POLICE EVIDENCE - DOWN THE RABBIT HOLE WITH WONDERLAND

The two decisions that have been published in relation to the Wonderland Nightclub in the London Borough of Sutton have sent us back down the rabbit hole as far as Police evidence is concerned. It is worth pausing, once again, to see what went wrong in Wonderland, and whether there are any lessons that can be learned in relation to future cases. Lessons, however, require motivation as well as capacity to learn, and if the real message of Wonderland is that the messages being sent so clearly from the decision makers are being received and rejected by the police, then a different issue emerges.

Birch House Business Centre -v- Denbighshire December 2010

The notorious V2 case from Ruthin, which was one of the better publicised cases concerning the catastrophic failure of Police evidence in a Magistrates' appeal, is now four years old. The message was identical to Wonderland.

That case concerned two police reviews and a summary review against the V2 club. In the course of the reviews, the police submitted various forms of "summary" of the incidents that they alleged against the premises. Some of those summaries took the form of typed redactions of the original source incident records; some took the form of "summaries" produced by police computer software; some were in the forms of tables, charts, graphs, maps and so forth. The police also produced statements. There are many ways of presenting information based upon original source material, but what was missing in that case was the original source material itself. That still happens not infrequently, but it is more common in more recent times to receive such summaries, and then to receive the original incident logs upon which they are based – either automatically, or as a result of a request. What is astonishing, therefore is the regularity with which it transpires that the two do not match up.

The original incident reports were doggedly withheld in the V2 case, in the teeth of two specific Court directions to disclose them. Some eventually materialised two working days before the

appeal, and the rest on the first morning of the court case. When they were analysed, it emerged that the summaries that had originally been provided to the Committee on the previous occasions were incomplete; incorrect or misleading in a number of key particulars. Typical examples included the fact that the summary highlighted one particular aspect of the original incident report, or reflected the original report of the incident, and failed to highlight a later entry in the incident report which put the whole incident into a different context, or confirmed that the original crime report had been false or misleading, and so on.

The District Judge, on the costs application against the Council had these things to say:

"An application for review of the premises licence was made on 14.10.2009 notwithstanding that the Appellants had only held the licence since 30.09.2009, during which time no new incidents of substantial nature had taken place.
This review was palpably premature. …
…A further review application was made again prematurely and this time founded upon a very selective presentation of incidents by the Police. I have been given an agreed record of incidents prepared by [Counsel for the Licensee] as a result of the disclosure of the police records, some of which, despite earlier requests, were not made available until the start of this hearing.
The nature of the incidents could be characterised as residents' complaints about unruly behaviour from persons going to and leaving from the club.
The material presented to the Committee did not give an accurate reflection of the true situation and was slanted by its omission of relevant details so as to present the Appellants in a worse light.
This was an attempt to revoke the licence, it was again ill judged and heavy handed. The Committee placed the Appellants on notice that further incidents could lead to revocation.
……..
The fact that a licensing committee has decided to revoke a licence does not of course mean that a local authority is duty bound to resist any appeal against revocation.

In the course of considering its approach to an Appeal, the local authority must scrutinize the evidence upon which the decision was founded, and the material provided by the Appellants in its support.

It is of course a feature of this case that much of the material which appears relevant was requested not by the authority in the course of considering its case but by the Appellants. It is a further feature that the material relevant to the decisions to revoke ie: detailed police reports of the night of the

13th June as far as the V2 club was concerned, but also in relation to that evening in Ruthin generally was only disclosed during the Appeal itself despite earlier requests. ….

….The Appellants confusion and concern is entirely understandable. There would appear to be legitimate scope for perceiving the operation of double standards and a lack of independence. That impression being furthered by a lack of enquiry conducted into the strength of the case / validity of the decision / question as to whether compromise by the attachment of conditions (as offered) was appropriate.

I find that both the perception and the reality is that the Respondent's view of the case lacked objectivity and was driven too much by the demands or wishes of local residents, (some of whom were shown to have exaggerated by [Counsel for the Licensee's] careful analysis of the Police reports).

I find that the strength of the evidence was misrepresented to the Licensing Committee and thereafter not properly scrutinised by the Respondent authority.

If the Respondents had investigated the merits of this case with any vigour they would not have opposed the Appeal. It is also clear that they would not have needed the compulsion of the Licensing Committee or court to compel the Appellants to consider the attachment of further conditions to the licence.

Costs allowed as claimed."

£24,000 costs to the Licensee.

The language is eerily reminiscent of the Wonderland decision.

Cashmere, Berwick upon Tweed, 12th March 2011

The issue was analysed again in a Police appeal against a Committee decision concerning the Cashmere Nightclub in Berwick upon Tweed in 2011.

The sub-committee allowed an application to vary the premises licence to extend the hours for alcohol to 04:00 on Friday, Saturday, and Sunday of a Bank Holiday. The Northumbria police opposed the variation and they appealed the committee's decision to grant to the magistrates.

The police agreed that the owner of Cashmere was a good and responsible operator, but nevertheless, objected to the extension of the hours. Their basis for doing so was that any increase

in hours would inevitably lead to more drinking, and more drinking would inevitably lead to more alcohol related crime and disorder. This was a clear and specific contention from the Inspector leading the police objection, who said to the Magistrates:

"the greater the amount of alcohol consumed, the greater the time period, the greater the rise in abuse, violence, damage and theft".

Again, one of the concerns was the quality of the evidence adduced by the police upon which they relied in order to substantiate their objection to the variation. Initially, the police sought to rely exclusively on summaries and statistics said to represent the level of crime and disorder experienced in the vicinity of the premises, and connected with it for licensing purposes. Initially, also, the police declined to disclose the source of their statistics, and sought instead to rely exclusively on their summaries, which they maintained were accurate. More detailed disclosure was requested by the Respondent licensee and the Police did make the required disclosure in the run up to the appeal.

The Magistrates said this about the police evidence that they were shown:

" Our broad overview of the statistics is that they were very limited, selective and failed to show trends. There were mistakes within them and the possibility of double counting of incidents in some cases, as admitted by [the Inspector] during his evidence.

" It is perhaps regrettable that the data had not been treated in a more rigorous fashion if so much weight was to be given to it.

" In short we feel that they are inadequate to support his contention. …

" In his evidence [the Sergeant] also describes a very quiet autumn and winter. Given his accuracy of feeling in relation to other matters it is a shame that we have also not had those statistics in order to make proper and fuller comparisons.

Costs of £46,000 were awarded against the Police.

Wonderland, London Borough Sutton, 28th, 29th May and 4th June 2013.

Wonderland presents familiar themes. The Wonderland review took two and a half days to conclude in front of the Sub-Committee. The Sub-Committee were legally advised by an independent barrister, instructed for the purpose. The written evidence submitted by the Police ran to approximately 1800 pages, including every incident log for every allegation. They also produced summaries, which were analysed closely by the Club's solicitors and a detailed table of inconsistencies was produced. The Police also submitted edited extracts of CCTV footage. A

further 500 pages of written evidence was submitted by the premises licence holder. There were four witnesses for the Police: a Detective Chief Superintendent; an Inspector; a Sergeant and a Constable.

The Sub-Committee in the ***Wonderland*** review determination had this to say [*Extracts]*:

"The review application was brought by the Police because it was alleged that the premises licence holder had failed to promote the licensing objectives. In their application the Police alleged that failure to promote the licensing objectives had arisen for the following reasons:-

Excessive intoxication of customers; Irresponsible drinks promotions; Illegal drugs; Large scale disorder and violence in the vicinity of the premises; Public nuisance caused by customers.

During the hearing we viewed the CCTV evidence, with a narrative provided by the complier of the footage, [the Constable]. We had also viewed it prior to the hearing and we did so again during our deliberations after the hearing.

We were concerned that, despite the volume of written and CCTV evidence submitted, neither of the two Police licensing officers had ever visited the inside of the premises during operating hours. The representatives from the premises expressed disappointment at this. They had not, apart from exhibit JDH/5, asked to see CCTV recordings from inside the premises that would link with CCTV recordings outside the premises and support or not the concerns, beliefs, assertions and allegations

in their evidence. In the schedule of incidents submitted and the Police commentary on the CCTV evidence the officers had used language that was excessively emotive and exaggerated and in evidence [the Constable] had embellished the actual events that we could see, giving a distorted and exaggerated view. Another example of that came from [the Sergeant] where (page 54A of the Third Dispatch of papers) he described images of drunk, vulnerable, predominantly female customers leaving Wonderland and going into the adjoining church area and undergrowth near the venue (page 54A of the Third Dispatch of papers). The CCTV did not, in fact, bear out that plurality assertion.

[The Constable] also asserted repeatedly that the premises sold drinks at lower prices than elsewhere and served them quickly to encourage customers to drink more. It was also alleged that the staff continued to serve alcohol to persons who appeared to be drunk and then uncaringly ejected customers who were in a vulnerable state. No part of that assertion was substantiated either by way of CCTV or credible oral evidence. [The Constable] also offered the example of pricing at premises that were not of a comparable type where the prices of drinks could not even be shown

overall to be more expensive; and there was no evidence, either from personal experience or CCTV, that bar staff at Wonderland served customers particularly quickly or served persons who appeared to be drunk.

We believe that the CCTV evidence showed that door staff did show concern for vulnerable customers outside the premises by keeping an eye on them, calming them down, offering them water, going to their assistance when necessary, taking the registration numbers of suspicious vehicles and, on one occasion, helping them to put on a coat. Under cross-examination and questioning [the Constable] frequently failed to answer the questions put to him. On the whole we found him not to be a credible witness and we formed the view that he was content to assert his own perceptions as fact and rarely, if ever, be willing to contemplate an alternative perspective. We noted the "warning" in paragraph 54 of R (on the application of Daniel Thwaites plc) v Wirral Borough Magistrates Court [2008] EWHC 838 (Admin) to the effect that the subjective views of the Police officer should not be elevated into the status of evidence. We would comment particularly so when the views are not borne out by the evidence upon which those views are

apparently based. We also noted paragraph 63 of that judgment where it was stated that "Had [the Magistrates] had regard to the Act and the guidance, they would have approached the matter with a greater reluctance to impose regulation and would have looked for real evidence that it was required in the circumstances of the case".

The staff witnesses for Wonderland were found to be enthusiastic, professional and passionate about their jobs and we regarded them as impressive and credible witnesses. The CCTV evidence showed the door staff to be vigilant, to deal with any trouble in a calm manner and to show concern for vulnerable customers, monitoring them outside the premises. It was clear from the evidence that [the Head Doorman] that he had contempt for the use of drugs and did not tolerate them. It was of note that he expressed sincere disappointment in the way in which drug cases were generally dealt with by the Police despite his standard approach of calling the Police when a drug search was positive. [The Constable] commented that there had been a reduction in drug finds at the premises and it was suggested for the Police that the reduction in positive drug finds was by reason of increased sophistication of concealment by customers. It was noted by the Sub-Committee that [the Constable] refused to countenance that this could have been because the security staff approach to drugs at the premises was acting as an effective deterrent. We preferred to accept that this was the more likely reason for lack of drugs at the licensed premises.

We regarded both [the Head Doorman] and [Marshall at the premises] as very credible witnesses and we regarded their supervision of their responsibilities as competently and effectively carried out and more consistent with what was shown on the CCTV than the narrative and interpretation advanced by the licensing officers.

We noted that some customers of Wonderland had given evidence for the premises licence holder. Apart from a desire not to see a night time venue, where they said they felt safe, closed, they had no personal interest in taking the time to attend the hearing.

So far as excessive intoxication was concerned, CCTV evidence showed a number of customers leaving Wonderland who were swaying or staggering from the premises. Some were seen to be unable to stand easily and on occasion people had fallen over and there was evidence of vomiting on one occasion. Considering Wonderland could have between 400 and 500 customers, the number of them leaving who might be regarded as drunk was extremely few and considered to be not

unreasonable for the type of premises, and in our view certainly not indicative that the premises were not promoting the licensing objective to prevent crime and disorder. We noted that in excess of 80,000 customers had been to the premises since opening in late 2011. Some customers were involved in minor crime and disorder incidents away from the Wonderland premises. Whilst they had, or may have, been drinking previously in Wonderland their behaviour did not suggest excessive intoxication and their subsequent involvement in crime and disorder could not be attributed fairly or directly to any failure or inaction by Wonderland staff to promote the licensing objectives.

We understood the wishes of the Police and the London Borough of Sutton to work in partnership, and that they both wished to work in partnership with licensed premises in the Borough. Such a partnership required all parties to be open and honest with each other and to respect each others' views, priorities and position. The decision of the Police on this occasion to pursue a review of the premises licence and then to seek evidence for such a review without the knowledge of the premises licence holder, rather than working with them, did not reflect, we believed, the partnership approach the three parties aspired to. It was also noted in the evidence that the Police licensing team took the view that the matter had become 'covert' once the decision to review had been taken and the operation had deteriorated into evidence gathering rather than discussion and and engagement. Witnesses for the premises licence holder gave evidence that it had become virtually impossible to engage with the Police licensing team in recent months despite a wish to work with the Police to

resolve any ongoing issues.

We would comment that the way in which the evidence was presented to the Sub-Committee by the Police was unsatisfactory. In addition to our view that a slanted view of the evidence was presented by reason of unsatisfactory editing of the CCTV, to give only a picture which appeared to support the application and omitting footage which showed a truer picture of incidents, the language in the statements and narrative was exaggerated and unnecessarily emotive. It is also worthy of comment (adversely), that we were presented with in excess of 1800 pages of documents by the Police. Substantial numbers of those pages contained no evidence whatsoever and thus, the Sub-Committee in preparation for the review hearing was burdened with an obligation to read volumes of unnecessary documentation. The schedule of incidents and many pages of call-out and crime reports and statements submitted by the Police had not been adequately cross-referenced. Many of t

he incidents, and a significant proportion of the papers, proved to be irrelevant to the review or their relevance was unclear. This unstructured, unfiltered approach to the presentation of a review case was extremely unhelpful and we would hope that lessons will be learnt by the Police in relation to any future review applications that are presented.

In addition, more than 400 pages of recent Police call-out and crime reports were received only the day before the hearing began. In or our opinion, the Police presentation of evidence did not reflect best practice and it did not assist consideration.

We would also comment that the Police evidence contained little or no recognition of actions taken by the premises licence holder in response to Police concerns, nor did it assist in understanding why the ongoing interaction was non-existent despite attempts from the premises licence holder to engage. In submission for the Police it was suggested that the licensing officers had sought to put a fair and balanced picture and had been "scrupulously fair" in the way that the schedule had been put forward. Unfortunately, we were not satisfied that that was so."

The Decision speaks for itself, and needs no further comment.

The Police appealed. They did so comprehensively, on the basis that the Sub-Committee had got everything wrong, from their consideration of the evidence, to their criticism of the Police.

The next thing that the Police did was to arrange a meeting with the Leader of Sutton Council, and other key local authority officers, to which the Licensee was not invited. The outcome of that meeting was a letter from the Leader to the Police, which the Police made public and relied upon to

state that the Sub-Committee's determination had been overcome, and that they had been vindicated. The letter stated:

"29th November 2013

We are writing to you in the hope that we may able to prevent very significant public funding (from both MPS and LBS budgets) being consumed in pursuance of the appeal of the Licensing Sub-Committee's decision in respect of "Wonderland" by asking that you consider withdrawing the appeal at the earliest opportunity.

We understand that whilst you were and are prepared to accept the decision of the sub-committee, you fell that both the tone and the overtly critical nature of the notification letter were inappropriate and this has caused offence to both you and your officers. May we immediately state that it was not the intention of the sub-committee to cause such offence and apologise for that outcome. We very much value the close and productive partnership with you personally and the police service locally and would not wish that to be harmed in any way. With hindsight, we recognise that the letter could have been better phrased, more strategic and less focussed on the details.

As a result of this incident and as part of a more general review of processes, we have reviewed legal representation to the committee and sub-committees and have asked that notification letters be more carefully scrutinised prior to the signature and despatch. We would hope that these actions will prevent any future issues of this kind arising.

We would like to say in conclusion that we fully acknowledge that the police officers all acted in good faith in this matter and that they were seeking to deliver our shared aims of a safer and better environment for the people of Sutton. "

The Sub-Committee members were not in this meeting. In fact, the Sub-Committee convened again, according to a public Minute of their meeting, on Monday 20th January 2014, and reconsidered the Wonderland decision for themselves, in light of the Police appeal. This is what they concluded:

"In May 2013, the Sub-Committee considered an application by the Metropolitan Police for a review the premises licence and by Minute 532/13 resolved that it be not revoked. The Metropolitan Police have appealed against the Sub-Committee's decision not to revoke the licence. The Sub-Committee are asked to review the current position regarding the premises and to determine whether or not to defend the appeal.

Minutes

By Minute 532/13 following the application by the Police for a review of the premises licence it was decided that the licence be not revoked. The Police had appealed against that decision and the Sub-Committee were asked to review the current position regarding the premises and whether or not to defend the appeal. It was reported that the Police had not produced any new evidence since

the review hearing and so the position had not changed since the decision in Minute 532/13.

Resolved: To defend the appeal"

The Police then arranged meetings with the Licensee, who had begun to prepare the case against the appeal. The Police sought numerous changes and conditions to the licence which they maintained would address the flaws they still asserted they found with the operation. The Licensee disagreed vehemently, and maintained, on the record, that he had done nothing wrong before, he was still not doing anything wrong, and that he was vindicated by the Sub-Committee decision and had no need to make any changes at all to his licence, and he point blank refused to do so.

The Police withdrew the appeal, a matter of three weeks before its commencement. The Licensee claimed his wasted costs of preparation, and the Police resisted, so the matter went back to the Magistrates' Court. The Police told the District Judge that they were able to withdraw the appeal because the Council had seen the error of the way in which they had gone about their decision, as reflected in the letter, and the Licensee had made notable "improvements" since the review, which had allayed their concerns sufficiently to enable them to withdraw the appeal. The District Judge wanted to know whether the Sub-Committee had accepted any "error" in the way in which they had gone about their decision, or whether their determination still stood, and she wanted to know what the improvements to the premises actually were. The Police had no answer to either of those questions.

In her determination, dated 11th June 2014, the District Judge said this:

"10. In coming to their decision, the committee also made a number of observations about the conduct and credibility of the police and the preparation of the review proceedings. It is not

necessary to set these out in full as they appear in the decision letter but it is submitted (and I accept) is relevant to the present application to note something of the tone and content; for example,(at page 11) describing the way in which evidence was presented by the MPD as "unsatisfactory", the view given by the edited CCTV clips as "slanted"; the language in the statements and narratives as "exaggerated and unnecessarily emotive"; the reviewing officer, [the Constable] as being "on the whole, not a credible witness"; the "burden" imposed on the committee

having to read "volumes of unnecessary documentation"; of the evidence itself – "substantial numbers of the pages contained no evidence whatsoever"; reports and schedules not being "adequately cross-referenced" or "relevant"; the service on the day before the hearing of an additional 400 pages of call-out and crime reports "not best practice"; and overall the "unstructured, unfiltered approach to the presentation of the review case was extremely unhelpful". Significantly, for present purposes, in my view, the committee also added; "we would hope that lessons will be learnt by the Police in relation to any future review applications that are presented".

11. The committee also noted that once they had decided to conduct a review, the MPS then began to gather evidence covertly and thereafter to cease to work in partnership with the local authority and the premises licence holders to resolve any issues. In short that the MPS had ceased to engage in constructive dialogue with the 2nd respondent. The committee also found that "the police evidence contained little or no recognition of actions taken by the premises licence holders in response to Police concerns".

12. By contrast, the committee formed a wholly favourable view of the witnesses relied upon by the 2nd respondent commenting (at page 8) that the staff witnesses were found to be "enthusiastic, professional and passionate about their jobs"; the committee regarded them as "impressive and credible witnesses"; that the CCTV viewed objectively, showed them to be "vigilant, to deal with any trouble in a calm manner and to show concern for vulnerable customers…". The committee was also impressed that a number of customers from the club also gave evidence in favour of the 2nd respondent; commenting that apart from supporting a club at which they felt safe, they had no obvious motive to give up their time to do so.

13. It has been necessary to set out the committee's findings in some detail as it forms the background against which the appeal was brought by the MPS. It is obvious but needs to be stated that the 2nd respondents did not seek to disturb any aspect of the decision of the licencing sub-committee and did not seek any appeal.

14. The police on the other hand, wrote to the local authority…. By letter of 29.11.13, the

leader of Sutton Council, Ruth Dombey wrote to the Borough Commander, apologising for the offence caused by the tone and overtly critical nature of the review which she described as "inappropriate". The letter asks the MPS to withdraw the appeal at the earliest opportunity seeking

to avoid the "very significant public funding being consumed in pursuance of the appeal of the Licencing Sub-Committee's decision". Importantly, Cllr Dombey states "we fully acknowledge that the police officers all acted in good faith". The letter was copied to two councillors, one of whom was Cllr Mary Dombey[1] (chair of the committee which made the decision complained about) . 17. On 10th January 2014, 23 working days before the appeal hearing (and without having served any evidence), the MPS withdrew the appeal. As stated, the 2nd respondent now seeks the costs incurred in preparation for that abandoned appeal.

"THE S.181 LA 2003 ARGUMENT"

18. In this hearing, the MPS Appellants sought, in strenuous terms, and without notice to the 2nd respondents, an initial ruling from the court that there was no power for a Magistrates Court to hear a costs application in respect of a discontinued appeal. It was submitted that s.181 Licencing Act 2003 is concerned only with appeals and so did not apply in this situation; there being no appeal in existence to which a costs order could attach. Counsel for the 2nd respondents described herself as feeling "ambushed".

19. However, upon being pressed more than once by the court, [counsel for the Appellant], was forced to concede the court's own suggestion that the correct provision to deal with costs where a complaint is not proceeded with is, in law, that contained in s.52 Courts Act 1971 ("Where a complaint is made to a justice of the peace but the complaint is not proceeded with a magistrates' court may make such order as to costs to be paid by the complainant to the defendant as it thinks just and reasonable"). In other words, the same test as would apply under s.181 LA 2003 following a completed appeal hearing; a position adopted thereafter by the 2nd respondent.

20. Accordingly, this costs application is now determined pursuant to the court's powers in s.52 Courts Act 1971 and on that and that basis alone.

21. [Counsel for the 2nd respondent] characterised this preliminary legal argument as "typical" of the manner in which the MPS has conducted this case from first to last; describing their dealings throughout as "confrontational, aggressive and non-conciliatory". (It is indeed one of the factors

[1] This was intended to refer to Councillor Mary Burstow, the Chair of the Sub-Committee

which she submits, has contributed towards a significant costs bill for which she now claims).

22. I myself found it surprising and less than helpful that [counsel for the appellant], sought a ruling from me on an argument (which I have called the "s.181 point") without notice to the 2nd respondents and which, in any event, she abandoned when the court challenged her with the correct statutory provision, namely s.52 (3) (b) Courts Act 1971. But for the court's own intervention therefore, much court time and resource would have been occupied with a possible adjournment (to enable the 2nd respondents to reply). Thereafter, specious preliminary argument with the possibility of future appeals and challenges to the ruling on a point which was never in play in the first place. It was most unsatisfactory and in my view is capable of supporting the 2nd respondent's analysis of the conduct of the appellants much of which concerns me in determining this costs application.

36. In her submissions, [Counsel for the 2nd respondent] described the review hearing and subsequent appeal proceedings as "hotly contested, bad-tempered and fractious". She characterised the original review allegations as "wide-ranging and hard hitting". She points out that the review hearing was unusual in that the committee retained independent counsel to assist them and that, also contrary to usual practice, the committee permitted cross examination of witnesses at the review. At the conclusion of almost 3 days of hearing, the committee gave a "lengthy and reasoned decision" (to which I have already referred in paragraphs 7 – 10 above).

37. [Counsel for the second respondent] submits that the committee went to a high degree of trouble in preparing their decision and the length and content of the decision gives a clear indication of the seriousness of what the committee felt they were dealing with. She further submits that the detailed critique of the police evidence by the committee and the manner of its presentation is "crucial" to understanding this case and this application for the 2nd respondent's costs.

38. The appeal lodged by the MPS on 1st July 2013, she described as a "declaration of war". The point she makes is that it was not a "holding" appeal to meet the 21 day time limit but a detailed challenge to the manner, tone, substance and content of the committee's decision. It is relevant therefore to this application because it could not be regarded and was not regarded by the 2nd respondent's as anything other than intended to be a fully contested re-run of the first review hearing for which full and proper preparation was required.

39. Further, the basis upon which the MPS resists the costs application is not accepted. It is the

2nd respondent's case that there has been no material change in the manner in which the Club was being run from the date of the finding of the committee to the date to the date upon which the appeal was withdrawn. The operation of the premises has not changed. The MPS has submitted no evidence (as opposed to making assertions) that it has. The suggestion that the appeal was withdrawn because of alleged "dramatic improvements" in the way in which the club was run from Christmas 2013 are she says, "fallacious" and the "shield behind which the MPS now hide" in an attempt to persuade this court that the MPS had therefore no need to pursue the planned appeal and so, an award of costs against them in those circumstances would be unreasonable.

40. [Counsel for the second respondent] points to and relies upon the discussions after the review findings which were held by the MPS with the London Borough of Sutton at Chief Executive level; discussions to which the 2nd respondents (and she alleges, in the absence of any evidence provided, the licencing sub- committee) were not a party and which discussions were later described by the local authority's own solicitors as "constitutionally irregular" (email at page 122).

41. Further, the suggestion by the MPS that the licencing sub-committee were party to ongoing negotiations between the local authority and MPS is not borne out by the further correspondence referred to in paragraph 14 above.

42. The position of the 2nd respondents was and is that the MPS had no proper basis upon which to appeal the decision of the licencing committee and having withdrawn their appeal without any concession by the 2nd respondent, the MPS are thereafter liable for the substantial costs incurred in having to prepare this case as if for a fully contested appeal hearing.

44. In summary, the appellant contends that the appeal against the decision of the committee was justified on the grounds that the original decision was flawed and failed to address the concerns of the MPS relating to the statutory licencing objectives in respect of this club.

45. The interim period between the appeal being lodged and the appeal being withdrawn was determinative for the resolution of the appeal in that the LB of Sutton and the Club had taken sufficient steps to satisfy the concerns of the MPS that the licencing objectives were now being met and that ultimately, no appeal was needed thereafter to achieve those objectives; that is to say, there had been real improvement in the management and operation of the Club such that the MPS no longer needed to pursue an appeal to achieve fulfilment of the licencing objectives.

46. The appellants unsurprisingly place great weight on the letter dated 29th November 2013

from the Leader of the Council (Cllr Dombey) for the purposes of the costs application in that the letter contains an assertion by Cllr Dombey that "we fully acknowledge that the police officers all acted in good faith in this matter……"

47. Further, that the MPS were acting reasonably at all times in the conduct and preparation of the case for hearing withdrawing the appeal as soon as it became clear that the appeal was no longer necessary to uphold and enforce the statutory licencing objectives. The position as to the reasonableness of costs should be assessed as at the date the appeal was abandoned.

48. Accordingly, there is no reason to displace the "no order" presumption where, as here a public authority is acting solely in pursuit of its public policy objectives.

FINDINGS

49. The original decision of the committee still stands. It has not been challenged by the MPS by way of a rehearing on the merits on appeal nor have the appellants sought to challenge the decision (which they described in their submissions to me, as "truly appalling") as to its vires or Wednesbury unreasonableness i.e. to seek leave for a judicial review of the decision. In any event, it is not open to me now at a costs application to go behind those findings or the reasons which of course, includes the adverse comment on the police conduct and evidence.

50. I repeat and remind myself that the review failed and the committee declined to revoke the licence as sought by the police and that remains the position to this date. The 2nd respondents were entitled to have believed the operation of the licenced premises at Wonderland to have been vindicated by that decision of the Licencing Sub-Committee.

51. The conciliatory tone of the letter of Leader of the Council, Cllr. Dombey to the Borough Commander on 29th November 2013 may have been sufficient to sooth injured police feelings and to promote harmonious relations between the local police and the local authority. However, there is no evidence before me that this letter was written after any consultation with the members of the original licencing committee (as opposed to those members being copied in on a letter drafted and sent on behalf of the Leader of the Council). Closer inspection of the letter reveals merely that the chair of the licencing committee, Cllr Mary Burstow (and one other councillor) was copied in on

Cllr Dombey's letter. There is nothing in that letter to show Cllr. Mary Burstow or any other of the original licencing sub-committee were consulted with, contributed towards, endorsed or agreed the contents or significantly, the conclusion that the police had indeed acted "in good faith in this

matter".

52. Indeed, pertinently in my view, after this letter was sent, Cllr Burstow was present at a later meeting of the licencing sub-committee which voted to defend their decision against the MPS appeal (see council minutes of 20th January 2014, served by way of additional material, see paragraph 6 above). In other words, whatever conciliation was being undertaken at executive level between the local authority and the Borough Commander for political or other motives, the licencing committee, by inference, continued to support the 2nd respondents position that the statutory licencing objectives were being met as they had already found, by proper management of the premises.

53. The letter of 29th November 2013 does not seem to me therefore to be able to support a finding that it was the view of the original licencing committee that their comments in the review notification were "inappropriate" or that the police had acted in "good faith". It is, of course, the licencing committee who have the statutory duty to make licencing decisions. With due respect to them, it is not the police and not the Leader of the Council. The decision by the licencing sub-committee to defend the appeal is a significant rebuttal of the proposition that the committee themselves accepted the view that the police had acted in good faith. In the light of their detailed findings and reasons for declining to revoke the premises licence, it is hard to see how they could.

54. In any event, such correspondence has no bearing in my view on the position as between the appellants and the 2nd respondents who were never a party to any such discussions and certainly no party to a finding that the police had acted "in good faith". The view of the 2nd respondents was and remained up until the day before the appeal was abandoned and to date, as expressed at meetings and in correspondence, that they did not feel able to trust the licencing Police officers.

55. I also find that at no point was there any compromise offered or adopted on the part of the 2nd respondents in any meeting in respect of the way in which the club was run or managed after the licencing review to the date upon which the appeal was discontinued. On the contrary, there is ample evidence in all the minutes and correspondence that the second respondents maintained

throughout that the MPS should abandon their unmeritorious appeal and pay the costs to the 2nd Respondents in full.

56. Further, there is no evidence in all the material shown to me or from any one of the four officers at court providing instructions to the solicitor and counsel for the MPS which supports the

assertion made in argument that the operation of this club was different in any material regard to how it had been from the time the appeal was lodged to the time the appeal was abandoned. When during submissions, I asked for a concrete example, I was provided with generalities ("the dispersal policy"). When I pressed for a specific factual example, I was offered a different generality ("the supply of drugs within the club"). This inability to provide evidence to support an assertion is entirely consistent with the view formed of the police approach to the review by the original licencing committee's findings for example, at page 7 of the decision, (in respect of assertions that the club ejected drunken, vulnerable young people on to the streets): "no part of that assertion was substantiated either by way of CCTV or credible oral evidence".

57. In the absence of any such evidence before me, any alleged improvements as the police sought to rely upon as evidence of a change in the management of the club since June 2013 are equally likely to be attributable to other, external factors which the parties agree existed (for example, that two other nightclubs in the area had closed during this period; also, there was a change in policing strategy in the area).

58. I therefore accept the submission of the 2nd respondents that the club was well-run at the time of the review (as the licencing committee found) and well-run in precisely the same manner still at the date at which the appeal was abandoned.

59. It follows from that that I reject the ostensible reason for the MPS not to proceed with the appeal (that public interest was protected by proper and effective change on the part of the club so that the appeal need not be pursued). As the 2nd respondent put it in argument, "it is the shield behind which the MPS hide". I agree.

60. Accordingly, the appellants have not discharged the burden to satisfy me on the balance of probabilities that the reasons advanced, as between the MPS and the 2nd respondents to justify their decision to abandon the appeal are made out. As such I can properly describe those reasons as

"without foundation".

61. Further and in addition, having scrutinised carefully the behaviour of the police as described by the committee in the conduct of the investigation leading to the review, the quality of the evidence and presentation at the initial review, in their conduct between lodging and discontinuing the appeal and as witnessed by me during this costs application, I do not disagree with the 2nd respondent's description of proceedings throughout being "hotly contested, bad tempered and

fractious". In fact, if anything, I find grounds to support it. That analysis lends further weight to my decision that in the context of this costs application, the police have not satisfied me that they have acted reasonably and properly. It follows therefore; they have not satisfied me on the balance of probabilities to displace the costs presumption."

The District Judge awarded costs in the sum of £29,086.14 (including VAT).

Again, the decision speaks for itself.

The Metropolitan Police were quoted after the decision as being "disappointed with the decision and said that they "maintained that the Police acted in good faith throughout both the review and the appeal proceedings and believe our position was supported with appropriate evidence."

The reader will be able to judge whether these cases should be viewed as worrying anomalies, unrepresentative of the common experience, or whether they are strikingly familiar because they are typical of that which occurs frequently. And if it should be the latter, then it begs the question as to why it should happen so frequently. If one possible answer to that question is that it happens habitually because it works, in the sense that it achieves a desired outcome in relation to a licence, then that begs the further question as to why it works, and who is allowing it to work. Licensing hearings are not always level playing fields, and there are many, many licensees who cannot afford robust representation to assist them to identify and challenge occasions where the playing field has things deposited on it that it shouldn't have.

These case studies should be used to stimulate debate surrounding not just the conduct of the Police, but more widely the conduct of licensing hearings, and the careful identification of situations that may give rise to unfairness, which is the enemy not just of the individual licensee, but of the public

interest, which is the only mandate and source of power that the Licensing Committee has. The need for fairness in administrative decision making is obvious common sense, but it is also a stern and overt requirement of the law which will not be overlooked or brushed off. Unfairness is a waste of time, and, as we see, significant money, because whilst it might work at one level, it is bound to unravel further up. And if it does not, when it should have done, then it is a disgrace, to which no-one should knowingly lend themselves.

Sarah Clover
Kings Chambers