

AFTER HOURS

Welcome

Welcome to the winter issue of After Hours, our bulletin in which we aim to keep you informed of current issues and news in licensing and gambling.

Burges Salmon acts for clients on a national basis in the leisure, entertainment and gaming sectors. The team deals with all the licensing requirements of the retail and licensed trade, and also advises clients in the gaming and entertainment sectors, including lottery and gaming advice and public entertainment issues. The team also advise on noise nuisance and control issues, the regulation of sports grounds, vehicle operator licensing and outdoor events. The team has also been at the forefront of negotiating on behalf of its clients with DCMS and the Gambling Commission on the implementation of the Gambling Act.

If you would like others in your organisation to be added to this regular briefing please email chris.pritchett@burges-salmon.com

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New Scottish Licensing Regime introduced



The biggest change to Scotland's licensing laws in 30 years came into effect in September, affecting outlets where alcohol is served and sold.

The previous system of seven licences and statutory opening hours has been replaced under the Licensing (Scotland) Act 2005 with two new licences – 'personal' and 'premises' - mirroring the situation in England & Wales. Once granted, premises licences will remain in effect until the occurrence of certain events, such as surrender or revocation, or the premises cease to be used for the sale of alcohol. Personal Licences will last for 10 years, with the option to renew for a further 10 years unless revoked or surrendered.

Key implications for licensees are that:

- All premises will require a premises licence, with a named premises manager (responsible for running the premises).
- Premises managers must hold a personal licence.
- All staff who serve alcohol must be trained in accordance with the Act.

The new licensing regime is founded on five licensing objectives, which mirror the familiar licensing objectives

from England & Wales, with the addition of "Protecting and improving public health".

The Scottish Government hope that the changes will help address problems created by alcohol misuse in Scotland while supporting retailers and publicans in their continued efforts to promote responsible retailing and consumption of alcohol. The addition of a public health objective is consistent with regulatory attitudes north of the border to such issues as minimum pricing. It will be interesting to see which other health-focused initiatives appear on the horizon.

The introduction of the new regime has not been without controversy. To take advantage of certain transitional rights, prospective premises and personal licence holders had to apply by certain dates. Trade Journals have noted that a number of pubs in Scotland have been forced to close after 'major difficulties' in obtaining premises licences. It was reported that when the new Act went live, only 30% of licences had been issued. The deadline for receiving personal licences was extended and the full regime did not come into force until 1 November. The Bill in Scotland estimate that one fifth of licensed premises in Scotland have closed since the new Licensing Act came into force.

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New Premises Licence Minor Variations Procedure

Changes came into force in July to the Licensing Act 2003 under the Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) Order 2009 (2009 No. 1772) which see a change to the way premises licence variations are carried out and the introduction of a new minor variations procedure.

The changes will allow premises licence holders to vary their licence under a new process intended to be more simple and less costly than the existing regime, although this new procedure will only be possible where none of the variations are considered to have an adverse effect on any of the licensing objectives.

Under the new process, licensing authorities must consult the responsible authorities they consider appropriate to the application and take into account relevant representations from those authorities or interested parties. Licensing authorities will have **15 working days** to determine the application. If the determination is not carried out within this time, the application is rejected and the application and fee returned. The new process differs to the normal procedure where an applicant must give notice to each responsible authority, and a hearing may be held in the event of relevant representations

Certain variations will not be allowed under the new provisions, such as extending the times for which a licence has effect, specifying an individual as Designated Premises Supervisor (which has its own separate procedure already), or adding the supply of alcohol to an entertainment only licence. Potentially acceptable minor variations are:

- Minor changes to structure/layout requiring plan change.
- Correcting errors.
- Adding licensable activities which do not risk disturbance.
- Removal of out of date or unenforceable conditions.

It is difficult to see how the new process will be substantially more streamlined for premises licence holders, as it involves an application form, notice and waiting period. There is also the risk of refusal for a variety of reasons and wasted application fee/time, together with the risk of the application being rejected should the 15 day period run out (which would require re-applying and the possibility of further scope for residents to object). There are also doubts over the helpfulness of the Guidance produced to support the revisions, but only time will tell how the new procedure works in practice, how it is used by licence holders and how it is received by licensing authorities.

A recent case where a licensee was fined £50,000 plus costs by Enfield Magistrates for breaches of 11 out of 19 licence conditions exemplifies the implications of non-compliance with licence conditions and suggests it is a good idea to perhaps utilise the new minor variations procedure to "tidy up" unworkable conditions. Burges Salmon's Licensing Team are able to advise on these matters and would recommend the removal of unnecessary or outdated conditions as soon as possible.

"...It is difficult to see how the new process will be substantially more streamlined for premises licence holders..."

Tenant's breach of Premises Licence does not make Owner criminally liable

Hall & Woodhouse Ltd v Poole Borough Council

The High Court has recently upheld a decision that a brewery company owner (and freeholder of a pub) could not be convicted under Section 136(1)(a) of the Licensing Act 2003 for breach of licence after breach by the tenant (and tenant's manager) of certain conditions.

The High Court held that Section 136(1)(a) is directed at persons who, as a matter of fact, actually carry on or attempt to carry on a licensable activity at the premises. It is therefore a question of looking at actual conduct and whether a person has, as a matter of fact, carried out a licensable activity in breach of the provision. In this case the

owner was not involved in day to day management of the pub. The judge stated that the mere fact that a person may be the holder of a licence did not make him automatically liable for licensable activities at the premises. If this had been intended, Section 136 could and would have expressly provided for this. The case will no doubt be welcome news to owners of pubs and other entertainment venues who do not get involved in the day to day running of their businesses. It is, however, important to remember that each case will still turn on its own merits and owners are advised to be vigilant nonetheless.

Nuisance Noise

Case Law Update



A recent case, *Hope and Glory Public House Limited, R (on the application of) v City of Westminster Magistrates' Court* (2009) heard in the High Court, serves as a useful reminder of how public nuisance claims in relation to noise from licensed premises are dealt with.

The case concerns "The Endurance" public house situated in Soho which was the subject of over 70 complaints in relation to noise caused by customers drinking outside in the evenings. The bulk of the complaints were from an individual who lived across the road from the premises. The local authority investigated these complaints and an application was brought for a review of the premises licence, after which a condition was imposed that "no customers be permitted to take drinks from the premises in an open container after 6pm". The licence holder objected to this (not unreasonably many would say!) and, after the condition was upheld in the Magistrates' Court, he applied for Judicial Review.

Counsel for the public house submitted that, as the nuisance only affected a few people living locally, it was not a public nuisance and also that as Soho is a noisy place,

full of entertainment centres with a high ambient noise, residents of Soho ought to be expected to put up with such noise.

The application for judicial review was refused. The case provides a useful summary of the issues that may be considered in noise nuisance cases and provides a useful discussion of the relevant case law in the area. The case highlights the difficulty in distinguishing between statutory nuisance as set out in section 79 of the Environmental Protection Act 1990 and public nuisance for the purpose of the Licensing Act 2003 ("the Act"). Guidance issued under section 182 of the Act notes that public nuisance under the Act **is not** narrowly defined and can include low-level nuisance affecting a few people nearby as well as major disturbance affecting a whole community. In this case the approach taken by the guidance was approved. It will be interesting to see how the case is treated by the Court of appeal should it progress that far.

"This seems a sensible (if overdue) response to the mountains of paper required for each new grant or variation application."

Consultation Launched

Online Applications

A consultation launched by the Department for Culture, Media and Sport ran until 13 November on online applications and notifications under the Licensing Act 2003. The changes proposed could see licensing authorities, not applicants, responsible for notifying the

relevant authorities if an application is made electronically. This seems a sensible (if overdue) response to the mountains of paper required for each new grant or variation application.

Consultation Launched

Lap-dancing



The Government has launched new proposals which will introduce a radical overhaul of the way lap-dancing clubs are regulated. If enacted, the proposals will mean that any lap-dancing operator, new or existing, who wishes to provide 'relevant entertainment' at the end of the transitional period will be required to apply for a sex establishment licence.

Most lap-dancing clubs are currently regulated under the Licensing Act 2003 and hold a premises licence/club premises certificate to provide 'regulated entertainment'. As such, the objections of local people and businesses must be based on one of the four licensing objectives, and licensing authorities cannot therefore consider objections based on matters outside the scope of these objectives, such as whether a lap-dancing club is appropriate given the character of the area. Legitimate concerns outside the scope of the licensing objectives will be able to be heard under the new regime.

Dismissing suggestions that existing planning legislation could be used to give authorities more control over these establishments (it was thought this would be "overly complex"), the Bill proposes to reclassify them as "sex encounter venues" and to bring them under the control of Schedule 3 to the Local Government (Miscellaneous Provision) Act 1982. In particular, it is proposed that:

- local people will be able to object to grants of licences if they have legitimate concerns that a proposed venue would be inappropriate given the character of an area (authorities will also be empowered to refuse applications on this basis);
- licences will need to be renewed at least yearly;
- authorities will be able to limit the number of such venues in particular areas; and
- authorities will be able to impose a wider range of conditions on licences.

The government's last review of food and drink uses in the Town and Country Planning (Use Classes) Order 1987, gave us the separate uses of cafes/restaurants, drinking establishments and hot food takeaways. Would it really have been overly complex to specify that lap dancing and similar establishments should be considered to be sui generis? This would have obliged local planning authorities to take into account all material considerations when considering applications for new establishments, whether new-build or changes of use.

The Home Office has indicated that after careful consideration it is proposed that grandfather rights, similar to those that existed under the Licensing Act 2003 and Gambling Act 2005 should not be made for the purposes of the Policing and Crime Bill and that existing lap-dancing clubs who wish to continue to provide 'relevant entertainment' should be required to apply for a new sex establishment licence, subject to the transitional arrangements. The potential for clashes between business which risk having to stop providing 'relevant entertainment' or in a small number of cases closing and the interests of the local people are yet to be fully seen.

"...any sex establishment operator, new or existing, who wishes to provide 'relevant entertainment' at the end of the transitional period will be required to apply for a sex establishment licence"

Continued fight against illegal machine supply

The Gambling Commission has conducted in excess of 20 joint operations with local authorities, involving 294 visits to operators, since launching last September a nationwide clamp down on illegal suppliers of gaming machines.

In a recent operation in Lancashire a criminal caution was issued for illegally supplying gaming machines to an alcohol

licensed premises, while hotels and guesthouses were found to be operating gaming machines illegally.

The Gambling Commission has warned that "Businesses supplying or making gaming machines available for use without a licence risk action from the Commission or its local enforcement partners".

Online Promotions, Competitions and Prize Draws



“A negative response has been received from all sectors during a consultation process ...”

We have advised a number of clients on the legality of online lotteries, competitions and prize draws and have advised on the establishment of legal competitions which fall outside the jurisdiction of the Gambling Act 2005 (“the Act”) as opposed to illegal lotteries, which clearly do not!

When establishing a legal competition, there are many issues to consider. The main hurdle that must be overcome when organising a legal competition (as opposed to an illegal lottery) is to show that an element of skill or judgement is involved, which causes a significant proportion of entrants to fail or be deterred from entering. This criteria is set out under section 14 of the Act. We have considered different forms of “skill or judgement” that may be used by clients ranging from multi-choice questions to “spot the ball” type formats. Some of the issues we have considered for clients include the number, style and difficulty of questions; the linkage between the skill element and multiple draws and the importance of obtaining evidence on entry levels, failure rates etc. to produce to the Gambling Commission. We have also considered issues surrounding payment and the need for participants to make payment prior to entry to the competition.

Use of quasi-gaming promotions is an area of increasing importance which has hit the headlines following the proliferation of house “raffles”. The Commission have previously warned home owners that such schemes could be illegal under the Act and that organisers are likely to attract regulatory intervention from the Commission. The Commission produced guidance in May 2009 on the topic warning that house competitions that do not meet the skill, judgement or knowledge test under section 14 of the Act will be classed as lotteries. The Commission note that they have written to more than 50 organisers of house competitions, with the majority having had difficulty in producing satisfactory evidence of their legality.

Online operators often have additional queries in relation to data protection/privacy advice, website terms and conditions, tax, property, company structure/corporate issues and cross jurisdictional regulatory regimes. Our dedicated Gambling Group are able to advise on all of the issues that are of importance to clients interested in online gaming or promotions.

Mandatory rules opposition

A negative response has been received from all sectors during a consultation process on proposed new mandatory conditions for all alcohol premises licences under the Policing and Crime Bill. The Home Office has gauged reaction to the proposals through a series of road shows and via written responses from representative organisations. Trade organisations are opposed to new condition-making

powers and a mandatory code. The Local Government Association and LACORS have also cited a mandatory code as against both the Hampton principles and the partnership principles of the Licensing Act. In addition, the idea of fixed local licensing conditions which will ‘tie the hands’ of local licensing authorities are opposed.

Proceeds of Crime Act

What small businesses should be aware of

The Gambling Commission have recently produced advice for operators aimed specifically at small businesses to aid compliance with their obligations under the Proceeds of Crime Act 2002 ("the Act").

The Gambling Commission have flagged requirements under the Act for all gambling businesses to identify,

assess and minimise the risk of customers using money obtained illegally to gamble. Operators must report any concerns to the Serious Organised Crime Agency with failure to do so potentially resulting in prosecution. We would commended this guidance to you

Form of Abatement Notice must be correct



The High Court decision in *Elvington Park Limited v York City Council* (2009) has considered the correct form of noise abatement notices. In this case the abatement notice served on the operators of an airfield outside York was held to be defective in law because it required them "to take the steps necessary to prevent noise from motor vehicles and associated activities causing a statutory nuisance at other premises", without defining what those steps were. The abatement notice was held to be defective in not specifying the works or steps to be taken to achieve an abatement of the nuisance under section 80(1)(b) of the Environmental Protection Act 1990. Had

the abatement notice been issued under sub-paragraph (a) it would have been valid.

The issue highlighted here is that while it is accepted that a local authority has a choice as to whether to issue an abatement notice, either under sub-paragraph (a) which requires merely that the nuisance is abated, or under sub-paragraph (b) which requires the execution of works or taking of other steps, if the notice is issued under sub-paragraph (b) then the requisite works or steps must be specified.

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