



City of Westminster

Licensing

Item No:	6
Date:	21 September 2016
Classification:	For General Release
Title of Report:	Licensing Appeals
Report of:	Director of Law
Wards involved:	Not applicable
Policy context:	A business like approach
Financial summary:	None
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1. Summary

1.1 This report provides a summary of recent appeal results.

2. Recommendation

2.1 That the report be noted.

3. Background

3.1 To date, 466 appeals have been heard / settled / withdrawn:

- 16 allowed
- 13 allowed only in part
- 56 dismissed
- 216 withdrawn
- 165 settled

4. Licensing Act 2003 Appeals

4.1 Press, 32-34 Panton Street, London

By application dated 4 June 2015, the Metropolitan Police Service applied for an Summary Review of the premises licence of Press Nightclub, 32-34 Panton Street, SW1.

The application was made on the grounds of the prevention of crime and disorder, public safety and the prevention of public nuisance. The review followed an incident within and outside of the premises on Sunday 31st May 2015 at approximately 02.35am, when a large scale disorder took place inside Press Nightclub. Several people were seriously assaulted and one male was stabbed in the neck. Numerous weapons were used during the incident including bottles, metal poles and tables. The disorder took place throughout the entire premises, with persons chased and attacked in staff areas. The disorder lasted approximately 10 minutes inside the venue before it spilled out onto the streets. 20-30 persons continued to fight outside the premises.

A Licensing Sub-Committee was held on 8 June 2015 to consider whether it was necessary to impose any interim steps pending the hearing of the full Review. Having watched the CCTV and considered the papers before it, as well as hearing representations from the Police and the licence holder, the Licensing Sub-Committee decided that it was necessary to suspend the primary premises licence due to the seriousness of the incident on 31 May 2015.

The full hearing of the Review was held on 29 June 2015. The Licensing Sub-Committee again heard submissions from the Police and Licensee with regards the operation of the premises and the incident on 31 May 2015. Mr Rankin on behalf of the Police advised that the licensee had denied that the stabbing had taken place inside the premises. The victim had suggested it had taken place outside and had not wished to take matters further. Mr Rankin added that the victim was known to the son of the licensee (who was also present at the time of the incident) and it may have been convenient for both parties to claim the stabbing had occurred outside. He added that the police were 99% certain that the stabbing took place within the premises. The Sub-Committee were of the view that there was a wholesale failure to manage the licensed premises and the proposals submitted on behalf of the licensee were not considered to be sufficient in the circumstances. The Sub-Committee therefore considered it was clearly appropriate to revoke the premises licence.

Notice of appeal was lodged by the Appellant's on 17 July 2015. The full hearing of the appeal is scheduled to commence on 12 January 2016 and continue on 13, 14, 15, 19 and 20 January 2016. Evidence and Rebuttal was exchanged in preparation for the full hearing with the Appellant proceeding on the basis that the decision of the Licensing Sub-Committee was correct, but that a new operator was proposed who would run the premises in a competent manner. In late November 2015, the Appellant advised of the withdrawal of their appeal as '*...it became apparent over the past few weeks from around the end of October that the appellant is insolvent.*'

A costs hearing was held on 9 February 2016 where the Court ordered that the Appellant, Paper Club London Limited, pay £39,746.20 to the City Council. The District Judge also agreed to list the matter for a further Case Management Hearing in May to enable the City Council to go back to Court if the costs are not paid. It is intended to seek costs against individual Directors who knew that the Appellant was insolvent and yet pursued with the appeal proceedings nevertheless.

4.2 Chutney Mary, 72-73 St James's Street, London, SW1

The matter concerns an application by an Indian restaurant in St James known as Chutney Mary. The premises applied to vary their licence so as to permit the sale of alcohol until 20.00 without food on the premises. The proposed variation concerned condition 19 on the premises which provides that:

Alcohol may be supplied to customers without food provided that:

- a) Such supply shall only be to persons seated and served by waiter / waitress service
- b) Such supply shall cease at 20.00
- c) Such supply shall be limited to 30 customers to be seated in the area hatched black and shown on plan number 3346/LIC2.22

The availability of alcohol without food shall not be promoted or advertised otherwise than on menus and price lists within the premises.

Relevant representations were received from Environmental Health, 11 local residents and the St James' Conservation Trust. Environmental Health and one of the residents, Mr Turner, were present at the Licensing Sub-Committee hearing and made oral representations.

The main issue in the appeal will be whether this restaurant should be permitted to operate a bar area where customers are permitted to purchase alcohol without food until 20.00 hours. Having considered the papers and heard representations, the Licensing Sub-Committee decided that that it did not have confidence in the operator upholding the licence objectives and complying with licence conditions, in view of admitted breaches in licence conditions in the past, and credible evidence from residents of noise and odour nuisance in the past. The Licensing Sub-Committee therefore refused the variation application. Notice of appeal was lodged by MW Eat Ltd against the decision of the Sub-Committee. A date for the full hearing has not yet been set.

5. JUDICIAL REVIEWS / CASE STATED

5.1 Sex Establishment Licensing - Fees

The challenge took the form of a judicial review brought by Mr Timothy Hemming, trading as Simply Pleasure Ltd, and six other long standing licensees of sex establishments in Westminster, challenging the legality of the fee charged by the City Council for a sex establishment licence in 2011/12 (£29,102). The claim was made on two grounds. Firstly it was said that the Council had never lawfully set a fee for 2011/12. Secondly it was said that the amount of the fee was unlawful because it contained an element reflecting the cost of enforcing the sex establishment licensing regime.

The case was heard in the High Court over two days in March, both sides being represented by Leading Counsel. The Court gave judgment on 16 May, upholding the claim on both grounds.

An application for permission to appeal on the Services Directive issue, and costs, was filed with the Court of Appeal, following refusal of permission by the High Court. The Court of Appeal granted permission to appeal and the matter was heard on 14 January 2013.

Following the hearing, the parties were invited by the Court to make further written submissions on several issues, including whether it would be appropriate for the Court to refer the case to the European Court of Justice. Both parties made further written submissions

The Court handed down judgment on 24 May. The City Council's appeal on both the Services Directive issue and on costs was dismissed. An appeal on a third point, relating to the way in which fees for past years should be calculated, was allowed. The Council was ordered to pay 90% of the claimants costs of the appeal, and the claimants were ordered to pay 10% of the Council's costs. The Council's application for permission to appeal to the Supreme Court was refused.

An application was lodged to the Supreme Court itself for permission to appeal. Submissions in support of the Council's application for permission to appeal were filed by the Architects Registration Board, the Bar Standards Board, the Solicitors Regulation Authority, the Law Society, the Farriers Registration Council, the Care Quality Commission and the General Council of the Bar. An Order was received from the Supreme Court granting permission to Appeal. Applications to intervene were submitted on behalf of the Bar Council, the Law Society, the Architects Registration Board, the Solicitors Regulation Authority, the Bar Standards Board, the Care Quality Commission and the Farriers Registration Council. A conference with Counsel was held to discuss procedural issues and how best to deal with intervenors. The LGA had been invited, and attended, the conference part way through to discuss the possible role of the LGA. It was agreed that WCC would instruct a Licensing Counsel to assist those already instructed to deal with any licensing issues and research regimes that may be impacted.

The LGA subsequently advised us that they have been advised by Counsel to apply to intervene by making written submissions.

A date for the hearing in the Supreme Court was set for 13 January 2015.

The case was heard in Supreme Court on 13 January 2015 before Lord Justices Neuberger, Clarke, Toulson, Reed and Mance. The parties are the City Council as appellant, Mr Hemming and the other sex shop proprietors as respondent, and the intervenors. Seven regulatory bodies and the Local Government Association were

given permission to intervene and were represented. There was also a ninth intervener at the hearing, the Treasury.

The hearing itself took place over one day. After the hearing, the Court wrote to all parties inviting further submissions on matters which, they considered, may not have been dealt with fully at the hearing because of shortness of time. These issues revolved around whether it is open to a licensing authority to charge, at application stage, a fee which is returnable if the application is unsuccessful, or whether such a fee may only be charged later, when the application is granted or at a later stage than that.

Judgment was delivered on 29 April, and, subject to one point which the Court has referred to the European Court of Justice, the City Council was successful.

The hearing on the reference to the CJEU took place on xx.xx in Luxembourg.

The issue referred by the Supreme Court related to whether making a charge “up front” to all applicants, with an element of the fee being refunded to unsuccessful applicants, was a lawful method of charging. However the Court appeared to be interested in wider issues which have not been referred and which had already been determined by the Supreme Court.

The CJEU has now published the Opinion of the Advocate General in this case. The Opinion is not the Judgment of the Court. The role of the Advocate General is to give an ‘independent opinion’ on any given case, before the judges deliberate and deliver their judgment.

However, the Opinion is not helpful to the Council. It strays into areas that are not only irrelevant to the issues that are properly before the Court, but which played absolutely no part in the proceedings before the English courts and were never raised by the Advocate General in the proceedings before the Court in Luxembourg. For example, the Advocate General opines that Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 (which governs the control of sex establishments under domestic legislation) is arguably incompatible with the EU Services Directive 2006/123/EC for reasons never before mentioned in the proceedings by any party, and not suggested by the Advocate General during the proceedings in Luxembourg. The Advocate General also expresses views on the “reasonableness” of the fees charged by Westminster, also an issue entirely outwith the ambit of the matters actually before the Court.

The Advocate General’s Opinion also, in our Counsel’s view, fails to grapple properly with either of the arguments presented to the Court on behalf of Westminster on the issue that actually was before the Court. Despite that, he comes down against us on both those arguments.

However, it does not appear that the Opinion directly contradicts or undermines the reasoning of the Supreme Court which led it to conclude that fees including an element designed to recover enforcement costs may legitimately be charged to licence holders.

The procedures of the CJEU do not allow us in practice to challenge, comment upon or criticise the Advocate General’s Opinion. We will therefore have to wait and see the extent to which it influences the Court, and whether the Court will limit itself to determining the issues actually before it. We understand that it is most unlikely that the Judgment of the Court will appear before November 2016 at the earliest, and the outcome remains uncertain.

6. Legal implications

6.1 There are no legal implications for the City Council arising directly from this report.

7. Staffing implications

7.1 There are no staffing implications for the City Council arising directly from this report.

8. Business plan implications

8.1 There are no business plan implications arising from this report.

9. Ward member comments

9.1 As this report covers all wards, comments were not sought.

10. Reason for decision

10.1 The report is for noting.

If you have any queries about this report or wish to inspect any of the background papers please contact Hayley Davies on 020 7641 5984; email: hdavies@westminster.gov.uk

Background Papers

- None