

LEGISLATIVE UPDATE

Committee	Licensing Committee
Officer Contact	Sarah White, Beejal Soni - Legal Services
Papers with report	None
Ward(s) affected	All

HEADLINE

This report provides an update for Members on:

- Recent caselaw
- A taxation scheme which impacts on the Licensing Act 2003

RECOMMENDATION

That the Committee note the update.

CASELAW UPDATE

Mayfair Residents Order to Pay Licensing Appeal Costs of Mayfair Residents.

Mr Adrian White and The Hon. Mrs Jessica White v Westminster City Council and London Executive Officers Ltd and 12-18 Hill Street Freehold Limited v Westminster City Council 4th November 2015

This appeal arose from the grant of a premises licence by Westminster City Council authorising serviced offices in London's Mayfair to sell alcohol to office users. Two sets of nearby residents (the Farm Street Residents and the Hill Street Residents) both appealed that decision to the Magistrates' Court but on different grounds and by way of two separate complaints. Given that these two appeals arose from the same decision they were conjoined by the Court and ordered to be heard together at a three-day hearing with the consent of all parties.

In relation to costs, the crucial issue concerned a condition attached to the premises licence by the Council requiring all deliveries and collections to take place in Hill Street i.e. outside the front entrance of the serviced offices. However, the Hill Street Residents, sought on appeal to amend this condition to ensure the deliveries and collections took place in Farm Street instead.

Unsurprisingly, the Farm Street Residents robustly resisted their neighbours' advance. They served unchallenged expert evidence confirming that in light of the physical layout of the respective streets and delivery points, the Council's decision to direct deliveries and collections via Hill Street was the correct one. They argued that it better promoted public

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safety and served to prevent a public nuisance. Westminster City Council took a neutral view at the appeal.

The Farm Street Residents reached a full agreement with the serviced offices on how to settle the appeal over a fortnight before the 3 day appeal hearing was due to be heard. The Farm Street Residents continued their efforts to persuade their neighbours not to pursue their attempt to reverse the deliveries and collections condition. Costs warnings were repeatedly given but were ignored.

One clear working day prior to the hearing, the Hill Street Residents also managed to reach an Agreement with the serviced offices settling the appeal and abandoned their request to amend the condition. However by this time, the bulk of the legal work preparing for the appeal had already been carried out, at significant expense to the Farm Street Residents. It was unfair, they submitted, that they should be financially penalised for successfully defending the deliveries condition imposed by Westminster City Council against the attack on it by the Hill Street Residents. They applied to the Court for an order that the Hill Street Residents should pay a proportion of their costs to reflect the work they carried out defending this point.

The power to make such an order lies in the wide-discretionary nature of Section 181(2) of the Licensing Act 2003 that permits a Court to make *"such order as to costs as it thinks fit"*. This wide power provides the Court with an *"unfettered discretion"* to make cost awards including by way of example:

- 1) Against parties who have technically succeeded in their appeal but have conducted themselves unreasonably; and
- 2) Against "non- parties" to an appeal in exceptional and appropriate circumstances.

Although, in the past, most non-party costs have involved instances, where for example an individual company director has been ordered to personally pay costs even though his company was formally the "party" in a licensing appeal, the District Judge accepted the submissions of the Farm Street Residents that this established a general principle that cost awards could be made against non-parties to an appeal in "exceptional and appropriate circumstances". Such circumstances existed in the present case where residents in a conjoined appeal had unreasonably conducted themselves at the expense of a party in the other appeal.

Although no decision of a Magistrates Court is of binding authority, District Judge Jeremy Coleman, in a written reserved judgment noted that:

"In reality both appeals became part of one court case. Having consented to the joining together of the two appeals, I find there to be an overall responsibility on all parties to the Court and to each other, to progress the case, seek to reach a settlement at all times, and prepare efficiently for an effective hearing. The waste of court time caused by last minute settlements at the door of the court is a constant concern in all areas of litigation. I find that I have power to award costs between the appellants in this case...I find that the failure to reply to correspondence and deal with offers to settle proceedings does amount to an unnecessary or improper act or omission resulting in the Farm Street Residents incurring additional costs. I therefore find it appropriate to exercise my discretion to order costs against the Hill Street Residents in favour of the Farm Street Residents".

Forster v Secretary of State for Communities and Local Government [2015] PLSCS 254

The owner of an East London tavern recently lost a High Court challenge against a planning inspector's approval for a block of flats neighbouring her premises which it was claimed might put her out of business.

She owned a tavern which was used for live music events, film-making and photographic shoots. A developer applied for planning permission to demolish the building next door and replace it with a mixed use three-storey building, including commercial uses and flats. Objection was made to the proposal on the grounds that the development might jeopardise her business as there was a risk that residents of the flats would complain about noise from the tavern.

The Authority refused permission for the development, but that decision was overturned on appeal by an Inspector appointed by the Secretary of State. In reaching his decision the inspector considered an acoustic report submitted by the developer on noise levels and the effectiveness of proposed sound insulation measures and concluded that permission should be granted subject to a condition requiring the developer to obtain the Authority's approval to a scheme to protect the residents of the flats from noise and prohibiting their occupation until it was shown that suitable sound insulation had been achieved.

The Inspector's decision was appealed to the High Court where it was argued that the Inspector had erred in his consideration of the noise issue and that the conditions attached to the permission were inadequate to deal with it. He had failed to have regard to the harm that the development might cause to the operation of her established business as noise complaints from residents could result in enforcement action from the council or revocation of the tavern's late night music licence.

It was decided that the Inspector had not erred in his consideration of the noise issue. He had exercised his own judgment on the issues and correctly identified the main one which was whether residents of the new building would be subjected to unreasonable levels of noise. He had taken into account the pub operator's concern about the effect of possible complaints on the operation of her business. The conclusions he had reached were open to him on the evidence and the conditions attached to the grant of permission were adequate. It was also determined that he had not erred in his consideration of the effects of the development on the viability of the tavern or failed to grasp the true nature of the objection to the proposal. He could not be criticized for not considering the law of nuisance as his remit was to decide on the planning merits of the application, having regard to the public interest, and he had done this. He had correctly exercised his planning judgment.

LEGISLATION UPDATE

HMRC ALCOHOL WHOLESALER REGISTRATION SCHEME (AWRS)

HMRC recently announced plans to begin the registration of alcohol wholesalers with a view to limiting instances of non-duty paid alcohol being made available for sale within the United Kingdom.

From 1 January 2016, it is a criminal offence for a person or business based in the United Kingdom to knowingly sell, arrange, offer or expose for sale alcohol wholesale without

authorisation from the AWRS scheme. From 1 April 2017, it is also an offence to knowingly buy alcohol wholesale from a person who should be approved. Penalties for these offences can include forfeiture of a personal licence, a fine, imprisonment of up to 7 years or all three.

Existing wholesale businesses that commenced trading on or before 31 March 2016 have until 31 March 2016 to submit their application for AWRS approval. Providing an application is submitted by this date, the business won't be considered to be trading without approval unless the application is refused and the business continues to trade. Any new business that may engage in the wholesale sale of alcohol must submit an application 45 days before the first day of trading.

Paragraph 3.9 of the notice has examples of the types of businesses that fall within the scope of the scheme. This would include a pub retailer with a wholesale arm to their business, a local Cash and Carry or a specialist wine merchant. Internet sales from a UK established internet wholesaler to a UK trade buyer fall within the scheme in the same way as any other wholesale business.

From 1 April 2017, trade buyers, for example off licences or restaurants, who buy their alcohol from UK wholesalers for resale will need to make sure that these wholesalers are approved by HMRC. The check will be made using an online look up service, and using this to check the validity of wholesalers will form part of these businesses' 'due diligence' processes. In addition to the penalties listed above, there is a potential that a trade buyer may have his/her premises licence reviewed as a consequence of failing to purchase alcohol for resale from an approved wholesaler.

The AWRS scheme only covers sales that are made in the course of a trade or business to other businesses. It does not apply to private individuals purchasing alcohol from retailers for their own use.

The Public Notice can be found at:

<https://www.gov.uk/government/publications/excise-notice-2002-alcohol-wholesaler-registration-scheme/excise-notice-2002-alcohol-wholesaler-registration-scheme>

Implications on related Council policies

None at this stage.

Legal implications

Legal comments are contained within this report.

Financial Implications

None at this stage

Background Papers / Further Reading Material

NIL