

Licensing Sub Committee (Panel Hearing) Minutes

Date: 9 January 2020

Time: 10.00 - 11.50 am

PRESENT: Councillor A E Hill (in the Chair)

Councillors C B Harriss and N B Marshall.

48 INTRODUCTORY REMARKS BY THE CHAIRMAN

The Chairman welcomed everyone to the meeting and following introductions he set out the procedure that would be followed during the hearing.

It was confirmed that Mr Sivashankar represented his client, Mr Tharmalingam although he confirmed that he did not hold a legal qualification. His company, Compliance Direct Ltd, represented licensees and businesses on licensing matters.

It was noted that Ms Vijitha Thillainathan was attending the hearing as an interpreter to Mr Tharmalingam.

Mr Sivashankar confirmed that some additional information had been provided. The WDC Legal Officer confirmed that this information had been circulated to the Panel and other interested parties.

49 APOLOGIES FOR ABSENCE

None.

50 DECLARATIONS OF INTEREST

There were no declarations of interest.

51 MR CLEMENT VINOTHRAJ THARMALINGAM, CORNER EXPRESS, 97 ROBERTS ROAD, HIGH WYCOMBE, HP13 6XD

The Panel considered an application under section 42 of the Licensing Act to transfer a premises licence and also under section 37 to vary a licence in respect of Mr Clement Vinathraj Tharmalingam, Corner Express, 97 Roberts Road, High Wycombe, HP13 6XD

Mr Brian Whittall, WDC Licensing officer, outlined the case to the Panel as detailed in the report, and explained that the applicant had applied under section 42 to transfer the premises licence and under section 37 to vary a licence to specify an individual as a premises supervisor.

In accordance with the legislation, the applicant served a copy of the application on the police who had a statutory period of 14 days in which to raise any objections to the application. Following receipt of a valid representation and in accordance with section 44 and section 39 respectively, the licensing authority must hold a hearing to determine the applications.

Sections 37(5) and 42(6) state: "Where a chief officer of police notified under.... Is satisfied that the exceptional circumstances of the case are such that granting the application would undermine the crime prevention objective, he must give the relevant licensing authority a notice stating the reasons why he is so satisfied." The police stated that the appointment of Mr Tharmalingam as licence holder and designated premises supervisor (DPS) would not be consistent with the licensing objective to prevent crime and disorder.

In September 2019, the Bucks Free Press published a story regarding these premises and the sale of Nitrous Oxide. A number of empty canisters had been found on the floor outside the premises. A visit by an Environmental Health Officer on 15 October 2019 produced more evidence of these canisters outside the premises. Further to these reports, on 13 November 2019, an investigation by Council and police licensing officers took place. On visiting the premises, it was found that the following licensing condition was not being complied with:

"All alcohol products that are available for sale on the premises shall be labelled with a sticker on which the shop name is written."

A significant number of alcohol products did not bear a label containing the name of the premises.

The person identified as being in daily management control of the premises at the time of this visit was Mr Tharmalingam. He stated that he was taking over the business although at this time he was not named as either the licence holder or premises supervisor. These positions were held by a Mrs Tharmini Sureshkumar and Mr Kanaganayagam Shanthakumar respectively.

Under questioning by officers during the visit on 13 November 2019 Mr Tharmalingam confirmed that nitrous oxide was on the premises and available for sale. He confirmed that each canister had a retail price of £7.00. Officers were shown a box of multiple canisters and Mr Tharmalingam was advised that they should not be sold or on the premises unless they were being sold for catering purposes and there was sufficient evidence to confirm this. During this visit, a member of the general public entered the premises and attempted to buy 4 cans of lager. Mr Tharmalingam was working behind the sales counter at the time. He was advised by officers that, given that the premises were not fully compliant with the terms of the premises licence, he would knowingly be committing an offense under the Act if he made the sale. Mr Tharmalingam continued with this sale, contrary to the advice given.

Mr Whittall brought the Panel's attention to the following, relevant parts of the National Guidance and the Council's own Policy:

8.100 "...Section 42 of the 2003 Act provides a mechanism which allows the transfer to come into immediate interim effect as soon as the licensing authority received it, until it is formally determined or withdrawn."

8.101 "In exceptional circumstances where the chief officer of police believes the transfer may undermine the crime prevention objective, the police may object to the transfer."

8.102 "Such objections should only arise in truly exceptional circumstances."

Police objections to new DPS:

4.40 "Where the police do object, the licensing authority must arrange for a hearing at which the issue can be considered and both parties can put forward their arguments..... The licensing authority considering the matter, must restrict its consideration to the issue of crime and disorder and give comprehensive reasons for its decision. Either party would be entitled to appeal if their argument is rejected."

The WDC Council Policy in respect of Crime and Disorder stated:

3.6 "If, upon receipt of a relevant representation, there is a likelihood of crime and disorder increasing as a result of the application being granted, the Authority will refuse the application, unless there are exceptional circumstances or it can demonstrated that additional conditions will alleviate the concerns."

3.9 "In considering licence applications, the Authority will particularly take into account the following where relevant:

- The measures proposed to prevent the consumption or supply of illegal drugs, including any search procedures and entry policies.
- The measures proposed to prevent or reduce violence and public disorder in the vicinity of the premises.
- Physical security features such as the use of CCTV.
- Measures taken to prevent bottles and glasses being used as weapons.
- Measures to control the strength of beers, lagers and ciders.
- Measures taken to prevent underage drinking offences.
- Representations from the police"

5.11 "In determining the application with a view to promoting the licensing objectives in the overall interests of the community, the Authority must give appropriate weight to the steps that are necessary to promote the licensing objectives, all relevant representations, the government Guidance and this Policy."

The Panel was obliged to determine the application with a view to promoting the licensing objectives which were:

- The prevention of crime and disorder
- Public safety
- The prevention of public nuisance
- The protection of children from harm

In making its decision, the Panel was also obliged to have regard to the national guidance and the Council's Licensing Policy. Should the panel depart from either it would bound to specify its reasons for doing so. The Panel was also bound to take into consideration all of the representations made and the evidence submitted both written and orally at the hearing.

In promoting the licensing objectives, the Panel could take any of the following steps in relation to the application:

- (a) Grant the application, or
- (b) Refuse the application on the grounds of the prevention of crime and disorder

The Panel was also bound to consider its responsibilities under the Human Rights Act when considering the fair balance between the interests of the applicant and their duty under section 4 of the Licensing Act to promote the licensing objectives.

Any decision taken had to be appropriate and proportionate to the objective being pursued. In particular, the following would be taken into consideration:

Article 6 – the right for a fair hearing

Article 8 – respect for private and family life

Article 1, First Protocol – peaceful enjoyment of possessions (which could include the possession of a licence).

There were not questions for Mr Whittall.

Mr Andy Dean, Thames Valley Police Licensing Officer, outlined his case of objection and stated that the reason for visiting the premises in the first place was due to the number of reports from members of the public about the number of canisters which had been left adjacent to the premises and public concern pointed to Corner Express as being the point of sale. Thames Valley Police received intelligence as to similar events occurring at the premises. The Bucks Free Press published an article on this after a local Councillor had expressed concerns. The article indicated that Corner Express was the place to buy the canisters from.

Nitrous oxide was a gas commonly used known as 'laughing gas' and used to get 'high' which could lead to health risks which included paranoia, breathing problems and even death. It was known as the second known commonly used drug by 16-24-year olds after cannabis. Thames Valley Police were concerned that Corner Express was selling nitrous oxide canisters and therefore the decision was taken to visit the premises to ascertain the truth of the information given by the Bucks Free Press and intelligence. Within the premises was a plain brown box containing canisters. This box was located on the floor behind the counter and once opened it revealed further, smaller boxes which contained the canisters. The applicant's

representative indicated that following the visit, the offending articles were stopped and not restocked at the premises and this was thought to be a positive move. At the time, Mr Tharmalingam was the manager of the premises and not the DPS or licence holder but he did hold a Personal Licence. Nitrous oxide canisters were used in the catering business so there was a legal use, but the sale for personal use was illegal under the Narcotics Act. Mr Tharmalingam had previously passed a course to hold a personal licence, this course covered legislation and actions to be taken by personal licence holders to adhere to the Licensing Act 2003.

During the visit to Corner Express on 13 November 2019, Mr Dean explained that he had asked Mr Tharmalingam to name one of the licensing objectives and all he received in response was a blank stare. He did not, or could not, understand what Mr Dean had asked. Mr Dean explained he has asked the same question in a number of different ways for easier understanding but, again, he did not or was unable to provide an answer. Mr Tharmalingam also could not provide full contact details of the DPS when requested which was a concern as he was the general manager of the shop and a personal licence holder. It was noted that all through the visit to the premises on the 13 November 2019 Mr Tharmalingam appeared not to understand what was being asked of him. This raised concern as if he could not understand verbal English how could he then adhere to the licensing conditions and the Premises licence conditions? Mr Dean explained that eventually, after several attempts to ensure that Mr Tharmalingam understood what was requested of him, Mr Whittall advised him not to serve any more alcohol until such time as the conditions of the licence were complied with. Immediately following this advice, a customer placed 4 cans of beer on the counter and Mr Tharmalingam served them. This further corroborated Mr Dean's view that Mr Tharmalingam did not understand the Licensing Act 2003 and the responsibilities thereof.

During a follow-up visit in December 2019 labels were found to have been applied as requested. It was noted that a good number of foreign nationals, whether citizens or with a Right to Work visa, run businesses such as Corner Express and were able to understand English meaning that the responsible bodies had no trouble in communicating with them. Mr Dean therefore expressed surprise that Mr Tharmalingam's understanding of English was so poor. The biggest overall concern was that if Mr Tharmalingam had difficulty in speaking or even reading English then he would be susceptible of committing offenses by allowing himself to be open to sell alcohol to the wrong person and therefore commit an offense in terms of the prevention of crime and disorder objective as quoted within the Licensing Act 2003.

Mr Dean explained that he had photographic evidence on untagged bottles / cans of alcohol and pictures of the boxes of gas canisters.

At this point, the Wycombe District Council Legal Officer asked Mr Tharmalingam's representative, Mr Sivashankar, if he had any objection to the pictures being introduced to the hearing as Thames Valley Police had not disclosed this evidence prior to the hearing. Mr Sivashankar replied that he had no objection to the evidence being submitted at that time but expressed disappointment that it had not been submitted prior to the hearing itself.

In answer to questions, Mr Dean confirmed that nitrous oxide was not classified as a controlled drug and that, in his experience, there was a reduction of crime and disorder if people did not use this substance. The issue arose due to the number of canisters found in the area and the concern raised from the public about what would happen as it was drawing in people who were not from the immediate area. It was noted that crime and disorder in that area had been reduced as a result of the visit which took place on 13 November 2019.

Mr Sivashankar, representative for Mr Tharmalingam, stated that he had already explained what he was going to say at the hearing to Mr Tharmalingam and therefore would not be slowing down for the interpreter.

The WDC Legal Officer explained that any answers would need to be provided by Mr Tharmalingam, through the interpreter. Mr Sivashankar confirmed he understood this.

Mr Sivashankar explained that once he had clarified the reasons for the hearing he would then question his client, Mr Tharmalingam. Mr Sivashankar explained it was true that on 13 November 2019 when Thames Valley Police Licensing Officer and WDC's Licensing Officer visited the premises photos were taken and his client did show them the nitrous oxide canisters but that at the time his client was not the DPS or the premises licence holder. He was, at that time, going through the process of buying the business and had been working there in an attempt to get to know the area and the customers so that when the business was transferred he would have a good idea of what the business was like. Mr Sivashankar explained that his client had been trying to understand the customers using the shop. When he was working as a manager, the products being sold were already in place so he continued to sell them although he was under instruction not to sell to any under 18-year olds and to ask people why they were buying the products (nitrous oxide in particular). Mr Tharmalingam was not aware of the Psychoactive Substances Act 2016.

Mr Sivashankar confirmed his client had notified Thames Valley Police following their visit on 13 November 2019 that the nitrous oxide canisters were no longer being sold at the premises and that he was now the owner of the business. Mr Sivashankar brought the Panel's attention to the evidence which had been submitted prior to the hearing, in particular an article which had appeared in the Guardian newspaper which had been published about one year after the legislation came into being. The Crown Court in August 2017 had difficulty in deciding whether or not nitrous oxide was illegal and they then decided there was confusion about the current status of nitrous oxide. Since then, Mr Sivashankar could find no other cases.

The WDC Legal Officer expressed gratitude for Mr Sivashankar's research but believed that because this hearing was quasi-judicial and not a Court of law this information was irrelevant as the Panel would only be taking into consideration the Crime and Disorder objective and the reduction of crime and disorder.

Mr Sivashankar explained that his client was advised about the canisters during the visit by Thames Valley Police on the 13 November 2019 particularly in relation to

the selling of the canisters. His client took the view that as concerns had been raised he immediately stopped selling them. Mr Sivashankar confirmed that his client had not sold any canisters since then.

Mr Sivashankar stated that once the advice had been given on 13 November 2019 in relation to the absence of stickers on alcohol goods there had been no written communication about either the sale of nitrous oxide or breach of licence conditions from either the Thames Valley Police or WDC licensing officers. Mr Sivashankar questioned this particularly in light of his client not understanding the advice given during their visit. It was also explained that the letter, sent by the WDC licensing officer and handed to his client – in the absence of the DPS – which stated that the sale of alcohol should stop immediately, was indeed acted on. His client then contact him to ask why this was so.

At this point, the Chairman and Legal Officer requested that Mr Sivashankar dealt solely with the crime and disorder directive and that any procedural matters would be dealt with at another time.

Mr Sivashankar stated that he believed an opportunity was missed for his client to meet with the licensing officer to deal with the situation in an amicable manner. On 27 November 2019 during a further visit by licensing officers, Mr Tharmalingam was advised to stop selling alcohol. Posters advising the sale of alcohol was not taking place were displayed at the time. Once alcohol was permitted to be sold again a very detailed inspection took place along with a test purchase which was satisfactorily carried out by his client.

Mr Tharmalingam explained, through his interpreter, that the canisters which had not been sold had been disposed of by being thrown in the bin. Mr Tharmalingam explained that it was his intention to take them to the police station but that he did not want to put them in his car in case he was stopped and fined. Mr Tharmalingam confirmed that after the 23 November he stopped selling alcohol and displayed signs to that effect. Mr Tharmalingam also confirmed that on 27 November 2019 when visited by WDC Licensing Officer, Mr Whittall and his manager Mr Tharmalingam was not selling alcohol and it was at this visit that Mr Whittall told Mr Tharmalingam that he could start selling alcohol again. However, Mr Tharmalingam explained that he had not received written confirmation of this despite requesting it from Mr Whittall. Following the request, Mr Whittall did send an email to Mr Tharmalingam.

Mr Tharmalingam confirmed that the shop's name and address were displayed on the price labels. He also explained the reason that some of the cans, in the photograph, had labels missing, the reason being that they had either stuck to other labels or had fallen off. Mr Tharmalingam also confirmed that all products now display price labels.

In answer to questions, Mr Tharmalingam explained that he had lived in the UK for four years and had learned to communicate with customers despite a communication issue in respect of language barriers. He explained that sometimes he struggled with communication. Mr Sivashankar explained that Mr Tharmalingam had previously lived in Italy and spoken fluent Italian.

When asked to name two of the licensing objectives, Mr Tharmalingam responded: "Public safety and protecting children from harm, prevention of crime and disorder."

Mr Tharmalingam confirmed that the exam he had taken to gain a Personal Licence was in written English. Mr Dean asked why, when during his visit on the 13 November 2019, he could not name any of the licensing objectives. Mr Tharmalingam responded that he was really shocked to get a visit from the authorities which had led to some confusion on his part as he struggled to understand some of the words Mr Dean used. When asked if he understood what Mr Dean was saying now, Mr Tharmalingam responded that he was struggling with some words but overall understood and explained that it was because Mr Dean was speaking fast.

Mr Tharmalingam confirmed that while he had looked at the Conditions of the Licence before the 13 November 2019 visit, he then looked at them more closely and in more detail after the visit as he had not looked through them fully before.

On being asked by Mr Dean why, knowing the condition that stated all alcohol products needed to be labelled showing the name of the shop, he did not check the shop was compliant, Mr Tharmalingam made sure that labels were used when he restocked shelves. However, if a delivery arrived meaning he had to label products quickly, obviously some got missed off.

In relation to the crime and disorder licensing objective, Mr Tharmalingam confirmed that he was checking ID every day and did not supply alcohol to anyone underage. The last time he challenged someone in relation to being underage was the previous week. Mr Tharmalingam explained that most people who came to the shop were locals and therefore known to him but that if someone new came into the shop he always asked for ID before selling alcoholic products to them.

The Chairman thanked everyone to attending the hearing and explained that he and the Panel would go into private session to make their decision.

The hearing closed at 11:25

During their deliberations the Panel took into consideration all the written and oral evidence presented at the hearing, the legislation, Statutory Guidance and the Council's Licensing Policy. The Panel took into consideration Mr Tharmalingam's Human Rights and the right to a fair hearing and agreed not to grant the application for the following reasons:

1. That the selling of alcohol after being advised not to by the Thames Valley Police Licensing Officer and the Wycombe District Council Licensing Officer was a criminal offense under Section 157 of the Licensing Act 2003.
2. The intelligence summary which was disclosed by Thames Valley Police Licensing Officer at the hearing was not objected to by Mr Sivashankar when given the opportunity to do so, recorded the following:
"There are rumours that Corner Express at 97 Roberts Road, High Wycombe, sells nitrous oxide canisters. A local male has gone to the shop at approximately 16:45 on 25/08/19 and asked for the canisters, by showing the

shop keeper one of the canisters found nearby. At first the shopkeeper said no by the male was persistent saying that he was going to have fun with his friends and that his friend told him about the shop. The shop keeper then looked around and took a box from behind the counter. The canisters must have been kept secure and hidden because the shop keeper had opened something, which sounded like a floorboard. The male then paid £6 for a box of 24 canisters, but the shop keeper did not put this money through the till.”

3. Direct evidence from the Thames Valley Police Licensing Officer that anti-social behaviour had been reduced as a result of canisters no longer being sold.

RESOLVED: that the application be refused for the reasons stated above.

Chairman

The following officers were in attendance at the meeting:

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| Caroline Steven | - Licensing Team Leader |
| Brian Whittall | - Licensing Officer |
| Liz Hornby | - Senior Democratic Services Officer |
| Richard Ricks | - Legal Officer |
| Hilary White | - Paralegal |