

AFTER HOURS

Welcome

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

Burgess 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. 2005 and 2006 saw many notable successes following heavily-contested applications, as well as landmark decisions where licensing authorities have derogated from their own stress or cumulative impact policies. 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@burgess-salmon.com

Inside information

- Prize Draws and Competition p2
- Poker in Pubs p2
- Planning to gamble? p2
- Licensing Fee Review p3
- Licence Reviews p3
- Illegal Broadcasting of Football Matches p4
- Smoking Update p4
- Smoking Bans: Will you be ready? p5
- Smoking ban and rateable values p5
- Statutory Nuisance p6
- Contact Team p6

Gambling Act 2005 update



After the debate, controversy and confusion, September 2007 will see the introduction of the Gambling Act 2005, bringing with it a total overhaul of gambling in the UK. Greater flexibility will be afforded to some types of gambling operators, but this will be balanced by a much tighter set of licence controls, greater monitoring and compliance burdens, and in many cases, much higher fees.

As set out in the last issue of "After Hours", all gambling operators will need to apply for new Operating, Premises and Personal Licences to ensure that they will be able to trade after September 2007. The key dates are as follows:

- **27 April 2007** - Cut-off date for applications for operating licences which are intended to benefit from 'continuation rights'; that is, the right to continue trading after September 2007 even if an operating licence application has not yet been determined.
- **21 May to 30 July 2007** - Businesses with premises used to host gambling must make advance applications for Premises Licences to the relevant local licensing authority. If applications are made on an essentially 'like-for-like' basis, there is a fast track transitional procedure available. This is quicker, cheaper and will not be subject to additional consultation and the possible

imposition of discretionary conditions by the licensing authority. The physical areas for which you have a current betting permission will automatically be authorised for betting by the new Premises Licence, (as they benefit from what are termed 'Grandfather Rights'), but it is important to remember that the Gambling Act imposes certain new mandatory conditions, even on fast-track 'grandfathered' applications.

- **29 June 2007** - Current operators must submit their applications for any additional personal licences by 29 June 2007 to be sure of obtaining continuation rights on your existing permissions from 1 September 2007.
- **1 September 2007** - Act comes fully into force. Businesses with undetermined applications made after the relevant deadlines will have to cease trading.

Applications will also be needed for permits or entitlements for gaming machines on licensed premises, whilst bearing in mind that gaming machines in premises such as chip shops and minicab offices will no longer be permitted.

For further advice on the Gambling Act 2005, please contact Chris Pritchett at chris.pritchett@burgess-salmon.com

Visit our website at www.burgess-salmon.com

Prize Draws and Competition

Under the current gaming regime system, there is much confusion over prize draws, competitions and illegal lotteries, with only complicated case law offering guidance on many of the issues. The Gambling Commission believe that many firms are currently taking advantage of this lack of clarity to run illegal lotteries under the guise of competitions. An example of this would be premium rate phone-in competitions with risibly easy questions, which the Commission propose should in future require “genuine skill or knowledge” to be classed as a competition.

The discussion papers also offer guidance on product promotions, and attempt to clarify the circumstances in which ‘payment’ to enter a prize draw is made, thus making the draw an illegal lottery. For example, the Commission has proposed that filling in a questionnaire or survey should not be regarded as ‘payment’ for entering a draw.

Burges Salmon will continue to monitor the developments in this area, which will have important consequences for retailers, manufacturers, promotions companies and media providers.

Poker in Pubs

The Department for Culture, Media and Sport (DCMS) has set out new proposals to control the provision of gaming in clubs and premises licensed to sell alcohol and update the current 40-year-old rules allowing certain forms of gambling.

Under the proposals, alcohol-licensed premises will no longer be required to seek permission from their local licensing authority for gaming to take place on their premises, providing:

- children and young people are prohibited from participation;
- gaming is limited to ‘equal chance’ games between customers, such as cribbage or poker (games like

roulette and blackjack will be prohibited);

- stakes are limited to a maximum of £5 in pubs and £10 in clubs for games of poker;
- the operator does not take a ‘cut’ from money staked or won or charge participation fees; and
- games only take place on one set of premises - (games across more than one property will be prohibited).

Clubs and licensees will be responsible for supervising gaming on their premises, but it is possible for licensing authorities to remove automatic entitlements as a sanction for failing to properly do so.



“...DCMS has set out new proposals to control the provision of gaming in clubs and premises licensed to sell alcohol...”

Planning to gamble?

The *Gambling Act 2005* (the “Act”) is due to be fully implemented later this year, to put in place a more comprehensive structure of gambling regulation. The changes being effected by the Act have led to a significant amount of controversy, and so have attracted much attention.

What has attracted less attention is the change to the treatment of casinos in the planning system under the *Town and Country Planning (Use Classes) Order 1987*.

Previously, casinos were one of the uses included in Use Class D2, together with cinemas, bingo halls, concert halls, dance halls, swimming baths, skating rinks and some other recreational uses. Changes of use from one use to another within the same Use Class, would not generally require planning permission so, by way of example, a change of use between, say, a dance hall and a casino would not have required the operator to seek planning permission. Under the revised provisions, such a change would now almost certainly require planning permission to

be obtained as well as the usual licences.

Of course, cynics might suggest that there is a great deal of similarity between gambling and seeking planning permission and that the outcome of either is far from certain. Appropriate professional advice will however usually be of great assistance to those seeking planning permission!

The Town and Country Planning (General Permitted Development) Order 1995 has also been amended. This grants planning permission for changes of use from a casino to any of the remaining Class D2 uses, so that an existing or new casino will not usually need to make a planning application to change to use as a dance hall, cinema etc.

At present, these changes to the planning system regarding casinos only apply in England.

For further information contact jim.ryan@burges-salmon.com.

Licensing Fee Review

On January 25 2007, the Independent Licensing Fees Review Panel, chaired by Sir Les Elton, reported on its findings. The panel was commissioned to look at the Licensing Act 2003 fees to ensure they were set at the right level for licensees and local councils.

1) The panel concluded that local authorities will have spent more than they received in licensing fees during the first three years of the new regime and there will be a shortfall of £97m created by the implementation of the new structure.

It recommended that:

- £43 million (20% of the total cost) should be met by central Government.
 - £54 million is due to decisions by some local authorities and should be met by local authorities.
- 2) It also found that fee payers incurred higher costs than anticipated.
- 3) It recommended that the fees should increase by 7% for the three year period from 2007/08, anticipated to bring in £3m in extra revenue a year, and these fees should be reviewed again for 2010/11 onwards.

4) The panel also made a number of other recommendations to streamline the process, including:

- premises where the sale of alcohol is incidental should be exempt from paying fees, (an example may be flower shops, but it will undoubtedly be difficult to sensibly define "incidental");
- all local authorities should accept electronic applications;
- fees for exceptionally large events, such as music festivals and country fairs, should be set locally; and
- the application forms and processes should be simplified.

These recommendations seem to be a sensible response to some of the problems encountered in respect of the Licensing Act 2003, but several key points that are still causing confusion have not yet been addressed. These include the level of fees for sports stadia, the disproportionately high cost of lodging a variation application for minor structural works, and the due date for payment of the annual fee.

"...fees for exceptionally large events, such as music festivals and country fairs, should be set locally..."



Licence Reviews

An increasing number of licence reviews are anticipated in this second year in force of the Licensing Act 2003 than from November 2005 to October 2006. The first year saw around 600 reviews, but as the police are getting used to the regime and their new powers, this figure is set to rise and licences will undoubtedly be more actively pursued. It is also anticipated that the Smoking Ban may lead to a rise in nuisance-related reviews as customers are forced outside or on to the street to continue smoking.

Whilst the licensing authority has the power to disregard complaints made by local residents, it cannot ignore requests made by the police. Review proceedings initiated by the police are therefore procedurally unstoppable and the restriction of one request for review per outlet per year does not apply to the police and other statutory authorities.

Although Burges Salmon's licensing team has been involved with some reviews initiated by local residents, the majority of its cases have indeed been brought about following action taken by the police. There have also been reports of the police threatening blanket reviews of licences in an area. For example, the Reading police have threatened to review the licences of all premises not using safety glass or plastic after midnight. This type of heavy-handed way of using the licensing system to impose policy can be disproportionately burdensome on licensed premises, and it will be interesting to see if the courts will allow license holders to be corralled by the police in this way.

If you are considering bringing a licence review, or may be the subject of a review yourself, please contact chris.pritchett@burges-salmon.com.

Illegal Broadcasting of Football Matches

There has been much debate and uncertainty regarding the legality of using foreign satellite TV systems that enable the reception of live premieriership football in the UK. In January, a licensee in Portsmouth was fined £3,000 and had to pay £5,000 in costs for breaching the FA Premier League's copyright by showing Premiership matches using Greek satellite operator Nova.

While subscription to the foreign satellite channels is not illegal, using it to show copyrighted material is, and Sky are the only company authorised to broadcast live FA Premier League matches in the UK.

The FAPL's position was helped last year when a number of satellite channels, including Arabic channel ART, issued letters confirming it was illegal to use their systems to show Premiership football in the UK.

In addition, in the last two months the FAPL has

issued actions against two foreign satellite equipment suppliers, namely QC Leisure and AV Station plc. The FAPL hope that these ruling may finally convince licensees it is not worth the risk, but a definitive ruling is still really needed in this area.

Following on from this, at the end of February, Bolton Wanderers applied for the licence reviews of five pubs around its stadium for showing matches via foreign satellite systems. Under the Licensing Act 2003, a review can be sought on the grounds of prevention of crime, but this will be the first time a club has taken action against pubs in this way. We would imagine the legal basis for bringing a review in this way is somewhat shaky, but as it transpires, the licensing authority in question deftly rejected the appeal on the basis that the pubs were not "in the vicinity" of the football club.



"While subscription to the foreign satellite channels is not illegal, using it to show copyrighted material is..."

Smoking Update

Smoking will be banned in all workplaces and substantially enclosed public places from **1 July 2007 in England** and from **2 April 2007 in Wales**, bringing England and Wales into line with Eire and Scotland.

The Government has published 5 sets of regulations, to be made under the Health Act 2006, which provide the details of the ban, including definitions of the terms "enclosed" and "substantially enclosed", the levels of fines or penalties for contravention and the requirements for no-smoking signs.

If certain outdoor locations such as football grounds and railway platforms, meet the definition of 'substantially enclosed', smoking will also be banned in these areas. Ministers will also be able to extend the ban to cover other places or vehicles, but any proposed regulations to do so will be subject to public consultation.

- No-smoking signs will have to be displayed in places where smoking is banned. The regulations about signs are in final draft form and require that signs consist of a minimum A5 sized notice containing a red circle no-smoking logo and the words:

"No smoking. It is against the law to smoke on these premises"

The Department of Health will make no-smoking signs freely available in the lead up to the new law coming into force.

- For those who do not comply with the new law, several new offences will be introduced:

- 1) **Smoking in a banned area** - This involves a fixed penalty of £50, discounted to £30 if paid within 15 days from the issue of a notice, or increased to a maximum £200 if taken to court.
- 2) **Failure to display no-smoking signs** - This will result in a fixed penalty of £200, discounted to £150 if paid within 15 days, but increasing to a maximum of £1,000 if the matter goes to court.
- 3) **Failing to prevent smoking in a banned area** - This duty falls on any person who controls or is concerned in the management of smoke-free premises. The maximum fine for failing to stop people smoking in banned areas will be £2500 for each occasion.



Smoking Ban: Will you be ready?

Top tips to prepare for the Smoking Ban

As 1 July 2007 is fast approaching, here are some areas for consideration in your preparations for implementing the smoking ban:

Provision for smoking outside your premises:

- Decide whether any existing external areas meet the definition of “substantially enclosed”. This means any area with a roof, and that is more than 50% enclosed by walls (not including windows and doors which can be shut). Decide whether you will need to alter these areas to be able to use them as smoking areas.
- Talk to customers to elicit their views and to determine the extent of any provisions you may need to make. Depending on the numbers of smoking customers, your plans may range from doing very little to creating an area that would go as far as to attract smokers. For example, a purpose built outside shelter with comfortable furniture and outside heaters may well be a useful selling point.
- It would also be wise to talk to neighbours who may be affected by increased noise outside your premises caused by groups of smokers. Failure to do so could result in reviews being brought on the grounds of public nuisance, and a little local consultation can go a long way in heading off this type of action.
- Ensure that any structures that you plan will not meet the definition of “substantially enclosed”, or smoking will be banned in this area. This unfortunate situation was even experienced by the Welsh Assembly after they had spent over £10,000 on a new shelter!
- Obtain any necessary consents for your plans.

Consider the need for Planning Permission, your Landlord’s consent if you are a lessee, or any internal company consents. In addition, make sure that your current premises licence permits the plans you have in mind, and make a variation application if not.

Signage inside your premises:

At least one sign must be displayed:

- at each entrance to smoke-free premises, in a prominent position



- in a prominent position in each compartment of a vehicle required to be smoke-free.

Signs must be a minimum of A5 sized notice containing a red circle no-smoking logo and the words: *“No smoking. It is against the law to smoke on these premises.”*

As all premises will have to comply with the regulations with regard to signage you may need to order your signs early.

“...a purpose built outside shelter with comfortable furniture and outside heaters may well be a useful selling point.”

Smoking ban and rateable values

Rateable values are based on turnover and are used to calculate premises licence fees but also affect items such as how much is paid for Sky television services in pubs.

The current rateable values are set until 2010 but there are concerns in the sector that the smoking ban coming into force later this year will affect turnover without a corresponding adjustment of the rateable values.

Appeals against rateable values are possible if there

is a material change to the property or its locality, but the process is lengthy and the smoking ban may not be an available ground for such an appeal. As the ban has national, rather than individual impact, it would need widespread action from the trade to challenge rateable values in this way and, in any event, there is evidence to show that the smoking ban may well lead to increases in turnover. Time will tell.

Statutory Nuisance

The recent case of *R v. Moshe Rottenberg* on the application of London Borough of Hackney is a useful reminder that the law relating to statutory nuisance is not as straightforward as it may seem.

The statutory nuisance legislation is intended to provide a straightforward procedure to prevent activities which harm the amenity of neighbours. Unfortunately, the law in this area has become complex and surrounded by many technical difficulties. The law of statutory nuisance may also have wider application than the licensing regime, and as such, aggrieved neighbours may bring nuisance actions where it would not be possible to review the premises licence.

In essence, the Environmental Protection Act 1990 sets out various categories of activities which can amount to a statutory nuisance. In relation to licensed premises, the most likely to occur is noise from the licensed premises. If a member of the public complains to the local authority about noise arising from premises (and this includes land such as a garden) the local authority is under a duty to investigate. If the investigating officer, usually an Environmental Health Officer or "EHO", considers that there is a statutory nuisance the local authority is usually obliged to serve an abatement notice.

Failure to comply with an abatement notice when served is a criminal offence. However, it is possible to appeal an abatement notice. That appeal must be made within 21 days. That time limit is mandatory and there is no possibility of an extension.

What a lot of people do not appreciate is that the consideration of what is a statutory nuisance is very complicated. It will involve a consideration of the location of the premises, the time at which the noise occurred, the duration of the noise, how often such noise occurred and other matters such as the importance to the community of the activity creating the noise. The Hackney case, referred to above, emphasises this fact. In that case the first instance judge, having heard the evidence of the EHOs, held that the court was entitled to not accept the evidence of the EHOs that there was a statutory nuisance and needed to view all of the evidence and the above factors together. In that case the court held that there was no nuisance.

In addition a defence is available to the operators of commercial premises that they use Best Practicable Means (BPM) to prevent any nuisance. This means that, even if the above test of what is a nuisance is satisfied, if the owner of premises is employing BPM, there will be no statutory nuisance.

In conclusion, if you are served or threatened with an abatement notice make sure you are aware of your options. As appropriate appeal might mean the difference between, for example, ceasing to use a beer garden and keeping it open.

For any further information on statutory nuisance please contact Michael Barlow on 0117 902 7708 or michael.barlow@burgess-salmon.com

Narrow Quay House
Narrow Quay
Bristol BS1 4AH
Tel: 0117 939 2000
Fax: 0117 902 4400

Holbrook House
14 Great Queen Street
London WC2B 5DG
Tel: 020 7405 4343
Fax: 020 7405 6788

From 18 June 2007:
Chancery Exchange
10 Furnival Street
London EC4A 1JQ
Tel: 020 7405 4343
Fax: 020 7405 6788

www.burgess-salmon.com

This newsletter gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

To receive your own regular copy of After Hours contact marketing@burgess-salmon.com

© Burgess Salmon LLP 2007. All rights reserved. Planning Law is printed on 75% recycled paper.

Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burgess-salmon.com

Burgess Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Law Society.

A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.

STOP PRESS!

The House of Lords has rejected secondary legislation which puts into effect the Casino Advisory Panels allocation of casinos, most notably, the selection of Manchester as the site for the UK's first 'super-casino'.

Opinions from the Lords would indicate that the vote is indicative of dissatisfaction with perceived failures in the decision process, but this would also appear to be symptomatic of the general levels of controversy surrounding this aspect of the new regime.

Burgess Salmon will monitor these developments closely!

Contact Team



Chris Pritchett

Associate

0117 902 6684

chris.pritchett@burgess-salmon.com



Jim Ryan

Associate

0117 902 6689

jim.ryan@burgess-salmon.com



Michael Barlow

Associate

0117 902 7708

michael.barlow@burgess-salmon.com