

On the edge - Lexis® PSL Restructuring & Insolvency

Liquor licences law for insolvency practitioners

In the eighth of a series of guides highlighting areas of legislation that may not fall within the everyday work of insolvency practitioners, Nicola Smith, a senior associate in the alcohol, entertainment and food licensing team at Squire Patton Boggs, offers guidance on liquor licensing issues for insolvency practitioners.

What is the main legislation governing this area?

The Licensing Act 2003 ("LA 2003") governs the provision of licensable activities in England and Wales (there is separate legislation in Scotland and Northern Ireland). Under LA 2003, the following activities are licensable:

- the sale by retail of alcohol
- the supply of alcohol by or on behalf of a club to, or to the order of, a member of the club
- the provision of late night refreshment (hot food and/ or hot drink between the hours of 23.00 and 05.00), and
- the provision of regulated entertainment (which includes music, dancing, exhibition of films, performances of plays, indoor sports and/ or boxing and wrestling (subject to various exemptions depending upon the nature and times of the entertainment being provided, audience numbers and whether it is amplified))

Premises licences are issued by the local authority for the area in which the premises is situated and covers the relevant building/ place for licensable activities. For multi-site businesses, there will be a licence for each premises where licensable activities are provided. Some local authorities have online registers of premises licences which have been granted in their area which can be searched if the insolvency practitioner (IP) has details of the trading name and/ or address of the licensed property but there is no central register. Premises licences have no expiry date, but an annual fee is payable to the local authority on the anniversary of grant.

Why is this area relevant to IPs and their staff?

Under LA 2003 (section 27(1)), a premises licence lapses if the holder of the licence becomes insolvent. The licence is usually held by the legal person (which could be a company or an individual) that carries on the business involving the use of the premises for licensable activities.

If any premises licence lapses, there is no authority to provide licensable activities. The provision of licensable activities without authority is an offence, punishable by a fine (now unlimited) and/ or up to 6 months' imprisonment. It is therefore important that IPs understand when a licence will lapse and can take appropriate steps to ensure that a lapsed licence is reinstated, either to allow continuity

of trade and/ or to ensure that the premises can be marketed as a licensed business.

It is also important for IPs to be aware of the requirements and potential offences under LA 2003 if the business continues to trade. Most offences under LA 2003 can be committed by any person, including the provision of licensable activities otherwise than in accordance with an authorisation. Therefore, an IP may be liable if they continue to trade without a licence, or in breach of the conditions of a licence.

Please give examples of the type of insolvency situations where liquor licences issues arise?

Section 27(4) of LA 2003 defines the point of insolvency for a company as follows:

- the approval of a voluntary arrangement proposed by its directors,
- the appointment of an administrator in respect of the company,
- the appointment of an administrative receiver in respect of the company, or
- going into liquidation.

Section 27(3) of LA 2003 defines the point of insolvency for an individual as follows:

- the approval of a voluntary arrangement proposed by them,
- being adjudged bankrupt or having their estate sequestrated, or
- entering into a deed of arrangement made for the benefit of their creditors or a trust deed for their creditors.

As set out above, if a company or an individual holds a premises licence and becomes 'insolvent' within the meaning of these definitions, any premises licence held in their name will lapse.

Note the appointment of a receiver pursuant to the Law of Property Act 1925 (LPA Receiver) is not specifically defined in LA 2003 as an insolvency event and accordingly the company or individual licence holder will continue to hold the licence. However, if an LPA Receiver is appointed in respect of a company and that company goes into liquidation, the company is classed as insolvent under LA 2003 and

any licence will lapse which may impact on the receivership.

What steps can IPs take to protect themselves from liability?

Following appointment, the IP will decide whether to: (i) continue trading whilst looking for a buyer; or (ii) not trade whilst looking for a buyer. This will depend on whether continuing to trade will facilitate a sale and/or preserve value and/or rental income in the site.

If the IP will not trade while looking for a buyer, they can surrender any premises licence to avoid ongoing liability for annual fees. However, the licence should not be surrendered if the property will be marketed to the licensed sector, as a surrendered licence cannot be resurrected after the initial 28 day period has passed.

If the IP will continue to trade the business and/or if they wish to retain the benefit of the licence they will need to ensure that the lapse provisions are avoided, or that any lapsed licence is resurrected by means of an interim authority or transfer application.

Interim authority

If a premises licence has lapsed, an application for interim authority can be made to the licensing authority by an IP or a person with a prescribed interest in the premises (usually the freeholder or leaseholder) within 28 days of the 'insolvency'. A copy of the notice must be given to the chief officer of the police.

Where an interim authority notice is given in accordance with the requirements under LA 2003, the premises licence is reinstated from the time the notice is received by the relevant authority and the person who gave the notice is from that time the holder of the licence (section 47(6) of LA 2003).

An interim authority will re-instate the licence for a period of 3 months – an application for transfer must be submitted by the end of that period, or the licence will lapse again.

If the business will continue to trade, an IP might be liable for offences committed under LA 2003 if they hold the interim authority at the time of the offence. However, as most offences can be committed by 'any person', they could be held liable even if the interim authority were held by another prescribed person. A 'due diligence' defence will, however, be available for most offences and in practice any enforcement authority is likely to pursue the person(s) in day to day control of the provision of licensable activities at the property.

It is worth noting that a third party, such as a subsidiary, an individual manager, or a management company, cannot apply for an interim authority under the provisions of LA 2003. However, with the agreement of the licensing authority and depending upon the provisions of any security document granted by the company or individual, it may be possible for the secured party (usually through a receiver), acting by powers of attorney granted by the company or individual in the security document which relates specifically to the licensed property, to execute the application for interim authority as someone with a "prescribed interest" in the property.

Transfer

A transfer application can be submitted to the licensing authority by a person who proposes to carry on a business which involves the use of the premises for the licensable activities. To reinstate the licence, the transfer must be submitted within the 28-day period after the licence has lapsed – where such an application is made, the premises licence is reinstated from the time the application is received by the licensing authority (section 50 of LA 2003). If the sale and transfer application

takes place within 28 days of the insolvency the licence may be reinstated by the purchaser. Alternatively, the IP may seek to transfer the licence to an individual or management company to avoid the loss of the licence while they are seeking a buyer.

Applications are only valid with payment of the required fee, currently £23. Applications for transfer must be accompanied by:

- original premises licence (or statement of reasons why original licence not available), and
- signed consent of existing licence holder to transfer, unless this requirement is waived by the licensing authority at their discretion, for which a statement of reasons will be required

Other liabilities

In addition to the potential liabilities if a lapsed licence has not been resurrected, if the business will continue to trade, the practitioner should ensure that any licensable activities are provided in accordance with the relevant licence. In particular, practitioners should be aware that:

- It is a mandatory condition of every premises licence that no supply of alcohol may be made under the premises licence at a time when there is no designated premises supervisor (DPS) in respect of the premises licence – the individual that is named on the premises licence as DPS will, or may be, made redundant, an application to name a new DPS must be made to take effect from the date of leaving to ensure continuity of trade (only a personal licence holder can be named as a designated premises supervisor).
- An annual fee is payable for every premises licence on the anniversary of its grant – the fee level depends on the rateable value of premises, but can be anywhere between £70 and £350 at current levels.
- The Police Reform and Social Responsibility Act 2011 allows licensing authorities to introduce a 'Late Night Levy' payable if a premises licence authorises sale of alcohol at specified times between midnight and 6am – annual levy liability is between £299 and £4,440 at current rates, depending upon the rateable value of the premises and whether or not used exclusively or primarily for the sale of alcohol.
- since 26 April 2012, licensing authorities MUST suspend premises licences for non-payment of annual fees (this applies to all annual fees which fell due for payment from 26 April 2012)—licences cannot be re-instated until payment is made (while a licence is suspended, there is no authority to provide licensable activities)

IPs should also remember that Scotland and Ireland are subject to separate licensing regimes.

How can IPs and their staff spot a liquor licence issue?

At the outset, it is important to determine:

1. does the business involve the provision of licensable activities?
2. who holds the original licences/ administrative records regarding those licences?
3. which company (or individual) holds any premises licence?
4. will the holder(s) of the premises licence become 'insolvent' within the definition of LA 2003 and, if so, when?
5. is it intended that the premises (or some of them) will continue to trade post-insolvency? Are there any mandatory conditions attached to the licence?

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6. who is the DPS?
7. is there an individual or company to whom the premises licences could be transferred to avoid the lapse provisions, if appropriate?
8. how many relevant premises licences are there and in which jurisdiction are those premises?
9. is any premises licence subject to a late night levy and if so, is it cost effective to retain the late night authorisation?
10. are there any other licences in force e.g. fireworks licences, marriage approvals, special treatment licences, second hand goods licences?

Any other points you would like to flag that are relevant to IPs.

Practitioners should be aware that if the premises licence holder is or will become insolvent, the following actions may be necessary:

- consideration of whether any applications or notifications will be required in relation to other licences or consents, for example

gaming machines or marriage approvals.

- Submission of potential applications:
 - transfer applications to third party company or individual, or
 - after insolvency, interim authority or transfer applications (immediately for trading premises and within 28 days for non-trading premises);
- If interim authority applications are made, transfer applications will be required within 3 months of the interim authority if the premises licence is still required.
- In preparation for disposal of licensed premises, remember:
 - licence clauses will be required in the sale and purchase agreement.
 - if the Licence holder will not consent to transfer to third party, you will need to apply to the licensing authority for a waiver of this requirement; and
 - third party will require original licences and consent to transfer.



Nicola Smith

Nicola Smith specialises in hospitality and leisure. Her expertise covers both licensing and food law. Nicola acts for a wide range of clients from listed companies to entrepreneurs. She prides herself on providing commercially-minded advice as part of a one-stop shop for clients dealing with the management of all of their licensing and food law issues.

In addition to direct advice on licensing and food issues, Nicola provides support on corporate, property and insolvency transactions and advises on the licences required for the playing of copyright music by PRS or PPL. Nicola is experienced in reviewing and advising upon due diligence systems and has drafted operations manuals and compliance documents for numerous clients following such reviews. She has also provided training at both a legal and operational level including general updates and training on specific changes in law.

Nicola has successfully represented clients at numerous contested hearings across the country, including for the grant of licences and licence reviews. Nicola writes client updates on topical legal issues for the licensed trade in England and Wales and is a member of the Institute of Licensing.

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