

# Pubs, Clubs, Hotels & Restaurants

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## ***Introduction***

The leisure industry encompasses a wide variety of businesses and organisations, the legal requirements of which are many and varied. The following is an overview of some of the legal issues which may affect owners and licensees.

See our **Mobile Homes and Caravan Parks fact sheet** for issues relating to Park Homes and **Shops & Offices fact sheet** for a guide to those letting or renting commercial premises.

## ***Appealing Licensing Decisions***

First instance decisions made by Local Authority Licensing Committees can be appealed to the local Magistrates Court or in some cases may be challenged in the High Court by way of judicial review.

## ***Air Conditioning, Advertisements & Other External Erections***

Planning permissions can be required for external air conditioning units, signs, awnings, wall mounted heaters, cigarette bins and jumbo umbrellas.

## ***Business Leases***

Business leases come in a wide variety of forms, usually dependent on the length of the term and the proposed rent. They all follow the same general format although institutional leases i.e. leases which are suitable for institutional investors usually contain much more detailed provisions. The lease will include details of the landlord, the tenant, the rent, obligations on the part of the tenant, obligations on the part of the landlord and some general provisions. There may be provision for the rent to increase or a provision for either side to bring the lease to an end early. In the main business leases fall within the provisions of the Landlord & Tenant Act 1954 allowing the tenant to ask for a new lease at the end of the term (see ***Renewal***).

## ***Business Structure***

If you are starting a new venture consideration needs to be given to the business structure you will use to operate it. This can be through a limited company or as a sole trader or partnership. There are advantages and disadvantages of each type of business structure as well as differing tax consequences.

## ***Buying & Selling a Business***

Where the business being sold is owned by a company then one of the key decisions to be made by the seller and buyer is whether to structure the sale as one of the company's shares or as a sale of the separate assets comprising the business. Each method has advantages and disadvantages as well as differing tax consequences.

## ***Breaching the Premises Licence***

The loss of its Premises Licence could be fatal to a business. Breaches of the licence, including underage sales, allowing unauthorised entertainment or trading beyond permitted hours, can lead to a review of the licence by the Local Authority which may result in the removal of the Designated Premises Supervisor, the imposition of operating restrictions or in worst cases revocation of the licence.

## ***Brewery Leases***

Licensees who are tenants of a brewery need to consider carefully the terms of any lease and associated finance arrangements. Leases will often include clauses linking the rent to turnover and imposing requirements relating to beer and soft drinks supplies. They also commonly prevent assignment or sale of the lease for a specified period.

## ***Borrowing***

Licensees who own the freehold of their premises may need to borrow to finance their business. Dependent on the level of borrowing the lender, usually a bank or brewery, may want other property or assets besides the business premises to be put up as additional or cross security.

## ***Capital Gains Tax***

The exemptions or reliefs from Capital Gains Tax available to individuals on the disposal of their business will vary dependent on whether the business is owned as a sole trader, partner or shareholder. Consideration must also be given to how reliefs and exemptions, such as hold over relief, roll over relief, entrepreneurs' relief and annual exemption interrelate as well as their interaction with other taxes such as Inheritance Tax.

## Clubs

Clubs fall broadly into two types: The “proprietary club” in which everything belongs to the proprietor, whether an individual or company, and members pay a subscription to use the club; and the “members club” in which everything belongs to the members jointly and subscriptions are paid to a common fund and an elected committee manages the club. There are various types of members clubs such as sports clubs, social clubs, working men’s club and community clubs each with their own constitution. Proprietary clubs require a Premises Licence if they wish to sell alcohol. A members club can obtain either a Premises Licence or more commonly a Club Premises Certificate. A club premises certificate gives the members of the club certain privileges not available to the holder of a Premises Licence.

## Conditional Contracts

A conditional contract is an agreement that only works if an uncertain event actually occurs. It is an agreement or contract conditional upon a specific event, the occurrence of which, at the date of the agreement, is uncertain. A common example is a contract conditional upon the buyer getting planning permission.

This simple explanation belies the complexity of the drafting involved in the preparation of such agreements which often relate to very valuable land or buildings. Poorly drawn documents can result in substantial loss.

## Designated Premises Supervisor

Any premises with the benefit of a Premises Licence must have a Designated Premises Supervisor (DPS). The DPS is the person ultimately responsible for everything that happens on the premises. There can only be one DPS for each premises and he or she must be named on the Premises Licence. When the business is sold the DPS usually needs to be changed.

## Door Staff

Busy pubs and nightclubs will invariably have a condition on the Premises Licence requiring the provision of security staff / door staff. Compliance with the Security Industry Authority requirements (or those of any successor body if the Government’s proposed abolition of the SIA goes ahead) for such staff is essential to avoid breaching the Premises Licence.

## Employment

See our **Employment fact sheet** for the employment issues which may affect you including the need for employment contracts and policies.

## Food Safety and Health & Safety

The Environmental Health section of your Local Authority will carry out routine inspections relating to the condition of your premises, the cleanliness of your kitchen, food temperatures and storage as well as responding to complaints from the public. Civil enforcement and prosecution can follow from breaches of legislation.

## Gaming Machine Permits

The Gambling Act 2005 introduced various categories of machines depending on the limit of the stakes and prizes. Clubs and alcohol licensed premises have an automatic entitlement to a permit for a limited number of lower category machines. If an alcohol licensed premises requires a higher category or greater number of machines then an application must be made to the Licensing Authority to vary the permit.

## Goodwill, Logos & Trade Names

It is essential that the sale contract identifies what assets are transferring including the right to the existing customer list, the use of the trade name and any associated logos and copyrights.

## Leases

Where a business is operated from a rented premises the terms of the commercial lease are essential to protect the landlord’s interest and to provide security of occupation for the tenant. Key issues include the length of the lease, any right to break it if the business is unsuccessful, rent reviews and the right to renew.

## Mortgages and Security

Lenders will normally want security for any lending they make whether to individuals or businesses. This can range from guarantees to charges, mortgages and in the case of companies, debentures. The security will often be taken over land, whether freehold or leasehold, but in a commercial context can be over fixtures, fittings, equipment, machinery and intellectual property rights like patents and designs. Usually the security will be heavily weighted in favour of the lender and in some cases may prejudice the flexibility of the borrower to run his business.

Commercial projects will often require financing from more than one lender and this will involve multiple charge forms and other security documents such as deeds of priority or postponement.

## Multiple purchases and sub-sales

We have experience acting for clients who wish to buy all or a large number of properties on a new development either for the purpose of letting or for immediate re-sale. Such purchases not only require the same level of attention to detail as if the whole site was being acquired for development (see **Site acquisition and development**) but also preparation, where appropriate, of bespoke sub-sale contracts. Such transactions often involve acting simultaneously for a lender who may be financing the acquisition.

## Noise

Your Local Authority is given powers in relation to noisy premises by various statutes including the Licensing Act, the Noise Act and the Environmental Protection Act. These powers include the right to issue noise abatement notices, to seize equipment, to issue fixed penalty notices and to serve closure orders. Noise problems may also result in a review of your Premises Licence or Club Premises Certificate.

## Options

An option is the right to require a party to buy a property (a 'Put' option) or the right to require a party to sell a property at a given time in the future (a 'Call' option). An option agreement will involve an option period where the party with the benefit of an option can call on the other party to either sell them the property or to buy the property from them at a price and on a given date. If that right is not exercised within the option period then the option lapses and both sides are back to the position they were in before the option was entered into.

Once granted an option is usually registered at the Land Registry against the relevant title to put any interested party on notice that there is an option in place. A bank which has a mortgage over a property needs to be put on notice of the option otherwise they can sell free of it if it post dates the charge.

## Personal Licences

To sell alcohol under a premises licence there must be a Designated Premises Supervisor (DPS) and the DPS must hold a Personal Licence. Applicants for a Personal Licence must hold a National Certificate for Personal Licence holders and supply a Criminal Records Bureau Certificate or equivalent.

## Planning Permissions

Premises will need to have planning consent authorising the use of the premises under the relevant category of the Use Classes Order. Further permissions or licences may be required to erect awnings or signs outside the premises or to authorise use of a pavement or external seating area for drinking or smoking.

## Premises Licences

Premises wishing to carry out the sale of alcohol or the provision of regulated entertainment or the provision of late night refreshment need a Premises Licence. A broadly similar regime applies to clubs which must obtain a Club Premises Certificate. One off events can be authorised by a Temporary Events Notice. Premises playing music may also need other licences to play recorded music, to show music DVDs, to publically screen videos or to play recorded music publicly.

## Prosecutions

Much of the legislation affecting licensed premises includes both civil and criminal penalties, for example, that relating to smoking, health & safety, food safety, trading standards and underage sales of alcohol. Prosecutions are usually brought by the Local Authority in the local Magistrates Court. Substantial fines can be imposed and imprisonment in very serious cases.

## Renewal

The renewal of a business lease is likely to be governed by the Landlord & Tenant Act 1954. Upon expiry of a lease the tenant is entitled to remain in the property until the statutory procedure has been concluded. Notice needs to be served by either the landlord or the tenant to invoke the renewal process. Once invoked, the ultimate decision as to whether a lease is to be granted and its terms will fall to the court to decide unless the parties can agree in the meantime. The landlord can only

oppose the grant of a lease on certain grounds specified in the Act. In some situations where the landlord is successful in opposing the grant, the tenant is entitled to statutory compensation based on the rateable value of the property. The parties may choose to bypass or contract out of the statutory procedure but this must be done before any lease or agreement for lease of the building is entered into.

## Rent Reviews

Failure to understand the mechanism for rent review in your lease can result in loss of rental for a landlord or an untimely increase in rent for the tenant. Rent review provisions, particularly in older leases, can be full of traps for the unwary.

## Sex Establishments

The regime of licensing 'sex establishments', which includes 'sexual entertainment venues' (lap dancing and pole dancing clubs), 'sex cinemas' and 'sex shops' is separate from the public entertainment activities authorised by a Premises Licence although both regimes require an application for a licence to the local authority.

A sexual entertainment venue is one providing live displays of nudity or live performances, with or without nudity, designed to sexually stimulate members of the audience.

A sex cinema is any premises predominantly used for the display of moving pictures concerned with sex or sexually associated matters. A sex shop is any establishment selling predominantly 'sex articles'. It is often a matter of argument whether the number of sex articles sold or sex films screened comprises a significantly large proportion of the business transacted to require a licence.

Businesses wishing to supply restricted adult videos must also be careful to comply with licensing requirements if they are not to commit a criminal offence.

## Site acquisition and development

It is essential when acting for a developer client in the acquisition of a property to consider all the key legal issues which may affect the ability to subsequently develop it. These include boundary issues, making sure that your client is not proposing to build outside the extent of the land he is purchasing; easement issues, making sure there are legal rights of access to the whole of the development; checking for ransom strips, pieces of land that lie between the development land and the public highway and which may be in separate ownership; checking restrictive covenants to make sure that development is not prohibited and making sure that planning consents and planning agreements are in place. These are a few of the many issues which need to be covered as part of "Site Assembly".

We are experienced in acting for developers in the acquisition of land for development and the subsequent preparation for sale of the plots on the site.

## Stamp Duty Land Tax

Stamp Duty Land Tax ("SDLT") is the self assessment tax which replaced the old stamp duty for property purchases from December 2003. Historically, documents were "stamped" with the level of duty paid whereas now a Return must be sent to the

Revenue with the appropriate tax payment. SDLT is calculated as a percentage of the purchase price ranging from 1% for purchases above £125,000.00 (£150,000.00 for commercial premises), 3% above £250,000.00, 4% above £500,000.00 and 5% above £1,000,000 from April 2011 (residential properties only). A purchase for £250,000.00 means tax of £2,500.00 whereas one penny over £250,000.00 means tax of £7,500.00. With commercial properties where VAT is paid on the price, SDLT is payable on the VAT inclusive figure – tax on tax. With leaseholds, the calculations become even more complex.

## Temporary Event Notices

Temporary Event Notices (TEN's) provide for one off events on any premises without the need for a Premises Licence or Club Premises Certificate. Depending on the number of persons attending the event TEN's can be used for small festivals. However, applications can be subject to police objection.

## Trading Standards and Weights & Measures

Trading Standard Officers will randomly test spirits to check the alcohol to volume levels and will also order drinks to test for under or over pours. Prosecutions can lead to heavy fines in the Magistrates Court.

## VAT

VAT is usually chargeable on goods or services supplied by a business unless the supply is exempt or the nature of supplies falls below the limit at which registration of VAT is required. Certain supplies fall outside the scope of VAT altogether. Special rules apply to commercial property where the ability to charge and recover VAT will normally be dependent on whether the owner or tenant has elected or opted to tax their interest.

### How can Powells with Chawner Grey help?

Whether you are looking to buy or sell a leisure business or need to make a licensing application or require representation before the Licensing Committee or in Magistrates Courts, we can assist.

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