



Supplementary Alcohol and Entertainment Licensing Sub-Committee (B)

Wednesday 2 March 2016 at 10.30 am

Board Room 3&4 - Brent Civic Centre, Engineers Way,
Wembley HA9 0FJ

Membership:

Members

Councillors:

Ketan Sheth (Chair)
Hector
Kansagra

Substitute Members

Councillors:

Aden, Eniola, Khan, Long and
Ms Shaw

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The press and public are welcome to attend this meeting

Agenda

Introductions, if appropriate.

Apologies for absence and clarification of alternate members

Item	Page
3 Application by the Metropolitan Police for the review of a premises licence held by Mr Nadarajah Sivapalan for the premises known as Sidneys Off Licence, (216 Ealing Road, Wembley HA0 4QG) pursuant to the provisions of the Licensing act 2003.	1 - 8

Respondent's submissions

BEFORE THE LONDON BOROUGH OF BRENT LICENSING COMMITTEE
AT THE BRENT CIVIC CENTRE

IN THE MATTER OF THE LICENSING ACT 203 PREMISES LICENCE (Review Application)

RE: SIDNEY'S OFFLICENCE, 216 EALING ROAD, WEMBLEY, LONDON, HA0 4QG

REPRESENTATIONS ON BEHALF OF THE LICENCE HOLDER
FOR REVIEW HEARING ON 2 MARCH 2015

1. INTRODUCTION

1. These representations are made on behalf of Mr Sivapalan, who is the holder of the premises licence and designated premises supervisor of Sidney's News, 216 Ealing Road, Wembley, HA0 4QG ("the Premises").
2. For the reasons set out below, Mr Sivapalan resists the application for a review of the premises licence, dated 16.12.2015 ("the Application").

2. FACTS

3. The Committee is respectfully referred to the Witness Statement of Mr Nadarajah Sivapalan, ("WS/NS"), which sets out the facts of this matter, and the enclosed exhibits, Marked NS1.
4. The Committee's attention is drawn, in particular, to the following facts upon which Mr Sivapalan relies:
5. First, the Premises is a small, family-owned business. There are just three full-time members of staff [WS/NS, para 4]. Mr Ramgi is a casual staff member who is called upon when the shop is busy [WS/NS, para 4]. Mr Sivapalan is the Premises Licence Holder, and the Designated Premises Supervisor. Currently, he is the only personal licence holder. However, Mrs Sivapalan is in the process of obtaining a personal licence as well [WS/NS, para 8].
6. Second, Mr Sivapalan is present on the Premises for the majority of time for which the shop is open. From Monday to Saturday, he is present between 09:00 (when the Premises opens) to 17:00, and from 21:00 until 23:00 (when the Premises closes) [WS/NS, para 5]. On Sundays he is present from 10:00 (when the Premises opens) until 22:30 (when the Premises Closes). On weekdays, Mrs Sivapalan works from 17:00 to 21:00. So, generally one or other of them is always in the shop. Mr Balasubramaniam works most days, but, although he is authorised to sell alcohol (see below), his principal role is on the shop floor. Normally, Mr or Mrs Sivapalan is behind the counter [WS/NS, para 5-6]. Mr Ramgi's role is solely to work on the shop floor and assist with unloading. Since the incident on 30.10.2015, Mr Sivapalan has reinforced this with Mr Ramgi.
7. Third, Mr and Mrs Sivapalan rarely go away. Between 27.10.2015 and 2.11.2015, Mr and Mrs Sivapalan were in Canada for their son's wedding. They took eight days' leave for their son's PhD graduation in August 2013, and took a few days off for their niece's wedding in August 2015. When they go away, there is written authorisation in place for Mr Balasubramaniam to serve alcohol [WS/NS, para 21; exhibit S/8]. Further, Mr and Mrs Sivapalan arrange for there to be a supervisor, who is a personal licence-holder on-call [WS/NS, para 29; exhibit S/9].
8. Fourth, Mr Sivapalan has, contrary to PC McDonald's submissions, given written authorisation for Mrs Sivapalan and Mr Balasubramaniam to sell alcohol in the shop [WS/NS, paras 20-21].

9. Fifth, Mr Sivapalan and his staff take the issue of under-age sales very seriously. Mr Sivapalan takes responsibility for the incident on 30.10.2015. He respectfully reminds the committee, however, that in the fifteen years for which the Premises has been operating, this is the only incident of an under-age sale. The Premises previously operated a Challenge 21 policy. After reading PC McDonald's recommendations, it implemented a Challenge 25 policy. In fact, staff ask for ID from anyone who looks under the age of 30. Staff are trained monthly on under-age sales and licensing. Training sheets have been given to all staff members. There are signs in the shop saying "No ID, No Sale" and "it is an offence to sell alcohol to underage persons". A further sign warns people not to purchase alcohol for underage persons. There is a robust policy in place.
10. Sixth, Mr Sivapalan does not accept that the premises licence was not on display at the time of PC McDonald and PC Sullivan's visit. It was in the front door. Copies have now been placed in the front window and behind the counter.
11. Seventh, there is a generalised issue with anti-social behaviour and street-drinking in the Ealing Road area. The Licensing Authority has recognised this in its Statement of Licencing Policy, for 2016-2021, published in January 2016 ("Statement of Licencing Policy") (Para 25.2).
12. The Statement of Licensing Policy recognises, however, that there is no clear causal link between the presence of on-licenses and off-licences and anti-social behaviour in the area: "*It is unclear that the presence of on-licence or off-licence premises contributes to this activity*" (Para 25.2).
13. There are seven other off-licences on Ealing Road, six of which have the same licensed hours as the Premises, and one of which as a 24-hour licence [WS/NS, para 32, Exhibit s/10]. Although some local residents have signed a petition asking for the Premises licence to be revoked, others support Sidneys and recognise that it is not responsible for the issues in the area [WS/NS, para 48; Exhibit s/11].
14. Eighth, Mr Sivapalan and the staff of the Premises have engaged with licencing officers and have taken all reasonable steps to prevent the Premises' licenced activities from contributing to anti-social behaviour in the area. For example, at the request of a licensing officer, the Sivapalans purchased and installed a CCTV system. Upon the recommendation of a Licensing Officer in 2013, the Premises stopped selling plastic cups. Premises staff sweep up litter from outside the shop on a daily basis. The Sivapalans have listened to the concerns raised by licensing officers in relation to the back alleyway. The gate was damaged by refuse collectors. The Sivapalans have mended it and persuaded neighbouring residents to sign an agreement to keep the gate locked at all times when not in use. Routine checks are conducted each day [WS/NS, paras 35 and 50 (h)].
15. Ninth, the Premises already complies with the majority of the conditions that have been suggested by PC McDonald and Ms Miller-Johnson. For example (see [WS/NS, para50]):
 - a. They have installed CCTV to the specification of PC McDonald and Ms Miller-Johnson
 - b. There is a sign stating "No Proof of age, no sale"
 - c. The Sivapalans have introduced the Challenge 25 policy – previously they operated the challenge 21 policy, although in reality they check ID for anyone looking under 30.
 - d. A clear and unobstructed view into the premises is maintained
 - e. There is an incident log-book, covering the issues requested by PC MacDonald
 - f. Two copies of the premises licence summary are on display

16. Given the size and nature of the business, and the number of staff, the remaining suggested conditions would either be financially ruinous for the business, or entirely unworkable [WS/NS, para 52].
17. Tenth, Mr Sivapalan respectfully draws the attention of the committee to the fact that neither PC McDonald nor Ms Miller-Johnson suggests that it would be appropriate to revoke the Premises Licence.

3. LEGAL FRAMEWORK

3.1. Licensing Reviews

18. **The Licensing Authority must exercise its licensing functions – including conducting licensing reviews, with a view to promoting the licensing objectives;** namely (a) the prevention of crime and disorder; (b) public safety; (c) prevention of public nuisance; and (d) the protection of children from harm (s4(1) Licensing Act 2003) (“LA 2003”).
19. The Licensing Authority must also have regard to guidance published by the Secretary of State under s182 LA 2003 (“The Secretary of State’s Guidance”) and its own statement of licensing policy, published under s5 LA 2003 (“The Statement of Policy”).
20. Section 52 LA 2003 provides that the Licensing Authority must, having regard to the Application and any Relevant Representations, take any such of the steps set out in section 52(4) as it considers appropriate for the promotion of the licensing objectives (s52)(3) LA 2003). The Section 52(4) steps are: (a) to modify the conditions of the licence; (b) to exclude a licensable activity from the scope of the licence; (c) to remove the designated premises supervisor; (d) to suspend the licence for a period not exceeding three months; (e) to revoke the licence. Steps taken under s52(4)(a) can either be perpetual or for a specified period of time not exceeding three months (s52(6) LA 2003).
21. **It is open to the Licensing Authority to conclude that it should take no action at all, to recommend improvements within a given timeframe or to issue an informal warning.** Informal written warnings should be viewed as an important means of ensuring that the licensing objectives are promoted (para 11.17 Secretary of State’s Guidance).
22. **There must be a causal link between the issue complained of, a licensing objective and the premises** (Secretary of State’s Guidance, para 11.7). It is for the Applicant to prove this link on the balance of probabilities: Chief Constable of Merseyside Police v Harrison (Secretary of State for the Home Department Intervening) [2007] QB 79.
23. **Representations which relate to general issues with crime, nuisance or disorder in the neighbourhood will not be relevant representations and should not be taken into account.** The issues must be positively linked or tied by a causal connection to the premises (Secretary of State’s Guidance, para 11.7).
24. **Any action taken by the Licensing Authority must be in accordance with the principle of proportionality** in that:
 - a. **It must be the least onerous course of action possible:** R v Secretary of State for Health, ex Parte Eastside Cheese [1998] 47 BMLR; De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69

- b. Any conditions imposed upon the license must “...*be tailored to the size, type, location and characteristics and activities taking place at the premises concerned...Licensing authorities and other responsible authorities should be alive to the indirect costs that can arise because of conditions....*” (Secretary of State’s Guidance, para 10.10).
 - c. “*It will always be important that any detrimental financial impact that may result from a licensing authority’s decision is appropriate and proportionate to the promotion of the licensing objectives*” (Secretary of State’s Guidance, para 11.23)
25. **Any measures taken under s52(4) LA 2003 must be rationally connected to the cause for concern** (which must relate to a licensing objective) and ‘***no more than an appropriate and proportionate response to address the causes of concern that instigated the review***’ (Secretary of State’s Guidance, para 11.20; De Freitas). They must be appropriate and proportionate to promoting a licensing objective (Secretary of State’s Guidance, para 11.23).
26. The above is reinforced by the **licence holder’s right to property under Article 1, Protocol 1 ECHR**. A licence is property for the purposes of this provision: Sunday Times v United Kingdom (1979) 2 EHRR 245, para 49. Therefore, a decision by the Licensing Authority to impose new conditions upon a licence, or to revoke it, constitutes an interference with the right to property. To be lawful, it must be justifiable within the terms of that article. In determining whether this is the case, the Licensing Authority must ask: (i) whether the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) whether the measures designed to meet the legislative objective are rationally connected to it; and (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish that objective (De Freitas).

3.2. Statement of Licensing Policy

27. The Licensing Authority has recognised that there is no clear causal link between the presence of on-licenses and off-licenses on the Ealing Road and the issues with anti-social behaviour there (see para 11, above). In terms of policies for the area, it states:

“[25.3] The informal nature of public alcohol consumption and hidden nature of some of the activities means that no policy can effectively mitigate or eliminate this behaviour...”

[25.4] The Council encourages the development of a formal partnership between local resident associations, cultural groups, local businesses, and police to address alcohol consumption issues in Ealing Road in unseen areas. Partnerships should include the Brent Drug and Alcohol Action Team (DAAT) to provide guidance and address substance (abuse) and addiction issues that may be discovered”

*[25.5] The Council encourages on and off-licence premises to participate in a **voluntary** ban on high-strength alcohol” [25.5] (emphasis added).*

3.2. Supervision Requirements

28. S19 LA 2003 provides that where a premises licence authorises the sale of alcohol, the licence must include, as a condition that the supply of alcohol be made or authorised by a person who holds a personal licence (s19(1) and (3)).
29. LA 2003 does not define “authorisation” but the Secretary of State’s Guidance provides clarification. In particular,

- a. **There is no requirement for a designated premises supervisor or personal licence holder to be present on the premises at all times:** a DPS/ personal licence holder can authorise others to sell alcohol in his/her absence (Secretary of State's Guidance, para 10.32).
- b. There is no requirement for such authorisation to be in writing. Although this is strongly recommended, the absence of written authorisation is not grounds for a licensing review.

4. SUBMISSIONS

4.1. Causes for concern which can be made out on the balance of probabilities

30. It is submitted, with reference to paragraphs 3 to 17 above, that in relation to the vast majority of issues raised by PC McDonald and Ms Miller-Johnson, there is insufficient evidence for the Licensing Authority to find on the balance of probabilities that there is a cause for concern, which is causally connected to the Premises and which is connected to a licensing objective.

31. In particular it is submitted that:

- a. There is insufficient evidence to conclude on the balance of probabilities that there is a general issue with under-age sales in the Premises. There has only been one incident in fifteen years.
- b. There is insufficient evidence to conclude, on the balance of probabilities that (a) Mr Sivapalan has not listened to the concerns of licensing authorities (see para 14, above); (b) that the premises licence was not on display (see para 10, above); (c) that there was no written delegated authority to sell alcohol (see para 8 above); (d) that there is a lack of supervision by a personal licence holder (see paras 6-7, above); or that there is a lack of staff training or licensing knowledge (see para 9 above). The lack of incidents other than that on 30.10.2015 suggests that there is sufficient knowledge and training amongst staff.
- c. There is insufficient evidence to establish a causal connection between the Premises and the issue of anti-social behaviour in the area. The Licensing Authority itself concluded, after a very recent review of the issues in the area, that it is not clear that there is a causal link. The photographs submitted by PC McDonald and Ms Miller have little if any probative value. It is not clear when or where they were taken, and they do not link the issues in the area to the Premises. The letters from local residents at pages 87-97 of the Bundle largely raise general concerns which are, therefore, not relevant. To the extent that they point the finger of blame at the Premises, their probative value is undermined by the fact that they are anonymous, appear to have been written in collaboration with each other, and fail to identify concrete instances of issues (e.g. with dates, times and supporting evidence) to support the vague allegations. They are further undermined by the fact that these issues have only been raised after the review application was made. It is submitted that they should be given very little if any weight.

32. It is submitted that when those allegations fall away, the only cause for concern that remains is that there was one incident of an under-age sale on 30.10.2015.

4.2. Proportionality of measures

33. If it is accepted that the only relevant cause for concern is the under-age sale on 30.10.2016, it is submitted that the appropriate response is no action. Mr Sivapalan has accepted full responsibility, and has made changes to his under-age sales policy in response to PC McDonald's

advice. In the fifteen years for which the Premises has been licensed, there has been just one under-age sale. There is a robust under-age sale policy in place to prevent further incidents (paras 9, 14 and 15 above).

34. In the alternative, and for the following reasons, it is submitted that even taken at their highest, the issues raised by PC McDonald and Ms Miller Warrant, at most an informal warning. This is the appropriate first step (para 21 above):
35. First, Mr Sivapalan is already complying with the vast majority of the conditions that have been suggested by PC McDonald and Ms Miller-Johnson and are committed to continuing to do so (paras 14-15, above). It is submitted that, in the circumstances, even if (which is denied) all of the allegations raised by PC McDonald and Ms Miller-Johnson were true, it would be disproportionate – in the sense of going further than is necessary to resolve any cause for concern) to impose the conditions. It would, therefore, constitute a breach of Mr Sivapalan's right to property (para 26, above).
36. Second, it is submitted, for the reasons given below, that the remaining conditions, which Mr Sivapalan strongly resists, would be grossly disproportionate and/or a breach of Mr Sivapalan's Article 1 Protocol 1 right to property:
 - a. **Personal licence holder, fluent in English, to be present on the premises at all times:** It is submitted that this condition is grossly disproportionate to the causes for concern identified. Given the size of the premises and the number of staff (both factors that the licensing committee must take into account - see above) it is entirely unworkable. There is already a licence holder on the premises for the majority of the working week. When Mrs Sivapalan gets her personal licence, there will generally be a personal licence holder present at all times. However, there will be occasions on which the Sivapalans will need to be away from the premises. There is no legal requirement for a personal licence holder to be present at all times. It is submitted that the scheme of delegation is designed to ensure that small businesses such as this can function. Further, the requirement that there be a fluent English speaker present at all times goes further than is necessary to achieve the licensing objectives. What is necessary is that staff members are able effectively to communicate effectively enough to ensure that licensing laws are complied with. Mr Balasubramaniam is able to do this; particularly since many customers speak Gujarati.
 - b. **Not to sell miniature bottles of wine or spirits or single bottles of beer, lager or cider/ high strength beers or ciders above 6% abv:** It is submitted that these suggested condition would be disproportionate for the following reasons. First, they would greatly affect Mr Sivapalan's business both because they generate significant revenue, and there is little room to store multi-packs. Second, customers that buy these products from the Premises tend to drink them at home [WS/NS, para 52(e)]. Third it is unclear how these conditions would address the majority of concerns raised by PC McDonald and/or Ms Miller. Third, insofar as they aimed at addressing anti-social behaviour, it is submitted that they would not do so, because there are seven other licensed premises from which individuals could purchase these items on Ealing Road. Further, no evidence has been provided to the effect that sales of smaller quantities of alcohol result in anti-social behaviour. The Statement of Licensing Policy does not suggest this. It is submitted that items sold in larger quantities are often cheaper per-unit and groups of street-drinkers could simply club together to purchase larger quantities of alcohol to divide up. Fifth, it would run counter to the Statement of Licensing Policy to impose a condition prohibiting sales of high strength beers and cider. The Policy is to encourage a **voluntary** agreement not to sell these items.
 - c. **There be a grill in place:** It is submitted that this suggested condition is disproportionate and not rationally connected to any of the causes for concern raised in the Application or

relevant representations. The shop is not open outside of licenced hours. There are already metal shutters in place when the shop is closed. There is no evidence of any issue with staff taking alcohol, and this has not been raised as a concern by either PC McDonald or Ms Miller-Johnson. It would be entirely impracticable to install grills.

- d. **Requirement that there be a cash delay safe:** it is submitted that this suggested condition is not rationally connected to any cause for concern identified by PC McDonald or Ms Miller-Johnson, and that, although it may be connected to the *general* objective of preventing crime, it is not connected to the *licensing* objective of crime prevention. A cash delay safe would be expensive and would take up a large amount of room in the Premises. Further, insofar as it is relevant, the Sivapalans have a cash-minimisation policy in place. Cash is banked at the end of each working day, except at weekends when it is taken back to the Sivapalans' home and stored in a safe.
- e. **Requirement that there be regular robbery awareness and cash minimisation training given to staff:** It is submitted that this suggested condition is not connected to any cause for concern identified by PC McDonald or Ms Miller-Johnson, and that it is not rationally connected to a licensing objective (see above). There is no objection to informal in-house training on these issues, but it is submitted that it would not, in the circumstances, be appropriate to impose this as a licensing condition.

5. CONCLUSION

37. For the reasons given above, Mr Sivapalan resists the licensing review.

Eleanor Sibley
Field Court Chambers
24.2.2016

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