

SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY
AT HAMILTON

[2018] SC HAM 11

HAM B716-17

JUDGMENT OF SHERIFF DANIEL KELLY QC

in the cause

NATL AMUSEMENTS (UK) LTD

Appellants

against

NORTH LANARKSHIRE LICENSING BOARD

Respondents

Appellants: Skinner, Advocate; Hill Brown Licensing, Glasgow
Respondents: Guidi; North Lanarkshire Council

Hamilton Sheriff Court

26 February 2018

Challenge

[1] The appellants challenge the refusal of an application to vary a licence which restricts the consumption of alcoholic drinks in a cinema complex to those watching films which are classified as suitable for persons aged 18 or over. They seek to enable patrons to take alcoholic drinks in with them while watching any film.

Licensing Board

[2] Among the appellants' cinema complexes is the Showcase Cinema, Barrbridge Leisure Centre, Coatbridge. It has 14 screens, a central area where snack food and drinks are sold and a seated section containing a bar where hot food, beverages and alcoholic drinks

are available. Children are permitted in the foyer area, including in the section which has the bar.

[3] On 8 May 2015 the appellants secured a licence which permitted the consumption of alcoholic drinks during the screening of films classified for persons aged 18 or over. The specific condition in the licence was that:

“There will be no alcohol consumption in the screening areas unless the classification is for persons aged 18 years or over or where the licence holder restricts the screening of any film to persons aged 18 years or over. This condition will not apply where any screening area has been reserved exclusively for a private or corporate event.”

[4] After one unsuccessful attempt to have this condition varied, the appellants lodged a further application to vary it in terms of section 29 of the Licensing (Scotland) Act 2005. The variation would have permitted the taking of alcoholic drinks into any films shown after 7 pm. The terms of the proposed specific condition were that:

“Until 19.00 alcohol will only be permitted into screens showing a film classified for 18 year olds or over, private conferences or corporate events. From 19.00 onwards alcohol will be permitted in all screens.”

[5] By letter of 25 August 2017 Police Scotland objected in terms of section 22(1)(a) of the 2005 Act. They expressed concerns as to the facilitation of adequate supervision of those consuming alcoholic drinks when there was subdued lighting. They maintained that those under 18 could be presented with an opportunity to consume alcoholic drinks. Dangers to those aged under 18, an increased likelihood of disorder and the potential for harm were advanced as the bases for maintaining the current condition. They proposed that the variation should be refused on the ground that it would be inconsistent with the licensing objectives of:

- securing public safety,
- preventing public nuisance, and
- protecting children and young persons from harm.

[6] In determining the application in terms of section 30 of the 2005 Act, on 22 September 2017 the Board refused the application, issuing a Statement of Reasons on 5 October 2017. The two grounds provided for taking the decision were:

- inconsistency with the licensing objective of protecting children and young persons from harm, and
- unsuitability of the premises for use for the sale of alcohol under the proposed variation having regard to the location, character and condition of the premises.

[7] The reasons advanced for the former ground were that the Board were “uncomfortable” with the idea of alcohol being consumed in the screening areas when young persons were present. They considered that those aged under 18 should not be placed in an environment where films were being exhibited when alcohol could be freely consumed in a dark environment. The Board were not satisfied that adequate supervision of the consumption of alcohol when young persons were present could take place in the darkness. They inferred from the police objection that the existing condition served a useful purpose. Finally, they adjudged the concerns which they had to be “real and not based on fanciful or speculative considerations”. As regards the latter ground, the reasons given by the Board included that they felt that the darkened enclosed cinema screening rooms were an unsuitable environment for alcohol to be consumed when young persons were watching films. Moreover, an important factor was said to be the concerns expressed by the police regarding the increased likelihood of disorder and the potential for harm.

Submissions

[8] Under reference to the grounds of appeal in section 131(3) of the 2005 Act, counsel for the appellants argued that the Board had erred in law *et separatim* exercised their

discretion unreasonably in that they had reached a decision for which there was no proper or adequate factual basis. Reliance was placed upon *Leisure Inns (UK) Ltd v Perth & Kinross District Licensing Board* 1991 SC 224 at 233 and *Martin McColl Ltd v South Lanarkshire Licensing Division No 2 (East Kilbride Area)*, Hamilton Sheriff Court HAM-B233-17, 21st August 2017, at paragraphs 35-38 for the proposition that there must be adequate reasons and that for those reasons there must be a proper basis in fact. The solicitor for the respondents maintained that the Board were entitled to have taken the decision which they did. He relied inter alia on two unreported authorities, although these might now be regarded as being mainly of nostalgic interest: *David Edwards v The City of Aberdeen Licensing Board*, Aberdeen Sheriff Court, 16 January 1985, and *Scott Catering and Offshore Services Ltd v The City of Aberdeen District Licensing Board*, Aberdeen Sheriff Court, 26 March 1987. Neither party was aware of any other cinema which operated under a similar condition restricting the consumption of alcoholic drinks in cinemas to those films classified as suitable for persons aged 18 or over.

Appeal

[9] Have the Board erred in law or exercised their discretion in an unreasonable manner in terms of section 131(3)? The concerns which the Board had for children in darkened cinemas when alcoholic drinks were being consumed might well be commendable. However, grounding a decision upon them would require clarity as to what formed their basis, which would have to be capable of enunciation and elucidation. If the concerns are vague and resistant to articulation they are more likely to be risks to which attention ought to be afforded than imminent, tangible dangers. While the Board have expressed a discomfiture which they feel and concerns which they harbour, it is not possible to detect any justifiable, objective material which forms the basis for them and thereby for the

decision taken by them. Were there any actual instances of harm to be drawn from cinemas elsewhere, none were alluded to. Were the particular locality such as to render it sensible to treat it differently from elsewhere, no mention was made of it. While the concerns might have been real in that they were genuinely held, they have not been demonstrated to be real in that any rational or discernible explanation was evident for them.

[10] A decision, or any condition imposed in relation to it, ought to be quashed as an improper exercise of discretion if, where it is one for which a factual basis is required, there is no proper basis in fact to support it: *Wordie Property Company Ltd v Secretary of State for Scotland* 1984 SLT 345 at 348. In my estimation the reasons provided by the Board were inadequate. No solid factual basis such as would warrant a blanket ban on alcohol consumption during films being screened in the venue was presented to the Board; nor was any relied upon by them in refusing the application. It follows in my evaluation that to have reached their decision upon the basis that they did the Board exercised their discretion in an unreasonable manner.

[11] Inasmuch as an error of law might extend beyond abstract questions of law and encompass the application of the law to particular factual situations and to decisions for which there is no evidence or which are inconsistent with the evidence (*CF v MF* 2017 SLT 945, p 948H), I also conclude that there was an error of law in the way in which the Board reached their decision and expressed their reasons for it. In relation to each ground, therefore, and on essentially the same basis, the appeal is upheld.

[12] There was little enthusiasm on either part in the event that the appeal was upheld in remitting the case back to the Board for reconsideration of the decision in terms of section 131(5)(a) of the 2005 Act. No relevant material was anticipated which on further consideration might justify a refusal of the application. The decision is, therefore, reversed

and in substitution for that decision the application is granted in terms of section 131(5)(b) and (c).

Expenses

[13] The respondents are found liable in the expenses of the appellants of the appeal and certification is granted for the instruction of counsel.