Dadds LLP

Chief Constable of the Metropolitan Police
Directorate of Legal Services
10 Lamb's Conduit Street
London
WC1N 3NR

Our Ref: dd/lb/JAM1-7

Your Ref:

11th November 2020

By email only to: Sally.Gilchrist@met.police.uk

Dear Sirs,

Re: Proposed claim for judicial review: R (Epiphyllum Ltd) v Metropolitan Police

Claimant:
Epiphyllum Ltd
Tudor Rose,
(Registered Office),
68 The Green,
Southall,
UB2 4BG.

Defendant's reference:
Not known

Claimant's legal advisers:
Dadds LLP Licensing Solicitors
Crescent House
51 High Street,
Billericay, Essex,
CM12 9AX.

Decision under challenge:
Certificate dated 21 October 2020 issued under s.53A(1)(b) of the Licensing Act 2003 ("the Act")

Dadds Solicitors
Crescent House, 51 High Street, Billericay, Essex CM12 9AX
T: 01277 631811 **F:** 01277 631055 **E:** office@dadds.co.uk
W: www.dadds.co.uk **DX:** 32202 BILLERICAY

Interested parties:
London Borough of Ealing
Perceval House
14-16 Uxbridge Road,
Ealing, W5 2HL.

Secretary of State for Health and Social Care
c/o The Treasury Solicitor
Government Legal Department
102 Petty France
Westminster
London SW1H 9GL.

A. THE ISSUE

1. The Claimant owns the Tudor Rose, 68 The Green, Southall, UB2 4BG (**"the Tudor Rose"**). The Claimant holds a premises licence in respect of the Tudor Rose and operates it as a banqueting suite and private events space.

2. On 30 September 2020 and 13 October 2020, the Tudor Rose is accused by the Metropolitan Police Service (**"MPS"**) of being associated with the following alleged offences:

   2.1. Having held unlawful gatherings in breach of the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (**"the Restrictions Regulations"**);

   2.2. Breach of the Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) Regulations 2020/1008 (**"the Undertakings Regulations"**);

   2.3. Public nuisance;

   2.4. Unspecified health and safety offences.

3. To date, no enforcement action under either set of Regulations listed at paragraphs 2.1 and 2.2 above, or the matters identified in paragraphs 2.3 or 2.4, has been taken against the Claimant or anyone associated with the Tudor Rose.

4. On 21 October 2020, the MPS submitted an application to the Council for a summary review of the Tudor Rose's premises licence, pursuant to s. 53A of the Act. S. 53A(1) provides:

The chief officer of police of a police force for a police area may apply under this section to the relevant licensing authority for a review of the premises licence for any premises wholly or partly in that area if—

(a) the premises are licensed premises in relation to the sale of alcohol by retail; and

(b) a senior member of that force has given a certificate that it is his opinion that the premises are associated with serious crime or serious disorder or both;

and that certificate must accompany the application.

Section 53A(4) provides that: *"'serious crime' has the same meaning as in the Regulation of Investigatory Powers Act 2000 (c 23) (see section 81(2) and (3) of that Act)."*

5. Duly accompanying the application was a certificate (required by section 53A(1)), issued by Superintendent Jill Horsfall, which purported to certify that the Tudor Rose was associated with *"serious crime"* (**"the Certificate"**).

6. At just after midnight on 23 October 2020, the Claimant's solicitors sent a judicial review pre-action protocol letter to the MPS challenging the application and Certificate on the basis that, as a matter of law, the Tudor Rose was not associated with serious crime and that the superintendent had misdirected themselves in so concluding.

7. The MPS responded at just before 2pm on 23 October 2020 maintaining its position.

8. An *"interim steps"* hearing took place virtually at 2pm on 23 October 2020 before the Council's Licensing Sub-Committee. The Sub-Committee's decision notice was provided to the parties just before 7pm on that date. The Sub-Committee decided to suspend the Tudor Rose's premises licence with

immediate effect and fixed a date for the final review hearing on 16 November 2020.

9. Accordingly, the Tudor Rose was forced to close and, up until the fresh Covid-19 restrictions which came into force on 5 November 2020, was incurring financial losses as a result. Further, the enforced closure from 23 October (rather than lawfully trading in the interim) is capable of having a negative effect on the outcome of the hearing of the full review on 16 November 2020.

10. The decision of the MPS to issue the Certificate and of the Council to suspend the premises licence were unlawful, because the conditions for issuing the Certificate under s.53A(1)(b) were not satisfied as a matter of law. The superintendent misdirected themselves in concluding that they were. In particular:

10.1. **First**, should any criminal offence have been committed (which is denied, in general and as set out herein), such an offence would not amount to *"serious crime"* and so could not form the legal basis for the issue of a certificate under s.53A.

10.2. **Second**, in any event no offence was committed as a matter of law on the facts as the superintendent appears to have understood them, or at the very least, no prosecution would be brought for any purported offence:

10.2.1. As to the alleged **public nuisance**, (a) the elements of this offence were not fulfilled on the facts as the superintendent understood them to be and (b) there was no prospect of prosecution for this offence in light of the legal approach to be taken to charging decisions.

10.2.2. As to the **Restrictions Regulations**, the Regulations are *ultra vires* and so conduct which they purport to prohibit could not amount to any offence at all, unless otherwise unlawful.

B. PUBLIC NUISANCE AND RESTRICTIONS REGULATIONS: SERIOUS CRIME

11. None of the alleged offences could, even if validly created and proven on the facts, amount to a *"serious crime"*.

(1) Definition of Serious Crime

12. The Regulation of Investigatory Powers Act 2000 (**"RIPA"**) s. 81 provides:

(2) In this Act—

(a) references to crime are references to conduct which constitutes one or more criminal offences or is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom would constitute one or more criminal offences; and

(b) references to serious crime are references to crime that satisfies the test in subsection (3)(a) or (b).

(3) Those tests are—

(a) that the offence or one of the offences that is or would be constituted by the conduct is an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more;

(b) that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose.

(2) Submissions

(a) Limb (a): Likely Punishment

13. The superintendent erred in law in concluding that Limb (a) was satisfied.

14. In respect of **public nuisance**, it is extremely unlikely – let alone "*to be reasonably expected*" – that anyone of previous good character could expect to receive a three-year custodial sentence for two offences of public nuisance. The offence is either-way[1] and therefore would, in most cases, be prosecuted as a

[1] s.17(1) and Sch.1 to the Magistrates' Court Act 1980

summary offence which could result in no more than six months' imprisonment. The Certificate unfairly cherry-picks the authorities for a single example of a 3-year sentence. That sentence was clearly exceptional. The Law Commission's report on public nuisance (*Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency*; Ref: ISBN 9781474121989, Law Com. 358, HC 213 2015-16) noted that between 2003 to 2013 just one defendant received a sentence of imprisonment in excess of a year.[2] In any event, we would also expect, as a matter of principle, that the sentencing court would have regard to the specific penalties enacted in the Regulations when passing sentence.

15. In respect of the **Restrictions Regulations** and **Undertakings Regulations**, if (which is emphatically denied) the Tudor Rose has contravened the requirements of the Restrictions Regulations and Undertakings Regulations, that would constitute a summary-only offence punishable by a fine and would therefore clearly not satisfy the first limb of the test in s.83(1)(a) of RIPA.

16. It was an error of law for the Defendant to conclude that limb (a) of the definition of serious crime was met.

(b) Limb (b): Other Factors

17. The MPS and Council further erred in law in concluding that Limb (b) was satisfied in respect of any of the alleged offences.

18. Limb (b) provides for three types of conduct which might render crime 'serious': the use of violence, substantial financial gain, or conduct by a large number of persons in pursuit of a common purpose. *"Seriousness"* is, however, a high threshold, and is clearly not met by the conduct in this case.

19. S. 53A(4) of the Licensing Act imports the definition of "serious crime" from RIPA. Under that legislation the threshold of serious crime is a very high one indeed.

---

[2] §§3.6-37
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/438194/50076_Law_Commission_HC_213_bookmark.pdf

19.1. **First**, RIPA draws a clear distinction between *"serious crime"* and (mere) *"crime"*. The mere fact that conducts amounts to an offence is insufficient.

19.2. **Second**, the kinds of state measure which *"serious crime"* can justify under RIPA indicate just how serious such crimes must be. The definition of serious crime has been lifted from a context in which it is the only kind of crime the prevention and detection of which can justify *intrusive surveillance* of private homes or cars. By contrast, the (still severe) measures of *covert human intelligence* and *directed surveillance* are available to prevent or detect (mere) crimes. A serious crime is therefore a crime which is by definition more serious than those crimes which could justify the use of *covert human intelligence* or *directed surveillance*. In short, the statutory scheme implies there are some crimes serious enough to justify the use of *covert human intelligence* or *directed surveillance*; but which still do not rise to the level of *"serious crime"*.

19.3. **Third**, the necessary consequence of the conclusion that a breach of the Restrictions or Undertakings Regulations amounts to a serious crime is that it is the kind of offence which could justify intrusive surveillance. That is a patently ridiculous proposition.

19.4. **Fourth**, the distinction between crime and serious crime is of European origin. As a matter of EU law, the retention of and access to traffic and location data, absent prior review, is permissible for the purpose of the prevention, investigation, detection and prosecution of serious crime; but not crime falling below the level of *"serious"*. The same distinction can be found in the case law of the European Court of Human Rights. An interpretation of *"serious crime"* which deprived the seriousness threshold of its true and accepted meaning would leave RIPA (and the Investigatory Powers Act 2016 (**"IPA"**)) providing protections below the level of protection required by these European regimes. That would be inconsistent with the origin and purpose of the provision, as well as s. 3

Human Rights Act 1998 or the duty of consistent interpretation under EU law, as applicable.

19.5. **Fifth,** the high level of seriousness which a crime must reach in order to amount to a *"serious"* crime is indicated by the guidance issued in respect of the surveillance powers under the IPA[3] in the form of the *Interception of Communications Code of Practice* (March 2018). The Code does not define *"serious crime"* beyond repetition of the statutory definition, but the examples of the exercise of IPA powers given in the Code include: export in breach of sanctions; human trafficking; terrorism; murder; cyber-attacks on banking networks; child abuse; kidnap; importation of Class A drugs; and the illegal sale of military grade weapons. These are not given in the Code as examples of serious crimes as such, but since they are deployed as factual examples of the exercise of IPA powers, it must follow that they are understood to be at least one of (a) serious crimes, (b) threats to national security or (c) threats to the economic well-being of the UK. The various offences alleged to be committed by holding a larger-than-permissible wedding does not belong on either list: it is clearly not the sort of conduct which belongs on the same list as threats to national security (in the statute itself); nor as murder, human trafficking and child abuse (in the Code).

20. Seen against this context, it is clear that reliance in the Certificate on the *"common purpose"* factor and *"substantial financial gain"* factor is misplaced. The former catches (broadly) conspiracies and organised crime; the latter catches (broadly) black market trading and unlawfully acquired assets. The mere fact that there might be revenue, and more than one person present, is not sufficient. The reference in the Certificate to the risks from Covid-19 is also misplaced when read against the very high threshold of seriousness in RIPA, for two reasons:

---

[3] Those powers, as with the powers of intrusive surveillance in RIPA, also depend on the existence of serious crime, threats to national security, and threats to the economic wellbeing of the UK.

20.1. **First**, the factors indicating serious crime in limb (b) all point towards culpability, not harm. There is no indication that the *"seriousness"* of indirect and remote consequences of conduct fall to be considered, rather than the blameworthiness of the perpetrators.

20.2. **Second**, (and reflecting this) special provision is made for the kinds of crimes that might *harm a person*, and that provision is that such crimes will be serious when they are *"violent"*. The provision anticipates that conduct causing personal harm will be serious only where it arises by violence.

21. Accordingly, the limb (b) threshold for serious crime is not met either. It was an error of law for the superintendent to consider that it was. However, in the alternative, neither public nuisance nor an offence under the Restrictions Regulations was committed in any event, and it was a misdirection of law for the superintendent to conclude otherwise.

C. PUBLIC NUISANCE

(1) Elements of Offence Not Fulfilled

22. In any event, the superintendent misdirected themselves in law when they concluded that the elements of the offence of public nuisance had been fulfilled. There is no arguable case of public nuisance on the facts.

23. A public nuisance requires (among other things) an act or omission which *endangers* the life, health, property or comfort of the public. The two cases referred to in the application have no relevance to this case. The principle established in *R v Vantandillo* (1815) 105 ER 762 (and upheld in *R v Henson* (1852) 169 ER 621) was that "*... if a person unlawfully, injuriously and with full knowledge of the fact, exposes in a public a person infected with a contagious disorder, it is a common nuisance to all the subjects, and indictable as such.*" By contrast, in this case there is no suggestion that the operator knowingly exposed anyone in public who was infected with COVID-19.

24. Accordingly, the superintendent's reliance on *Vantandillo* and *Henson* is a clear misdirection of law. On their own understanding of the facts, no offence of public nuisance was committed.

(2) No Reasonable Expectation of Prosecution for Public Nuisance

25. The superintendent should not, in any event, have relied upon an alleged public nuisance as a basis for issuing the Certificate, since there was no realistic prospect of prosecution (and so imprisonment of any term) for this offence, even if there were an arguable basis for concluding that it had been committed.

(a) Legal Principles

26. In *R v Rimmington* [2005] UKHL 63, Lord Bingham held as follows:

> *"Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited.*
>
> *[...]*
>
> *"It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.*
>
> *"It follows from the conclusions already expressed above that the circumstances in which, in future, there can properly be resort to the common law crime of public nuisance will be relatively rare."*

27. This principle is reflected in the CPS' *Code for Crown Prosecutors*, which instructs prosecutors to select charges which *"reflect the seriousness and extent of the offending"*, *"give the court adequate powers to sentence and impose appropriate post-conviction orders"* and *"allow the case to be presented in a clear and simple way."*

(b) *Submissions*

28. The superintendent's reliance on the common law offence of public nuisance is contrived and artificial, disregarding a detailed statutory scheme under the Restrictions Regulations.

29. In outline, the Restrictions Regulations required a *"restricted business"* to close between the hours of 2200 and 0500 (Reg. 4A(1)) and prevented gatherings of more than six persons (Reg. 5). They contained, in Reg. 7, detailed powers of enforcement:

29.1. a constable or PCSO had power to serve a prohibition notice on a person in (among others) Reg. 4A where it was both necessary and proportionate to do so for the purpose of preventing that contravention (Reg. 7(2));

29.2. a constable or PCSO had powers to disperse unlawful gathering in contravention of Reg. 5: (Reg. 7(3));

29.3. a contravention of (among others) Reg. 4A or 5 was an offence punishable on summary conviction by a fine (Regs. 8(1) and (4));

29.4. a constable or PCSO also had power to issue a fixed penalty notice on a person whom the constable or PCSO reasonably believed had committed an offence under the Restrictions Regulations (Reg. 9(1)).

30. Given that the Restrictions Regulations specifically legislate for measures to prevent the spread of Covid-19, it is totally unrealistic to suggest that the CPS would authorise a prosecution for public nuisance, relying on Victorian-era case law. The modern legislator, making the decision in light of up-to-date knowledge of the pandemic, has set out the ambit of the relevant offence and decided that a fine is adequate punishment. The Claimant notes that the Certificate (despite

citing *Rimmington*) conspicuously fails to suggest any *"good reason"* (as Lord Bingham held was necessary) for *not* proceeding under the Restrictions Regulations.

31. Further, CPS guidance on the Restrictions Regulations (applicable by analogy) indicates that a relatively light-touch approach would be taken to enforcement:

"In general, we expect that enforcement of the regulations will be through the issuance of a prohibition notice (for businesses) or by directions (in respect of gatherings). These may be issued to encourage compliance with the regulations or may be issued where an authorised person 'believes' that there has been a breach. However, this does not stop an authorised person from treating a breach as an offence without first issuing a prohibition notice or giving a direction."

"These offences are summary only and, in line with the Directors Guidance on Charging, can be charged by the Police. Prosecutors are reminded that the issuing of criminal proceedings is likely to have been a matter of last resort."

32. The superintendent accordingly erred in law in issuing the Certificate in respect of alleged public nuisance, or alternatively, in light of the *Rimmington* principles, acted unreasonably in so doing. For completeness, the Claimant points out that this argument is, to the extent it relies on the existence of an alternative offence to public nuisance, an alternative argument to its claim that the Restrictions Regulations are *ultra vires* in any event.

D. RESTRICTIONS REGULATIONS: ULTRA VIRES

33. The Restrictions Regulations were ultra vires because they were adopted under an urgent procedure, for which the condition precedent to the exercise of that power (namely, necessity by reason of urgency) was not made out.

(1) Condition Precedent for the Adoption of the Restrictions: Necessity/Urgency

34. The Public Health (Control of Disease) Act 1984 (**"PH(COD)A"**) s. 45C empowers the Secretary of State to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response

to the incidence or spread of infection or contamination in England and Wales. It is under this power that the Restrictions Regulations were imposed.

35. PH(COD)A sets out two processes by which such regulations can be made. The ordinary process is that set out in s. 45Q(4), which requires the regulations to be laid before both Houses of Parliament in draft and approved before coming into effect. The Act also provides for an urgent procedure, under s. 45R. S. 45R(2) provides:

"The instrument may be made without a draft having been laid and approved as mentioned in subsection (4) of that section if the instrument contains a declaration that the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved."

36. The Restrictions Regulations contained such a declaration, as follows:

"In accordance with section 45R of that Act the Secretary of State is of the opinion that, by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament."

37. Whether the Secretary of State had the power to make this declaration and adopt the urgency procedure to make the Restrictions Regulations, is a question of law. It is trite that, on an application for judicial review, a court can review the lawfulness of delegated legislation. If delegated legislation is purported to be made without the procedural and substantive conditions precedent set out in the enabling power being met, that delegated legislation will be *ultra vires*. It is irrelevant that the Houses of Parliament have, by resolution, approved unlawful regulations: they remain *ultra vires* and incapable of creating a criminal offence.

38. It is unsurprising that under the PH(COD)A Parliament reserved for itself the decision whether or not regulations under s. 45C should come into effect, outside of situations of genuine necessity by reason of urgency, where it is not possible to bring draft provisions to Parliament. Regulations made under that provision can create sweeping curtailments of civil liberties (as we are all now well aware): they can require a person to submit to decontamination, provide information

about their health or other circumstances, have their health monitored, be subjected to restrictions about where to go or with whom they have contact, and require them to abstain from working or trading. They can also enable a decision to be taken by a subordinate authority, in an individual case, to compel a person to submit to medical examination, be removed to or detained in a hospital or other suitable establishment, or be kept in isolation. They can require premises to be closed, disinfected, or destroyed.

39. The procedure under s. 45R permits the creation of such wide-ranging and intrusive regulations by the flick of a ministerial pen. Parliament need not be consulted before they come into force. In a fast-moving situation, regulations may be made and revoked before either House of Parliament considers them, in particular the Commons, in which the same government which created the regulations also enjoys a majority and de facto control of the timetable. There is only one limit expressly provided for in the statute before the Secretary of State can enjoy this power: that is the requirement that necessity by reason of urgency be declared by the Secretary of State. Making a declaration in circumstances where such necessity or urgency does not pertain is an error of law, frustrating the scrutiny function which Parliament has reserved for itself where it is sorely needed. Alternatively, it is irrational to declare that there is such urgency where there is no factual basis for that conclusion. In either case, such an error renders the purported regulations *ultra vires*.

40. *"Necessary" "by reason of urgency"* in this context has a specific and functional definition which must be read consistently with the statutory purposes for which the regulation-making powers to which it applies may be used. The s. 45R procedure will accordingly be available only where there would not be time to seek resolutions in both Houses endorsing the measures before it was *necessary* for them to come into effect for the public health purposes provided for in the PH(COD)A. It does not apply wherever there is some kind of emergency (however serious), but rather where a necessary infection-control response to whatever circumstances pertain simply cannot be laid before Parliament in time to achieve the purposes of infection control under PH(COD)A.

(2) Submissions

41. There were two errors in the Secretary of State's use of the s. 45R procedure to create the Restrictions Regulations, each of which renders them *ultra vires*.

(a) Use of Urgency Procedure to Reduce Infection Control Measures

42. As a matter of law, it was not open to the Secretary of State to use the urgency procedure to *reduce* infection control measures.

43. The requirements of s.45R must be read in the context of the Public Health (Control of Disease) Act 1984. The regulation-making power under s. 45C is exercisable *"for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination."* The Claimant does not dispute that the power to make regulations under the PH(COD)A implies a power to unmake them. However, it does dispute that the urgency procedure – which depends on *urgent necessity for the statutory purpose* – can be used to make a legislative change which does not serve those purposes, but rather withdraws protective, controlling or responsive measures in light of an assessed lower level or risk, without laying a draft before Parliament. Within the scheme of PH(COD)A and the purposes for which the s. 45C power is exercisable, that cannot be *necessary by reason of urgency*.

44. Equally, it cannot have been necessary to create by urgent procedure prohibitions which *already existed*. The activities which the Restrictions Regulations prohibit in the name of infection control were unlawful on 2 July, before the Regulations came into force. The *"incidence or spread of infection or contamination"* to which the Regulations respond was equally effectively (indeed more effectively) controlled by the prior regime, *on the Government's own understanding of what kinds of controls were necessary to do so*.

45. Accordingly, the declaration to the effect that it was necessary, by reason of urgency, to make the Regulations without laying a draft before Parliament is untenable in law: it could not have been necessary for the purposes of infection control urgently to reduce existing levels of protection against infection.

(b) *Factual Context*

46. Finally, it is quite clear from the factual context in which the Regulations were introduced that no situation of urgency pertained, and it was an error of law, alternatively irrational, for the Secretary of State to make a declaration to that effect.

47. There is no tenable argument that any situation of urgency, which could have justified not laying the Regulations in draft before Parliament, existed at the time the Secretary of State made the declaration above.

47.1. On 16 April the Government announced five tests for easing measures.[4]

47.2. On 10 May, the Prime Minister addressed the nation about the route out of the current *"lockdown"*.[5]

47.3. On 11 May 2020, the Government published a document entitled *"Our Plan to Rebuild: The UK Government's Covid-19 Recovery Strategy"*.[6] In the Foreword, the Prime Minister stated (emphasis added):

> *"Our success containing the virus so far has been hard fought and hard won. So it is for that reason that* ***we must proceed with the utmost care in the next phase****, and avoid undoing what we have achieved. This document sets out a plan to rebuild the UK for a world with COVID-19.* ***It is not a quick return to 'normality.'*** *Nor does it lay out an easy answer. And, inevitably, parts of this plan will adapt as we learn more about the virus. But it is a plan that should give the people of the United Kingdom hope." [...]*
>
> *This is one of the biggest international challenges faced in a generation. But our great country has faced and overcome huge trials before.* ***Our***

---

[4] https://www.gov.uk/government/speeches/foreign-secretarys-statement-on-coronavirus-covid-19-16-april-2020

[5] https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-10-may-2020

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf

response to these unprecedented and unpredictable challenges must be similarly ambitious, selfless and creative."

47.4. Under the heading *"The challenges ahead"*, the document stated (emphasis in original):

"1. ***This is not a short-term crisis****. It is likely that COVID-19 will circulate in the human population long-term, possibly causing periodic epidemics. In the near future, large epidemic waves cannot be excluded without continuing some measures."*

"3. ***There is no easy or quick solution.****"*

"8. ***The plan depends on continued widespread compliance****."*

47.5. The document summarised its goals as follows (emphasis added):

"Reflecting these challenges, the rest of this document ***sets out a cautious roadmap to ease existing measures in a safe and measured way****, subject to successfully controlling the virus and being able to monitor and react to its spread. The roadmap will be kept constantly under review as the epidemic, and the world's understanding of it, develops."*

47.6. As part of the attempt to return life back to normal (emphasis added):

"To do this, the Government will need to ***steadily redesign*** *the current social distancing measures with* ***new, smarter measures*** *that reflect the level of risk at that point in time, and* ***carefully*** *wind down economic support schemes while people are* ***eased back into work****."*

47.7. Among its *"overarching principles"* for the easing of lockdown, the Government included (emphasis in original):

"(5) ***Transparency.*** *The Government will continue to be open with the public and parliamentarians, including by making available the relevant scientific and technical advice. The Government will be honest about where it is uncertain and acting at risk, and it will be transparent about the judgements it is making and the basis for them."*

47.8. *"Phase 2"* of the recovery plan was to involve *"smarter controls"*, which would be *"developed and announced in periodic 'steps' over the coming weeks and months, seeking to maximise the pace at which restrictions are lifted, but with strict conditions to move from each step to the next."*

47.9. The Government predicted that:

"Initially, the gap between steps will need to be several weeks, to allow sufficient time for monitoring. However, as the national monitoring systems become more precise and larger-scale, enabling a quicker assessment of the changes, this response time may reduce."

47.10. The Government also took the view that:

"It is vital that Parliament can continue to scrutinise the Government, consider the Government's ambitious legislative agenda and legislate to support the COVID-19 response."

47.11. Finally, the document stated:

"In order to facilitate the fastest possible re-opening of these types of higher-risk businesses and public places, the Government will carefully phase and pilot re-openings to test their ability to adopt the new COVID-19 Secure guidelines. The Government will also monitor carefully the effects of re-opening other similar establishments elsewhere in the world, as this happens. The Government will establish a series of taskforces to work closely with stakeholders in these sectors to develop ways in which they can make these businesses and public places COVID-19 Secure."

47.12. On 25 May, the Prime Minister announced plans for non-essential shops in England to open in June, subject to meeting the Covid-19 guidelines.[7] He stated that:

---

[7] https://www.gov.uk/government/speeches/pm-press-conference-statement-25-may-2020

"[...] because of the progress we are making, I can, with confidence, put the British people on notice of the changes we intend to introduce as we move into step 2.

And I think it is important to give that notice, so that people have sufficient time to adjust and get ready before those changes come into effect."

[...]

So I can announce that it is our intention to allow outdoor markets to reopen from June 1, subject to all premises being made COVID-secure, as well as car showrooms, which often have significant outdoor space and where it is generally easier to apply social distancing.

We know that the transmission of the virus is lower outdoors and that it is easier to follow Covid Secure guidelines in open spaces. That means we can also allow outdoor markets to reopen in a safe way that does not risk causing a second wave of the virus.

Then, from 15 June, we intend to allow all other non-essential retail, ranging from department stores to small, independent shops, to reopen. Again, this change will be contingent upon progress against the 5 tests and will only be permitted for those retail premises which are COVID-secure."

47.13. On 10 June, the Prime Minister stated:[8]

"A month ago I set out our roadmap to recovery and that explained the gradual steps we would take to ease the lockdown, as the data and the evidence allows. The measures it contained were all conditional on continued progress in tackling the virus. We are continuing to follow our roadmap, while adjusting our approach as we need to, as we always said we would."

---

[8] https://www.gov.uk/government/speeches/pm-statement-at-the-coronavirus-press-conference-10-june-2020

[...]

"As set out in our roadmap, the next set of changes - Step 3 - will not begin until 4 July at the earliest, as the evidence allows."

47.14. On 23 June, the Prime Minister stated:[9]

"From 4 July, your household will be able to meet with one other household at a time, including staying over.

This can be indoors or outside, at your home, in a restaurant or pub, or in paid accommodation.

I want to stress you should remain socially distant from anyone outside your household.

For meeting outdoors, you can continue to meet in a park or a garden in a group of up to six people, drawn from six different households.

Again, at all times you should maintain social distancing from anyone outside your household.

As we give people back more control over their lives, we will be asking them to follow guidance on limiting their social contact, rather than forcing them to do so through legislation."

48. The statements set out in the preceding paragraph show that the Government quite rightly recognised the need to proceed gradually and carefully at each stage of the easing of restrictions. The Government also acknowledged the importance of Parliamentary scrutiny of its Covid-19 response.

49. The following are apparent from this timeline:

49.1. The Government began planning the easing of lockdown before 11 May 2020.

---

[9] https://www.gov.uk/government/speeches/prime-ministers-statement-on-coronavirus-covid-19-23-june-2020

49.2. The Prime Minister had selected 4 July as the date to ease lockdown restrictions (through a measure like the Restrictions Regulations) by 10 June at the very latest (evidence permitting).

49.3. By 23 June, the Government had decided on the broad outline and philosophy of the Restrictions Regulations, including the basic rules they would contain.

50. There is no basis on which the Secretary of State could have declared that the adoption of the Restrictions Regulations by the s. 45R procedure was necessary by reason of urgency.

50.1. **First**, they were trailed, at least in principle, just under two months in advance.

50.2. **Second**, the basic outline of what was required from the Regulations was clearly understood by 10 June, and a more detailed understanding had been developed by 23 June.

50.3. **Third**, it was well understood within Government what the key risk factors for disease transmission were (large groups, indoors), and that basic scientific understanding did not change throughout the Government's easing of restrictions. It would have been obvious that the premises and gathering restrictions in the Restrictions Regulations, or something very similar to them, would have to be included; or at the very least, this was a highly likely eventuality. It is accepted that the urgency procedure might have been necessary if the Government had been blown off course by new scientific advice or epidemiological developments, but it is apparent that this did not happen. The Government proceeded, as it had said it would from 10 May, with its phased reopening plan.

50.4. **Fourth,** the Government had generally enjoyed broad Parliamentary support for the measures imposed up to this point and controlled the order paper in the Commons. It could easily have seen the Regulations laid before both Houses and voted on in a matter of days, and perhaps even less time.

51. Accordingly, the Regulations were *ultra vires*. The singular statutory condition precedent for the use of the procedure by which they were made was not met. In circumstances where the Regulations were *ultra vires*, no offence purportedly created under them can amount to a crime, serious or otherwise, which might form the basis of a certificate in proceedings under s. 53A of the Licensing Act 2003. The Certificate was accordingly unlawful.

E. CONCLUSION

(1) Details of the Action the Defendant is Expected to Take

52. In these circumstances, the Chief Constable should withdraw the Certificate and the application.

(2) ADR Proposals

53. At present it does not appear to the Claimant that ADR will be appropriate in light of the complaints of unlawfulness made in this letter. The Claimant is however willing to discuss the basis on which the unlawful decision to issue the Certificate is to be corrected.

(3) Proposed Reply Date

54. In light of the new restrictions applicable in England, there is less urgency than there would otherwise be since the Claimant's premises would be required to be closed this month in any event. We accordingly propose that it would be appropriate for the Defendants to respond to this letter by 2nd December 2020.

Yours faithfully

DADDS LLP