# Cornerstone Leisure Newsletter

February 2017

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cornerstone barristers

## Welcome to the first edition of the Cornerstone Barristers Leisure Newsletter

The idea behind this new publication is to provide some regular, topical and up-to-date commentary on the issues that affect the leisure industry. Cornerstone's expertise across the fields of Licensing and Planning mean we are ideally placed to give interesting perspectives on this vital sector and you can expect to see articles ranging from roll-your-sleeves-up practical tips and guidance through to the kind of forward-looking think-pieces that can help stimulate debate ahead of the curve.

In this first edition we have just that: Philip Kolvin QC, head of our chambers and newly appointed as the Chair of the Mayor of London's Night Time Commission, shares his thoughts on future attitudes to the development of, and regulation of, the night-time economy; Matt Lewin and I reflect on the latest developments in the saga that is minimum unit pricing for alcohol; Jack Parker explains how to go about converting your leisure use premises to residential and points out

some pitfalls, and Kuljit Bhogal – head of the Cornerstone Housing Team - provides a customarily practical guide to the powers available to close commercial – including of course leisure – premises that are causing problems.

I hope you enjoy the first issue. As editor I would be delighted to receive feedback, suggestions and comments on the contents.

Josef Cannon
*Editor*

## 20:20 Vision

*Philip Kolvin QC reflects on the changing attitudes to the night-time economy.*

In the old days, the route into licensing for barristers was through criminal law. The business of licensing was conducted in the conflict setting of a magistrates court, often between advocates schooled in the rhetorical arts of jury advocacy. The genetic codes for such work were rooted in place keeping: the business of regulation of an errant and rather dangerous industry. My own way in was through planning, my native terrain being council buildings where professionals came together to forge visions for their areas, in the recognition that local authorities could take a lead on place shaping, the business of creating towns and cities which work for all, by harnessing the entrepreneurship of the private sector to the will of the people as expressed through policy. This approach involves answering four key questions, what should go where, over which hours and on what conditions? If you get that right, then decision by decision, venue by venue, you inch your town towards being a place of delight. In that world, "what do we want?" is as important a question as "what don't we want?"

I've banged that particular drum for 15 years. I wrote about the principles in my door-stopper of a book *Licensed Premises: Law, Practice and Policy*, and then was, I guess, not too amazed when far more people read my *Manifesto for the Night Time Economy* in which I synthesised the principles into a few bite-sized commandments.

I think that we are now beginning to see the tectonic plates shifting. Authorities are now starting to express what they do want to see in their licensing policies. Schemes such as BIDS and Purple Flag are raising consciousness about how partnership work can increase the quality of whole town centres at night. Great work has been done by the Portman Group in bringing together the voluntary schemes under one umbrella – the Local Alcohol Partnerships Group – to advise the LAAAs areas on the possibilities. A new company – Nightworks – has been formed to research and promote the benefit of diversity in the night time economy. And, perhaps seminally, the Mayor of London Sadiq Khan, has appointed a Night Czar and a Chair of the Night Time Commission to devise and promote a vision for our capital city. These are the first such appointments in the UK, and if they work we can expect them to be followed elsewhere.

The night time economy is hugely important to the UK economically and culturally. It is bizarre that, with all the care we take about fostering the day-time economy, we should leave the night time economy to case by case decision-making. Thinking is now shifting. In the next few months I will be speaking in Austin Texas, Liverpool and Dublin about how we can put culture and leisure

at the heart of town and city regeneration, and am looking forward to discussing what I learn with friends and colleagues in the exciting period ahead.

Philip Kolvin QC

*Philip Kolvin QC is Head of Cornerstone Barristers and of its licensing team. He has recently been appointed Chairman of the Night Time Commission for London and also Chairman of the Advisory Panel for Nightworks.*

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## One more round for minimum unit pricing of alcohol

*Josef Cannon and Matt Lewin study the latest chapter in the saga that is minimum unit pricing of alcohol.*

*This is an edited version of a longer article which will appear in the coming edition of the Journal of Licensing (JoL).*

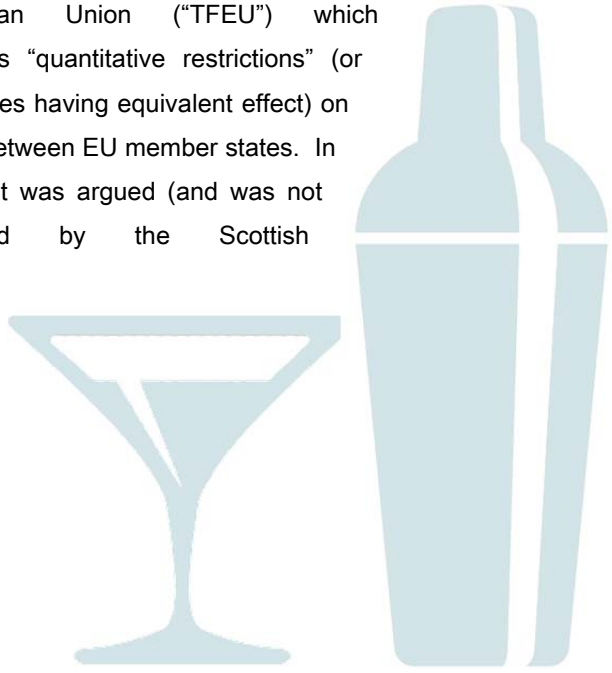
The latest twist in the saga of the attempt to introduce minimum unit pricing for alcohol in Scotland was the decision by the Court of Session in October 2016, following the matter being sent back to it by the CJEU. The outcome? Minimum pricing is lawful – but the decision has been appealed, so the final say will be had by the Supreme Court in London.

The background to minimum pricing is powerfully described in the following extract from the Court of Session's judgment:

*178. The societal, family and personal effects of excessive alcohol consumption in Scotland are difficult to overestimate. In some comedic settings they form an unfortunate, if distorted, caricature of the Scottish character. The effect of excessive consumption on the nation's health, levels of crime and productivity is notorious and hardly needs exposition, since they are apparent in daily life, especially to those practising in the courts. According to the government, the annual cost of excessive alcohol consumption can be estimated in billions of pounds.*

Minimum unit pricing was introduced by the Scottish government as part of a range of measures primarily intended to reduce levels of hazardous and harmful drinking and, as a secondary outcome, to reduce alcohol consumption generally. In 2012 the Scottish Parliament enacted the Alcohol (Minimum Pricing) (Scotland) Act 2012. In draft secondary legislation, the Scottish government proposed to fix the minimum price per unit of any alcoholic drink sold at retail at 50p. The Act and the draft secondary legislation were challenged by the Scotch Whisky Association and others representing alcohol-related interests.

The most significant aspect of the challenge was whether minimum pricing was lawful under EU law, principally whether it breached Article 34 of the Treaty on the Functioning of the European Union ("TFEU") which prohibits "quantitative restrictions" (or measures having equivalent effect) on trade between EU member states. In effect, it was argued (and was not disputed by the Scottish



Government) that by setting a floor price below which alcohol cannot be sold, minimum pricing legislation impedes the free movement of alcoholic products by preventing the lower cost price of imported drinks from being reflected in the selling price: it potentially prevents products that are lawfully marketed in other EU member states from competing in Scotland (at least at the intended price).

The central issue in the case thus became whether the measure could be justified for public policy reasons under Article 36 TFEU. If it was justified, minimum pricing would be lawful under EU law. Justification under Article 36 TFEU requires that the measure is proportionate: the measure must pursue one of the objectives prescribed by Article 36 TFEU (in this case the protection of human life and health); *and* that the same objective could not be as effectively achieved by an alternative measure which is less restrictive of trade within the EU. Only the second of these two aspects was truly controversial before the CJEU and the Court of Session: minimum pricing pursued the primary aim of reducing consumption by hazardous and harmful drinkers in particular and, as a secondary aim, sought to reduce generally the Scottish population's consumption of alcohol.

As such, the focus for the Court of Session was a comparison between minimum pricing and an increase in the level of tax on alcoholic products (taxation being a less restrictive measure). Could the Scottish Government show that raising tax would be less effective than minimum unit pricing in achieving the aim?

The Court of Session accepted the (largely academic) evidence adduced by the Scottish Government and concluded that increasing tax would not be as effective as minimum pricing. Its reasoning was neatly captured in para [196]: "*The fundamental problem with an increase in tax is simply that it does not produce a minimum price ... [M]any supermarkets, in the past, sold alcohol at below cost. They have absorbed any tax increases by off setting them against the price of other products unrelated to alcohol. Cheap alcohol is perceived as a draw, lure or enticement to pull shopper into the particular retailer's premises and away from those of the competition.*"

The Court of Session also observed that minimum pricing – unlike tax – targets cheap alcohol and therefore has a much more direct impact on the hazardous and harmful drinkers who tend to purchase those kinds of drinks; increasing tax would result in price rises across all kinds of drink and therefore have a less direct effect on hazardous and harmful drinkers [199], as well as affecting those who do not drink irresponsibly ('moderate drinkers') [200].

The decision has been appealed to the Supreme Court. Meanwhile in England - where in 2013 a similar policy was dropped by the UK government on the basis of a lack of empirical evidence that minimum unit pricing worked – things may be shifting.

In December 2016 Public Health England published a detailed Report which concluded that a combination of both minimum pricing *and* an increase in taxation is likely to be most effective in reducing alcohol-related harm: such an approach would be most likely to "*lead to substantial reductions in harm*", whilst the minimum pricing element would have a "*negligible impact on moderate consumers and the on-trade*" ('penalising responsible drinkers' was one of the concerns cited by the UK government in 2013).

Shortly thereafter Sarah Newton MP, a Home Office minister, gave evidence to the House of Lords Select Committee on the Licensing Act 2003. She reiterated the government's desire to pursue evidence-based policy making, but (in the light of the Court of Session's decision) said that the UK Government would watch the outcome of the (expected) Supreme Court appeal with interest; and that the Home Office "*would consider minimum pricing if the evidence supports it*".

Minimum pricing seems to be closer to a reality in Scotland now than ever; and (subject to the Supreme Court's decision) might signal a change in approach south of the border too: the absence of evidence cited by the UK government in 2013 appears no longer to be the case and the UK government's own public health advisory body has now come out firmly in favour. Those opposed to minimum unit pricing may be anxiously looking at the clock, fearing last orders may be called soon.

**Josef Cannon and Matt Lewin**

*Josef Cannon and Matt Lewin are members of the Cornerstone Licensing and Planning teams.*

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## When can premises be closed by the Council or the Police?

*Kuljit Bhogal surveys the powers available to close commercial premises that are the source of anti-social behaviour.*

The powers available to local authorities and the Police to close premises involved in drugs activity or anti-social behaviour have been well publicised. It's worth knowing that these powers are not limited to closing units of social housing. Both local authorities and the Police can apply to close commercial premises (including licensed premises) as well as owner-occupied residential premises.

The Anti-Social Behaviour, Crime and Policing Act 2014 consolidated and amended powers which had been available to close licenced premises (under s161 and 165(2)(b)-(d) of the Licensing Act 2003), noisy premises (s.40 of the Anti-Social Behaviour Act 2003 'ASBA 2003'), premises associated with persistent disorder or nuisance (s.11B of the ASBA 2003) and drugs closures (s.2 ASBA 2003).

The effect of a closure order is to close the premises to everyone except authorised persons (as defined in s.85 of the Act). Exceptions can be included to allow access to certain categories of person or at certain times/in certain circumstances.

A closure order can have effect for up to three months and can be extended for a further three months. The maximum period of closure is six months and can have huge consequences for the occupiers.

In order to seek a closure order a two stage process must be followed. The first stage involves the service of a Closure Notice. The second stage involves an application to the Magistrates' Court for a Closure Order. The process is designed to provide immediate respite to communities affected by the problem premises. The court is only able to adjourn the application for a maximum of 14 days. During this time the court has the power to extend the closure notice (s.81(3)). As a result the opportunity to seek an adjournment in order to obtain legal advice and/or make representations is limited.

In order to serve a closure notice the local authority or the Police must be satisfied:

(i) that the use of the premises has resulted, or (if the notice is not issued) is likely soon to result in nuisance to members of the public

(ii) that there has been or, (if the notice is not issued) is likely to be, disorder near those premises associated with the use of the premises, and

(iii) that the notice is necessary to prevent nuisance or disorder from continuing, recurring or occurring.

A Closure Notice usually lasts up to 24 hours but can be extended to a maximum of 48 hours if certain conditions are satisfied. The Closure Notice has the effect of closing the premises to everyone except the owner and anyone who is habitually resident. These two categories of person cannot be excluded until a Closure Order is made by the Magistrates Court. This is a powerful tool, if a Closure Order is made an even the owner or resident can also be excluded.

The Magistrates Court can make a closure order if it is satisfied:

(i) that a person has engaged, or (if the order is not made) is likely to engage, in disorderly, offensive or criminal behaviour on the premises, or

(ii) that the use of the premises has resulted, or (if the order is not made) is likely to result, in serious nuisance to members of the public, or

(iii) that there has been or, (if the order is not made) is likely to be, disorder near those premises associated with the use of those premises, and

(iv) that the order is necessary to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring.

The Court also has the power to make a temporary closure order to deal with prohibiting access in respect of a specific event or a specific date (section 81(2)).

Issues such as noisy premises, drugs use, noise or anti-social behaviour on or close to premises are all capable of falling within the statutory test. Business owners should note that closure powers are no longer the ‘last resort’ as some of the old closure powers once were. Local authorities and the Police are required to make reasonable efforts to inform an occupant, any person who has control or responsibility for the premises, or who has an interest in them, that a Closure Notice is going to be issued. The short timescales involved once a closure notice has been served means that advice should be sought immediately in order to establish whether there is any scope for a Closure Notice or a Closure Order to be avoided.

**Kuljit Bhogal**

*Kuljit is joint Head of the Cornerstone Housing Team and a specialist in housing, community care and Court of Protection. She is the author of 'Cornerstone on Anti-Social Behaviour: The New Law'.*

# Please, make yourself at home

*Jack Parker looks at permitted development rights for the conversion of buildings in leisure use.*

The Government's decision to expand permitted development rights to provide for the conversion of buildings in use for a number of leisure uses (including casinos, amusement arcades and betting shops) to residential dwellings has no doubt created development opportunities previously stymied by restrictive development plan policies.

To take advantage of these new opportunities, however, one must tread very carefully. What exactly does "converting" a building mean? How significant can redevelopment works be before the project is no longer a "conversion" of an existing building, but the construction of a new one (so requiring a full application for planning permission)?

**The permitted development rights**

Class M, N and Q of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 2015 all provide for the change in use of buildings to residential purposes without the need for planning permission. Class M makes provision in relation to buildings in use for A1 (retail), A2 (financial and professional services), betting shops, pay day loan shops and launderettes (including where the building already has a partial residential use). Class N makes provision for amusement arcades and casinos. Class Q makes provision for Agricultural Buildings.

In addition to the conditions and restrictions imposed on these classes of permitted development, common to all of them is a grant of permission for the building operations which are "reasonably necessary to convert the building" to a dwellinghouse.

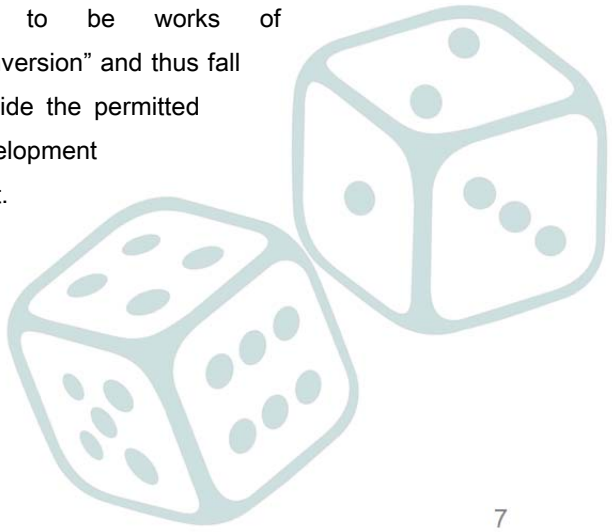
**Conversion vs rebuild**

Although the fundamental question as to what "conversion" means lies at the heart of these important rights, it has only recently been the subject of authoritative guidance in the case of Hibbitt v SSCLG [2016] EWHC 2853 (Admin).

The Applicant in Hibbitt sought to convert a steel-framed agricultural barn which was largely open on three sides to residential use.

The Applicant had demonstrated that the barn was structurally strong enough to support the loading which would come from the external works necessary to provide for residential use (and thus complied with the relevant NPPG guidance on this point - see Reference ID: 13-105-20150305).

However, the Court upheld the Inspector's view that, notwithstanding compliance with the NPPG guidance, the proposed redevelopment works (including in particular the construction of 4 external walls) were "so extensive as to comprise rebuilding" so as not to be works of "conversion" and thus fall outside the permitted development right.



While it is likely that casinos, amusement arcades and betting shops etc are unlikely to require works in respect of the fabric of the building that are extensive as might be required in respect of agricultural buildings, the court's judgment in Hibbitt is nonetheless important insofar as it makes clear that the (a) the dividing line between a "conversion" and a "re-build" (or "fresh build" as the Inspector thought more appropriate) is ultimately a matter of planning judgment; and (b) that dividing line will not always be clear cut.

Careful thought will therefore need to be given in every case as to whether any works to the fabric of the building are such as to go beyond the scope of "conversion".

### Internal works

The judgment in Hibbitt also raises an interesting issue in relation to internal works.

Of course, works affecting the interior of the building are excluded from the definition of "development" by s.55(2)(a) of the Town and Country Planning Act 1990 so that no planning permission is required for them. At the same time, however, the internal works necessary to convert, for example, an amusement arcade, may well be very extensive and may well include significant structural alterations. The distinction between "conversion" and "re-building" in Hibbitt did not refer to any distinction between external and internal works and so the question arises whether the extent of internal works might be so great that the development could no longer be described as the "conversion" of a building so as to benefit from the permitted development right. This question remains unanswered by Hibbitt.

Furthermore, the recent decision of the Court in Eatherley v Camden LB [2016] EWHC 3108 (Admin) reaffirms the principle that there may be works which are part and parcel of the development permitted by the GPDO 2015 but which, by reason of their planning impacts, are a "separate activity of substance" not covered by the permitted development regime. Eatherley concerned the excavation of a basement at a residential dwelling and the Court held that it would be a matter of judgment as to whether the necessary engineering operations were a "separate activity of substance" for which planning permission was required. Wherever considerable structural works are required, it will always be necessary to consider whether they amount to a "separate activity of substance", thus falling outside the permitted development regime and requiring a full application for planning permission to be made.

### The future

One thing is clear. While the expansion of the permitted development regime in respect of the conversion of buildings for leisure, agricultural and retail purposes has given rise to development opportunities, it has also given rise to questions and issues that remain to be resolved. Careful consideration will need to be given in every case to the scope of the development permitted under the Order and whether separate planning applications may need to be made in respect of the operational development necessary to facilitate the change in use.

**Jack Parker**

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