



JUDICIARY OF  
ENGLAND AND WALES

**IN THE WESTMINSTER MAGISTRATES' COURT**

Case no: 2301070982

Before: District Judge (Magistrates' Courts) Law

**BETWEEN:-**

**WESTMINSTER CITY COUNCIL**

**Prosecution**

**-v-**

**SYED ANDRABI**

**Defendant**

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**JUDGMENT**

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Mr Charalambides for the Prosecution

Mr Rankin for the Defendant

Hearing date: 19 July 2024

Judgment date: 24 October 2024 at 10am

## Introduction

1. Mr Syed Andrabi (D) is charged with one offence contrary to s.136 Licensing Act 2003 (the Act) as follows:-

*“On 08/01/2023 at London W9 carried on a licensable activity, namely the provision of late night refreshment, on or from premises, namely from premises known as ‘French Tacos’ and situate at 414 Harrow Road, London W9 2HU, otherwise than under and in accordance with an authorisation issued under the Licensing Act 2003.”*

2. D was initially summonsed to attend court on 30 August 2023 for his first appearance. That hearing was subsequently adjourned to 25 October 2023 when the defendant entered a “Not guilty” plea. Following ineffective trial dates on 17 January 2024 and 12 July 2024 the case came before me on 19 July 2024 when I heard legal argument and reserved this judgment.
3. I am grateful to counsel for their helpful submissions (both oral and written). Where I have considered it appropriate, I have adopted and / or summarised some parts of them and trust that I have done so faithfully.
4. The evidence in this case was entirely agreed and it was not necessary for me to hear any oral evidence as the issue in the case is purely one of law. The prosecution allege that D is guilty of the charge because his business ‘French Tacos’ is providing late night refreshment without a licence when one is required. The charge is effectively a “sample count” for the conduct by D of his business. D on the other hand maintains he is not guilty of this (or any) offence in the running of his business because he does not require the relevant authorisation. D submits that he is not carrying out any licensable activity by handing hot food to delivery drivers for onward delivery to his customers.
5. This case turns on a question of statutory interpretation which the parties agree has not been the subject of decided authority before. It follows that my conclusion involves a novel

and therefore controversial conclusion of law which the parties anticipate will be litigated further. For that reason I decided to reserve and hand down a written judgment.

### **The factual background**

6. I set out the following agreed matters of fact which form the background against which I have decided the disputed point of law with reference to the sample date on which the prosecution made a test purchase:
  - a) On 8 January 2023 D operated a premises known as ‘*French Tacos*’ and situate at, 414 Harrow Road, London W9 2HU.
  - b) D did not have an authorisation issued under the Act for the provision of late-night refreshment from premises between 11pm to 5 am.
  - c) D accepted an order from a member of the public for hot food via a third-party delivery app ‘*Uber eats*’ at 00.08 on that date. That order had been placed by Mr Ofori, a Westminster City Council City Inspector.
  - d) D provided hot food from a side window of the premises which was passed to a delivery driver in fulfilment of that order.
  - e) The hot food was passed by the delivery driver to the customer who had placed the order at a nearby address at 00:27 on the same date.

### **Legal principles**

7. A person commits an offence contrary to s.136 of the Act if:

*“(1)(a) he carries on or attempts to carry on a licensable activity on or from any premises otherwise than under and in accordance with an authorisation, or*

*(b) he knowingly allows a licensable activity to be carried on.”*
8. S.1(1)(d) of the Act provides that “*licensable activity*” includes “*the provision of late night refreshment*”, which is further defined in Schedule 2(para.1) of the Act (as relevant on the facts of this case):

*“... a person ‘provides late night refreshment’ if–*

*(a) at any time between the hours of 11.00pm and 5.00am, he supplies hot food or hot drink to members of the public, or a section of the public, on or from any premises, whether for consumption on or off the premises,...*”

9. D will therefore be guilty of the offence if the prosecution are able to prove the following elements of the offence:
  - a) D *supplied on or from any premises*;
  - b) *hot food or drink*;
  - c) *between 11pm and 5am*;
  - d) to *‘members of the public, or a section of the public’*;
  
10. There is no dispute about elements b)-d). It is accepted that hot food was supplied, that it was supplied between 11pm and 5am and supplied to a member of the public. The issue for me to decide is whether the primary element is made out, namely whether it was D who made the supply from his premises. There is no dispute that there was no supply “on” the premises because D operates his business as a takeaway only.
  
11. As I have said counsel agreed that no authority is available to assist in the application of the plain words in the section to the facts in the present case. While that might seem surprising given the large value of the late night food supply industry and the number of operators, the parties told me that the fact was that nobody had previously taken or litigated the point. That of course does not render it a point lacking in merit but it does mean there is no support for the interpretation urged on behalf of the defendant, which would mean a radical departure from the *status quo* in which operators have hitherto accepted the licensing regime provided by the Act applies to them.
  
12. Both parties agreed with my proposition that if I was satisfied about the meaning of the ordinary English words “supply” and “from any premises” then in accordance with basic principles of statutory construction it was not necessary or appropriate to apply the rule in

*Pepper v Hart* [1992] UKHL 3 by looking to the legislative history of the section or to secondary material such as Hansard to aid statutory interpretation. Neither side, while having diametrically opposed submissions on how I should apply the meaning of these words to the facts of the case, submitted that the words were so ambiguous or obscure as to justify that sort of inquiry.

13. Both parties further agreed that the court should have regard to Amended Guidance issued by the Secretary of State under s.182 of the Act. The version of this guidance relevant to this offence is dated October 2012 and says the following (at para.3.12) about when “supply” takes place:

*“3.12 Schedule 2 provides a definition of what constitutes the provision of late night refreshment. It involves only the supply of ‘hot food and hot drink’. Shops, stores and supermarkets selling cold food and cold drink that is immediately consumable from 11.00pm are not licensable as providing late night refreshment. The 2003 Act affects premises such as night cafés and take away food outlets where people may gather at any time from 11.00pm and until 5.00am. In this case, supply takes place when the hot food or hot drink is given to the customer and not when payment is made. For example, supply takes place when a table meal is served in a restaurant or when a take-away is handed to a customer over the counter.”*

14. In the course of argument I raised with the parties the only assistance I had found, in the course of preparation of the case, as to the meaning of “supplies” within Schedule 2(para.1) of the Act. In the leading practitioner work on licensing, *Paterson’s Licensing Acts* (132<sup>nd</sup> Edn.), the following curious footnote appears against the word “supplies”:

*“<sup>2</sup> It has been argued that a unit on an industrial estate which does not entertain personal callers, that is used between 11pm and 5am to produce hot food (eg heated pizzas) which are then delivered to persons who have ordered it (either by telephone or online) is not carrying out any licensable activity. Paragraph 1(1)(b) does not apply, as the public are not admitted to the premises. It may be the case that the courts would also hold that food is not supplied from it either in that the food goes from the premises into the hands of a delivery driver before subsequently being handed to the customer at some other place. Note that ‘premises’ means (s 193) ‘any place and includes a vehicle, vessel or moveable structure’.”*

15. I describe it as curious because it does not cite any authority on the point (confirming the parties' agreement that there is none). Mr Charalambides was able to shed some light on the origin of the footnote – an online blog written by a colleague in chambers. Given it is no more than an editorial comment in favour of the construction advanced by D it carries little weight, particularly because it is not supported by any authority (or any reasoning) and is couched in quite diffident terms. It does no more than reflect the fact there is no authority on the point which has been the subject of debate among practitioners in the field. It had not been relied upon by Mr Rankin in his skeleton argument. I do not find it assists me in my decision.

### Submissions

16. Each party made oral submissions based upon their respective written submissions. The prosecution case is that both “*supply*” and “*from any premises*” are clear in their ordinary meaning so that, on these facts, D carried out the supply from his premises.
17. Mr Rankin submitted that the supply of the food in this case was made not by D from the restaurant premises at 414 Harrow Road but by the delivery driver from his e-bike at the customer's doorstep. He based this submission upon para. 3.12 of the s.182 Amended Guidance set out above that supply took place when the hot food was given to the customer. This was done not by D but by the delivery driver. He added that “premises” is defined by s.193 of the Act as “*any place and includes a vehicle, vessel or moveable structure*” such that the delivery driver's e-bike was a premises for the purposes of the Act from which a supply could be made. Mr Rankin accepted in oral argument that the consequence of his submission must be that the delivery driver in this situation would be making a licensable supply and it would follow that all such drivers would require a licence. He sensibly did not pursue the submission made in his first skeleton argument at [21] that no licensable supply had taken place at all and the supply on the doorstep was a “*private, and unlicensable, supply*”.
18. Mr Charalambides relied both upon the *Shorter Oxford English Dictionary* definition of supply, namely “*Make available (something needed or wanted); provide for use or consumption, esp.*

*commercially.*” He pointed out that in the leading case on drugs supply *R v Maginnis* [1987] AC 303, HL the position of a custodian (here the delivery driver) was excluded from the meaning of supply (per Lord Keith at 309 A-B):

*“The word “supply” in its ordinary natural meaning, conveys the idea of furnishing or providing to another something which is wanted or required in order to meet the wants or requirements of that other. It connotes more than the mere transfer of physical control of some chattel or object from one person to another. No one would ordinarily say that to hand over something to a mere custodian was to supply him with it.”*

19. Mr Charalambides submitted the delivery driver was simply a custodian who was not making a supply but simply delivering the supply made by D. The words of para. 3.12 of the s.182 Amended Guidance did not alter the position, that the supply did not take place until the point at which the food prepared by D was handed over to the customer. He submitted that given the purpose of the legislation – to regulate late night food and drink provision – the meaning urged on behalf of D would be artificial and unnatural, by rendering those driving e-bikes to deliver food subject to licence but not those who produced the food or drink ordered by the customer. The delivery driver was in a directly analogous position to a member of waiting staff taking food to a restaurant table. While a vehicle (such as a mobile coffee kiosk) could be licensable an e-bike could not as it has no capacity to create and supply hot food or drink. On an ordinary meaning of supply it must relate to the person who made the food or drink not those who were simply transferring physical control.
  
20. Mr Rankin submitted that the legislation was not currently clear and that any ambiguity ought to be resolved in D’s favour. He disputed that a waiter or waitress was analogous to a delivery driver who was an independent person from the business making supply far away from it.

## Analysis

21. The real issue for me to decide is who made the supply in this case – the fact there was a supply not being in dispute as set out above. Was it D from his premises or the delivery driver from his e-bike?
22. The starting point must be the clear purpose of the legislation, which is to licence the activity of a late-night food production (in this case) industry rather than a late-night delivery service. The licensing regime in this context, in pursuance of the statutory licensing objectives, is bound as a matter of logic to be tied to the producer of the food rather than the deliverer. This points towards the construction advanced by the prosecution.
23. One way of approaching the question might be to posit the question to a customer whose party had been catered for by D – *“Who supplied the food for your party?”* One imagines the expected answer would be *‘French Tacos’* rather than *‘Uber eats’* because at the heart of the issue is who prepared the food, not who delivered it. This ties in with the analysis in *Maginnis* which excludes a mere custodian from the definition of supplier. The delivery driver is in my judgment no more than a custodian. He is in the identical position of a member of waiting staff. The precise employment or contractual arrangements, the mode of delivery by e-bike rather than on foot or in a vehicle, or the time or distance involved, do not in my view make any difference. The way in which this role is carried out is immaterial. What each has in common is to carry out the supply being made by the food producer. The most obvious and ordinary meaning of the section points to the food producer being the person who supplied the food.
24. It seems to me that the purpose behind the Amended Guidance under s.182 defining when supply takes place *“when the hot food or hot drink is given to the customer and not when payment is made”* is obvious. It comes directly after a reference to the relevant timings, namely 11pm to 5 am. It is obviously important in that context to know, in order to apply and enforce the provisions, what the relevant time is. The fact that the point of supply is defined in the guidance in this way does not in my judgment assist with who is making that supply. The fact that supply is complete when the food is handed to the customer does not in any way

determine who is making the supply within the meaning of the Act. The examples that follow, namely when a restaurant meal is handed to a customer at their table or a takeaway handed to a customer at the counter, are just that – examples. They could not in my view have been intended to exclude, nor do they seek to even cover, the current position. They do not support Mr Rankin’s position, that the delivery driver is the person making the supply. In my judgment this is a neutral point and while I give respect to the statutory foundation on which the Amended Guidance is laid, I must be cautious not to elevate it to a status on a level with the primary legislation. There is nothing in para. 3.12 of the Amended Guidance in my judgment which is determinative of the question this court has to answer.

25. Whether or not a delivery driver’s e-bike is capable of being a “premises” within the meaning of the Act does not greatly assist. The obvious and ordinary meaning of the word when applied to the facts of this case points strongly to the supply coming from the producer’s premises just as from the producer himself. An extension of the question posed above would be “*Where did your party food come from?*” to which the natural answer of “*French Tacos’ on Harrow Road*” presents itself rather than “*Ubereats*”.
26. I have also considered the question from the wholly different but familiar analogy of a set of instructions to counsel. The Solicitors Regulation Authority regulates the activities of solicitors in England and Wales. Assume a solicitor has drafted a set of instructions to counsel and they are delivered to counsel in chambers whether, as formerly, in hard copy paper form by hand cart or DX van or by email. Assume that guidance issued by the Secretary of State determined that the instructions were deemed to be supplied on receipt by counsel. It is not difficult to conclude who supplied the instructions to counsel. It was not the barrister’s clerk, the DX company or email platform host. Whatever mode of delivery is used the ordinary sense of supplying something is directed straight to the author of the instructions. That is because we recognise the various delivery carriers as no more than custodians and it is obvious that the regulation is intended to cover the solicitor. It seems to me that the position is no different in the context of this case.
27. In my judgment the interpretation urged on behalf of D would lead to random and undesirable results. Those supplying late night food using a member of staff to take food

on foot to a customer would remain subject to the licensing regime while all those using delivery drivers would fall outside it. Meanwhile all delivery drivers carrying late night hot food, none of whom would have contemplated or wished to be subject to a licensing regime, would be subject to it.

28. Overall I am quite satisfied that the prosecution are correct in their submission that, on the ordinary and logical meaning of “*supply*” and “*from any premises*” applied to these facts D made the supply from his premises. That is so notwithstanding the fact that, in accordance with the s.182 Amended Guidance, the supply takes place when the food was handed to the customer. The delivery driver was no more than a custodian, just like a waiter or waitress, who did not make a supply. To find otherwise would require an unnatural and strained interpretation of these terms.

### **Conclusion**

29. For these reasons I find D Guilty of the charge. I will pass sentence having heard representations from the parties after this judgment is handed down.

District Judge (Magistrates’ Courts) Law

24 October 2024