



City of Westminster

Licensing Committee Report

Date:	Wednesday 29 th November 2017
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Title:	Licensing Appeals
Report of:	Director of Law
Wards Affected:	All
Financial Summary:	N/A
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1. Summary

1.1 This report provides a summary of recent appeal results.

2. Recommendations

2.1 That the report be noted.

3. Background

3.1 Over the last quarter we have been dealing with the appeals against decisions of the Licensing Sub-Committee ("Committee") and the Hemmings case as specified in section 4 and 5 of this report.

4. Licensing Act 2003 Appeals

4.1 Sophisticats, 3 – 7 Brewer Street, London, W1F 0RD

4.1.1 Devine Restaurants Ltd ("Appellant") appealed against two decisions of the Committee made on 1st December 2016 and 6th April 2017, primarily against the Committee's decisions to refuse the extension of hours in relation to the Premises Licence granted under the Licensing Act 2003 and the renewal of the Sex Establishment Licence ("SEV") granted under the Local Government (Miscellaneous Provisions) Act 1982. Both appeals were conjoined and heard at Westminster Magistrates' Court on 27th and 30th June 2017, when the

District Judge concluded that both decisions of the Committee were not wrong, so the appeals were dismissed.

- 4.1.2 The Council sought recovery of its legal costs from the Appellant and at the costs hearing on 14th September 2017, the Appellant was ordered to pay £42,684 to the Council. These costs have yet to be received and the Council is endeavouring to recover these from the Appellant.

4.2 Crocker's Folly, 24 Aberdeen Place, London, NW8 8JR

- 4.2.1 This Premises is a public house and restaurant which has an outside seating area. On 24 January 2017, the Premises Licence Holder, (Firestone Management Ltd), sought permission to vary the licence by extending the hours for the use of the external outside area at the side and front of the premises from 21:00 hours to 23:00 hours each day. The application was opposed by Environmental Health, two Ward Councillors and 15 local residents.
- 4.2.2 The Committee refused the application on 27 April 2017 on the grounds that the variations would not promote the prevention of public nuisance licensing objective.
- 4.2.3 The appeal was scheduled to be heard at Westminster Magistrates' Court over three days from 4th to 6th October 2017. However, on 10th August the Appellant withdrew its the appeal. The Council sought to recover its costs from the Appellant and at the costs hearing on 11th October 2017, the Appellant was ordered to pay £15,180 to the Council. These costs are being pursued.

4.3 London Film Museum, 45 Wellington Street, WC2E 7BN

- 4.3.1 An application was received on 21 April 2017 to extend the hours for licensable activities to 02:00 in a marked area within the Premises so that the area could be used for private and pre-booked events. The existing permitted hours of the licence has a terminal hour on Mondays to Saturdays of 00:30 and 22:00 hours on Sundays. The proposal was to extend the terminal hour Mondays to Saturdays to 02:00 and to the same terminal hour on any Sunday before a bank holiday. It was intended that the Premises would close 30 minutes after the proposed new terminal hours.
- 4.3.2 The Police and the Licensing Authority objected to the variations sought and on 6th July 2017 the Committee decided to refuse the application primarily on the basis that firstly, the proposal would be contrary to the Council's Cumulative Impact Area Policy and secondly, because the Applicant had not demonstrated why the application should be granted as an exception to this policy.
- 4.3.3 The appeal was scheduled to be heard over two days on 25 and 26 January 2018. However, the Appellants have now withdrawn the appeal and the

Council will be seeking to recover its legal costs.

4.4 **Swingers, 15 John Prince's Street, W1**

4.4.1 The Court has advised that an appeal has been received and it is being processed by the Court. No details of the grounds of appeal have been provided so Members will be updated at the next Licensing Committee.

5. **JUDICIAL REVIEWS / CASE STATED**

5.1 **Hemming and others v Westminster City Council**

5.2 This is a claim brought by the proprietors of a number of sex establishments in Soho alleging that the fees charged by Westminster on an application for a sex shop licence are unlawful. The history of and background of this case has been set out in previous reports to the Committee.

5.3 The case has now returned to the Supreme Court for final decisions to be made following the earlier decisions in the Supreme Court and the European Court of Justice ("CJEU"). There are two issues remaining, namely:-

(1) obtaining an assessment as to what costs should be paid by Hemmings and the other Operators in light of the previous decisions that enforcement and monitoring costs can be recovered; and

(2) obtaining an order that the Council should recover its legal costs in connection with the hearing before the Supreme Court and the CJEU.

5.4 The Council has filed draft skeletons of arguments and draft orders with the Supreme Court so that these matters can be remitted to the Administration Court for determination and it is estimated that these matters will be resolved some time in 2018.

5.5 By way of background, the Council's licensing fees were calculated on the basis that the regime was supposed to be self-financing, so that the administrative costs of processing and granting licenses should be recovered, together with the costs of monitoring and enforcing the entire licensing regime against unlicensed and licensed operators. Hemmings and a number of other licence operators objected to the fees charged by Westminster for various reasons, but one of the main reasons was that they contended that Westminster could not recover the costs of monitoring and enforcement, as they argued that this would be contrary to the Service Provision Regulations which came into force in 2009 and the European Union Services Directive. The High Court and the Court of Appeal had both previously held that the European Directive prevented Westminster from recovering the fees for monitoring and enforcing the licensing regime as part of the licence fee.

5.6 However, Westminster appealed to the Supreme Court which held in 2015 that authorities were entitled to charge a fee towards the costs of monitoring

and enforcing the licensing regime. However, the Supreme Court had a concern about the impact of the Services Directive on the timing of when such charges could be demanded. The Supreme Court was clear that schemes of Type A (whereby the licensee paid a fee to cover the administration of the licence application at the time when that application was made, and a further fee to cover the monitoring and enforcement of the regime only if the application was successful) were lawful. However, it referred to the Court of Justice of the European Union the question of the lawfulness of schemes of Type B (where both the fee for the administration of the licence application and a refundable fee for the monitoring and enforcement costs of the licensing regime were charged at the time when the application was made). Westminster had previously charged one fee when the application was made under a Type B process. Subsequently, on 16 November 2016 the CJEU held that Type B schemes were unlawful as a matter of European Union law. The Council had subsequently converted to a Type A scheme.

5.7 At the latest and final hearing before the Supreme Court on 11 May 2017, Westminster sought various orders which included orders for the repayment of the sum of £1,417,245 (which had been returned to the Operators following the decision of the Court of Appeal.) However, Hemming and the other Operators argued that, in light of the CJEU's finding, that the Type B scheme, which Westminster had used, was unlawful, that the Council should not be entitled to a refund for the licence fees repaid.

5.8 On 19 July 2017 the Supreme Court decided decisively in favour of Westminster that the Council could recover a reasonable fee for the monitoring and enforcement of the sex licensing regime in Westminster (including the costs of enforcement measures against unlicensed operators). Consequently, the Council is seeking recovery of all sums repaid, in addition to a reasonable sum for the monitoring and enforcement of the licensing regime for the periods in question (i.e. for the years ending 2011, 2012 and 2013).

6. Legal implications

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

7. Staffing implications

7.1 There are no staffing implications for the 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 Heidi Titcombe, Principal Solicitor on 020 7361 2617; email: heidi.titcombe@rbkc.gov.uk