



NEXSTART

COVID-19 CASE STUDIES

V.1

Sarah Clover

Londis, Gravesend.

Sarah Clover instructed by Licensing Matters consultancy successfully defended a convenience store licensee from a Police application to revoke the premises licence for a Londis convenience store in Gravesend. This is one of a number of case studies regarding “COVID-19 Enforcement”.

Kent Police based the review application on connections that they were making between sales of alcohol from the off licence to people they described as “street drinkers”, who were not only the people known locally to abuse alcohol, but people the Police were observing taking cans of alcohol into the local park during lock down.

The Officer who compiled the review application did not present it to the Committee or give any responses, although she attended the remote hearing, and Officers who made statements against the licensee did not attend the remote hearing to answer questions about their allegations. The Police based their request for revocation upon a period of

only seven weeks, during a time when the licensee had lost his key member of staff for COVID related reasons, and had had to leave his own family to live over the shop to cope with the pandemic situation. Despite this, the Police claimed that the licensee was in “continuous breach” of his licence conditions and that they had “no faith in him to uphold the licensing objectives.”. The licensee had been at the store for ten years with no previous issues identified.

It became apparent during the hearing that the Police had no awareness of the guidance given by Home Office Minister, Kit Malthouse in a letter to the Chairs of Licensing Committees in April, and from the Local Government Association, Institute of Licensing and others to take a more pragmatic and sympathetic approach to businesses during the coronavirus crisis, and had not taken this into account in bringing the review.

The Licensing Panel Decision said this:

“The Panel further considered the impact that the Covid-19 pandemic had on the ability of the licensee to fully comply with the conditions of his licence.

The Panel was disappointed to note that the Police presented no evidence to corroborate many of their claims and that [*the Officer who brought the review*] did not address the Panel. In addition, [*the Officers who submitted statements with allegations*] did not attend the Panel to undergo questioning.”

The Panel only imposed the conditions that were offered by the licensee, and declined to reduce the hours of the premises, remove the licensee as DPS or revoke the licence, as the Police had requested.

OMG Nightclub, Plymouth.

Police brought a summary review application against OMG, a LGBT club in Plymouth. OMG is part of a national chain of venues, and the owner is an experienced licensee of over twenty years.

Previously a nightclub, OMG was re-purposed to a bar for day and night time trade. The premises had never had any notable issue before in the seven years of trading. On an evening shortly after re-opening the premises as a bar in July, Police requested OMG doorstaff to leave their positions to assist Police with wider issues in the Barbican in Plymouth. In that space of time, a couple were reported inside the premises for having sex, and were ejected. Later, a report of rape was made by the female complainant, and it was unclear whether the allegation related to the incident within the club, or an incident later in the night.

The Police Summary Review certificate was served 13 days after the incident, and had no details upon it other than the basic allegation of rape of a woman over 16. No circumstances were set out at all, and no “connection relevant to the regulation of the premises” was explained, nor any need for preventative measures, in contravention of the principles set out in *Sharanjeet Lalli v Commissioner of Police for the Metropolis & London Borough of Newham* [2015] EWHC 14 (Admin)

At the summary review hearing, the Police indicated that they “were not seeking immediate revocation of the licence”, and it had to be pointed out that this was not an option open to the Licensing Committee in any event.

The Police sought in the hearing to rely upon evidential material that had not been disclosed prior to the hearing. On two occasions, the hearing had to be halted, to give the Committee and the licensee an opportunity to read the material that the Police were attempting to refer to. This undermined the Police case. The Police had not disclosed the CCTV footage of the incident.

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Licensing and others to take a more pragmatic and sympathetic approach to businesses during the coronavirus crisis, and had not taken this into account in bringing the review.

The Police case for the connection of the premises with crime and disorder (as recorded in the Decision Notice) was:

“ • Reason for the associate (*sic*) of the crime to the premises was that door staff were too friendly and too kind to police officers and therefore left their posts to help manage people not related to the premises; and also the fact that there were no staff members on the floor.”

The Committee expressed some concern that the act had occurred in the premises, but declined to suspend the premises licence. As an interim step, the Committee imposed a condition that between the hours of 11pm until close of the venue, a SIA registered door staff must staff each floor within the premises. The Committee further recommended that all staff be updated on the Ask Angela policy with evidence of this produced at the final review hearing.

At the full review in August, the Police attempted to introduce CCTV footage two working days before the hearing. It had been edited by the Police, and the Committee refused to allow it to be shown.

The Police presented a long list of 32 conditions which they asked to be added to the licence. These ranged from fourteen conditions about training, including “staff shall be trained to perform their role”; a condition that staff should make “all reasonable efforts to keep the impact of the users of the outside area on the surrounding community to a minimum”, to “polycarbonate containers on Bank Holiday weekends”. The Police representative accepted that many of the proposed conditions had nothing to do with the Summary Review, but asked for them to be added anyway, “to tidy up the licence”.

On behalf of the Licensee, Sarah resisted the conditions on the basis that they were not required for such an experienced and compliant Licensee. She also asserted that it was far preferable to have policies concerning training and staff performance, which could be amended and updated when required, rather than trying to micro-manage the licence with reams of specific conditions. The Committee agreed. Although they reiterated their

concern that this incident had occurred in the premises, and that perhaps more could have been done to safeguard the young woman in a potentially intoxicated state, the Committee confirmed that it was not for them to make determinations as to precisely what had occurred. Their job was “to reach a determination as to what steps were appropriate and proportionate to prevent any future incidents and to promote the licensing objectives”.

Their conclusion was that they “did not consider that it is necessary to impose the conditions suggested by the Police and do not consider that this review is the appropriate place to revise the full premises licence conditions and would expect the Police and the premises licence holder to meet separately on this point to agree any changes by variation.”

The Committee imposed one single condition, requiring staff to be given training and refresher training in accordance with the Licensee’s policies.

The Licensee’s case was squarely and robustly presented on the basis that the Police had been heavy-handed, and unnecessarily aggressive in their approach, damaging the business, and also the important partnership working and trust between the Licensee and the Police. Effectively, the Committee rejected the Police case, both at Summary and Full Review.

Winkers Nightclub, Chalfont St Peters.

Sarah represented a nightclub that was not permitted to open by virtue of the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (No. 684 as amended).

The nightclub has an unusual location in the countryside, in open fields. The nightclub re-purposed as a pub, and erected a marquee in the car-park, and re-opened to the public from 4th July. The premises had a risk assessment suitable to their new operation and

people were socially distanced within the marquee and in the car-park and in the premises themselves.

The premises received visits from Environmental Health officers, who indicated that they had had complaints from neighbours about the premises re-opening and the noise of patrons, particularly in the outdoor areas and the marquee. The Licensee was also visited by Licensing Officers and Planning Officers from the Council who told her that she was not allowed to serve drinks outside, and that she would have to close completely. The Planning Officer stated that the change from nightclub to pub was impermissible under planning regulation, as it involved a change of use class from “sui generis” to Class A3 Pub. The Officer indicated that she was minded to serve a Temporary Stop Notice and ultimately, a planning Enforcement Notice. This did not take into account the changes brought about by Town and Country Planning (Use Classes) Order 1987 (as amended most recently by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 [No. 757, 21 July 2020).

The premises were insured by NDML and represented by the NTIA, who involved Sarah. Sarah was able to advise that the Planning Officer could not serve a Temporary Stop Notice in all the circumstances of the case, because it was contrary to the Town & Country Planning Act 1990. Neither had the Planning Officer taken account of the fall-back position in threatening enforcement action. Whilst it was not unlawful for the Licensee to trade outside, she took into account any potential noise impact on neighbours and moved the predominant trade indoors, in accordance with a risk assessment. The Licensee wrote to the enforcement authorities, guided by Sarah, pointing out the errors in their regulatory approach, and also the Ministerial letters and guidance from Kit Malthouse MP, (Home Office); Local Government Association; Institute of Licensing and NEXSTART, concerning planning, licensing, pubs and nightclubs. The authorities did not appear to be aware of these.

The premises continue to trade successfully.

Hurst Street, Birmingham

Sarah's client made an application for a premises licence for an outdoor area comprising part of the pavement and the road in Hurst Street / Ladywell Walk in Birmingham.

The Licensee wished to conduct outside events in the open space, for anywhere between 1000 – 5000+ people, including regulated entertainment, up to 22:45 hours on Fridays, Saturdays and Sundays. Conditions were agreed with the Police, which included risk assessment of specific events in a Multi-Agency Group (MAG) including responsible authorities, the BID and another local partner.

A representation was made by an Environmental Health Officer from the Council, who objected that outdoor events could potentially cause noise nuisance for local residents. He made the representation purely on the basis that the street was within the Cumulative Impact Zone Special Policy near the Arcadian. At the hearing, he amplified this representation and said that there had been visits by EHOs to the area, who had observed noise break out from premises. He also said that he was aware of resident complaints about noise in the locality, and he said that, although there were no representations against the application by any residents, that might only be because they were "ignorant of how to make a representation" or a complaint about noise. He also stated that further residential blocks were due to be built in the locality because the representations from the EHOs to the Planning Department objecting to more residential units in the night time economy had been ignored. He objected to the new licence on this basis as well.

Sarah pointed out that the Cumulative Impact Policy did not apply in this case. According to caselaw, objections based on Cumulative Impact must relate to the specifics of the Policy, and in the case of the Birmingham Hurst Street/ Arcadian Special Policy, the wording was for the control of "Crime, disorder and anti-social behaviour". Noise was none of these things, and so Cumulative Impact did not apply. Therefore the case fell to be considered on its merits.

The Committee agreed. The Committee also indicated that they felt confident in the experienced Licensee. The Licence was granted as applied for.

The St Mildred's Bay, Kent

Sarah represented a beach side café / restaurant / bar which had previously had a licence before being purchased by the current licensee and significantly refurbished, before the COVID pandemic. The Licensee had invested significant money into the premises to bring them to a more up-market clientele, but the business had been hit hard by lockdown.

The licensee had to apply to remove two restrictive conditions on the licence:

1. "Intoxicating liquor shall not be sold or supplied on the premises otherwise than to persons taking table meals there and for consumption by such a person as an ancillary to his meal."
2. "It is an implied condition of this licence that suitable beverages other than intoxicating liquor (including drinking water) shall be equally available for consumption with or as an ancillary to meals served in the licensed premises."

Two alternative conditions were agreed with the Police:

1. "All off sales of alcohol shall be supplied in non-glass containers with the exception of any sale of alcohol that is for delivery via a delivery service or any alcohol that a customer may have not finished and wishes to take home, i.e. an unfinished bottle of wine."
2. "The hours of off sales shall be limited to between 1000hrs and 2200hrs seven days a week."

Large numbers of residents objected to the variation, and used the remote hearing as an opportunity to air their grievances about the premises generally, and express concerns at the existence of a bar in a residential area, and the late hours of the licence. They represented their concerns that it would not be an upmarket bar and restaurant, but would turn into a rowdy pub.

The Committee noted the concerns of the residents about the potential for noise outbreak and disturbance, and stated that whilst they did not minimise the concerns, they also noted

Sarah Clover’s submissions that the Guidance issued under section 182 of the Licensing Act 2003 stipulates that Committees should accept the advice of the Police on matters relating to the prevention of crime and disorder. The Police made it clear that there was no evidence which would indicate that any of the licensing objectives would be prejudiced if the application were to be granted.

The Committee gave weight to the fact that the Licensee was experienced, and had one other set of premises in the town already which he ran successfully. Sarah emphasised the vital important of supporting businesses during the COVID-19 crisis, and the need for successful business people who were able to make investments in their towns and create employment opportunities to be encouraged to do so.

Sarah also emphasised that the Licensing Act 2003 provides sufficient safeguards, including the mechanism to review the premises licence, in the event that the operation of these premises should fall short of the aspirations that the Licensee had put before the Committee, and the Committee agreed with this in their Decision Letter. The Application was granted as sought, with the conditions agreed with the Police.

Case Ongoing.

Sarah represented a bar/ nightclub/ events space situated in London that has a large rooftop open air space. The premises had a licence with a red line around the interior space only, and for on-sales only. Off-sales were not permitted under the licence.

The licensee re-purposed the outdoor open air space area as a day-time eating and drinking venue, with stalls for different styles of food, picnic style benches for eating and drinking, and low level music.

The licensee applied for a variation of the premises licence, in order to be able to add alcohol to the offering in the outdoor area. The Objections were received to the variation application, which meant that a hearing was necessary. The licensee was worried that this would delay his plans for his premises.

Sarah was able to advise that the licensee was already able to serve alcohol to the diners in the outdoor areas. The Business & Planning Act 2020, Section 11 (modification of premises licences to authorise off-sales for limited period) amends the Licensing Act 2003, to add 172F Authorisation of off-sales for limited period.

What this means is that any licensed premises that have only “on-sales” authorisation for the supply of alcohol automatically get “off-sales” added to their licence. The off-sales are automatically authorised up until 23:00 hours, as long as the licensed premises are open during that period. Obviously, the sales can be terminated earlier, if the client requires: it is a matter for them.

In practical terms, this meant that the licensee could already serve alcohol to the diners outside. Orders could be taken from people outside, or they could place their orders in any COVID-19 secure way, in accordance with the premises’ risk assessment.

In this situation, the alcohol must remain within the red line of the premises licence, and when an order is placed, the alcohol can be obtained from the bar or other place from within the red line of the premises licence, and “appropriated to the contract”. This means that it is selected for the customer’s order. Then it can be brought outside and served to the customer, and this is an “off-sale” - a sale for consumption of the premises. This is what the Business and Planning Act 2020 expressly allows.

There cannot be any bars or other facilities for supplying alcohol situated anywhere outside the red line of the premises licence. . People could go inside the licensed premises themselves, if the risk assessment permits it.

The Licensing Authority had not given the licensee this information, and he was unaware of what he was already entitled to do. Sarah’s Advice meant that there was nothing to stop the licensee trading as he wished to, whilst waiting for the premises licence application to go through (which would only be necessary to position new bars outside). No particular permission was needed, nor confirmation required from the Licensing Authority for him to continue: the Business & Planning Act 2020 is automatic in its effect.

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18 August 2020