

## Licensing Case Law – Licensing (Scotland) Act 2005 (the “Act”)

### Key Cases 2012 – 2017

#### ***McColl v Aberdeen City Licensing Board 2015<sup>1</sup>***

Subject: Licensing Objectives – Possibility v Probability

This case concerns the refusal of an off sale licence by the Aberdeen Licensing Board (the “Board”) for a proposed RS McColl’s premises in Kincorth, Aberdeen. The application was refused by the Board on the basis of overprovision and the public health objective. This summary will focus on matters related to the public health objective.

In this appeal case it was held that the Board had (incorrectly) assessed whether the application ‘may’ be inconsistent with the public health objective whereas the legal test under S23 (5) (c) is whether the granting of the licence ‘would’ be inconsistent. The difference between ‘may’ and ‘would’ is vital and the following passage from the appeal decision serves to highlight this critical difference: “It is very clear that [the Board] 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.”

#### Key Point

The above case highlights the vital distinction between possibility and probability. When determining an application, under S23 (5) (c) (inconsistency with licensing objectives) the legal test is not whether granting the application ‘may’ be inconsistent with the any of the licensing objectives but rather whether the granting of the licence ‘would’ be inconsistent.

#### ***Aldi Stores Ltd v Dundee City Licensing Board 2016<sup>2</sup>***

Subject: Licensing Policy - non- adherence to the 2005 Act

The facts of the case are as follows. In 2014 Dundee City Licensing Board (the “Board”) issued an overprovision policy in terms of S7 of the Act, which stated that the whole of the Board area was overprovided with the exception of the Central Waterfront Area (the “CWA”). Aldi applied for a provisional premises licence for a store in an area out with the CWA. The application was refused on the ground of overprovision.

It was determined at Dundee Sheriff Court that the decision of the Board to refuse the provisional premises licence was based on an overprovision policy which had failed to follow the requirements of the Licensing (Scotland) Act 2005. The public consultation issued by the Board had invited respondents to identify ‘overprovided’ areas. The sheriff held that in doing so, the Board had failed to meet its

<sup>1</sup> A copy of the judgement can be found here: <https://licensinglaws.files.wordpress.com/2015/09/mccoll-v-aberdeen-2015.pdf> Accessed 02.08.2017

<sup>2</sup> A copy of the judgement can be found here: <http://www.sllp.co.uk/TWLinks/Aldi.pdf> Accessed 02.08.2017

statutory obligations as it was for the Board to identify the locality that was the possible subject of overprovision before going out to consultation on whether the policy should to be adopted. Sheriff Veal stated “It was for the [Board] to propose the locality, not for them to delegate to the consultees such a fundamental decision.”

Because the sole reason for refusal of the licence was that the application was inconsistent with the Board’s (flawed) policy, the court ordered the Board to grant the licence for the premises.

Key Point

The above case serves to illustrate

- it is the board’s responsibility to identify a locality which is the possible subject of overprovision before going out to consultation.
- board policies must be in accordance with the provisions of the 2005 Act. Where the policy is not aligned with the 2005 Act’s provisions, any resultant decision(s) based on that policy may be set aside.

***Martin McColl Ltd v West Dunbartonshire Licensing Board 2017<sup>3</sup>***

Subject: Public Health Objective – Evidential Basis

This case concerned an appeal against the West Dunbartonshire Licensing Board (the “Board”) which had refused an application by Martin McColl Ltd (“McColl”) for a provisional premises license. One of the Board’s stated reasons for refusing the application was *“the fact that the grant of the application will result in the increased sale of alcohol, availability and consumption, and the relationship from studies between the availability of alcohol and alcohol related health harms, that the grant of the application would be inconsistent with the licensing objective of ‘protecting and improving public health.’* At appeal, McColl argued that there was no evidence which entitled the Board to conclude that the granting of this application would prejudice the “objective of protecting and improving public health.”

Sheriff Principal Murray’s response to the argument was as follows: *“While I accept that the health statistics in West Dunbartonshire are extremely poor [...] I am not satisfied that the defender had a proper evidential basis [...] I am not persuaded that the results of “studies” may be said to sufficiently link this application and its effect with the general objective of “protecting and improving public health”.* In these circumstances I do not consider that the defender was entitled to rely on contravention of section 23(5)(c) as a stand-alone reason for refusal of the pursuer’s application.”

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<sup>3</sup> A copy of the judgement can be found here: <https://www.scotcourts.gov.uk/search-judgments/judgment?id=b08631a7-8980-69d2-b500-ff0000d74aa7> Accessed 07.08.2017

Key Point

The above case serves to illustrate that although health statistics in a board's area may be poor, the results of such "studies" may not sufficiently link an application and its effect with the general objective of "protecting and improving public health" and may not be accepted as a "stand-alone reason" for refusal.

\*Please note this appeal was refused by the Sheriff Principal - the Board's decision that granting the application would result in an overprovision of licensed premises in the locality was in line with the Board's policy and the applicant had not satisfied the Board that there was a basis to rebut the presumption against refusal. In addition, the Board's decision was adequately explained.

**Buzzworks Leisure Ltd v South Ayrshire Licensing Board 2012**

Subject: Statement of Reasons / Overprovision & Licensing Objectives

Buzzworks Leisure Ltd ("Buzzworks") a leisure company which owned licensed premises in South Ayrshire petitioned for judicial review of a decision by the South Ayrshire Licensing Board (the "Board") to grant a provisional premises licence to J D Wetherspoon Plc. Buzzworks sought declarator that the Board's decision was unlawful and sought to have the decision reduced.

Statement of Reasons - Inadequacy

The Board's Statement of Reasons accompanying the decision notice to Wetherspoon included the following:

*"The Board, having regard to all the submissions and evidence before them, were of the view that grant of this application would not be inconsistent with any of the licensing objectives".*

Judge Wise hearing the appeal was of the view that this reasoning was inadequate, stating *"In my view there can be few clearer examples of a decision failing to set out proper and adequate reasons."* She then cited *Ritchie v Aberdeen City Council 2011* where the Lord Justice Clerk had opined:

*"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."*

Judge Wise then concluded *"It is clear that the validity of any decision of this sort will turn on the particular wording and expression of the statement of reasons."*

Overprovision & Licensing Objectives

In its Statement of Reasons the Board had also stated: *"[I]n the absence of any concerns on the part of the Board in relation to inconsistency with any of the licensing objectives, the Board was constrained by the terms of the recent Tesco decision in Aberdeen and accordingly could not refuse the application on grounds of overprovision."* So the Board's view was that it had no powers to refuse the application on the grounds of overprovision because it had not found that the application was inconsistent with

any of the licensing objectives. This view followed the decision in *Tesco Stores Ltd v Aberdeen City Licensing Board 2010*<sup>4</sup>. Judge Wise stated that the Tesco decision was wrong in this regard – it was incorrect to say that there can only be overprovision if there are also inconsistencies with the licensing objectives.

The judge held that that the granting of the licence to Wetherspoons by the Board was unlawful and reduced the Board’s decision. The matter was then remitted back to the Board for reconsideration.

#### Key Point

The above case highlights

- that each board’s Statement of Reasons must provide adequate reasoning underpinning its decisions. Where this is not effected, the validity of the board’s decisions may be undermined.
- That it is incorrect to say that there can only be overprovision if there are also inconsistencies with the licensing objectives

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<sup>4</sup> A copy of the judgement can be found here: <http://www.scotcourts.gov.uk/search-judgments/judgment?id=cd0487a6-8980-69d2-b500-ff0000d74aa7> Accessed 09.08.2017