SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

B638/15

INTERLOCUTOR

of

MALCOLM GARDEN ESQ.,
SHERIFF OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

in

SUMMARY APPLICATION
APPEAL UNDER LICENSING (SCOTLAND) ACT 2005

in causa

MARTIN McCOLL LIMITED,
Martin McColl House, Ashwells Road, Brentwood, Essex, CM15 9ST

Pursuer

against

ABERDEEN CITY LICENSING BOARD,
Town House, Castle Street, Aberdeen, AB10 1AQ

Defenders

Act: Skinner, Counsel
Alt: Hajducki, Queen's Counsel

ABERDEEN, 30 November 2016.

The sheriff having resumed consideration of the cause;

Dismisses Pursuer's plea-in-law 1 for want of insistence; Sustains Pursuer's pleas-in-law 2 and 3; Repels Defenders' pleas-in-law 1 and 2; and

ACCORDINGLY upholds the Pursuer's appeal against the Defenders' decision and, in terms of Section 131(5)(c);

GRANTS the Pursuer's application for a provisional premises licence in terms of Section 20 and 45 of the Licensing (Scotland) Act 2005 in respect of premises known as R S McColls, 207A Union Street, Aberdeen;

Certifies the appeal as suitable for the employment of junior counsel;

Finds the Defenders liable to the Pursuer in the expenses of the cause, allows an account thereof to be given in and remits the same, when lodged, to the auditor of court to tax and to report.

Sheriff

NOTE

[1] This is a summary application in terms of Section 131 of the Licensing (Scotland) Act 2005 comprising an appeal by the Pursuer against a decision of the Defenders, Aberdeen City Licensing Board. The Pursuer applied to the Defenders for a provisional premises licence in terms of Sections 20 and 45 of the Act in respect of premises R S McColls, 207A Union Street, Aberdeen. The premises are well established on the upper half of Union Street, Aberdeen, the city's main thoroughfare. The premises are now a small general convenience store. The Pursuer is a well-known national chain. The Pursuer's position that they do not offer cheap or discounted alcohol at their premises is not disputed. The application itself relates to an area of 6.78 square metres. The application was considered by the Defenders at its public meeting on 6 October 2015. The Defenders heard submissions on behalf of the Pursuer, a submission on behalf of the Chief Constable, Police Scotland

restricted to advice on three convictions of the Pursuer company, submissions in respect of a letter of objection from NHS Grampian and considered a letter of objection from Doctor Claire Rebello, who claimed to represent Central North Aberdeen GP Practices. The application was duly considered and was refused.

[2] On 30 October 2015, the Defenders issued a Statement of Reasons. The motion to refuse the application, which was passed by the Defenders, stated

"In terms of Section 23(5)(c) of the 2005 Act granting the application would be inconsistent with the licensing objective of protecting and improving public health."

[3] In their reasons for decision the Defenders further explained the basis of that decision. They confirmed that they did not consider the issue of the three criminal convictions were a ground for refusal of the application. They did, however, consider that the content of the objections from NHS Aberdeen and Doctor Rebello provided evidence in support of their decision. In particular, they accepted the suggestion that alcohol related deaths and patient admissions in the relevant postcode were 5% worse than the Scottish average, that patients with alcohol related conditions made a majority of alcohol purchases from corner shops and not supermarkets, that a study completed in Glasgow was equally applicable to Aberdeen and that the local GP letter, which objected to the expansion of provision, commented that increased alcohol health related problems were connected to the provision of alcohol in newsagents and corner shops. It was their view that there was a risk that any increased availability of alcohol could lead to increased consumption and consequently harm to health. The Defenders stated that the granting of the application would add to the number of licensed newsagents/corner shops in the relevant postcode zone extending the availability of alcohol which in turn would add to an already concerning health problem. They applied this both to the postcode zone and to the wider City of

Aberdeen. They accepted that the location of the premises was such that it would draw trade from the wider area. The Board concluded that the granting of the application would have a detrimental effect on health in the surrounding postcode zone and the City as a whole.

[4] It is clear from the decision of the Defenders that they did not come to the view that the granting of this application would, in terms of Section 23(5)(e), result in overprovision of licensed premises or licensed premises of that description in the locality. In their Statement of Reasons they specifically note that their overprovision statement relating to off sale premises had been declared *ultra vires* by this Court. They had not issued an amended statement. That situation would not, however, have prevented them from making a finding that this grant would result in overprovision, in the event that they adopted the correct approach to making a finding of that nature. It is therefore clear that the Defenders did not reach the view that the granting of this application would result in overprovision of facilities.

[5] Counsel for the Pursuer helpfully produced written notes of submission setting out his argument. A copy thereof is in process. He placed the application in the context of this Court's earlier determination that the Defenders' overprovision policy was *ultra vires* of the Board. As a result, they could not apply a presumption of refusal based on overprovision. He noted, however, that this did not prevent them from refusing the application under Section 23(5)(e) provided that they came to that view in the correct and appropriate manner. They had chosen not to make a finding of overprovision but had dressed up their decision to refuse as being taken under the statutory health objective when that was not justified. Their

written reasons stated "That an increase in availability of alcohol would lead to increased consumption and consequently harm health." He then reviewed the relevant statutory provisions.

[6] With reference to *Leisure Inns UK Limited* v *Perth & Kinross DLB 1993 SLT 796* he submitted that there must be a rational and proper evidential basis for refusal of an application. The proper test required the Board to find that the particular application, if granted, would cause detriment to public health. It could not be on the basis of a simple increase in the availability of alcohol as that would fall into the category of overprovision. He suggested certain circumstances which might fall into that category such as, an applicant who proposed to sell only high strength alcohol products, premises shown to sell excessive amounts of alcohol to individual patrons or premises selling alcohol at low or discounted prices. They might engage the licensing health objective. The present case was a modest application by a well-respected national operator for a small facility, 6.78 square metres, designed to complement the facilities of the general convenience store. The Board's approach of generalising a view that some within the postcode area were drinking too much alcohol without any link to this particular application was simply an attempt to re-impose their overprovision policy. There was no material before the Board which would justify a view that the granting of this particular application would result in a likelihood of harm to public health. There must be a causal link between the particular premises and harm to the city wide population. He submitted that adopting a postcode approach was inappropriate and there was no evidential link to establish that alcohol consumed by persons within the postcode had been purchased within the postcode. He quoted from the Scottish Government Consultation Paper "Further options for alcohol licensing consultation

document 2012"which stated, "In respect of the public health objective, in the absence of a whole population approach over a wider geographical area it is difficult to make a case and almost impossible to relate public health data to individual premises. In terms of the public health objective it is very difficult, if not impossible in most cases, to make a causal link between where alcohol is sold and where it is consumed." As a result of this difficulty, Parliament had enacted a provision allowing a whole area overprovision policy which although now in force was not at the time of consideration of the application. The simple grant of an additional licence could not, in itself, be sufficient to show prejudice to public health. He referred to *Galloway* v *Western Isles Licensing Board*, an unreported decision of the Sheriff Principal on 18 January 2011, where the refusal was overturned due to there being no causal link between excessive drinking in the area and the grant of the particular licence. He accepted that an overconcentration of licensed premises in the context of a particular area might lead to the reduction in alcohol sale prices but such an approach was based on overprovision which was specifically not involved in the present decision. The Defenders had relied on generalised statistics with no proper nor evidential basis for finding that a grant of this application would prejudice the public health objective.

[7] The Board took into account that the application was for a small corner shop type premise rather than a supermarket. They took into account the size and type of the premises as influencing the prejudice to public health. The letter of objection from Doctor Rebello contained nothing other than a note of her belief that the provision of alcohol in newsagents and corner shops was leading to an increase in drinking habits of the population. Her objection appeared tied to the concept of increase in availability which was a factor tied to overprovision and not properly to prejudice to public health. The Defenders in their reasons

and answers maintained a position that this type of premise brought a greater danger to public health than a supermarket based on the study referred to in the Health Board objection, but not specifically considered by the Board. The Defenders did not explain their reasons for accepting the simple reference to this study. They had not taken into account any detail concerning the ratio of available corner shops and supermarkets to the relevant area nor specific numbers of persons purchasing from each type of premises. They offered no rational explanation as to why corner shop premises were more prejudicial to the licensing objective than larger supermarket premises. They had not explained the basis of accepting the relevance of a survey based on drinking habits in Glasgow to the City of Aberdeen. They had not properly considered the rational basis for such a finding. In particular, they had not considered whether, for example, that finding was based on location, availability of the particular type of premises or the prices charged at these different types of premises. In absence of proper consideration, these factors were not relevant which meant that the Board had reached its decision and exercised its discretion unreasonably.

[8] He further submitted that their approach was capricious and irrational in respect that they accepted that they had granted two other off sale licenses in the City at the same meeting where, irrespective of the issue of objection the grant of those applications must add to the availability of alcohol in the Aberdeen area in general, which was part of the basis on which the present application was refused.

[9] With reference to *Ritchie* v *Aberdeen City Council 2011 SC 570*, he submitted that the Defenders had failed to provide adequate and proper reasons for their decision. There was

a complete failure to explain why the grant for an off sale capacity of under 7 square metres for a small store run by a reputable national operator in Union Street, Aberdeen would prejudice the citizens of Aberdeen or the citizens in that same postcode area. They did not explain the basis for their assertion that this licence would give rise to an increased risk of prejudice to public health.

[10] He submitted that the court should, in the event of upholding the appeal, exercise its broad discretion in terms of Section 131(5) of the Act, reverse the decision and grant the application. There being no basis for the Board's decision on the ground specified and the Act requiring the Board to grant an application unless a proper ground for refusal existed the appropriate course was for the Court to grant the application. *Leisure Inns (UK) Limited* v *Perth & Kinross District Licensing Board.* The Board clearly did not want to grant this application. At the same meeting they had granted other applications which would also serve to increase the availability of alcohol in Aberdeen. Were it to be remitted back to them they may place themselves in a position whereby they could apply a whole area overprovision policy and refuse the application again, albeit on a different basis. The application was for very small additional licensing capacity. The operator was reputable. The grant would not result in people drinking harmful amounts of alcohol. He also pointed out that the proceedings had resulted in a delay of almost one year since the application was refused and that it would be prejudicial to the applicants for them to be required to go back before the Board given that they would then be put to further delay and considerable expense.

[11] Mr Hajducki, for the Defenders, submitted that the court should refuse the appeal. The Board's decision was properly taken. It was not capricious, it was reasonable and it was fully explained. He referred to paragraphs 9 and 10 of the Board's Statement of Reasons. They had taken the decision on the basis of evidence presented to them from the NHS Grampian Public Health Directorate and had also taken account of a letter of objection from Doctor Rebello. The document referred to by the NHS representative was appendix 3 to the Statement of Reasons and had been served on the appellants before the hearing. The letter of objection referred to the Alcohol Research Council's findings which could be downloaded. The objection advised that the rate of referrals to the Integrated Alcohol Service in Aberdeen was higher for the relevant postcode than the city average. This was supported by the letter from the General Practitioner speaking to particular problems in that area. He submitted that the National Health Service and the General Practitioners working in the area were the correct people to provide advice on alcohol related problems. He accepted that the survey referred to was not based in Aberdeen but submitted that the Board were entitled to take the view that there was not likely to be any material difference with the particular problem of corner shops. The Board had heard argument from both sides and had come to its conclusion. They had decided that the results of the survey were applicable to Aberdeen. They were entitled to assimilate the terms small convenient store with corner shop and to take account of those residing in the selected locality namely, the postcode area.

[12] It was, he submitted, obvious that where it was known that alcohol consumption could cause health problems, an increase in that consumption would lead to an increase in those problems. This approach was supported by the survey to which they referred. It was supported by what he referred to as the evidence from the doctor writing on behalf of local

GP's. The Defenders were entitled to consider the evidence before them regarding the position in this particular postcode, and of Aberdeen as a whole based on the applicant's understanding and submission that the facilities would be used by both local persons and commuters. The evidence provided to the Board and accepted by them did show that there would be a detrimental effect on health were the application to be granted. It was the location of the premises which was important rather than its size. The applicants could, had they so wished, have challenged the evidential value and content of the survey in detail rather than simply arguing it to be irrelevant.

[13] He submitted that the Statement of Reasons did set out the Board's reasons for refusal. They were full and adequate reasons and had taken into account the points raised and argued by the appellant. The Board were entitled to take the view that AB11 6 postcode had a particular problem on the basis of the figures supplied by NHS and with the local GP's support. It was not the Board who were making that assertion but they were following the submissions to them. It was not a capricious decision. It was difficult to see how a Licensing Board could simply ignore representations made to them by the local NHS Trust and local General Practitioners. Their approach and refusal was accordingly based on good grounds. It was a matter for them to decide what evidence to accept and what evidence to reject. They had not ignored the applicant's submissions. They were entitled to assess the weight to be given to any information placed before them. Having accepted the evidence they were bound to refuse the application.

[14] He submitted that it was not unreasonable for the Board to grant the other applications. As per the Record, any objections to those had been received late and had not

been taken into account. The Co-operative grant was for a supermarket not a corner shop. There was no area specific objection to those two applications. There was no suggestion that those applications had been granted in an area where there was a specific problem.

[15] It was accepted that the Statement of Reasons stood or fell on its own and could not now be adjusted. It was a rational statement of reasons which made sense and one which the Board were entitled to make. It was based on specific objections from qualified persons. The Board were entitled to take those objections and indeed required to take those objections into account. The protection of public health was a valid ground for refusal. The Board had explained why they had come to that view, what they had taken into account and the reasons for their decision.

[16] He submitted that if the appeal were to be granted the Court should remit the application back to the Board for its reconsideration setting out the basis of the criticism of their decision and the reason for it being overturned. It was not for the Court to grant a new licence.

[17] Both counsel concurred in the view that the expenses of this application should follow success so that if the appeal were to be upheld the expenses would be granted in favour of the Pursuer and if the appeal were refused in favour of the Defenders. Both sought and submitted on a motion for sanction of the cause as suitable for the engagement of Counsel.

My decision

[18] This appeal relates to an application for an off sale licence involving a modestly sized display. In determining the application the Defenders decided, for whatever reason, that a refusal of the application based on overprovision *(Section 23(5)(e))* was not appropriate. I note that although, due to the earlier decision of this court, they were unable to consider the application in the context of their policy document relating to overprovision for off sale premises, they were not prevented, should they have deemed it appropriate, from refusing the application on that ground.

[19] They have elected to refuse the application under Section 23(5)(c), namely that the grant of the application would be inconsistent with one of the statutory licensing objectives, that being the objective set out at Section 4(1)(d), of protecting and improving public health. It is the Pursuer's position that the tests which they have applied are those more appropriate to a decision based on overprovision and inappropriate for a decision based on protection of public health.

[20] It is difficult to reconcile the Defender's position that the application will not result in overprovision of facilities for the sale of alcohol, in terms of number and capacity, with the position that the sale of alcohol at the same premises will result in detriment to public health.

[21] In coming to their view, the Board have placed great weight on the terms of the letter of objection from NHS Grampian, which letter was spoken to at the meeting. That letter, initially deals with an objection based on overprovision of facilities, then moves on to public

health with reference to a number of quoted statistics, using a variety of comparators. The Defenders have taken particular note of a graph which demonstrates that the postcode area in which the premises in this application are situated had a slightly higher level of referrals to the Integrated Alcohol Service than the average for the City of Aberdeen. This seems to be by a factor of slightly less than one person per thousand of population. They also paid particular attention to a selected quote from a study of alcohol pricing and purchasing behaviour completed in Glasgow in which it is said that the majority of persons with alcohol related conditions make their alcohol purchases from corner shops "and not supermarkets". The extract does not assist in assessing the relevance of alcohol pricing to that finding. It does not quantify the level of "majority" and it does not assist with the availability of different shop types in the areas from which the sample was taken. The Pursuer's agent's comments about these points are dismissed by the Defenders as speculative. Brief, unspecific and out of context quotations from lengthy reports should always be treated with utmost caution. Notwithstanding the clearly flawed approach adopted in the NHS letter of objection, it seems to me that Mr Hajducki is correct when he submits that it is for the Board to assess the value of evidence and submissions and to come to a conclusion based on its view of the weight to be attached thereto. The Pursuer legitimately comments on the Board's failure to consider the actual report but it would, of course, have been open to the Pursuer to produce the actual report and to make reference to its wider terms and analysis. I do not think that it is for this Court to apply a different assessment to that of the Board. I do not think it could properly be stated that no reasonable Board would have come to a similar view on this element.

[22] The contrast between the Board's decision in this and the other off sale applications heard on the same day is more difficult to justify. Where the Board are making a refusal based on protecting and improving public health it is no argument to distinguish between premises where an objection has been validly lodged and premises where no objection has been validly lodged. Prejudice to public health is not predicated upon the existence of an objection. The Defenders' distinction between corner shops and supermarkets is based entirely on the selected quotation from the Alcohol Research Report. The quotation refers to the majority. It does not quantify that majority. The majority could be anything from 51% to 99%. If at the lower end of the scale it would plainly not justify a conclusion that the grant of a corner shop application will fail to protect and improve public health when the grant of a supermarket application will meet that objective. The Defenders make it clear that in coming to their decision they accepted that the Pursuer's customers would comprise both local residents and those from other areas of the city. This acceptance plainly dilutes the relevance of the over-average figures for alcohol referrals from the postcode area.

[23] Whilst the Defender's acceptance of the NHS position, based on a selected quote without proper context, would appear to be ill judged I do not consider that it can be categorised as unreasonable for this reason. There is clearly a limit to the level of enquiry which can be undertaken by the Defenders at their meetings and it is for applicants to focus their challenge of any such assertions. It is then for the Defenders to reasonably assess the value of the material placed before them in the context of the parties' submissions. Had they been taken to the whole report or relevant portions and then reached a decision based on a misrepresented quotation their decision would have been open to review on the basis of unreasonable exercise of discretion.

[24] In their written Statement of Reasons, the Board state "They determined that an increase in availability of alcohol would lead to increased consumption and consequently harm health". This proposition may well be accurate but it is identifying the health problem as the increase in availability. Given that the Defenders have made no decision that this application would result in overprovision, it is inconsistent and inappropriate for them to seek to base their decision on this position. In this regard they have exercised their discretion to refuse the application in an unreasonable manner.

[25] If the Defenders wish to refuse an application based on licensing objectives then they must specify in what way the grant of the application under consideration would be inconsistent with such objectives. They cannot simply state that the existence of an additional licence will, in itself, be inconsistent with the licensing objectives. In a case such as this they require therefore to set out what it is about the particular application that leads to that conclusion. An example would be an application for premises where it was intended to sell large containers of cheap alcohol or undertake substantial price promotions.

[26] I am therefore satisfied that the Board has erred in law in coming to its decision. It has made a decision without specifying, as is necessary, the factual basis for that decision. They have not set out a proper evidential basis for applying the specific breach of licensing objective to this application. They do not set out a causal link between a grant of this application and a breach of the licensing objective. Such specification as they have given would more properly be directed to a decision based on overprovision, but they have specifically chosen not to refuse the application on that ground.

[27] Accordingly, it is appropriate that the Court uphold this appeal in terms of section 131 (3)(i) and (iv).

[28] The options available to the court on upholding an appeal are set out in Section 131(5) of the Licensing (Scotland) Act 2005. Courts should be reluctant to grant applications for licence so, in the majority of cases the court will, under subsection (a), remit the case back for reconsideration of the decision. In this case, I do not consider that would be appropriate. The Defenders have declined to make a finding of overprovision. They have identified no factors particular to this application which would have entitled them to come to their decision. Were the application to be returned to them they would require either to grant the application or to come to a decision based on different and perhaps contrary reasoning. The application is for a small off-licence facility. Nowhere is it suggested that its grant will have a major impact. The Pursuer has been put to considerable expense and delay up to this point. For these reasons, it is appropriate that the court, in terms of Section 131(5) (c), grants the application, as craved in the appeal.

[29] It was agreed that expenses should follow success and accordingly expenses are awarded against the Defenders. Having considered the submissions made by Counsel on both sides I will certify the cause as suitable for the employment of Junior Counsel.

Sheriff of Grampian Highland and Islands at Aberdeen

30 November 2016