SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

B648/14

INTERLOCUTOR

of

MALCOLM GARDEN ESQ., Sheriff of Grampian
Highland and Islands at Aberdeen

in

SUMMARY APPLICATION (APPEAL UNDER THE 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: Douglas

ABERDEEN, 26 August 2015.

The Sheriff, having resumed consideration of the cause, Sustains pursuer's pleas-in-law 1 and 2 to the extent of upholding the pursuer's appeal against the defenders' decision; Repels Pursuer's plea in law 3; Repels defenders' pleas 1, 2, 3 and 4; in terms of Section 131(5)(a) of Licensing (Scotland) Act 2005, Remits the case back to Aberdeen City Licensing Board for reconsideration of the decision; 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; Certifies the appeal as suitable for the employment of junior counsel.

Sheriff

NOTE:

[1] This is a summary application comprising an appeal, in terms of Section 131 of the Licensing (Scotland) Act 2005, by the pursuer against the decision of the defender, 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, Provost Watt Drive, Kincorth, Aberdeen. Those premises are, or are to become, a small convenience store. The application sought permission for the sale of alcohol with a capacity of 10 square metres at those premises. The application was considered by the defenders at its public meeting on 11 November 2014. The defenders considered submissions and two letters of representation, one from Police Scotland and one from the Licensing Standards Officer. The application was refused. The defenders issued a Statement of Reasons on 26 November 2014.

[2] The reasons for refusal are stated as follows.

1. In terms of Section 23(5)(e)(ii) of the 2005 Act having regard to the number and capacity of licensed premises of the same or similar description as the subject premises, in the locality in which the subject premises are situated, there would, as a result, be an over provision of licensed premises of that description in the locality;

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

[3] Both counsel for the pursuer and the solicitor for the defenders helpfully produced written submissions setting out their respective arguments. These are available in process. I do not therefore propose to set these out at length.

[4] The pursuer claims that the defenders erred in law, exercised their discretion in an unreasonable manner and acted contrary to natural justice. Each of these claims is denied by the defenders.

[5] The pursuer attacks the defenders' Statement of Licensing Policy prepared in terms of the Act. That policy designates the whole of the board's area excluding two token areas, one a forest with industrial estate and one a farm and steading. They claim that approach does not comply with the requirements of the Act particularly when read in conjunction with the Scottish Minister's Guidance which the board must take into account when determining its policy. (Section 142). The effect of such policy statement with regard to a declaration of over provision in a locality is to create a rebuttable presumption against the grant of any further licenses for premises of a same or similar description to those in respect of which over provision has been declared. The board had acted *ultra vires* and exercised their discretion unreasonably in assessing the whole of their area, with the exception of two plainly nominal locations, as a single location subject to over provision. Their present decision was founded upon that policy statement and therefore fell to be rejected.

[6] Section 23(5)(e)(2) requires the board to consider the number and capacity of premises of a same and similar description in the locality. They had not carried out this

exercise and it did not appear in their Statement of Reasons. They must go through the procedure of identifying relevant premises considering both the number and capacity of those premises and then determining that the grant of a further application would result in over provision. Having identified the wider locality the board were not then entitled to conduct an exercise restricted to a smaller locality. In any event, their reasons demonstrated that in considering the smaller locality they had taken into account only the number of off-sale licences therein and had not addressed the issue of capacity. Inconsistency with their policy was not sufficient. They still required to carry out the proper assessment of over provision in respect of the particular premises under consideration. At no point in their policy statement nor reasons for refusal do they identify the numbers and capacities of premises which they have taken into account which would require to relate only to off-sale premises. Without such identification it is not possible to ascertain whether they have based their decision on incorrect material facts. They cannot simply say that they have applied the correct test without explaining how they have done so.

[7] It is plain from the terms of the board's policy document that the rationale behind their decision over provision relates to a concern about the supply of cheap alcohol. In this case the pursuers had carefully submitted to the board on their pricing policy which excluded the sale of cheap alcohol. The board had noted this in their reasons but had then ignored this in their decision. It was a material consideration which ought not to have been ignored. The defenders could have taken it into account and decided that it was outweighed by other considerations.

[8] The second reason given by the defender for its decision was inconsistency with the licensing objectives set out in the legislation, namely the objective of protecting and improving public health (Section 4(1)(d)). The Act set out how this should be approached,

namely that the board should consider whether the granting of application would be inconsistent with one or more of the licensing objectives. (Section 23(5)(c)). The board's decision was that the application may be inconsistent with such objective. That is not the correct test as set out in the legislation. Further, they did not set out the basis on which the granting of this application would or, on their test, may breach that objective.

[9] In arriving at this second ground of decision, the board had considered the issue of domestic harm caused by the grant of the application. This was not a matter raised with the pursuer's representative at the meeting and it was a breach of natural justice to take into account such a factor without giving the representative the opportunity to comment.

[10] Finally, the pursuer submitted that the discretion of the defenders had been exercised in an unreasonable manner in that they had failed to provide proper and adequate reasons for their decisions. They failed to identify the number and capacity of the off-sale licensed premises which they had considered in reaching their decision, failed to explain why the grant would lead to an over provision in the chosen locality and failed to explain their reason for leaving out of account the issue of the pricing of alcohol on the premises. They further have failed to explain why the application would, or indeed could, potentially lead to increased harm in a domestic setting.

[11] For all these reasons, the pursuers moved the court to uphold the appeal and in so doing direct the Board grant the application. The approach and submitted failures of the Board suggested that they would not be in a position to reconsider the application dispassionately.

[12] For the defenders, it was submitted that the board had no discretion but to refuse the application as the stated grounds for refusal did apply. The defenders' solicitor concentrated on the terms of Section 23(5)(c) as in her submission this was the section of paramount importance. She submitted that the board had applied the correct test as evidenced by the statement on page 11 that the board was of the opinion that an increase in the number of off-sale premises in the locality would add to alcohol related harm. In considering whether or not the application was inconsistent with the licensing objectives the board had regard to their policy. In formulating their policy they were entitled to take into account the evidence from NHS suggesting that increased numbers of premises led to increased consumption. It was for the pursuer to persuade the board why his application should be considered an exception to their policy. The failure to do so was not the same as the board failing to take into account the submissions made to it and they were entitled to refuse the application.

[13] It was claimed on behalf of the board that they had specified a number of factors in coming to their decision and set these out at page 10 of the Statement of Reasons. It was stated on behalf of the board that the policy was based on fact. It was submitted that licensing objectives are statutory and stand alone from any other ground but that the board policy statement required to be taken into account when assessing that as a ground.

[14] Turning to the issue of over provision, the defenders' solicitor emphasised that it was the board which was in the best position to assess whether there was over provision in specific localities. The board had selected its locality and had regard to the capacity of licensed premises in that area. It had then proceeded, in exercise of discretion, to assess a smaller locality, which it was claimed was a one kilometre locality, had then identified the number of premises in existence therein and had made its decision. She submitted that it

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was clear from the guidance that the exercise of over provision was not an arithmetical one. In considering whether the over provision presumption should be rebutted, the board had identified an immediate vicinity, different to the policy locality, and considered the position with regard to that vicinity. This was a reasonable approach. The board had not been satisfied that the pursuer should be treated as an exception to their policy. The decision should not be recalled unless the court was satisfied that it was one which no reasonable board could properly have reached.

[15] During the hearing the board's policy had not been challenged by the pursuer's agent. He had accepted the position and accepted that he required to rebut the presumption of over provision. The board had not acted *ultra vires* or irrationally. Their policy was properly formed. It was consistent with the purpose of the statute and they had not refused the applicant an opportunity to be treated as an exception. It was, at this point, asserted on behalf of the board that in formulating their policy it was open to them to deem the whole of their area as a single locality.

[16] The defenders rejected the point concerning natural justice. It was their position that as the issue of domestic harm was set out in terms of their policy, a public document, and reference having been made to that policy then the board was entitled to take it into account in the manner in which they did.

My decision

[17] There are a number of issues in this case. Firstly, the issue of the board's policy document. Although stoutly defended by their solicitor, it appears to me that the document is clearly flawed in respect of its approach to over provision. Although at one point the solicitor submitted otherwise it appears to be accepted by the board within the terms of their

own policy document that they were not entitled to treat their whole area as a locality for the purpose of consideration of over provision. That is, however, precisely what they have chosen to do. They have excluded 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. What they require to do is assess localities where there is over provision not assess localities where there is not. Had they identified the whole of their area by localities and then identified these two localities as the only ones without over provision then they would have approached the matter correctly. That is plainly not what has been done in this case. They have clearly identified their whole area as subject to over provision and then subtracted these two locations as a cosmetic exercise. At the relevant point the legislation did not entitle them to approach the matter in this way. That situation is about to change with the passage of the Air Weapons and Licensing (Scotland) Act 2015 but that is of no relevance to the present appeal.

[18] It is not in dispute that, when considering over provision, 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. Although the defenders seek to suggest that they have dealt with the present case on the basis of two separate localities, I do not consider that they are entitled to take that approach. Having set out their position on locality in their policy document, it seems to me that they are bound to proceed on that basis. They are bound then to consider any application such as this in the context of the number of relevant licensed premises in the whole locality, the capacity of those licensed premises and, in that context, whether or not the present application should be allowed to proceed as an exception. There does not appear to be any suggestion in the Statement of Reasons that they

have undertaken such an exercise. To proceed without first considering the application in the context of their policy locality seems plainly wrong. To then proceed to undertake an exercise using an entirely different locality is also wrong and is perhaps suggestive of an acceptance that the true locality is not that set out in the policy document. The decision refers to overprovision in the locality. Given their consideration of two separate localities they do not then specify in which of these would a grant of the application result in overprovision. In the event that the defenders are to consider exceptions to their policy based on more localised locations and consider whether there is overprovision in that smaller locality then their policy statement on overprovision in the whole locality is clearly flawed.

[19] Even if their approach is correct and that they are entitled when considering the issue of whether the application can be considered as an exception to consider a different and smaller locality, they would be required to take account of both the number and capacity of premises in the area which they designated as the second locality. They have not done so in this case. They may have considered the number of premises but not the capacity.

[20] I do not agree with the pursuer's submission that the defenders required to accept that the application would not interfere with their policy given that the underlying basis of their policy relates to the supply of cheap alcohol and the pursuer clearly indicated that their own pricing policy would exclude provision of cheap alcohol. I consider that to be a factor which the board could quite properly take into account. I do not consider that they are obliged either to accept that because this is an element of their policy decision they are bound to regard it as paramount nor are they obliged to accept the pursuer's statement of intent at face value and incapable of alteration. I tend to agree with the defenders' solicitor

that the board are not obliged to raise every aspect of its consideration with the representatives of the applicant. The policy statement gives notice to applicants of the relevant factors and it is for applicants to select the topics on which they wish to address the defenders in support of their application. I do not see any breach of natural justice in the way in which the hearing on the application was conducted.

[21] It would be inappropriate for this court to seek to instruct the defenders on their assessment of over provision. It was submitted on their behalf that the exercise was not arithmetical and that it should not be based on a quota system, I would accept that point. It does, however, appear that the board are required to consider the levels of relevant licenses and capacity and it is difficult to see how they could properly achieve that exercise without some level of counting and assessment. Any "all area" policy makes such an assessment more difficult.

[22] The defenders' solicitor really did not address the issue of the board's failure in respect of the second ground of refusal. I do not take issue with much of what she said about the factors taken into account by the board in making this assessment and I certainly agree that it is an assessment required by the Act but the plain fact of the matter is that the board have used the wrong test. It is very clear that they require, when applying such factors as are relevant, to come to a view that these would be inconsistent with one or more of the licensing objectives (Section 23(5)(c)) and in that event that the board must refuse the application. That is, however, a completely different test from a set of circumstances which may be so inconsistent. This is the difference between possibility and probability. The defenders have adopted a substantially lower test than required. The defenders have plainly misconstrued the level of test required in arriving at their decision. It is clear that

that decision cannot be allowed to stand particularly as the defenders' submission was that this was the more important of their two reasons for refusal.

[23] It follows from the foregoing that I will find in favour of the pursuer and allow this appeal. I sustain their first and second pleas in law but not the third for the reasons given. I see no lack of relevance in the pursuer's pleading and also repel the defenders' remaining pleas.

[24] I was asked by the pursuers to substitute a grant of the application. I do not consider that to be appropriate. The issues of over provision and compliance with licensing objectives are clearly matters for the decision of the licensing board and not the court. I do not think the defenders are incapable of dealing with the application in an appropriate manner. I accordingly remit the case back to the defenders for reconsideration.

[25] It was agreed that expenses should follow success and the appeal having been successful I have awarded expenses to the pursuer. Although on one view a relatively simple matter there are issues of some complexity particularly surrounding the defenders' approach to and the terms of their policy document. I am satisfied that the proceedings justify the engagement of junior counsel and have found accordingly.

Sheriff of Grampian, Highland and Islands at Aberdeen

ABERDEEN, 26 August 2015.