City of Westminster

Licensing Committee

Item No:	
Date:	**30 November 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. Recommendations

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3.1 To date, 466 appeals have been heard / settled / withdrawn: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- 216 withdrawn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 to enable the City Council to seek costs against individual Directors if the evidence could be provided that they knew that the Appellant was insolvent and yet pursed with the appeal proceedings nevertheless. That hearing was held on 13 October 2016, the current director was ordered to personally pay £8,500. Mr Lumba was found personally liable for the entirety of the costs, £39,746.20.

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. The appeal is listed for a three day hearing on 13th – 15th February 2017.

4.3 28th Floor and 29th Floor Millbank Towers, 21-24 Millbank SW1

Applications for review of the premises licences in respect of both the 28th floor and 29th floor of Millbank Tower were submitted by the Metropolitan Police on the grounds of the prevention of crime and disorder and public safety. The applications followed a number of incidents of crime and disorder having taken place on the 28th floor on the night of the 26th March 2016. Several people had been seriously assaulted inside the premises. Due to the serious nature of the incidents and the lack of effective management the Metropolitan Police sought the revocation of the premises licences for both the 28th and 29th floors of Millbank Tower. The Police advised that had they been made aware of the nature of the incidents initially by the applicant, they would have submitted an expedited review. The Police had only become aware of the serious nature of the incidents when they had viewed the CCTV and carried out further investigations into the incidents.

A Licensing Sub-Committee considered the applications on 4 July 2016. Having considered the evidence and heard from those present, the Sub-Committee took the view that it lacked confidence in the company's ability to promote the licensing objectives based on the management's failure to comply with conditions on the premises licences and liaise with Police. The Sub-Committee was concerned to note that even prior to the review hearing, the Licence Holder had failed to liaise with the Police regarding the proposed conditions. The Sub-Committee shared the serious concerns of the Police and had no confidence in staff, including those who had been in place before and after the event in March. The Sub-Committee having regard to the full set of circumstances, the crime and disorder and public safety licensing objectives which were not being promoted by the licence holder , considered it appropriate and proportionate to revoke the premises licences for the 28th and 29th floors.

Appeals were lodged by the Applicant's on 20 September 2016. The appeals will be heard over 8 days commencing on 28th March 2017 through to 6 April 2017.

5. JUDICIAL REVIEWS / CASE STATED

5.1 Sex Establishment Licensing – Fees

On 16 November the Court of Justice of the European Union handed down its judgment in the case of Hemming and others v Westminster City Council.

As set out in detail in previous reports, Hemming is a case between the proprietors of a number of sex establishments in Soho ("the claimants") and the City Council. The City Council is the licensing authority for sex establishments under the Local Government (Miscellaneous Provisions) Act 1982. The Council is entitled to charge a reasonable fee for the grant, renewal or variation of a licence. The principal issue in the case is whether, following the coming into

effect of the Provision of Services Regulations 2011, which implemented in the UK the provisions of the EU Services Directive, the fees charged by the City Council were lawful.

At the time the challenge was brought, the City Council charged a very large sum for a sex establishment licence (just under £30k). The sum was so large because (i) it included an amount intended to recover expenditure by the Council on policing the licensing regime and closing down unlicensed sex establishments (on which activity the Council spent approx £400k per annum) and (ii) a quota system was in operation so that only a limited number of licences were granted. There was therefore only a small pool of operators from whom the costs of enforcement could be recovered. However the right to charge a fee designed to recover the cost to the Council of policing the legislation was an established one in domestic law.

The fee charged by Westminster was comprised of two elements. The bulk of the fee (£28k approx) related to enforcement costs. The balance related to the cost of dealing with the application. The Council's practice was to require the fee to be paid in full in advance. However, if the application was not successful and the licence was not granted, that part of the fee related to the costs of enforcement was refunded to the applicant. The fees were payable each year – a sex establishment licence lasts for only one year and must then be renewed.

The EU Services Directive is intended to remove barriers to the establishment of new service providers in EU countries. It therefore contains a number of provisions about the extent to which licensing regimes are justifiable, and upon how they may operate. One provision in the Directive (Article 13) says that the fee charged to an applicant under a licensing regime may not exceed the cost to the licensing authority of the "authorisation procedures".

The claimants argued that the effect of Article 13 of the Directive, and of its equivalent provision in the 2011 Regulations, was that it was no longer lawful for a licensing authority to seek to recover the cost of enforcement action against licensed and unlicensed operators through licence fees, because such action was not part of the "authorisation procedures".

The claimants were successful in the High Court and the Court of Appeal. The effect of the judgment of the Court of Appeal was that Westminster was required to refund a number of years licence fees to the claimants, in a sum totalling £1,200k approx.

However Westminster's appeal to the Supreme Court was successful. The Supreme Court accepted one of Westminster's arguments, to the effect that whilst Article 13 limits what may be charged to an applicant for a licence to the cost to the licensing authority of dealing with the application, there is nothing in the Directive (or in domestic licensing legislation) which prevents a licensing authority from charging licence-holders (ie successful applicants) further sums after their applications had been granted, including sums representing the costs of enforcement action (subject to such sums being in compliance with other parts of the Directive relating to proportionality, non-discrimination etc, and non-

compliance with those requirements had not been alleged on behalf of the claimants).

It follows from the approach of the Supreme Court that it is lawful in principle to make a charge to successful applicants in respect of enforcement costs. However, the Supreme Court was unsure about the practice adopted by Westminster (see para 4 above), which involved making a charge to all applicants at the time of application to cover both the processing of the application and contributing to the costs associated with enforcement activities, and refunding the enforcement costs part to any applicant who was unsuccessful. The Supreme Court took the view that, as a matter of EU lawful, whether that approach involved making an unlawful charge to applicants was unclear. Accordingly they referred the narrow question of whether collecting the fee in the way Westminster had done was lawful to the Court of Justice of the European Union (the CJEU).

The CJEU has concluded that Westminster's practice was not lawful, and that charging a fee upon application which includes an element attributable to the costs of enforcement action against licensed and unlicensed operators is unlawful under Article 13 of the Services Directive.

There is no right of appeal against the decision of the CJEU. However the decision does not conclude the litigation. The proceedings in the Supreme Court are currently stayed, pending the outcome of the reference, and there will now be a further hearing in the Supreme Court, and a final judgment from the Supreme Court in the light of the CJEU ruling.

The decision of the CJEU has significant implications.

Clearly the most desirable outcome for Westminster would have been a decision from the CJEU that its previous practice was lawful. However, it is important that the implications, and the limitations, of the CJEU decision are properly understood.

The proceedings having been brought, the City Council's primary objective in defending them has been to establish that it could recover its costs in carrying out enforcement action from licensees, as opposed to Council taxpayers. The importance of the case, and the reason it has been pursued so far by both parties, is that an important principle is at stake, namely the extent to which licensing and regulatory regimes within the scope of the Services Directive can be self-funding. The significance of this principle is illustrated by the range of interested parties (including the Law Society, the Bar Council, the Architects Registration Board, the Treasury and the Local Government Association) who intervened at the Supreme Court stage. From the City Council's own perspective, the outcome potentially affects its ability to recover costs not only in relation to sex establishments, but also in relation to the Licensing Act 2003 regime, and the street trading regime (amongst others). The Supreme Court decision therefore represented an important victory.

Since the judgment of the Court of Appeal in May 2013, the Council has also had a further objective, being the recovery of the £1,200k paid to the claimants following their success at that stage.

Against that background, a favourable decision from the CJEU would have had the effect of confirming the Supreme Court judgment on the issue of principle, and leaving the way clear for the recovery of the £1,200k (subject to the ability of the claimants to pay). However, the unfavourable judgment does not have the opposite effect.

The positive feature of the CJEU judgment is that quite correctly it is limited to addressing the specific and narrow question referred to it. In that respect it differs from the Opinion of the Advocate-General issued in August, which ranged much wider, suggesting (for example) that the 1982 Act under which sex establishments are licensed in the UK may not be compatible with the Services Directive, that the City Council's fees were not "reasonable", and that the fees may be unlawful because they could have a dissuasive effect on new entrants to the market (none of which points had previously been argued in the proceedings, and which were not matters that had been referred to the CJEU). If the CJEU's decision had followed the approach of the Advocate-General, the CJEU would have gone well beyond its lawful remit and would have risked undermining Westminster's success on the issue of principle achieved in the Supreme Court.

However, in addressing only the narrow issue referred to it, the CJEU does not suggest that the conclusion of the Supreme Court on the issue of principle is wrong. **The most important consequence of the decision is that it remains the case, as ruled by the Supreme Court, that licensing authorities may recover their costs in carrying out enforcement action from licensees, as opposed to Council taxpayers**

Furthermore, the CJEU decision has significant positive implications for the potential recovery by the Council of the sums previously repaid to the claimants.

The Court of Appeal ruled in May 2013 that those sums should be repaid, primarily on the basis that the fees were unlawful because of the element relating to enforcement costs which they contained. There were other issues regarding the legality of the Council's decision making process in relation to the setting of the fees - but these issues were of secondary importance to the Court of Appeal's ruling. The claimants had a claim in restitution, and were held by the Court of Appeal to be entitled to recovery of a sum equal to the difference between the amount they had paid, and the amount they would have had to pay if the Council had set the fees in a lawful way.

The CJEU has ruled that the City Council's practice in relation to collecting the fees (see para 4 above) was unlawful. However, the Supreme Court has ruled (and the CJEU has recognised) that it is lawful to collect the costs of enforcement from licence holders once a decision to grant a licence to them has been made. This may still leave the claimants with a claim in restitution, for the amount they have lost because of the Council's unlawful practice of collecting the costs of enforcement from licence holders at the point of

application, rather than after a decision to grant has been made. But this is a very different claim from the one that the claimants succeeded on in the Court of Appeal. All the claimants are licence-holders, not unsuccessful applicants. The City Council was therefore entitled to charge each of them fee that it did in fact charge, but only once the decision to grant had been made - not when the application was submitted. Accordingly, and on the face of it, the amount they would be entitled to in restitution is only the financial loss (e.g. loss of interest) incurred from being required to pay that element of the fee designed to cover the costs of enforcement early.

This issue has not so far been the subject of any argument in the proceedings. However, **the second important consequence of the CJEU decision is that the City Council now has a reasonable prospect of recovering most of the sums previously paid to the claimants.**

The Council has, following the Supreme Court judgment, already revised its previous practice and has since then been charging the fee for a sex establishment licence in two parts to avoid further risk. No further change in practice is therefore necessary.

However, this kind of charging method has not been extended to include statutory set fees or other fees, such as Street Trading across the Council. Following this judgment all fee levels that fall within the scope of the EU Services Directive will need to be changed to this two part fee structure. The annual fee paid by licence-holders under the 2003 Act will not be affected (because it is only paid by licence-holders).

There may be other consequences of the CJEU decision in the longer term. Although the actual decision is a narrow one, the earlier Opinion of the Advocate –General raised a much wider range of issues. That Opinion is not an authoritative statement of the law, and does not create a precedent (unlike, in each case, the judgments of the Supreme Court and the CJEU). However, it may encourage further challenges to licence fees, and it can be predicted that further litigation in this area (whether or not involving Westminster) is likely.

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