SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2021] SC GLW 57

GLW-B345-21

NOTE OF SHERIFF S REID

in the cause

KEASIM LTD

Pursuer

against

CITY OF GLASGOW LICENSING BOARD

Defender

Pursuer: Mr R. Skinner, Advocate; TLT LLP, Glasgow
Defender: Mr J. Findlay QC; Mr J. Kiddie, Advocate; Glasgow City Council Legal Department

Glasgow, 8 October 2021

Summary

[1] What is an occasional licence, in terms of section 56 of the Licensing (Scotland) Act 2005?

[2] Should such a licence be granted only for a special event or occasion such as a wedding, birthday, or fund-raising dinner?

[3] Does an occasional licence application cease to be an occasional licence application if it forms part of a series of applications for consecutive licences extending, in aggregate, over many weeks or months? Put another way, is a licensing board entitled to decide that a series of consecutive occasional licence applications extending over a lengthy period constitutes an "abuse of process" or a "circumvention" of the statutory procedure applicable to

applications for a full premises licence by avoiding, among other things, the wider consultation and more intense scrutiny applicable to the latter?

[4] These questions arise in the context of the pursuer's applications for seven consecutive occasional licences to operate a so-called "pop-up bar" from a vacant site in Glasgow's Merchant City. The site lies at the corner of Candleriggs and Wilson Street. It was originally proposed to be occupied by Selfridges, but that deal fell through many years ago, and it has since lain empty as a gap site. It is presently earmarked for residential development at an unknown date in the future. The pursuer obtained the landowner's consent to occupy the site from 24 April 2021 until the beginning of October 2021. Accordingly, the pursuer lodged seven applications for a series of consecutive occasional licences running, in aggregate, for a period of 101 days, from 26 April 2021 to 4 August 2021. The pursuer intended to apply the brand name of "Festival Village" to its pop-up bar.

[5] A year ago, a series of similar consecutive occasional licences, covering an aggregate period of 68 days (from 14 July 2020 to 28 September 2020), was sought by the pursuer, and granted by the defender, for the same site.

[6] However, this year, the defender refused the pursuer's seven applications purportedly on the basis that the grant of the applications would be inconsistent with the licensing objectives of securing public safety and preventing public nuisance, in terms of sections 4(1)(b) & (c) and section 59(6)(c) of the Licensing (Scotland) Act 2005 ("the 2005 Act").

[7] Although I have some considerable sympathy for the approach taken by the defender's licensing board, I have concluded that it has fallen into error in a number of respects, as explained more fully below. Accordingly I upheld the appeals; I quashed the decisions of the defender made on 6 April 2021 to refuse the pursuer's occasional licence

applications; and I ordained the defender forthwith to grant the said occasional licence applications in accordance with their terms, subject to the mandatory conditions prescribed by section 60 of the 2005 Act, together with further conditions recommended and proposed by the Licensing Standards Officer ("LSO").

Factual background

[8] The pursuer operates licensed premises called Malones in Sauchiehall Lane, Glasgow. It also claims to have experience in operating so-called "pop-up bars", whereby it trades at various sites on a temporary basis through the use of occasional licences.

[9] Last year, the pursuer applied for the grant of a series of occasional licences, covering consecutive periods from 14 July 2020 to 28 September 2020, to operate premises at a vacant site at the corner of Candleriggs and Wilson Street, Glasgow as an outdoor drinking and dining facility under the brand name "Festival Village". The applications were considered at a hearing on 23 July 2020; the first application was granted (to take immediate effect from 23 July 2020 to 20 August 2020); and consideration of the remaining applications was deferred to allow for a period of "monitoring" of the initial period of trading, on the understanding that if the premises operated satisfactorily in that first period, the remaining applications could be granted under delegated powers. In the event, the remaining occasional licence applications were all duly granted under delegated powers. The pursuer traded without incident at the site until the occasional licences expired at the end of the 68 day period. Separate market operator licences were also granted by the defender in tandem with these alcohol licences.

[10] On 29 September 2020 in order to allow the pursuer to continue to use the vacant site for outdoor drinking and dining facilities (this time under a proposed festive market brand),

the pursuer submitted applications for further consecutive occasional licences (and concurrent temporary market operator licences) to run from 30 October 2020 until 13 January 2021. In the event, these further applications were not processed by the defender due to the disruption of hospitality facilities and of the defender's administrative processes as a result of the Covid-19 pandemic.

[11] On 15 March 2021, the pursuer lodged seven applications to the defender for the grant of consecutive occasional licences (each licence allowing 14 days' trade) to operate the site as an outdoor drinking and dining facility under the same brand name ("Festival Village") as had been operated in 2020. As originally lodged, the seven consecutive applications were intended to run, in total, from 29 April 2021 to 4 August 2021, though this was subsequently amended to bring the proposed start date forward to 26 April 2021 in line with the Scottish Government Coronavirus "roadmap" for the use of outdoor hospitality. The seven applications (each being for a period of 14 days) were given application reference numbers OCC35158 (for the period from 26 April to 9 May 2021), OCC35160 (for the period from 13 May to 26 May 2021), OCC35161 (for the period from 27 May to 9 June 2021), OCC35162 (for the period from 10 June to 23 June 2021), OCC35163 (for the period from 24 June to 7 July 2021), OCC35164 (for the period from 8 July to 21 July 2021) and OCC35165 (for the period from 22 July to 4 August 2021). In each case, the licensed hours sought were from 11 am to 10 pm each day for on-sales, together with reference to a food offer. The pursuer also submitted a series of applications for temporary market operator licences under the Civic Government (Scotland) Act 1982.

[12] The applications were intimated to the Chief Constable and the LSO, and were publicised more generally. Neither the Chief Constable nor the LSO objected to any of the

applications. The LSO sought agreement to a number of conditions, all of which were accepted by the pursuer.

[13] Eleven objections to the applications were received from the public, ten of which came from operators of other licensed premises in the vicinity, and one purportedly from a local resident. The trade objections were concerned largely with the alleged adverse economic effect upon these competing businesses. Some of the trade objections made reference to issues of alleged noise and nuisance from the site when it had been operated by the pursuer the previous year. In the event, the defender did not determine the applications on the basis of there being any difficulties during the operation of the site in 2020 (Answer 8).

[14] A hearing was convened on 23 April 2021 to consider the applications. A transcript of the hearing is lodged (item 2, defender's first inventory of productions).

[15] At the hearing, there was no written report on the applications from the defender's Building Control Department. However, an oral representation was made by a Building Control Officer regarding certain safety arrangements. The Building Control Officer confirmed that a short-life building warrant had been asked for, and had been submitted by the pursuer; he confirmed that a wind management plan had been asked for, and submitted; and he confirmed that a structural safety had been asked for, and submitted. No negative comments or objections were made by or on behalf of the defender's Building Control Department.

[16] Following the hearing, the defender refused all seven applications, on the basis that the grant of the applications would be inconsistent with the licensing objectives of preventing public nuisance and securing public safety, as more fully explained in its

statement of reasons dated 29 April 2021 (item 1, defender's first inventory of productions). The pursuer appealed against those decisions.

Statement of reasons

[17] The defender's statement of reasons records that the seven applications were refused in terms of section 59(6)(c) of the 2005 Act on the basis that the grant of the applications would be inconsistent with the licensing objectives of securing public safety and preventing public nuisance.

[18] The statement observes that, in response to the Covid-19 pandemic, and in recognition of the significant challenges facing the City's licensed trade, the licensing board had adopted a truncated system for consideration of occasional licence applications for outdoor areas associated with licensed premises, in order to support the demand for additional outdoor space for licensed premises and to aid their economic recovery. However, as the present occasional licence applications were not in relation to an outdoor area associated with a licensed premises in the locality and were, instead, of the nature of "pop-up" premises, the applications were processed in accordance with the statutory process set out in sections 56 to 59 of the 2005 Act. These provisions required the board to send a copy of the application to Police Scotland and the LSO, and to advertise the application on the defender's website for a period of 7 days to allow for any person to submit to the licensing board an objection or representation, including a representation in support of the application. In contrast with the procedure for dealing with applications for a premises licence or provisional premises licence, there is no requirement for neighbourhood notification, or for the applicant to display a site notice at the premises, or for the applicant to submit a section 50 certificate in relation to planning, building standards or food safety, or

for notification of the application to the local community council, Scottish Fire & Rescue Service or the local health board.

[19] The statement of reasons reads as follows:

> "While the Licensing Board is aware that the Act does not refer to the holding of an event in the provisions dealing with Occasional Licences, given their short-term nature and that they are not subject to any requirements for certification, neighbourhood notification or public site notices, it will generally look for the applicant to demonstrate that the Occasional Licence is required for a special event to be catered for on unlicensed premises, with the exception of Occasional Licence applications in respect of outdoor areas associated with licensed premises.
>
> The Board believes that this policy approach is necessary so as to avoid the Occasional Licence process being used as a mechanism to circumvent the full licensing process which would more readily identify any issues of concern in relation to one or more of the Licensing Objectives, and in particular that relating to Securing Public Safety. Each application for an Occasional Licence will be determined on its individual merits…..
>
> …. Against the background of part 8 of its policy statement, which was adopted following an extensive consultation and evidence gathering process…the Board was concerned that the applicant was seeking to utilise Occasional Licences for a large scale hospitality area 7 days a week on a continuous basis over a period of several months. In the view of the Board this was not 'occasional use' or in respect of a respective one-off event which the Board considered to be the appropriate use of Occasional Licences given the limited process for consultation and review of the proposals.
>
> The Board was aware that the determination of these Occasional Licence applications did not require the applicant to produce section 50 certificates and therefore there would be nothing available to the Board evidencing that a completion certificate in connection with the proposed use as licensed premises had been accepted under the Building (Scotland) Act 2003, or that temporary occupation of the site had been granted under that Act, or that neither such completion certificate or permission is required.
>
> The Board was aware that, in accordance with its police, Occasional Licences are normally only used in respect of outdoor seating areas directly associated with licensed premises or for one-off or infrequent events which would not require building warrants or completion certificates. Taking account of the information provided by the Building Standards Officer that, due to the size and scale of the proposals, a limited life building warrant was required, it was of significant concern to the Board that it was being asked to grant Occasional Licences to allow for the sale of alcohol to members of the public 7 days a week

over a prolonged period of time without being able to require evidence of the safety of the structures in place on the site, which included not only seating areas but two stages as shown on the layout plan submitted with applications…

The Board was aware that had the applicant submitted a Premises Licence or Provisional Premises Licence, such certification in relation to public safety would require to be produced before alcohol could be sold to members of the public at the premises. In the view of the Board, and against the background of its policy statement, the Board consider that the use of Occasional Licences was not appropriate in view of the nature, size and scale of the Festival Village and the intended continuous operation for the sale of alcohol over an extended period of time. The Board therefore considered that the granting of the applications would be inconsistent with the licensing objective of securing public safety such that the application required to be refused in terms of section 59(6)(c) of the Act.

Separately, the Board was also concerned that given the nature, size and scale of the proposal, it was being asked to grant Occasional Licences for the continuous sale of alcohol over an extended period of time without having the knowledge or comfort that the impact on the amenity and potential for public nuisance in relation to its operation in a residential area had been properly considered via the Council's Planning Department. The Board was aware that such an assessment would have been a prerequisite of a Provisional Premises Licence or Premises Licence application. Nor was the Board able to properly assess the potential impact on the local community in terms of the likelihood for public nuisance of these proposals for the sale of alcohol 7 days a week in an area capable of holding up to 300 people over a period of several months given the limited consultation associated with the Occasional Licence process. The fuller consultation process associated with a Premises Licence, a Provision Premises Licence application would have allowed the Board to make a proper assessment in relation to the experience of local residents following the operation of the Festival Village last year and therefore whether there was a likelihood of public nuisance arising from the proposed operation of the site this year. As such the Board considered that the granting of the applications would be inconsistent with the licensing objective of preventing public nuisance such that the application required to be refused in terms of section 59(6)(c) of the Act.

In the view of the Board, the decision to proceed by way of Occasional Licences was a circumvention of procedure which did not allow for a full and proper assessment of the impact of the proposals for the sale of alcohol in terms of either of the licensing objectives of securing public safety or preventing public nuisance, contrary to part 8 of its Licensing Policy Statement…Given the extent of the intended use of Occasional Licences in this particular case, the Board did not consider it appropriate to make an exception to its general policy. Given that the site had been operated last year, the Licensing Board believe that there

> had been sufficient opportunity for a Provision Premises Licence or Premises Licence application to have been submitted and that the current applications were contrary to its Policy Statement and the said licensing objectives for the reasons articulated above."

Scottish Government guidance

[20] In terms of section 142 of the 2005 Act, the Scottish Government is empowered to issue guidance to licensing boards on the carrying out of their functions. Such guidance, approved by the Scottish Parliament on 7 March 2007, has been issued by the Scottish Ministers. In relation to occasional licences, it states (paras 139 to 140):

> "Occasional Licences are subject to mandatory national licensing conditions set out in schedule 4 to the 2005 Act. An example of where occasional licences might arise would be where a licensee wished to make provision for the sale of alcohol at a wedding reception or other social event held outwith their licensed premises. Voluntary organisations may also apply for an occasional licence authorising the sale of alcohol at an event connected with the organisation's activities. When an occasional licence is in force it will not negate the requirement for a public entertainment licence and late night catering licence issued under the Civic Government (Scotland) Act 1982 where appropriate."

The defender's licensing policy statement

[21] In terms of section 6 of the 2005 Act every licensing board must publish a statement of its policy (a "licensing policy statement") with respect to the exercise of its functions under the Act. In exercising its functions under the Act, a licensing board must have regard to the relevant licensing policy statement published by it (section 6(4), 2005 Act). In relation to occasional licences, the defender's licensing policy statement states (paras 8.1 to 8.2):

> "The Licensing Board considers that as Occasional Licences authorise the sale of alcohol for a period of up to 14 days without having to go through the detailed requirements associated with an application for a Premises Licence, it is appropriate to have a policy setting out the terms in which such applications will normally be granted.
>
> While the Licensing Board is aware that the Act does not refer to the holding of an event in the provisions dealing with Occasional Licences, given their short-

> term nature and that they are not subject to any requirements for certification, neighbourhood notification or public site notices, it will generally look for the applicants to demonstrate that the Occasional Licence is required for a special event to be catered for on unlicensed premises, with the exception of Occasional Licence applications in respect of outdoor areas associated with licensed premises.
>
> The Board believes that this policy approach is necessary so as to avoid the Occasional Licence process being used as a mechanism to circumvent the full licensing process which would more readily identify any issues of concern in relation to one or more of the Licensing Objectives, and in particular that relate to Securing Public Safety. Each application for an Occasional Licence will be determined on its individual merits.
>
> Where an application is to allow premises to trade on a regular basis prior to a Premises Licence application having been determined, the application will generally be referred to the Board for consideration in the first instance….
>
> …. The Licensing Board will generally look for the applicant for an Occasional Licence to demonstrate that it is required for a special event, such as a birthday, anniversary party or a wedding reception. Information relating to the event will require to be detailed on the application form and the applicant may be asked to provide appropriate supporting documentation. Where the event relates to a charitable activity, the Licensing Board will require a letter from the charity stating that they are aware of the event and that they are receiving some benefit from it.
>
> Where the application is from a voluntary organisation, the applicant will be required to demonstrate that the event is connected to the organisation's activities, for example, a fund raising dinner-dance.
>
> Where the application for an Occasional Licence is being made in relation to a festival or event of local or national significance, the principles outlined below in relation to the Licensing Board's expectations for applications for extended hours will generally be applied…"

Submissions for the parties

[22] Both parties lodged exceptionally thorough and helpful written submissions, for which I am grateful, supplemented by brief supplementary oral submissions. I shall not repeat the terms of the submissions, for the sake of brevity. I was fortunate to have the opportunity to consider those submissions, and to determine the appeals, in accordance with

an express authority granted to me by the Sheriff Principal by interlocutor dated 8 June 2021, pursuant to section 132(4) of the 2005 Act. I undertook to issue this Note as soon as possible thereafter, explaining my reasoning in more detail.

Discussion

[23] If an application for an occasional licence is competently made to a licensing board (and there is no suggestion to the contrary in this case), then it can only be refused if one or more of the statutory grounds for refusal applies (as set out in section 59(6), 2005 Act). In the present case, the application was refused purportedly on the grounds of inconsistency with the licensing objectives of (a) preventing public nuisance and (b) securing public safety.

[24] Behind every ground for refusal of a licence, there must be adequate reasons, and for those reasons there must be a proper basis in fact (*Leisure Inns (UK) Ltd* v *Perth & Kinross District Licensing Board* 1993 SLT 796, at 798I–J). Put another way, the licensing board must have adequate material before it to justify its conclusions (*BAPU Properties Ltd* v *City of Glasgow Licensing Board,* 22 February 2012, Glasgow Sheriff Court, unreported). Further, in the context of an occasional licence application, unless the board finds (on a proper factual basis) that one or more of the statutory grounds of refusal applies to the application, it must grant the application. It has no discretion to refuse to do so (s. 59(3), 2005 Act).

[25] It is also now axiomatic that the statutory licensing objectives are not, so to speak, "free-standing" (*Brightcrew Ltd* v *City of Glasgow Licensing Board* 2012 SC 67). They are qualified by the introductory reference to their being "licensing" objectives. Inconsistency with a licensing objective is inconsistency flowing from the permitting of the sale of alcohol on the premises in question. The fact that the objectives listed in section 4 of the 2005 Act are all desirable in a general sense does not empower a licensing board to insist on matters

which, while perhaps unquestionably desirable, are nevertheless not linked to the sale of alcohol. To do so, would be to divert a power from its proper purpose (*Brightcrew Ltd*, *supra*).

[26] Therefore, in the present, if the defender's grounds for refusal are to be defensible, there requires to be a proper evidential basis to conclude that *alcohol-related* public nuisance, or *alcohol-related* threat to public safety, may reasonably arise if the applications were granted.

Inconsistency with licencing objective of preventing public nuisance

[27] Against that background, let us consider, first, the defender's decision that the grant of these occasional licence applications would be inconsistent with the licensing objective of preventing public nuisance.

[28] In my judgment, there was no factual basis for any such finding in the present case. There were no police objections and adverse comments from the LSO. On uncontradicted submissions for the pursuer, the venue had operated on the exact same basis the previous year "with no police incidents, no issues of trouble, no drunkenness, no noise complaints related to anti-social behaviour" (Report of Proceedings, 9 April 2021, submissions of pursuer's agent, pages 20–21: item 2, first inventory of productions for the defender). Indeed, in answer 8, the defender appears to expressly disavow any reliance upon previous incidents, issues or complaints. Answer 8 states:

> "…The defender did not determine the applications under appeal on the basis that there were any difficulties during the pursuer's said operation of the site in 2020."

[29] Therefore, on what factual basis does the defender conclude that the grant of the application would be inconsistent with the licensing objective of preventing public nuisance? There was no such evidential basis. In effect, the defender has said that if there had been the wider consultation process associated with a premises licence application, that process would have enabled the defender to make a fuller assessment in relation to the experiences of local people in relation to noise and nuisance. Therefore, it appears that it is the *absence* of information that forms the basis of the defender's conclusion that there would likely be an inconsistency with the licensing objective of preventing public nuisance.

[30] That approach is erroneous. There is no onus on an applicant to show that a threat of public nuisance (or to public safety, or the like) would not arise if the application were granted (*Din v City of Glasgow Licensing Board* 1995 SC 244). The defender's approach inverts the onus. It seeks to compel the pursuer to satisfy the board that no such threat to the public peace would arise. In so doing, it purports to found its refusal on the *absence* of supporting factual information, rather than upon the existence of any actual material.

[31] Further, the defender's approach ignores the terms of the statute which deem the intimation provisions laid down for occasional licence applications to be sufficient. It is entirely speculative on the part of the defender to presume that any wider consultation or intimation would have generated relevant adverse evidence. The defender's approach presumes that wider consultation would have provided the necessary evidence to justify a likelihood of alcohol-related nuisance. It ignores the uncontradicted submissions made for the pursuer at the hearing, it ignores the fact that the community council had been consulted, and it ignores the absence of any objection from the police or the LSO.

Inconsistency with licencing objective of securing public safety

[32] The same criticism can be directed at the defender's decision so far as it is based upon an alleged inconsistency with the licensing objective of securing public safety (s.4(1)(b), 2005 Act). Certain additional features merit comment.

[33] In the case of premises with a track record, this ground for refusal will normally be based upon previous instances of threats to public safety at the premises (e.g. *Trust Inns Ltd* v *City of Glasgow Licensing Board* 2015 SC 499). As previously explained though, such an approach is expressly disavowed by the defender in Answer 8, where it states that it did not determine the applications on the basis that there were any difficulties during the pursuer's previous operation of the site in 2020. Instead, the rationale for the refusal appears in the penultimate page of the statement of reasons. It states:

> "…(a) The determination of these applications did not require the applicants to produce section 50 certificates; (b) it was contrary to its policy that occasional licences are normally used only in respect of outdoor seating areas directly associated with licensed premises or one-off or infrequent events which would not require building warrants or completion certificates and that…(c) [the defender was]…being asked to grant occasional licences for the sale of alcohol…over a prolonged period of time without being able to require evidence of the safety of the structures in place…"

[34] In my judgment, the key flaw in this reasoning is that, again, there is no actual factual basis for the conclusion that public safety might reasonably be at risk by the grant of the occasional licence applications.

[35] Firstly, the defender founds its refusal upon the lack of section 50 certificates. There is a short answer to this. The occasional licence procedure does not require the production of any such certificate and it is not open to a licensing board to impose additional requirements over and above those contained in the 2005 Act. Any required permissions (for food safety, or for the safety of structures, or the like) are dealt with by other

enactments, such as those for the obtaining of a market operator's licence (for the supply of food) or a building warrant (for the safety of structures). Therefore, in so far as the defender's refusal is founded upon the absence of section 50 certificates, it has fallen into error by trespassing upon an area of statutory regulation reserved to a different decision-maker under a different enactment. It has sought to impose an additional requirement over and above those contained within the 2005 Act; it has inverted the onus that applies in the context of such licence applications; and, essentially, it has founded its conclusion (that public safety may be at risk) upon an *absence* of evidence (which the pursuer was not obliged to produce anyway), rather than upon any actual evidential material.

[36] Secondly, the defender stated that the applications were contrary to its policy that occasional licences are normally used only in respect of outdoor seating areas directly associated with licensing premises, or one-off or infrequent events which would not require building warrants or completion certificates. There is no warrant under the 2005 Act for this proposed restriction in the Board's policy. The Board's policy cannot impose additional criteria to those set out in the statute. Once there is a competent application before the board under section 59, it can only be refused if one or more of the statutory grounds for refusal applies to it.

[37] Thirdly, the defender's refusal appears to be based on the logic that it was being asked to grant occasional licences for the sale of alcohol:

> "… over a prolonged period of time without being able to require evidence of the safety of the structures in place." (Statement of Reasons, penultimate paragraph: item 1, first inventory for defender)

The error in this reasoning is mentioned above. The safety of structures is not a matter for a licensing board. It is not alcohol-related (per *Brightcrew Ltd*, *supra*) and it is covered by other legislation (*Northside Ltd* v *City of Glasgow Licensing Board*, 19 March 2012, unreported).

Besides, the defender was aware that the site was to be operated (as it had been in the previous year) for the purpose of the sale of food and alcohol. The pursuer could not lawfully sell food at the site (a core element of the operation) without the requisite market operator's licence issued under the Civic Government (Scotland) Act 1982. Conceivably, if it was relevant, it would have been an easy matter for the defender to have made the grant of the occasional licence conditional upon the obtaining of this other statutory permit, or to have sought an undertaking from the pursuer to ensure that this separate permit was in place before trading. The amended Scottish Government Guidance published in June 2020 states:

> "Boards will need to consider the individual circumstances of each application and, where appropriate, consider whether conditions may be attached to ensure the licensing objectives can be met."

[38] For the foregoing reasons in my judgment the defender has fallen into error because there is no proper, relevant factual basis for its conclusion that the grant of these occasional licence applications would be inconsistent with either of the stated licensing objectives. Absent such evidential material, the defender had no discretion but to grant the applications.

Failure to provide adequate reasons

[39] Separately, the defender has erred in that it has failed to provide proper and intelligible reasons for its decision. The classic test for the sufficiency of reasons appears in *Wordie Property Ltd* v *Secretary of State for Scotland* 1984 SLT 345 (at 348) per the Lord President (Emslie):

> "…All that requires to be said is that, in order to comply with the statutory duty imposed upon him, the Secretary of State must give proper and adequate

> reasons for his decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court 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."

Though *Wordie* was a planning case, the test has been accepted as being applicable to licensing cases (*Leisure Inns (UK) Ltd* v *Perth & Kinross District Licensing Board*, *supra*, p. 798C). The decision in *Leisure Inns* is instructive on this point. In that case, the licensing board had refused an application for the provisional grant of a public house licence 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 [neighbouring] dwelling houses". Although not explicitly stated in the board's written seasons, in the course of the subsequent appeal proceedings the board sought to explain that the supposed "detrimental effect on amenity" was, in fact, noise. Pausing there, it will be observed that, in the present case, there is no clarity as to the nature of the alleged threat to "public safety" or what form the apprehended "public nuisance" is said to take. In *Leisure Inns*, the Inner House noted that the licensing board had given no indication in its reasons as to the circumstances in which it was apprehended that the supposed noise would occur. The Lord Justice-Clerk (Ross) asked (p.798J–K):

> "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?"

The Lord Justice-Clerk's rhetorical questions illustrate the nature of the factual material that ought to have been available if the board's conclusion was to be justified. Likewise, in the present case, the defender's statement of reasons gives no insight as to whether the supposed "public nuisance" was noise, smell, drunkenness, alcohol-induced violence, or any number of other anti-social behaviours. Likewise, the defender's statement of reasons give

no insight as to the nature of the supposed threat to public safety. For example, did it relate to the likely collapse of roof coverings? Or the apprehended collapse of the raised stage area? Or did it relate to poor hygiene at the food stalls? Or at the portaloos? Or was it thought that there might be drunken brawls? If any of these applied, what weight did the defender place on the lack of objection from the police or the LSO?

[40] In short, the defender's reasons fail adequately to disclose what the apprehended "public nuisance" or threat to "public safety" actually was, beyond some general feeling of unease at the absence of the fuller and wider information that might have been available if this application had been presented as a full premises licence application. So, all that the defender points to is an absence of information (notwithstanding that no such evidence required to be produced anyway).

Circumvention of procedure?

[41] The only discernible basis for the defender's refusal of the applications appears to be that, in its view, given the aggregate length of the pursuer's venture, this should have proceeded by way of a premises licence application, and that the occasional licence applications were not "appropriate", and that they constituted "a circumvention of procedure" or abuse of process. The defender states (in its written reasons) that the pursuer's occasional licence applications were:

> "… a circumvention of procedure which did not allow for a full and proper assessment of the impact of the proposals for the sale of alcohol in terms of either the licensing objectives of securing public safety or preventing public nuisance."

[42] I confess to having had some initial sympathy with the licensing board on this issue. However, the difficulty for the defender is that "circumvention of procedure", or perceived

abuse of process, is not one of the grounds for refusal permitted by statute. The defender's whole decision-making process has been skewed by this error of law.

What is an "occasional" licence?

[43] Specifically, it was the defender's position that an occasional licence application is appropriate only for "an event" that is "occasional" in nature. The defender undertook a contextual analysis of the 2005 Act, whereby the purpose and duration of an occasional licence was contrasted with the purpose and duration of a premises licence, provisional premises licence, and temporary premises licence. Viewed in context, the defender argued cogently that the premises licence, being indefinite, and having regard to its procedural requirements, was envisaged by the Scottish Parliament to be appropriate for premises of some permanency, where the sale of alcohol was intended to be a consistent activity. In contrast, it was said that the occasional licence, being for only a maximum of 14 days and having regard to its far less onerous procedural requirements, was envisaged by Parliament to be appropriate for premises where the sale of alcohol would be for a materially shorter period. This analysis was said to explain why the requirements for occasional licence applications have been described as being "lighter touch" (Scottish Government Guidance dated 18 June 2020: Coronavirus (COVID-19): Licensing (Scotland) Act 2005, section 142). The distinction was said to reflect a balance of risk against administrative requirement: it would be disproportionate to impose the full statutory requirements on one-off or short-term occasions. The risks associated with the sale of alcohol on such occasions are limited by virtue of the short operational time-scale involved. For that reason, it was said, occasional licences are not subject to the same scrutiny as full premises licences. However,

the longer the premises are open and trading, the greater the justification for more intense scrutiny of the circumstances in which the alcohol is sold.

[44] According to the defender's attractive argument, the licence sought was not for any "occasion" or "special event", such as a birthday, anniversary party or a wedding reception (City of Glasgow Licensing Board's Licensing Policy Statement (4th ed.), November 2018, paras 8.1 & 8.2; Scottish Ministers' Guidance, Part 5, para 139). There was no "event" or "occasion", other than one of the pursuer's own invention.

[45] Besides, the consecutive occasional licence applications were intended to run at least from to 26 April to 4 August 2021 (that is, for 101 days), which was nearly double the duration of the preceding year's iteration of the same alleged "event". In those circumstances, the defender argued that the occasional licence applications were not truly "occasional" but were, in effect, "an abuse" (defender's written submissions, para 7.5; defender's reply, para 2).

[46] The defender's argument has a *prima facie* attraction. Nevertheless, I have concluded that the pursuer's analysis is to be preferred for the following reasons.

[47] Firstly, there is no definition of "occasional licence" in the 2005 Act. Specifically, there is no requirement in the statute for an occasional licence to be in respect of only a "one-off" or "special" occasion or event. There is also no requirement in the Act for the licensed area to be adjacent to or associated with licensed premises held by the applicant.

[48] Secondly, the current statutory wording in respect of occasional licence applications can usefully be contrasted with its statutory predecessor. Section 33 of the Licensing (Scotland) Act 1976 allowed a licensing board to grant an occasional licence authorising the sale of alcohol:

> "in the course of catering for *an event* [my emphasis] taking place out with the licensed premises…"

The current provision is materially different. It makes no reference to "an event". This now-repealed wording may point to the source of the defender's assertion and belief that an occasional licence should be limited to some sort of one-off "event" or occasion. It might reasonably be inferred, from the removal of the concept of "an event" in the present incarnation of the occasional licence provision, that Parliament's intention was to broaden the circumstances in which such applications might be made and granted.

[49] Thirdly, the only Scottish authority bearing upon the issue is a decision of Lord Osborne in *Hollywood Bowl (Scotland) Ltd* v *Horsburgh* 1993 SLT 241. It related to the (now-repealed) predecessor provision in section 33 of the 1976 Act. A company had applied for an entertainment licence in respect of premises; the application was objected to; the board granted the application; the objectors appealed to the sheriff. The effect of the objectors' appeal was to suspend the entertainment licence. However, prior to the appeal hearing, the applicant made a separate application for an occasional licence for permission to sell alcohol at the premises as an adjunct to catering for "an event" at the premises. The supposed "event" was said to be a "high score bowling competition". The occasional licence application was granted.

[50] Having been outmanoeuvred, the objectors presented a petition for judicial review to the Court of Session seeking suspension *ad interim* and reduction of the board's decision to grant the occasional licence on the basis that it was an abuse of process. The petition was refused. The Lord Ordinary was satisfied that the "high score bowling competition" was "an event" within the premises. More significantly, the *Hollywood Bowl* decision scotches the notion, also articulated in the present case, that the seeking and obtaining of an occasional

licence, in circumstances where a different licence application is pending (or precluded), is somehow characterised as a circumvention of procedure or abuse of process. It is not. Lord Osborne opined that "in a superficial sense" the grant of the occasional licence application "may perhaps be thought to involve the circumventing" of the terms of the 1976 Act, but he opined that if one considers the whole circumstances of the two applications "the realities did not bear out that impression". He stated:

> "The fact of the matter is that the entertainment licence, if effective, would confer the right to sell by retail or supply alcoholic liquor to persons frequenting the premises for consumption on the premises as an ancillary to the entertainment provided…The occasional licence, on the other hand, permits the holder to sell alcoholic liquor only during the hours and period permitted by it, in the course of catering for an event, in this case the high score bowling competition, taking place outwith the licensed premises…and …on the particular conditions attaching to that grant, which are plainly different from those which would apply to the operative entertainment licence. In my opinion, these two rights or privileges are of a markedly different character and the availability of one cannot properly be seen as, in any real sense, a substitute for the other…"

[51] In the present case, I also conclude that it is only in a superficial sense that the pursuer's occasional licence applications may be said to involve the circumventing of the legislative requirements for obtaining a premises licence. The two rights or privileges are "of a markedly different character". The availability of one cannot properly be seen, in any real sense, as substitute for the other.

[52] Fourthly, absent any Scottish authority directly in point, I draw some comfort from two English decisions, both at first instance, from eminent judges who have wrestled with the same thorny issue. Obviously, neither of these decisions is binding upon me, and they relate to different legislation, but the logic of the analysis is persuasive.

[53] In *R* v *Bow Street Stipendiary Magistrate ex parte Commissioner of Police of the Metropolis* [1984] 1 WLR 93, a licensee forgot to apply for renewal of a licence prior to its expiry in April 1982. The following month, police officers found customers drinking at the unlicensed

premises; they informed the licensee that he was breaking the law; the licensee took immediate steps to apply for a renewal of the licence at the next licensing session (to be held in July 1982); and, in order to enable him to sell liquor legally at the premises during the intervening period, he sought, and was granted, two occasional licences covering consecutive periods up to the date of the next licensing session. The police commissioner sought judicial review of the magistrate's decision, arguing that it was wrong in law. Glidewell J, concluded that the magistrate had been quite entitled to grant the application for the occasional licences, and refused the judicial review application. In his judgment, there was "no doubt at all" that "in the vast majority of cases" an occasional licence is granted for the sale of alcohol "at or on the occasion of some event or function, such as a sporting event, a festival, a dance or a dinner". The "event or function" may take place on one day only or it may extend over a number of days. However, he observed that:

> "[w]hat I have to decide is whether the words are restricted in their meaning to events or functions, or whether the words have a somewhat wider meaning."

[54] For the police commissioner, it was contended that "occasional" meant referable to an occasion of some sort, which, in effect, meant an "event or function".

[55] For the licensee, it was submitted that the word "occasional" had "a wider meaning", and meant "the circumstances which give rise to the need for the grant of a licence", or, more shortly, "the reason."

[56] The learned judge found it helpful to go to the dictionary definition where he noted that the second main definition of the word "occasion" (in the Shorter Oxford English Dictionary) was a "necessity or need arising from a juncture of circumstances"; that the third meaning was "a juncture of circumstances"; and that the fourth meaning was "an event, incident, circumstance". Glidewell, J concluded that the word "occasion" was to be

interpreted as meaning the circumstances which give rise to the need, or the alleged need, for the sale of alcohol at the premises. In the *Bow Street Stipendiary Magistrate* case, the "occasion" was merely the applicant's failure to apply for the renewal of the permanent licence at the proper time, having forgotten to do so. That circumstance was enough to entitle the licensee to apply for and obtain an occasional licence. The language used by Parliament was "wide enough to cover that situation".

[57] The decision in *R* v *Bow Street Stipendiary Magistrate*, *supra* was followed in *Rindberg Holding Co Ltd* v *The Newcastle Upon Tyne Justices* [2004] EWHC 1903 (admin). The Court of Appeal had quashed the grant of a so-called "special removal licence" for premises known as the Gresham Hotel. No stay was sought in respect of the Court of Appeal judgment, with the result that the Gresham Hotel lacked a licence necessary for its operation, unless and until a new "special removal licence", or some other licence, was granted on a fresh application. In anticipation of this adverse Court of Appeal decision, and in order to avoid the effects of the imminent closure of the Gresham Hotel, the owner applied for a series of consecutive occasional licences. It did not disclose this fact to the Court of Appeal when it was handing down its judgment quashing the special removal licence. The three consecutive occasional licences were granted. An objector challenged the grant of the occasional licences as "an abuse of process". In this sense, the *Rindberg* case has certain similarities with *Hollywood Bowl*.

[58] Richards J refused the objector's judicial review application. He concluded that it had been neither improper nor an abuse of process for the owner to seek and obtain occasional licences, notwithstanding the Court of Appeal judgment quashing the grant of the separate special removal licence. He concluded that:

> "It had been perfectly legitimate for [the owner] to look for alternative means of continuing to trade lawfully… The application for occasional licences had been premised on the Court of Appeal's decision, rather than antagonistic to it. It had looked to the future and how to deal with the consequences of the judgment…" (paras H9 & H11).

[59] The next question was whether the grant of the licences had otherwise been contrary to the scheme of the legislation. Richards J concluded it was not. He stated:

> "…The grant of an occasional licence in circumstances of this kind was not contrary to the policy and scheme of the 1964 Act. The width of the discretion conferred on magistrates…was emphasised by Glidewell J in *R* v *Bow Street Stipendiary Magistrate ex parte Commissioner of Police of the Metropolis* [1983] 2 All ER 915. He held that the occasion in respect of which a licence may be granted under that section was not limited to special events or functions but referred to the circumstances which give rise to the sale of intoxicating liquor at premises other than those for which the claimant holds a non-licence. The section could properly cover the situation where a licensee had forgotten to apply for the renewal of a licence and a period of time would elapse before the renewal application could be determined… Just as in the case of a failure to renew, so here it was going to take a few weeks to seek to regularise the position for the longer term. It was a situation of a kind that fell within the scope of [the Act], as interpreted in the *Bow Street* case, and the power to grant occasional licences was capable in principle of being exercised in relation to it. The approach adopted by Glidewell J was compatible with existing authority and was eminently sensible. Further, the present case fell within the scope of principles laid down within it. The grant of an occasional licence was not equivalent to allowing the benefits of a full licence to be given in advance and could not be said in that way to be contrary to the statutory scheme of the 1964 Act…"

[60] Fifthly, as in *Bow Street Stipendiary Magistrate*, while acknowledging that the words used in the 2005 Act must be given their ordinary meaning, I too find it helpful to consider the dictionary definition of the noun "occasion" (in the most recent edition of the Shorter Oxford English Dictionary). The first meaning is given as:

> "a set of circumstances allowing something to be done or favourable to a purpose; an opportunity, a chance…"

The adjective "occasional" is first defined as meaning:

> "happening on, made for, or associated with a particular occasion"

In this case, the availability of the vacant Candleriggs site from April to October this year would appear to fall within this definition of "occasion", being "a set of circumstances allowing something to be done or favourable to a purpose", and giving the pursuer "an opportunity" to trade there. A licence to sell alcohol from that site may be said to be an "occasional" licence because it "happens upon" or is "associated with" that particular set of circumstances, or opportunity, or "occasion".

[61] Sixth, while an occasional licence cannot be granted for more than 14 days (s.56(5)), Parliament clearly envisaged the grant of consecutive occasional licences. Besides, such consecutive licences have frequently obtained judicial approval. The 2005 Act states that if the granting of an occasional licence application would result in the "occasional licence limit" being exceeded, the board must refuse the application (s.56(6A), 2005 Act). The "occasional licence limit" means, in the case of a voluntary organisation, a limit specifically provided for in section 56(6) of the 2005 Act, namely not more than four occasional licences each having effect for a period of 4 days or more in any 12 month period; and not more than twelve occasional licences each having effect for a period of less than 4 days, provided that, in any period of 12 months, the total number of days on which occasional licences issued to a voluntary organisation have effect does not exceed 56. So, for voluntary organisations, an aggregate limit of only 56 days of "occasional licence" trading is permitted in any 12 month period.

[62] In contrast, in any other case (that is, in any case not involving a voluntary organisation), the Scottish Parliament enacted that the "occasional licence limit" is to be prescribed by the Scottish Ministers by statutory instrument (s.56(6B)(b), 2005 Act). Such Regulations may, in particular, limit the number of occasional licences that may have effect in respect of the same applicant, or the same premises, in any 12 month period; the

Regulations may limit the number of days on which occasional licences may have effect in respect of the same applicant, or the same premises, in any 12 month period; and the Regulations may limit the number of continuous days on which occasional licences may have effect in respect of the same premises (s.56(6C), 2005 Act).

[63] Significantly, the Scottish Ministers have not yet issued any such Regulations. In other words, no "occasional licence limit" has been imposed (for a person that is not a voluntary organisation).

[64] In my judgment, what the defender now seeks to do is unilaterally to impose such an "occasional licence limit". It has no legislative authority to do so. Its authority is limited to the refusal of an occasional licence application on one of the limited grounds stated in section 59. None of those grounds applies in the present case.

[65] It must be assumed that the Scottish Ministers have made a conscious decision not to issue Regulations on this matter. Presumably, the omission reflects the Scottish Government's amended Guidance published in June 2020 (in light of the coronavirus pandemic) which states:

> "New and innovative ways to continue to trade and sell alcohol within the constraints of physical distancing will be essential and the Scottish Government expects all applications to be considered sensitively with no unnecessary hurdles having to be overcome prior to the granting of an occasional licence. This does not mean the requirements of the 2005 Act should not be adhered to however; instead this reflects the open, flexible and pragmatic mindset the Scottish Government expects Licensing Boards to adopt in fulfilling the requirements of the 2005 Act… Decisions have to be made within the legal framework contained in the 2005 Act, but all decisions should also be made with a clear focus on alleviating, where practical, the negative impact of the coronavirus outbreak on the licensed trade…"

One can only speculate, of course, but perhaps pop-up bars are regarded by the Scottish Ministers as one of the "new and innovative ways" by which licensees may continue to trade, post-pandemic.

Decision

[66] For the foregoing reasons, I upheld the pursuer's appeals. In respect of the extant applications (a handful were already historic by the date of the appeal hearing before me), I quashed the decisions of the defender made on 6 April 2021 to refuse the pursuer's occasional licence applications. I remitted those extant applications to the defender, ordaining it forthwith to grant each of them and to issue to the pursuer occasional licences in the prescribed form for the premises, period and hours of duration stated therein, subject to (i) the mandatory conditions prescribed by section 60 of the 2005 Act and (ii) the further conditions recommended and proposed by the LSO in the statutory report relative to those applications.

SHERIFF

GLASGOW, 8 October 2021