



City of Westminster

Licensing Committee

Item No:

Date:

28 November 2018

Classification:

For General Release

Title of Report:

Licensing Appeals

Report of:

Bi-Borough Director of Law

Wards involved:

Not applicable

Policy context:

A business like approach

Financial summary:

None

Report Author:

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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 one appeal which was successfully dismissed in October 2018, as specified in section 4 of this report. All previous licensing appeals having been completed as specified in the July 2018 report. We are also dealing with the Hemmings case as specified in section 6 of this report.

4. Licensing Act 2003 Appeals

4.1 The Windmill 17-19 Great Windmill Street, London W1D 7LQ – dismissed but subject to an appeal to the Crown Court

4.1.1 The Council received a renewal application of the sexual entertainment venue ("SEV") premises licence from Big Country Ltd to provide full nudity striptease, pole dancing and table dancing between the hours of 09:00 to 05:30 on each of the days Monday to Saturday and from 14:00 to 03:00 on Sunday at The Windmill. The Applicant did not ask to change the relevant entertainment or remove any standard conditions of the licence.

4.1.2 The renewal of the SEV licence was opposed by a campaign group alleging that the club allowed groping, pinching and slapping of the performers. The objector employed covert ex-police officers to observe what was happening within the venue and statements from the officers concerned were submitted as evidence before the Licensing Sub-Committee. The objector also contended that that conditions on the licence were being breached and therefore the current owners and management were not fit and proper persons to hold an SEV licence.

4.1.3 The Westminster City Inspectors also submitted an objection to the renewal application on the basis that they had observed breaches of some conditions of the licence; that the CCTV also needed to be improved to allow for better coverage of the premises and that criminal activity was taking place at the premises.

4.1.4 On the 11 January 2018 the Licensing Sub-Committee refused to renew the SEV licence application as it was considered that the Applicant was not suitable to hold the SEV premises licence.

4.1.5 Big Country Ltd appealed this decision and the appeal took place on 8, 9 and 10 October 2018 at the Westminster Magistrates' Court

before Chief Magistrate Arbuthnot. The Judgment was handed down on Monday 22nd October 2018, whereby the appeal was dismissed. The Council is seeking its costs from the Appellant.

4.1.6 There is a right of appeal to the Crown Court and on 6 November 2018 the Appellant lodged an appeal with Blackfriars Crown Court. This will be a complete re-hearing of the case and new evidence can be produced by all Parties. We are currently awaiting details of the directions which will be made by the Court in order to determine the appeal and Members will be updated in due course.

5. RECORD OF APPEALS

5.1 To date, 475 appeals have been received since the Council took over the licensing functions from the Magistrates' Court in February 2005. 474 of these appeals have been heard / settled / withdrawn etc. as shown below:

- 220 withdrawn
- 166 settled
- 59 dismissed
- 16 allowed
- 13 allowed only in part.

6. JUDICIAL REVIEWS

6.1 Hemming and others v Westminster City Council

6.2 Members will be aware that Hemming and a number of other proprietors of sex establishments in Soho have challenged the fees charged by Westminster for sex shop licences. They have alleged that the Council is only entitled to recover the administrative costs of processing the application within the licence fee, and not the costs of monitoring and enforcing the whole licensing regime against unlicensed and licensed operators. They claimed that this would be contrary to the Service Provision Regulations which came into force in 2009 and the European Union Services Directive. At the time of the claim, Westminster were charging just over £29,000 for the annual licence fee. This was on the basis that the licensing regime should be self-financing.

6.3 The High Court and the Court of Appeal had both previously held that that the European Directive prevented Westminster from recovering the fees for monitoring and enforcing the licensing regime, against licensed and unlicensed operators. Westminster were therefore ordered to repay that element of the fee which related to monitoring and enforcement.

6.4 Westminster appealed to the Supreme Court which held in 2015 that local authorities were entitled to charge a fee towards the monitoring and enforcement of the licensing regime. The Supreme Court was

clear that it was lawful to charge a licence fee which was payable in two tranches. The first fee, payable at the time when the application was made to cover the costs of processing the application. Then if the application was successful, a second fee to cover the costs of monitoring and enforcing the whole regime against licensed and unlicensed operators. This scheme is commonly called a Type A scheme.

- 6.5 However, the Court wanted clarification as to whether it was lawful under European law to charge one fee, covering both the costs of processing the application and a refundable fee for monitoring and enforcing the licensing regime, payable at the time the application was made, (commonly called a Type B scheme). The Court therefore referred the latter issue to the Court of Justice of the European Union ("CJEU"). Westminster originally adopted the Type B scheme but as the case progressed it adopted a Type A scheme. On 16 November 2016 the CJEU held that Type B scheme was unlawful as a matter of European Union law.
- 6.6 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 against unlicensed operators).
- 6.7 The case has returned to the Supreme Court for final decisions to be made following the earlier decisions in the Supreme Court and the CJEU.
- 6.8 There were two issues outstanding, namely (1) obtaining an assessment as to what costs should be paid to Westminster by Hemmings and the other Operators to cover the monitoring and enforcement costs which are were not payable and (2) seeking an order for costs against the Claimants in relation to the hearing before the Supreme Court and the CJEU.
- 6.9 In relation to the first issue, the Supreme Court has now remitted the question of the quantum of the enforcement fees to the Administrative Court for determination.
- 6.10 In terms of Costs, the Supreme Court has ordered that Hemming and others shall pay the Council's costs in relation to the Supreme Court and Court of Appeal hearings. The Council is required to pay Hemming's costs in relation to the High Court case. These costs will be assessed if not agreed. No order for costs was made in relation to the hearing before the European Court of Justice.

7. Legal implications

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

8. Staffing implications

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

9. Equalities Implications

9.1 There are no direct equalities implications arising from this report.

10. Business plan implications

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

11. Ward member comments

11.1. 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 and Manager of the Planning, Highways and Licensing Legal Team on 020 7361 2617;
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