IN THE HIGHBURY CORNER MAGISTRATES' COURT

BETWEEN :

MCDONALD'S RESTAURANTS LTD. **Appellant**

and

LONDON BOROUGH OF CAMDEN **Respondent**

Judgment of District Judge Rimmer in the matter of the appeal under Section 181 and Schedule 5 of the Licensing Act 2003 ("EA 2003") against the decision by the Licensing Sub-Committee of the Respondent Council on 17th September 2015 relating to the premises known as and situate at McDonald's Restaurant, 84-86 Charing Cross Road, London, WC2H 0JA ("McDonald's Cambridge Circus").

1. This appeal (heard 4-6.4.16) is brought by McDonald's Restaurants Ltd. ("McDonald's") against the decision of the licensing sub-committee of the Respondent council, the London Borough of Camden ("LBC").

2. Following a meeting of 'Licensing Panel C' on 17th September 2015 the panel refused McDonald's application to change the existing premises plan, whilst agreeing to suspend certain conditions and adding others.

3. The Court is grateful to Counsel for both the Appellant and Respondent for the clarity with which they have set out the case both orally in court, in skeleton arguments (Appellant's dated 10 & 30.3.16 and 4.4.16; Respondent's dated 1.4.16) and in the 2 lever arch bundles and preliminary application bundle prepared for the Court in advance of the hearing.

4. I have been referred to the *Revised Guidance issued under section 182 of the Licensing Act 2003 (March 2015)*, ("the *Revised Guidance*") and a number of case authorities.

5. The approach of the Court to appeals of this nature is set out in the cases of *R v (Hope and Glory) v Westminster Magistrates Court [2011] PTSR 868, [2011] EWCA Civ 31*, *R (on the application of Townlink) v Thames Magistrates' Court 2011*, *Marathon Restaurant v London Borough of Camden [2011] EWHC 1339 (QB)*, *Noor Mohammed Khan v Coventry Magistrates' Court [2011] EWCA Civ 751* and *Sevket Gurgur v London Borough of Enfield [2013] EWHC 3482 (Admin)*:

a) It is a re-hearing *de novo*;

b) The Court must consider the necessity of promoting the licensing objectives, the LA 2003, the Statement of Policy and the relevant guidance and case law;

c) The Court has to consider proportionality;

d) The Court should hear evidence including new evidence arising since the original determination, which may, if appropriate, include hearsay, and give proper weight to the evidence in reaching its judgment;

e) The Court is not concerned with the way the Respondent Licensing Authority approached its decision or the way it was made;

f) The Court must note the decision of the Respondent Licensing Authority with careful attention paid to the reasons given by the Authority;

g) The Court should not lightly reverse the decision of the licensing sub-committee;

h) The Court should come to its own decision on the basis of the evidence before it and, if the Court disagrees with the decision of the sub-committee, in light of the evidence before it, the Court should go on to consider whether because the court disagrees with the decision of the sub-committee it was therefore wrong;

i) The burden of proof rests with the Appellant.

Background

6. It is common ground between the parties that the application which led to the decision under appeal was unusual in that it was an application to vary the plans for the premises' internal layout, which if allowed would have the practical effect of extending the opening hours. This is because 'Late Night Refreshment' is a licensable activity under Section 1 and Schedule 2 of the LA 2003, for which in order lawfully to serve hot food and drink beyond 23.00, the plan attached to the licence would have to reflect the current premises layout. If this was not done (e.g. due to the sub-committee's decision to refuse the variation application), the Appellant's opening hours remain restricted to 23.00, despite the licence providing for Late Night Refreshment until 00.00 Sunday to Thursday and 01.00 Friday and Saturday.

Preliminary Issue & Ruling

7. At the outset the Court was invited by the Appellant to make a preliminary ruling in the following terms:

   (i) That the LBC's Statement of Licensing Policy ("SLP") 2011 expired on 6.1.16. It would be unlawful to have regard to an expired SLP;

(ii) That the LBC as licensing authority is in breach of its statutory duty to determine and publish an SLP for the 5 year period 2016-2021, due to have commenced on the 7.1.16;

(iii) That the Cumulative Impact Policies ("CIP") and in particular the effect of the Seven Dials Special Policy Area ("SPA") has no legal effect. It would be unlawful to have regard to the expired CIP in an expired SLP.

8. Having had regard to the arguments set out both orally and in the skeleton arguments of the Appellant and Respondent, the Court declined to make the ruling sought.

9. The Court found that the 2011 SLP was replaced by the 2016-2021 SLP with effect apparently from 31.1.16, albeit late, so that there was a valid SLP in place. Moreover, that the process by which that was achieved was compliant with s.5 of the LA 2003.

10. True it is that a detailed process of consultation and evidence gathering (such as that which appears to have preceded the implementation of the 2011 SLP) had not been carried out prior to the adoption of the 2016 SLP. This was supported by proposals apparent from LBC documentation to conduct such an exercise during the currency of the 2016 SLP.

11. The 2016 SLP was, in effect, the 2011 SLP "rolled over" and unchanged. Indeed, the SLP was referred to in Respondent documentation as the 2011 SLP on more than one occasion, but I accept the Respondent's explanation that this was "an unfortunate oversight".

12. Despite the lack of timely evidence gathering so as to produce an updated 2016 SLP, there was adequate evidence that the statutory consultation exercise had taken place, albeit minimally.

13. Accordingly there was in place a valid SLP at the time this appeal was heard.

14. On appeal, the court is required to accept and apply the Licensing Authority's SLP as if it were standing in the shoes of the local authority when reaching a decision: *R (Westminster City Council) v Middlesex Crown Court [2002] EWHC 1104* (the so-called 'Chorion' case).

15. I went on to consider paragraphs 12.8 and 12.9 of the *Revised Guidance*, which provides that *"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…"*, but also provides for departure from those documents where that is justified by individual case circumstances or where they are held to be *ultra vires*.

16. With that guidance in mind, I did not find that the individual circumstances of this case justified the exercise of my entitlement to depart from either the SLP or the *Revised Guidance*. Nor did I find the Licensing Authority should have

done so. I do not hold any part of those texts to be *ultra vires* the EA 2003 and therefore unlawful.

17. The Magistrates' Court is not the appropriate forum for an exploration of alleged defects in how the 2016 SLP was arrived at. To engage in such an exercise would be to trespass upon the jurisdiction of Judicial Review, the appropriate forum for which is the High Court.

Evidence

Appellant's Case

18. The following live witnesses were called on behalf of the Appellant:

- **Geoff COOPER –** (Independent Licensing Consultant)
- **Paul DONLEVEY -** (McDonald's Security and Licensing Manager)
- **Peter ROGERS -** (Managing Director; Sustainable Acoustics)
- **Dimitri HAMARD –** (McDonald's Cambridge Circus Business Manager)

19. **Geoff COOPER**, independent Licensing Consultant, adopted his Observation Report dated 10.9.15, with which the LBC committee had been provided at the time of its decision. He also adopted his statement of 29.2.16 and Observation Report of 8.1.16. Briefly, his reports set out his observations as to the impact on the Licensing Objectives of the operation of McDonald's Cambridge Circus; also of pedestrian flow and direction of travel. He arranged for customer surveys to be conducted.

20. In examination-in-chief ("XIC") he gave evidence that in so far as it may have been suggested the Temporary Event Notices ("TENs" – which allowed the premises to open later on a limited number of occasions) had been obtained surreptitiously by McDonald's, there was no truth in that. It was correct to describe (as one Respondent witness had) the Seven Dials area as "an oasis of calm". Pedestrian levels were low. Much more noise was caused by the background noise from taxis, rubbish collections and pedicabs. It was a busy area featuring a predominant flow of pedestrians from north to south along the Charing Cross Road.

21. In cross-examination ("XX") Mr Cooper confirmed that he had made observations both before and after the 23.00 closing time, and during the operation of the TENs which allowed the premises to open later on a number of occasions. He could then compare his findings. He introduced himself to the Duty Manager on his visits, and they knew he was making an assessment, but they would not have had time to change the operation and continued to run the premises in the normal way. Mr Cooper confirmed food delivery time was about 3 ½ minutes; customers flowed and were served promptly. The big open

space was designedly ‘anti-crime’ and enabled easier management, cutting disturbances and problems.

22. He was asked about the numbers representing pedestrian flow in his reports, including those leaving McDonald’s. There was a slight increase in people in the area after 23.00, but the data had to be considered as a whole. People were not drawn into the area by McDonald’s; rather people already there were using the facilities. Customer surveys were intended to ask people why they were in Central London and where they were going, and to establish the activities they were involved in. People coming from McDonald’s were better behaved than people on the street. Commercial waste from other premises was more of an impact than McDonald’s litter.

23. Mr Cooper understood why SPA’s existed, but his opinion was that McDonald’s Cambridge Circus did not contribute to cumulative impact. Most people causing a nuisance had consumed alcohol. It was a definite benefit for people to get food at short notice, and in his opinion they were less likely to cause problems than if they had come from an alcohol-led premises. He agreed he could not say what they did once out of his eyesight; that there had been drunk people in the vicinity, and that the situation got worse, particularly on Halloween, when the security guard had to ask people to leave. The incident logs exhibited confirmed that from time to time there were problem people to be dealt with. Security would stop people who were deemed too drunk from coming in.

24. Mr Cooper didn’t assess how long customers would remain in McDonalds, but agreed it would not likely be longer than required to consume a meal. People did not seem to hurry and he thought the effect of alcohol would be lessened from the experience. Residents’ concerns that people would be drawn into the area and create a nuisance were not reflected in his observations. He observed no misbehaviour in Seven Dials or Earlham Street, but thought residents had valid concerns about crime. It was put to him that residents suffered simply from people walking down the streets. He said that pedicabs and rubbish collections were noisier, but accepted it was true that just because some things caused worse noise didn’t mean pedestrians didn’t cause noise. In his opinion pedestrians weren’t causing a problem. Cambridge Circus was very different to Seven Dials, and there was little difference between normal periods of operation, and those under a TEN.

25. Asked about crime figures in the evidence relating to McDonald’s premises, he cautioned that they may not have been linked to a particular McDonald’s, had been withdrawn by the police, and were not specific to the Cambridge Circus area, which on account of its design and management would mean a significantly lower crime rate than a standard McDonald’s. In relation to the chart he exhibits showing a variety of local premises’ opening and closing hours, he said that document demonstrates that McDonald’s closes well before many other premises “get going”, and which do not shut until later. He could not comment whether such other premises were licensed under a CIP.

26. In re-examination ("Re-X") Mr Cooper said he did not think the proposed layout would increase people in the area or anti-social behaviour. The establishment had a calming effect such that people leaving behaved better than those in the street. The crime and security regime was optimum.

27. **Paul DONLEVEY**, McDonald's Security and Licensing Manager, adopted his signed statements of 29.2.16 and 17.3.16. In XIC he said the TENs had not been applied for surreptitiously or dishonestly; neither the police nor LBC had been in touch on the matter. McDonald's Cambridge Circus was constructed to a new specification where the opportunity had been taken to design out crime. It was the only one of its kind in the SPA. '*Staff Safe*' was a remotely monitored audio-visual system where operators could intervene in the event of disorder. The lowest level of activations came from this branch. Crimes attributed to McDonald's branches often did not in fact occur on the premises.

28. The brand was a beacon, so that people may refer, for instance, to "a fight at McDonald's". He acknowledged that McDonald's can attract crime. As a company, McDonald's responded to that. Drug-dealing was a feature of the West End: it had been the worst area in London when he was a police officer. McDonald's or West One Foods (the franchisee of this branch) were happy to commit to turning up to LBC meetings and engage with residents. They did so already and were happy for future attendance to be a license condition if required. Extra lighting outside could also be made a condition.

29. In XX Mr Donlevey said that the TEN dates, including Halloween, were selected on 'best practice' principles to provide the maximum opportunity to demonstrate the operation to the court. Asked about crime figures associated with McDonald's venues, he accepted a proportion of incidents would involve customers, but many would not, such as drug-dealers in the vicinity. Offences were not necessarily alcohol-related. One incident occurred where a customer exited the restaurant and was attacked. The majority of criminality occurred in the West End. McDonald's did their best to manage the premises.

30. Dispersal of persons occurred along Charing Cross Road in particular; the main thoroughfares were north and south. His view was a majority of nightclubs and bars did not occasion dispersal until 02.00 or later. As well as Salsa club there was Zoo Bar in Leicester Square. He accepted theatres "kicked out" about 22.30. At the venue, incident logs were maintained to record everything important in terms of crime and disorder. Not all persons involved were drunk. Security was in place to make a judgment as to who could come in. There had been an incident with a patron featuring mental health issues. He accepted the venue could not mitigate the impact of having more customers on the premises if it was open extra hours.

31. In Re-X, Mr Donlevey agreed the TEN dates may well have been selected for profitability as well as for testing. The police data he had been asked about did not relate to McDonald's Cambridge Circus. At closing time there was an outflow policy so shutters came down 15 minutes before closing. The layout of the premises had not caused incidents. There was nothing beyond what was presently being done which could control the impact of public nuisance.

32. **Peter ROGERS,** Acoustic Consultant, owner and Managing Director of Sustainable Acoustics, adopted his Noise Evidence report of 26.2.16. Briefly, his report provided information on the site location; the residents' objections and members' deliberations; the 'soundscape' and character of each area; the licensing objectives and national and local policy; the interpreting criteria for assessing impact of people noise; methodology and equipment used for his tests and observations; people movements. It provided an assessment of data collated, of noise impacts including a helpful summary ranking impact from sample 'noise events'. He made recommendations and conclusions.

33. In XIC Mr Rogers said he was absolutely convinced McDonald's Cambridge Circus had no adverse effect on noise. The area was already noisy. Seven Dials was not a quiet area. It featured a different soundscape to Soho and the Charing Cross Road. There was evidence of positive impact: people who visited the premises and sat down for food were quieter, and not behaving as others. It provided time to pause and sit down, and was an oasis in the area. The vast majority of people attending McDonald's were heading north or south. Occasionally some passed through Seven Dials, but these were "a drop in the ocean". Residents' opinions did not hold up, and were characterised by general sensationalising. The "canyon effect" in Seven Dials meant there was not a big difference between street and window level. You would expect now not to place a residential premises at this location, which is consistent with residents experiencing noise.

34. There was a real benefit to be had for residents if the facility was able to operate. The operation was really very good and provided an opportunity to improve an existing problem. It would result in better, quieter surroundings. There was not one example of a customer making the impact worse. During his observations, what was striking was McDonald's seemed ordered, given the disorder occurring outside.

35. In XX Mr Rogers accepted that the noise of people has the potential to disturb residents, but observed such noise currently existed already in the area. It was put that additional hours would increase the situation. He accepted it may cause a delay, in that people would leave later. But there would be no increase in noise. He rejected the proposition that if people were dispersing away from the SPA, their voice noise would increase. Rather, they would be quieter for enjoying the opportunity to sit down and consume a meal. Not many went through Seven Dials, instead travelling north or south. He accepted whereas the previous layout had 186 seats, now 843 people (per the CCTV analysis) left in just over a 2 hour period, effectively multiplying the previous capacity by 4.5 times. He accepted there was potential to cause nuisance, but said there was no evidence to point to where that occurred. The "threshold shift" where people adjusted as they sat and ate after an evening out, would lead to quieter dispersal. There was additional benefit as McDonald's did not serve alcohol.

36. In Re-X Mr Rogers said many other venues closed much later than McDonald's. The peak of the West End's vibrancy was about 02.00, and when theatres closed 22-22.30. Levels stayed high until about 03.00. The sound of a

pedicab at Seven Dials would be more impactful than people. A group of 2-6 people who had had a drink but had not been clubbing would be between positions 13-14 (towards the bottom or lower impact end) on his table ranking noise impact. A hypothetical group of 3 passers by would not be heard among the refuse collection, black taxis and pedicabs.

37. **Dimitri HAMARD**, Business Manager of McDonald's Cambridge Circus, adopted his signed statements of 8 and 21.3.16. In XIC he gave evidence that he had joined McDonald's at the age of 19 as a part-time crew member. He is now 28. His job in his starting position was to look after customers in the dining area. He worked at the counter a few months after starting and had graduated now to the position of Business Manager having chief responsibility within the store. There was nothing unethical about McDonald's. He felt well looked after and happy in his job. He had worked at branches in vibrant areas, for instance, the Strand.

38. McDonald's Cambridge Circus is a new platform operated in a different way. Food was prepared to order, so the volume of custom was much slower. This was also due to the location. McDonald's County Hall next to the London Eye was, for example, much busier.

39. In XX he said the restaurant shutters go down between 22.30 and 22.40, within the last half hour of closing. All were down by 22.40. There was no interest in closing earlier. If the premises were open until 1am it would make the situation slightly more challenging due to increased trading hours, but not due to intoxicated people.

40. In Re-X he said McDonald's Cambridge Circus was not disorderly. He did not think that position would change if it was open later. Conversely, if it opened until 01.00 there would be a benefit to people coming into the restaurant, as noise outside is reduced. The restaurant provides hot food and drink, bright lights and soft music. It doesn't sell alcohol. In these ways it was implementing the "soft finish" objectives set out in LBC policy recommended for night venue closing procedures.

Respondent's Case

41. The Respondent called the following live witnesses:

- **Kathy PIMLOTT** (Earlham Street Resident)
- **Toby DAYNES** (LBC Licensing Enforcement Officer)
- **David KANER** (Chair of the Licensing Committee; Covent Garden Community Association)
- **Amanda RIGBY** (Mercer Street Resident and Ching Court Association member)
- **Sue VINCENT** (Resident north of Great Bussell Street)

42. **Kathy PIMLOTT** adopted her statement dated February 2016. She drew attention to where her home was on a map: Earlham Street West. She has lived there for 33 years. Sources of noise included pedestrians walking down Shaftesbury Avenue and pedicabs. Asked in XIC how often loud noise was a problem, she replied that it varied; up to midnight she expected quite a lot of noise; after that it did not take very much and just 2 people walking down the streets talking was sufficient to cause a disturbance. The noise gets channelled by the buildings; her bedroom faced the street; she gets woken up by people chatting and tended to tune into people's voices regardless of the direction people were coming from. She would not know whether people were coming from McDonald's.

43. Her reason for objecting was to prevent more noise. It was nonsense that conversational noise would not be audible above occasional louder noises such as that caused by pedicabs. A revving engine might serve to drown out talking, but the reality was noise was not all simultaneous but came in fits and starts: you might hear a pedicab and then separately people talking whilst walking down the road. The McDonald's situation was not impacting negatively on her at the moment. She did not know where noisy people were coming from. The 23.00-00.00 dispersal generally impacted on her. She remembered when the premises was operating as 'Leon de Bruxelles' restaurant, which incarnation lasted about 5 years but never really took off. Before that it was the 'Med Kitchen'. It was now much busier. Her main concern was the increase of people in the area.

44. In XX, Ms Pimlott said that for her the impact was as much about people talking than about exceptional instances of loud noise such as revving engines.

45. **Toby DAYNES**, LBC Licensing Enforcement Officer, adopted his signed statement of 24.2.16 and his unsigned statement of 21.3.16. In XIC he confirmed he had been in his role for 10 years. The premises licence for McDonald's Cambridge Circus had been granted pre-2003, and pre-dated any CIP. The hours permitted by the licence (Sun-Thur until 00.30; Fri-Sat until 01.30) are outside Special Policy Hours and would be unlikely to be granted if applied for now. They would be inappropriate for a Late Night Refreshment venue. He had made regular visits to the Seven Dials area, and observed noise from patrons leaving the area. Later opening hours would, in his opinion, have an impact on cumulative effect. Whereas people now took their bus, taxi or Uber and left the area, if they remained for late night refreshment then nuisance, noise, litter and urination would occur. In his experience many complaints were generated by take-aways, but none from conventional sit-down restaurants. Exceptions to CIP's were almost never granted.

46. In XX, Mr Daynes accepted that in his first statement he had not felt it necessary to refer to residents' representations. He had not engaged in direct monitoring of the premises. He had not commented on Mr Cooper's report. He categorised McDonald's as a take-away rather than a restaurant, although he conceded it could be both, but he felt it was more a take-away late at night. There had been no complaints about the premises. But take-aways caused anti-

social behaviour independently from venues serving alcohol. Most visitors had been drinking anyway. The issue was keeping drunk people in the area. No formal visit had been conducted at all to the premises, but he had "popped in". Few exceptions were granted to the CIP. Residents' strength of feeling was taken into account. He did not accept there had been a failure to consider the application on its merits, fairly and objectively.

47. **David KANER** has lived at Mercer Street since 1993 and is chair of the Licensing Committee of the Covent Garden Community Association. He adopted his signed statements of 25.2.16 and 18.3.16. There was no issue with McDonald's as an operator; the same objection would have been raised to any fast-food outlet. His organisation had suggested McDonald's made a new application within the "framework hours" which they would be prepared to review. Across the SPA there were approximately 30 licensed premises which all end sales by 00.00 and close at 00.30, with the exception of the Salsa club. This gave rise to an expectation that up until 00.00 people would be going to bars; thereafter they would disperse.

48. The SPA was subject to a CIP. It was noisy in any event, but an operation such as McDonald's would retain people in the area to disperse much later than otherwise, consequently causing noise much later into the night. People would cross Charing Cross Road to attend McDonald's, a phenomenon he had himself witnessed. A significant number of people came to McDonald's, and he and his associates were concerned that people staying at the restaurant would then leave causing a disturbance. Their concern was about the practical impact of a place serving a large number of people late at night, which McDonald's was very well designed to do.

49. Mr Kaner had conducted practical observations, at one point standing between 22.15 and 22.45 by a coffee shop opposite McDonald's. From his vantage point he could see whether people were coming from the South or West. He attempted to measure the flow of people arriving in ten minute increments, and concluded in one study that 18% came from Westminster and a significant number from the south. People were being attracted to McDonald's and would cross the road to attend it, Cambridge Circus being a major focus of people.

50. He gave a practical example whereby a hypothetical patron of the Crown Pub exits when it closes at 00.00. In the event later opening hours were allowed it would be open to the hungry patron to attend McDonald's Cambridge Circus. S/he might stay for 30 minutes, perhaps calming down a bit from drinking, before crossing the SPA again, potentially causing a nuisance on dispersal. Mr Kaner observed that, as a resident, he walked past McDonald's often, and noted that in the last 15 minutes before closing the restaurant functioned as a take-away only. That last period is the most sensitive for residents so that any benefits which might accrue from patrons enjoying the facility of sitting and calming down would no longer be available.

51. His evidence was that the area calmed down after 00.00. People disperse slowly so that the amount of noise in the area gradually reduces between 23.00-00.00. He observed that the Appellant's noise data, gathered during

peak periods, such as Halloween, was different to normal times as on such busy nights lots of premises opened later. He had checked, and on 31.10.15 there were 59 TENs in operation, whereas the previous weekend there had been three. He would not complain about noise on peak nights which one expects to be unusual. He had personally seen the noise logging equipment used by Sustainable Acoustics, and had tried to contact that company. He observed the equipment on a weekend heavy with traffic, which he thought would impact on the data collected. Mercer Street had become a main route for taxis and Ubers, because traffic wishing to travel north was obliged to use it. He had written to Ed Watson asking why there had been an increase in northbound traffic.

52. Mr Kaner's general experience was that any big peak in noise can wake one up. It doesn't have to be that loud. In a quiet area, noise can be caused simply by talking, rather than for instance people screaming on a pedicab. The "canyon effect" of the buildings was true and very relevant to Seven Dials, and had been referred to by many residents who had made representations.

53. He concluded by saying that he had personal experience of being disturbed by people talking rather than shouting, and that it happens once every 2-3 weeks. He could not tell whether or not the people concerned were drunk. The Salsa club is a problem, but patrons don't tend to disperse down Earlham Street. In any event, in his view just because Salsa is a problem, that doesn't mean other premises won't be a problem. That is the point a CIP is designed to address. He had seen McDonald's litter on the street, and plenty of other operators' litter too. He observed that McDonald's did patrols to pick up litter, and he wished that other operators did.

54. Mr Kaner was not cross-examined.

55. **Amanda RIGBY** is a Mercer Street Resident and member of the Ching Court Association. She adopted her signed statement of 24.2.16. She described Ching Court as a triangular arrangement of residential buildings with a courtyard, the frontage of which mostly faces Shelton, Monmouth and Mercer Streets. It is an area characterised by families with children. Asked to what extent noise 'spikes' in the street were a problem, she said that it was difficult to quantify, but that every one to two weeks people get woken up by pedestrians "larking around". Importantly, perpetrators were not always drunk, and it was not their fault because they may not realise the area was residential. There had been a recent spike in traffic noise and gridlocks since December, causing an increase in cabs "honking" at night.

56. Ms Rigby observed that the history of Seven Dials goes back to the 1690's when the tall buildings served as warehouses. Noise could be heard to echo around the space, and it was possible to hear everything said by a passer-by engaged in a telephone conversation. Earlham Street was normally "dead as the grave" after 00.00; there was slightly more noise up Mercer and Monmouth Streets. It was so quiet one might almost suppose it was the countryside.

57. Ms Rigby thought that patron dwell-time when the premises had been "Leon de Bruxelles" was about 1 ½ hours. She thought a burger meal might take 8 to 9 minutes to consume, and only 3 minutes might be spent on the premises if obtaining a take-away. She was interested to read the data produced by Mr Cooper, whom on her recollection said 500,000 people were served in 9 months, which she equated as 1,800 per day. She had worked close to the Strand McDonald's, and would see people coming there late. In her view it was common sense that if people were drinking they would want a burger. She had experienced litter on her doorstep from McDonald's Cambridge Circus, but thought they did their best to control it and the litter issue should not be a distraction. People did sit on the Seven Dials monument and eat their food, but she was sure McDonald's could "sort that out". Had residents known the licence would be transferred to a fast-food operation, there would have been opposition.

58. Ms Rigby was not cross-examined.

59. **Sue VINCENT** lives north of Great Bussell Street, outside the current SPA, although she said there is an application to extend it. Seven Dials was recognised as an area of high footfall and impact on residents. An extension of the SPA up to Kingsway and Southampton Row, towards Great Russell Street and down Charing Cross Road was in contemplation. There was recognition of interests and concerns from residents. She had been involved with licensing committees, and over a number of years had attended hearings representing her constituents.

60. She opined it was a very difficult exercise to balance the need for amenities with residents' interests. On the one hand, London's West End was of international renown as a place to come and have a good time. On the other, the residential population help to create the character and liveliness of the West End, which is a vibrant place for families to live. Striking the balance was important, and was the reason for the development of the "framework hours". Having lived in the area for 35 years she had an overall picture of the West End and a lot of experience as to the balance required. She was familiar with the CIP and had attended a couple of licensing hearings. There were occasions where small restaurants had been granted exceptions within the framework hours.

61. Ms Vincent was not cross-examined.

Submissions

Respondent

62. In addition to the Respondent's skeleton argument, I take into account the oral submissions advanced at the appeal hearing.

63. Miss Dring submitted that there was a narrow issue for the Court to decide. Although McDonald's application had been to vary the layout, the practical effect would be greater. The legal framework was not in dispute. The licensing

regime is democratic in nature, and decision-making is primarily the role of the Licensing Authority ("LA") whose panel is trusted to make a decision. It is up to the LA to decide what policy should be applied in an area, having regard to local knowledge, and allowing residents' input into the process of the licensing application and appeals.

64. It was submitted that while local residents are not parties to appeals, it is important their voices are heard. They are the ones affected by the decisions made. It is important the Court is able to hear residents voice their range of opinions and take all that evidence into account. LBC did not align itself with all views expressed by the residents in their statements: it is for the Court to attach weight to the evidence as it sees fit.

65. It was submitted that to an extent the identification of particular premises is arbitrary: it is about the overall effect on the area. There is a presumption of refusal when a CIP is engaged, the burden being reversed. Applications would in almost all cases be refused, and it was necessary to show exceptionality to depart. The need to strike the balance between the ability of residents to live and work and maintaining the vibrant attractive late-night economy was provided for in the policy framework. The instant application was not exceptional.

66. The Respondent accepted that as a matter of law each case must be considered on its merits, and that example CIP exceptions in the published policy were not exhaustive. However those examples (e.g. including premises which were not alcohol led *and* were within framework hours) were such that underlying aims would be met and the thrust of the policy maintained while avoiding additional impact. *R (on the application of Portsmouth City Council) v 3D Entertainment Group (CRC) Ltd [2011] EWHC 507 (Admin)* demonstrates, at paragraphs 10 and 11, that where a CIP is in place, it is up to the Applicant to prove exceptionality, not for the Respondent to prove that a cumulative impact would occur.

67. It was submitted that the proposed changes to the plan would lead to additional people visiting the premises. The CIP presumption of refusal had not been rebutted. Despite the additional evidence this Court has heard on appeal, which was much more than the LA sub-committee had, their decision had not been proven wrong.

68. The Respondent contended that the Appellant sought to rely on 3 main purported exceptionalities: lack of cumulative impact, high operating standards, and the suspension of the alcohol provision in the licence.

69. In respect of cumulative impact, it was submitted that the starting point was the current position: there is no late night refreshment provided by the Appellant, and that if this appeal were to succeed, the 2 hours' additional trading would inevitably mean additional patrons. It was for the Appellant to prove there would not be an increase. Comparisons with the previous occupant at the venue, "Leon de Bruxelles", were hampered by the fact that business has closed thus trading records are inaccessible. However inferences could be

drawn that visitors would increase. It was in evidence that LDB had 186 covers. Ms Rigby had estimated McDonalds's patrons at 1,800 people per day. There was evidence that the speed of food delivery was about 3 ½ minutes, permitted by the layout and infrastructure. Mr Rogers' data from CCTV showed 843 people leaving the premises in just over 2 hours. It was submitted the Appellant had not proven the sub-committee wrong by demonstrating fewer patrons would result if the variation contended for was allowed. Conversely, more people would be in the SPA.

70. It was submitted conclusions could not be drawn from Mr Cooper's evidence as to whether patrons would be drawn into the SPA. Because of where the boundary between Camden and Westminster falls, patrons had simply to cross the road to McDonald's to give rise to the potential for them to disperse into the SPA. Messrs Cooper's and Rogers' evidence showed such dispersal, albeit minimally, but that still meant additional people dispersing at a later hour into residential streets, causing the sorts of disturbances residents complained of.

71. It was submitted that McDonald's, if open later, would delay dispersal changing the evidenced current trend for people to seek transport home. As Ms Pimlott and Mr Kaner made clear, the fact the premises was a McDonald's was not the problem; rather, it was the number of people in the area affecting the cumulative impact.

72. It was submitted that noise in the streets was already a problem as Messrs Rogers and Cooper acknowledged, but Respondent witnesses such as Mr Kaner had provided evidence the area quietened down during the time the Appellant wished to remain open. While the Appellant had made much of Mr Rogers' sound data, the measurement of sound did not equate to the subjective experience of residents. Drinkers are often louder, and it was common ground they may be attracted to McDonald's. The calming and sobering effect the Appellant contended for may take 30 minutes to set in and so be ineffective in the context of fast food. But it was not merely drunk people who would cause noise nuisance: any noise was exacerbated by the canyon effect of the buildings in the area, particularly Seven Dials. As Mr Donlevey had accepted, once patrons leave the premises, there was little McDonald's could do.

73. It was submitted that although the Appellant's litter-picking policy was of benefit to local residents, litter dropped late (except that in the post-sundown zone closer to the premises) wouldn't be caught until the following day. While this was a small issue, it amounted to impact. Crime and disorder, sometimes linked to alcohol, was not advanced as a particular problem, but was more likely after 23.00 and hence during the additional hours sought. The Appellant had not proven that additional cumulative impact would not be caused by those factors, extra people, or the disturbance they might cause.

74. In respect of operating standards, it was submitted that a large part of the Appellant's evidence focussed on this, and that all licensees should aspire to the highest standards. If McDonald's as a successful international company was setting that standard, then that was desirable. It did not however negate

the clear policy that high operating standards did not provide exceptions to cumulative impact, which was about the overall situation in the area.

75. In respect of alcohol, it was submitted that as McDonald's don't serve alcohol as part of their operation, its absence had no practical effect. In suspending the alcohol aspect of the licence, the Appellant sought credit for not using it, yet was not prepared to surrender it entirely. Alcohol would not be removed from the equation as many of the Appellant's patrons would still have consumed it earlier. The cumulative impact would be worse if alcohol was sold at the venue, but the fact it is not does not remove other impacts.

76. In conclusion, it was submitted that the reasons that the sub-committee gave for their decision still stand. There was no basis for rebutting the presumption of refusal.

Appellant

77. In addition to the Appellant's skeleton arguments, I take into account the oral submissions advanced at the appeal hearing.

78. Mr Charalambides agreed that this was an unusual case, submitting that was so especially because it involves an existing licence which the Appellant sought to change within the CIP. There was a "trinity of impacts" for the Court to consider: policy, legal and practical considerations. No issue was taken with the established legal framework, and it was accepted the burden was on the Appellant to demonstrate the sub-committee's decision was wrong; further, to demonstrate the effects of the variation would not add to the cumulative impact.

79. It was submitted that, as per *Hope & Glory*, "*The fuller and clearer the* [LA's] *reasons, the more force they are likely to carry*", but where they are not it is difficult to place much weight on the answer as the reasoning with which to participate is lacking. Moreover, LBC as Respondents had not been prepared to listen to and engage with the Appellant's arguments in exploring hypothetical impact, but sought only to give residents a "soapbox". There had been a lack of direction, assessment and discernment by LBC of its evidence, and a failure to present its case in a considered way, which conduct the Appellant relied upon to show the sub-committee's decision was wrong.

80. McDonald's as Appellant however, had taken Residents' assertions on board, tested and considered them, by producing the detailed reports of Messrs Cooper and Rogers. With paragraph 13.36 of the *Revised Guidance* in mind, which provides, inter alia, that "*A special policy should never be absolute. Statements of licensing policy should always allow for the circumstances of each application to be considered properly and for applications that are unlikely to add to the cumulative impact on the licensing objectives to be granted…*", to what extent had the LA engaged with Mr Cooper's report which had been before them? To what extent had they individually examined its merits? Mr Daynes, LBC's Licensing Enforcement Officer had not

considered it. Public-spirited Mr Kaner was the only Respondent witness able to comment on it.

81. It was submitted that it was relevant that the existing "rolled-over" Statement of Policy was based on stale evidence from 2010, and whilst it must be applied, strictness ought be reduced on account of that. It was unlikely additional people would walk into the Seven Dials area: Mr Cooper had provided evidence people tended to walk north or south or along Shaftesbury Avenue instead. Salsa club already closes at 03.00 but there was no evidence patrons walked into the Seven Dials area. Mr Kaner had said the area was silent at 01.00, and there was no evidence that would change, despite assertions that pedestrians might cut through for transport or refreshment facilities along Kingsway.

82. It was submitted that the legal effect of LBC's decision (and perhaps the appeal process) was to effectively review McDonald's *intended* operation and so identify an effect before it had a chance to operate. The refusal of the proposed variation to the plan elevated it to a different status by affecting 'licensable activities' already permitted by the premises licence. A CIP is designed to ossify what exists. The Court was asked to consider, hypothetically, what if an alternative operator took over, such as Belgo or a cocktail and tapas bar? They would be driven by alcohol sales, yet operating within the premises licence. In this case, while the character of the premises was changing to a degree, McDonald's sought to remove a licensing activity by eliminating alcohol consumption. That spoke to the reduction of cumulative impact. It was "by the by" that was a consequence of McDonald's operation: it still meant one less liquor establishment. It was significant that the operation was exceptionally well-run and constructed. There was evidence it was a less challenging venue to run than other McDonald's branches.

83. It was submitted that concerns as to dispersal into the SPA were unfounded. It was not presently being affected by other late night refreshment venues, and there was no need to cross the SPA due to establishments available on the other side. McDonald's Cambridge Circus catered to the 'soft-finishing' guidance LBC's policy encouraged, due to its lack of alcohol, low lights, slow music and service of hot food and drink. LBC had closed its mind and been unwilling to engage with the possibility of supplementary licence conditions to further control litter, lights and attendance at residents' and/or council meetings.

84. In conclusion, it was submitted that the scenario presenting on this appeal is very rare: that allowing McDonald's appeal would occasion a benefit and reduction in impact which must be taken into account as exceptional; that this was one of those very rare cases that, judged on its merits, revealed exceptional circumstances. It was possible for McDonald's to act within the licence, with some variations to improve and add to that benefit. There was no discernible impact that could not be ameliorated.

Analysis

85. Grappling with the issues in this case, I have kept to the forefront of my mind the four licensing objectives, viz: prevention of crime and disorder, public safety, prevention of public nuisance, and protection of children from harm. In my judgment, it is the prevention of public nuisance which is the objective most pertinent to this case.

86. The legal framework as set out in the respective skeleton arguments is not in issue, and I adopt and apply it.

87. I have paid particular attention to the "*Camden Statement of Licensing Policy 2016-2021*" which has been adopted as the current SLP in force. I have considered especially Chapter Six of that document: '*Cumulative Impact Policies*' to which I was directed during the hearing. In the context of this appeal, I note as of key relevance:

    - **[Para. 104]** *"…'cumulative impact' means the potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area."*

    - **[Para. 108]** *"The Special Policies set out in this Part apply to…applications to extend the hours during which licensable activities may take place in existing licensed premises… variations that may otherwise have a negative impact on cumulative impact in the area, such as the addition of licensable activities that may change the character of the premises."*

    - **[Para. 109]** *"The Special Policies have been introduced to address concerns about large numbers of persons leaving an area at night and the resulting pressure on transport infrastructure, street cleaning services and Police resources, combined with an increase in public nuisance and crime and disorder. As a result, where representations have been received, applications for licences within the two Special Policy Areas will, in almost all cases, be refused."*

    - **[Para. 111]** *"…Each case will be considered on its merits, though applicants should be aware that departures from the Policy in respect of cumulative impact will only be made in exceptional circumstances."*

88. Against that background, 3 examples of factors the LA may consider as exceptional are provided at paragraph 112. While non-exhaustive, no such factors (or similar factors) apply in this case. I have considered the Appellant's point that McDonald's Cambridge Circus is not alcohol led, which in the course of the appeal was used to compare it to one sample exception factor. However that same factor also entails operation within Framework Hours, which the Appellant's venue would not.

89. Contrariwise, at paragraph 113, 3 examples of factors the LA will not consider as exceptional are given, namely that the premises will be well managed and run, or constructed to a high standard, and that the applicant operates similar premises elsewhere without complaint. In the instant case, much of the evidence on which the Appellant seeks to rely seems directed towards the first factor, and to a lesser extent, the second.

90. I have carefully considered the *Revised Guidance*, especially part 12 – Appeals. I have already referred to paragraphs 12.8 and 12.9 (see preliminary ruling, above) regarding the court's obligation to have regard to the Guidance and the LA's SLP, including where it is entitled to depart from them, although I have not seen fit to do so. I have further in mind paragraph 12.6 at which *"the court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both"*.

91. The Appellant argues that neither LBC's minutes or reasons had any regard to the independent observations of Mr Cooper, the lack of any representations by responsible authorities, the fact that the extent and scope of the existing premises licence is being reduced, the unique layout of the premises, its operational competence, the role of SIA, and the willingness to engage in effective partnership. I heard evidence that McDonald's have tried to design out crime with the new form of operation which this branch exemplifies, which promotes the first licensing objective.

92. But even on the Appellant's own evidence the venue is plainly a fast-food establishment with turnover likely to be consistently far higher than when the premises was used by "Leon de Bruxelles". I accept the Respondent's contention that the court can take judicial notice of the fact that customers going out for a sit-down meal in a table service restaurant will stay longer than customers purchasing fast food from a branch of McDonald's.

93. The Appellant argues that the proposed internal variations in and of themselves can favourably impact upon the promotion of the licensing objectives; that the proposed operation falls entirely within the existing permitted licensable activities which are mostly reduced because of the agreed suspensions (especially the provision of alcohol); and that the unchallenged professional expertise from independent experts is sufficient to allow the appeal.

94. Particular focus in the Appellant's skeleton is put on Mr Rogers' conclusions, including that "*there could be noticeable benefits for residents… it is considered possible that the operation of the premises later into the night may in fact help to reduce noise impact on residents…* ". Mr Cooper's conclusions are cited, including *"McDonald's Cambridge Circus provides a safe, calm space in which customers can obtain a meal and a soft drink and an opportunity to take time to consume it inside the premises… many customers derived a distinct benefit from a meal and a rest during a night out, with positive effects on their behaviour"*.

95. Despite the impressive evidence-gathering directed to attractively presented conclusions, in my judgment it stretches credibility that those effects would operate to the exclusion of contributing to the cumulative impact. I prefer and accept the Respondent's contention that a variation which permits a high turnover fast-food outlet to operate until 00.00 and 01.00 on Fridays and Saturdays would add to the cumulative impact being experienced in the area. It is highly likely to attract often intoxicated people who are leaving other licensed premises and seeking food prior to dispersing.

96. In adopting that approach, I place considerable weight on the cogent, credible and compelling evidence of the residents, especially Mr Kaner, Mrs Pimlott and Mrs Rigby, all of whom related experiences to the effect that even ordinary sober conversation disturbed residents' late night peace. That evidence went largely unchallenged by the Appellant, with only Mrs Pimlott being subjected to brief cross-examination. The evidence of the residents demonstrates how statistical acoustic analysis may not accord with or identify the problems thrown up by residential experience. For example, louder noise spikes were not necessarily experienced as problematic, whereas ordinary conversations were. So the value of Mr Rogers' data, while impressively gathered and presented, is not without limitation.

97. Public nuisance is dealt with at paragraph 82 *et seq* of the SLP, and at paragraph 85 non-exhaustive examples are given of possible causes. The second example is customer noise, and while more extreme forms are described in the SLP, it seems to me on the evidence before me that mere conversation of passers by may often be sufficient to cause public nuisance, in the context of this case. Those passers by need not be particularly drunk, noisy or otherwise trouble-causing. They need merely to be engaged in conversation with a fellow pedestrian, or alone on the telephone. The evidence I have heard during this appeal makes clear they still create nuisance for residents.

98. The conclusions of Messrs Roger and Cooper do not overcome that effect.

99. Applying Appendix 4 of the SLP to which the Respondent's skeleton directs me, notwithstanding that the evidence behind the policy is now over 5 years old, it is relevant that it records:

    (a) In the Seven Dials SPA, the areas public houses close at 23:00, with a sprinkling of late night bars, and the area becomes much quieter after midnight;

    (b) Delays in dispersal from the Seven Dials SPA were associated with visits to nearby takeaway establishments;

    (c) Those surveyed later in the evening had consumed more alcohol;

    (d) Seven Dials SPA had only one late night takeaway. All takeaway customers who were surveyed indicated they had finished their entertainment for the evening and were stopping at a takeaway before

attempting to find transportation home, this pattern was confirmed by observations;

(e) The period following the closure of nightclubs and bars corresponds with sharp increases in custom at late night refreshment premises;

(f) Litter associated with use of takeaways is a significant problem;

(g) Public nuisance and anti-social behaviour associated with alcohol in Seven Dials' SPA tended to be concentrated in the period after midnight.

100. This information supports the view that if McDonald's stayed open later, it would contribute to cumulative impact.

101. As to the Appellant's criticism in its skeleton of the "dated", "stale" evidence base relied upon in the SLP, that is not in my view a reason for this court to treat with circumspection the CIP, or be more ready to find an exception to it.

102. I accept the Respondent's contention such an approach would be unlawful, the SLP having been lawfully determined and adopted. It is not, it seems to me, for this court to form its own view about the merits of the policy or the strength of its underlying evidence base; that is a matter for the Respondent alone.

103. I accept as valid the Appellant's criticisms of aspects of the Respondent's evidence and case presentation. For example, the generalisation in Toby Danes' evidence; the fact LBC's policies are not as up to date as they might be; the fact the level of engagement at various stages of the process has not been as involved as it might have been. I also find McDonald's commendable, both as an operation and in the way it has conducted this Appeal and the original application, in particular its well-honed operational systems and management, litter-picking, engagement with its community, and the impressive evidence-gathering and presentation of data and argument.

104. None of those factors however persuades me to adopt an approach other than set out in this analysis.

Reasons

105. In paying careful attention to the reasons given by the LBC panel, I have had regard to those recorded in their decision of 17.9.15:

"Reasons: Members were of the view that granting the changes to the existing premises plan would facilitate additional patrons visiting the premises, which would add to the cumulative impact of premises in the area and the presumption to refuse all new and variation applications were not rebutted. In respect of the remaining aspects of the application, Members did not believe that granting these aspects, along with the agreed conditions would undermine the licensing objectives."

106. I have considered paragraph 12.10 of the *Revised Guidance* which provides: *"It is important that a licensing authority should give 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…"*.

107. Having had regard to the reasons and full minutes of the 17.9.15 meeting of Licensing Panel 'C', it seems to me that those documents are light of reference to the SLP and *Revised Guidance*. It is therefore hard to assess the extent to which the decision was made with regard to them. But I bear in mind it is not for this court to be concerned with the way the Respondent Licensing Authority approached their decision or the way it was made.

108. On all the evidence I have read and heard, it seems to me inevitable that if McDonald's Cambridge Circus is open longer hours and so trading longer, that would facilitate additional patrons visiting the premises. Indeed, it seems there can be few other reasons for such a trading establishment to stay open.

109. From that flows the ineluctable consequence that potentially more people *may* then travel through the SPA at a later hour than otherwise would be the case. That potentiality remains regardless of the fact that did not seem to be the effect during the TENs. There is potential knock-on impact for residents in the ways described in their statements and in live evidence. In my judgment the Appellant's premises does not constitute an exception to the Cumulative Impact Policy.

110. Impressive though the Appellant's evidence of empirical research conducted by independent experts is, that evidence does not in my judgment negate the inevitable conclusion in paragraph 109. Indeed, Mr Cooper referred to the venue's *"swift service"* implying rapid turnover, and although he found *"no significant customer movements towards the Seven Dials area at any time leading up to the 0100hrs closing time and the dispersal of patrons was well managed,"* that dispersal would still occur later than is presently the case, and the potential for people to infiltrate the SPA is self-evident.

Decision

111. In considering this appeal I have had regard to the test to be applied detailed at paragraph 5 above.

112. I have further in mind the powers set out at paragraph 12.7 of the *Revised Guidance*, which specify that that, *"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".

113. The Appellant has not, in my judgment, shown exceptional circumstances sufficient to rebut the presumption contained in the Cumulative Impact Policy.

114. It has not discharged the burden of proving that, on the balance of probabilities, and having regard to the evidence which is now available, the decision of the licensing sub-committee to refuse to vary the premises licence plan was wrong.

115. I do not disagree with the decision of the sub-committee. I would have reached the same decision.

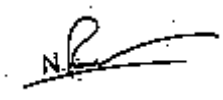
116. It follows this appeal is dismissed.

Costs

117. My preliminary view is that costs ought to follow the event, subject to my assessment to ensure the quantum is just and reasonable, in accordance with s.64 of the Magistrates' Court Act 1980. I have had regard to any applicable principles set down in *Bradford MBC v Booth [2001] LLR 151* and *R (Perinpanathan) v City of Westminster Magistrates Court [2010] EWCA Civ 40*.

118. **The parties are invited to indicate as soon as possible whether they wish to preserve the hearing currently listed for 4th May 2016, or to vacate that hearing and have costs assessed on the basis of written submissions.** This judgment, now distributed, will not be read out at the hearing which, if retained, shall serve purely for the Court to entertain submissions on costs.

119. Whether or not the parties wish to preserve the hearing, written submissions on costs are invited.



N. Rimmer
District Judge (Magistrates' Courts)

29th April 2016