It has to be said that the responsible authorities have largely put themselves in an emotional and nervous state in wrestling with what to do with people who are selling things which are legal but potentially subjectively undesirable. This has been the issue with Marmite for decades (nothing else remotely like it is available). The mental gymnastics required have been connived in and encouraged by the Secretary of State's s 182 and other Home Office Guidance which, while creating paroxysms of drama and nail-biting about legal highs, fail to give virtually any practical and effective steps to deal with them other than to wait patiently for the bespoke piece of legislation that will clearly outlaw them. Impatiently, the responsible authorities have brought reviews to protect society from the things that will shortly be illegal (or will they?) but aren't yet, and have tied themselves in linguistic knots trying to explain why said products are already illegal really, if you just stand back and squint a bit.

This has had some curious results, not least the recent sub-committee decision which decided to hedge all bets and confirm, categorically, for the avoidance of all doubt, that it recognised that the poppers being sold by the hapless licensee were indeed legal, and were most aptly described as "legal highs", but that the sub-committee were, nevertheless, going to take the most severe licensing action as a result because, if the poppers had not been legal highs, and if they had, instead, contained illegal drugs, then they would, beyond any shadow of a doubt, have been illegal. Which is an incontrovertible truth, but, as a colleague wryly remarked, one could make the same true pronouncement about a packet of peanuts or a Wagon Wheel. Other nuts and chocolate-flavoured covered biscuit products are available, and are also illegal if they are found to contain classified drugs.

Sarah Clover
Barrister, Kings Chambers

Greene King takes bingo ruling to the Court of Appeal

The much anticipated decision of the Upper Tier Tribunal in the litigation between the Gambling Commission and Greene King has finally been arrived at, as has a tax decision regarding games and spot the ball. **Nick Arron** reports

The Upper Tier Tribunal has delivered its decision in G*reene King v Gambling Commission,* it was handed down on 29 January 2016 by Judge Levenson.

A brief reminder of the background. Greene King operates over 1,000 licensed premises, and applied to the Gambling Commission for an operating licence to permit it to provide bingo in its pubs. The application was originally made to the Gambling Commission on 24 May 2012, and it was refused by the Commissioners at a Regulatory Panel on 22 February 2014. Greene King appealed to the First Tier Tribunal, and Judge Warren handed down his decision, allowing the appeal on 8 December 2014. This decision quashed the earlier decision of the Gambling Commission to refuse the application.

In Judge Warren's decision of 8 December 2014, he was of the opinion that the Gambling Commission was trespassing on territory which the Gambling Act 2005 assigns to licensing authorities, and he found that the Commission's purpose in refusing the applications made by Greene King was to prevent it from applying for a bingo premises licence for one of its pubs.

It is the Gambling Commission's subsequent appeal against the decision of Judge Warren sitting in the First Tier Tribunal, which was handed down on 29 January 2016 by Judge Levenson sitting in the Upper Tier Tribunal. Judge Levenson found in favour of the Gambling Commission. This decision did not consider the detail of the Greene King application, or the merits of that application; rather the Upper Tier Tribunal was asked to consider whether the First Tier Tribunal decision was legally flawed in two ways:

- The First Tier Tribunal erred in law in finding that the Commission had taken into account matters which were exclusively for the licensing authorities on a premises licence application. This finding was contrary to the statutory scheme of the Act, and the function of the Commission as the national regulator.
- The First Tier Tribunal erred in law in requiring the Commission to issue an operating licence it had found to be inconsistent with the licensing objectives, in circumstances in which no factual finding had been made by the First Tier Tribunal, which overturns that conclusion.

Judge Levenson allowed the appeal on the basis of (1) above and, therefore, it was not necessary for him to consider the arguments regarding (2) above, and the factual findings that had been made by the First Tier Tribunal.

It helps, in analysing the Upper Tier Tribunal decision, to consider the Gambling Commission's original decision to refuse the operating licences to Greene King back on early 2014. In its decision the Gambling Commission expressed concern about the development of commercial bingo in pub premises, and the potential impact on the licensing objectives. The Commission therefore decided to take a precautionary approach. The Gambling Act 2005 requires the Commission to pursue, and wherever appropriate, have regard to the licensing objectives, and must permit gambling insofar as it thinks such permission is reasonably consistent with those objectives. In its decision, the Gambling Commission's regulatory panel did not consider that granting the applications to permit bingo in the Greene King pubs would be reasonably consistent with the pursuit of the licensing objectives, as high stakes bingo and £500 jackpot machines in a pub owned by Greene King could potentially jeopardise the fair and open objective as well as the objective protecting children and vulnerable persons from gambling. The Commission expressed a view that the intention of the Act was to create a graduated regulatory regime, and that there are different expectations of those frequenting pub or bingo premises after their primary purpose.

They therefore refused the application to Greene King, and this approach has been upheld by the Upper Tier Tribunal. Judge Levenson, in his decision, made a number of other noteworthy comments. In his view, the Commission has an integral role as the national body, with oversight over

gambling policy and regulation: it issues statements of principles and codes of practice; it acts as a gamekeeper by issuing operating licences and personal licences; it provides guidance to licensing authorities and advice to Government; and its first duty is to have regard to the licensing objectives.

He added that although licensing authorities are empowered to consider matters relating to individual premises, this does not mean that the Commission has no power to consider matters relating to the operating environment. Although the Act creates a dual regulatory structure, albeit one heavily balanced in the favour of the Commission, and the functions overlap to some extent in cases of overlap and statutory controls, the Courts have consistently held that it is inappropriate to place a legal fetter on the discretion of either regulator by attempting to draw a clear line between their jurisdictions.

He commented that the Commission has the function of setting policy at a national level, and where innovative applications are made which give rise to issues of gambling, as a matter of principle, regardless of the particular local areas to which they relate, it cannot be unlawful for a national regulator to express a view as to the wider issue of principle.

Judge Levenson confirmed that the Commission has a broad power to attach conditions to an operating licence, including the manner in which facilities are provided, and that this inevitably includes consideration of the operating environment; in the case of the Greene King application, within pubs.

Greene King had a right of appeal to the Court of Appeal from the Upper Tier Tribunal, which it has exercised. It first sought permission from the Upper Tier Tribunal, and is now taking the matter to the Court of Appeal. So this is not the end of the litigation and we will of course keep you updated.

Court of Appeal provides clarity on requirements of a "game"

This case involved operators of spot the ball (STB) competitions and whether their activities could be classed as a game of chance under the Gaming Act 1968 in order to claim VAT exempt status under the Finance Act 1972, the Value Added tax Act 1983 and the Value added Tax Act 1994.

The operators originally sought to recover VAT paid between 1979 and 2006 in the region of £70 million.

The STB competitions in question invited players to place a cross where he or she thought the ball was located on a player coupon, which was then returned to the operator. The winners of the competition would be decided not by reference to the actual position of the ball in the original photograph, but by reference to the opinion of a panel of experts.

The competition was presented to the public as involving skill and judgement and also involving elements of chance.

The First Tier Tribunal found that however skillful a competitor might be and even if superlative skill was applied, that in the circumstances a player could only approximate the ball's location and that accordingly spot the ball was indeed a game of chance and therefore exempt from VAT.

HMRC appealed that decision and the Upper Tribunal found that the First Tier Tribunal had erred in its findings. A game of chance required some sort of engagement with other players and therefore the STB competition, where no such interaction occurred, could not be classed as a game and therefore the VAT exemption would not apply.

The matter has finally reached the Court of Appeal which has held that the First Tier Tribunal did not err in its decision and that spot the ball in these circumstances was indeed a game of chance.

For the purposes of the Gaming Act 1968, whether a competition is a game or not is a question of fact and "game" is to be given wide meaning, although there must be a degree of active participation. There is no requirement for competitors to be assembled together. Nor is there a requirement for inter-player interaction.

Courts will look at the realities of the offer and the competition and will not be deceived, whether innocently or otherwise, by delusive appearances or descriptions.

So where does this leave us? The definition of gaming in the Gaming Act 1968 and the current Gambling Act 2005 are similar: gaming means playing a game of chance for a prize. Spot the ball can be run as a game of chance where the result is determined by a panel of judges. If players' crosses were compared with a football's actual location there could be a strong argument that this may be less a game of chance and more a game of skill.

Depending how a particular promotion / game is run there are potential costs implications from both licensing and taxation perspectives.

Nick Arron
Solicitor, Poppleston Allen

The IoL matters: my personal reflections

Ever since his days as a lobbyist at BEDA, **Jon Collins** was a strong admirer of licensing practitioners and becoming a Board member, then Chairman of the Institute of Licensing, has been a role he's relished. As part of the IoL's 20th anniversary celebrations, he looks back at some highlights of his time at the frontline of policy making

When I took on the position of Campaigns Director at the nightclub and bar trade association (BEDA) back in the late 1990s, it could be a pretty lonely role at times. Nightclubs were seen by many as the black sheep of the licensed trade; as the source of late night disturbance and disorder, unlike the far more respectable, and even revered, great British pub.

Back in those days, the attitude towards nightclubs and bars of many in Central Government, including a succession of Home Office Ministers, was most obvious in their policy on drugs. Drugs are bad, drugs are in nightclubs, therefore nightclubs are bad and must be closed. A logic that is Trump-esque (or should that be Trump-ian) in both its simplicity and inaccuracy. It took several years to achieve a more sensible, pragmatic approach – recognising that yes, drugs are bad and we don't want them in clubs and bars (bad for business, attract crime etc) but that, if you cannot completely keep drugs out of prisons, you are never going to banish them completely from clubs.

This basic beginning point for any policy decision repeated itself across a range of policy measures around not just drugs but alcohol, late night trading, Sunday dancing, licence conditions and beyond. Ministers did not go to nightclubs, they did not use town and city centres late at night and the people who voted for them were fed up of reading about disorder in the local press and experiencing low level anti-social behaviour in their own neighbourhoods. Clubbers, conversely were more hedonistic and, crucially, younger – making them unlikely to act come Election Day.

So the challenge in front of us was how best to move BEDA into the policy mainstream and shed our outsider status. The answer, I felt, could be found in American politics. Being a great believer in former President Bill Clinton's "triangulation" approach to policy development, I looked to employ that strategy with any and all interested parties when discussing the role of the late night entertainment industry in our towns and cities.

Triangulation basically requires you to assess your current position on a policy matter and that of the person or agency with which you were dealing and then project forward to a common point where you could both work with the output. For example, I believed clubs were an important part of the late night economy and as such should be free to trade. Many politicians and officials believed clubs were the cause of too much anti-social behaviour (and worse), particularly in the early hours of a Saturday and Sunday morning. Once we both accept that not all clubs should be allowed to trade with minimal intervention and that not all clubs are hot spots for disorder, we could find common ground in the idea that well run clubs should be able to trade while poorly run venues should face sanctions.

It might not seem like much now but shifting away from a blanket view of late night venues, often accompanied with blanket conditions, was significant and allowed both parties to have a useful dialogue. Instead of touring England and Wales attempting to dissuade council after council from implementing a blanket ban on glass bottles across all public entertainment licences, my trips became more focused on areas where both parties could secure a successful outcome. BEDA took a leadership and / or support role on issues such as door supervisor regulation, standard conditions for PELs, Best Bar None, Business Improvement Districts and much more. Our dialogue went from reactive to proactive joint working to create safer public spaces with better run outlets – creating a safer night out and a quieter night in.

Absolutely central to this shift were the kindred spirits I found in the licensing community – local government and police officers, solicitors and barristers. It quickly became apparent that, pretty much without exception, these individuals were members of either SELP, the LGLF or both. Many of them would go on to play important roles in the establishment and development of the Institute of Licensing – some nationally, many more with invaluable work locally.

For a number of years, the extent of my interaction was around committee meeting tables or on shared platforms. It always amused me to see the slow realisation creep across

an official's or minister's face that, shock horror, the trade and regulators were agreeing with each other. Unfortunately, this was too often accompanied by my own sense of déjà vu as said minister / officials then chose to ignore both of our positions as it did not fit with their own (often short term) agenda. Still, we would persevere, offering up counsel on sensible areas of reform and the not so sensible, for example, Alcohol Disorder Zones.

My involvement became more formal when I was asked, and enthusiastically agreed, to join the Board. They say, "Find a job you love and you'll never work a day in your life". Well I have loved every minute I have spent on the Board, at meetings, supporting events – even when over enthusiastic timetabling meant I was barely off duty for a minute of the three days of one year's annual conference! It is always a pleasure to work on IoL matters because I do so in the knowledge that the other participants share my values and ambitions for licensing and the Institute. As such, I was fortunate enough to take on the Chairmanship at a time when much great work was coming to fruition – such as the launch of this *Journal,* the re-establishment of the National Licensing Forum, the sustained increases in membership and further development of our training and events programme.

For me, the Institute is so strong because of the sheer quality, energy and expertise of the people who comprise its membership, officers and Board. Institute events are, without doubt, the best value training and conferences I have come across. Expert after expert either donating their time for free or at a substantially discounted rate to share their thoughts with an audience that is often at least as informed on the matters at hand. That is when I see the Institute at its strongest – experts coming together in an atmosphere of mutual respect, willing to both offer their own thoughts and listen to counterpoints. These sessions lead to improved understanding of often complex issues to the benefit of our members, their colleagues and constituents.

As we know, licensing covers issues that are central to our everyday lives. As such, the work of the Institute is both of high quality and highly relevant. I firmly believe that we should be an automatic adviser on all relevant areas for Government policy, not simply invited to respond to consultation papers. The Institute is unique, able to tap in to an unrivalled body of expertise across all aspects of licensing and from multiple perspectives. Surely having the considered and aligned (triangulated?) view of both our largest national pub operators and the councils and police forces that work with them should be seen as a tremendous asset to any policymaker? While we are being heard more often, I still believe Government could and should do more to seek out our input.

I would like to end this reflection with a quick nod to the many people in the licensing community who have helped me so much over the years, many of whom I am glad to say have become friends. This is not an attempt at a comprehensive list as there would have been no room elsewhere in the article for any other points. For me, the IoL begins with David Chambers, Roger Butterfield and Jim Button – a trio whose knowledge of licensing, humility and all-round niceness made entry into this world far easier than it could have been for "the nightclub guy". Philip Kolvin swiftly followed, fiercely intelligent and with a sense of fun – both evident in his decision to support the mighty Everton. Jim Hunter and Sue Nelson surprised me with the vibrancy and quality of their local events, which meant I was not surprised when they repeated that success in their roles with the Institute. John Garforth, Phil Andrews, Richard Nash, Susanna Fitzgerald and many more have impressed me with their input at the Board and in meetings and events around the country.

I leave my last words to the first person I met who had a role in licensing. Little did I know, as a youthful lobbyist, that that person happened to be one of the true greats of British licensing – Jeremy Allen. I look back now at our early debates around the BEDA committee table and laugh – the confidence of youth is the only explanation I can offer for the number of times I found ways to disagree with him. Over time, I learnt more about licensing and learnt in particular that Jeremy knew a heck of a lot more than I did. I was delighted to endorse his nomination as IoL Chairman, stunned by his untimely passing and deeply honoured to follow him in that role. Expert, intelligent, experienced with a passion for licensing and a lighter side that enjoyed the social opportunities, not least for a late night malt. In many ways, he embodied all that is best about the Institute.

Congratulations one and all for everything that we have achieved to date. And if anyone from the Home Office is reading this – pay more attention to and put more store in anything and everything the Institute produces. It will be based on evidence, brim full of common sense and prove to be right.

Jon Collins, CIoL
Patron and former Chairman, the Institute of Licensing

Are you turning a blind eye to a bubbling public health risk?

Are the spas and saunas in your borough all licensed? Have budget pressures forced you to trust their operators to pay their operating fee? And do you work on the basis that if no complaints are received, there isn't a problem? All questions that worry **Julia Sawyer** as she highlights a looming public health issue

Using saunas and spas has become a popular activity in our health and fitness clubs. They give a sense of wellbeing, relaxation, enjoyment and fun. The responsible owners and managers ensure the facilities are properly managed to prevent a risk to health to those who use them and those who work in the leisure industry. They also ensure they comply with the relevant legislation. However, what happens in the premises that are open to the public and are not licensed (when they should be) or are never inspected by an enforcing authority? Do the mangers of these premises have public health as a priority?

In the Nordic countries saunas are a well-established family tradition and most homes have built-in saunas. In the UK, single-gender saunas and spa baths have become the most common type. Nudity is expected in the segregated saunas but usually forbidden in the mixed saunas. This is a source of confusion when residents of the Nordic countries visit other European countries or vice versa. In the UK, the practice of alternating between the sauna and the spa in short sittings (considered a faux pas) has emerged.

A sauna can be a small room or building designed as a place to experience dry or wet heat sessions, or an establishment with one or more of these facilities. The steam and high heat makes the bathers perspire. There are a wide variety of sauna options. Heat sources include wood, electricity, gas and other more unconventional methods such as solar power. There are wet saunas, dry saunas, smoke saunas, steam saunas and those that work with infrared waves. There are two main types of stoves: continuous heating and heat storage-type. Continuously heating stoves have a small heat capacity and can be heated up on a fast on-demand basis, whereas a heat storage stove has a large heat (stone) capacity and can take much longer to heat.

A spa can be any of the following: a mineral spring considered to have health-giving properties; a place or resort with a mineral spring; or a commercial establishment offering health and beauty treatment through such means as steam baths, exercise equipment and massage. A spa bath is a bath containing hot aerated water.

Gay saunas / spas and swinger saunas / spas are becoming more widely known and talked about. Documentaries are now appearing on mainstream TV[1] that show they're a place to go if you want to have sex. In many of these saunas there are "rest rooms" for consensual private sex, where people can become involved or be a voyeur. For its users, these saunas offer a safe and private place to meet people and have fun in an open and consensual environment.

But how many of these premises are actually known about by qualified specialist licensing officers and the health authorities? And if they're not, how then to give advice to the management of the premises on protecting public health or help promoting safe sex messages? Are we doing enough as responsible authorities to protect the public?

The London Local Authorities Act 1991 introduced the licensing of premises offering special treatments in all of the 32 London boroughs. Special treatments are procedures which, if administered or managed incorrectly, would potentially be harmful to health. Such procedures usually require a level of professional competence in order not to be injurious to the person receiving them. Special treatments, according to the Act, are: massage, manicure, acupuncture, tattooing, cosmetic piercing, chiropody, light, electric, vapour, sauna or other baths or treatments of a like kind.

The licensing of such treatments was brought in to protect public health. A list of what is a special treatment has been produced by the Special Treatment Group, made up of representatives from the majority of the 32 London

1 Channel 4 Nottingham's CS2 sauna programme, Secrets of the Sauna, shown on 24 February 2016.

boroughs. This list currently contains 163 treatments and is updated approximately once a quarter.

Any premises in the boroughs used, intended to be used, or represented as being used to provide special treatments must be licensed, unless there is an exemption in place.

In other parts of the country, where there is regulation for saunas and spas it is usually under the local acts.

The problem of unlicensed premises offering special treatments has grown. These may be premises that have been licensed previously and then failed to renew their licence as well as premises that have never had a licence, so the enforcement authorities are not aware of them.

These unlicensed premises may have never been inspected, which means the competency of those giving the treatments has not been verified and the standards being followed have not been checked. As some of the unlicensed premises will be offering potentially higher risk treatments such as tattooing / piercing (risk of blood-borne infections such as hepatitis B, hepatitis C and HIV), lasers (risk of burns) and spa pools (risk of Legionnaires' disease) the need for proper checks is vital.

What infectious diseases could be present in a spa or sauna?

Poor control of work-related risks has many implications for public health and safety, as well as for employees. The following diseases / injuries would need to be considered on a risk assessment for the use of spas and saunas and adequate control measures would need to be put in place to protect the user:

- Legionnaires' disease
- Dehydration
- Athletes foot
- Toenail fungus
- Burns

For gay and swinger saunas, the following infectious diseases would also need to be considered on the risk assessment:

- Chlamydia
- Syphilis
- Gonorrhoea
- HIV

What the statistics say

- In 2014, there were approximately 440,000 diagnoses of sexually transmitted infections (STIs) made in England.[2]
- The impact of STIs is greatest in young heterosexuals under the age of 25 years and in men who have sex with men (MSM).
- The most commonly diagnosed STI was chlamydia, with 206,774 diagnoses made in 2014.
- The largest proportional increase in diagnoses between 2013 and 2014 were reported for syphilis (33%) and gonorrhoea (19%).
- Large increases in STI diagnoses were seen in MSM, including a 46% increase in syphilis and a 32% increase in gonorrhoea. High levels of condomless sex probably account for most of this rise, although better detection of gonorrhoea may have contributed.
- There was a 4% decrease in diagnoses of genital warts (first episode) between 2013 and 2014.

How saunas / spas should be controlled

Due to the risk of the infectious diseases in the sauna/spa environment there are regulations and numerous guidance documents available (detailed at the end) to help an operator run a safe venue.

Control measures that should be in place when running a spa:

- The free chlorine levels should be between 3 (min) and 5 (max) mg/l
- The pH should be maintained at between 7.0 – 7.6
- The water treatment plant being operated should be suitable and sufficient. It should be designed and operated taking into account:
  - bathing load
  - circulation rate
  - turnover period
  - choice of treatment / disinfection system
  - circulation hydraulics
  - balance tank
  - plant room
  - filtration
  - chemical treatment and storage areas
  - operation
  - mains water quality, drainage and dilution
  - access for operation and maintenance
- The sampling of the spa pools should be done at least once a month for microbiological tests and at least quarterly for Legionella tests.
- Water samples should be taken by competent personnel trained in the sampling of water, with knowledge of how, how much and how long the samples should be kept before analysis.
- The analysis for the microbiological samples must be carried out in a laboratory accredited for the analysis

2 Public Health England: Infection report - Volume 9 Number 22 Advanced Access report published on: 23 June 2015 HIV-STIs.

to ISO 17025:2005. All analysis of water samples for Legionella should be carried out by a UKAS accredited laboratory.

Control measures that should be in place for both spas and saunas are:

- A risk assessment. The person who conducts the risk assessment should:
  - have adequate knowledge, training and expertise to understand the hazards (ie the presence of infectious agents in the spa pool, the heat required and how it can be managed in a sauna) and risk
  - know how running the spa pool (and hot and cold water systems) produces the hazard
  - have the ability and authority to collect all the information needed to do the assessment
  - have the knowledge, skills and experience to make the right decisions about the risks and the precautions needed
- The risk assessment must be undertaken in line with British Standard BS 8580:2010 (*Water Quality – Risk assessments for Legionella control – Code of Practice*)
- Following on from the risks identified in the risk assessment, prepare a written scheme for preventing and controlling those risks. The scheme must detail:
  - instructions for the operation of the system
  - the precautions to be taken to control the risk of exposure to Legionella and other disease causing micro-organisms
  - the checks that are to be carried out and their frequency to ensure the scheme is effective
  - the water treatment programme in place
- The duty holder must implement a monitoring and auditing regime of the controls in place at the premises to ensure that the overall management of the system is effective. The duty holder (and any deputy) must be suitably trained to understand the risks of Legionella and other disease-causing micro-organisms at the premises and know how these risks can be controlled. In particular, they should know:
  - potential sources of Legionella bacteria and other harmful microorganisms and the risks presented
  - the measures to be adopted, including precautions to be taken for the protection of people and the significance of these precautions
- Provide a constant, plumbed-in supply of drinking water in close proximity to the area where the spa, steam and sauna are located.
- Provide a readily identifiable emergency device within easy reach of the spa pools / sauna.
- Provide and display safety guidelines on the use of the spa / sauna near to each of the spa pools / sauna.
- Ensure the manufacturer's instructions are followed for the construction and maintenance of the spa / sauna.
- Regularly supervise the use of the areas to ensure cleanliness is maintained and items such as the heating element in the sauna have not been damaged in any way.
- Have a procedure in place for the cleaning and maintenance programme of the spa and sauna.
- Guidance on safe sex if sexual activity takes place on the premises.

It's up to us

As licensing authorities, owners and managers, we are responsible for helping to ensure our spas and saunas are safe for people to use and employees to work in. Knowing where these premises are and how they are being managed is important.

There is an under-reporting of incidents that occur within the gay saunas / spas and swinger saunas / spas and this could be due to a variety of reasons: people are embarrassed to say they have attended them and not want their partner / others to know; there is not enough resource available to local authorities to ensure all premises offering special treatment are visited and licensed, if required; owners / managers deliberately do not inform the enforcing authorities as they are sexually exploiting people, they do not want to pay the licence fee and they are permitting illegal activities to take place within the premises.

In the spring issue of the *Journal of Licensing* last year[3], Editor Leo Charalambides wrote:

> *Only a very small number of local authorities have explicitly and publically recognised that such venues are as a matter of fact and law, sexual recreational venues and accordingly regulated under the Local Government (Miscellaneous Provisions) Act 1982. The sex establishment regime maintains a deliberate and narrow focus upon the regulation of lap dancing and similar entertainments to the exclusion of saunas, swingers bars, BDSM venues, fetish clubs, sex clubs and other sex-on-premises venues.*

Not ensuring the premises are licensed (if needed) and adequately managed is not fair to those who do abide by the legislation and it could encourage sexual exploitation and the spread of STIs. So, licensing officers, get out in your borough/local area and make sure premises offering special treatments are being managed properly and can be used safely.

3 (2015) 11 JoL, p3

Legislation and guidance for an operator of a sauna and / or a spa pool:

- Health and Safety at Work, etc Act 1974
- Management of Health and Safety at Work Regulations 1999 and as amended in 2006
- Public Health England guidance *Management of Spa Pools - Controlling the Risks of Infection* available at: http://www.hpa.org.uk/Publications/InfectiousDiseases/InfectionControl/0603ManagementofSpaPoolsControllingRisksofInfection
- Health and Safety Executive (HSE) approved code of practice L8 *Legionnaires' disease. The control of legionella bacteria in water systems*, available from: http://www.hse.gov.uk/pubns/books/l8.htm
- Safety notice issued by the HSE to any employer who uses water systems including hot and cold water systems and spa pools where a reasonably foreseeable risk from legionella may exist. This was issued in September 2012 and can be viewed at: http://www.hse.gov.uk/safetybulletins/legionella2.htm
- Managing health and safety in swimming pools HSG179

Julia Sawyer
Director, JS Safety Consultancy

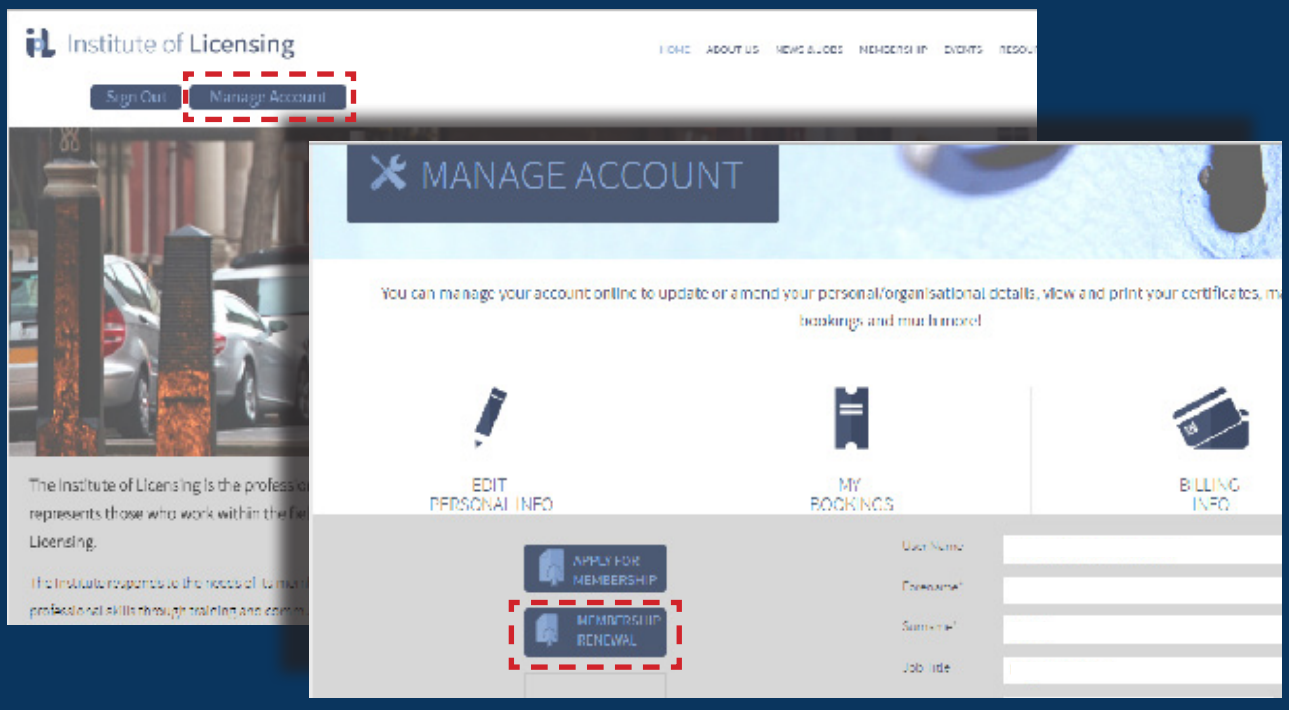
Have you paid your membership renewal?

The 2016/17 membership year is the first time that members can renew their membership by accessing their profile online and downloading the renewal invoice. The renewal date was 1st April.

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

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

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



Child sex exploitation – the challenge for the hospitality industry

Hospitality professionals need to be vigilant and properly trained if they are to help combat the horrors of child sexual exploitation, as **Tim Leeson** explains

While recently checking out of a reputable hotel in the East Midlands, my attention was drawn to a man in his early 20s standing only a few feet away from me who was requesting a room. The young man stated that he only required the room for a few hours. The receptionist curtly replied "We are not that kind of establishment, sir" and dismissed the man, who then left as confidently as he had entered.

I later brought the incident to the attention of the hotel duty manager who immediately recognised the activity as being indicative of child sexual exploitation (CSE). However, he acknowledged that not all of his staff would know how to recognise the signs of CSE and then how to go about reporting any concerns. I shall explore this in more detail later.

Child Sexual Exploitation

So what is CSE?[1]

The Association of Chief Police Officers' (ACPO)[2] definition of CSE is:

> *The sexual exploitation of children and young people[3] under 18 which involves exploitative situations, contexts and relationships where the young person (or third person/s) receive 'something' (eg, food, accommodation, drugs, alcohol, cigarettes, affection, gifts, money) as a result of them performing, and / or others performing on them, sexual activities.*
>
> *Child sexual exploitation can occur through the use of technology without the child's immediate recognition; for example being persuaded to post (indecent) images on the internet / mobile phones without immediate payment or gain.*
>
> *Violence, coercion and intimidation are common. Involvement in exploitative relationships is characterised by the child's or young person's limited availability of choice, as a result of their social, economic or emotional vulnerability.*
>
> *A common feature of CSE is that the child or young person does not recognise the coercive nature of the relationship and does not see themselves as a victim of exploitation.*

To summarise:

- CSE is the sexual abuse, howsoever, of a child.
- It can affect any child, girl or boy, at any time, in any community – regardless of their social or ethnic background.
- CSE generally involves a child being offered something in return for performing sexual acts. That something could be money, gifts, cigarettes, alcohol, drugs, (perceived) love or attention. Violence is common.

Contrary to many media reports portraying groups of Asian men as perpetrators, CSE most often involves a lone victim and a lone perpetrator, with victims and perpetrators usually white.[4]

Grooming is a key feature of CSE - an action deliberately undertaken with the aim of befriending and establishing an emotional connection with a child (perceived love), to lower the child's inhibitions with the intention to sexually abuse them.

1 In law there is no specific criminal offence of CSE. The lack of a specific offence often causes problems for professionals and others not directly involved in child safeguarding in recognising the signs.

2 ACPO has been replaced by the National Police Chiefs Council (NPCC).

3 Throughout the article the term child / children is used rather than young person. I acknowledge that many teenagers prefer not to be described as children, but I have accepted the view of Louise Casey, expressed following the Rotherham inquiry into CSE:

> *Child sexual exploitation is sexual and physical abuse, and habitual rape of children by (mainly) men who achieve this by manipulating and gaining total control over those who cannot consent to sex either by virtue of their age or their capacity. It is therefore important that professionals working in the field of CSE refer to anyone under 18 as a child so their status is never overlooked.*

4 *If Only Someone Had Listened* - Office of the Children's Commissioner's (OCC) Inquiry into Child Sexual Exploitation in Gangs and Groups. Final Report, November 2013.

In England and Wales, ss 14 and 15 of the Sexual Offences Act 2003 make it an offence to arrange a meeting with a child, for oneself or someone else, with the intention of conducting sexual activities. The meeting itself is also criminalised. Such meetings often take place in licensed establishments, often hotels.

Grooming is a carefully planned process with the aim of controlling and ultimately isolating a young person to ensure that they do exactly what the perpetrator wants. Initially, a young person may receive gifts and be showered with attention and affection, but this may later turn to blackmail, threats of violence or actual violence.[5]

Perpetrators can be male or female from any background, any age group and any ethnicity. Often, perpetrators are well-liked, articulate and plausible. Sexual exploitation can also happen between young people and within peer groups.[6]

Trafficking is where children are moved away from their locality, hometown or from abroad to other locations for the purpose of sexual exploitation. A person might commit this offence if they are moving children unlawfully from building to building or room to room, such as in a hotel for example.

It should always be remembered that it is not a young person's fault if they are sexually exploited, quite the contrary. Perpetrators of child sexual exploitation often have power – real or perceived – over the young people they abuse. This power may be due to their age, their status, their intellect or their physical strength. They use this power to manipulate and control their victim.

Consent

Often the man or woman in the street will say that these children knew what they were doing and this was a lifestyle choice. They chose to do it!

We need to remember that the age of consent to sexual activity is 16 years of age. However, to consent an individual needs three things: choice, freedom and capacity.

As described above, the grooming process invariably removes both the choice and the freedom to consent. Additionally, many of the children involved do not have the required capacity to consent, either in law (as a child under 13 years of age cannot consent to any form of sexual activity) or because their cognitive or social development limits their capacity to make rational and informed decisions – a capacity which may also have been removed or worn away by the abuser.

Licensing's role

So where do you, as responsible professionals, fit in? How can you be professionally curious with confidence?

Apart from having a moral responsibility to protect children, the Licensing Act 2003 imposes certain requirements to protect children from harm. Similarly, health and safety legislation imposes a requirement for establishments such as hotels to provide a safe environment.

However, there may be other legal implications for hotels if CSE is taking place on the premises.

The Anti-Social Behaviour, Crime and Policing Act 2014 provides three provisions for the investigation of child sexual exploitation offences.

Sections 116, 117 and 118 allow the police to issue a notice requiring the owner, operator or manager of relevant accommodation to disclose information where intelligence indicates the premises are being or have been used for the purpose of CSE. This includes preparatory or other activities connected to CSE.

The police, where they reasonably believe CSE is taking place, can request the owner, operator or manager to provide information about their guests.[7] This includes the name and address and any other relevant information such as age. The information supplied can be used as intelligence to support the investigation of any criminal offences which may have been or is being committed on the premises, thereby helping to identify lone individuals and organised groups involved in CSE.

Procedure

A police officer of at least the rank of inspector may serve a s 116 notice on an owner, operator or manager requiring them to provide information. The notice specifies the information that should be provided, how frequently, and over what period of time. The specified period will be no more than six months, although a subsequent notice may be served on the expiry of that period.

The officer must reasonably believe that the hotel has been or will be used for the purposes of CSE or conduct that is preparatory to or otherwise connected with CSE.

5 See Barnardo's report *Puppet on a String* (2011).

6 Peer-on-peer exploitation, particularly by gangs and other peer groups, including sexual abuse as part of a group's rituals of "initiation" or "punishment".

7 The definition of "guest" covers guests regardless of whether they have paid themselves or whether they are the "principal" guest or a person accompanying the principal guest.

The hotel operator commits a s 118 criminal offence if they fail to comply with the notice without a reasonable excuse. It is also an offence to provide information without taking reasonable steps to verify it or knowing it to be incorrect. They will not commit an offence if there were no reasonable steps they could have taken to verify the information.

Prosecution of these offences will be heard in the Magistrates' Court, with a maximum penalty on conviction of a level 4 fine (currently £2,500).[8] A person served with a notice has a right of appeal to the Magistrates' Court under s 117 of the Act.

Safeguards have been placed on the information that could be requested. The power is already limited to information which can readily be obtained from guests and does not impose an additional requirement on guests to provide the information.

There are also safeguards in place to make sure innocent people are not targeted. An hotelier will only be required to provide police with information about guests if there is reasonable belief that the premises have been or will be used for CSE, and will only be required to do so for a specified period. This information would be used for vital intelligence and evidence gathering by the police and to help close the net on those perpetrating CSE.

What happens if a hotel refuses to provide information or a guest gives false information?

Breach of the requirements of a notice, providing false information or not providing any information would be a criminal offence which would attract, on conviction, a maximum penalty of a fine. An hotelier would be expected to take reasonable steps to secure the information (for example, by requesting identity documents on check-in). If the hotelier requested the information but a guest either did not provide the information or provided false information, the hotelier would not be liable. A person served with a notice would have a right of appeal to the Magistrates' Court in respect of the police decision to serve the notice.

This power has never been intended as a catch-all or the only tool in the police's armoury to tackle CSE. It provides them with additional powers to enable them to obtain information and is intended to serve as a deterrent to those establishments that may be complicit in the offending that takes place on their premises.

8 Subject to implementation of provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 relating to maximum fines which may be imposed on summary conviction.

The hospitality industry's role

That said, it is recognised that the hotel and leisure sector, the licensed trade and the taxi, retail and hospitality industries have an increasingly important part to play in preventing CSE from taking place in our communities through the alertness, quick thinking and professional curiosity of their employees. It is far better for the reputations of the police and the hotel industry to work together to build a relationship of trust and mutual understanding to prevent innocent children from becoming further victims, rather than rely on legislation when it is often too late.

Many of the hotel groups with premises in major cities and towns up and down the country are now accepting that their hotel premises are vulnerable to CSE. They recognise the civic duty and the good business sense in raising awareness and they train staff by adopting the "Operation Makesafe"[9] branding, which aims to raise awareness of the signs and indicators of CSE in the licensed trade, the hotel and leisure sector and the taxi, retail and hospitality industries.

Such training encourages staff to be professionally curious and will inform them of potential signs and indicators to look out for.

So, if we cast our mind back to the start of this article and the young man attempting to book into the hotel, we can see how different that scenario might have been had the member of staff behind reception been more professionally curious. Such was the case when on another occasion recently, a man arrived at a hotel in the late afternoon and booked a room in his name. He paid in cash and did not have any photo ID but gave his bank card details and car registration number.

The male was then seen to lead a young female child, who had been waiting in the car, to his room. Both were then seen to leave the hotel a short time later, and subsequently return with another young female child.

The receptionist at the hotel, who witnessed the comings and goings, had grave suspicions about the situation and reported this to her duty manager. The duty manager, recognising the concerns of his colleague, spent a short time in the corridor outside the room where he could hear the girls talking and laughing.

9 Numerous police forces throughout England and Wales have adopted this initiative. Operation Makesafe aims to raise awareness of CSE among hotels, licensed premises and taxi operators. Other police forces have adopted the branding of "Say something if you see something" or may have a local initiative under a different name.

Alcoholic drinks were ordered from the room and the duty manager made the decision to deliver the order to the room himself. The door was opened by one of the children, and the duty manager insisted that he went into the room with the drinks rather than hand the tray over at the door as would be normal practice.

An adult male was in the bathroom and the two children were dressed in pyjamas with one in the bed within the room. The duty manager asked the girls if they were okay, to which they replied "Yes". He asked them again and he told them that they could leave the room with him if they wished. Again they said they were okay and happy to stay.

The duty manager then left the room to contact the local police. The male and the two children, realising that they had been rumbled, left the hotel within minutes. The hotel's concerns were relayed to the police call centre quoting Operation Makesafe. The hotel room was subsequently secured for evidence recovery; and by using the car registration number provided when booking in, the male was subsequently traced and arrested that same evening.

When one of the children (they were both 14 years' old) was interviewed by specially trained police officers and social workers, she disclosed that sexual activity had been taking place with the arrested male, who was subsequently charged with serious sexual offences.

In this scenario, it can be seen that, thanks to the hotel owners providing awareness training to their staff, the receptionist was able to recognise the signs of CSE and had the confidence to communicate her concerns promptly to the duty manager.

The duty manager was persistent, engaged the girls in conversation and knew how to report his concerns to the police.

The police call-handler responded appropriately (under the Operation Makesafe trigger plan) and officers followed up the concern promptly and attended the scene to secure witness statements and preserve evidence.

So be professionally curious - and if you feel someone is not safe, tell someone; you are almost certainly right.[10]

SIGNS TO LOOK OUT FOR

- Guests with a local address renting a room.
- Guests who appear secretive about their visit or seem to be trying to conceal their activities in the room or who they are with.
- Frequent visitors to the hotel who do not appear to have a reason for being there.
- Guests who move in and out of the hotel at unusual hours.
- Rooms with a lot of condoms / condom wrappers, drugs / drug paraphernalia.
- Lots of people coming and going to the hotel room.
- Guests arriving and asking for a specific room number and not knowing the name in which it is booked.
- Guests who don't want their room cleaned or visited.
- Guests who don't have any luggage or identification.
- Young people with significantly older boyfriends.
- A hospitality suite with businessmen and young girls or boys.
- Guests who appear to be under the age of 18 in the bar areas or when they have alcohol served to their rooms.
- Two or more adult men heading for a room may indicate it is being used for a party.
- A number of men visiting the room at regular intervals may indicate it has been arranged for men to visit a room where a child is being exploited.
- A young person or adult who appears withdrawn and tries to hide their face or appears afraid, disorientated or restricted from moving or communicating.
- Young girls who appear overly made up.
- Guests who access an excessive or unusual amount of pornography on the hotel's TV or computer.
- Individuals who appear to be monitoring public areas.

Further information about Operation Makesafe, the available training products and marketing material can be found at the NWG Network[11] website or by contacting your Local Safeguarding Children's Board (LSCB).

Tim Leeson
National Co-ordinator, National Child Sexual Exploitation (CSE) Action Plan

10 The Brooke Serious Case Review into Child Sexual Exploitation - *Identifying the strengths and gaps in the multi-agency responses to child sexual exploitation in order to learn and improve.* Final Report by Jenny Myers and Edi Carmi. March 2016.

11 NWG Network Tackling Child Sexual Exploitation nwgnetwork.org

The 2003 Act: better for the trade than local authorities

Local authorities have failed to appreciate the full extent of their powers since the Licensing Act 2003 came in; embracing the opportunities afforded by a public health objective could stiffen their resolve, writes **Jon Foster**

The tenth anniversary of the Licensing Act 2003 came and went last November, and brought with it various views on the success or otherwise of the legislation. A recently released report from the Institute of Alcohol Studies, focusing particularly on the views of licensing professionals from across local government and the police, has added to the debate.

Based upon interviews and workshops with 70 participants, with subsequent legal input, *The Licensing Act (2003): its uses and abuses 10 years on* looks back on what has and hasn't happened over the last 10 years, while also attempting to look towards the future and ways in which the act might be used more effectively.

For many, the headline finding will not come as a surprise - that local authorities are often bullied out of using the act to its fullest extent by the threat of expensive legal action from the licenced trade. What may be slightly more surprising, however, is the next logical step on from this – that the act has been interpreted to the advantage of the licensed trade, and as a result, a number of myths and misconceptions have developed around the act's use.

Time and again, these taken-for-granted misconceptions help the licensed trade while putting the local authorities on the back foot. But if they were addressed, they could provide significant opportunities for local authorities to use the act in a more effective and assertive manner. While this might sound rather optimistic, and changing the act's day to day use would certainly be hard to achieve, the strongest evidence in support of these ideas is the fact that some local authorities already successfully take this approach.

Looking back

In many respects the act resulted in continuity rather than change, and there was a common view that the act improved day-to-day coordination and cooperation, both within the various regulatory agencies and between the regulators and the licenced trade. Yet at the strategic level many saw the act as fundamentally permissive, reactive and led by market forces at the expense of local communities. Controlling the off-trade was seen to be a particular problem.

Regarding the night-time economy, late night opening introduced by the act has spread crime and disorder back into the early hours, causing significant problems for the police and other emergency services. Most police forces had to rearrange their shift patterns and allocate increased resources to the night-time economy to address this change.

Yet, late night opening seems not to have increased the amount of time or money that people spend in the night-time economy, but to have shifted the night out backwards. This has probably increased pre-loading, as people have more time to drink at home before going out, and surprise, surprise, there's no evidence of a relaxed Continental drinking culture.

All of these issues are to a significant degree directly related to the act, but lots of other things have happened over the last 10 years, such as demographic changes, the impact of the recession on how much money people have to spend and changes in other Government policies. As everyone in licensing knows, correlation is not causation, so a little care is needed in trying to assess the way the act has, and has not, impacted on wider social trends.

When it comes to overall crime, and crime specifically related to alcohol, this has been dropping fairly steadily since before the act was introduced, and there is little evidence that the act has had any impact on this either way. There certainly was not an additional drop in alcohol-related crime when the act was introduced. As mentioned above, the act has spread crime and disorder back into the night; and while this has reduced the "11 o'clock swill", many police officers stated that being kept busy until 5am or so was actually more difficult to deal with.

The picture is similar regarding overall levels of alcohol consumption, which had been in decline since before the act was introduced, with the impact of the recession being

a key factor. Since the act came in, rates of binge drinking have declined, while the number of people abstaining from alcohol has increased, but again there is nothing to link these developments with the act itself and the Office of National Statistics, which collects these figures, points to other factors.

Overall, this suggests that the act has been helpful for local authorities on a day-to-day administrative level, difficult at a broader strategic level and negligible with regard to levels of crime or overall alcohol consumption. But what about the detailed use of the act, and the fact that there appears to be a significant mismatch between the written contents of the act and its practical application?

Looking forward

So, what are these myths and misconceptions which if challenged might help local authorities to use the act more assertively? Firstly, many participants claimed that the decision-making process is overly permissive, leaving them little choice but to grant a licence more often than not. It is true that an application must be granted if no representation is made against it; however, once a representation is made "the licensing authorities' discretion will be engaged" (Guidance, para 9.3) and the act becomes a balancing regime, assessing the likely impact of an application on the licensing objectives.

Given this discretion the act should only be narrowly permissive, and licensing authorities are required to "determine what actions are appropriate for the promotion of the licensing objectives in their area" (9.41). This could involve granting a licence, granting with conditions attached, or rejecting the licence, and as the report details, there is no reason why this should necessarily be used in a permissive manner.

Another misconception involves the idea that licensing decisions must be made with large amounts of factual evidence. The Guidance, at para 9.42, is very open about what evidence can be used, and does not strictly bind committees although some is needed. Evidence may, for example, come from the geographic location or the conduct of an operator, and there is reasonable discretion.

Linking this issue with the one above, it is also clear that decisions should not only be made on whether there is currently crime, public nuisance etc present, but whether an application might lead to circumstances that could generate these, and therefore undermine the licensing objectives.

A high evidential burden would make this difficult to do. However, the High Court has made it clear that licensing decisions should be "an evaluative judgement" (*Taylor v Manchester* [2012] para 73) and that while the issues they deal with:

> *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… (this) is essentially a matter of judgement rather than a matter of pure fact. (*Hope and Glory v Westminster *[2011] para 42)*

Crucial to all licensing decisions is the issue of causality; establishing causality between a premises and an effect is central to licensing law. However, a close reading of the act and relevant case law shows that the nature of the causality needed is different to that found within a court of law. A licensing committee does not have to be clear beyond reasonable doubt that an existing premises has undermined the licensing objectives, or that a new premises would do so. Rather, as the High Court has emphasised, it has to reach an evidenced, reasoned and yet discretionary judgement that this is probably the case. Being clear about this approach greatly increases the discretion available to licensing committees.

However, perhaps the most conspicuous myth related to the act's decision-making process is the claim that licensing decisions must be made using a strict "premises by premises" approach, disregarding interactions with the local area. However, at no point in the act or the guidance is the phrase "premises by premises" mentioned, and there is nothing in the act, guidance or case law to properly underpin this idea.

Going back to basics, para 1.17 of the guidance states that "each application must be considered on its own merits", while para 9.41 also states that "all licensing determinations should be considered on a case-by-case basis". This is both common sense and in keeping with natural justice. The common usage of the "premises by premises" idea to suggest that licensed venues must be considered as if artificially isolated from their geographic location is a fallacy, and rulings from the High Court clearly direct licensing authorities to consider an application within its local context. In the *Hope and Glory* case, for example, the court details some of the wider considerations relevant to an application:

> *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. (*Hope and Glory v Westminster *[2011] para 42)*

As such, the High Court clearly directs licensing authorities to look at an application within its context, in direct contrast to a supposed "premises by premises approach". Doing this greatly increases the scope and discretion available within decisions, and the fact that this approach is rarely taken at present greatly helps the licenced trade.

The interviews with licensing professionals also produced a range of contrasting views about the role of public health within licensing, some of which were very wide of the mark. As para 9.21 of the guidance makes clear, directors of public health are responsible authorities under the act, and while health concerns do of course have to be addressed via the four licensing objectives, some local authorities regularly do this. Many of these report being able to assert greater control over licensing in their area as a result, particularly in dealing with the off-trade.

The existing framework of the act means that more proximal health issues seem likely to be the most actively addressed via licensing. By looking at smaller time periods, and smaller areas, with more of a bottom-up approach, many public health concerns can be linked to local social, rather than physical, health issues in an area. As a result it may be useful to shift from focusing on traditional public health issues and physical health, to social health issues, such as street drinking, domestic violence and issues linked to deprivation.

Some areas have already done this, and with care and creativity many of these social concerns can be linked to the objectives. Yet only a limited number of areas take this approach at present, with the risk-averse nature of many local authorities, and the contested legal environment in which they operate, meaning that the full extent of all the objectives are unlikely to ever be explored.

Adding an additional health objective would give local authorities the practical ability to address the wider social impact of licensing, in effect allowing for the more even application of the current objectives. From this perspective a public health objective could be seen more as an evolution than a revolution, and there was significant support for this within the interviews for the report.

Looked at overall, the act has been a qualified success, but could be greatly improved and has created significant problems in some areas. The report's recommendations include local authorities considering specialist legal advice more often, the addition of both a health and wellbeing objective and an economic objective and a more forward looking and strategic approach to statements of licensing policy. Locally-set fees are also essential, with many participants reporting that those authorities which struggle the most to enforce the act are often areas where the income they generate is far too low.

However, the report's main recommendation is for all parties involved in licensing to better engage with the s 182 Guidance, and the report includes many suggestions for where the Home Office might amend things in order to better promote the more assertive and forward-looking approach outlined above. Yet even without any changes there is plenty of scope for local authorities to try and do things differently.

Jon Foster
Senior Research and Policy Officer, Institute of Alcohol Studies

The full report can be found at: http://www.ias.org.uk/What-we-do/IAS-reports/Licensing-Act-2003-Its-uses-and-abuses-10-years-on-Documents.aspx

Institute of Licensing News

Jeremy Allen award nominations

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

This prestigious award is open to anyone working in licensing and related fields and seeks to recognise and reward exceptional practitioners. Crucially, entry to the award is by third party nomination, which in itself is a tribute to the nominee in that they have been put forward by colleagues in respectful recognition of their professionalism and achievements.

Nominations for the 2016 award are invited by no later than **9 September 2016.** The criteria are shown below and we look forward to receiving nominations from you. Please email nominations to awards@instituteoflicensing.org and confirm that the nominee is happy to be put forward.

Award criteria

The award is a tribute to excellence in licensing and will be given to practitioners who have made a notable difference by consistently going the extra mile. This might include:

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

The annual award seeks to recognise individuals for whom licensing is a vocation rather than just a job. Everyone nominated for this award should feel very proud that others have recognised their commitment and dedication.

Fellow and Companion nominations

Don't forget that in addition to the Jeremy Allen Award, the IoL has a Fellowship category for members following nomination and award.

Fellowship is intended for individuals who have made exceptional contributions to licensing and /or related fields; Companionship is intended for individuals who have substantially advanced the general field of licensing.

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

1. Is a member of the Institute or meets the criteria for membership; and
2. Has made a significant contribution to the Institute and has made a major contribution in the field of licensing, for example through significant achievement in one or more of the following:
   - Recognised published work.
   - Research leading to changes in the licensing field or as part of recognised published work.
   - Exceptional teaching or educational development.
   - Legislative drafting.
   - Pioneering or taking a leading role in licensing initiatives or developments leading to significant changes or having a significant impact.

It is stressed that Fellowship is intended for individuals who have made exceptional contributions to licensing.

Nominations are welcomed at any time and should be emailed to awards@instituteoflicensing.org

All awards are presented annually at the Gala Dinner during the IoL's National Training Conference, this year at the Holiday Inn, Stratford-upon-Avon on the evening of Thursday 17 November.

Membership renewal reminder

All our membership renewals were sent out before April, and a big thank you to all who have renewed and paid. If you have not received yours, please email membership@instituteoflicensing.org. If you have not paid and wish to pay by card or you wish to set up an annual direct debit, contact our Accounts Manager, Caroline Day, on 0845 287 1347 or accounts@instituteoflicensing.org. To view the benefits of membership, view our member benefits pages http://www.instituteoflicensing.org/member_benefits.html .

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

National Licensing Week

This year saw the launch of the first ever National Licensing Week (NLW), which took place between 20 and 24 June 2016. NLW was launched by the IoL as part of its 20th year celebrations, and is intended to be established as an annual awareness week, providing a platform for all licensing practitioners to get involved and celebrate the role of licensing in everyday lives.

There are so many areas covered by licensing it is impossible to cover them all in one day and it was for that reason that a full week of events was organised.

- Day 1 – Licensing is all around – a general awareness raiser about just how much of everyday life is influenced or safeguarded through licensing, what is covered and the broad aims in each case.
- Day 2 – Gambling and Gaming.
- Day 3 – Alcohol and Entertainment.
- Day 4 – Taxis.
- Day 5 – Partnership and a focus on other licensing areas including Animal Welfare, caravan sites charity collections etc.

The inaugural week was extremely well received, and a number of activities took place locally and nationally, including various job swaps, local joint visits and initiatives such as the IoL's National Training Day. Online poster campaigns were available for downloading and display in offices, licensed premises and other public places. All of this was complemented by lots of social media support and press releases.

We were delighted to receive such a great response to the first NLW and we will build on this going forward, hopefully for many years to come.

A big thank you to everyone who contributed to NLW this year and we look forward to even more contributions and activity for NLW 2017!

National Training Day

The IoL's National Training Day took place during National Licensing Week on 22 June at the Holiday Inn, Stratford-upon-Avon. The day was a great success and a huge thank you goes to our speakers who delivered an excellent training day for all.

This year, for the first time, the National Training Day was offered with a residential option, and we were delighted to be joined by so many delegates for the evening of 21 June. Our intention is to repeat the residential option again next year.

National Training Conference 2016

The IoL's signature event, the National Training Conference, will be held for the 20th time in November this year. The venue is the Holiday Inn, Stratford-upon-Avon, and the dates are 16-18 November.

The hotel is a fantastic conference venue, and Stratford-upon-Avon is a fascinating town, as well famously the birthplace of William Shakespeare. We are planning evening activities to complement the conference and to take advantage of the facilities on offer in this beautiful town.

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

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

We are looking forward to seeing all our delegates at the

event. It is, quite simply, a joy to run this event and be able to welcome delegates old and new to join us for three days of excellent training with unrivalled networking opportunities.

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

Safeguarding events

Following the successful and feedback of our Safeguarding through Licensing training days in 2015, we are planning a further series of similar events at the end of the year and in early 2017. Full details will be made available online once arrangements are confirmed.

Safeguarding is the underlying theme behind all licensing legislation and it is all too clear why this is the case. We hear concerns about data protection and information sharing, as well as the impact of the changes to the Notifiable Occupations Scheme, and it is imperative that we find a way around these issues to ensure that data is shared as appropriate to enable licensing authorities to make informed decisions on licence applications.

The safeguarding events will examine the issues as well as looking at local initiatives which are working successfully to disrupt child sex exploitation and the exploitation of vulnerable adults.

Pleasure Boat Licensing National Code of Practice

In conjunction with Michelle Baird, Licensing Manager at Stratford-upon-Avon Council, the IoL will be working on the development of a Pleasure Boat Licensing National Code of Practice. The project team is being established and will be meeting in the summer. It is early days at the moment, but we will keep members updated on progress of this important project via our website.

Scrap Metal Dealers Act September 2016

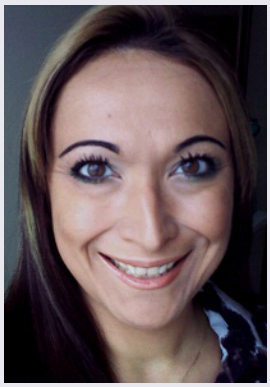
The course will explain the workings of the Scrap Metal Dealers Act 2013, how it works and how the renewal process will be applied. It wil also look at the workings of the Act and secondary legislation, together with the Guidance and puts it all in a practical context.

This course is a must for those who are responsible for the activities of scrap metal dealers in their area. It will provide you with the understanding needed to deal with what is required and also how the renewal process should be applied and is aimed at licensing officers, members and local authority lawyers.

Dates and Locations:
September (date TBC) - South West Region
September (date TBC) - London Region
16th September 2016 - Matlock

Fees:
Members - £125 + VAT
Non-Members -£175 + VAT

What being a Regional Officer means to me: Jane Blade, London Region Director and Chair



When Philip Doyle stood down as IoL London Region Chair in 2010, I was working for the London Borough of Camden as a Licensing Policy Officer and had only been to one or two IoL meetings. The only reason I'd attended at all was because the meetings were held at Camden Town Hall and my manager hauled me there despite my protestations. I didn't know very much about the IoL back then, but I found myself wondering when an email went round asking if anyone wanted to stand for the position of Chairman whether there was anything I could bring to the table. I asked what the position entailed and was told, "Oh not much, just introducing the speakers really". I was standing against very stiff competition in the form of Julian Skeens, and I recall several people laughing in my face and telling me I was going to humiliate myself if I persisted. But I truly believed London needed a local authority person on the Executive team, so persist I did. Against all odds, I was elected.

There was never any question in my mind that I would merely be introducing speakers. I immediately set about making contacts – networking frantically, getting to know the right people, making a nuisance of myself. I scrutinised discussion boards such as Licensing Guru to see what people were talking about. I had a mission – to "sex up" the meeting agendas, provide only the best speakers and focus the training on the hot topics of the day. Within the space of a few meetings, attendance had soared from around 30 to 40 people to 90 to 130 per meeting. IoL London is now seen as a flagship region - and that has not occurred purely by chance.

The first thing I have to explain to many people is that the position is unpaid. All of us who work on the regional teams do so free of charge and in our own time. For me, running the London region is like having a second full time job. I still source all the speakers and draw up the agendas, just the same way I always have. Sometimes my gambles pay off and sometimes they don't, but generally our speakers receive incredibly positive feedback. I also have a role I didn't realise I was inheriting on the IoL Board of Directors, which is a mammoth task in itself. And I maintain the IoL London Facebook and Twitter feeds, and basically nag, cajole and do whatever I have to do to make our meetings run smoothly. This includes dealing with last minute disasters such as speakers dropping out the day before the event (always great fun to sort out).

None of this would be possible without being surrounded by a fabulous team of helpers. In particular, Mandy Watson and Julia Peterson from the London Borough of Camden and Esther Jones and Sarah Williams from the London Borough of Lambeth are indispensable. Without them, the whole process would be a disaster. The food, drink, setting out and clearing away, buying of goodie bags, booking in of delegates and so on is all done in their own time and alongside their incredibly busy day jobs. They never grumble and I am eternally indebted to them. Geoff Cooper copes with the tedious task of managing our banking arrangements, which is something that causes me to glaze over at the best of times. David Chambers continues to be such a rock and fount of all knowledge on all things IoL that I honestly don't know how I would ever cope without him.

On meeting days I can usually be found running around like a lunatic, trying to get the temperamental Camden laptop to load and attempting to think of something mildly amusing to say when introducing the speakers, wondering why I didn't get round to it the day before (lack of time as usual). I recall once introducing Gerald Gouriet QC (arguably the most prominent licensing QC in the country) as "the Justin Timberlake of licensing". (Justin Timberlake himself was a bit more prominent back then.) Strangely, this endeared me to him, which was just as well, as it would have been an epic fail had he taken offence.

Philip Kolvin QC recently likened his relationship with the IoL as a kind of love affair and I know what he means. At times I have wanted to tear my hair out with the frustration of finishing a day's work only to start another when I would rather be doing something else, of feeling unappreciated, of wondering whether people really understand how much work and effort is required to make our meetings run so apparently seamlessly. But then I think of the incredible things – the people I have met, the feeling of achievement I have at how successful the region has become and the astounding level of support we receive. Which is why, for me, this is a love affair that is set to continue.

Reducing the harm of shisha smoking in Westminster

The rapid growth of shisha bars and growing concerns over matters such as health, noise, anti-social behaviour and duty evasion have prompted Westminster Council to propose new measures and regulations to tackle the perceived problems, as **Richard Williams** explains

In December last year Westminster City Council launched a consultation document, *Reducing the Harm of Shisha*, which set out the council's proposals to reduce harm caused by shisha smoking.

The consultation document highlighted the council's concerns about the rapid growth of shisha premises in Westminster, which had risen from 60 in 2010 to 132 in January 2014. There was particular concern about the spread of shisha bars beyond the "traditional" Edgware Road Stress area.

The consultation considered the adverse impact of shisha smoking in Westminster. Health was raised as a major concern, highlighting evidence that the effects of shisha smoking are similar to, or worse than, those of cigarette smoke, as shisha results in inhalation of tar, carbon monoxide, heavy metals and nicotine. The consultation pointed out that many shisha smokers wrongly believed that because shisha smoke is inhaled through a water-pipe, shisha is "safer" than traditional cigarette smoking.

The consultation highlighted other adverse impacts of shisha smoking, including pavements being blocked by tables and chairs, noise, anti-social behaviour and duty evasion. Since January 2014, all herbal smoking products have been liable for excise duty, so duty is payable on shisha, whether it contains tobacco or not. The council noted that a significant proportion of shisha in the UK appeared to be illicit, imported illegally and with no duties paid. In the UK, it is estimated that illicit tobacco costs the taxpayer £2.2 billion a year.

The consultation document set out the council's proposals to regulate shisha smoking, including:

- Strict enforcement of the smoke-free legislation contained in the Health Act 2006, to prosecute business owners who allow smoking in "substantially enclosed" outdoor spaces. Between April 2011 and 2013, 48 businesses in Westminster were prosecuted for allowing smoking in smoke-free areas.
- Licensing of tables and chairs on private forecourts within seven metres of any road or footway.
- Enforcing the requirement for planning permission for tables and chairs placed on the highway outside premises.
- Requiring premises used for shisha smoking to apply for planning consent for change of use, stating its view that shisha smoking is a *sui generis* use.
- Taking enforcement action under the Highways Act 1980, where enclosures, seating or charcoal burners are obstructing the public highway.
- Serving notices under the Environmental Protection Act 1990 for nuisance from noise or fumes.
- Longer term, to lobby for shisha smoking to be regulated as a licensable activity (by possible inclusion under the late-night refreshment regulations) and to require shisha businesses to be regulated.

The consultation document noted that the rapid growth of shisha smoking establishments was not just a Westminster problem. Other London boroughs such as Brent and Tower Hamlets and cities including Manchester and Birmingham have seen rapid growth of shisha premises. Blackburn with Darwen Borough Council has been lobbying the Government to consider increasing penalties under the Health Act for allowing smoking in smoke-free areas, as the current fines are not seen as a sufficient deterrent. Without doubt, other councils around the country will be closely watching the progress made by Westminster Council.

We are already noting that shisha smoking establishments in Westminster are coming under significant scrutiny and it is likely that regulation and enforcement will increase.

The Westminster Council consultation closed in February and a detailed response is now awaited, together with the council's firm proposals for action. Without doubt, premises offering shisha are going to face significant planning and regulatory obstacles moving forward.

Richard Williams
Solicitor-Advocate, Joelson

Has the Licensing Act 2003 made local residents more engaged?

One of the aims of the 2003 Licensing Act was to make it easier for residents to participate in and influence local decision-making. In the light of a new report looking at the differences brought about since the 1964 Licensing Act was superseded, **Richard Brown** considers whether the 2003 has succeeded in that aim

Readers may be aware of a recent report by the Institute of Alcohol Studies (IAS) entitled *The Licensing Act (2003): its uses and abuses 10 years on*. Published in March this year, it is a weighty tome which considers the impact of the Licensing Act 2003 on the "wider public sector" emanating from a research project undertaken by the IAS in which structured interviews were carried out with a range of stakeholders. The report author is Jon Foster of the IAS and expert legal advice was provided by this *Journal*'s editor, Leo Charalambides (see p26-28 and p43 for the book review).

The bulk of the IAS report is taken up by looking back on 10 years of the Licensing Act 2003, and looking forward to the future. The issues covered are many and varied but for this article I will focus on one chapter, that which examined the role of residents in the licensing process and, particularly, whether the aim of increasing accessibility for local residents had come to fruition in the decade since the move from magistrates to licensing authorities.[1] Coming as a newbie to licensing post-2005, I have tended to take it as read that the system is or at least has become more accessible. But is the system in fact more accessible to residents than it was under the Licensing Act 1964? Are residents more "empowered"? Unsurprisingly, the view of interviewees was, generally, in the affirmative, although significant practical barriers were identified. The IAS also found that there are significant differences from one authority to another.

A seismic change

The IAS report found that the system administered by the licensed justices in the Magistrates' Court was "widely regarded as overly formal, bureaucratic and intimidating". This would clearly do nothing to encourage lay resident objectors. In contrast, interviewees generally agreed that the transfer of responsibilities to local authorities has made the system more accessible to local residents but not, perhaps, to the extent envisaged when the 2003 Act came in to force.

One difference under the 1964 Act was that there was a power to award costs against a residential objector. In 1996, the then MP for Harrow West became so exercised by the Harrow licensing justices' decision to awards costs against a residents' association which had objected to a licence application that he introduced a Private Members' Bill to remove the power of the Magistrates' Court to award costs against such an objector.

As can be seen from *Hansard*,[2] this was clearly an unusual circumstance. Nevertheless, the power to order such costs as the court thinks fit existed. Residents will hardly be encouraged to involve themselves if there is a potential costs award looming around the corner. The reference in *Hansard* to the "array of expensive advisers, including a barrister" who appeared for the applicant is one which may strike a chord with many a lay resident objector under the 2003 Act.

In any event, this view of procedure in the Magistrates' Court was clearly one which had reached the upper echelons of the Home Office as was evidenced in the 2003 White Paper *Time for Reform: proposals for the modernisation of our licensing laws.*[3] The White Paper announced the intention to transfer responsibility for liquor licensing from the licensing justices, in whom the power had vested for the small matter of 450 years, to local authorities. Many local residents, it was said, "may be inhibited by court processes, and would be more willing to seek to influence decisions if in the hands of local councillors". The intention can be deduced from the heading of the section: "accessibility". It was also made clear that applications for extended hours would be subject to a consideration of their impact on local residents.

1 Chapter 9 Engagement of *Local Residents in the Licensing System*. The report is published by the Institute of Alcohol Studies.

2 http://hansard.millbanksystems.com/commons/1996/may/21/licensing-act-1964-amendment

3 April 2000 (Cm 4696).

Participants in the IAS study generally thought that although licensing sub-committee hearings are more accessible than Magistrates' Court hearings, they are still regarded by some interviewees as intimidating and difficult for residents to speak at. This is surprising given the clear direction that the "hearing" should take the form of a discussion led by the licensing authority. One unhelpful practice referred to was to restrict residents to only one statement between them. While a sub-committee is not going to be assisted greatly by multiple residents saying exactly the same thing, restricting them in this way fails to achieve the aim of enabling a sub-committee to be apprised of all the relevant information it needs to make the evaluative judgement as to what steps are appropriate for the promotion of the licensing objective. Residents who have made representation on ostensibly very similar grounds can nevertheless often have slightly different perspectives which can be teased out by sensible questioning. The nuances of each resident's concern can be highly relevant when considering the local context, which is where residents' "expertise" lies. On a more practical level, a resident who feels that they have not been given a fair chance to express their concerns is not likely to give up their time to attend another hearing, and is likely to be disenchanted in a way that they may not have been had they been able to "say their piece".

Good practice and technology

A number of examples of good practice with regard to engagement and consultation were mentioned by participants in the study. One of the good practice examples cited is the work of Newcastle City Council. I am grateful to Jon Foster for pointing me in the direction of the City Council's Statement of Licensing Policy, from which it is clear that local residents were fully engaged in the consultation process. Their views on the impact of existing licences for off-sales and licences for late-night refreshment played an important part in establishing a new cumulative impact area in the Elswick area of the city, with the data gathered by the council and the views of residents each supporting the other:

> *7.6.1 …residents have told us that there are too many shops selling alcohol in the area. Local data and concerns raised by residents show that there are issues related to alcohol related crime, underage drinking, youth related anti-social behaviour and street drinking by adult drinkers who visit or live in the hostels in the area.*
>
> *7.6.2 Local residents have told us that there are too many shops selling alcohol and late night takeaway premises in the area.*
>
> *7.6.3 In response to this evidence, the Licensing Authority has decided to establish a new Cumulative Impact Area….*

Of course, being able to point to residents' responses to such consultations is an important factor in solidifying the legitimacy of a cumulative impact policy. This can be one of the residual benefits for a licensing authority of making sure that residents have the chance and are encouraged to participate in the process.

Some authorities send notification letters to residents within a certain vicinity of the application premises. Although it is not something mentioned in the IAS report, easily accessible lists of pending applications on a council website or readily available information publications keeping interested residents updated can add to the information pool from which residents can drink. Good links with local residents associations and amenity societies is also important.

Improvements in technology and the development of social media have made it easier for residents to become involved. Indeed, the philosophy of involving local residents and making it easier for them to make their views known simply mirrors developments in wider society. Citizens are, in general, more aware of, willing and able to exercise what could be seen as democratic rights by making their views known (notwithstanding desultory turnouts in elections). From Twitter to the *Guardian* website's *Comment is Free*, to online petitions, to radio phone ins, to in-play banal polls in sports coverage - the public is being encouraged to object, support, petition, agree, disagree or simply "have their say" on anything from the EU referendum to "Who has the smoothest voice in the commentary box?".

Acceptance of representations via email and systems such as public access make it easier on a practical level and less time-consuming for residents to participate in the 2003 Act decision-making than it was for the bulk of the time that the 1964 Act was in force. It also makes it easier for a licensing authority to ensure that residents are kept informed of developments, for example, amendments to an application.

Although the 1964 Act required applications to be advertised, technological advances and systems such as public access can enable residents to proactively make sure they are notified of applications in their area which may affect them.

An easily accessible and navigable online licensing register can be a mine of information which can assist residents in putting forward their views effectively. Clear guidance on the statutory requirements and the easy availability of application documents and licences is also helpful. However, the IAS found that the licensing pages of some websites were difficult to navigate.

Challenges

One example given by an interviewee in the IAS report is a difficulty for residents in structuring their objection around the licensing objectives. Clearly-set-out information on local authority websites and consultation letters can help. Some respondents stated that the standard of evidence required of residents is sometimes misunderstood. It should be remembered that a representation is required to do no more than address the "likely effect" of granting an application on the promotion of the licensing objectives. Case law is sometimes used as authority for the proposition that a sub-committee needs actual evidence of actual harm. It does not; indeed this would be impossible on an application for a new premises licence. The *Hope and Glory* and *Taylor v Manchester* decisions make very useful reading on this point.

Another finding was that representations are sometimes withdrawn because the objector is fearful of intimidation. The Guidance (paras 9.25-9.29) does address this eventuality, approving anonymising representations in such circumstances, although it refers to a "well-founded" fear of intimidation in the opinion of the licensing authority. Nevertheless, some authorities routinely anonymise representations, which was seen by some interviewees as potentially beneficial to wider engagement.

Some of the trade participants had different views, with too much engagement seen as problematic for business. One view was that it is too easy to object. However, under the 1964 Act objectors were constrained neither by statutory "licensing objectives" nor the strict time limits under the 2003 Act. Although there was no right for a resident to apply for a review of a licence under the 1964 Act, this was balanced by the requirement to apply for a renewal of the licence periodically.

Once responsibility for alcohol licensing had been returned to the Home Office, it took up the baton.[4] The subsequent Police Reform and Social Responsibility Act 2011 amended the 2003 Act to replace references to "necessary" with references to "appropriate", in order, it was said, to lower the evidential burden. The requirement that in order for a representation to be "relevant" the resident had to demonstrate they lived in the "vicinity" of the premises was also removed.

Conclusion

The IAS found that "most authorities do not encourage" resident participation, despite the clear steer at para 1.5 of the Guidance that one of the "key aims and purposes" supported by the legislation, is "encouraging greater community involvement in licensing decision and giving local residents the opportunity to have their say regarding licensing decisions that may affect them."

This is perhaps reflective of the pressure on finances on most, if not all, local authorities. The IAS report talks in more detail about licence fees and how increased fee income could impact on licensing authorities. Residents' participation is undoubtedly one area which could benefit.

The various responsible authorities are the experts in their own fields. Residents are surely the experts in their local area, the accurate and realistic perspective of whom is crucial to a process which leads to a decision based on an evaluative judgment, which a licensing sub-committee reaches on the basis of the all relevant information presented to it. Accessible information is crucial. If knowledge is power, information is liberating.[5]

Richard Brown
Solicitor, Licensing Advice Project, Westminster CAB

4 The 2010 consultation entitled *Rebalancing the Licensing Act: A consultation on empowering individuals, families and local communities to shape and determine local licensing.*

5 Kofi Annan.

Licensing's purpose is not to restrict trade

The case of the operator of a snack van in North Lanarkshire is a reminder that licensing conditions must relate to the underlying aims of the relevant legislation. **Niall Hassard** outlines the salient points

McCluskey & Others v North Lanarkshire Council [2016] SC HAMS 3,is a licensing David versus Goliath. It is an interesting and surprisingly technical case arising from the Civic Government (Scotland) Act 1982 (the 1982 Act).

The case pits the operator of a snack van, authorised to trade by way of a Street Trader's Licence (STL) issued by the local authority, against the same local authority. Although the appeal case was argued in the Sheriff Court both parties had recourse to counsel.

It should be noted that it was agreed that the *McCluskey* case would be the "lead case" (there were approximately 30 traders appealing against the local authority's decision) behind which other appeals would sit. The *McCluskey* decision would be binding upon them as they shared similar facts and circumstances. This ensured the *vires* of the contentious condition was determined by the sheriff in the judicially expeditious manner for all concerned.

Ms McCluskey held a STL granted by North Lanarkshire Council, which permitted the sale of hot and cold food from her snack van operation. The licence held by Ms McCluskey stated:

> *The above named, residing at the above address, is hereby authorised to act as a street trader within the North Lanarkshire area subject to the under noted specific conditions and the conditions contained in the attached schedule of conditions. It set the parameters in terms of location of the van and hours of permitted.*
>
> *The licence will expire on 30 September 2017.*
>
> *Conditions*
> *a) The Street Trader shall be permitted to trade only in the following parts of the North Lanarkshire area, namely: Bruce St, Bellshill (across from Orthoworld)*
> *b) The Trader shall be permitted to trade between the hours of Mon-Sat 8am – 4pm*
> *c) The Trader is permitted to sell Hot and Cold snacks and no other commodities…*

A map showing the designated site was attached.

During the currency of the permission the council varied the STL to include a further condition which stated:

> *The street trader will be prohibited from operating within a distance of 250 metres from the defined perimeter, as constituted by the physical boundaries in place, of all secondary schools in the North Lanarkshire Area from 8.00 am to 5.00 pm on any school day during term time. The prohibition will apply to snack vans selling or offering for sale hot or cold food, fish and chip vans and ice cream vans.*

Ms McClusky's snack van traded within 250 metres of a secondary school.

The facts were not in dispute so no evidence was led. It was accepted that the basis for the contentious condition came from two publications, namely, *The Hunger for Success Initiative* of the Scottish Executive, 2004, and the council's *Diet and Nutrition Policy,* 2013-14. Both publications had, at their heart, the desire to promote healthy eating for children by improving the food provided in schools.

The council's legal department prepared a report on the policy underpinning the condition. The report highlighted the duty imposed on the council, as local education authority, under s 53A of the Education (Scotland) Act 1980 to promote the availability of school lunches and to encourage pupils to use this facility. The report's author felt snack vans undermined the promotion of healthy eating in schools on the basis that they offered less healthy alternatives to school meals. It also highlighted the fact that other councils have imposed similar conditions.

The report recognised that the council was effectively powerless to prevent fixed retail or food outlets near to schools from selling less healthy food but it had the power to regulate street traders by imposing a condition on their

licences. While recognising that some street traders would be adversely affected by the condition, the report recommended that the condition should be incorporated into all STLs.

Against this backdrop, all holders of STLs would be invited to address the council's licensing sub-committee to state a case for an exemption from the condition. They were invited to attend a committee hearing on 20 August 2014 to argue for an exemption. The pursuers attended and were represented by UK law firm TLT. In basic terms it was argued that the condition was *ultra vires*, breached natural justice and was incompatible with human rights law and the that underlying policy was unfair and disproportionate. The arguments found no favour and they were rejected, meaning the condition was imposed.

A statement of reasons was requested and received where the council stated that it was entitled to impose the condition in order to further the aims of reducing obesity among young persons and to encourage healthier eating. The council's position was that the 1982 Act empowered a licensing authority to vary a licence at any time "on any grounds they think fit". Its reading was a broad interpretation of the scope afforded to the licensing authority. They believed that the licences were being varied to achieve a legitimate aim, namely, promoting healthy eating among school pupils rather than unhealthy food, which contributed to childhood obesity. According to the statement of reasons, this generally accepted fact, coupled with the fact that other local authorities had adopted similar conditions, provided a sufficient evidential basis to impose the condition.

By agreement at the appeal the sheriff focused on the case of Karen McCluskey. He felt that the salient issue was whether the council, as a licensing authority, had the power to impose this particular condition upon the STLs. The sheriff's judgement was that it does not. In particular, the sheriff highlighted that the practical effect was a blanket ban.

The sheriff had been referred to the case of *Stewart* and he agreed with Lord Hope who found the legal test to be based on two questions. The first requires a close analysis of the condition and its effect and the second an examination of the scope of the power which the relevant act gives to the licensing authority. In *McCluskey,* the sheriff reasoned that if the effect of the condition is to require street traders to do more than a licensing authority is empowered to require of them, the condition must be held to be *ultra vires*.

In his examination he found that the condition requires Ms McCluskey to cease trading within the hours of 8am and 5pm during the school year. The time period covers the normal working day with the result that she will not be able to trade with anyone, school pupils or not, for a significant part of the calendar year. After holidays are taken into account the school year lasts 39 weeks, which equates to 75% of the calendar year. Compounding this is the fact that the STL is location specific and does not allow trade elsewhere.

The assertion that 90% of Ms McCluskey's turnover comes from adult workers and visitors to the industrial estate was not challenged. Four hundred adult customers objected to the imposition of the condition by signing a petition and a number commented on the healthy food that is available from the snack van.

Furthermore the condition had the effect of seeking to control what was sold. The STL clearly permits her to sell hot and cold snacks. The aim was restricting purportedly unhealthy alternatives to school lunches.

A significant flaw in the process was that the sub-committee did not outline the nutritional standards that the licence holders had to meet - there was no transparency. The sheriff noted a FOI request established that no assessments had been carried out on the food sold by the licence holders, so there was no evidence which allowed the sub-committee to come to an informed decision that the food was less healthy than school lunches.

Turning to the question, does the 1982 Act permit the licensing authority to impose a condition on a street trader which regulates the terms on which she trades with her customers?, the sheriff reiterated that the net effect is Ms McCluskey cannot trade for 75% of the calendar year and any attempt to do so is a criminal offence.

Paragraph 10 (1) of schedule 1 of the 1982 Act gives power to the licensing authority to "vary the terms of a licence on any grounds they think fit". The sheriff, again with reference to Lord Hope's reasoning in the case of *Stewart*, felt the power afforded is not unlimited and the local authority is not able to use it for any purpose. Instead the condition attached to the STL must be for a proper licensing purpose.

The Introduction to the 1982 Act states that it is: "An Act to make provisions as regards Scotland for the licensing and regulation of certain activities; for the preservation of public order and safety and the prevention of crime…".

With reference to relevant government circulars the sheriff held the purpose of licensing is not to restrict trade or competition; rather, it was preventing the mischief set out in the Introduction to the 1982 Act. Insofar as street traders selling food were concerned, the only addition was meeting hygiene regulations.

Based on the 1982 Act and the relevant circulars the sheriff concluded that Parliament did not contemplate that the licensing system would be used by local authorities to involve themselves in the running of businesses once a licence had been granted to carry out a particular activity In this case, the sub-committee had "an ulterior purpose" beyond the scope of the underlying legislation.

In summary the sheriff determined that while:

the aim of the condition cannot be criticised. It may have public support and it may be the case that other authorities have introduced similar conditions into licences but all of that is not enough to make it legitimate. It depends entirely on the intention of Parliament. In my judgement Parliament did not intend the licensing of street traders to be used in this way… The condition imposed by the defender is ultra vires.

In the aftermath of the sheriff's decision the repercussions have been felt beyond the bounds of North Lanarkshire Council. TLT has recently appeared for another operator in East Dunbartonshire Council's area, pursuant to a variation application, and successfully argued at the licensing committee for deletion of a similar condition. Dumfries and Galloway Council and East Ayrshire Council have taken cognisance of the case and moved to delete their versions of the condition of their own volition. Accordingly, this appears to have been a very significant appeal case.

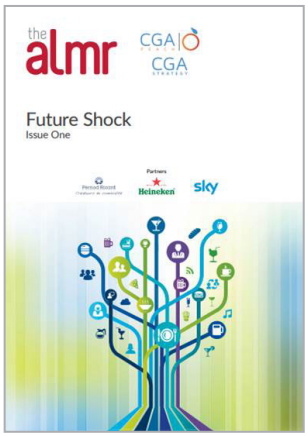
Niall Hassard
Licensing legal director, TLT

Kids in a candy shop

By getting their food offer right, operators can win the loyalty of even the very choosy younger generation. Staying optimistic will help too, writes **Paul Bolton**

For the younger consumer, visiting the on-trade is becoming more and more like being a kid in a candy shop. The ever-expanding array of colourful new concepts, particularly in our city centres, has given millennials an unprecedented amount of choice for places to socialise, and they're doing more of that than any other demographic. CGA Peach Brand Track figures show that 18-34 year olds go out and spend more than anyone else.

But should we be surprised the appeal is so strong, despite a continuing tough economic climate for the young? According to CGA Peach's Business Leader's Survey, the operators and suppliers who are most optimistic are of a very similar age. Nearly a quarter of leaders under 40 are "very optimistic" about the future of the on-trade, compared to just 10% of those aged 40-plus. Emerging businesses tend to be fronted by the young (for example, Red True Barbecue, MEATLiqour), helped in part by their embrace of technology as a way of interacting with their "always online" consumers.



But beyond a social media campaign, just how do operators make sure they bring in the younger crowd? The message may have been hammered out time and time again for the trade as a whole over the last few years, but a food offer has become particularly important for millennials. CGA's *Future Shock* report found that 55% of non-parents aged between 18-24 eat out weekly, compared to 40% of non-parents who drink out with the same frequency. Continuing the theme of less focus on the drink-led occasion, the most popular drinks category of those 18-24s surveyed was soft drinks, which suggests they're there for a meal, thus putting more pressure on licensees to make sure the food offering goes way beyond just a necessity.

So what exactly do younger people want? The *Future Shock* report cites the difference in importance of recommendation, special offers and atmosphere for 18-24 year olds – all factors that play into creating a great "consumer experience". More than a third of operators said this was important to the consumer in the Business Leader's Survey, up 10% on last year. Pop-up bars and festivals are in high demand at the moment, so operators need to draw some of that heat from the streets and parks and into their outlets in order to attract a consumer that has come to expect more and is the least loyal. A bigger and / or ever-changing choice of food and drink therefore seems to be on the menu, with strong relationships with suppliers helping to support this. Having this bond is also important for activations, which links back to the consumer experience. Themes are also still "in", with 7 out of 10 consumers in CGA's Late Night report saying they would be more likely to visit a bar if it was themed.

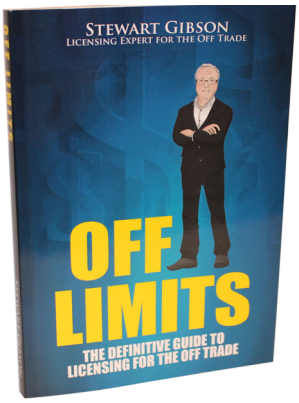
Ultimately, loyalty is the name of the game and bringing in the young and keeping them in is the hardest challenge with this most promiscuous demographic. But by engaging and evolving as much as the young do, licensees can appeal and become the preferred choice for the most important group of consumers.

Paul Bolton
Researcher, CGA Peach

CGA *Future Shock* is available to download here; http://www.cgapeach.co.uk/s/ALMR-CGA-FutureShock-Report_Issue-One.pdf

The full CGA Business Leaders Peach Report is available to purchase here; http://www.cgapeach.co.uk/peach-report-purchase

Book Reviews



Off Limits
Stewart Gibson, Elite Publishing Academy, 2016
£34.99 plus VAT

Reviewed by **Caroline Daly,** barrister at Francis Taylor Building.

Off Limits describes itself as the definitive guide to licensing for the off trade and the "only book of its kind dedicated entirely to the sale of alcohol for consumption off the premises".

The book is certainly not, and nor does it profess to be, a textbook or practitioners' manual. It is safe to say that it will not imminently feature on the latest acquisitions list of any of the barristers' Inns of Court libraries, or indeed any other licensing practitioners' libraries.

Off Limits is aimed squarely at the layman. Its focus is on the licensee, specifically the "typical convenience store retailer". At the offset, Gibson lays out the purpose of the book as being "to improve the sale of alcohol from your business". He further states:

> *Licensing is not your expertise, running a shop and making money is. Licensing plays a part in this, and once you have read this book you will be better placed to get the most out of the key area of your store (if it isn't already, it should be).*

This extract from the introduction gives something of an indication of the informal writing style deployed by Gibson throughout the book. The tone of the work is consistently casual, and it deliberately avoids arid and technical references to statutory provisions and / or policy.

It is a practical guide for those who sell alcohol for consumption off the premises as to how they can avoid a variety of licensing pitfalls.

The opening chapter deals with both mandatory and specific conditions on licences. Gibson explains a number of common issues in relation to conditions, such as the fact that many licensees fail to read and / or understand the conditions on their licence, accept offer conditions that they cannot in practice comply with, or fail to take seriously their obligations to secure compliance with any or all of the conditions on their licence.

His advice is straightforward and is summed up in punchy bullet points at the end of each chapter. With regards to conditions, he warns retailers to, among other matters, be aware of the conditions on the licence, understand what needs to be done to adhere to the conditions, ensure that staff are also made aware of and understand the conditions, and to make variation applications to remove unwanted or impractical conditions.

This is all pretty basic stuff, but important nonetheless.

The subsequent chapters continue in this eminently practical vein, dealing with issues such as avoiding under-age sales, proper staff training, and preventing the sale of illegal alcohol.

Gibson also explains, in a clear and simple manner, the licence review hearing process, the appeal process to the Magistrates' Court, and the role of responsible authorities under the 2003 Act. He also includes a concise and effective summary of the role of planning in the licensing process, and the overlap in practice between the two regimes.

The sections on recent and proposed changes to licensing and associated regimes will be of particular use to retailers.

With regards to illegal alcohol, reference is made to the Alcohol Wholesaler Registration Scheme, introduced by HMRC in January 2016 as a means of tackling alcohol fraud. The effect of the new regime on retailers is explained as being that all businesses that trade in, or retail, alcohol will, from 1 April 2017, be under an obligation to ensure that any UK wholesalers from whom they purchase are registered with HMRC under the new Registration Scheme. In effect, Gibson explains that alcohol retailers will be required to review their supply chains to ensure that they are doing all that they can to source only genuine tax-paid alcohol.

The Immigration Bill 2015-2016 and the formal link that it seeks to establish between licensed premises and illegal working is also explained in some detail. Gibson highlights that, if the Bill gains Royal Assent, the Secretary of State will become a responsible authority, which would allow the Home Office to make representations in relation to applications for premises licences. He also points out that the proposed legislation would amend the Licensing Act 2003 to mean that applicants for premises or personal licences must be entitled to work in the UK, and that licences would lapse if the licence holder ceases to be so entitled.

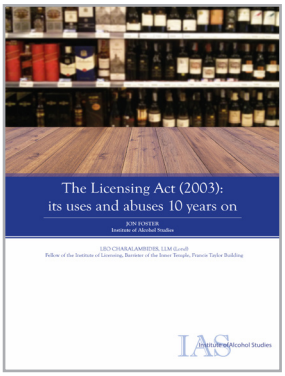
This chapter also refers to the proposed powers of an

immigration officer to issue an illegal working closure notice and close a premises for up to 48 hours, or for a longer period if the premises are placed under special compliance requirements as directed by the courts. The effect of the proposed changes is put in Gibson's typical no-nonsense fashion as follows: "Put simply, employ someone who isn't legally allowed to work for you, and you place your whole livelihood at risk, because your premises licence could be revoked."

Peppered throughout the book are anecdotes relating to the author's clients and their licensing mishaps, included as a means of providing real life examples and, one assumes, demonstrating Gibson's expertise and experience. Indeed, at various points, the author explicitly advertises his professional advice to the reader, referring to his email address and stating at one point:"I may be able to help… unless you ask you will never know…". Indeed, the book concludes: "I hope we can speak soon."

One cannot help but feel that *Off Limits* is, at heart, a rather elaborate advertising campaign for the professional services of Stewart Gibson. However, I do not think that the author attempts to hide this perfectly legitimate aim, and so I wish him luck and hope that his endeavours bear fruit.

A 50% discount is being offered to IoL members who purchase *Off Limits* by using the following website link - https://gpretail.leadpages.co/off-limits2/.



The Licensing Act (2003) : Its uses and abuses 10 years on

By Jon Foster (Institute of Alcohol Studies) and Leo Charalambides (FIoL and Barrister of the Inner Temple. Francis Taylor Building).

Published by Institute of Alcohol Studies London 2016

Reviewed by **Dr Paul Lehane**, JP, FCIEH Head of Food, Safety & Licensing. London Borough of Bromley

Significant anniversaries seem to prompt retrospectives and the 10th anniversary of the Licensing Act 2003 is no exception with the publication of *The Licensing Act (2003) : Its uses and abuses 10 years on* by Jon Foster (Institute of Alcohol Studies) and Leo Charalambides (FIoL, Barrister of the Inner Temple and Editor of the *Journal of Licensing*) adding his own inimitable legal perspective.

Between them, they have produced an insightful, informative and ultimately useful work which will be especially relevant to those licensing practitioners with a local government or policing interest.

The work is based on a series of structured interviews and workshops with a range of stakeholders in the licensing regime, including councillors, licensing officers, police, lawyers, academics and the licensed trade, and it provides a qualitative base upon which to base their comments and develop their arguments. However, this approach is not without its limitations, such as a small sample size and the possible bias of self-selected respondents.

Jon Foster provides a commentary on the political, social and policy background to the Act which is illuminating as a measure of how it was a compromise between the inevitably different requirements of the trade and those charged with administering the licensing regime. This can be seen all the more clearly with the passage of time and the clarity of hindsight.

While a little repetitive in places, the book is well worth reading by hard-pressed councillors, licensing officers and police as it strongly suggests that licensing authorities need not be on the back foot when it comes to making licensing decisions. In fact, the authors suggest the Act can be used positively to strengthen not only the licensing authority role but also show how wider concerns relating to health, the local economy and the wider public interest can be integrated in to statements of licensing policy and day to day decisions.

I look forward to the sequel in another 10 years .

The full report can be found at: http://www.ias.org.uk/What-we-do/IAS-reports/Licensing-Act-2003-Its-uses-and-abuses-10-years-on-Documents.aspx

Phillips' Case Digest

ALCOHOL AND ENTERTAINMENT

Court of Appeal (Civil Division)
Lord Justice Beatson, Lord Justice Simon, Sir Robin Jacob

Effect of a mistake made in notice of appeal against the revocation of premises licence. Notice named the premises licence holder's holding company FL Trading Ltd ("FL"), rather than the appellant. Sole director of both FL and the appellant was Mr Franco Lumba. Whether power to amend notice of complaint in civil proceedings in Magistrates' Court by substituting name of company which as premises licence holder had standing to appeal, in place of the name of another company which did not have standing.

R (on the application of Essence Bars (London) Limited (t/a Essence) v (1) Wimbledon Magistrates' Court and (2) Royal Borough of Kingston-upon-Thames [2016] EWCA Civ 63

Decision: 3rd February 2016

Facts: Notice of appeal against the revocation of the club's premises licence by the licencing authority had named the premises licence holder's holding company FL Trading Ltd ("FL"), rather than the appellant. The sole director of both FL and the appellant was Mr Franco Lumba.

Point of dispute: Whether there was power to amend a notice of complaint in civil proceedings in the Magistrates' Court by substituting the name of the company which, as premises licence holder, had standing to appeal, in the place of the name of another company which did not have such standing?

Held: There would be two questions to be decided by the magistrates on the hearing of the appeal when construing the notice of appeal and the relevant background, namely whether:
1. on the facts of this case, the document had simply misdescribed the name of the premises licence holder who was the appellant/complainant, or whether, notwithstanding the reference in it to "the complainant, the premises licence holder", in the circumstances of this case the identity of the actual appellant was FL; and (only if it was found that the mistake was one as to *description* rather than one as to *identity*)
2. the other party - here the licensing authority - was not in any reasonable doubt about the identity of the appellant, applying the approach of the Divisional Court to the test formulated by the justices in *Marco (Croydon) Ltd (t/a A&J Bull Containers) v Metropolitan Police* [1984] RTR 24 and noting the analogy of the cases involving the CPR.

The court held that each of the preceding questions would be for the Magistrates' Court to decide objectively in all the circumstances of the case. The Court of Appeal allowed the appeal against the decision of the Administrative Court, set aside the decision of the District Judge, and remitted the matter to the Magistrates' Court for redetermination in the light of the senior court's judgment and the evidence before the lower court.

ALCOHOL AND ENTERTAINMENT

Administrative Court (Case Stated)
Jay J

Licence revoked on basis of alleged immigration offences, dealt with by way of civil penalties. Magistrates' court allowed appeal. Crime prevention objective not engaged as no offence established. Decision challenged by licensing authority in the High Court. Appeal allowed.

East Lindsey District Council v Abu Hanif (trading as Zara's restaurant and takeaway) (2016) (unreported)

Facts: Respondent owned and managed a restaurant that was the subject of a joint police and immigration visit. Chef with no right to be in or work in the UK found working as an illegal worker. Paid cash in hand and did not account to HMRC for tax deducted. Police applied for the respondent's licence to be reviewed and the licensing sub-committee revoked it.

Point of dispute: Whether prosecution of licence holder was needed for the licence to be revoked on grounds of licensing authority's duty to prevent crime and disorder.

Held: Despite absence of criminal conviction, clear evidence of the commission of criminal offences, both in relation to the non-payment of the minimum wage and also tax evasion. As for the offence of knowingly employing an illegal worker, clear inference that licensee was aware that he was employing an illegal worker. Deterrent approach justified on the facts.

Mr. Justice Jay certified the case as appropriate for citation in future cases under the relevant Practice Direction. The decision demonstrates that actions *capable* of being addressed by way of a criminal prosecution, but in the event pursued by way of a civil sanction capable of constituting a breach of the 'crime and disorder' licensing objective upon which a licence review might be founded.

STREET TRADING

Administrative Court (Judicial Review)
Hickinbottom J

Licensing officer purported to make a finding of fact but had clearly proceeded on the basis of a fundamental procedural error. Claim originally sought to challenge two separate decisions of the council to terminate stallholder licences, albeit on the basis of different reasons. One decision quashed and matter remitted to the Council for referral to appropriate appeal body.

R (on the application of (1) Qasim Aryubi (2) Saber Nazary) v Birmingham City Council [2015] EWHC 1972 (Admin)

Decision: 17 March 2015

Facts: Claimants market traders selling fruit and vegetables from market stalls in Birmingham. Market owned by the Council, which issued licences to trade there. Licences governed by Council's Rules and Regulations for the Operation of Retail Markets 2006. The 2006 Regulations allowed assignment of licences. Complex set of facts leading to alleged breaches by First and Second Claimant. Claim pursued in respect of one decision of Ms Kennedy of 4 April 2014 to terminate the licences.

Point of dispute: Whether it was incumbent upon Ms Kennedy to make a finding of fact on the central issue before her, namely whether the employees of the Claimant were illegal workers.

Held: Officer had failed to make the necessary finding of fact, having simply noted concerns about the evidence and had not grappled with the core factual issue before her. Decision clearly made upon the basis of a fundamental procedural error and must be quashed.

However, appeal body was bound to make findings of fact in relation to the core issue. The High Court should not make those findings, which was a task properly for the appeal body to determine on the basis of the evidence it considered it appropriate to hear.

GAMBLING

Upper Tier Tribunal
(Administrative Appeals Chamber)
Upper Tribunal Judge H Levenson

Allowed appeal made by Gambling Commission against a decision of the General Regulatory Chamber of the First-tier Tribunal dated 8th December 2014 to the effect that the decision of the Gambling Commission refusing the grant of an Operating Licence to Greene King would be quashed and application remitted to the Commission with a direction that the applications be granted. Applications referred to completely differently constituted panel in the General Regulatory Chamber of the First-tier Tribunal with a direction that fresh decisions on the appeal(s) against the decision(s) of the Commission be made in accordance with the legal basis set out in the decision of the Upper Tribunal.

Gambling Commission v GK [2016] UKUT 0050 (AAC)

Decision: 29th January 2016

Facts: Greene King applied to the Gambling Commission for the relevant bingo operating licences in respect of up to eight of its premises. If such licences were granted it would then apply to the local licensing authorities for the necessary premises licenses. Regulatory Panel "satisfied as to the suitability and competence of the [company], and persons relevant to the applications, to offer the proposed licensed gambling activities". However, Panel refused to grant the licences which had been applied for, having had regard to the licensing objectives, to an intention in the Act to create a graduated regulatory regime and to the different expectations of those frequenting pub or bingo premises as to their primary purpose, and taking a precautionary approach.

Point of dispute: Whether issues of concern to the Commission should be determined by licensing authorities upon individual applications for premises licences (per First Tier tribunal), or whether that strategic decision remained within the purview of the Commission when asked to grant the necessary Operating Licence (per Upper Tier tribunal).

Held: The combined effect of the legislative provisions was to place on the Commission the main responsibility for ensuring compliance with the licensing objectives and, in particular, the protection of vulnerable persons. Primacy is to be given to the decisions of the Commission on whether to grant an operating licence. In light of these provisions, it could not really be the case that when such matters are at issue the legislation required the Commission to step back in individual applications and let the multitude of local licensing authorities deal with such national policy issues on a case by case basis.

Permission granted to appeal to the Court of Appeal

TAXIS

Divisional Court (Case Stated)

Lord Justice Beatson, Mr Justice Wilkie

Mr Kaivanpor sought to have his taxi licence reinstated after collision with a cyclist and consequent revocation of his hackney and private hire licences by Brighton & Hove Council. Revocation upheld by Brighton Magistrates' Court in October 2014. The council contended that it was up to the driver to show he was a 'fit and proper person' to be a taxi driver.

Mehrdad Kaivanpor v DPP [2015] EWHC 4127 (Admin)
Decision: 28 October 2015

Facts: Appellant had been a taxi driver and was involved in an accident with a cyclist. Charged with driving without due care and attention and failing to stop following an accident. Local authority revoked his licence pursuant to the Local Government (Miscellaneous Provisions) Act 1976. District judge directed that the appellant's licensing appeal should be heard by the same bench and held immediately after his criminal trial. Magistrates appeared to have taken that evidence that was heard in the criminal trial into account when determining the regulatory appeal.

Point of dispute: Whether the magistrates were right 1(a) not to recuse themselves; 1(b) to place the burden on the appellant to show that he was a fit and proper person; (2) whether the decision to dismiss the appeal was perverse.

Held: (1) Could be no criticism of the way the magistrates conducted the criminal appeal or same court conducting the regulatory appeal. (2) Magistrates had been referred to the relevant authorities, but *Canterbury City Council v Ali* [2013] EWHC 2360 (Admin) had a number of limitations and deficiencies. Once a person had a licence the scheme sensibly required the licensing authority to be satisfied of certain matters; the burden was therefore *on the licensing body* to satisfy itself of changes of circumstances and not for the holder of the licence to be required to establish that. Magistrates had erred in law in following *Canterbury* instead of *Muck It Ltd v Secretary of State for Transport [2005] EWCA Civ 1124*. Wrong to place the burden of proof on the appellant. (3) Appellant did not come close to establishing a perversity case. (4) Matter would be remitted to a differently constituted bench to decide the question of the burden of proof.

TAXIS

Queen's Bench Division
Ouseley J

Claimant, as the regulator of private hire vehicles and hackney carriages in London, licensed the first defendant company as a private hire vehicle operator in London. Booking and billing process involved the customer and driver, each using application software (apps) on smartphones equipped with a global positioning system (GPS). Both apps were licensed by the first defendant. Each fare was, therefore, not calculated and displayed on a running basis, as with black cab taximeters. Regulator seeking a declaration that the vehicles operated by the first defendant were not "equipped with a taximeter" for the purposes of s 11 of the Private Hire Vehicles (London) Act 1998.

Transport for London v Uber London Ltd [2015] EWHC 2918 (Admin)

Decision: 16 October 2015

Facts: In May 2012, Transport for London (TfL), licensed the first defendant, Uber London Ltd (Uber) as a private hire vehicle operator in London. The vehicles operating within the Uber network included licensed private hire vehicles (PHVs) and black cabs. Second defendant, the Licensed Taxi Drivers' Association (LTDA), an association representing licensed hackney carriage drivers, the London black cabs; third defendant, the Licensed Private Hire Car Association (LPHCA), an association representing licensed taxi and private hire vehicle operators. An offence under s 11 of the Private Hire Vehicles (London) Act 1998 for a licensed PHV to be equipped with a device for calculating the fare to be charged for any journey ('a taximeter').

Point of dispute: Whether private hire vehicles operating within the Uber network were equipped with taximeters, in contravention of the criminal law.

Held: PHVs operating within the Uber network are not equipped with a taximeter as defined by the Act. The driver's smartphone with the driver's app was not a device for calculating fares by itself or in conjunction with the central server. Even if it were, the vehicle was not equipped with it. That conclusion as a matter of the ordinary meaning of the words as applied to the agreed facts.

Declaration: "A taximeter, for the purposes of s 11 of the Private Hire Vehicles (London) Act 1998, does not include a device that receives GPS signals in the course of a journey, and forwards GPS data to a server located outside of the vehicle, which server calculates a fare that is partially or wholly determined by reference to distance travelled and time taken, and sends the fare information back to the device."

Jeremy Phillips
Barrister, Francis Taylor Building

***Phillips' Case Digest* is written by Jeremy Phillips based upon the case reports produced by him for *Paterson's Licensing Acts*, of which he is Editor-in-Chief.**

Index of cases

Index of Cases JoL 1 –14

A

Adamson v Waveney District Council [1997] 2 All ER 898
11:10, 12:13

Albert and Le Compte v Belgium (1983) 5 EHRR
4:6, 6:35

Applegate Inns v North Lanarkshire Licensing Board (1997) 7 SLLP 10
3:14

Ask Entertainment Pub Ltd and Ask Entertainment Nightclub Ltd v Aberdeen City Licensing Board [2013] SLT (SH Ct) 94
14:12

Attorney General's Reference (No 3) of 2002 R v Loosley [2001] 4 All ER 879 HL
3:11

Attorney General v National Assembly for wales Commission [2012] UKSC 53
13:29

B

Bapu Properties Ltd v City of Glasgow Licensing Board (2012) GWD 11-214, [2012] SC 26
3:14, 14:12

Belfast City Council v Miss Behavin' Ltd [2007] 1 WLR 1420, [2007] UKHL 19
6:37, 11:22

Blue Line Taxis (Newcastle) Ltd v Newcastle-upon-Tyne City Council [2012] EWHC 2599 (Admin)
D6:45

Bradford v Booth; City of Bradford Metropolitan District Council v Booth [2000] 164 JP 485
4:31

Brentwood Borough Council v Gladen [2004] EWHC 2500 (Admin)
3:48

Brightcrew Ltd v City of Glasgow Board [2011] CSIH 46
3:14, 8.23, 14:12

Britain v ABC Cabs (Camberly) Ltd [1981] RTR 395
3:48

British Amusement Catering Trades Assoc v Westminster City Council [1989] AC 147
4:40

British Steel plc v Customs and Excise Commissioners (No. 1) [1997] 2 All ER 366
4:11

Bryan v United Kingdom (1995) 21 EHRR 342
4:6, 6:35

C

Canterbury City Council v Ali [2013] EWHC 2360 (Admin)
7:36, D9:50, 14:21

Calvert v William Hill Credit Limited [2008] EWCA Civ 1427
14:4-8

Canterbury City Council v Knight [2013] EWHC 1329 (Admin)
D9:48

Catscratch Ltd v City of Glasgow Licensing Board [2001] LLR 610 3:36

Cherwell District Council v Naveed Anwar [2011] EWHC (Admin)
3:46, 6:36, 6:37, 11:11

Chief Constable of Nottinghamshire Police v Nottinghamshire Magistrates' Court [2009] 3182 (Admin)
3:3, 4:32, 10:22

Clockfair Ltd v (1) Sandwell Metropolitan Borough Council (2) Grovenor Casinos Ltd [2012] EWHC 1857 (Admin)
D6:46

Cogley v Sherwood [1959] 2 QB 311
3:47

Commissioner of Metropolitan Police v Mayfair Realty Limited (22 July 2014, unreported)
10:33

Crawley Borough Council v Stuart Attenborough [2006] EWHC 1278 (Admin)
8.93

Crompton v Department of Transport North Western Area [2003] EWCA Civ 64
6:36

City of Bradford MBC v Booth [2000] EWHC (Admin) 444
8:4

D

Daniel Thwaites plc v Wirral Borough Magistartes' Court [2008] EWHC 838 (Admin)
1:21, 2:19, 5:13, 8.34

Di Ciacca v The Scottish Ministers [2003] SLT 1031
14:38

Dittah v Birmingham City Council, Choudhry v Birmingham City Council [1993] RTR 356 QBD
12:13

Developing Retail Ltd v South East Hampshire Magistrates' Court [2011] EWHC 618 (Admin)
3:15, 3:32

Dudley Metropolitan Borough Council v Mohammed Arif [2011] EWHC 3880 (Admin)
D3:47

E

East Riding of Yorkshire Council v Dearlove [2012] All ER (D) 163 (Jan)
3:11

Estates & Agency Holdings Ltd v Westminster City Council (18 Septemebr 2012) QBD (Admin)(unreported)
D6:43

Extreme Oyster v Guildford BC [2013] EWHC 2174 (Admin)
D9:46

F

G

Galloway v Western Isles

Licensing Board (2011) GWD 4-134
3:13

Gardener v Morris (1961) 59 LGR 187
2:20

Gateshead Council v Henderson [2012] EWHC 807 (Admin)

Gateshead Metropolitan Borough Council v Secretary of State for the Environment [1993] 3 PLR 100
14:36-40
3:11

Gerry Cottle's Circus v City of Edinburgh District Council (1990) SLT 25
3:14

Gillingham Borough Council v Medwat (Chatham) Dock Co. [1992] 3 WLR 449
4:19

Gold Kebab Ltd v Secretary of State for Communities and Local Government [2015] EWHC 2516 (Admin)
14:36-40

Gough v Avon & Somerset Licensing Bureau [2002] All Er (D) 52 (Apr)
8.38

Greene King Brewing and Retailing Ltd & Greene King Retailing Ltd v The Gambling Commission GA/2014/0001 & GA/2014/0002
D12:49

Gudmundson v Iceland (1996) 21 EHRR CD 89
6:36

H

Handyside v United Kingdopm (1976) 1 EHRR 737
3:36

I

Imran Ahmed v Revenue and Customs Commissioners [2013] EWHC 1991 (QB)
D9:51

J

Jones v Bath & North East Somerset Council [2012] EWHC 1361 (Admin)
D6:48

K

Kaivanpor v Sussex Central Justices DC, 28 October 2015 (unreported)
14:21

Kell (Scotland) Ltd v City of Glasgow Licensing Board (2010) SLT (Sh Ct) 197
3:15

Khan v Coventry City Council [2011] EWCA Civ 751
8:4

Kingsley v United Kingdom (2002) 35 EHRR 10
4:6

L

Leeds City Council v Hussain [2002] EWHC 1145
3:47, 6:37, 11:9, 11:11, 12:19

Leeds City Council v Leeds District Magistrates and Another [2013] EWHC 1346 (Admin)
D9:49

Lethem v Secretary of State [2002] EWHC 1549 (Admin)
14:36-40

Lidster v Owen [1983] 1 All ER 1012
8.37

Little France Ltd v Ealing London Borough Council (15 February 2013) (QBD) (Admin)(unreported)
D6:44

Lough v First Secretary of State [2004] 1 WLR 2557
8.6

Luminar leisure Ltd v Wakefield Magistrates' Court & Ors [2008] EWHC 1002
3:30

Luxury Leisure Ltd v The Gambling Commission GA/2013/0001
D9:53, D12:48

M

Matthew Taylor v (1) Manchester City Council (2) TCG Bars Ltd [2012] EWHC 3467 (Admin)
5:3, D6:43

Mayor and Burgesses of the London Borough of Lambeth v Elma Sanil; Mayor and Burgesses of the London Borough of Lambeth v Ndue Meli [2012] EWHC 1623 (QB)
D6:49

Mayor and Burgesses of the London Borough of Tower Hamlets v Thames Magistrates' Court, Lovebox Festivals Ltd [2012] EWHC 961 (Admin)
D3:46

McCarthy v First Secretary of State -2007] EWCA Civ 510
3:36

McCool v Rushcliffe Bourough Council [1998] 3 All E 889
9:50, 11:10, 12:19

Michael Mark Anthony White (2) Michael Thomas White v South Derbyshire District Council [2012] EWHC 3495 (Admin)
D6:49

Muck It Ltd v Secretary of State for Transport [2005] EWCA Cic 1124
14:21

Murtagh (t/a Rubery Rednal Cars) v Bromsgrove District Council (1999) Independent, 20 November, QBD
1:10

N

Northset Ltd v City of Glasgow Licensing Board (unreported, Glasgow Sheriff Court, 22 March 2012)
14:12

Nottingham City Council v Amin [2000] 2 All ER 946
3:11

Nottingham City Council v Woodings [1994] RTR 72
3:11, 3:47

O

Ogwr Borough Council v Baker [1989] COD 489
3:11

P

Padfield v Minister for Agriculture Fisheries and Food [1968] AC 997 HL, [1968] UKHL
5:12, 7:33

Partnership & Ors v HMRC [2003] UKFTT 210
9:10-11

Index of cases

Pascoe v First Sceretary of State [2007] 1 WLR 885
3:36

Patricia Jones, Mourad Tighilt (Suing on behalf of themselves and all other members of the Bristol Branch of the National Taxi Association) v First Greater (*sic*) Western Limited [2013] EWHC 1485 (Ch)
7:36, D9:51

Pinnington v Transport for London [2013] EWHC 3656 (Admin)
D9:52

Philip Ivey v Genting Casinos UK Limited [2014] EWHC 3394
14:4-8

Practice Direction (Citation of Authorities) [2001] 1 WLR 1001
7:41-45, 8.7, 10:34

Practice Direction [2002] 1 WLR 811
9:49

Prasanna v Royal Borough of Kensington & Chlesea [2010] EWHC 319 (Admin)
4:31

Q

R

R (Alconbury) v Secretary of State for the Environment, Trade and the Regions [2001] UKHL 23
4:6

R (Alistair Thompson and Spearmint Rhino Ventures (UK) Limited) v Oxford City Council [2014] EWCA Civ 94
D12:46

R (Blackwood) v Birmingham Magistrates' Court [2006] EWHC (Admin)
4:18, 14:36-40

R v Birmingham City Council ex parte Quietlynn Ltd & Ors (1985) 83 LGR 461
3:48

R v Birmingham City Council ex parte Dredger (1993) 91 LGR 532 QBD
6:30

R v Bow Street Magistrates' Court ex parte McDonald [1996] 15 LS Gaz R 30
2:21

R v Chaaban [2003] EWCA Crim 1012
8.9

R (Chief Constable of Nottinghamshire Police) v Nottinghamshire Magistrates' Court [2009] 3182 (Admin)
3:3, 4:32, 10:22

R (Clays Lane Housing Co-operative Ltd) v The Housing Corporation [2005] 1 WLR 2229
3:36

R v Clarke [2008] UKHL 8
7:33

R v Davis [2008] UKHL 36
1:34

R v Drinkwater [2012] EWHC 765 (Admin)
8.9

R v Greater London Council ex parte Rank Organization [1982] LS Gaz R 643
6:30

R v Loosely, A-G's Ref (No 3 of 2000) UKHL 53
3:11, 5:40

R v Maidstone Crown Court, ex parte Olson [1992] COD 496
12:19, 14:21

R v Manchester City Council ex parte King (1991) 89 LGR 696
6:28, 6:30

R v Manchester Crown Court ex parte Dransfield Novelty Company Ltd [2001] LLR 556
5:13

R v Minister for Agriculture Fisheries and Food ex parte Padfield [1968] AC 997 HL, [1968] UKHL
5:12, 7:33

R v Misra and Srivastava [2004] EWCA Crim 2375
9:55

R v Newcastle-upon-Tyne City Council ex parte The Christian Institute [2001] BLGR 165
5:5, 11:22

R (Quark Fishing Ltd) v Secretary of State for Foreign & Commonwealth Affairs [2003] EWHC 1743 (Admin)
6:36

R v Secretary of State for Health ex parte Eastside Cheese [1993] 3 CMLR 123
2:6, 12:6, 12:8

R (Shamaroo) V SSHD [2001] 1 EWCA Civ 1139
8.6

R (Sharonjeet Lalli) v Metropolitan Police Commissioner and Newham Borough Council [2015] EWHC 14 (Admin)
D12:45

R (St Albans City Council) v Jass Patel [2008] EWHC 2767 (Admin)
7:20

R v Secretary of State for the Home Department, ex parte Jeyeanthan [2000] 1 WLR 354
12:44, 12:45

R v Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] COD 107
10:31

R v Stoke-on-Trent City Coucnil ex parte Sheptonhurst Ltd & Quietlynn Ltd (1985) LGR 461
6:30

R v Taylor (Gary) [1995] Crim LR 252
1:34

R v Torbay Licensing Justices, ex parte White [1980] 2 All ER 25
8.37

R (Westminster City Council) v Merran [2008] EWHC 1202 (Admin)
12:8

R v Westminster City Council ex parte Hutton, R v Birmingham City Coucnil ex parte Quietlynn Ltd v Ors (1985) 83 LGR 461
3:48, 4:11, 6:28, 6:30, 12:20, 12:32, 12:41-42

R v Windsor Licensing Justices, ex parte Hodes [1983] 2 All ER 551, [1983] 1 WLR 685, CA

8.36

R (on the application of 4 Wins Leisure Ltd) v Licensing Committee for Blackpool Council & Ors [2007] EWHC 2213 (Admin)
3:29

R (on the application of 93 Feet East Ltd) v Tower Hamlets [2013] EWHC 2716 (Admin)
7:35, 7:41, 8.6, 10:31, 10:33

R (on the Application of Aylesbury Vale District Council) v Call A Cab Ltd [2013] EWHC 3765 (Admin)
D9:3, 9:7, 9:15-18, D9:50

R (on the application of Bean Leisure Trading A Limited) v Leeds City Council; R (on the application Ruby May (1) Limited) v Leeds City Council [2014] EWHC 878 (Admin)
D9:53

R. (on the application of Bednash) v Westminster City Council (unreported)
D9:49

R (on the application of Begum (by her litigation friend Rahman) v Denbigh High School [2006] 2 WLR 719
6:37, 10:

R (on the application of Bridgerow Limited –v- Cheshire West and Chester Borough Council [2014] EWHC 1187 (Admin)
D9:54, D12:46

R (on the application of Bristol City Council) v Bristol Magistrates' Court and Somerfield Stores [2009] EWHC 625 (Admin)
3:15, D6:45, 12:7

R v (on the application of British Beer and Pub Association & Ors) v Canterbury City Council [2005] EWHC 131 (Admin)
6:21

R (on the application of Camelot UK Lotteries Ltd) v Gambling Commission & Health Lottery Elm Ltd & Ors [2012] EWHC 2391 (Admin)
4:16

R (on the application of D&D Bar Services Ltd) v Romford Magistrates Court and the London Borough of Redbridge [2014] EWHC 213 Admin
D9:3, 9:4-9

R (on the application of Developing Retail Ltd v South East Hampshire Magistrates' Court [2011] EWHC 618 (Admin)
3:15, 3:32, 7:20, 12:9

R (on the application of Daniel Thwaites plc) v Wirral Magistrates' Court [2008] EWHC 838
1:21, 2:19, 5:13, 8.34

R (on the application of Davis & Atkin) v Crawley Borough Council [2001] EWHC 854 (Admin)
6:30, 6:31, 12:9

R (on the application of Exeter City Council) v Sandle [2011] EWHC 1403 (Admin)
1:11

R (on the application of Mark Eric Morris) v Preston Crown Court and Blackpool Borough Council [2012] EWHC 2134 (Admin)
D9:50

R (on the application of Hemming t/a Simply Pleasure Ltd & Ors) v Westminster City Council [2012] EWHC 1260 (Admin) and [2012] EWHC 1582 (Admin)
D3:48, 4:1, 6:28, 6:29, 6:30, 14:19

R (on the application of Hemming t/a Simply Pleasure Ltd & Ors) v Westminster City Council [2013] EWCA Civ 591
6:28, 6:29, 6:30, D6:48, 14:19

R (on the application of Hemming t/a Simply Pleasure Ltd & Ors) v Westminster City Council [2015] UKSC 25
11:42-43, 12:20, D12:47, 14:19

R (on the application of Holding & Barnes plc) v Secretary of State for the Environment, Transport & Regions [2001] 2 WLR 1389
6:35

R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court & Ors [2009] EWHC 1996 (Admin)
3:31, 4:19, 8.5, 8.6, 10:23

R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court & Ors [2011] EWCA Civ 31
1:32, 3:31, 4:6, 4:30, 5:3, 7:20, 8:3, 8:4, 8.5, 8.6, 9:3, 12:3, 14:40

R (on the application of Ian Gordon Shanks and Others t/a Blue Line Taxis) v Northumberland County Council [2012] EWHC 1539
D3:47,

R (on the application of Keep Streets Live Campaign Ltd) v London Borough of Camden [2014] EWHC 607 (Admin)
8:3, D9:55, 11:6

R (on the application of KVP ENT Ltd) v South Bucks District Council [2013] EWHC 926 (Admin)
D6:47, 7:14, 14:36-40

R (on the application of Malik) v Waltham Forest Primary Health Care Trust [2006] EWHC 487 (Admin)
6:36

R (on the application of Merlot 73 Limited v City Of Westminster Magistrates Court and Others [2013] EWHC 3146 (Admin)
D9:49

R (on the application of Nicholds) v Security Industry Authority [2007] 1 WLR 2067
6:36

R (on the application of Singh) v Cardiff City Council [2012] EWHC 1852 (Admin)
4:8, 5:10, D6:44, 7:36, 12:19

R (on the application of Thompson) v Oxford City Council [2013] EWHC 1819 (Admin)
7:14, 8.24

R (ex parte Thompson) v Oxford City Council [2014] EWCA Civ 94

D9:54, D12:46

R (on the Application of Star Oyster Limited and The Casino Limited v Guildford Borough Council [2014] EWHC 1412 (Admin)
D9:46

R (on the application of Tower Hamlets) v Commissioner of the Metropolis (Co/3009/2012) (unreported)
6:20

R (on the application of Townlink Ltd v Thames Magistrates' Court [2011] EWHC 898 (Admin), [2001] 1 WLR 1001
4:18, 8.5

R (on the application of William Hill Organisation Limited & Another v The Horserace Betting Levy Board & Others [2013] EWCA Civ 487
D9:52

R (on the application of Yasar Akin (t/a EFE's Snooker Club)) v Stratford Magistrates' Court and hackney London Borough Council [2014] 4633 (Admin)
D12:4v

Re Sainsbury's Supermarket [2012] NIQB 45
8.9

Regina v Minister of Agriculture, Fisheries and Food & Anr [1991] 1 CMLR 507
2:6

Rertrobars Wales Ltd v Bridgend BC [2012] EWHC 3834 (Admin)
D9:48

Ritz Hotel Casino Limited v Gaebury [2015] EWHC 2294
14:4-8

Ritz Hotel Casino Limited v Noora Al Dahar [2014] EWHC 2847
14:4-8

Royal Albert Hall (Corporation of the Hall of Arts and Science) v The Albert Court Residents Association & Ors [2011] EWCA Civ 430
1:31, 11:22

Runa Begum v London Borough of Tower Hamlets [2003] 2 AC 430
4:6

S

Sagnata Investments Ltd v Norwich Corporation [1972] 2 QB 614
3:31, 7:36

Sales v Lake [1922] 1 KB 553
3:47

Samaroo v Secretary of State for the the Home Department [2001] EWCA 1139
3:36

Sarai v London Borough of Hillingdon CO Ref 3240/2014 (27 August, 2014)
10:31, 10:34

Scotch Whisky Association v Lord Advocate (C-333/14)
14:42-44

Sevket Gurgur v London Borough of Enfield [2013] EWJC 3483 (Admin)
D12:44

Shanks v North Tyneside Borough Council [2001] EWHC Admin 533
12:15

Sidabras v Lithuania (2006) 42 EHRR 6
6:37

Sharp v Wakefield [1891] AC 173
8.37

Solomon v Green [1955] Brewing Tr Rev 313
8.38

Stepney Borough Council v Joffee [1949] 1KB 599
3:31

Stockton-on-Tees Borough Council v Fiddlers & Ors [2010] EWHC 2430 (Admin)
1:10

T

Taylor v Manchester City Council [2012] EWHC 3467 (Admin)
5:3, D6:43

The Queen on the Application of the Mayor & Burgesses of the London Borough of Newham v Stratford Magistrates' Court [2012] EWHC 325 (Admin)
D3:45, 10:23

Timothy Martin Hemming (t/a Simply Pleasure Ltd) & Ors v Westminster City Council [2012] EWHC 1260 (Admin) D3:48, 4:1, 6:28, 6:29, 6:30

Torfaen County Borough Council v Brian Stubbs [2014] EWHC 4702 (Admin)
D12:48

Tower Hamlets v Ashburton Estates Ltd (t/a 'The Troxy') [2011] EWHC 3504 (Admin)
3:3, D3:45, 4:19, 4:30, 10:23

Tre Traktorere v Sweden (1989) 13 EHRR 308
3:36, 4:6, 6:36

Trafalgar Leisure Ltd v The Gambling Commission (4 September 2013) (GA/2012/06) First-Tier Tribunal, General Regulatory Chamber (unreported)
7:11, 7:12, D9:52

U

V

W

Westminster City Council v Secretary of State for CLG and Cordani [2013] EWHC 23 (Admin)
7:19

Wathan v Neath Port Talbot County Borough Council (12 July 2001 (unreported), QBD
11:12

Wilcock v Lancaster City Council [2013] EWHC 1231 (Admin)
8.14

Wilcock v Lancaster City Council [2013] EWCA Civ 1607
8.14

X

Y

Z

Note to readers (article clarification):

In (2015), 14 JoL, p13 the article entitled *What does the future hold for the regulation of street collections* stated that in 2015 "aggressive fundraising tactics had tragically led to the death of prospective donors".

In the tragic case of Olive Cooke, the inquest into her death did not mention charities and fundraising practices, and Mrs Cooke's family have publicly stated that while the fundraising requests to Mrs Cooke were 'intrusive' they were not to blame for her death. The IoL accepts that although the article rightly underlines instances of poor fundraising practice, it was potentially misleading in this regard.

We are grateful to the Public Fundraising Regulatory Association for bringing this to our attention, giving us the opportunity to clarify the position.

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