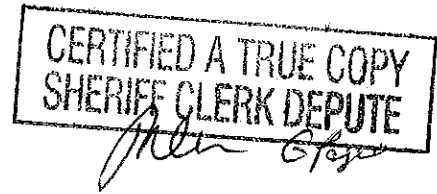


B133/16

**BP Oil UK Limited v Dundee City Licensing Board**

Dundee 21 June 2016



Act: R Skinner, Advocate, instructed by Harper Macleod, Solicitors, Glasgow

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 second and third pleas in law for the pursuers;
- (2) Repels the first and fourth plea-in-law for the pursuers;
- (3) 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 2005 for a variation of the pursuers' existing Premises' Licence in respect of premises known as BP Kingsway West Filling Station, Kingsway, Dundee DD2 4TD; and
- (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 (2) (e) of the Licensing (Scotland) Act 2005, the pursuers seek a reversal of the defender's decision to refuse an application for variation of their existing Premises Licence for premises known as BP Connect, Kingsway West Filling

Station, in terms of which they sought authority to increase the permitted capacity for Off-Sales in those premises from 5.26 square metres to 8.67 square metres.

### Background

[2] The background to the original application for variation, which was not disputed by the defenders, arises following a decision of the pursuers to demolish and rebuild the existing petrol station, converting it from a "BP Connect" style operation into a slightly more sophisticated Marks and Spencer Simply Food outlet. A new Premises' Licence for this operation with the existing capacity was duly applied for and obtained from the defenders. The pursuers then decided to seek a slightly increased capacity of an additional 3.5 square metres, the practical effect of which was to increase the capacity to a total area of 8.76 square metres. The slight increase in area, which better suited the style and operation of a Marks and Spencer retail operation, was important to the commercial offering of the proposed new operation.

[3] The necessary application for variation of the premises' Licence was lodged with the defenders, for consideration at their meeting scheduled for 14 January 2016. An objection was lodged on behalf of the Public Health Directorate of NHS. (As an aside, I was advised that it is the policy of that organisation to lodge objections to each and every licensing application.) 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 identified as the Central Waterfront Area), was overprovided with licensed premises.

[4] On consideration of the pursuers' application for variation at the meeting of the defenders on 14 January 2016, at which a lengthy written submission on behalf of the pursuers was presented to the membership of the Board, the defenders unanimously determined to refuse the application.



Pursuers' submissions

[5] I would at this stage formally record that, in the course of the submissions on behalf of the pursuers presented to the board, it was submitted that that overprovision policy above referred to was *ultra vires*. Whether that policy is in fact *ultra vires* has not had to be judicially decided by me in the context of this process. This appeal had been decided on other grounds, as will become apparent later in this judgement.

[6] An examination of the formal Statement of Reasons for the refusal of the Application for variation of the Pursuers' existing Off-Sales licence is found in the pursuer's Inventory of Productions. Part 10a, giving the reasons for refusal, states: -

"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 licences in the city (excluding social clubs), of which 133 were off-sales premises with a total off-sales capacity of 6,406.536 square metres. The application in this case is for an increased capacity of 5.26 square metres. However, at the end of the day, this is just another off-sale which would add to the availability of alcohol in a locality in which the Board has already determined there is over-provision. The Board has already agreed to set the policy aside when granting the provisional licence for the premises since that was merely replacing what had existed previously. There was nothing in the submission on behalf of the applicant which the Board could be satisfied made this latest 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."

[7] In criticising the decision of the board, counsel submitted that the board had exercised their discretion unreasonably in refusing this application based on the provisions of Section 23(5)(e) of the 2005 Act. That section of the Act is dealing with determination of "Premises Licence Applications". What was before the defenders was not an application for a Premises Licence, but an application to vary a licence already granted to the pursuers in respect of the premises. The terms of Section 23(5)(e), which have no relevance to this application, do not give the Board power to vary an existing licence. Thus, the defenders have made a clear error both in fact and in law, and that is sufficient to dispose of this appeal in favour of the pursuers.

RS

[8] Continuing the attack on the defenders' decision, counsel reminded me that the defenders stated that the application was for "an increased capacity of 5.26 square metres". In fact, the existing capacity available to the pursuers in terms of the Off-Sales Premises Licence which they already held was 5.26 square metres. The variation sought was for an increase of 3.5 square metres. The board, in coming to their decision, mistakenly must have thought that the increase sought was 50% more than it actually was.

[9] Counsel further submitted that the dicta of Sheriff G H Gordon in the case of Loosefoot Entertainment Ltd v Glasgow District Licensing Board 1991 SLT 843 at 846 J-H, where he opined: -

"I think the board's decision has to stand or fall by the reasons it gives, if only because the appellants are entitled to know what they are appealing against, but I think that it would be wrong to scrutinise the Board's decision line by line and word by word as if they were a closed record or a trust disposition and settlement."

was entirely apposite in the instant case. The figure of 3.5 square metres is nowhere mentioned in the Statement of Reasons. It is thus not open to the defenders to contradict the clear terms of their Statement of Reasons – a document prepared by them after the meeting had ended.

[10] In terms of the 2005 Act, the court retains a discretion as to whether this application be granted or refused. It was submitted that, in the particular circumstances of this application, the public interest would not be prejudiced by the granting of an Application to vary an existing Off Sales Licence by some 3.5 square metres. In reality, the extension sought was 0.05% (one twentieth of one per cent of the existing overall licensed capacity within the defender's licensing area.

#### Submissions for the Defenders

[11] For the defenders, Mr Stuart QC submitted that the errors identified in the Statement of Reasons dated 28 January 2016 (number 1 of the pursuers' Inventory of Productions), namely the wrong area set out as the area sought for increased capacity, as well as the reference to the wrong Section of the 2005 Act, could properly be categorised as "clerical errors". In particular, he drew my attention to the fact that the application by the pursuers

was correctly set out, both in area and with reference to the appropriate Section of the 2005 Act in the pursuers' formal Application for variation to the defenders.

[12] It was accepted on behalf of the defenders that Section 30 of the 2005 Act does deal with Applications for Variations, and that the reference to Section 23(5)(e) was erroneous. The reference within the Statement of Reasons should have been to Section 30(5)(d), (which is the overprovision ground for refusal in respect of variation applications).

[13] 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 these circumstances, the first and third craves of this appeal should be refused.

#### Decision

[14] In my judgement, the submissions of the pursuers fall to be preferred. The defenders are bound by the terms of their Statement of Reasons, particularly when that document has been drafted after the meeting of the defenders.

[14] The errors therein are 3 in number.

(1) The increased capacity sought was for an additional area of 3.5 square metres. (The defenders have recorded the increase as 5.25 metres.)

(2) In 10a.1 of the defenders' Statement of Reasons, one reads that

“... at the end of the day, this is just another off-sale which would add to the availability of alcohol in a locality where the Board has already determined that there is overprovision.”

(3) The reference to Section 23(5)(e) of the Licensing (Scotland) Act 2005 is, as was very properly conceded by senior counsel for the defenders, incorrect.

[15] It seems to me, from reading the above, that – notwithstanding that this was an application for a variation of an existing licence – the Board made their decision on the premise that this was an application “which would add to the availability of alcohol in a locality”. The

reader could not be criticised for thinking that the Board regarded this as a new application for an off-sale Premises Licence, (notwithstanding that Part 6 of the Statement of Reasons sets out that this is an application for a "Variation of Premises Licence". Whilst there may be scope for treating a single error as a "clerical error", such latitude should not be extended when there is more than one error in the Statement of Reasons. Thus, I have little difficulty in holding that the defenders based their decision on incorrect material facts.

[16] In addition, having regard to the submissions made by counsel for the pursuers as set out in Paragraphs [8] and [10] of this judgement, I consider that the defenders exercised their discretion in a wholly unreasonable manner. What was sought by the defenders was a very modest extension of that part of a retail Food Shop which was being refurbished to a more modern presentation. Given that it was an extension of an existing premises Licence, I am of the opinion that to refuse the Application for Variation was an unreasonable exercise of the discretion of the defenders. On that ground also, I would reverse their decision and grant this appeal.

[17] As earlier stated, I have found it unnecessary – in the context of this process – to address at any length – the arguments about the *vires* of the defenders' over-provision policy. I shall deal with that at length when I issue my judgement in the case of Aldi Stores Limited v Dundee Licensing Board, which I heard at the same time as this case. I have this sustained the pursuers' pleas in law 2 and 3 and repelled their pleas in law 1 and 4.

[18] In the circumstances of this case, I have granted the Application for Variation sought, and not returned the Application for Variation back to the defenders for reconsideration.

#### Expenses

[19] 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, particularly with regard to the *vires* argument, which shall be addressed in the Aldi judgement to be delivered at a subsequent date, and the importance of the case to the parties.

*AS*