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Opening hours under the Licensing Act 2003

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The fact that the status of opening hours under the Licensing Act 2003 could form a credible topic for a licensing journal six years after the Act came into force is an indictment of the legislative provisions themselves. The lack of clarity in the Licensing Act 2003 is exemplified by section 172, which permits the Secretary of State to extend "opening hours" for special occasions, one such being the recent Royal Wedding. However, "opening hours" is defined in section 172(5) as meaning the times during which the premises may be used for licensable activities. This is to conflate licensing hours and opening hours, when in fact these are different concepts altogether.

The history of closing times may be briefly stated. Under the Licensing Act 1964, the hours of supply of alcohol were statutory, with a prescribed drinking-up time. During transition to the Licensing Act 2003, in some cases drinking-up times were grandfathered onto premises licences, and in some cases they were not. Under the Licensing Act 2003, there are prescribed forms for new licences, provisional statements and variations, whose Box O asks the applicant what hours the premises are to be open to the public. Applicants will sometimes indicate on the form that they intend to remain open to the public for a short period, perhaps 30 or 60 minutes, following the terminal hours for sale of alcohol. In some cases, this is translated by the licensing authority into a condition regarding opening and closing times. In others it is not.

Where there is no opening or closing time placed on the licence, then plainly the premises can open whatever hours the licensee wishes. The real issue comes where the licensing authority does place opening and closing times on the licence. Particular instances include the following:

a. The licence has an opening time of 10 a.m. The licensee wishes to open to serve breakfast, but not to conduct any other licensable activity, at 7 a.m. Would s/he be committing a criminal offence?

b. Late night refreshment premises have a licence which permits the provision of late night refreshment from 11 p.m. to 3 a.m., and then requires the premises to close at 3.30 a.m. Would the licensee be committing a criminal offence by remaining open, though not for the provision of late night refreshment, thereafter?

c. Premises have a premises licence which authorizes, say, the sale of alcohol. On some days the licensee does not sell alcohol, e.g. because s/he rents out a room on a dry hire basis. Is the licensee bound by licence conditions, including closing hours?

The reason why these situations do not admit of an easy answer is because it is not an offence under the Act to breach a licence condition, much less to open the premises to the public outwith the hours specified on the licence. Instead, section 136 of the Act provides that it is an offence if a person:

> *"(a) … carries on or attempts to carry on a licensable activity on or from any premises other than under and in accordance with an authorisation, or*
>
> *(b) he knowingly allows a licensable activity to be so carried on."*

Plainly, the *actus reus* under (a) is carrying on or attempting to carry on the licensable activity. Under (b) it is knowingly allowing the activity to be carried on. In other words, it is not *per se* an offence to do something prohibited by a condition. It is an offence to carry on the licensable activity, or knowingly allow the activity to be carried on, in breach of the condition.

In considering the legal status of opening and closing hours, it is important to state that they could only have legal force as conditions on the licence. A licence confers the right to do something which would otherwise be unlawful, e.g. selling alcohol. If one does that beyond the hours permitted by the licence, then that is a breach of section 136 because one would be doing so otherwise than under the authorisation. A licence may also impose conditions on the authorisation, e.g. by preventing the playing of amplified music other than through a noise limitation device. To play amplified music without using such a device would be to do so otherwise than in accordance with the authorisation.

These seemingly banal points are made to underscore the fact that there is no other way of committing an offence under section 136. Thus, a closing hour need not coincide with the terminal licensing hour. Even where it does coincide it is always specified separately from the terminal licensing hour. I.e. closure is a separate concept from the terminal hour for licensing. Therefore, if it has any force, it can only conceivably have force as a condition on the licence.

With those essentially preliminary comments in mind, we can now approach the question of the legal enforceability of opening and closing hours. The argument proceeds in stages.

First of all, when there is a condition which specifically limits the licensable activity, then it is plain that this is caught by section 136. For example, a pub has a condition that alcohol must be sold in polycarbonates. An outdoor festival has a licence which prevents music being played above a certain decibel level. In these cases, there is no doubt whatsoever but that the licence is governed by the condition and breach of the condition is an offence under section 136.

The second proposition is that the condition does not have to circumscribe the licensable activity itself in order for a breach to engage section 136. For example, there is a condition requiring a pub to use door staff to control who comes in. That is not a limitation on the sale of alcohol. It is a control of the circumstances in which alcohol is sold. If alcohol is sold when no door staff are on, that amounts to carrying on the licensable activity otherwise than in accordance with the authorisation.

The third area for scrutiny concerns conditions which go further in that they do not circumscribe the licensable activity **and** are not contemporaneous with such activity. For example, there might be a condition preventing emptying of bottles outside at night, or preventing deliveries before a particular time in the morning, or requiring a take away restaurant to sweep up outside after the premises close.

In all these cases, it is doubtful that anyone would suggest that the conditions are not enforceable. Indeed, were they not to be enforceable, a great many conditions imposed under the Licensing Act 2003 would be ineffective except in terms of their persuasive force and as a basis for the bringing of a review when they are breached. However, that there is a collective consensus that a category of conditions is enforceable and is regularly imposed is not a sufficient basis to say that section 136 is engaged. Those involved with licensing may simply be acting on custom and practice, without specifically turning their mind to the enforceability of the conditions. The question is why such conditions are enforceable. For example if a delivery were to be made at 5 a.m., 5 hours after the premises closed and 5 hours before it re-opens, could it be said that there are licensable activities being carried on otherwise than under and in accordance with the licence?

In truth, the enforceability of such conditions under section 136 is somewhat problematic. The argument could be made that section 136 does not require precise contemporaneity between the licensable activity and the condition. So if, for example, premises close at midnight and open the following morning at 10 a.m. but breach their conditions by taking a noisy delivery at 5 a.m. then their offence is carrying out the licensable activities throughout the whole period (i.e. the day before and the day after). In other words they are selling alcohol while accepting delivery of the alcohol at forbidden times.

However, that argument might be thought to stretch language quite close to breaking point in significant regards. Imagine that in the situation just described the premises do not in fact open the following day. How could it be said that the premises had traded on the previous day otherwise than in accordance with the licence when at the time they were trading they were not in breach of the licence, the breach of the licence only coming five hours later?

These arguments are finely balanced. However, the High Court would probably come down in favour of enforcement of the condition under section 136. The rationale would be that the premises are in general carrying on licensable activities while not adhering to the conditions subject to which those licensable activities were permitted. Having regard to the mischief at which section 136 is aimed, the construction of the section is sufficiently wide that contemporaneity is not required.

With those propositions in mind, one may turn to consider one kind of condition – a condition which requires the premises to close at some point following the termination of licensable activities and/or which specifies an opening hour at some point prior to the provision of licensable activities.

For the reasons just given, it is submitted that on narrow balance a condition of that nature would be enforceable under section 136. To take but one example, a licence to sell alcohol is conferred, but subject to the stricture that the customers to whom the product is sold must be off the premises with the doors closed within 30 minutes of the terminal hour. Such a condition could be enforced by prosecution.

However, not all situations are so simple. What of the pub which dutifully closes 30 minutes after selling the last pint, but then wishes to open again to sell coffee and croissants at 8 a.m. the following morning, in other words for an activity which is nothing to do with licensable activities? Probably, this is where the relevant line is to be drawn. Where a condition requires premises to close at the end of trading hours, that is a way of limiting the impact of the licensable activities themselves. Beyond that what the proprietor chooses to do with the premises is not a matter for licensing.

In reality, it would be rarely if ever that a licensing authority could attach a condition which expressly purported to control the use of premises in general outside the licensing hours in relation to activities which are not licensable activities. Therefore, the question really boils down to whether upon construction a licence which imposes a closing hour imposes requirements or prohibitions upon a licensee in relation to commercial activities which are not licensable activities at all. It is submitted that it does not. Or, rather, in the absence of some very express language, it

does not. The purpose of a licence condition is to provide the requirements and prohibitions subject to which a party is permitted to provide licensable activities. Without very specific language, it is hard to contemplate that a condition could be construed so as to limit the ability of premises to conduct activities on premises which have nothing to do with licensable activities.

Coming back to one of the examples above, what of the pub which supplies coffee and croissants in the morning? It does not need anybody's permission to do that. It is hard to see that it could somehow lose permission by virtue of asking for a licence to sell beer in the evening. There may well be some grey shading. What of the pub, for example, which closed but then re-opened 5 minutes later to serve the coffee and croissants? As it happens, that is arguably an effective breach of the closure condition because the condition is designed to dissipate the clientele who have been purchasing alcohol, and a brief, technical closure does not satisfy the condition. However, the fact that one can think of examples which challenge the application of the rule does not mean that there is no rule. While an attempt to circumvent a condition, e.g. by closing and then immediately re-opening, may well be considered to be a breach, that does not mean that conducting activity which has nothing whatsoever to do with the licensable activity and at a different hour from the licensable activities, would be held to breach a condition which is intended to govern the impact from licensable activities.

In conclusion, a condition which is designed to control the impact of the licensable activities is enforceable under section 136, even though the condition requires or prohibits action outside the licensing hours. There is a counter-argument, that one cannot be charged with "carrying on licensable activities" at a time when one is not actually carrying on licensable activities; and that if that conclusion is inconvenient then the remedy lies with Parliament by way of legislative amendment rather than with the courts by way of linguistic distortion. However, for the reasons set out above, the argument that a closing time imposed on a licence is enforceable under section 136 is to be preferred.

Nevertheless, when directed at activities which are not only outside the licensing hours but which have nothing to do with the licensable activities, a much clearer answer appertains. In that situation, a general closing or opening hour on the licence is designed to control the licensable activities and their impact and it is not appropriate to construe it so as to restrict other activities altogether.

Therefore, the pub may serve its coffee in the morning without offending the conditions on the licence. The function room can have its dry hire, and if the room is not used pursuant to the licence, the licence conditions do not apply. The late night refreshment premises can operate out

of hours. However, it should avoid action which appears as an attempt to find a loophole to the condition. E.g. if the condition is to close at 3 a.m., it should not re-open with the same customers at 3.05 a.m. However, it would have a good argument that nothing prevents it from opening for cold drinks and sandwiches at 4 a.m., an hour after the customers served hot food have disappeared. I.e. there is no reason or logic why a licence condition should be construed to place the business at a disadvantage to another premises selling cold food all through the night.

These arguments underline all too clearly the importance for legislators of testing through proposals with practitioners before they are placed on the statute book. When this does not happen, lawyers descend like crows from the trees.