B127/16

Aldi Stores limited v Dundee City Licensing Board

Dundee, 12 August 2016

Act: S Blair, Advocate, instructed by Lindsays, Solicitors, Edinburgh

Alt: S Stuart Q.C. instructed by Dundee City Council, Legal Services

The sheriff, having heard counsel for the pursuers and senior counsel for the defenders: -

(1) Sustains the pleas-in law for the pursuers;

(2) Repels all pleas-in-law for the defenders;

And, in consequence thereof,

(1) Reverses the decision of the defenders dated 14 January 2016 to refuse the application by the pursuers made under and in terms of the Licensing (Scotland) Act;

(2) Ordains the defenders to grant the said application forthwith;

And thereafter,

(1) Finds the defenders liable to the pursuers in the expenses of the cause, and allows an account of said expenses to be ingiven, remitting the same, when lodged, to the Auditor of Court to tax and to report; and

(2) Certifies the cause as suitable for the employment of junior counsel.

Note

Introduction

[1] In this appeal in terms of Section 131 and 132 of the Licensing (Scotland) Act 2005, the pursuers seek a reversal of the defender's decision of 16 January 2016 to refuse the pursuers' application for a provisional premises' licence at their proposed new-build modern supermarket at Myrekirk Road, off Kingsway West, Dundee.

Background

[2] The pursuers had earlier sought and successfully obtained planning permission from the defenders (in their capacity as the local planning authority), to build a licensed retail superstore on the site. The pursuers proposed that, as part of their service to the wider community, and in addition to the sale of goods consistent with the operation of a supermarket, they would also sell alcohol on an off-sales basis only.

[3] The pursuers' proposal was that alcohol would be available for sale in the proposed premises on an off-sales basis only between the hours of 10 a.m. and 10 p.m. seven days per week. The intended and proposed stated capacity, in terms of the alcohol display area within the store, was 38.25 square metres, comprising a 31.5 square metres area for a permanent display area, with an additional seasonal display area (to cover the Christmas and New Year period from 24 November to 9 January), in terms of which authority was sought to temporarily increase the permitted capacity by an additional area of a further 6.75 square metres. In reality, for most of the year, the area of alcohol display would be 31.5 square metres.

[4] The necessary application for the grant to the pursuers of a Provisional Premises Licence was lodged with the defenders, for consideration at their meeting scheduled for 14 January 2016. A letter of objection dated 23 December 2013 (a copy of which is 5/1/4 of process) was lodged on behalf of the Public Health Directorate, Tayside NHS. Board (As an aside, I was advised that it is the policy of that organisation to lodge objections to each and every licensing application lodged with the defenders.) The thrust of the objection was that the defenders had in place an overprovision policy, which deemed that the whole of the City of Dundee, being the territorial jurisdiction of the defenders, (but excepting therefrom an area within the City identified as the Central Waterfront Area), was overprovided with licensed premises.

[5] Having heard submissions from various interested parties, including a lengthy presentation on behalf of the pursuers by their solicitor to which reference shall later be made in this judgement, the defenders, in their quite separate and distinct capacity as the Licensing Authority, refused to grant a Provisional Premises Licence to the pursuers.

[6] Following the refusal of the application, a formal request by the pursuers for a Statement of Reasons as to why the application had been refused was made to the defenders, and their response dated 28 January 2016 forms number 5/1/9 of process.

[7] The pursuers have now appealed to the court seeking the reversal of the defenders' decision of 14 January 2016.

Pursuers' submissions

[8] The most significant leg of the pursuers' submission was that the overprovision policy operated by the defenders was *ultra vires*. The policy had been framed in the widest or "global" terms. The criticisms of the policy may be enumerated as follows: -

(1) The over-provision policy was reached in a manner inconsistent with the requirements of Section 7 of the Licensing (Scotland) Act 2005.

(2) The defenders' policy had been reached in a manner inconsistent with the requirements of the mandatory Statutory Guidance under the Act.

(3) *Separatim*, the defenders failed to have regard to the Guidance.

(4) The overprovision policy was reached in a manner which was inconsistent with the obligations implied in a consultation exercise.

(5) The defenders' policy failed to provide proper and adequate reasons as to why it came to be settled in the terms that it was. The failure to do so is inconsistent with the Guidance.

(6) The policy arrived at by the defenders was predicated on undisclosed "local knowledge", which is also inconsistent with the Guidance and natural justice.

(7) In short, taking all the above reasons into account, it was submitted that that the overprovision policy was flawed and *ultra vires*. It was further submitted that it was an error of law *et separatism* an unreasonable exercise discretion to apply that policy in rejection of the pursuers' application.

(8) *Separatim*, it was further submitted that the applying of this policy could properly be characterised as the reliance by the defenders on an incorrect material fact in their determination of this application.

(9) Finally, it was submitted – in connection with the overprovision policy – that said policy was in breach of natural justice, with that being a separate basis for setting aside the defenders' decision.

[9] An examination of the formal Statement of Reasons for the refusal by the defenders of the Application for a Premises' Licence (Provisional) (found in the Pursuers' First Inventory of Productions number 5/1/9 of process) discloses that the members of the Licensing Board unanimously decided to refuse this application because, *inter alia*, :

> "... if the application were to be granted, there would, as a result, be overprovision of licensed premises in that locality, in terms of Section 23(5)(e) of the Licensing (Scotland) Act 2006."

The Statement of Reasons continued: -

> "The Board was not satisfied that the case presented for the applicant had overcome the "rebuttable presumption" that the application should be refused on the basis of the overprovision policy. At the time of consideration of the application, there were 452 premises' licenses in the city (excluding social clubs), of which 133 are off-sales premises with a total off-sales capacity of 6,406.536 square metres. The application in this case is for a provisional off licence premises with a capacity of 31.5 square metres, with an additional display capacity of 6.75 square metres from 24 November to 9 January every year. The Board recognises the fact that Aldi are a well-established and most reputable firm as was submitted in support of the application and also that a number of employment opportunities will be created by the opening of the store. However, at the end of the day, this is just another off-sale which would add to the availability in a locality in which the Board has already determined that there is an overprovision. There was nothing in the submission on behalf of the applicant which the Board could be satisfied made this application a case which should be treated as an exemption to the policy and the application was therefore refused in terms of Section 23(5) (e) of the 2005 Act.
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> The Board was satisfied that that none of the other grounds for refusal in terms of Section 23(5) of the 2005 Act applied in this case. In particular, it accepted Mrs Loudon's (the pursuer's solicitor's) submission with regard to the objection from NHS Tayside based upon the Public Health objective. Given that these premises are not open, it is practically impossible in any event to establish a causal link between the sale of alcohol, the premises and the public health objective, being the test applied in the case of Galloway -v- Western Isles Licensing Board [2011] 48 SLLP 12".

[10] Although I have not set it out at length, the first part of the Statement of Reasons(5/1/9 of process) sets out that the pursuer's solicitor, in her lengthy submission to the defenders, seriously challenged and criticised their overprovision policy. She had

founded strongly on the decision of Sheriff Garden at Aberdeen Sheriff Court on 26 August 2015, in the case of Martin McColl Limited -v- Aberdeen City Licensing Board. Following the logic and ratio of that decision, she submitted that there were good grounds for setting the policy aside. The policy promoted and attempted to be applied by the defenders in this case had largely the same flaws which resulted in the Aberdeen policy being determined to be non-compliant with both the terms of the Licensing (Scotland) Act 2005, and the statutory guidance issued by the Scottish Ministers to which Licensing Boards must have regard in terms of Section 142 of the 2005 Act.

[11] Separately, it had been submitted that the letter of objection from NHS Tayside dated 23 December 2015 (5/1/4 of process) was in very general terms, and did not evidence in any way a causal link between the proposed premises, the sale of alcohol, and the "public health objective". It was additionally submitted and emphasised that there had been no formal objection to the granting of this application from the Dundee City Alcohol and Drug Partnership (APD). I was informed that Aldi's emphasis is on consistent and reasonable pricing, the sales of alcoholic goods not being the predominant share of their average shopper's "shopping basket". In short, the obtaining of this licence was both important and essential to ensuring the fullest and widest provision and service to their clientele.

[12] It was submitted that the defenders, in their determination of this application, applied Section 23(5)(e) against the rebuttable presumption that they consider to have been created by the overprovision policy. They should have had regard only to the "all premises" test which requires that capacity in both on and off-sales premises be considered. The defenders however only referred to off-sales capacity. The reference was to 452 licenced premises in the City, with an explanation that there are 133 off-sales premises with a stated capacity. It was pointed out that the defenders have not defined what the on-sales capacity is, even although the over provision policy is expressed as an "all premises" policy and is applied to all premises.

[13] The over provision policy can be found at 5/1/3 of process. The Central Waterfront Area (CWA) was specifically excluded from the policy when it was adopted on 21 August

2014. (The total extent of that area (the CWA) can be identified from the map which accompanies the actual policy document.) There is little doubt, it was submitted, that the over provision policy adopted and applied by the defenders was predicated to no small degree on the submissions lodged by the Alcohol and Drug Partnership (ADP). However, it was pointed out to me that the recommendations of these submissions were on the premise that off-sales provision was health based, whereas on-sales were crime based.

[14] The licensing objectives are set out in Section 4 of the Licensing (Scotland) Act 2005. The objectives are 5 in number: -

(a) preventing crime and disorder.

(b) securing public safety.

(c) preventing public nuisance.

(d) protecting and improving public health, and

(e) protecting children from harm.

[15] The Scottish Government's Explanatory Notes to the Act state that

> "12. This Section establishes 5 high level "licensing objectives" that represent the values on which the Scottish licensing system would be based, the parameters against which everyone would measure the elements of that system and the solid foundation which Local Authority Licensing Boards must have regard to in carrying out their functions under the Act. "

In support of the proposition that the courts have been prepared to have regard to the Explanatory Notes for a number of purposes when construing and applying legislation, I was referred to the case of R (Westminster City Council) v National Asylum Support Service (2002) UKHL 38, and the dicta of Lord Steyn in the final part of paragraph 5.

[16] Continuing his submission, Counsel reminded me that Section 6 of the 2005 Act dictates that each Licensing Board must publish a statement of their policy with respect to the exercise of their statutory functions for the following 3 years. The relevant Section – Section 6(2) of the Act – gives a discretion to the Licensing Authority to publish a "supplementary statement of their policy" at any time during the 3 year period of the main policy.

[17] Section 7 imposes a duty on Licensing Boards to assess over provision in any locality within the Board's area, and also sets out those persons who must be consulted before a decision is arrived at.

[18] Section 23 of the 2005 Act provides for the consideration of licensing applications. Sub-section (5) lists the grounds of refusal for any application and includes *inter alia* the following:

> "(e) …having regard to the number and capacity of: -
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> i. Licensed premises; or
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> ii. Licensed premises of the same or similar description as the subject premises
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> in the locality in which the subject premises are situated, the Board considers that, if the application were to be granted, there would, as a result, be overprovision of licensed premises, or licensed premises of that description, in the locality."

[19] It was submitted that the test is anchored upon "locality". Furthermore, the wording makes it clear that the perceived problem is about "overprovision" and not "availability".

[20] The defenders, in this case, determined that the application be refused because, to have granted this application, would have conflicted with their overprovision policy, which created a rebuttable presumption of overprovision of both on-sales and off-sales licensed premises. Whilst it may be suggested by the pursuers' counsel that there were good reasons to enquire whether the overprovision policy was a lawful, reasonable and fair basis on which to proceed to make a finding under Section 23(5)(e), it was nonetheless abundantly clear that this policy was the driver behind the decision taken by the defenders when they rejected this application. In short, without a lawful policy, the whole basis of the defenders' decision was flawed.

[21] In January 2014, the Dundee City Alcohol and Drug Partnership (ADP) had made a detailed presentation to the defenders entitled "An assessment of overprovision in Dundee". (This document is 5/1/8 of process). (That assessment is alluded to at Paragraph 1.3 of 5/2/3

of process, the Public Consultation Document prepared by the defenders.) Subsequently, on 20 February 2014, a Report (5/2/4 of process) was provided to the defenders by their Clerk, paragraph 2.1 of which provides "options" available to the defenders. Following a public consultation, (which was late criticised by the pursuer's counsel), the defenders adopted on 21 August 2014 the over provision policy. At paragraph 5.7 of 5/2/4 of process, the Report had wrongly suggested that the defenders could, if they were of the opinion that there was over provision, decide to treat the whole city as "overprovided". Alternatively, the defenders – and this is also alluded to in paragraph of 5.7 of 5/2/4 – could confine their deliberations to individual "localities". These actions of the defenders were criticised, in that the locality should have been first determined and consulted upon, before any decision was arrived at on over provision. To consider utilising the whole city locality wise as a lawful option was wrong and illegal. Consistent with the forgoing, it was pointed out to me that, in previous Answers, the defenders had formally admitted that they had treated the whole of Dundee as a locality. That admission was later deleted in the adjusted Answers, and intimated to the Pursuers with other pleading adjustments on 6 June 2016, the last date for adjustment in this process.

[22] The defenders, in entering into consultation about the proposed overprovision policy, (the consultation period running between 1 April and 23 May 2014), set out their stall in the Consultation Document, (5/2/3 of process) which *inter alia* stated that: -

> "In light of the findings in the in the ADP Report, the Board is satisfied that there is, in principle, overprovision of licensed premises in Dundee. However, the Board would welcome your views as to the areas within which an overprovision policy would apply."

A variety of options were then listed.

[23] Criticism of the defenders' actions in connection with the Public Consultation Document stemmed from

a) the defenders' failure to properly and firstly identify the locality within which any overprovision may have existed;

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b) the defender's general assertion that there was already existing on a city wide basis an overprovision. This assertion did not sit comfortably with the defenders' consultation document which said that the defenders would welcome views as to the areas within which such a policy should apply.

c) the defenders taking the whole city of Dundee as their starting point. If that was their position, then that was a wrong approach and an error which went to the heart of the consultation process.

[24] Counsel submitted that the Public Consultation Document, to conform to the terms of the legislation, should have sought responses to localities identified by the defenders as perhaps already being overprovided. It was not about working back from the decision already taken by the defenders, (when they deemed that overprovision already existed in the city on a city-wide basis), and thereafter deciding to which localities that decision should apply. It was submitted that the defenders, as a matter of law, could not choose the whole of Dundee, that is, the whole of their area of jurisdiction, as a single "locality" for the purpose of the over provision consultation and then work back from that to narrow down the area.

[25] It was submitted that the correct approach to the issue of "locality" would have been for the defenders to first clearly identify from within their area of jurisdiction numbers and capacities of licensed premises, or premises of a particular description in that "locality" and to thereafter consult with defined persons, all as set out in Section 7(3) and (4) of the 2005 Act. Referring to Paragraph 44 of the Statutory Guidance, it was submitted that there was nothing in the consultation document which demonstrated clear identification of numbers and capacity in the process undertaken on a defined locality basis. As counsel put matters, "(there is) a formulaic declaration in the policy that regard has been had to numbers and capacity but nothing before that to demonstrate at what point they had had such regard". In reality, there was nothing in the material before either the defenders or the court which showed that the defenders – at any stage prior to their final decision on the issue of overprovision – purported to have proper regard to numbers and capacity.

[26] That the numbers of which the defenders took cognisance is not set out or available in terms of what has been lodged in process, is – it was submitted – a separate error in terms of lack of adequate reasons. To simply set out, among the reasons, the statutory test, is in itself, inadequate. The defenders ought, according to pursuers' counsel, have first accurately identified numbers and capacity. Unless these figures were set out in the consultation document, the informed reader and the court cannot be in a position to make any accurate judgement as to whether or not the defenders got the figures correct when the policy was adopted. Thus, in this case, the policy adopted by the defenders was not in conformity with the published guidance, and no adequate reasons, as required by Paragraph 50 of the Guidance, was before the court. It is a requirement of the Guidance that that numbers and capacity must be assessed in the pre-chosen locality before the consultation process is commenced. There is no evidence before the court to show that this was addressed to any degree in this case.

[27] Counsel accepted that the law will change, with the passing and coming into effect on 1 September 2016 of the Air Weapons and Licensing (Scotland) Act 2015. (Sections 7 and 23 of the 2005 Act will be amended to remove the reference to having regard to numbers and capacity as mandatory considerations. The passage of that legislation will also permit Licensing Boards to regard the whole area of their jurisdiction as a single locality.)

[28] In summary, therefore, Paragraph 47 of the Guidance requires that there be a "dependable causal link between evidence and the operation of the policy in question." It is important to properly identify the proposed locality before one can lawfully and rationally carry out a proper consultation and thereafter, a proper assessment of overprovision including: -

(1) having regard to the issue of capacity and numbers in that locality.

(2) anything demonstrating that the Board has identified a dependable causal link between the operation of the licensed premises in that locality and relevant harms.

(3) anything which allows a Board to lawfully and rationally conclude that a state of overprovision arises in the stated locality.

[29] There was, it was submitted, no evidence presented to the Board – or indeed made available to the court – of the dependable causal link between such evidence and the operation of licensed premises in the locality. It was suggested by counsel for the pursuers that, of necessity, it was plain that there must be a link between the purchase of alcohol in that locality and relevant harm in the same locality, which is the consequence of such overprovision. The ADP Report of January 2014, on which the defenders appear to have placed much reliance, provides no data on the identity, capacity, or actual location of any licensed premises within the City of Dundee. In particular, my attention was drawn to page 17 of the Report which alludes to marked variations in the distribution of licences within Dundee, leading to high concentration in some localities. The Report is predicated on the basis that availability of alcohol is the cause of harm. Of great importance is that the Report does not evidence that, if alcohol was purchased in a locality, any of the claimed harm also occurred in that locality. Furthermore, the ADP Report does not state – nor refer to any evidence – that there is any link between where alcohol is sold, when and where that alcohol is consumed, and where any relevant harm arises. It was submitted that the table of Accident and Emergency admissions gives no accurate information as to where any alcohol had been purchased. Place of residence of those presenting at any Accident and Emergency Department is not evidence of where the alcohol that they may have consumed was purchased, or where it was actually consumed. (It was also suggested that Sections 6.2 and 6.3 of the ADP Report – relating to alcohol related acute hospital discharges and alcohol related mortality – could be similarly criticised.)

[29] Having regard to the "statistics" set out in Appendices 2, 3A and 3B to the Report of 20 February 2014 number 5/2/4 of process (and which appear to have been lifted from the ADP Report) and the additional Report of 21 August 2014, number 5/1/7 of process, there is, it was submitted, nothing to show the necessary linkage of the harm caused by the sale of alcohol in any given locality with the operation of licensed premises in that locality, which is the test for overprovision. Appendices 3A and 3B provide information in tabular form in relation to the Community Regeneration Area, (CRA). These would appear to emanate from the ADP Report as reference is made to the "main overprovision report". In stressing this

submission, counsel again submitted that the defenders had not properly fulfilled their duties under the 2005 Act, before putting matters out to consultation.

[30] Section 7 of the ADP Report number 5/2/4 of process deals with alcohol related crime and disorder. The specific recommendation to the defenders and first option suggested by the ADP partnership on page 8 of the Report was that

> "all future off-sales licences should be refused, unless the applicant can demonstrate that the new licence will not contribute to overprovision."

That Report (5/1/4 of process) proposes that off-sales be treated as "over provided" because of claimed link to health harms. Whilst the ADP Report did not recommend that crime and disorder would also be a basis for treating off-sales as being overprovided, the application of this policy would appear to attempt to restrict off-sales on the basis of both health care and crime. Nothing is said in Section 7 of the Report regarding any link between where the alcohol was consumed and where the relevant incident occurred. Criticism was made of Section 7.4 of the Report because this only addresses the "alcohol related offences by area of residence of offender". One cannot discern from the content of the Report, and one must not guess, where the offence occurred in relation to where the alcohol was acquired.

[31] Examining further the provisions of Section 11 of the overprovision Report 5/2/4 of process and the conclusions, key findings and recommendations, these provisions make plain that "crime and disorder" drove the recommendation on on-sales and health issues drove the recommendation on off-sales. It was submitted that the policy, without any explanation, and which relies to no small extent on the ADP Material, appears to be predicated on a "global reliance" on both crime and disorder on the one hand, and health on the other hand, to limit both types of premises.

[32] Counsel then proceeded to discuss the importance of "locality", in terms of licensing objectives. The importance of the test of locality is set out in Section 23(5)(e) of the Act where reference is made to "premises in the locality", and overprovision in the locality. There must be a linkage of premises to a locality and problems caused by those premises in that same locality.

[33] Whilst the ADP Report refers to harm, it provides no link or dependable causal link between purchase of alcohol in locality A, and harm experienced in locality A. There was, it was submitted, no evidential basis to show that this important element, that the effects and consequences of consuming alcohol, are experienced in the same locality where that alcohol was purchased. Thus, so the argument went, it was important to clearly identify at the outset the locality which is being considered during the consultation process, as that then could become the basis for a lawful analysis of whether alcohol purchased in locality A causes relevant harm in the same locality A. If such initial lawful assessment is absent, one cannot conclude that a lawful or rational consideration as to whether a state of overprovision arises within the chosen locality, as in contemplated within the meaning of Section 23(5)(e) of the 2005 Act. As is set out in the written submission for the pursuers, this problem is recognised at Page 18 of the ADP Report. The Report first makes the "unevidenced" point that "off sales sell alcohol at markedly cheaper prices." It then goes on to say that "Bearing in mind that people will travel to purchase cheaper alcohol, the distribution of alcohol on a ward by ward basis may appear irrelevant". As counsel out matters, it was common knowledge that alcohol may be purchased at any number of off sales premises somewhere other than the home locality of the consumer, and then be consumed at home or another locality or localities thereafter.

[34] Following the refusal of the application, the pursuers' solicitors made a Freedom of Information request, under the Freedom of Information (Scotland) Act 2002. The defenders' response, which was dated 25 March 2016, together with the original request and relevant appendices, is all to be found at 5/2/5 of process.

[35] Counsel helpfully set out the chronology of the overprovision policy. This can be set out as follows: -

(1) On 16 January 2014, the Dundee City Alcohol and Drugs Partnership (ADP) made a detailed presentation to the defenders. The ADP Report contained a table showing a summary of its principal statistical findings relating to alcohol related health harm and alcohol related crime by reference to Local

Community Planning Partnership (LCPP) areas, which coincide with electoral wards for the Board's area of jurisdiction. Importantly, the table's figures appeared to suggest that all of most of the alcohol related harm is connected to 5 of the 8 areas listed, (and which are to be found at Section 1.5 of the Public Consultation Document number 5/2/3 of ptocess).

(2) On 20 February 2014, the defenders put out to consultation the putting in place of an over provision policy. The cut-off date for responses was fixed for 23 May 2014. (Page 4 of 5/2/3 of process is the public consultation questionnaire.)

(3) The public consultation document above referred to does not consult in respect of a specific locality. Question 2 asks in terms: - "In which areas do you think that there is overprovision?"

(4) Written responses were timeously received from four sources, Dundee Community Safety Partnership; Outlook; Signpost International; Dundee International Women's Centre; and the Chief Constable. There were 35 responses to an on-line survey. The Health Board and ADP did not submit a response within the prescribed time limit.

(5) Outwith the period of consultation, the local ADP submitted a letter dated 15 August 2014. (As an aside, counsel asked how it could be, given that the material which is referred to in the policy is that summarised in the Report of 12 August 2014 which does not mention – as it could not – any letter of 15 August 2014. Counsel then queried the transparency of the whole process and asked whether there can be confidence in what may have been done.)

(6) On 21 August 2014, the defenders adopted an overprovision policy which would apply to the whole of Dundee, under exception of what is described as the Central Waterfront Area (CWA).

(7) A letter of request (being a Freedom of Information request) was sent by the pursuers' solicitors to the defenders dated 22 February 2016.

(8) The response from the defenders to the Freedom of Information dated 25 March 2016, number 5/2/5 of process, is sent.

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[36] In the FOI response, it is stated: -

"There was no geographical restriction to the persons consulted since the Board had not at this stage decided that any particular locality was overprovided for. Accordingly, we consulted as widely as we thought practicable throughout the Board's area."

Counsel for the pursuers submitted that the decision ultimately arrived at did not sit comfortably with the decision in principle that the whole of the City of Dundee was over provided for. In addition, the original Answers lodged on behalf of the defenders seemed to aver that there had been consultation with persons in a pre-defined locality. (These averments in the Answers were totally re-written during the adjustment period.)

[37] It was further submitted that none of the consultation responses received during the consultation period bore to exempt the Central Waterfront Area from any proposed overprovision policy. Indeed, having regard to the Public Consultation Document of 20 February 2014, (5/2/3 of process), it was arguable that the defenders considered that the whole of the City, including the Central Waterfront Area, was overprovided. By 21 August 2014, when the overprovision policy was adopted, the Central Waterfront Area had been excluded. Nothing in the Report by the Clerk to the Board of 12 August 2014 (number 5/1/7 of process) gives even the slightest hint that the exemption of the CWA was a live issue for the Board. Thus, so the argument ran, by 21 August 2014, these excluded areas (which form the CWA) with their own rates of harm were excluded from the proposed overprovision policy. In addition, there was no indication in any of the communications from the Clerk to the defenders that exemption of the CWA was a possibility or under active consideration.

[38] The pursuers submitted that, as at 20 February 2014, the defenders considered that the whole of the City of Dundee was, in principle, overprovided. By 21 August 2014, the defenders had "purported" to exclude the CWA. The policy promulgated by the defenders did not set out why or on what basis the exclusion from the policy was reached. Counsel analysed the ADP Report of January 2014 (5/1/8 of process). Reference was made to page 26 of the Report, which was compared with the map adopted as per the overprovision policy. The Central Waterfront Area lies partially within the West End and Maryfield areas, and it also straddles the Tay Road Bridge area and its approach roads.

[39] Further scrutinising the health data relative to alcohol related presentations at Accident and Emergency at Ninewells Hospital, Dundee, on pages 25 and 26 of the ADP Report, counsel pointed out that presentations to A & E from the West End numbered 892 per 100,000. The figure for Maryfield was 1473, (the second highest within the City of Dundee). Figures for acute related hospital discharges and alcohol mortality show the Maryfield area as second highest in the City on both categories. Additional statistics (page 34 of the ADP Report) – relative to alcohol related crime and disorder – give Maryfield the highest overall crime rate (relative to offences with an alcohol aggravator) in the City, based on an incident of 323.5, The corresponding figures show 68.8 for the West End; 15.1 for Broughty Ferry; and 52.2 for Strathmartine. Turning then to data re the address of the offender, this disclosed 295 for Maryfield, (some of which should have been excluded); 115 for the West End; and 28 for Broughty Ferry.

[40] Counsel alluded to the selective inclusion of certain data within the logic adopted in the formulation of the overprovision policy. Maryfield, part of which area is excluded because it is within the CWA, is above "1" on ten of the twelve suggested harm indicators. The Ferry is not above "1" on any indicator, yet the whole of The Ferry area is included in the area covered by the overprovision policy of the defenders.

[41] The premises in this case, in Myrekirk Road off Kingsway West, Dundee, are located in the wider Lochee area of the City of Dundee, and lie to the north and west of Charleston Housing Estate scheme within the City. Like Maryfield, the Lochee area scores in ten of the twelve claimed relevant measures. Counsel submitted that, even if the defenders did not adopt the overprovision policy for the whole city on 21 August 2014, it is evident that the ADP Report of January 2014 had recommended that Maryfield in its entirety be included. In brief, on an examination of the data and maps, the independent observer can quickly observe that Maryfield, an area where there is a high rate of harm, was included in the area covered by the proposed policy in February 2014, but which was thereafter excluded in part in August of the same year. The response to the Freedom of Information request established that there exists in the Central Waterfront Area large capacity licensed premises, including

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both on-sales and off-sales premises. No rationale or explanation is given as to why Maryfield was excluded in part from this overprovision policy – notwithstanding very significant harm arising in the area.

[42] Counsel then turned to the Statutory Guidance, (found in Section 142 of the 2005 Act), and also the Scottish Government's Explanatory Notes (which are found in paragraph 289 of the Notes). On the whole issue of Statutory Guidance, I was directed to Paragraph 35 of the judgement in the case of R (on the application of X) v London Borough of Tower Hamlets [2913] EWHC 480 (Admin), where Mr Justice Males opined: -

> "35. In summary, therefore, the guidance does not have the binding effect of secondary legislation and a local authority is free to depart from it, even "substantially". But a departure from the guidance will be unlawful unless there is a cogent reason for it, and the greater the departure, the more compelling must that reason be. Conversely a minor departure from the letter of the guidance while remaining true to its spirit may well be easy to justify or may not even be regarded as a departure at all. The court will scrutinise carefully the reason given by the authority for departing from the guidance. Freedom to depart is not necessarily limited to reasons resulting from "local circumstances",... although if there are particular local circumstances which suggest that some aspect of the guidance ought not to apply, that may constitute a cogent reason for departure. However, except perhaps in the case of a minor departure, it is difficult to envisage circumstances in which mere disagreement with the guidance could amount to a cogent reason for departing from it."

[43] On the interpretation of the words having "regard to" a relevant consideration, I was referred to the dicta of Scott Baker LJ in Brown v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), where he stated that

"it is well established that the duty to have "due regard" involves a "conscious approach and state of mind".

This was followed up with reference to the dicta of Mr Justice Brown in R (Domb) v Hammersmith and Fulham London Borough Council [2009] EWCA Civ 946 at paragraph 52, where it is stated: -

> "The test whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and the duty must be performed with vigour and an open mind."

From the case of Letts, R (on the application of) v The Lord Chancellor and Others [2015] EWHC 402 (Admin), it is stated at paragraph 111: -

> "Under LASPO, the Director "must have regard" to the Guidance when determining whether legal aid should be granted and the Director would hence act unlawfully if he failed to have regard to those guidelines. Equally, the Guidance itself makes it clear that it sets out factors which the caseworkers "should take into account" and it is indeed specifically addressed to caseworkers. The Guidance has forensic bite. Parliament had stipulated that when it is issued it cannot be ignored and must be taken into account; its very purpose is to be influential and it would be most surprising if it were not viewed by the Director and by caseworkers as an important guide as to the manner in which they were to exercise their discretion and take decisions to grant or refuse legal aid. As such, whilst it is important not to overplay its significance, it is also important not to underplay the role that it plays, and is intended to play."

[44] In a recent Scottish case, The Highland Council v The School Closure Review Panel, a decision at Portree Sheriff Court on 17 February 2016, Sheriff JK Tierney opined that "Regard, however it is qualified, must be a conscious approach and state of mind. It must be an essential preliminary to any decision."

[45] The approach set out by Sheriff Tierney, I was urged, should have been followed in the instant case, especially where, as here, the defenders are under a duty to give notice and reasons for departure from Guidance to the Scottish Ministers. In the instant case, it was submitted that nowhere in the process undertaken by the defenders is the Statutory Guidance given any prominence. It is described as a background paper, a description which counsel disputed. Such reference is unsurprising given that the terms of the ADP Report, on which the Defenders had placed much reliance, makes no reference whatsoever to the existence of the Guidance.

[46] In addition, there was nothing before the court to show that the defenders had given notice to the Scottish Ministers that they had departed from the terms of the Guidance. Such Notice is a mandatory requirement for such departure to be lawful. A call placed on the record for the Defenders to lodge such Notice in process had gone unanswered. In the absence of any response to that call, it was submitted that no such Notice to the Scottish Ministers exists. It follows therefore that, if there has been a departure from the Guidance and the appropriate Notice had not been given to the Scottish Ministers, then illegality must

exist. Put differently, counsel submitted that the Guidance has not been preliminary to any decision relative to the subject of the "conscious approach and state of mind," nor had it been seen as an "essential preliminary in any decision".

[47] Counsel also submitted that that, insofar as formulation of the policy in terms of the policy process discloses a departure from the Guidelines, then there is an error of law in the approach taken. Furthermore, the reasoning adopted in the policy must show compliance with the Guidelines and departure from it, without any clear basis for so doing, is – it was submitted – unlawful.

[48] Counsel then attacked the defenders' approach to the "essential preliminary question" of selection of locality under Section 7. The defenders were under a duty to have regard to the Guidance because of the terms of Section 142. Mere lip service to the terms of the Guidance will not demonstrate compliance with the Guidelines.

[49] The current approach to licensing and overprovision is to be found in *inter alia* Section 7 of the 2005 Act, where a single premises' licence, based on an operating plan which gives a clear outline of an applicant's intentions, may be modified and/or adjusted subject to conditions. In addition, Licensing Boards must now take a pro-active position on over provision and identify those localities in which it would not propose to grant new licences for premises of a particular description. Licensing Boards are also allowed to take account of the particular description of premises (which, I was informed, meant their respective styles of operation), when assessing over provision. Importantly, Licensing Boards are directed to have regard to the number and the capacity of licensed premise sin localities. The fruits of this policy permit the Licensing Board to take account of changing market trends (such as the development of "hybrid" premises; provides potential entrants to the market with the clearest signal that they may incur irrecoverable costs if they apply for a licence in a locality in which the Licensing Authority has determined that there is overprovision; improves public and licensed trade confidence in the system by clearly setting out the grounds on which overprovision ought to be determined; and recognises that halting the growth of licensed premises is not intended to restrict trade but rather may be required to preserve

public order, protect the amenity of local communities, and mitigate the effects of increased alcohol consumption resulting from growing local density.

[50] Section 7 of the 2005 Act requires each Licensing Board to include in its policy statement

> "a statement as to the extent to which the Board considers there to be an overprovision of – (a) licensed premises, or (b) licensed premises of a particular description., in any locality within the Board's area."

The Act goes on to specify that the Board must have regard to (a) the number and capacity of licensed premises in the locality; and (b) consult those persons specified in Section 7(4) of the Act.

[51] It was submitted that any assessment of overprovision for the purposes of the former 1976 Act would have normally resulted in Licensing Boards selecting specific localities by reference to a town or city centre in which the premises were situated or by taking a radius from the application premises on site. With the enactment of the 2005 Act, it was put to me that the process, as formerly applied, was now inverted. The Licensing Board should now carefully scrutinise the provision of licensed premises across the whole of its area, before proceeding to determine those localities which it proposes to examine. That said, it is not necessary to divide the whole of the Board's area into separate localities. The process instigated by the Board in its selection exercise is very much within the Board's discretion and will almost certainly involve the use of its own local knowledge. The locality selected could be, for example, a particular town, city centre, a street, council ward.

[52] It was suggested to me by counsel for the pursuers that the identification of and arrival at the specific locality can be approached in a number of different ways. A possible (and reasonable) starting point may be information provided by the Chief Constable, who would be able to assist the Board in: -

> (a) identifying "hotspot" areas within the Licensing Board's area, areas where it can be demonstrated that crime, disorder and nuisance are caused by customers from a concentrated number of licensed premises.

(b) suggesting other areas in which the number of licensed premises or premises of a particular description is moving close towards overprovision.

(c) providing the Licensing Board with the geographical boundaries of such areas.

[53] Pursuers' counsel then submitted that, once the Licensing Board had made this initial assessment and determined on which localities to focus its attention, it should formally identify the number of licensed premises or premises of a particular description in those localities, determine their capacities, and then properly fulfil the consultation obligations.

[54] On carrying out such wide ranging consultation prior to the formulation of any overprovision policy, the Licensing Board will have to work in harmony with others to achieve the licensing objectives. In terms of Section 7(4) of the Act, persons to be consulted include the Chief Constable and persons who appear to the Board as being representative of the interests of

(i) the holders of premises' licences in respect pf premises within the locality;

(ii) persons resident within the locality; and

(iii) such other persons as the Board thinks fit.

The Board is also enjoined to consult the Local Licensing Forum established for the whole of the Board's area and, where not represented on the Forum, those who would represent the interests in that area of

{i} the holders of personal licences,

(ii)persons having function relating to a health, education, or social work,

{iii} young people, and

(iv) persons resident in the Forum's area.

[55] The Licensing Board's duty encompasses making the initial assessment, and deciding those localities on which to focus; identifying the number of licensed premises, or premises of a certain description in those localities; determining their capacities, and thus fulfilling the consultation obligation.

[56] Once the consultation responses have been considered, so the submission ran, the results should be evaluated to identify robust and reliable evidence which suggests that saturation point had been reached or is close to being reached, having regard to a dependable causal link being forged between the evidence and the operation of licensed premises in a locality. Factors which the Licensing Board may take into account include: -

(a) information supplied by the Chief Constable;

(b) in short, CCTV footage – supplied by the Chief Constable or another source – which illustrates disorder associated with the dispersal of customers from any location.

(c) evidence from the licensed trade that the density of licensed premises in the locality has resulted in levels of consumption which have applied downward pressure on the price of alcohol;

(d) evidence gathered from local residents of anti-social behaviour associated with licensed premises;

(e) information from the local Environmental Health Department about noise complaints which can be attributed to the operation of licensed premises in a specific locality;

(f) data supplied by NHS Board or other health bodies, e.g., local Accident and Emergency Departments or Alcohol Teams; and

(g) residents in the locality giving their view on that locality. (In connection with this strand, I was asked to bear in mind that, where the consultation was about the whole of the City of Dundee, there was no method of knowing whether people in one area of the city were expressing a view about another part of the city and what the state of affairs was in that other part).

[57] It was further submitted that it would not normally be appropriate to arrive at any decision based on one factor alone, but rather consideration ought to be given as to whether aggregated information and evidence from a number of sources points compellingly towards a particular conclusion. In addition, it was highlighted that the need or demand for licensed premises in the locality was a matter which could not be taken into account by the Board.

[58] The published policy of the Licensing Board should be expressed in such a way that interested parties are left in no doubt as to the reasons for its adoption, including the evidence upon which the Board relied and the material considerations which were taken into account.

[59] It was pointed out that the Board should carefully consider whether it wishes to state that overprovision exists in any locality having regard to the number of licensed premises and their capacities. Such an approach should only be adopted in exceptional circumstances. Because of the different types of licensed premises, and notwithstanding that the Single Premises' Licence introduced by the Act removes the former seven fixed categories available under the 1976 system, it is still possible to differentiate premises according to facilities that each may have with regard to sale and/or consumption of alcohol, the following of which were random examples: -

(1) "Vertical drinking establishments", are distinguishable from those premises caring predominantly or exclusively for persons taking meals.

(2) Nightclubs are likely to have a more significant impact on town centres, city centres and communities than, say, concert halls and theatres, although all may have a large capacity and provide entertainment.

(3) Premises specialising in adult entertainment such as lap-dancing and pole-dancing are entirely distinct from other entertainment venues and the Licensing Board would be entitled, if they saw fit, to deal with these premises in a totally distinct way.

(4) "Chameleon" premises have, in recent years, developed, whereby daytime facilities are markedly different from evening facilities, with a switch from, say, a daytime food led operation to an evening nightclub style of operation.

(5) A town or city centre hotel may have little or no impact on licensing objectives and produce benefits for tourism and the local economy while an hotel in a residential locality with few letting bedrooms but extensive bar facilities may have a negative impact on amenity of local residents.

(6) In rural locations, an hotel whose trade in mainly derived from bar sales may provide a valuable local function.

(7) Large supermarkets serving catchment areas larger than then localities in which they are situated and delicatessens selling speciality foods with a limited range of wines and spirits for off-premises consumption are distinguishable from shops devoted to off-sales and local and "corner" convenience stores selling the whole range of groceries. Convenience stores may provide an essential local service in some communities, particularly those with an elderly population, where transport considerations may make it difficult for residents to take advantage of more extensive shopping facilities available at larger supermarkets in adjoining or neighbouring localities.

[60] Thus, in the present case, so the submission continued, the Board should have selected appropriate localities across the whole area of the Board's jurisdiction, and identified the number of licensed premises or premises of a particular description in those localities and their respective capacities.

[61] With all of the foregoing, counsel attacked the decision making process of the Licensing Board directing much of his criticism at the Board's decision to go out to consultation before the locality had been identified and selected or chosen. The consultation exercise should only have been embarked upon once the initial assessment of locality had been determined, and that has to be a lawful locality. Thereafter, numbers and capacity should have been identified and assessed at "locality" level. Evidence should then have been gathered from that locality so identified, and such evidence should be evaluated to establish if there is dependable causal link.

[62] Counsel stressed that the importance of evaluation at pre-chosen locality level. He submitted, with reference to Section 7(4)(b)(i) that the duty imposed on the Board is to consult holders of licences in the locality and the residents of that locality. The consultation is also, about paying due regard to the numbers and capacity of licensed premises in the locality. (Section 7(3)(a)). Evidence should be gathered at locality level during the consultation process, that evidence being the tools to be used by the Board to arrive at its final decision. Evidence obtained during the pre-consultation exercise is, at most – so it was

submitted – background. Assessment of evidence arising during the consultation period can only be done in a meaningful way if the defenders have already pre-selected and publicly identified the locality at which they are looking. One is then able to properly scrutinise what evidence arises in the specific chosen localities.

[63] In effect, pursuer's counsel submitted, the defenders had inverted the process. The localities had not been identified prior to the consultation. Absent such localities being identified prior to consultation, it was submitted that such "consultation" as took place was neither lawful nor meaningful. There could not be evidence gathered on proposed localities, which could be scrutinised to ascertain whether there a dependable causal link between licensed premises in such localities and evidence of harms arising in those localities.

[64] Reinforcing the foregoing submission, counsel suggested that the terms of the Guidance gives assistance to Boards on how localities should be identified. The Guidance envisages that a Board will scrutinise its whole area and then seek to identify those areas where the excessive availability of alcohol is prejudicing the licensing objectives. In particular, Paragraph 44 of the Guidance states that

> "Once the Board has made the … (assessment across its whole area) … and decided localities upon which to focus…"

The Defenders ought to have and needed to carry out the exercise envisaged by the Guidance before proceeding to consultation on the important question of whether a state of overprovision does arise in any identified locality. In addition, that the Defenders did so must be clear from the approach that they took. It was submitted that there must be a properly evaluated starting point as failure to have such a starting point will render the policy flawed. If the defenders do not first identify the locality, then one cannot have meaningful assessment of any evidence pertaining to that locality.

[65] Once the potentially problem locality or localities has or have been identified, the response of relevant consultees, to quote paragraph 47 of the Guidance: -

> "should be evaluated to identify robust and reliable evidence which suggests that a saturation point has been reached or is close to being reached, always provided that

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a dependable causal link can be forged between that evidence and the operation of the licensed premises in a locality".

Counsel submitted that the above stated exercise only becomes a meaningful exercise if a consultee can be linked to a defined locality. Whilst the defenders, in their adjusted Answers, aver that Paragraph 47 of the Guidance is not relevant, the pursuers contend the exact opposite. It is relevant and is the key to the formulation of a lawful policy, before that policy can be properly applied. The defenders had not paid proper regard to the terms of the Guidance, and their formulation of the overprovision policy was deeply flawed,

[66] The terms of Section 7 of the 2005 Act were considered in the case of Martin McColl Limited v Aberdeen City Licensing Board (26 August 2015), a decision of Sheriff M Garden at Aberdeen Sheriff Court. He held that it was not open to a Board to have whole of area locality approach to the assessment of overprovision. At paragraph [18] of his judgement, he opined:

"It is not in dispute that, when considering overprovision, the defenders have to consider both the number of relevant premises and the capacity of those premises within the designated locality. If the exercise of choosing a locality is incorrect, then anything which flows from that exercise must also be incorrect".

[67] Paragraphs [6], [19[and [21] of the foregoing judgement makes clear that the Board are required to

"to consider the levels of relevant licences and capacity and it is difficult to see how they could properly achieve that exercise without some level of counting and assessment".

Sheriff Garden continued: -

"any "all area" policy makes such an assessment more difficult".

Even without an "all area" approach to policy, there must still be clarity on the issues of numbers and capacity, these being material considerations in determining whether a state of overprovision is existing in the selected locality.

[68] Section 7(1) of the Act refers to "any locality within the Board's area". Any locality described as "within the Board's area" must be less than the whole administrative area of

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the Licensing Board. In other words, consultation cannot proceed on the premise that the locality is the total area of the Board's jurisdiction.

The provisions of Section 5(1) of the Act were drawn to my attention. The subsection reads: -

> that there is "to continue to be a Licensing Board for –
> (a) the area of each council whose area is not, at the time this section comes into force divided into licensing divisions under Section 46(1) of the Local Government etc, (Scotland) Act 1994 (c.39) ("the 1994 Act")."

Section 147(1)(b) provides that "area" means

> "in relation to a Licensing Board or Local Licensing Forum, the council area or, as the case may be, licensing division for which the Board or Forum is established".

It was submitted that it would not be a normal use of English to regard locality as capable of being the whole area, in the absence of the introduction of special provision to that effect.

[69] Counsel for the pursuers advised me that Section 55(2)(a) of the Air Weapons and Licensing (Scotland) Act 2015, once it came into force, would bring into effect that provision (the facility of treating the whole of the Board's area as a "locality"). Until the introduction and coming into effect of that Section, it is not open to a Licensing Board to treat the whole of its area as a single "locality". This Section was not enacted or in force at the time the defenders adopted their overprovision policy on 21 August 2014. I was informed that, as at the date of the debate in this case, the Section was still not in force. If the law in force as at 21 August 2014 had permitted the adoption of the whole of the Board's area as a single "locality", then no amendment to the proposed locality to be covered by the overprovision policywould have been required.

[70] The official Scottish Government paper, "Further Options for Alcohol Licensing – Consultation Paper" of19 December 2012 (which led to the passing of the 2015 Act) suggested in Proposal 17

> "that the locality for assessment of overprovision can be the entire board area".

This recommendation emanated from Alcohol Focus Scotland (AFS) and the Scottish Health Action on Alcohol Problems (SHAAP).

[71] The 2005 Act had placed upon Licensing Boards a duty to make an assessment of overprovision in any locality within the Board's area. As previously submitted, the use of the term "within" is an indicator that the area for the assessment of the overprovision cannot be the entire Board area. It was argued that denying the use of the whole of the Board's area as a single "locality" presents a formidable obstacle when considering the wider scope of the protection and improvement of the public health objective, and prevents Boards from considering the availability of alcohol across their entire geographical area.

[72] In respect of the public health objective, and in the absence of a whole population approach over a wider geographical area, it was submitted that it would be difficult to make a case, and almost impossible to relate public health data to individual premises. Likewise, it would be very difficult, and again almost impossible in most cases, to make a causal link between where alcohol is sold and where it is consumed. Indeed, paragraph 47 of the Guidance acknowledges why it is very difficult to formulate an overprovision policy, underpinned by the public health objective, which can be regarded as meeting the Guidance criterion of a dependable causal link between where the alcohol is purchased and where it is consumed. Paragraph 47 of the Guidance reads: -

> "The results of all consultation should be evaluated to identify robust and reliable evidence which suggests that a saturation point has been reached or is close to being reached, always provided that a dependable causal link can be forged between that evidence and the operation of licensed premises in the locality."

The Guidance then goes on to suggest certain criteria which may properly be taken into account.

[73] In this case, it was submitted that the defenders did not identify, by reference to the whole of their area, relevant localities. In addition, they failed to go on and then consider if any locality so identified should be exempted from the overprovision policy. It would be at this stage that the defenders should have made a decision on locality, and whether overprovision existed in that locality.

[74] Taking the defender's case at its best, pursuers' counsel agreed that the decision of 21 February (to go out to consultation) treated the whole of the City of Dundee as a single

locality before, oddly, asking for views as to which localities the policy should apply, as opposed to consideration of which localities might be exempted.

[75] In submitting that the approach of the defenders was wrong, flawed and unenforceable, pursuers' counsel submitted that the defenders ought first to have carried out for themselves an exercise to determine the localities within Dundee on which they should have focussed to provide a proper and correct statutory basis for what was to follow in terms of the assessment of numbers and capacity, and in ensuring that there was a dependable causal link between the operation of premises in the locality and evidence of harm. Once that exercise had been carried out, the defenders should have consulted on which localities were or were not to be included or excluded in the final assessment.

[76] Summarising on what the pursuers submitted should have been the approach of the defenders, counsel suggested that the defenders ought to have carried out for themselves an exercise in deciding which localities within Dundee should be identified so that they could properly focus on what was to follow in terms of assessment of numbers and capacity, and in also ensuring that there was a dependable causal link between the operation of premises in the locality and evidence of harm. Having carried out all the foregoing, the defenders should then have formally consulted as to which localities were or were not to be included or excluded in any final assessment. Detailing matters further, counsel submitted that the defenders, as at 28 February 2014, ought to have at that point identified which were the chosen localities within in the City and why they were chosen. Having identified the localities, there was then a proper basis on which to: -

(a) identify numbers and capacities in those localities;

(b) consult with persons in those defined localities;

(c) receive evidence from such persons in those defined localities;

(d) having established locality, use that as a basis for deciding if, within that locality, there is a dependable link between the "robust and reliable evidence" and "the operation of licensed premises in that locality".

[77] The clear identification of localities at the outset ties into the whole question of "dependable causal link". If properly identified localities are absent at the outset, consideration as to whether there is the necessary dependable causal link between the claimed evidence and the operation of licensed premises in those localities is potentially futile. In the circumstances of the present case, counsel submitted that the localities that made up the whole city had not been identified at the start of the consultation process. By leaving it to consultees to identify locality from a starting point of there being overprovision within the City of Dundee as a whole as the declared principle, cannot be the correct approach.

[78] The defenders had erred in 2 ways. They wrongly approached locality from the perspective of "whole Board" area, an approach which contravened the terms of the Act. In the defenders' original Answers that were lodged, it was averred that the defenders were entitled: -

> "on the basis of the material, to treat the whole of their area as a locality for the purpose of their policy. They did not exclude the Central Waterfront Area in terms of their policy".

The pursuers submitted that this was a clear statement of position and showed the true thinking of the defenders. The Answers were in response to the averment of the pursuers which read that: -

> "Further and separately, it is evident the defenders in effect took the whole of the area of the City of Dundee as being an area for the assessment of overprovision but then excluded the Waterfront area."

It was submitted that the forgoing showed a confused approach on the part of the defenders. The second error, as already highlighted, was the failure of the defenders to identify at the outset of the consultation process which localities they considered might be subject to overprovision. It was submitted that this was quite evident from the terms of their decision of 20 February 2014 that they left the determination of

> "which specific localities should be covered by any overprovision policy"

to the consultees so that they (the consultees) could provide any views.

I was referred to the case of R v North and East Devon Health Authority (2001) QB 213 where Lord Woolf stated at paragraph 108

> "...if (consultation) is embarked upon, it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response..."

[79] The consultees should have been provided with the defenders' proposals as to the locality or localities to be covered by the over provision policy. This is implied by what is considered to be a proper consultation exercise. It was submitted that, in the instant case, those consulted did not have sufficient material to give a properly informed response.

[80] It was pointed out that ADP Report of January 2014 suggests a whole range of approaches on what approach could be taken. Suggestions included a whole city approach, LCCP, (Local Community Planning Partnerships), CRA (Community Regeneration Areas) , whether the policy should be applied to on-sales or off-sales or both etc. There was nothing presented to the consultees to show which localities the defenders proposed to be subject to the overprovision policy that was then being formulated. It was for the defenders to propose the locality, not for them to delegate to the consultees such a fundamental decision.

[81] Was this exercise carried out to ensure that as near a whole City Policy was secured? In excluding what was described as the "Central Waterfront Area" from the whole city raised concerns that this was done largely as a cosmetic exercise, so as to avoid a legal challenge. There is also nothing in the papers before the court to demonstrate that the defenders had regard to numbers and capacities in chosen localities before they embarked upon the consultation exercise. It was submitted that if, in truth, this was because they had not selected a locality or localities on which to focus, this simply compounds the other separate error. In addition, Section 7(3)(b) requires that there be consultation with *inter alios* persons resident in the locality, as well as premises licence holders within the locality. Unless one knows what locality one is dealing with, one cannot properly identify who is to

be consulted. It was submitted that consultation with the whole population of the City is not consultation with persons resident in a locality, or holders of premises licences within a locality. The issues prevalent in a locality A may be quite different from those in locality B. There could be no confidence, according to pursuers' counsel, that there was consultation with persons in pre-identified localities, and who were aware and knew about what they were being asked because they had experience of that defined locality, whether as holders of licences or residents.

[82] Following on from the Freedom of Information request, it would appear that there were no geographical limits on those who were consulted. It was also clear from the Report dated 12 August 2014 prepared by the defenders' clerk and from the policy that was subsequently formulated that the defenders have taken into account the consultation responses and the material in their clerk's report. Most of those who responded to the consultation would appear to have favoured a "whole city" approach. Pursuer's counsel submitted that there could be no confidence in a process when the Board was open tom influence by responses from persons who do not live in localities determined in advance before the consultation process commenced.

[83] Quite separately, these was a separate submission on behalf of the pursuers that the overprovision policy was unreasoned. The Statement of Reasons did not contain adequate, intelligible and lawful reasons.

[84] The Statutory Guidance should have been at the forefront of the imposition of any consideration of an overprovision policy by the defenders. This is a direct consequence of the provisions of Section 142(3) of the Act which *inter alia* sets out: -

> "(3) Each Licensing Board must, in the exercise of their functions under this Act, have regard to any guidance issued to them under subsection (1)."

There was nothing in the Clerk's Report 71-2014 dated 20 February 2014 (5/2/4 of process) or the actual policy process of the defenders taken on that date to demonstrate that the defenders had, as they were required to do in terms of paragraph 44 of the Guidance, properly addressed themselves to the identification of localities as an essential preliminary

of the consultation process. Similarly, it was submitted on behalf of the pursuers that, with regard to the Report 317-2014 dated 21 August 2014, allied to the Minute of the Defenders of even date adopting the policy under appeal, that a bland, unalloyed assertion that the Guidance was there as background will not suffice.

[85] That failure to follow the Guidance was exacerbated when the defenders' failed to identify localities before putting the document out to consultation. This occurred when the defenders failed to take a pro-active role in the assessment of overprovision and this ought to have included a clear pre-consultation decision as to which were the localities on which the consultation was to focus. The failure to do so is in clear breach of the Guidance. Furthermore, there is nothing to show that the defenders ascertained numbers and capacity in the selected localities before proceeding to consultation. The policy development exercise – by leaving "locality" open – pending consultation responses on a possible narrowing down of locality, would appear to be yet another unexplained departure from the Guidelines. Capacity was not addressed. A mandatory consideration in overprovision assessment is capacity, this being a material factor when determining if there is overprovision in any locality. Capacity must be addressed in the consultation process. To carry out a rational overprovision assessment, there has to be a link between locality and capacity in that locality. Counsel submitted that that there was no evidence to show that the defenders consciously addressed this issue at that stage.

[86] Turning again to Paragraph (50) of the Guidance, counsel submitted that – following on their consultation process – the defenders failed to have regard as to how the policy ought to be expressed (to comply with the directives of Paragraph 50), or that they were aware that an "all premises" approach should be exceptional (in terms of Paragraph 51 of the Guidance). The reader of the policy is entitled to know (and read in a sufficiently reasoned way) why a particular conclusion was reached, having regard to the test that is to be applied. If the policy is "unreasoned", then the reader will have little confidence that the defenders have asked themselves the correct question. Is there a dependable causal link between the operation of licensed premises in this locality and harm occasioned in this locality?

[87] There is no reasoning process evident in the policy. It simply refers to other material. The ADP material of itself cannot supply the missing link. Can the reader have confidence that the defenders have properly addressed the issues identified in the preceding paragraph? Counsel stressed that, if the Guidance is not followed, clear reasons must be given for departing from it. Did the defenders approach this exercise with the requisite rigour and vigour? Counsel again criticised the defenders for not selecting lawful and relevant localities before going out to consultation. In inviting consultation responses, the defenders did so against a background of: -

1. either taking the approach that the entire City of Dundee as a whole was a locality, (which approach was unlawful at the date of the consultation); or
2. failing to identify for themselves which localities they considered might require to be subject to an overprovision policy, before going out to consultation (which approach counsel also considered to be unlawful). The duty of the defenders was to identify relevant localities before going out to consultation.

[88] In suggesting that inadequate reasons had been given for the policy adopted, counsel referred to the dicta of LJC Gill in the case of Ritchie v Aberdeen City Council 2011 SC 570 where he opined at Paragraphs 12 and 13: -

> "12...In fulfilling his duty to give proper and adequate reasons, the decision-maker need not engage in an elaborate and detailed evaluation of each and every point that has arisen at the hearing. But his statement of reasons must identify what he decided to be the material considerations; must clearly and concisely set out his evaluation of them; and must set out the essence of the reasoning that has led him to his decision.
> 13 The general principles governing the matter are well established; but in every case the validity of the decision complained of must turn on the wording of the statement of reasons."

The above dicta follow on from the now classic dicta of LP Emslie in the cases of Wordie v Secretary of State for Scotland 1984 SLT 345 at paragraph (11) and Albyn Properties Ltd v Knox 1977 SC 108 (at page 112).

[89] Paragraph 50 of the Statutory Guidance imposes a duty on the defenders to give reasons why they had reached a certain view on overprovision. That case law is also, it was

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submitted, relevant to the separate challenge to the adequacy of the reasons set out in the formal Statement of Reasons. The defenders had not followed the Guidance, and had thus ended up applying a "flawed" policy. There had thus been an error of law, with defenders' discretion being exercised in an unreasonable way. The Statement of Reasons must clearly identify the process that has been followed and the essence of the reasoning on material issues. The statutory process has to be followed, and the whole process has to conform to statutory requirements. It was submitted on behalf of the pursuers that the policy did not properly set out these factors, or at least did not provide a properly articulated basis as to why the Central Waterfront Area was excluded, and why the whole remaining area which was included in the overprovision policy was included. It was noteworthy that the policy did not identify numbers and capacity which the defenders had considered before arriving at their decision.

[90] The defenders' policy should have been framed and expressed in such a way that interested parties are left in no doubt as to the policy and exceptions to the policy, and the reasons for the adoption of the policy; the evidence relied upon by the defenders, and the material considerations taken into account which justified the adoption of the overprovision policy.

[91] Counsel was particularly critical of the following statement found in the Statement of Reasons 5/1/9 of process, at paragraph 10a.2: -

> "The material before the Board when they adopted the policy is summarised in Report 317 – 2014 which can be accessed on the Council's Minute Page on this website. ...Taking this material into account, together with the location, number and capacity of existing licensed premises in the City and the Board's local knowledge of the area, the Board determined overprovision in the city as outlined above."

The submission was that, interested parties, including the pursuers, are entitled to know what the defenders made of the material and why the conclusions as to the extent of the application of the policy and exception to it were reached.

[92] It was claimed that there were a series of errors in the Statement of Reasons Adequate notice to interested persons, should enable them to discern from the Statement of Reasons: -

(1) What localities were chosen by the defenders on which their assessment could be concentrated? Why was the policy cast in the words that were selected?

(2) What was the outcome of assessment in the chosen localities after consultation and why? How did the defenders approach locality to achieve something that looks like the whole of the City of Dundee less the Central Waterfront Area?

(3) Where is the evidence to link localities to evidence of overprovision? Where is the dependable causal link between the premises in these localities and overprovision? It was important to note that the ADP Report, on which the defenders heavily relied, did not offer to provide evidence of that dependable causal link, Counsel suggested that the Report rested on the equation that "availability equals harms, and harms equal overprovision". Put starkly, the defenders simply relied on the ADP material without addressing the issue of dependable causal link. Following on from the foregoing, the ADP recommendation was based on health harms only. The overprovision policy bears to apply to both on-sales and off-sales premises, because of "powerful evidence to show the extent of alcohol related harm in the City, in terms of both damage to public health and alcohol-related crime ". Since the policy does not differentiate between health and crime, there was no evidential basis for a control on off-sales, based on alcohol related crime, a factor which the ADP Report did not seek to explore, but which was plainly an important factor underpinning the basis of the policy.

(4) What were the numbers and capacities of the licensed premises to which regard was had, prior to the adoption of this policy? This point had been addressed by Sheriff Garden in Martin McColl Limited v Aberdeen City Licensing Board (26 August 2015 – unreported) and Paragraphs 6, 19 and 21 of that judgement.

(5) Why was the Central Waterfront Area excluded, when it was earlier included in the previous assessment exercise covering the whole of the City of Dundee. The defenders' decision of 20 February 2014 would appear to indicate that that Central Waterfront Area was deemed to be part of an area of overprovision. What happened

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between that date and August of the same year, when this area was excluded from the policy? What were the considerations underlying that decision? Were irrelevant (such as need or demand or commercial) considerations taken in to account?

(6) Did the defenders have regard to the late ADP recommendation about the "Central Waterfront regeneration area"? The date on that letter, 15 August 2014, postdates the material summarised in the Report 317-2014. If the defenders did take it into account, then counsel submitted that *ex facie* the policy is not accurately expressed. Following the approach laid down by Paragraph 50 of the Statutory Guidance, taking it into account would be fatal to the legitimacy of the flawed overprovision policy. Can one have confidence, counsel asked, in what the defenders did or did not have regard to and what they made of such at the time when the overprovision policy was adopted. The pursuers have genuine concerns that what may have occurred is being utilised as simply *ex post facto* justification. If the defenders did have regard to the out of time letter sent by the ADP, then the fact that they did so should have been formally acknowledged and made plain in the policy document. In truth, which considerations were those to which the defenders paid attention and gave credence?

(7) If the defenders did have regard to that "late letter" from ADP, there is still no clear evidence on which to form any basis for exempting the CWA to any degree whether from its whole area or limiting any exemptions to hotels, restaurants, or cafes. Counsel summarised the position as "being redolent of a desperate last minute attempt to avoid an unlawful whole Boards area overprovision". If the defenders did have regard to the out of time ADP intervention, there is still no explanation as to the basis on which the CWA was to be exempted. Why was this area (the CWA) not considered to be overprovided?

(8) What was the reasoning adopted by the defenders, and why was it not spelled out in accord with the ADP letter of 15 August 2014? The ADP recommendation did not seek to attempt to exempt all off-sales premises, but the policy does.

(9) Did the defenders take into account the consultation responses as to where any policy should apply? The Report prepared by the defenders' clerk simply illustrates possible options. No recommendation is made one way or the other.

(10) Criticism was also advanced of the use of unidentified and unexplained "local knowledge". If "local knowledge" on the part of board members did indeed have a role to play, there is no indication of what that knowledge is, and the extent to which reliance was placed upon it.

(11) What is meant by "Location of premises"? This expression and its meaning is not addressed by the defenders. The pursuers ask whether it is location relative to the overall locality, (whatever that may be), relative to other licensed premises, relative to schools, relative to housing. The informed reader can have no idea what was taken into account, and the free use of the expression "locality" must be considered as seriously unsatisfactory.

(12) Counsel set out series of additional criticisms of the Statement of Reasons, in respect that it states that the policy was based on Ward/LCCP, (Local Community Planning Partnership), something that counsel submitted was not evident from the policy itself. The range of problems include: -

1. The overprovision policy does not state in terms that it is based on Ward/LCCP.
2. The policy does not identify any specific localities in terms relating to Wared/LCCP.
3. The ADP Report, on which the policy may be based, suggests a range of options from "whole city", limited area LCCP or CRA based options.
4. Other options may exist to which no reference has been made by the defenders.
5. From consultation responses and the report from the defenders' clerk dated 12 August 2014, it appears that there was little support for a Ward/LCCP approach. (Responses showed that most favoured a "whole city" approach as did the ADP as Option 1.) The Statement of Reasons suggests the approach taken was a Ward/LCCP approach. What was the process here which arrived at a conclusion?
6. If a Ward/LCCP approach was the approach taken, what had changed so dramatically from February 2014? The boundaries of the Wards/LCCP were still the same. Why was a non-ward area – the Central Waterfront Area –

excluded from the area affected by the overprovision policy? There is no answer or solution immediately available to persons who referred to the terms of the overprovision policy, or who seek to understand that policy.

7. Overall, and recognising the way that the defenders conducted themselves and apparently acted upon the responses to the Public Consultation Document, there was a real risk of arbitrary decision-making and decision-taking on the part of the defenders.
8. All factors taken into consideration, counsel submitted that the whole exercise leading up to the adoption of the overprovision policy was redolent of *ex post facto* reasoning to bolster a policy in which the reasoning in support of it should be transparent and apparent from the face of the policy itself.

[93] In submitting that there has been little compliance with the terms of Paragraph 50 of the Statutory Guidance, counsel added that it is not for the Statement of Reasons or the Answers in this process lodged on behalf of the defenders to make good any deficiencies in policy. It must stand on its own feet and in its own terminology as a reasoned document, which complies with its statutory basis. In the final analysis, the policy document must be *ex facie* adequate and intelligible. Counsel submitted that this was not the position found in the instant set of circumstances.

[94] Counsel argued that a duty to consult does not equate to a duty to comply with the wishes of the consultees. The content of the duty of consultation encompasses: -

1. A consultation must be undertaken at a time when proposals are still at a formative stage.
2. The consultation document must include sufficient reasons for particular proposals, to allow those consulted to make intelligent consideration and an intelligent response.
3. Adequate time must be given for the consultation document to be considered and responses prepared and submitted.
4. The product of the consultation must be conscientiously taken into account when the ultimate decision is taken.

[95] Counsel helpfully referred to the *dicta* in a number of cases, which he said supported his arguments. At paragraph 108 of R v North and East Devon Health Authority *ex parte Coughlan* (2001) 1QB 213, the court opined: -

> "It is common ground that...if (consultation) is embarked upon, it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken. (R v Brent London Borough Council ex p Gunning (1985) 84 LGR 168)."

[96] On the whole question of identification of localities, counsel stressed that it was for the defenders to identify the localities, and thus it is they who must choose the localities and ask for responses which considered the pre-selected localities. A declaration that that "the whole city is overprovided with the exception of specified areas" again shows an incorrect and wrong approach. In like manner, offering the option of "whole city", the consultation was skewed from the very start. The consultation document did not contain a lawful or meaningful proposal.

[97] A variety of responses were received, the majority favouring the "whole city" option, whilst others favoured localities e.g. Wards/LCPP and CRA's, and a few suggested specific areas. The consultees did not give any reason for any of their selections. Counsel queried whether the consultation exercise was eloquent of the process being motivated by an improper purpose to achieve a pre-conceived outcome. The independent and fair-minded observer would have had little confidence in this consultation, which counsel described as both meaningless and irrelevant. It had proceeded in the absence of properly defined localities, (which should have been determined by the defenders), and without clarity on numbers and capacities in the relevant localities. Additionally, (and this would be later cited as a reason <u>not</u> to remit the application back to the defenders for reconsideration), the ADP letter of 15 August 2014 (page 27 of 5/2/5 of process) was lodged well outwith the consultation period, and no one was afforded the opportunity to comment on the new proposal.

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Local knowledge

[98] Did the Board take local knowledge into account? The principle, taken from the case of Freeland v Glasgow District Licensing Board 1979 SC 226, is that the rules of natural justice preclude a board from taking a decision against a party upon facts within the knowledge of the board without disclosure of those facts to him for comment. As Lord Kissen stated, at pages 234 and 235: -

> "If there is some material fact which could influence the decision against an applicant or objector, it seems elementary justice to us that the applicant or objector should be told about it so that he may have the opportunity of meeting it or commenting upon it".

The instant case before the court is a policy case. Cases such as Mirza v City of Glasgow Licensing Board 1996 SC 450 and Pagliocca v City of Glasgow District Licensing Board 1994 SC 561 were not policy cases, but rather cases about specific applications where one tried to infer what the local knowledge might have been, on the basis of what was heard and said before the board.

[99] In the instant case, the development of a broad licensing policy where the considerations that inform the decision are in a policy document. What is local knowledge of the area as a pre-determined position is being dealt with. Contrary to the Mirza and Pagliocca cases, this case, together with its own particular circumstances, is quite different. In policy development, there are many considerations to be brought into play and it is difficult to infer in which sense local knowledge may have been brought to bear.

[100] Counsel asked: -

(1) What comprises local knowledge of the area?

(2) What is the area under consideration?

(3) Is the local knowledge, knowledge of the area as a whole?

(4) Or, alternatively, is it the city minus the Central Waterfront Area?

(5) Is it knowledge of different potential localities?

(6) Is the knowledge, knowledge of possible alcohol related harms in the area?

(7) If so, which types of alcohol-related harms?

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(8) Is the knowledge, knowledge of links of harms to licensed premises in the area?

(9) Is the knowledge that of the geography of the area?

(10) Or is it knowledge of the outlet density?

(11) Does the knowledge include, for example, knowledge of crime rates, health issues, problems with types of premises?

(12) Is the knowledge in addition to the material that the defenders received from the Alcohol and Drugs Partnership?

(13) What was the exact local knowledge that played a part in the decision taken, and how did it impact upon the general discussion and decision making process?

(14) Was local knowledge material in its own right, or used to interpret other material?

(15) How could anyone know in advance of an application just what this local knowledge comprised?

Section 23(5)(e)

[101] From paragraph 10a.1, of the Statement of Reasons, it is not immediately evident which strand of Section 23(5)(e) was relied upon by the defenders. Because of the reference to section 23(5)(e), that may have referred to licensed premises in the locality in which the premises are located. Thus, the argument runs that the defenders considered that the granting of this New Premises' Licence would result in an overprovision. It follows that the defenders must have applied the provisions of Section 23(5)(e) when determining this application. Importantly, it was pointed out that if this assessment was based on an "all premises" basis, these premises must have included off-sales.

[90] Looking at the rest of the reasoning in paragraphs 10a.2 and 10a.3, it would appear that the defenders purported to apply their "all-premises" policy, but then simply narrated the off-sales capacity in the policy area. In refusing this application the defenders purported to refuse in terms of Section 23(5)(e)(i). To lawfully do that, they must identify the applicable on-sales capacity, whereas the listed sales capacity in the Statement of Reasons is capacity

figures for on-sales only. It was submitted that that approach was wrong, since the overprovision policy is in respect of all premises. The policy refers quite specifically to both on and off sales. Only capacities for off-sales was before the Board. Support for this can be found in the decision of Sheriff J Bickett in the case of Nasir v North v North Lanarkshire Licensing Board (unreported from Hamilton Sheriff Court dated 17 November 20110, and in particular paragraph 41.

[102] In summary, the defenders have only referred to the capacity of off-sales. Because an essential component of the first leg i.e. capacity of on-sales is missing, the defenders' decision cannot stand. It was central to any decision that the defenders address capacity in the correct way.

[103] In the whole circumstances, and recognising that the sole ground for refusal of the application was that the granting of this application would breach the overprovision policy that the defenders believed was in place for that locality of the city covered by the policy, and the pursuers submitting that the whole policy was misconceived and wrongly established for the reasons already advanced, I was asked to uphold this appeal and thereafter either reverse the decision of the defenders or alternatively send back the whole matter to the defenders for reconsideration.

Submissions for the Defenders

[104] In commencing the submission for the defenders, Mr Stuart QC submitted that, whilst it was legitimate to attack in a statutory appeal a policy (the defenders' overprovision policy) which has been applied to a decision on the ground that it was *ultra vires*, it is irrelevant in any appeal to challenge or criticise the way in which the defenders went about formulating the actual policy. Such challenge should have been brought by way of judicial review of the policy after it had been adopted. All that can be challenged in this statutory appeal is the application of the policy to the individual application on statutory grounds, which would include the *vires* of the policy. What may not be included however is any criticism of the actual policy, consultation process, reasoning in the policy, and whether

there was sufficient basis for the imposition of the overprovision policy before the Board when it was adopted.

[105] Section 131(3)(a) of the Licensing (Scotland) Act 2005 allows an appeal against the decision of the Licensing Board if, in reaching their decision, the Board: -

i. erred in law.

ii. based their decision on an incorrect material fact.

iii. acted contrary to natural justice, or

iv. exercised their discretion in an unreasonable way.

[106] In addressing the argument for the defenders that "locality" – for the purpose of the overprovision policy – which extended to the whole of the Board's area but under exception of the Central Waterfront Area was simply a device adopted to avoid treating the whole area as a single locality, (a tactic which senior counsel om behalf of the defenders vehemently denied) – I was asked to compare the original proposal of February 2014 with the policy that was ultimately adopted by the defenders in August 2014. The whole of the Board's area was initially to be covered by a proposed overprovision policy. After receipt of responses to the consultation document, an area – now identified as the Central Waterfront Area – was excluded and not made subject to the overprovision policy. The defenders did not merely rubberstamp what had been earlier proposed and consulted upon. The locality was significantly changed.

[107] While, in many cases, localities will be smaller areas within the wider whole area of the board's jurisdiction, senior counsel submitted that it did not thus follow that any locality adopted must be so limited. Whilst it would be perfectly competent to for the board to treat specific and delineated areas as potential localities, it nonetheless remained open to the Board to determine that, looking at the totality of those areas which could add up to the entire Board area, there existed, on the basis of material before the Board, overprovision. Examination of the actings of the defenders in this case do not demonstrate the adoption of such a policy.

[108] Senior Counsel then submitted that the facts underlying the decision of Sheriff Garden in Martin McColl v Aberdeen City Licensing Board *supra* can properly be distinguished from the facts in the present case. Unlike the present case, the Aberdeen Board appear to have proceeded on the basis that Section 7 of the Act did not support the use of the entire area to assess overprovision. They thus decided to exclude 2 areas. Sheriff Garden's approach and logic is set out in paragraphs [17] and [18] of his judgement. What the Board in that case did was to exclude

> "two areas of no consequence in an effort to present the resulting locality as other than covering the whole area. This approach is plainly disingenuous but further it does not follow the requirements of the statute."

[109] Somewhat differently in the present case, it was clear, so ran Mr Stuart's submission, from the reports prepared for the defenders in February and August 2014 that the defenders had identified the option of concluding that there was overprovision throughout the whole of their jurisdiction, which they could consider along with the option of specified localities. The option of designating the whole area as overprovided for was not of itself unlawful for the reason advanced. Thus, it cannot be concluded that – by excepting the area now identified as the Central Waterfront Area – the whole process was a mere cosmetic exercise.

[110] In this case, senior counsel submitted that the Board treated locality as their area, less a "discreet, identifiable and substantial area", which could be readily identified from plans and maps attached to the policy. The area excepted was an area awaiting significant development, and there was not there a significant number of licensed premises there.

[111] The basis for the exception can be found in the letter from ADP dated 15 August 2014. (Pursuers' second Inventory 5/2/5 of process at page 27). Senior counsel very properly recognised that that there is no mention of this letter in the Policy document. The Board members did however have that letter before them. Although the Board did not incorporate justification for this letter's suggestions into the policy, the very existence of the letter provides a rational explanation for the proposed exception of the Central Waterfront Area. It was urged upon me not to hold that this was a cosmetic exercise.

[112] Accepting – for the purpose of argument – the suggestion that the letter of 15 August 2014 from the ADP should perhaps not have been taken into account, as it was received outwith the consultation period set by the Board, senior counsel submitted the consultation period was not a prescriptive statutory period. In fact, the letter did not bear to be a consultation response. Senior counsel submitted that it was no more and no less than a recommendation to the Board. In the final analysis, it was a matter for the Board to take into account whatever material it considered appropriate and relevant in arriving at its policy. In consultation, the Board did not commit itself to any specific locality. The consultation itself was not a formal statutory consultation in respect of a specific application or statutory decision where an issue of fairness to applicants and objectors can arise quite apart from any breach of a specific statutory provision.

[113] Given that the overprovision policy had not been subject to Judicial review, the remaining issues – such as how the policy was adopted, consultation, treatment of responses and what the policy may or may not say – are irrelevant to the treatment of the pursuers' application in this process. As Mr Stuart expressed matters:- "These factors may have carried some force or weight, but only if the policy had been the subject of a Judicial Review challenge."

[114] On the status of the Guidance, which was prayed in aid by pursuers' counsel as a basis for attacking the overprovision policy on a number of issues, it was submitted that – if the policy had been earlier challenged in a Judicial Review – the Board would have been placed in a position where it would have had to justify or explain its actions. Where, as here, the policy was not challenged by way of Judicial Review, the policy was adopted and the Board at a later date refused an application on the strength of the published policy, it did not follow that the Board cannot apply this policy to specific applications. Notwithstanding his submission that the policy and its adoption could only have been challenged within the parameters of a Petition for Judicial Review, senior counsel did proceed to respond to the pursuers' submissions.

[115] On the whole issue of the formulation of the overprovision policy, senior counsel identified the pursuers' criticism of the defenders for their alleged failure to properly identify localities where over provision existed before proceeding to consultation. Whilst acknowledging that, in terms, the defenders did not identify localities as such, they did – on the other hand – clearly set out potential localities in their report (11/4 of process, at 43-4). Counsel also reminded me that there is no provision in Section 7 which requires Boards to fix on any particular locality or localities upon which to consult, although one would expect that there be proposals in place before matters were put out to consultation.

[116] It was clear that the defenders – at their February meeting – decided in principle that there was evidence of overprovision in their area (as per 5/2/2 of process). This in turn fed into the Public Consultation Document (5/2/3 at paragraph 2.1). As such, the defenders were identifying the whole of their area as an area in which, potentially, there was evidence of overprovision.

[117] The defenders, without committing themselves to any particular final decision, were identifying their area as a potential locality in which there may be a degree of overprovision. Subsequently, the defenders invited comments on locations, an invitation in respect of which they could not be faulted. I was reminded that the whole exercise of consultation was to receive views before the definitive decision is made. Clearly, the defenders had not reached any concluded view as at the stage of consultation. The defenders had invited comment om localities, which indicated that the defenders were expecting representations, which could alter their original position. The consultation exercise was both transparent and appropriate.

[118] With regard to "numbers and capacity", I was again referred to the specific provisions of Section 7(3) of the 2005 Act, which prescribed that the defenders must "have regard to" the number and capacity of licensed premises in the locality. It was clear, from the terms of the overprovision policy as adopted by the defenders that number and capacity had been taken into account. The full extent of licensed premises in the designated locality had been referred to in material which was before the defenders whilst this proposed policy

was under consideration. This can be extracted from the ADP Report 71-2014, which is at 5/2/4 of process and the relevant maps on pages 9 to 16 of that production.) Senior counsel submitted that it was not possible at this much later stage to go behind what is said in the policy document relative to what was taken into account. It could not be seriously be argued that the overprovision policy should not be applied in the absence of numbers and capacity, when these issues had been addressed in documentation earlier presented to the Licensing Board.

[119] In similar vein, he argued that the same point applies to contentions in Condescendence 8 about reference to local knowledge and locality in the policy. With the passage of time since the adoption of the policy, it was – at his stage – far too late to make extensive scrutiny into what local knowledge and locality was in the minds of the defenders at the time of adoption of the policy. It was further submitted that none of the foregoing could have any bearing on the lawfulness or vires of the actual policy or its application to applications to the defenders, or to applications under appeal. There was nothing wrong with reference to the location of licensed premises. It can be presumed that the defenders, with individual members coming from the local community, know the locations with which they are dealing. Senior counsel asked whether, in every case, those members of the defenders are expected to spell out, in some detail, the extent of their "local knowledge". In this case, it was further submitted that there was nothing capable of suggestion that any undisclosed local knowledge had any bearing upon the determination of this application, which could be a relevant ground of appeal.

[120] The Board, in setting out the overprovision policy, did not require to go into detail as to their evaluation of material and their reason for the adoption of the policy in the terms in which it was adopted. It was sufficient and adequate that reference be made to the material available to the Licensing Board on which the overprovision policy was adopted.

[121] Had, for example, the issue (the "all premises" issue), been earlier raised in the proper forum, (a Petition for Judicial Review), the sole question for determination would have been whether the defenders, on the basis of the material then before it, were entitled to

adopt the overprovision policy within the parameters which they applied. The policy could only be challenged if the defenders erred in law or acted unreasonably in so doing.

[122] Indeed, the defenders were clearly entitled to adopt the overprovision policy in the terms that they did. They had had before them – at the time of adoption of the policy – the ADP Report, the February Report with its important appendices, the consultation responses, the August Report from the Clerk to the defenders and the additional ADP Letter dated 15 August 2014. With this plethora of information from a whole variety of sources, it was wrong to contend that the defenders erred or acted unreasonably in the various respects which were the subject of criticism by the pursuers' counsel.

[123] In a nutshell, the defenders did not require to explain to consultees why the whole area was considered as an "overprovided" locality. The requirement was on the defenders to consult on potential localities and obtain views, they had to summarise material before them, and give information in the Public Consultation Document of the basis on which consultees may respond. That Document 5/2/3 of process at 1.4 to 1.8 does give the background information to consultees to enable them to properly respond. It is neither possible nor appropriate to pre-determine the form of consultation or what is required for consultation. Everything will turn on the individual circumstances and the statutory provision. Section 7(3) of the 2005 Act dictates that there is a general duty to consult. Likewise, the Statutory Guidance (paragraphs 37 and 45), is not specific. In this case, the defenders determined the form of consultation, and kept to the forefront of their minds that this was a public consultation – in respect of a proposed policy. Once adopted, all applications have to be considered against that proposed policy and the Board must consider whether any exceptions to the policy can properly be admitted. This is "not consultation before the taking of a decision on a particular application, which falls to be determined".

[124] Similarly, the criticism directed against the use of the online survey (in the course of the consultation exercise) was misguided. The questions put forward for public response and comment were straightforward and easily comprehendible. It was the defenders'

decision how they consulted. I was asked to bear in mind that the defenders' ultimate decision on the overprovision policy was not based exclusively on the public response to the consultation. That was simply one factor that was considered before the decision was reached. The whole process of the adoption of the policy should not be impugned simply on the basis of certain questions asked or the form of the consultation exercise. This matter cannot properly be one for a statutory appeal.

[125] Turning to the determination of the application, senior counsel rejected the argument that the correct test in terms of Section 23(5)(e) had not been applied. This was not the "arbitrary application of the policy". It was not correct to categorise the decision taken in this case as involving purely policy decision without consideration of an exception. The defenders were fully entitled to take into account their overprovision policy. As can be observed from the defender's Statement of Reasons number 5/1/9 of process, and Paragraphs 10a.1 and 10a.3 thereof, the defenders determined that to grant this application would result in an overprovision of licensed premises. The defenders had carefully considered all that had been said on behalf of the pursuers, but were neither convinced nor persuaded that an exception should be made in favour of the pursuers. In addition, whilst there was criticism from the pursuers of there being no direct reference to sales numbers and capacity in the Statement of Reasons, it required to be kept in mind that the application in this case was in respect of off-sales only, and there had thus been no need to refer to on-sales figures and statistics.

[126] Complaint that, in the absence of an objection, the representative of the Drug and Alcohol Partnership (ADP) was permitted to speak at the hearing, was stated by senior counsel as not being indicative of a "closed mind". An examination of paragraph 10.5 of the Statement of Reasons makes it clear that – in arriving at their decision – the Licensing Board disregarded the comments made during the verbal presentation made by Mr Allan of the ADP when the pursuer's application was determined.

[127] In addition, it is not averred in what respect Dr Drew Walker went beyond the objections that he had earlier articulated in his letter to the board of 23 December 2015

(number 5/1/4 of process). Paragraph 9.1 of the Statement of reasons (5/1/9 of process) demonstrates that his verbal submission – before the defenders considered their decision in this application – was entirely on all fours with what he had already submitted to the Board

[128] Finally, whilst accepting that the overprovision policy was largely an Alcohol and Drug Partnership driven policy, that fact *per se* does not permit the ADP to dictate the policy of the defenders. The ADP is, without question, the source of much material presented to the Defenders. That fact dos not however undermine the overprovision policy and cannot be said to be eloquent of a lack of objectivity on the part of the Licensing Board at the time of adoption of this policy.

[129] The defenders were perfectly entitled to take into account the letter from the ADP of 15 August 2014, when they came to dispose of the application by the pursuers. It was a single strand of a substantial body of evidence and submissions considered by the defenders before determining the pursuers' application,

[130] Senior counsel further submitted that the Statement of Reasons, properly read in conjunction with all the other documents in the application, did not disclose any error on the part of the defenders of any material fact. He also submitted that the decision of the defenders was well within the parameters of discretion that they, as a quasi-judicial body, were afforded.

In all the circumstances, this appeal should be refused.

Decision

[131] At the outset, I must express my gratitude to all involved for furnishing me with written copies of their submissions. That these have been available to me has made the writing of this judgement a little less burdensome. Having given this matter and the submissions much thought, I am of the opinion that the submissions of the pursuers fall to be preferred and that this appeal ought to be granted.

[132] The pursuers applied for and obtained planning permission for a new build modern supermarket at Myrekirk Road, off Kingsway West, Dundee. With the grant of planning permission in their favour, the pursuers applied to the defenders for a provisional off-sales premises' license. The refusal by the defenders to grant that licence is the catalyst for this litigation. As is set out in paragraph [3] *supra*, the pursuers sought an off-sales licence in respect of a permanent area of 31.5 square metres, with an additional 6.75 square metres at the festive period, (which would normally run from 24 November until 9 January of the following year).

[133] The application was lodged and the hearing before the Licensing Committee took place on 14 January 2016. An objection was lodged by the Dundee Alcohol and Drugs Partnership (ADP), the objection being that the defenders had in place, for the whole of the City of Dundee under exception of an area which the defenders termed the "Central Waterfront Area" (CWA), an over provision policy, which they had adopted in late 2014. The pursuers' solicitor made a lengthy verbal submission, (which also questioned the *vires* of the policy), and there was also support for the granting of this application from the Chairperson of Charleston Tenants and Residents Association.

[134] Objection to the granting of the pursuers' application was articulated by Dr Drew Walker, the Director of Public Health, of NHS Tayside. In a nutshell, his objection was that the grant of this application would breach the Board's overprovision policy. He also argued that the granting of this application would increase the availability of alcohol at low prices. There was, he said, a clear relationship between availability of alcohol and amount consumed, together with recognition of associated anti-social problems.

[135] The defenders' decision was to the effect that the grant of this application would result in there being overprovision of licensed premises in the area. In refusing the application, the Board held, (Paragraph 10a of the Statement of Reasons 5/1/9 of process), that there was nothing in the pursuers' application or submissions which made this application a case which could be treated as an exemption to the overprovision policy which they regarded as being in force, and the application thus fell to be rejected.

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[136] Much criticism was made of the overprovision policy which the defenders utilised in their refusal of the pursuers' application. The pursuers' serious and in-depth criticism of the policy are set out in paragraphs [7] onwards of this judgement.

[137] Section 4 of the Licensing (Scotland) Act 2005 sets out the licensing objectives thus: -

(1) For the purpose of this Act, the licensing objectives are—
(a) preventing crime and disorder,
(b)securing public safety,
(c) preventing public nuisance,
(d) protecting and improving public health, and
(e) protecting children from harm.

Section 5 of the same Act provides for the continuation of the Licensing Board for the area of each council, whose area is not, at the time the section comes into force, divided into licensing divisions (in terms of Section 46(1) of the Local Government etc, (Scotland) Act 1994.

Section 6 of the same Act legislates on Statements of Licensing Policy.

(1) Every Licensing Board must, before the beginning of each 3 year period, publish a statement of their policy with respect to the exercise of their functions under this Act during that period (... *the licensing policy statement.*)

(2) A Licensing Board may, during a 3 year period, publish a supplementary statement of their policy with respect to the exercise of their functions during the remainder of that period (...*the supplementary licensing policy statement.*)

(3) In preparing a licensing policy statement or a supplementary licensing policy statement, a Licensing Board must—

(a) ensure that the policy stated in the statement seeks to promote the licensing objectives, and

(b) consult

(i) the local Licensing Forum for the Board's area,

(ii) if the membership of the Forum is not representative of all the interests specified in paragraph 2((6) of Schedule 2, such person or

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persons as appear to the Board to be representative of those interests of which the membership is not representative.

(iia) the relevant health board, and

(iii) such other persons as the Board thinks appropriate.

(3A) A Licensing Board may not, in a licensing policy statement or supplementary licensing policy statement, indicate an intention to introduce (by means of the imposition of conditions on the granting of premises licences or the variation of conditions in premises licences) a prohibition on the sale of alcohol for consumption off licensed premises to persons aged 18 or over but under 21 which applies to—

(a) all premises in its area which are licensed to sell alcohol for consumption off the premises, or

(b) premises licensed as mentioned in paragraph (a) –

(i) in a particular part of its area, or

(ii) of a particular description.

(6) On publishing a licensing policy statement or supplementary licensing policy statement, a Licensing Board must—

(a) make copies available for public inspection free of charge, and

(b) publicise—

(i) the fact that the statement has been published, and

(ii) the arrangements for making copies available for public inspection in pursuance of paragraph (a).

Section 7 addresses the Board's duty to address overprovision. It provides: -

(1) Each licensing policy statement published by a Licensing Board must, in particular, include a statement as to the extent to which the board considers there to be overprovision of—

(a) Licensed premises, or

(b) Licensed premises of a particular description,

in any locality within the Board's area.

(2) It is for the Licensing Board to determine the "localities" within the Board's area for the purposes of this Act.

(3) In considering whether there is overprovision for the purposes of subsection (1) in any locality, the Board must—

(a) have regard to the number and capacity of licensed premises in the locality, and

(b) consult the persons specified in subsection (4).

(4) Those persons are—

(a) The (Chief Constable)

(aa) the relevant health board,

(b) Such persons as appear to the Board to be representative of the interests of-

(i) holders of premises licences in respect of premises within the locality,

(ii) persons resident in the locality, and

(c) such other persons as the Board thinks fit.

[138] Section 23 of the 2005 Act provides: -

(1) A premises licence application received by a Licensing Board is to be determined in accordance with this section.

(2) The Licensing Board must hold a hearing for the purpose of considering and determining the application.

(3) In considering and determining the application, the Board must take account of the documents accompanying the application under Section 20(2)(b).

(4) The Board must, in considering and determining the application, consider whether any of the grounds for refusal applies and—

(a) if none of them applies, the Board must grant the application, or

(b) if any of them applies, the Board must refuse the application.

(5) The grounds for refusal are—

(a) that the subject premises are excluded premises,

(b) that the application must be refused under section 25(2), 64(2) or 65(3).-,

(c) that the Licensing Board considers that the granting of the application would be inconsistent with one or more of the licensing objectives.

(d) that, having regard to—

(i) the nature of the activities proposed to be carried on in the subject premises,

(ii) the location, character and condition of the premises, and

(iii) the persons likely to frequent the premises,

the Board considers that the premises are unsuitable for use for the sale of alcohol.

(e) that, having regard to the number and capacity of—

(i) licensed premises, or

(ii) licensed premises of the same or similar description as the subject premises

in the locality in which the subject premises are situated, the Board considers that, if the application were to be granted, there would, as a result, be overprovision of licensed premises, or licensed premises of that description, in the locality.

(6) In considering whether the granting of the application would be inconsistent with one or more of the licensing objectives, the Licensing Board must in particular take into account—

(a) *(not applicable)* and

(b) Any report given by the chief constable.

(7) *not applicable)*

(8) Where the Licensing Board refuses the application—

(a) The Board must specify the ground for refusal, and

(b) If the ground for refusal is that specified in subsect ion(5)(c), the Board must specify the licensing objective or objectives in question.

[139] It is useful at this juncture to make reference to the overprovision policy (5/1/5 of process) that was adopted by the defenders in August 2014. In adopting such a policy, the defenders were attempting to fulfil their statutory obligation, (in terms of Section 6 of the

2005 Act). It is however important that, in so doing, the defenders faithfully followed the statutory criteria.

[140] The defenders had first considered such a policy, after receiving, on 16 January 2014, a detailed presentation from Dundee City Alcohol and Drug Partnership. (This is found at 5/1/8 of process.) That report, which extends to 45 pages, argued strongly in favour of the whole city being the subject of an overprovision policy.

[127] The defenders' clerk prepared a Report (5/2/4 of process) for the defenders, which was presented at the meeting of 20 February 2014. It is illuminating to note that the recommendations contained in paragraph 2.0 of that document, recommends that the following options be considered: -

"2.1.1 A statement that there may be overprovision if licensed premises generally or licensed premises of a particular description

- throughout the whole of the Board's area; or
- in specified localities within the Board's area; or

2.1.2 A Declaration that there is no overprovision, either of licensed premises generally, or licensed premises of a particular description, in any locality within the Board's area."

[141] In light of that report, the defenders commenced a consultation exercise, the consultation period running from 1 April 2014 to 22 May 2014. The public consultation document issued by the defenders (and which is 5/2/3 of process) extends to 2 and ¼ pages and the public consultation questionnaire (which is page 4 of 5/2/3 of process) has only 4 questions. The crucial question for this judgement is question 3 which was in the following terms:-

Q3. In which areas do you think there may be overprovision?

The whole city.

Wards/LCCP Areas.

CRA's.

The whole city except for specified areas.

Other

[142] It is my opinion that the defenders did not properly consult in accordance with the terms of the legislation. To properly fulfil their statutory obligations in terms of Section 7 of the Act, they should have first identified the "locality" within their total area which they considered to be overprovided and, having so identified the locality, then gone out to consultation in respect of that locality. In reality, what they did was to provide a list of options as to the possible locality or localities that may have been overprovided. The consultees were then asked to identify the overprovided areas from that list. A question in that form should not have been put out for wider consultation. It was for the board to determine the area over provided, and then consult in respect of that locality. That basic and early error in the whole consultation process calls the entire policy into question. Mr Stuart for the defenders argued that, if the policy were to be challenged, this should have been dome via the vehicle of a judicial review. It is my opinion that, whether or not a Petition for Judicial Review was taken, this consultation process was – by the very nature of the questions that were asked of the consultees – flawed from the outset. Thus, the *vires* of the policy can properly be called into question during the consideration of an appeal when refusal of an application on the ground of overprovision is used.

[143] I would also recognise that, when the amending provisions to the Licensing (Scotland) Act 2005 are brought into effect with the passage into law of the Air Weapons and Licensing (Scotland) Act 2015, it will be possible to regard the whole of the Board's area as a single "locality" for the purposes of the 2005 Act. However, that option (one of those formally put to the consultees) was not open to the defenders at the time this policy was consulted upon and adopted.

[144] I regard the exclusion of what is termed the Central Waterfront Area as an attempt to bypass the fact that having the whole city as a single locality was not, at the time of consultation, an option that was available to the defenders. This option (the city minus the CWA) was never consulted upon. This option was first addressed by the defenders and only arrived at after the conclusion of the consultation period, and following an intervention dated 15 August 2014 (previously alluded to) by the ADP. In passing, I note that the timing of that intervention was not only long after the conclusion of the consultation period but

also subsequent to the date of the Clerk's report for the meeting of 21 August 2014. (That report, number 5/1/7 of process is dated 12 August 2014, some 3 days prior to the date of the ADP correspondence.) That intervention was not in the last hour before midnight. Rather, it was received a few hours into the following morning. I do not think that it is good enough to say that the APD letter of 15 August was part of the ongoing interaction between the APD and the Licensing Board. The terms of that letter – which flagged up for the first time the suggestion that the Central Waterfront Area be excluded from the area covered by the overprovision policy – strengthen my view as to the procedural improprieties of the whole consultation process.

[145] It is my considered opinion that the defenders should have consulted on the proposed locality (i.e. the whole of the city less the area described as the Central Waterfront Area) before their assessment of all the responses to that specific consultation, and the possible subsequent adoption of an overprovision policy. At the relevant date, the legislation did not permit the defenders to approach the issue of overprovision in the wat that they did. The requirements of the statute and the guidelines were not followed. The over provision policy is clearly flawed. Whether or not the policy is challenged by use of the vehicle of Judicial Review or, as here, by the solicitor for the pursuers when she addressed the meeting of 14 January 2016, the process by which the overprovision policy was achieved did no, from its very inception, comply with statute. In these circumstances, I consider that I am entitled to disregard the policy when considering this appeal.

[146] I would also add, even although it is not essential for the disposal of this appeal, that I consider that, in coming to their decision, as explained by the Statement of Reasons issued on 28 January 2016, the defenders were selective in the information that they used in their wider calculations. Reference is made in their decision (paragraph 10a.3 of 5/1/9 of process) to off-sales capacity only. As counsel for the pursuers observed, they referred to 452 licensed premises in the City, with added information that there are, in the city of Dundee, 131 off-sales premises with a stated capacity. There is no definition as to what the on-sales capacity is, even although the policy adopted by the defenders is expressed as an "all premises policy". It seems to me that the defenders ought to have considered the capacities of all

relevant licences – both off-sales and on sales – especially given that the overprovision policy that they sought to apply was in respect of "all premises."

[147] In the whole circumstances, and taking the view that the defenders' overprovision policy was wrong from the outset because of the question asked of the consultees, where the whole process was seriously flawed, and where consequently it should not have been utilised against the pursuers when this application was under consideration by the Licensing Board, as I have attempted to set out in this judgement, the only ground in respect of which this application was rejected cannot be supported. The Board accepted (paragraphs 10a.4 and 10.5 of 5/1/9 of process) that the refusal of this application was predicated solely on the overprovision policy (which the Board believed was properly in place) and which I have now held was seriously defective, because of the process utilised to arrive at the adoption of the policy. Accordingly, this appeal must succeed.

[148] Because there is now no statutory basis to support refusal of the pursuers' application, I have reversed the decision of the defenders and ordered that the appropriate licence be granted to the pursuers.

Expenses

[149] Expenses will follow success. I shall also certify this case as suitable for the employment of junior counsel. I consider that such employment is justified because of the difficulty and complexity of this case, (as is evidenced by the length of the written and oral submissions), and also the quite considerable preparation that has gone into the presentation of the arguments in this case. The disposal in this case is a matter of some significance to both parties and is indicative of the importance of this appeal to the parties.