IN THE CITY OF LONDON MAGISTRATES COURT

Mr Adrian White and The Hon. Mrs Jessica White

V

Westminster City Council (1st Respondent) and
London Executive Offices Ltd (2nd Respondent).

and

12 – 18 Hill Street Freehold Limited

V

Westminster City Council

A. There are two appeals before me under the provisions of the Licensing Act 2003 relating to premises situated at 8–10 Hill Street, Mayfair, London W1.

B. The two appeals are both against the decision of The Westminster City Council acting as a Licensing Authority made on 11th December 2014, granting to London Executive Offices Limited a Premises Licence authorising the sale of alcohol at those premises. The first appeal is made by Mr and Mrs White ("the first appellants"). The second is made by 12 – 18 Hill Street freehold limited ("the second appellants").

C. In the course of the appeal proceedings, on the 26th February 2015, directions were made by this court ordering that both appeals be heard together ("co-joined") as they arose out of the same factual basis. All parties appear to have consented to that course. However, they remain separate appeals.

D. The final hearing was fixed for three days commencing the 12th October 2012. On Friday 9th October that the court was informed that the parties had reached agreement and therefore the hearing would not be contested. This appears to have followed a last minute agreement between the parties of both appeals. The case papers were placed before me on the morning of the hearing.

All parties were most ably represented by senior counsel. The hearing did not result in the anticipated consent orders, but both appeals were unopposed and I have made orders in the terms agreed.

The dispute that I have to resolve in this judgement relates to costs.

E. <u>The Background</u>

i. The basis of the appeal by Mr and Mrs White was based upon their fear of noise pollution from the garden of 8-10 Hill Street, if alcohol were to be delivered and sold from those premises. It seems that the property has a garden which abuts the outside space of Mr and Mrs White's property. The dispute was settled between the parties by the insertion of extra conditions into the terms of the licences and approved in the final orders made by me. I am told that as far as Mr and Mrs White were concerned, agreement was reached on 22nd September 2015. There were no further issues between the White's and WCC, and a consent order was anticipated.

ii. The separate appeal by 12-18 Hill Street Freehold Ltd initially sought the total withdrawal of the premises licence, and subsequently proposed the

addition of 49 extra conditions. The grounds relied upon are set out in the witness statement of Corrine Brydon, who is the Chairman and a director of the company.

Mr and Mrs White indicated in their skeleton argument dated 1st October 2015 at paragraph 5, that apart from one proposal put forward by the second appellants, they were neutral as to the other areas of dispute between the Company and WCC.

iii. That one remaining disputed issue between the two appellants related to condition 25 of the premises licence. This states that "*Deliveries and collections to the premises shall only be made at the front of the premises in Hill Street."* The first appellants wished that condition to remain in place.
However the second appellants submitted that the condition should be changed to read *"All deliveries will come from the Farm Street entrance via the underground car park".* This proposal was unacceptable to the first appellants.

iv. Eventually, on 8th October the second appellant indicated that it was prepared to concede the outstanding point. Clause 25 remained as set out in the licence. This was the last working day before the start of the 3 day hearing fixed before me.

F. <u>The Costs Application</u>.

The application before me for costs arises in the following circumstances.

i. By agreement, no order for costs was made against City of Westminster by either appellant in respect of either appeal. The application for costs that I am dealing with is made by Mr and Mrs White, against 12 – 18 Hill Street Freehold Ltd. Therefore an appellant in one appeal is making application for costs against the appellant from the linked appeal. The application is made under the provisions of Section 181(2) of The Licensing Act 2003 which indicates that on the conclusion of an appeal the court "*May*

make such order as to costs as it deems fit" and under the provisions of section 64 MCA 1980 which provides that on hearing a complaint a Magistrates Court has power to award costs "*as it thinks just and reasonable".*

ii. The basis of the application is that the company ,through its director Mrs Brydon, acted unreasonably in its conduct of this appeal and, as a result, Mr and Mrs White have incurred unnecessary legal expenses as set out in the costs schedule amounting to a total of £19,824.80 (including VAT).

The conduct complained of is set out in the skeleton arguments. It is submitted that the second appellants were unreasonable in initially deciding to pursue an amendment to clause 25. However, they chose to do so. On 17th July 2015 they were served with an expert report prepared by a transport and highways expert Mr Michael Hibbert, who was instructed by the first appellants. The report clearly states that clause 25 is necessary and appropriate, giving clear reasons for that conclusion. It is submitted that at that stage the second appellants should have conceded the point, but more especially from the 22nd September 2015, when it was clear that all other issues had been resolved. Instead they delayed until the day before the final hearing. As a result the first appellants incurred unnecessary costs.

iii. The second appellants oppose the application for costs and their grounds for doing so are set out in the skeleton argument before me.

The basis of the submissions the company puts forward are;

a. I have no power to make an order for costs in the circumstances before me. The costs application is made between appellants in separate cases. The two appeals remain completely separate applications, only linked together for administrative purposes, which was done with the objectives of saving costs and valuable court time. I am reminded that both appellants were successful in their respective appeals. It is submitted that to make such an order is beyond my powers and without precedent.

b. Even if I am in a position to make such an order I should not do so as there has been no unnecessary or improper act or omission by the second appellant in conducting the appeal. I am reminded that the appeal was successful so clearly initially justified. Furthermore, although final agreement was reached at a late stage, this is common place in litigation. Indeed, settlement was reached before the day of hearing, so there was an opportunity to scale down the extent of legal representation before me. I should therefore exercise my discretion to make no order.

c. Were I to make a costs order, the amount claimed by the first appellant is grossly excessive.

G. I have read all the papers placed before me in this case. I have particularly noted the correspondence between the parties from the 22nd September – 8th October 2015.

H. In considering the submissions made I must decide the following issues;

(i) Do I have power to make a costs order in this case?

(ii) Has there been an unnecessary or improper act or omission?

(iii) As a result have costs been incurred by another party?

(iv) Should this court exercise its discretion?

(v) If so, what is the sum specified?

I. Decision

a. In considering my powers to order costs I have been referred to Patterson's Licensing Acts 2015 (5.5 – 5.8A). I have particularly considered *City of Bradford v Booth (2000) AER, Canterbury City Council v Knight (2013) EWHC 1329 (Admin),Chief Constable of Nottinghamshire v Nottingham Magistrates Court and Tesco Stores Ltd. (2009) EWHC 3182,* and *Prasannan v RBKC (2010).*

b. Both Section 181(2) LA and Section 64 MCA give this court wide powers to award costs. Neither section restricts that power to any particular party to the proceedings before the court. That wide discretion has been confirmed, and interpreted by the courts, to include not only the parties to the proceedings before it, but also any party who has played a significant role in those proceedings in exceptional and appropriate circumstances.

c. A significant point in the history of these proceedings occurred at the review hearing on the 26th February 2015 when the two appeals before me were directed to be heard together. This direction was made with the consent of all parties, including both appellants. It seems that the parties were legally represented. The advantages to the court and all parties were apparent. The evidence was the same for both appeals. Court time and costs could be saved. Moreover there was a clear overlap of issues. It seems that the dispute over clause 25 was apparent at that stage.

The point has been made that the two appeals remained (and still remain) separate applications. However it seems to me that to regard them as such is unrealistic. 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 the power to award costs between the appellants in this case.

d. I must next decide whether there has been an unnecessary or improper act or omission on the part of the second appellant.

i. In the case of *Evans and Others v Serious Fraud Office* [2015] EWHC 263 the High Court held that the test to be applied was that which had been set down in *DPP v Denning (1992) 94 Crim App.* In which Lord Justice Nolan held;

"…improper in this context does not necessarily connote some grave impropriety used, as it is, in conjunction with the word 'unnecessary'. It is in my judgement intended to cover an act or omission which would not have occurred if the party concerned had conducted the case properly".

In *R (on the application of Singh) v Ealing Magistrates Court [2014] EWHC* 1443 i Mr Justice Bean held that;

> *" if the act or omission giving rise to the application consists of someone on the prosecution side not conducting the case properly, and it causes the defendant to incur additional costs, the discretion arises....*
> *A single mistake, if it can be shown to have caused the defendant to incur costs, is enough to trigger the court's discretion to make an order…."*

ii. I have considered the conduct of the second appellant in the course of its appeal. Prior to the 22nd September 2015 I can find no unnecessary act or omission. The appellant company was perfectly entitled to appeal the decision made by WCC. Indeed the appeal was successful. Similarly the company was not initially unreasonable in disputing the contents of clause 25.

By the 22nd September the second appellant had had the expert report from Mr Hibbert for two months. On that date a letter was sent from the first appellants' solicitors to solicitors for the second appellant marked "without prejudice save as to costs". The letter asks the second appellant not to pursue the deletion or amendment of clause 25 in the light of Mr Hibbert's report. If they were prepared to do so, no order for costs would be applied for. If agreement were not reached a perfectly clear warning was given that an application for costs might be made against them.

Subsequent correspondence took place. Regrettably it was one sided. Time after time the first appellants' lawyers requested the second appellant to indicate its stance as to clause 25. They did not receive a response indicating agreement until the 8th October, by which time a brief had been delivered to counsel and preparations for a three day hearing made.

Three days of court time also remained allocated.

No explanation for such a course of conduct has been put before me. I find that the failure to reply to correspondence and deal with offers to settle the proceedings does amount an unnecessary or improper act or omission resulting in the first appellant incurring additional costs. I therefore find it appropriate to exercise my discretion to order costs against 12-18 Hill Street Freehold Ltd. in favour of Mr Adrian White and The Hon. Mrs Jessica White.

iii. I have considered the Statement of Costs filed by Charles Russell Speechleys LLP on behalf of the first appellant. Costs are claimed mainly on the basis that the appearance before this court on 12th October could have been avoided completely had agreement been reached on, or shortly after the 22nd September 2015. Therefore the costs of preparation for the hearing and further disbursements need not have been incurred.

In fact an appearance before this court would have been required, although some of the preparation would not have been necessary and the seniority of legal representation could have been reduced. I consider it appropriate under Section 181(2) of The Licensing Act 2003 to order the second appellant to pay to the first appellant costs amounting to 50% of the amount claimed. This amounts to £8,052 plus VAT of £1,860.40 making a total of £9,912.40.

I order payment within 28 days.

Jeremy B Coleman 4th November 2015
District Judge