SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY
at
HAMILTON

HAM - B233-17

JUDGMENT OF SHERIFF D.A. BROWN

in the cause

MARTIN McCOLL LTD

Appellants

against

SOUTH LANARKSHIRE LICENSING DIVISION NO 2 (EAST KILBRIDE AREA)

Respondents

Appellants: Skinner
Respondents: Agnew of Lochnaw, QC

Hamilton: 21 August 2017

The Sheriff, for the reasons set out in this judgment, Allows the appeal against the Licensing Board's decision of 10 March 2017and Grants the application for a provisional premises licence in respect of the premises known as McColls at 25-27 Loch Shin, East Kilbride, subject to the condition that there will be a minimum of two members of staff on duty when the premises are open for business; Finds the Respondents liable to the Appellants in expenses as taxed; Grants sanction for the employment of junior counsel at the appeal hearing; Allows an account of expenses to be given in and Remits same, when lodged, to the auditor of court to tax and report.

Sheriff

Introduction

[1] The appellants applied in terms of sections 20 and 45 of the Licensing (Scotland) Act 2005 ("the Act") to the respondents as the appropriate Licensing Board for a provisional premises licence in respect of the premises known McColls at 25-27 Loch Shin, East Kilbride ("the premises"). The application was to allow the sale of alcohol within a convenience store. 15 persons lodged written objections to the application. A petition in favour of the application contained over 100 signatures. Police Scotland did not object to the application.

[2] The respondents considered the application at a meeting on 10 March 2017. Following submissions they unanimously refused it on the ground specified in section 23(5)(c) of the Act, being that they considered that granting it would be inconsistent with one of more of the licensing objectives, in particular the two licensing objectives specified in section 4(1)(c) and (e) of the Act, namely

(c) preventing public nuisance, and

(e) protecting children from harm.

On 22 March 2017 they issued a statement of reasons for their decision. The appellants appealed against that refusal.

[3] In terms of section 131(3)(a) of the Act the decision of a Licensing Board may be appealed on the ground that, in reaching the decision, they

(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 manner.

[4] In terms of section 131(5) of the Act, where the sheriff upholds an appeal against a Licensing Board's decision, the sheriff may—

(a) remit the case back to the Licensing Board for reconsideration of the decision,

(b) reverse the decision, or

(c) make, in substitution for the decision, such other decision as the sheriff considers appropriate, being a decision of such nature as the Licensing Board could have made.

Submissions for appellants

[5] Mr Skinner, who had appeared at the hearing of the application by the Board, said that the appellants Martin McCall Ltd owned and operated some 1200 stores in England and over 120 in Scotland. Though traditionally a newsagent, tobacconist and confectioner, they were in the

process of transforming stores into small convenience stores to meet modern customer demand. They had taken over the premises which were the subject of this application a year or two ago, had upgraded them and were operating them as a convenience store. The intended area to be used for alcohol sales was 15.5 square metres which was a relatively small part of the store.

[6] In determining a premises licence application, the Board did not have a wide discretion. That was clear from section 23(4) of the Act which provided that -

> (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.

The question was whether the Board were entitled to reach the view they did that the granting of the application would be inconsistent with either of the licensing objectives they relied on, namely

> (c) preventing public nuisance, and
>
> (e) protecting children from harm.

[7] He submitted that the Board erred in law and, separately, exercised their discretion in an unreasonable manner in that (a) they reached a decision for which there was no proper factual basis and (b) took into account irrelevant matters and failed to take into account relevant matters.

[8] The broad stance of the Act was that a reputable business should be granted a premises licence unless there was a good public interest reason, as articulated in the 2005 Act, for refusal. That reason had to be factually based, rather than being merely speculative. In order to justify refusing an application on the public nuisance ground, there would require to be a factual basis from which it could reasonably be inferred that the sale of alcohol would result in public nuisance. "Nuisance" in this context was anything "which renders life uncomfortable to the public in general or to the neighbourhood..." (*Bells Principles* s 974)

[9] He referred to JC Cummins *Licensing Law in Scotland* 2nd edition at pages 91 to 93 where the author discussed the similar ground of refusal in the Licensing (Scotland) Act 1976 that "the use of the premises for the sale of alcoholic liquor is likely to cause undue public nuisance, or a threat to public order or safety". At page 92 the author commented that

> "This ground is more likely to be successfully invoked in the context of renewal applications where premises have an established "track record", since it requires to be

supported by factual material beyond mere speculation. For example in *Augustus Barnett Ltd* v *Ross and Cromarty District Licensing Board* (9 March 1993, unreported) Tain Sheriff Court, there was no evidence "that the existing problems will be increased if the pursuers' application were granted. There is no more than a belief based upon on assertion."

At page 93 the author emphasised the need for a causal relationship between the sale of alcohol and any public disorder relied on -

"(T)he chief constable's supply of statistics relating to crimes of disorder in a locality could not be relied upon to justify a refusal where these had not been causally related to the operation of the licensed premises (*Pagliocca* v *Glasgow District Licensing Board* 1994 SCLR 999).

[10] In *Leisure Inns (UK) Ltd* v *Perth & Kinross District Licensing Board* 1993 SLT 796 an application was made for the provisional grant of a public house licence in respect of premises for which planning permission had been granted for use as a restaurant and café bar. There were objections from four householders who lived above the premises on the basis that the noise that might emanate from the premises would seriously affect the amenity of the houses. The licensing board refused the application on the ground *inter alia* that there was a "strong possibility that the use of the premises as a public house would have a detrimental effect of the amenity of the four dwellinghouses." The applicants appealed to the sheriff who held that the reasons for refusal were inadequate and granted the application. The licensing board appealed to the Court of Session where the appeal was refused, it being held that (1) behind every ground for refusal there had to be adequate reasons and that for those reasons there had to be a proper basis in fact, and (2) the reasons given by the board were inadequate. At page 799 the Lord Justice Clerk (Ross) said

"Having considered all the material which was before the appellants, I am satisfied that they had no sound basis for concluding that there was a strong possibility that the use of the premises would have a detrimental effect on the amenity of the objectors' premises. Other than assertions from the objectors that their amenity would be affected, there appears to be no basis for any such conclusion."

[11] *Deejays Nightclub and Forsyth* v *Aberdeen Licensing Board* [2007] CSOH 188 highlighted the point that if a licence application was to be refused on the public nuisance ground, there had to be a clear and direct causative link between the sale of alcohol at the premises and the likelihood of public nuisance. In that case the board relied on a "vandalism offences report" submitted by the police and a Chief Inspector's submission that the number, timing and location of the incidents "were indicative of the probability that the incidents had been committed by patrons leaving the premises". Commenting on this report, Lord Glennie said (at paras [13] & [14]) -

"Here the issue, thrown into stark relief by the vandalism offences report, is whether the material put before the board does show any causative link between the premises being open and the incidents of vandalism reported. By causative link I do not mean necessarily that the applicants are to be considered at fault. It may be...that the vandalism occurs simply because at certain times a large number of people, possibly the worse for wear, are leaving the premises. The question at issue ...is whether the material before the board demonstrates any causative link....It is plain from looking at the vandalism offences report that it provides no evidence of any causative link between vandalism and the applicants' premises...."

[12] In relation to the objections, Mr Skinner said that it was important to note that the premises had not been previously licensed so there was no track record of past concerns linked to the sale of alcohol there. It was also important to note the lack of objection from the Chief Constable, which indicated that he had no significant concern about the potential for public nuisance. He referred to *Licensing Law in Scotland,* supra, where at page 93 the author said –

"The absence of objection by the chief constable is likely to be a factor in the applicant's favour: where an application was refused on the basis inter alia that the use of premises for exotic dancing would create the potential for violent conduct, it was considered "significant that the police, with their knowledge and experience, had no objection."(*Risky Business Ltd* v *City of Glasgow Licensing Board* 2000 SLT 923)

He submitted that the objections consisted of assertion and speculation rather than providing the necessary factual material from which it could be inferred that the grant of the licence would result in public nuisance, with a clear causal connection between the public nuisance and the sale of alcohol at the premises. If the application was granted, the situation could be monitored and the Board had ample power to review the licence if there were any problems.

[13] The statement of reasons recorded his submissions to the Board. Given that the objections had raised the issue of underage drinking, he addressed the Board on measures taken by the appellants to prevent sales to underage persons. In particular all staff had to undergo full training before they went behind the counter, the training programme exceeded that required by the Act and their tills identified any alcohol sale and automatically prompted the staff member to ask for ID and flashed up the date before which the customer required to be born. The tills were integrated with the CCTV system and any transaction could be checked on CCTV. This was not a cost-saving store and would not sell fortified wines or strong cider and lager such as might appeal to teenagers. The objections had also raised the issue of youth disturbance but the police had not raised any concern and in their Anti-Social Behaviour Report of 11 January 2017 in terms of section 21(3) of the Act had recorded that during the

whole of 2016 within a 50 metre radius of the premises there were no reports of drinking in public places, no reports of persons being drunk and incapable and only 2 reports of disturbances.

[14] The statement of reasons noted Councillor Maggs' reference to the Notice by Police Scotland dated 11 January 2017 in terms of section 21(4) of the Act detailing the appellants' previous convictions for selling alcohol to children under 18 years of age and her view that she was not confident that the appellants' staff training was as effective as suggested. What that notice recorded in relation to such offences were two convictions for selling alcohol to persons under the age of 18, the first on 26 June 2014 at West Suffolk Magistrates Court in respect of an unspecified number of sales and the second on 15 March 2016 at Suffolk Magistrates in respect of what appeared to be three sales. As recorded in the statement of reasons, Mr Skinner said that he told the Board that the appellants had around 1,200 stores in the UK, commented that there were only two such convictions over the 4½-year period covered by the report, accepted that there was always the possibility of human error and said that in the event of fault, disciplinary action was taken. He suggested to the Board that given the number of stores and the period of time involved, this was a very impressive record. He also pointed out that there had been no such convictions in Scotland where there were some 120 stores. Mr McGraw, the appellants' area manager, advised the Board that there was more training in Scotland than in England.

[15] Also noted in the statement of reasons were comments by Councillor Maggs based on her knowledge as a local resident in the area for a number of years. She said that she was aware of problems with the previous shop, that she got a number of complaints and that numerous complaints went to housing and not the police. Mr Skinner responded by telling the Board that prior to the appellants taking over the shop, it was not run in the way that the appellants operated but that in any case any such problems as there had been had not been linked with the sale of alcohol as the premises had not previously been licensed. Councillor McGinley expressed concern about only one member of staff being on duty at a time. Mr Skinner responded by saying that there would be two members of staff in the shop at all times if that was made a condition of the licence.

[16] The reasons for the Board's decision were noted at part 10 of the statement of reasons. These reasons (indicated here by lettering only for ease of reference) were in brief as follows –

(a) The Board accepted Councillor Maggs' comments based on her local knowledge about complaints (of disorderly behaviour) being made to the Housing Department rather than the police and took the view that these supported the objections referring to anti-social behaviour.

(b) The Board did not accept that the appellants' training procedures were as vigorous as indicated by Mr Skinner. Though none of the previous convictions for sale of alcohol to underage children related to incidents in Scotland, it found that they were of some relevance.

(c) The Board was concerned that there was currently only one member of staff on duty despite cigarettes being sold, noted Mr Skinner's submission that a second member of staff would be put in if it was made a condition of the licence and would have expected this to be done whether or not it was a condition of the licence.

(d) The Board noted objections from certain named objectors and made certain comments as follows -

- Mrs Brown – that during the 40 years she had resided in the area she was aware of problems around the shop and the nearby underpass for most of the time
- Mr Sweeney – that the shop is 15 yards from the children's play park, 150 yards from 3 local schools and 40 yards from a pedestrian underpass
- Ms Watts – that the underpass could be used as a drinking shelter and toilet. The Board formed the view that there were social issues in the area and that prior to McColls taking over the premises, youths hung around the shop and created an intimidating atmosphere for residents.
- Ms Dyet – that an alcohol licence would see such behaviours return
- Mrs McKay - that the area is already overrun during school breaks by older children from the local high school and that teenagers are known to request residents using the shop to purchase cigarettes on their behalf. The Board had concern that this behaviour would extend to the sale of alcohol if a licence was granted. The Board accepted that given the social issues in the area spoken to be the objectors, there was a very real concern that young people would loiter around the shop and that once purchased, alcohol would cause issues in the community playground.
- Mr Peters - that people already congregate in the nearby underpass and that the sale of alcohol would increase this intimidating behaviour. The Board also noted that broken glass, bottles, litter and debris were already a problem and was concerned that if alcohol was sold, youths and revellers would increase the number of people who congregate in the underpass, thus causing a nuisance to residents seeking to use the underpass in the evening. The Board had a real concern that if the premises were granted a licence to sell alcohol, the fears of the residents would be a reality given the present issues in the area.
- Mr McLachlan – that there was a previous history of violence in the area, that the previous owner had been assaulted and that there was a robbery at the

A.T.M. The Board was very concerned that the sale of alcohol would result in an increase in the anti-social behaviour which it found currently took place in the area.

- Ms Richardson – that there was disorder in the past involving people sitting in the local playground drinking and urinating within her block of flats. The Board accepted her concern that if the premises were granted a licence to sell alcohol, this kind of behaviour would increase. It agreed with her assertion that it would encourage people to linger within the area and the playground creating a noise nuisance. The Board also had a concern that if alcohol was sold in the premises, due to the proximity of the underpass this would deter people from using the underpass.
- Ms McDonald – that a lot of youths congregate at night in the swing park causing disturbances and that groups of youths have historically congregated in the underpass drinking alcohol and causing disturbances. It found that if the licence was granted, this would exacerbate the position.

(e) The Board found that in their view the area currently suffered from anti-social activities and that if the application was granted, this would be inconsistent with the licensing objectives of preventing public nuisance and protecting children from harm.

[17] Mr Skinner criticised the decision on the basis that there was no proper factual basis underpinning it and that the Board took into account irrelevant matters and failed to take into account relevant matters.

[18] The following were the relevant matters which they failed to take into account were

(a) the lack of objection or concern by the police;

(b) the detailed staff training, over and above that given in England, to prevent the sale of alcohol to underage persons and the supporting systems such as the till prompts;

(c) the fact that although the appellants operated some 120 licensed premises in Scotland, these had never been the subject of any complaints or review proceedings in Scotland arising from nuisance or the sale of alcohol to underage persons;

(d) the petition signed by over 100 local people supporting the application;

(e) the fact that the alcohol to be sold by the appellants would not be particularly cheap and that the product range was unlikely to appeal to younger persons; and

(f) an email from the Council Ground Services Department confirming that there had been no concerns about anti-social behaviour in the area and that they had not been made aware of any problems now or in the recent past

[19] As regards the irrelevant material which they had taken into account, he said that this largely consisted of the assertions and speculations of the objectors about what could or might happen if the licence was granted, without there being any proper factual basis for assessing

the likelihood of these things happening. The information about past incidents such as previous violence, an assault on a previous owner of the premises and a robbery at an ATM was not relevant as these were not linked either with the sale of alcohol or the appellants' business. The local knowledge of Councillor Maggs was not relevant to the issue of whether the sale of alcohol at the premises would be likely to cause public nuisance or harm to children.

[20] The Board held that the 2 alcohol-related convictions in England over a 4-year period were "of some relevance" to the application without explaining the nature and degree of relevance and without have regard to the facts that there was a different training regime there, that the convictions were the only relevant convictions over a 4-year period in respect of 1,200 stores and that there had been no review hearings in respect of the 120 licensed premises in Scotland arising out of the sale of alcohol to underage persons.

[21] He also submitted that there was no proper basis for finding that the licensing objective of protecting children from harm would be prejudiced by the grant of the licence. It was difficult to understand what children were being referred to. Was it children in the park who would be harmed by persons who had purchased alcohol from the premises or was it children who could cut themselves on broken alcohol bottles? And what was the factual basis for any such conclusion?

[22] He further submitted the Board had failed to provide proper and adequate reasons for their decision. He referred to the test for adequacy as recently reaffirmed in *Ritchie* v *Aberdeen City Council* 2011 SC 570 in which the Lord Justice Clerk (Gill) said-

> " [11] In the now classic formulation of Lord President Emslie, the duty of the decision-maker in a case of this kind is
>
> > 'to give proper and adequate reasons for [the] decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it'
>
> (Wordie Property Co Ltd v Secretary of State for Scotland , pp 347, 348; cf Mirza v City of Glasgow Licensing Board , Lord Justice-Clerk Ross, p 457C-D). A consideration is material, in my opinion, if the decision-maker decides that it is one that ought to be taken into account. The court may of course interfere if he perversely disregards a consideration that in the view of the court is manifestly material.
>
> [12] The decision-maker, having taken a particular consideration into account, may in the event decide that other considerations outweigh it. Such a consideration, being thus outweighed, is not a determining consideration; but it is material nonetheless because it has formed part of the decision-making process. 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.

That case concerned a taxi driver who was convicted of drink driving and disqualified for driving for one year but thereafter completed a rehabilitation programme and successfully applied for early restoration of his driving licence. He then applied for renewal of his taxi driver's licence, the chief constable objected on the basis of the conviction and the licensing committee refused the application, setting out its reasons in a statement of reasons. This was held to be inadequate, as explained by the Lord Justice-Clerk as follows –

"[14] The narrative of the hearing that I have given suggests to me that the essential decision for the committee was to balance the objection based on the nature and the seriousness of the conviction against the mitigatory factors.....

[15] In this case there are two interpretations of the committee's reasons, on either of which they are unsound. The first is that the committee regarded itself as having to carry out a balancing exercise such as I have described. If that interpretation is right, the statement of reasons fails, in my opinion, to specify how the committee carried out its evaluation of the competing considerations and in particular why it decided that the mitigatory factors were outweighed by the conviction. The decision therefore fails to set out proper and adequate reasons and cannot stand.

[16] The other interpretation of the decision ..... is that the committee considered that the conviction was of such a nature that it was a conclusive reason for refusal, regardless of any mitigatory factors that might exist. On that interpretation, I consider that the committee's approach was misguided. ....Simply to decide that any such conviction is per se a conclusive ground for refusal in all cases is in my opinion unreasonable. On that interpretation of the decision I consider that it is invalid."

Mr Skinner submitted that these comments underlined the importance of discussing and weighing the material considerations. In this case at the reasoning portion of the statement of reasons there was simply a narration of some of the objectors' concerns and, without any analysis, an indication that the Board agreed with them. It was not explained why any social problems in the area would be exacerbated by the grant of a licence to sell alcohol at this small convenience store run by a reputable operator. There was no weighing of the mitigatory factors advanced on behalf of the appellants. There was no explanation about why the complaints referred to by Councillor Maggs were relevant to the proposed sale of alcohol. There was no proper explanation about why the Board did not accept that the appellants' training procedures were as vigorous as suggested. They failed to explain whether and for what reason they considered that if the premises were licensed, underage persons would be able to obtain alcohol there and would then cause problems. They failed to explain why the

grant of the licence would be inconsistent with the licensing objective of protecting children from harm. They failed to have regard to the lack of problems at other McColls stores. They failed to specify the weight, if any, they gave to the petition of over 100 local people supporting the application. They failed to weigh the lack of objection by the police. He submitted that for all these reasons the Statement of Reasons was wholly inadequate.

[23] He submitted that the appeal should be allowed. In that event, the court had a discretion in terms of section 131 of the Act as to what to do. In particular it could grant the application or remit the matter back to the Board for further consideration. He submitted that it should grant the application rather than remit it back to the Board. He referred again to *Leisure Inns (UK) Ltd* v *Perth & Kinross District Licensing Board,* supra, where the Court of Session, having reached the decision that the reasons for refusing an application were inadequate, held that there was no adequate material before the board for holding that the ground for refusal had been made out and that there was therefore no point in directing that the case should be remitted to the board. That was the situation here.

[24] In response to a question from the court based on concerns expressed at the hearing about only one member of staff being on duty, he indicated that if the application was granted the appellants would accept a condition that there be a minimum of two members of staff on duty in the store during opening hours.

Submissions for respondents

[25] Sir Crispen Agnew of Lochnaw said that the application was refused because the Board considered that granting it would be inconsistent with the licensing objectives of (first) preventing public nuisance and (second) protecting children from harm. The appeal should be refused if the court was satisfied that there was substance in either ground. If the appeal was allowed, his motion was for the application to be remitted back to the Board for reconsideration in terms of section 131(5)(a) of the 2005 Act. Remit back would be inappropriate if the court considered that there was no material on the basis of which the Board could properly refuse the application, in which case the court could grant it, but if the court considered that the Board erred its appraisal of the material and that there was still a decision to be made on it, the matter should be remitted back to them. He referred to *Matchurban* v *Kyle & Carrick District Council* 1995 SC 13 in which Lord McCluskey, delivering the opinion of the court, said (page 103D)

"....Parliament has decided that the decision on matters of this kind should be taken by the local licensing authority and there would need to be compelling reasons for removing from such an authority the responsibility for taking such decisions."

There had been a previous refusal of a licence application by the appellants about a year before the current application. There was no information about the reasons for that refusal and there had been no appeal against the decision. The history of refusal was not a sufficient reason not to remit back.

[26] The court could only interfere with the Board's decision if the statement of reasons was inadequate. It was not for the court to re-assess the submissions and decide the matter on the basis of a differing view from the Board. The court had to be satisfied that the Board erred in law in their approach to what was an administrative decision.

[27] The starting point was, as Lord Allanbridge observed in *Latif* v *Motherwell District Licensing Board* 1994 SLT 414 at p 415 –

"(A) licensing board has had the advantage of hearing many such applications, knows its own area and may be assumed to have developed some expertise in assessing problems such as the over-provision of licensed premises."

Similarly it could be assumed that they would have developed some expertise in assessing the likelihood of public nuisance associated with licensed premises. So when examining the statement of reasons and the deductions made from the material provided by the objectors, it should be borne in mind that the Board were viewing this in the light of their expertise in assessing such problems, that on the basis of this expertise they knew what could happen and that they were making deductions against that background.

[28] The following matters should be taken into account when considering the adequacy of a statement of reasons –

1. it was to be assumed that it would be read by an informed reader, meaning a reader who was well aware of the relevant issues to be considered;
2. it only required to refer to the main issues and need not canvas every submission nor evaluate every issue;
3. it need only identify the main considerations taken into account in reaching a decision, being those which the Board has identified as material considerations;
4. if the statement of reasons says that the Board has had regard to material, it is not for the court to go behind that statement unless there are obvious indications to the contrary; and

5. adverse inferences should not readily be drawn.

It was not the case, as suggested by Mr Skinner in submissions, that because there was no mention in the statement of reasons of certain things he said at the hearing, they had been disregarded. He referred to *Noble* v *City of Glasgow District Council* 1995 SLT 1315 in which Lord McCluskey, delivering the opinion of the court, said

> "(C)ounsel for the appellants referred to the letter containing the reasons to demonstrate that important evidence adduced on behalf of the appellant to the committee had either been ignored or brushed aside for what was said to be inadequate reasons. It is not necessary.....that the letter containing the reasons should canvass each piece of evidence or each assertion..... If the letter states that the authority had had regard to the evidence and to the productions it is not possible for this court to go behind such a statement, unless something else makes it clear that the authority have not had regard to such material."

[29] The basic requirements of a statement of reasons were explained in *South Bucks District Council* v *Porter*[2004] 1 WLR 1953 as follows (para 36) –

> "36 The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. .."

[30] The weight to be given to any material consideration was a matter for the Board and even if the conclusion they reached was only just conceivable, the court should respect it. The Board had a wide discretion in relation to fact finding. He referred to *City of Glasgow Council* v *Binmende* 2016 SLT 1063 which involved an application for the renewal of a taxi booking office licence and in which Lady Paton, delivering the opinion of the court, said (para [28]) –

> "[28] There are no provisions, either in statute or case law, limiting or defining the bases upon which a licensing authority may conclude that an applicant is not a "fit and proper person" to hold a licence. Such decisions are, of course, subject to the usual controls on administrative action: taking account of relevant considerations and avoiding irrelevant

considerations; perversity; *Wednesbury* unreasonableness and the like. Beyond those controls, the authority enjoys a wide measure of discretion……A licensing authority has a broad discretion when exercising their judgment. They are entitled to place weight on the nature and cumulative impression of a series of circumstances…..".

He submitted that that was what the Board had done in this case in relation to all the circumstances described in the letters of objection. In relation to the Board's discretion, Lady Paton said (para [35])

"[35] (I)t is our opinion that the sheriff erred in law in holding that the committee's decision represented an unreasonable exercise of their discretion. We consider that, on the evidence before the committee, it could not be said that no licensing authority acting reasonably could have reached the conclusion they reached. As was said in *Hughes* v *Hamilton District Council* , at 1991 S.C., pp.256–257; 1991 S.L.T., pp.631–632: "… Once there is relevant material before a licensing authority the question as to the weight to be attached to that material and the significance of any other balancing factors must before the authority to assess … [and the question was whether it could] possibly be said that no reasonable committee could have arrived at the view at which this committee arrived..."

Accordingly before the court could allow the appeal, it would have to be satisfied that no reasonable committee could have arrived at the decision.

[31] He also referred to *Puhlhofer* v *Hillingdon London Borough Council* [1986] A.C. 484, which involved an appeal against the decision of a local housing authority to refuse to provide accommodation, and in which concern was expressed at the use of judicial review to challenge the performance by local authorities of their functions under the relevant Homeless Persons Act. In particular Lord Brightman said (at p 518)

" The ground upon which the courts will review the exercise of an administrative discretion is abuse of power - e.g. bad faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in the *Wednesbury* sense - unreasonableness verging on an absurdity…Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

He submitted that these comments were equally relevant to the review of the decision in this case in that the Board had made a discretionary decision on whether public nuisance or harm to children would result from the granting of the application. If that decision was just conceivable, the court could not interfere.

[32] He took no issue with what Mr Skinner had said about the relevant statutory provisions.

[33] It was clear from the statement of reasons that the Board took into account all of the material before them. In particular they specifically took into account the fact that the police did not object to the application. The various submissions made were recorded at section 9 and thereafter the decision and the reasons for that decision were recorded at section 10. The Board were entitled to reach the decision on the basis of the material before them. Many of the objectors referred to things which happened at the shop before the appellants took over and to things which happened in the neighbourhood. Contrary to what had been suggested, these were not just assertions. There were the two convictions in England involving the sale of alcohol to children under the age of 18, each on two or more occasions, and that was a fact which the Board were entitled to take into account. That could be viewed as trivial on its own but as in *City of Glasgow Council* v *Binmende* (supra), the Board were entitled to place weight on the cumulative impression of a series of circumstances and were in particular entitled to take the view that the training procedures were not as vigorous as represented. If public nuisance was likely, then the proximity of the children's play area was clearly relevant in that children would require to be protected from exposure to that nuisance. The presence of bottles and litter supported the view that people congregated in the vicinity. The Board made deductions from what was currently happening on the basis of a detailed analysis of all the material factors. They explained why they reached their decision and it was one they were entitled to make. The appeal should therefore be refused.

Decision

[34] In the final paragraph of the statement of reasons it is stated that -

> "The Board .... found that if the application was granted, this would be inconsistent with the following licensing objectives, namely preventing public nuisance and protecting children from harm and accordingly the application was refused."

Having reached that conclusion, the Board were bound in terms of section 23(4)(b) of the Act to refuse the application. The issue was whether they were entitled to reach that conclusion on the basis of the material before them.

[35] As reflected in the Board's finding, the relevant requirement in terms of section 23(5)(c) of the Act is that "the Licensing Board considers that the granting of the application *would be* inconsistent with one or more of the licensing objectives"(emphasis added). This implies that there must be more than a risk or possibility of the occurrence of something which is inconsistent with a licensing objective. For example in *Risky Business Ltd* v *Glasgow City Licensing Board,* supra, which involved the refusal of a licence on the ground that the premises

were not suitable or convenient for the sale of alcohol, Lord Prosser when delivering the opinion of the court said (at para 15) -

> " (T)he mere possibility of some undesirable sequel to the grant of an application was not a ground for refusal: the test was one of likelihood or probability, and since s 17 (1) (b) was concerned with general issues of suitability and convenience, what was in issue was not the likelihood or probability of some individual but undesirable event occurring on some occasion in the future, but the likelihood or probability of such events constituting a feature or characteristic of the operation of the premises, so as to have a bearing upon their suitability or convenience for the sale of alcoholic liquor."

The question for the Board in this case was therefore whether they were satisfied that it was likely or probable that events which were inconsistent with the specified licensing objectives would be a feature or characteristic of the operation of the premises if the licensing application was granted.

[36] In considering whether undesirable consequences are likely to result from the granting of an application, a Licensing Board can draw inferences from the material before them but such material must be factual and capable of supporting any inference drawn. That was emphasised in *Leisure Inns (UK) Ltd* v *Perth & Kinross District Licensing Board,* supra, in which the Lord Justice Clerk (Ross) said(at page 798) that

> "behind every ground for refusal there must be adequate reasons and that for these reasons there must be a proper basis in fact."

Further, the material must provide a proper basis for inferring the necessary causative link between the granting of the application and an anticipated consequence (*Deejays Nightclub and Forsyth* v *Aberdeen Licensing Board,* supra), meaning that it must support the inference that the consequence will result if the sale of alcohol is permitted at the premises.

[37] If a Board is presented with objections to an application for a licence and is considering whether to refuse it on the ground of inconsistency with a licensing objective, they have to bear in mind that such a decision has to be factually based. Objectors may understandably have genuine concerns about the possible consequences of granting an application, and the Board may well be sympathetic to their concerns, but if there is no factual basis from which it can be inferred that these consequences are likely to materialise, such concerns cannot justify a refusal of the application. This is perhaps readily understandable as there will almost inevitably be the risk of alcohol-related problems associated with the sale of alcohol and if mere risk or possibility in itself could justify a refusal, very few applications might be granted, which is plainly not the intention of the Act. An application can only be refused if a specified

ground of refusal is established and the test for refusal appears deliberately to have been set at a reasonably high level. That however is not the end of the story because if the test for refusal is not met and the licence is granted, then if any problem relevant to the licensing objectives does arise, the Board can deal with the matter by means of a review of the licence. In particular, if a ground for review is established, the Board can in terms of section 39 of the Act issue a written warning to the licence holder, vary the licence, suspend it or revoke it.

[38] If a Board does refuse an application on the ground that they consider that granting it would be inconsistent with a licensing objective, the statement of reasons explaining their decision has to be reasonably explicit in identifying the problem which they considered would arise if the application was granted and the factual basis on which they reached that conclusion. For example in *Leisure Inns (UK) Ltd* v *Perth & Kinross District Licensing Board,* supra, four householders living above the relevant premises objected to the grant of a public house licence on the basis that the noise that might emanate from the premises would seriously affect the amenity of their houses. Their concerns were understandable and were apparently shared by the Board who refused the application on the ground *inter alia* of "there being the strong possibility that the use of the premises as a public house would have a detrimental effect on the amenity of the four dwellinghouses". An appeal against that decision was allowed on the ground that this was not an adequate reason for refusal. The Lord Justice Clerk (Ross) was particularly critical of the statement of reasons, saying (at page 798) -

> "(T)here is no indication as to the circumstances in which it was apprehended that there would be noise detrimental to amenity. How long was the noise to continue? With what frequency was such noise to be experienced? At what time of the day or night was it apprehended that this noise would occur? What degree of noise was anticipated? These are some of the questions which are not dealt with in the statement of reasons. In my opinion the statement of reasons is unspecific and anyone reading the statement of reasons would be left in real doubt as to what the reasons were for refusing this application."

At page 799 he said

> ".. I am satisfied that (the Board) had no sound basis for concluding that there was a strong possibility that the use of the premises would have a detrimental effect on the amenity of the objectors' premises. Other than assertions from the objectors that their amenity would be affected, there appears to be no basis for any such conclusion."

In *Singh* v *City of Glasgow Licensing Board* 1998 S.C.L.R. 865 there was a letter of objection to an application for an off-sales licence from an adjoining shopkeeper on the basis *inter alia* that drunks regularly caused a nuisance in the back lanes and that granting the licence would

encourage drunks to drink, stand and make a nuisance there. The Board refused the application on the ground that the use of the premises for the sale of alcohol was likely to cause undue public nuisance or a threat to public order and safety. In explanation of the decision it was said that

> "The board took into account the comments and concerns of the objector with regard to existing problems to residents caused by persons loitering and drinking in or around the premises which gave rise to concern that these individuals are likely to frequent the premises which are the subject of the application.....(T)he board considered that the conduct complained of by the objector amounted to undue nuisance and that such problems as existed at present in this regard were likely to be exacerbated if the present application was granted. The board was satisfied that the persons who could clearly suffer from any increase in these problems were the local residents. The board considered the objection to be an expression of genuine concern which was valid and well-founded in relation to the present application."

In an appeal against that decision it was submitted for the appellant that there was no proper basis for thinking that the grant of the application was likely to cause or exacerbate undue public nuisance and that the objection consisted of mere assertions which did not provide a basis for the Board's conclusion. The Appeal Court agreed and allowed the appeal. In delivering the opinion of the court, the Lord Justice-Clerk (Cullen), said (at pages 833/834) –

> "We consider that the submission of counsel for the appellant is compelling.....The objector's letter lacked specification. In particular it was not possible to determine the extent and weight of her complaint about what had already happened, and the relationship, if any, which such behaviour was likely to have to the proposed use of the appellant's premises. In these circumstances we consider that the objector's letter ..... was little more than a series of assertions in relation to matters of doubtful materiality. In our opinion it did not provide the respondents with a proper basis for deducing that the use of the appellant's premises for the sale of liquor would cause or materially contribute to the causing of undue public nuisance."

[14] If a Board rely on their own knowledge and experience in reaching a decision, there is a similar requirement to explain the facts they relied on, the conclusion drawn and the link with the sale of alcohol. This was made clear by Lord Prosser when delivering the opinion of the court in *Risky Business Ltd* v *Glasgow City Licensing Board,* supra, at para [16] -

> " If a board have some local knowledge, or some licensing experience, which they regard as relevant and wish to rely upon in reaching a decision, the position in relation to that material seems to me to be plainly the same as the position in relation to evidence: in explaining any reasoning, the knowledge or experience which is seen as relevant will have to be identified, just as any relevant part of the evidence would have to be identified. Indeed, it may be more important to identify the alleged knowledge or experience, which, unlike evidence, may not easily be identifiable by others."

[39] Given that the main issue in this appeal is whether the material before the Board was capable of justifying the conclusion reached, it is necessary to consider the nature of that material.

[40] First there were the 15 objections to the application. At part 10 of the statement of reasons the Board referred to the objections which they took into account and commented on some of them. In brief these objections and the Board's views were, and my comments on them are, as follows -

- There had for many years been problems and social issues in the area. – This would only be relevant if granting the application was likely to exacerbate these problems, which depended on the view taken on the other matters considered by the Board.
- There were 3 schools nearby and the area was overrun with children during school breaks. – Similarly this would only be relevant if, as a result of other factors, the granting of the application would result in children causing or being exposed to public nuisance or being placed at risk of harm.
- There was a nearby underpass where people already congregated drinking alcohol and causing disturbances, the sale of alcohol would exacerbate this problem by leading to an increase in the number of people congregating there, there would be a consequent increase in this intimidating behaviour and nuisance to residents using the underpass in the evening and this would deter them from using it. – This was little more than speculation about a perhaps unlikely possibility. In particular, the people who currently congregated in the underpass were clearly able to obtain alcohol from other sources and it was not clear why the availability of alcohol from a further source or a nearer source should increase the appeal of this antisocial activity to the extent that others would become involved.
- There was a children's play park nearby, a lot of youths congregated there at night and caused disturbances and this would be exacerbated if the licence was granted – This involved much the same type of speculation as was apparent in relation to the previous matter though it was not clear whether the concern was about the possibility of underage persons obtaining alcohol from the premises or about a further or closer source of alcohol resulting in more youths drinking or in the existing youths drinking more. There was no proper basis any such inference. Further, there was no suggestion that the alcohol to be sold at the premises would be cheap or designed to appeal to youths, in fact quite the reverse.

- There was previous disorder involving people sitting in the play park drinking and urinating in a block of flats and the Board accepted the objector's concern that this kind of behaviour would increase if the application was granted and agreed with her assertion that it would encourage people to linger in the area and the playground creating a nuisance. – This point is similar to the previous two. There was no proper basis for an inference that shop customers would consume their alcohol and create a nuisance in the vicinity of the shop and in particular there was no evidence of this previously happening as the premises had never previously been licensed.
- Prior to McColls taking over the premises, youths hung around the shop creating an intimidating atmosphere and there was a concern that an alcohol licence would see such behaviours return. – The improved position after the appellants took over the shop could have been regarded as a point in their favour but at the very least it was a factor which should have reduced the significance of what was in any case no more than a concern.
- Teenagers were known to request residents using the shop to purchase cigarettes on their behalf, the same could happen in relation to alcohol and young people would obtain alcohol and cause problems. – This is one of the alcohol-related problems which can arise in relation to almost any licensed premises. There was no basis for inferring in relation to these premises that residents would comply with such requests and thus encourage this activity or that the shop would not be alert to this potential problem.
- Broken glass, bottles, litter and debris were already a problem – The concern apparently was that customers buying alcohol at the shop would exacerbate this problem by drinking it near the shop and dropping bottles, litter, etc. on the ground. There was no factual basis on which it could be inferred that this would happen.
- There was a previous history of violence in the area, the previous shop owner was assaulted, there was a robbery as the A.T.M. and the Board were very concerned that the sale of alcohol would result in an increase in the current level of anti-social behaviour – There were no details about these previous incidents and in particular nothing to link them with the sale of alcohol at the premises or with alcohol from any source. This concern plainly had no foundation in fact.

[41] None of the objections therefor provided a proper factual basis capable of supporting the inference drawn by the Board that permitting the sale of alcohol at the premises would result

in public nuisance or harm to children. The question then is whether the other material available to them did so.

[42] In relation to this other material, first there was the information provided by Councillor Maggs based on her knowledge as a local resident in the area for a number of years. The information from her accepted and relied upon by the Board, as recorded at section 10 of the statement of reasons, was that when she resided in the area there were complaints about the previous shop and that most of the complaints were made to the Housing Department rather than to Police Scotland. The Board, commenting on the lack of objection from Police Scotland to the application and the low number of incidents recorded in their Anti-Social Behaviour Report, said that they appreciated that Police Scotland could only report on the complaints they were informed about and expressed the view that it was apparent from the objections and Councillor Maggs' local knowledge that not all incidents were reported to the police. – There are various difficulties with the reliance on this material. First, the shop was now under new management and there was no link between the current and previous operating practices. Second there was no detail about the complaints referred to by Councillor Maggs and in particular nothing to suggest that alcohol was a factor or linking them with the sale of alcohol at the premises. Third was no indication of when and how often the incidents complained about occurred. Fourth there was no explanation about why, if there was any criminal conduct, it was not reported to the police. Fifth, if this information was regarded as supporting the objections made, then given that the objections were such as could not justify a refusal of the application and this information provided no factual details, it was similarly not capable of justifying the refusal. Overall then it is clear that this information provided by Councillor Maggs could not properly support the inferences which required to be drawn if the application was to be refused.

[43] Second, the Board took into account the appellants' two previous convictions in England in respect of the sale of alcohol to underage persons, considered that they were of some relevance and on that basis took the view that the appellants' training procedures were not as vigorous as indicated by Mr Skinner. They were clearly entitled to take these convictions into account and attach such weight to them as they considered appropriate.

[44] Third, the Board were concerned that there was only one member of staff on duty between the hours of 7am and 11am, given in particular that the application was to allow alcohol sales from 10am. – This point was addressed by Mr Skinner at the hearing before the Board in that

he agreed on behalf of the appellants that any licence granted should be subject to the condition that two members of staff be on duty at all times, an undertaking which he repeated at the appeal hearing.

[45] Those then in brief were all the matters considered by the Board. Although there was a lot of material, ultimately the only factual matters properly relevant to the decision were the two previous convictions in England in relation to the sale of alcohol to underage children. As discussed below, that in itself could not have justified the decision. Accordingly I agree with the submission for the appellants that in reaching their decision the Board erred in law in that they reached a decision for which there was no proper factual basis and took into account irrelevant matters in reaching it. On that basis the appeal is allowed. I also however agree with the submission for the appellants that the statement of reasons was inadequate due to the failure to proceed beyond expressions of concern about possibilities and explain why and on what basis the Board considered that the sale of alcohol at these premises was likely to result in consequences which were inconsistent with the licensing objectives. I was however not satisfied that they disregarded relevant material and to that extent agree with the submission on behalf of the respondents.

[46] As regards the appellants' previous convictions, given that they operated some 1,200 stores, that these were the only relevant convictions over a 4-year period, that there was nothing to counter the evidence that additional training was provided in Scotland, and that there had been no relevant convictions in Scotland and no review hearings in respect of the 120 licensed premises operated by the appellants in Scotland arising out of the sale of alcohol to underage persons, it appeared to me that if this had been the only relevant material to consider, no reasonable Board would have refused the application.

[47] As regards the question of a remit back to the Board in terms of section 131 of the 2005 Act, that would only be appropriate if there was relevant material which could on further consideration by the Board justify a refusal of the application (*Leisure Inns (UK) Ltd* v *Perth & Kinross District Licensing Board,* supra). I do not consider that there is such material available and there is therefore no point in directing that the case should be remitted to the Board. I have therefore, in exercise of the power in that section, reversed the decision and granted the application.

[48] Given the Board's concern that there should always be two members of staff on duty and the acceptance on behalf of the appellants that the licence if granted could be made subject to that

condition, I have in terms of section 27(6) of the Act imposed a condition that there be a minimum of two members of staff on duty in the shop during opening hours.

Expenses

[49] It was agreed that expenses should follow success and that is reflected in the interlocutor. I granted, as I considered it reasonable to do so, an unopposed motion for sanction for the employment of counsel at the appeal hearing, based on the complexity and importance of the matter and the desirability of ensuring that neither side gained an unfair advantage by virtue of the employment of counsel.