

EXTRAORDINARY LICENSING COMMITTEE held at COUNCIL OFFICES LONDON ROAD SAFFRON WALDEN on 23 NOVEMBER 2010 at 10am

Present: Councillor D K Perry – Chairman.
Councillors J E Hudson, D J Morson and A W Walters.

Officers in attendance: Murray Hardy (Licensing Officer), Michael Perry (Assistant Chief Executive-Legal), Rebecca Procter (Democratic Services Officer) and (for the first part of the meeting only) Gordon Wallace (Enforcement Officer).

Also attending: Steve Sparrow (Essex Police Licensing Officer), PCSO Joanna Trevail-Phillips, Wayne Groves (Essex Trading Standards), David Dressel (Company Solicitor, Costcutter Supermarkets), Sohail Munawar (Costcutter), Alan Aylott (Alan Aylott Licensing Ltd) and David Dadds (Barrister for Costcutter).

LC53 APOLOGIES FOR ABSENCE AND DECLARATIONS OF INTEREST

There were no apologies for absence or declarations of interest.

The Committee agreed to deal with the determination of a hackney carriage/private hire drivers licence first.

LC54 EXCLUSION OF PRESS AND PUBLIC

RESOLVED that the press and public be excluded from the meeting for the following item of business on the grounds that it involved the likely disclosure of exempt information within the meaning of s.100 I and paragraph 1 of Schedule 12A Local Government Act 1972.

LC55 DETERMINATION OF A JOINT HACKNEY CARRIAGE/PRIVATE HIRE DRIVERS LICENCE

The Committee noted the absence of the driver or any representative and heard that the driver had been informed both verbally and by post of this meeting.

Members considered the report of the Enforcement Officer regarding an allegation that a driver licensed by the Council had committed an offence of benefit fraud under the Social Security Administration Act 1992.

Members asked questions regarding the replies made by the driver to questions during an interview under caution, and regarding claim documents he had submitted.

Decision

The Chairman gave the decision of the Committee as follows:

'Members having considered the evidence are satisfied on the balance of probabilities that the driver has committed an offence of dishonesty. Indeed the driver admitted as much in his interview under caution. Whether or not he faces a prosecution for that offence is within the discretion of the Department of Work and Pensions, but a decision not to prosecute would not mean that an offence had not been committed. The Council's licensing standards provide that persons with unspent convictions are not regarded as fit and proper persons. By analogy where there is clear evidence of an offence, even prior to conviction, Members can form a view that the driver is not a fit and proper person and the licence may be revoked for other reasonable cause. The driver did not attend to put forward any mitigation and Members therefore came to the conclusion that he is not a fit and proper person and determined to revoke the licence.'

The Assistant Chief Executive-Legal said he would notify the driver of the decision and of his right to appeal.

LC56

DETERMINATION OF A VARIATION REVIEW OF A PREMISES LICENCE (COSTCUTTER)

The confidential part of the meeting then ended and those attending in connection with the remaining item on the agenda were invited to join the meeting. The Chairman invited all present to introduce themselves.

At the request of the representative for Costcutter, David Dadds, the Assistant Chief Executive-Legal said this meeting was considered to be a meeting of the full Licensing Committee. Mr Dadds said he had no objection to the fact that four Members were sitting, but raised his concern that an even number of councillors could result in a split vote. The Assistant Chief Executive-Legal said it was not possible to guarantee an odd number of councillors for any committee meeting, and that the Chairman had a casting vote. Mr Dadds said in his view the Chairman should not have a casting vote in quasi-judicial matters, but that in stating this view he intended no adverse comment.

Mr Sparrow said Essex Police were content with the Committee process.

The Assistant Chief Executive-Legal said notice of intention to attend had been given by Costcutter's representatives by email late the previous afternoon, despite the provisions of regulation 8, which provided that the period of time to give such notice was no later than two working days beforehand.

Mr Dadds said Costcutter had the right to appoint a representative to attend and that no-one was penalised by such attendance today.

Mr Sparrow said had he been aware that Costcutter had instructed a legal representative, Essex Police might also have done so. However he would raise no formal objection as in his view it was in the public interest to proceed.

The Assistant Chief Executive-Legal referred to the late service of additional documents on behalf of Costcutter the previous day. Mr Dadds confirmed no further documents had been served since then.

The Assistant Chief Executive-Legal set out the procedure. He said although questions could be put, formal cross-examination was not considered appropriate in licensing proceedings.

The Licensing Officer presented a report setting out an application for a review of the premises licence in respect of the Costcutter Store, 41-45 High Street, Saffron Walden, made by the Chief Constable of Essex. The report referred to a previous review of the premises licence on 27 January 2009, when the Committee had imposed conditions. The premises licence had been transferred from Costcutter Supermarkets Group to Mosawar Khan on 5 March 2009, with the designated premises supervisor being listed as Sohail Munawar. Mr Munawar had been the designated premises supervisor at these premises since 1 June 2006.

The report set out the circumstances of a test purchase which had been conducted on 9 September 2010 at the premises, which resulted in a positive sale being made. A fixed penalty notice had been issued for selling alcohol by retail to a person under the age of 18 years of age. It was on the basis of a second positive sale being made that another review of the premises licence was made. The Chief Constable sought a minimum outcome of suspension of the premises licence for a period of not more than two months.

Members had no questions regarding the report, and the Chairman invited Mr Sparrow to speak. Mr Sparrow said although the license had been transferred, this was the second failure of a test purchase at these premises. He said the premises had been the subject of police investigations during March 2010 when the manager had suspected people were buying alcohol as proxies for others who were under the age of 18. The police had also investigated racial abuse which had been reported at or near the premises. In July 2010 the police had supported Costcutter in implementing Challenge 25, which was being introduced across the district. Following this undertaking, a series of test purchases were carried out at a selection of premises. There had been a sale of alcohol, albeit to a person over the age of 18 years, but no challenge under the new scheme Challenge 25 had been made. This lack of challenge prompted a test purchase to be carried out on 9 September,

involving a 15 year old purchaser, and a sale was made, leading to the application for a review. Mr Sparrow said on 24 September a young person had alcohol confiscated from her outside the premises, but there was no evidence that it had been purchased from this store.

The Chairman asked Mr Sparrow for his observations on the minimum desired outcome sought in the application. Mr Sparrow said Essex police regarded this matter as serious, and felt the Committee might wish to consider a suspension of the premises licence.

Councillor Morson asked whether police had ever investigated training records at Costcutter. Mr Sparrow said he was not aware of inspection of such records, but that when officers visited the premises the CCTV was working.

The Chairman invited Wayne Groves of Essex Trading Standards to speak. Mr Groves explained the purpose of the Challenge 25 scheme, which was to avoid error by retail staff in assessing whether a purchaser was over the age of 18. He said the Challenge 25 policy was being implemented throughout Essex; and it had recently been implemented in Uttlesford. He described Trading Standards' visits to the Costcutter store to assist with implementation of the Challenge 25 scheme there. He described the test purchase using a person over the age of 18, which had been followed up by a test using a person aged 15.

Mr Sparrow asked a question regarding attendance on a training course by Mr Saeed, referred to in Mr Groves' statement. Mr Groves said he had had no further contact with the Costcutter Store since the sales. Mr Sparrow asked whether it was correct that four other licensed premises had refused a sale to the same 15 year old volunteer. Mr Groves confirmed that this was correct.

Mr Dadds said nowhere in the grounds did it refer to a first failed test, and said the overview provided by the Licensing Officer had brought in matters not relevant to the grounds of the review, which could not be dealt with. Mr Dadds said this was the first review, which related to a first failed purchase. He said Members should have no more than regard to previous history. There had been one failed test under previous stewardship two years ago. Time had passed and there had been a change of ownership, so his client could not be held responsible for a separate matter. In any event, if the police had wanted to rely on those events they should have been set down as grounds for review, and the public should have been informed and had the opportunity to comment.

Mr Dadds said it would be unfair not to separate the events referred to in comments made by Mr Sparrow which had occurred prior to 2009. Regarding references to a test involving a person of age, he said such reference bore no relevance to the review. Challenge 25 was a voluntary arrangement and no offence had been committed, so this test purchase

could not be taken into account. He said the premises staff were trained, this had been a lawful transaction, the aim was to work in partnership and the store accepted Challenge 25 was good practice. However it would be counterproductive to criticise the store for failure of a test purchase using a purchaser aged 18 and caution should be taken in mentioning this in the review.

With regard to a reference to confiscation of alcohol from a young person outside the shop, he asked the Committee not to take this reference into account. There was no direct causal link.

He referred to guidance on procedure set out in Paterson's Licensing Acts to promote co-operation between premises licence holders, the police, the licensing authority and trading standards. He said in the event of any concerns, the guidance stated a premises licence holder could expect to receive warnings, including possibly meetings with police, so that a graduated approach was taken. He referred to 'route maps' which he contended should have taken place prior to any review.

Mr Dadds submitted there should be no linking of a previous review to the current review, due to passage of time. He said his client acknowledged the gravity of selling alcohol to underage persons and said Costcutter had put two further members of staff on the personal licence holder course.

Mr Dadds tabled statements regarding two independent test purchases carried out by a company instructed by Costcutter, Alan Aylott Licensing Ltd. These tests had been carried out on 13 November. Two purchases had been attempted, on both of which a challenge had been made. Mr Dadds said the statements indicated the individual carrying out the tests had seen the Challenge 25 posters, and had observed the documenting of the refusals in the register.

The Chairman said these measures had occurred after the event.

Mr Dadds said guidance in Paterson's indicated the licensing authority should seek to establish the causes of concern and any response should be no more than reasonable and proportionate. The Committee was not here to establish innocence or guilt or to give punishment, which had been dealt with by a fixed penalty, but to address whether the licensing objectives had been met. He said the designated premises supervisor had identified that he needed to be more robust, which he had done. Clearly there had been a transfer of the designated premises supervisor, the role of such person being merely as a point of contact with the police.

The Chairman said this statement struck him with concern, and as far as he understood it, Mr Munawar had a duty to be at the shop in connection with this role. Mr Dadds expressed concern at this interpretation.

The Assistant Chief Executive-Legal said the role of designated premises supervisor was not defined in the legislation, and the only requirement was that such person should be named on the licence. Providing that person held a personal licence, the obligations were met. Whilst there were some offences that a designated premises supervisor could commit under recent mandatory legislation, there was no requirement that the designated premises supervisor should be present during the sale of alcohol.

Mr Dadds referred to discussion in Hansard of the role of designated premises supervisor. He reiterated that time had passed since the first review and the designated premises supervisor was not responsible for the training of individuals, as this task was for the premises licence holder.

Mr Dadds reiterated that this review related to a first failure of a test purchase by the premises licence holder, who had now taken appropriate steps. He repeated that there was meant to be a graduated approach. He said the premises licence holder was prepared to offer up a condition that all members of staff before going on a till would undertake an age verification course by EPI, administered by CPL. He warned against treating the matter as if in a court, as the issue was not one of blame, and guilt or innocence should not be merged with the licensing objectives. He asked the Committee to take into account only the sale which had occurred during the time Mr Khan had been premises licence holder. He asked that the Committee only take measures to promote the licensing objectives which were necessary and proportionate. He said that for nearly 12 months Costcutter's designated premises supervisor had been a co-ordinator of 'Offwatch', a body which promoted good practice. Regarding the question by Councillor Morson on training records, he said there were no grounds in the review regarding failure to comply with conditions, and the Committee should not take this issue into account. He concluded that his client was apologetic but believed he should be liaising with the police to draw up an action plan.

Mr Sparrow said he strongly disagreed that the designated premises supervisor was merely a 'point of contact'. He did not accept any suggestion that the police were failing to cooperate with the designated premises supervisor or the premises licence holder, and he described steps he had taken to try to arrange a meeting with Mr Khan. He said he had met with Mr Munawar and found him compliant, and he hoped Mr Munawar would agree the police had supported him. He said it was usual practice for training records to be submitted during a review. He said he found the late submission of substantial material to be unhelpful. He concluded that the guidelines clearly required the police to set down previous tests at the premises, and he regarded as misguided tactics to try to show the action of the police in a bad light with regard to inclusion of the previous review at the premises.

The Chairman asked whether there were any further questions. Mr Dadds asked the Committee to refer to the statements submitted. The Assistant

Chief Executive-Legal advised the Committee on licensing authority guidance. Regarding the submission made by Mr Dadds that punitive measures were not appropriate in a review, he said it had been expressly approved in the case of Bassetlaw that measures could be imposed as a deterrent.

Regarding the recommendations in Paterson's regarding drawing up a 'route map', the Assistant Chief Executive-Legal said the police were the responsible authority and had made an application on two of the statutory grounds. The appropriate venue to challenge a police decision to apply for a review of the licence was the high court on an application for judicial review. No such application had been made.

Regarding the statutory function of the designated premises supervisor, the Assistant Chief Executive-Legal said there was none. When the bill had first come before Parliament, no such role had existed. A condition was imposed that all sales of alcohol were to be supervised by a licence holder. Representations from police were received that they needed a point of contact, so this role was introduced. It was not necessary for a designated premises holder to hold a personal licence but no sale of alcohol could take place unless he did. There were no functions for the designated premises holder in the Act, and there were numerous instances where designated premises holders held multiple licences for different stores.

The Assistant Chief Executive-Legal said the Committee had heard submissions that they should disregard what had happened under the previous licence holder. All the circumstances of the case regarding these premises comprised information which the Committee needed to be aware of. The new premises licence holder ought to have enquired and ought to have known about the history of and the conditions imposed on the licence. Regarding the change of licence holder, Costcutter was a well-known chain. The store now had a different licence holder but continued to trade under the name 'Costcutter'. Members had no knowledge of whether Mr Khan had a connection with Costcutter before the transfer of the business. Regarding the training of two members of staff, the Licensing Officer should be able to advise on whether these individuals had applied to this authority for personal licences, although they might have obtained these from other licensing authorities. It was not a necessity for them to hold personal licenses.

Mr Dadds replied that the case of Bassetlaw dealt with whether licensing authorities could impose a deterrent, but in his submission this case was not good law as it was heard *ex parte*.

The Assistant Chief Executive-Legal replied the case had been contested in the magistrates' court.

Mr Dadds said the hearing in that case was ex parte and the point had never been challenged, therefore the case had little or no weight. He also distinguished it because it related to four sales to underage purchasers, and the actual premises licence holder was the seller.

Regarding the question of a route map, Mr Dadds said it was not right to say that such procedures were not part of the process, and the Committee should take into account good practice guidance.

Regarding the role of the designated premises supervisor, he agreed the Assistant Chief Executive-Legal had defined this role very well.

Regarding the issue of the two failed tests, Mr Dadds said there had been two years between them. He said there was no evidence of any breach of conditions; regarding the courses undertaken the members of staff concerned had not obtained licences.

Mr Dadds took instructions regarding Mr Khan's previous role. He said this Mr Khan had no connection to the previous operation. The person in question was another Mr Khan.

In conclusion Mr Dadds referred to the guidelines at 11.17 of Paterson's. There was nothing to prevent the issue of a warning, which was the outcome he sought. The guidance was an important mechanism to effectively promote licensing objectives. However the police had already issued warnings. The licensing authority should not be repeating that approach. His client took the matter seriously, he was not here due to ill health, and Members by taking this approach would not merely be repeating a step already taken. His client accepted the Committee wished to ensure the licensing objectives were met, and believed a warning and the addition of a condition that all staff undertake the e-course were sufficient.

Mr Sparrow said this review was the first under this licence holder and the second for this premises. As a licensing officer he was not aware of an organisation called 'Offwatch'. On instruction Mr Dadds said the organisation was based in Borehamwood.

Mr Sparrow said he had taken steps to try to engage with the premises licence holder, and had written a letter on 20 October to which he had had no reply; he had advised the premises licence holder regarding implementation of Challenge 25; following the Challenge 25 test purchase a verbal warning had been issued.

Mr Dadds said the letter referred to had been written after the application for a review had been lodged; and that the reference to a verbal warning was a new point.

Mr Groves explained the process relating to a failed Challenge 25 test purchase by a person aged over 18. Trading Standards Officers would speak to the premises licence holder, and this could be construed as a verbal warning. Mr Dadds said it had to be clear that a verbal warning was issued, and he submitted in this case it was merely advisory.

The Committee withdrew at 11.40am to consider the matter.

At 1.15pm the Committee returned to give its decision. The Chairman read out the decision as follows:

Decision:

The Committee have today considered an application for a review of the premises licence for Costcutter 41 – 45 High Street Saffron Walden held by Mr Mosawar Khan. The application was made by the police based upon the licensing objectives of the prevention of crime and disorder and the protection of children from harm. The circumstances giving rise to the application for the review are that on 9 September 2010 a test purchase of alcohol organised by Essex Trading Standards resulted in alcohol being sold to a 15 year old boy. The person who made the sale was dealt with by the issue of a fixed penalty notice.

The police in their submissions make reference to a failed test purchase in October 2008. As a result of that incident there was an application to review the licence and the conditions attached to the licence were varied with a view to preventing further underage sales. The amended conditions included requirements to carry out reasonable and adequate staff training in relation to underage sales and that no staff would make sales of alcohol until they had received such training. Since the last review the premises licence holder has changed from Costcutter Supermarkets Group to Mr Khan. Mr Dadds on behalf of Mr Khan submits that the Committee should disregard the earlier failed test purchase and regard this as a first incident. He makes this submission on the basis that the application for review did not make reference to the first incident, that it occurred almost 2 years earlier and that there has in the interim been a transfer of the licence to a new premises licence holder notwithstanding the fact that the designated premises supervisor remains the same.

The Committee rejects the first submission. The first failed test purchase gave rise to a review of the licence. It would not be appropriate for the licence to be reviewed again based on the same facts. However the situation is that these premises have failed a test purchase and in deciding how to deal with the current situation the Committee should have regard to the history of the premises.

The period between the two test purchases is not a relevant factor. As stated in paragraph 6.1 of the Council's licensing policy "the protection of children from harm is a most important issue." This is echoed in

paragraph 11.26 of the government guidance published in October 2010 which says "There is certain criminal activity that may arise in connection with licensed premises which the secretary of state considers should be treated particularly seriously". One of these activities is the use of licensed premises for the purchase and consumption of alcohol by minors which impacts upon the health, educational attainment, employment prospects and propensity for crime of young people. Mr Sparrow for Essex police referred to incidents of anti-social and racist behaviour linked to the premises. In this connection Members disregard the incident Mr Sparrow referred to after the test purchase but note that other incidents clearly relating to the premises were referred to. Members take the view that unsupervised alcohol consumption by young people has a real propensity to impact upon health and educational achievement.

Members recognise the force in Mr Dadds' third submission that the identity of the premises licence holder has changed since the first test purchase. He indicated in his closing remarks that prior to taking over the licence Mr Khan had no involvement in the business. However Mr Khan ought to have ascertained the history of the licence when he acquired the premises. He ought to have been aware of the conditions on the licence and the reason for them. Whilst Members accept that the designated premises supervisor has no personal responsibility under the Act Mr Khan left in place a designated premises supervisor who held that role when the first test purchase was failed. This suggests a failure of management and control on Mr Khan's part. The Committee whilst recognising that the test purchase giving rise to the review was the first failure under Mr Khan's ownership do have regard to the history of the premises.

In considering its response to the application the Committee have had regard to its licensing policy and the government guidance. In addition to the provisions cited above Mr Dadds has commented on paragraph 11.7 of the government guidance which suggests that in certain circumstances no action is required. He maintains that the police application for a review is in effect premature and that the police should have used other less draconian actions to achieve compliance with the law in the first instance, referring in particular to Home Office guidance and the route maps contained therein. The position of Members today is that we are where we are. An application for review has been made and we have a duty to deal with it. Any attack upon the police decision to seek a review of the licence is outside the jurisdiction of the Committee and should have been a matter for the high court. For reasons I will give later the Committee do not accept that this is a case where no action is appropriate.

Mr Dadds also refers to paragraph 11.19 of the government guidance which states that licensing authorities should seek to establish the cause of concern and take remedial action which is a necessary and proportionate response. The Committee's decision is taken with that objective very much in mind. On the previous application for a review conditions were imposed to try and prevent underage sales. The fact that

a further test purchase occurred was not due to a failure of the conditions but due to a failure in management. In particular the witness statement of Mr Groves indicates that staff on the premises at the time of the second test purchase had not received adequate training. This gives the Committee grave concerns about the standard of management of the premises. In the submitted minimum outcomes from the review the police seek variations to the conditions attached to the licence. Mr Khan does not object to these through his solicitor and indeed offers an additional condition that all staff will pass the EDI course on age related sales before being allowed to sell alcohol. However these conditions will only be effective if the management ensures that the conditions are observed. Members lack confidence that this will be done. Members gave consideration to removing the designated premises supervisor from the licence as suggested by paragraph 11.20 of the government guidance but concluded that given the limited statutory role of that position such a step would not necessarily secure the achievement of the licensing objectives. Members also considered a revocation as referred to in paragraph 11.27 but concluded that for a second offence, putting the police case at its highest, this would be disproportionate.

Members had regard to the government guidance contained in paragraph 11.22 concerning the imposition of suspensions as a deterrent and to the judgement in the case of Bassetlaw. Mr Dadds has submitted that this was not good law as it was determined without argument. The Committee have been advised and accept that the case is good law unless and until it is overturned by a higher court and that the Committee are entitled to take it into account in reaching its decision and indeed the magistrates will be obliged to take it into account on any appeal. Members are aware that any suspension of the licence must be proportionate balancing the need to secure compliance with the licensing objectives against any financial hardship which may be suffered by the licence holder during the period of suspension. Mr Dadds has shown himself aware of the guidance and case law but chose not to introduce evidence or make submissions as to what would be the appropriate period of suspension. The Committee therefore have to rely upon their own experience and judgement. In a case involving other premises in the district which failed two test purchases on the second review the committee imposed a 1 month suspension of the licence as a deterrent. In Bassetlaw 1 month was again the length of suspension imposed. The Committee therefore determined that the licence in this case should be suspended for a period of 1 month.

In addition the Committee will vary the conditions on the licence to those proposed by the police in Appendix 4 to the officer's report.'

The Chairman asked what was the difference between BIIAB level 1 and EDI. Mr Dadds said the BII AB level 1 was of a similar weight to the EDI course. Mr Sparrow, upon being asked for his view, accepted the EDI course would be appropriate in these circumstances. The Assistant Chief

Executive-Legal said Condition 2 (d) of the minimum desired outcome would therefore be amended accordingly.

The Assistant Chief Executive-Legal informed the representatives of Costcutters of their right to appeal.

The meeting ended at 1.40pm