

Merton Council
Licensing Sub-Committee
5 May 2023
Supplementary agenda

5 Notice of Determination

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London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 12 May 2023

Subject: Café La Lavella, 63 London Road, Morden, SM4 5HT

Having considered relevant applications, notices and representations together with any other relevant information submitted to any Hearing held on this matter the Licensing Authority has made the determination set out in Annex A. Reasons for the determination are also set out in Annex A.

Parties to hearings have the right to appeal against decisions of the Licensing Authority. These rights are set out in Schedule 5 of the Licensing Act 2003 and Chapter 12 of the Amended Guidance issued by the Home Secretary (April 2018). Chapter 12 of the guidance is attached as Annex B to this notice.

For enquiries about this matter please contact

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Useful documents:

Licensing Act 2003

<http://www.hmso.gov.uk/acts/acts2003/20030017.htm>

Guidance issued by the Home Secretary

<http://www.homeoffice.gov.uk/>

Regulations issued by the Secretary of State for Culture, Media and Sport

http://www.culture.gov.uk/alcohol_and_entertainment/lic_act_reg.htm

Merton's Statement of Licensing policy

<http://www.merton.gov.uk/licensing>

Annex A

Determination

The Licensing Sub-Committee considered an application by the Metropolitan Police for a Review of the Premises Licence of “Café La Lavella” at 63 London Road, Morden, SM4 5HT held by Constantin Mitrofan.

In discharging its functions in respect of this Summary Review, the Licensing Sub-Committee had to take such steps to promote the Licensing Objectives, have regard to the Home Office Guidance and/or the Council’s Statement of Licensing Policy, and apply relevant case law, whilst making a decision that is appropriate and proportionate, pursuant to section 52 of the Licensing Act 2003.

In determining the Review under section 52(4) of the Licensing Act 2003, the steps available to the Licensing Sub-Committee at the Review hearing were as follows:

- To modify the conditions of the Premises Licence
- To exclude a licensable activity from the scope of the Premises Licence
- To remove the designated premises supervisor
- To suspend the Premises Licence for a period not exceeding three months
- To revoke the Premises Licence.

The Licensing Sub-Committee decided to revoke the Premises Licence held Constantin Mitrofan for the premises “Café La Lavella” at 63 London Road, Morden, SM4 5HT. The reasons for this decision can be found at the end of this notice.

Licensing Sub-Committee Hearing

The Licensing Sub-Committee looked carefully at the application, its supporting papers, the Representations contained in the agenda papers and the oral evidence submitted at the hearing by all parties present.

Claire Nevin, barrister representing the Applicant (the Metropolitan Police), advised that the Metropolitan Police were seeking revocation of the Premises Licence due to clear and consistent breaches of licencing conditions by the Premises Licence holder, despite being given the opportunity to rectify his behaviour, breaches and errors, the Metropolitan Police have lost faith in the Premises Licence holder’s ability or willingness to promote the licencing objectives and comply with the authorisation in his Premises Licence.

The Metropolitan Police believe that revocation would be appropriate due to breaches of all four licencing objectives. The Licensing Sub-Committee noted that:

At 01.26am on 4 September a member of the public called police about a fight outside the premises. An intoxicated male was sent to hospital, the premises was still serving alcohol, had not attempted to call police, an ambulance or give first aid

Police pointed out that the licensee was not allowed to operate the premises outside of licenced hours, and persistence could lead to a revocation of the licence. Officers

explained every condition and objectives, to the licensee and made him fully aware of what was required of him.

The venue advertised live music events. Between 24 and 26 February the Metropolitan Police received further information of late night opening and events. Licensing officers attended again and spoke to the licensee on the phone, and again issued a warning of consequences if the conditions of the licence were not adhered to.

At 00.40 on 25 February 2023 police attended again, the premises was open and live music was causing a nuisance to the public. The police had received reports from members of the public and from Environmental Health about incidents on the previous weekend, with music played as late as 5am and drunk customers outside the venue.

4 March, 0200, further complaints of live music being played.

10 March, 0015, police attend, live music in course with customers drinking inside with Mr Mitrofan, the licensee. Mr Mitrofan claimed it was a private party for his birthday. Officers informed him that an application for review of the licence would be submitted.

It is noticeable in the video shared with the meeting that children are attending the venue after midnight, and further videos exist along with evidence on Mr Mitrofan's facebook page where he streams events.

Merton Council CCTV found the venue operating past 2am, after this latest warning.

It is clear that there is complete disregard for the conditions of the licence and the licencing objectives.

Mr Mitrofan has produced an invoice which he believes allows him to host music events. However, the invoice relates to intellectual property rights permitting a premises to play copyright music in a venue, it does not allow them to play music outside of hours. The invoice is not a silver bullet that allows him to disturb the public or operate outside of his hours, and to do so his licence would need to be varied. On 16 March, Police explained that this invoice was not permission, and explained how to apply to vary his licence to come within the law.

The latest video shared with the Licensing Sub-Committee is from 22 April, after the review application had been served and shows that the licensee continues to ignore the conditions of his licence and the licencing objectives.

Police have no faith in Constantin Mitrofan's ability to run the premises in line with objectives, given the frequent breaches. There has been no indication that he will stop and therefore the only solution is to revoke the licence.

In response to questions, Ms Nevin confirmed that:

- The Metropolitan Police had attempted to work with the licensee and take the Home Office stepped approach to engage and educate rather than move for an immediate revocation or suspension of the licence, this had however failed.
- The fireworks seen in the video appear to be lit by someone coming from the venue, but they had not identified them or their role in the business.

Mr Andrew Pickup from Environmental Health informed the Licensing Sub-Committee that Environmental Health supported the application, the premises had been staying

open later than allowed, providing regulated entertainment and been subject to noise complaints by local residents. Mr Pickup gave the following examples:

8 October 22, while working in Night Time Noise Service, on the 6th floor of Merton Civic Centre, he became aware of music from a premises and could see lights on at Café La Lavella, at approximately 2am. Bass music was clearly audible within the 6th floor office, with the windows closed. On checking the council records, he found that the premises should have been closed at midnight, with no TEN in place. He visited venue, where the manager on site admitted that they were aware closure was due at midnight.

25 February 23, Environmental Health observed fireworks on the public highway outside Café La Lavella, with 3 rounds of 20 seconds each. 30-35 people were inside and outside, with a live band still playing.

26 February 23, a noise complaint was logged from a resident, complaining that the restaurant was playing very loud music on Fridays and Saturdays and ongoing at 5am on Sunday morning.

26 February, a noise complaint from another resident, complaining that the Café had been playing music late on random nights and especially Friday until Sunday, sometimes until 5am, causing constant nuisance. The residents explained it's hard to sleep, their drunk customers are shouting, and it's unsafe to come home late from work at night.

Environmental Health Noise officers spoke with the licensee on 1 March, discussed the complaints and advised that the noise service would be monitoring the noise levels and opening hours.

5 March – 2 more complaints were received, one recorded at 00.09 and the second at 01.08 regarding loud music from the premises, this was only a few days after speaking with the licensee, the music could again be heard in the Civic Centre, a visit made at 01.50. The officer asked if Mr Mitrofan was present, explained that noise complaints had been received, and that music could be heard outside the premises. He said he was new to the business. The officer advised that he should immediately reduce the music volume and that further incidents would result in action against him.

Environmental Health are concerned that this will continue if not addressed by the Review of the Licence.

In response to questions, Mr Pickup confirmed that Environmental Health would consider other actions pending the outcome of the Licensing Sub-Committee Review and Decision, Environmental Health are prepared to issue a noise abatement notice if problems persist.

The Licensee, Constantin Mitrofan, acknowledged that the incidents had occurred and it was his responsibility. He apologised for the breaches of the conditions. He had been following the example and practice of the previous licensee/owner, he is new to the business and now learning the rules. In response to questions, Mr Mitrofan informed the Licensing Sub-Committee that:

- He had stopped live music since receiving the Notice of Review. He had a DJ at the venue on 23 April, but did not believe this constituted live music, as he thought he had his own licence.
- He had a new manager with more experience in the business who was teaching him what he needed to do.

Licensing Officer confirmed that recorded and live music are licensable activities in their own right, music played by a DJ is a licensable activity as recorded music, and there was not a licence in place for permitting it. PC O'Brien referenced the stepped approach, applied by responsible authorities, and no Police officer would apply for closure in the first instance, and that approach had been followed.

In his closing statement, Mr Mitrofan, the licensee, suggested that the complaints may come from jealous family members or friends, envious of his premises, whereas the previous owner never had any complaints and he was not doing anything new.

In his closing statement Mr Pickup, the Environmental Health officer, reiterated their view that the conditions and requirements were not being complied with and the operation was causing residents to make complaints and causing them upset. The aim of Environmental Health is to ensure the objectives for prevention of public nuisance are met, additional conditions could be applied, but the existing conditions have been disregarded, so it was not clear what additional conditions could be added that would be complied with.

In her closing statement, Claire Nevin for the Metropolitan Police, reiterated the concerns with breaches of all the licencing objectives:

- Prevention of crime and disorder – fireworks, fights, no effort to stop these incidents and fuelling them by continuing to serve alcohol is clearly a breach, and has been happening for some time.
- Public safety – fireworks on the public highway, near cars with children observing and present is an obvious breach of public safety as well as allowing people to drink till all hours of the morning. She observed that the Licensing Sub-Committee had also heard from Mr Pickup about complaints from the public, music blaring with breaches and public nuisance but it continues unabated.
- Protection of children form harm - children on the premises after midnight, near fireworks, is clearly putting children at harm.

Mr Mitrofan has suggested that he is unaware, but evidence to EH shows that he and his staff know that the closing time should be midnight. In addition, time has been spent to explain everything, surely having police turn up regularly since September 2022, should put someone on notice that something is wrong. Since March, he was told his licence would be reviewed and yet incidents have continued. He has been given every opportunity to improve. Licensing objectives are paramount. He says he didn't bring the fireworks, but in the video we can see Mr Mitrofan in a blue suit, he's filming it and live streaming it, effectively approving of the activity, you don't see him attempting to stop it happening. The copyright licence he holds is not approval to play music at all hours of the night or in a way that causes a nuisance at any time.

Metropolitan Police are of the view that additional conditions would be fruitless, the current conditions are routinely being ignored. New conditions would inevitably be breached, and we would find ourselves back here in the future.

Decision of the Licensing Sub-Committee

The Licensing Sub-Committee decided to **revoke** the Premises Licence.

Reasons

The Licensing Sub-Committee gave the following reasons for their decision:

1. There is concerning evidence of persistent incidents occurring at this venue, which have not been adequately addressed or dealt with. The case of *Daniel Thwaites v Wirral Borough Magistrates' Court (2008)* applied.
2. All licencing objectives have been breached, notably in terms of licensed hours and activities.
3. The Premises Licence holder and DPS has not heeded repeated warnings or taken advice from the Responsible Authorities, and has not shown that he properly understands the seriousness of the breaches, or fully acknowledged his complicity in them.
4. The Licensing Sub-Committee considers that revocation of the Premises License is a proportionate response to persistent breaches of conditions and objectives and the lack of competent management by the Premises License Holder. The case of *R (Bassetlaw District Council) v Worksop Magistrates' Court* considered.

Annex B

Extract from the Amended Guidance issued by the Home Secretary under Section 182 of the Licensing Act 2003 (April 2018).

13. Appeals

13.1 This chapter provides advice about entitlements to appeal in connection with various decisions made by a licensing authority under the provisions of the 2003 Act. Entitlements to appeal for parties aggrieved by decisions of the licensing authority are set out in Schedule 5 to the 2003 Act.

General

13.2 With the exception of appeals in relation to closure orders, an appeal may be made to any magistrates' court in England or Wales but it is expected that applicants would bring an appeal in a magistrates' court in the area in which they or the premises are situated.

13.3 An appeal has to be commenced by the appellant giving a notice of appeal to the designated officer for the magistrates' court within a period of 21 days beginning with the day on which the appellant was notified by the licensing authority of the decision which is being appealed.

13.4 The licensing authority will always be a respondent to the appeal, but in cases where a favourable decision has been made for an applicant, licence holder, club or premises user against the representations of a responsible authority or any other person, or the objections of the chief officer of police, the Home Office (Immigration Enforcement), or local authority exercising environmental health functions, the holder of the premises or personal licence or club premises certificate or the person who gave an interim authority notice or the premises user will also be a respondent to the appeal, and the person who made the relevant representation or gave the objection will be the appellants.

13.5 Where an appeal has been made against a decision of the licensing authority, the licensing authority will in all cases be the respondent to the appeal and may call as a witness a responsible authority or any other person who made representations against the application, if it chooses to do so. For this reason, the licensing authority should consider keeping responsible authorities and others informed of developments in relation to appeals to allow them to consider their position. Provided the court considers it appropriate, the licensing authority may also call as witnesses any individual or body that they feel might assist their response to an appeal.

13.6 The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both.

13.7 On determining an appeal, the court may:

- dismiss the appeal;
- substitute for the decision appealed against any other decision which could have been made by the licensing authority; or
- remit the case to the licensing authority to dispose of it in accordance with the direction of the court and make such order as to costs as it thinks fit.

All parties should be aware that the court may make an order for one party to pay another party's costs.

On any appeal, the court is not entitled to consider whether the licence holder should have been convicted of an immigration offence or been required to pay an immigration penalty, or whether they should have been granted by the Home Office permission to be in the UK.

This is because separate rights exist to appeal these matters or to have an immigration decision administratively reviewed.

Licensing policy statements and Section 182 guidance

13.8 In hearing an appeal against any decision made by a licensing authority, the magistrates' court will have regard to that licensing authority's statement of licensing policy and this Guidance. However, the court would be entitled to depart from either the statement of licensing policy or this Guidance if it considered it was justified to do so because of the individual circumstances of any case. In other words, while the court will normally consider the matter as if it were "standing in the shoes" of the licensing authority, it would be entitled to find that the licensing authority should have departed from its own policy or the Guidance because the particular circumstances would have justified such a decision.

13.9 In addition, the court is entitled to disregard any part of a licensing policy statement or this Guidance that it holds to be ultra vires the 2003 Act and therefore unlawful. The normal course for challenging a statement of licensing policy or this Guidance should be by way of judicial review, but where it is submitted to an appellate court that a statement of policy is itself ultra vires the 2003 Act and this has a direct bearing on the case before it, it would be inappropriate for the court, on accepting such a submission, to compound the original error by relying on that part of the statement of licensing policy affected.

Giving reasons for decisions

13.10 It is important that a licensing authority gives comprehensive reasons for its decisions in anticipation of any appeals. Failure to give adequate reasons could itself give rise to grounds for an appeal. It is particularly important that reasons should also address the extent to which the decision has been made with regard to the licensing authority's statement of policy and this Guidance. Reasons should be promulgated to all the parties of any process which might give rise to an appeal under the terms of the 2003 Act.

13.11 It is important that licensing authorities also provide all parties who were party to the original hearing, but not involved directly in the appeal, with clear reasons for any subsequent decisions where appeals are settled out of court. Local residents in particular, who have attended a hearing where the decision was subject to an appeal, are likely to expect the final determination to be made by a court.

Implementing the determination of the magistrates' courts

13.12 As soon as the decision of the magistrates' court has been promulgated, licensing authorities should implement it without delay. Any attempt to delay implementation will only bring the appeal system into disrepute. Standing orders should therefore be in place that on receipt of the decision, appropriate action should be taken immediately unless ordered by the magistrates' court or a higher court to suspend such action (for example, as a result of an on-going judicial review). Except in the case of closure orders, the 2003 Act does not provide for a further appeal against the decision of the magistrates' courts and normal rules of challenging decisions of magistrates' courts will apply.

Provisional statements

13.13 To avoid confusion, it should be noted that a right of appeal only exists in respect of the terms of a provisional statement that is issued rather than one that is refused. This is because the 2003 Act does not empower a licensing authority to refuse to issue a provisional statement. After receiving and considering relevant representations, the licensing authority may only indicate, as part of the statement, that it would consider certain steps to be appropriate for the promotion of the licensing objectives when, and if, an application were made for a premises licence following the issuing of the provisional statement. Accordingly, the applicant or any person who has made relevant representations may appeal against the terms of the statement issued.

13.1 This chapter provides advice about entitlements to appeal in connection with various decisions made by a licensing authority under the provisions of the 2003 Act. Entitlements to appeal for parties aggrieved by decisions of the licensing authority are set out in Schedule 5 to the 2003 Act.

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