

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

B1495/11

JUDGMENT OF SHERIFF JAMES
KENNETH MITCHELL, Esquire, Advocate
in the cause

LIDL UK GmbH, 19 Worples Road,
Wimbledon, London and having a place of
business at 300 Victoria Road, Glasgow
G42 7RW

PURSUER

against

CITY OF GLASGOW LICENSING
BOARD, City Chambers, George Square,
Glasgow G1 1QZ

Act: Mr. Skinner, Advocate instructed by Messrs
Harper Macleod LLP, Glasgow

Alt: Mr. Blair, Advocate instructed by Corporate
Services, Glasgow City Council

GLASGOW, ~~4~~ November 2011. The Sheriff, having considered the cause, Repels the pursuer's first and second pleas-in-law; Sustains the first and second pleas-in-law for the defenders; Dismisses the first, second and fourth craves of the Summary Application; Refuses the appeal against the decision of the defenders dated 16 May 2011 which found that the grounds for review were established in terms of section 39(1) of the Licensing (Scotland) Act 2005 in respect of the pursuer's premises licence for premises known as 300 Victoria Road, Glasgow G42 7RW ("the Premises Licence") and which suspended the Premises Licence for a period of five days from Tuesday, 17 May 2011 in terms of section 132(3) of the Licensing (Scotland) Act 2005; Orders that the defenders' Premises Licence for premises known as 300 Victoria Road, Glasgow G42 7RW be suspended for the unexpired portion of the five day period with effect from ~~14~~



November 2011; Certifies the cause as suitable for the employment of junior counsel; Finds the pursuer liable to the defenders in the expenses of the appeal; Allows an account thereof to be given in and Remits the same, when lodged, to the Auditor of Court to tax and to report thereon.



NOTE:

[1] This is an appeal by way of summary application against the decision of the defenders dated 16 May 2011 finding that grounds for review of the pursuer's premises licence in respect of 300 Victoria Road, Glasgow were established and suspending the premises licence for a period of five days.

[2] The appeal was heard on 29 September 2011, when neither party led evidence. I heard competing submissions from Mr Skinner, Advocate for the pursuer and Mr Blair, Advocate for the defenders. Each counsel presented written submissions which were delivered orally and, to some extent, amplified. I should record that I have been greatly assisted by these written submissions and also by the full Inventories lodged by parties' solicitors to facilitate my task in determining this appeal.

[3] Mr Skinner explained that this appeal was brought in terms of section 131(2) (a) of the Licensing (Scotland) Act 2005, as amended. He invited the court to uphold the appeal, reverse the decision of the defenders and quash the suspension. Alternatively, he submitted that, upon upholding the appeal, the court should make its own decision in terms of section 131(5) of the 2005 Act or, as a second alternative, remits the case back to the defenders for reconsideration of the decision. Mr Blair, for the defenders, invited refusal of the appeal and dismissal of the summary application. He stated that in the event that the appeal was upheld, the defenders did not seek a remit for reconsideration of their decision.

Undisputed background

[4] By letter dated 27 April 2011 (no. 5/1 of process) Chief Inspector McGuire on behalf of the Chief Constable of Strathclyde Police wrote to the defenders in terms of section 36(1) of the 2005 Act making application for a review of the premises licence for



the pursuer's premises. The application was made in terms of section 36(3) (b) on a ground relevant to the licensing objective stated in section 4(1) (a) of the 2005 Act, namely, preventing crime and disorder.

[5] In this letter the Chief Constable provided certain information to the defenders. The letter advised that as a result of numerous complaints from within the local community regarding increased underage drinking and youth disorder, the Community Policing Team was tasked with focusing on those community concerns and directing resources accordingly. "In the light of information gathered, it was decided to conduct Test Purchase Operations for alcohol at the 10 premises identified within the relevant locality". The letter stated that "(A) Test Purchase Operation may be carried out in premises for either of the following reasons:

- there is intelligence to suggest that alcohol is being sold illegally to persons under 18 years of age from specific licensed premises and/or
- there is intelligence indicating that persons under 18 years of age are consuming alcohol in the locality where the licensed premises are also situated".

The letter also advised that "Test Purchasing provides police with an effective tool in the fight against underage sales and underpins the "no proof – no sale" provision which represents a vital safeguard in tackling under aged drinking and the resultant anti-social behaviour which adversely affects many communities".

[6] The letter details the stringent controls for the recruitment of test purchasers and the control of Test Purchase Operations. It is worth setting out these in detail, as follows:-

"The young person – who must be between 16 and 16½ years of age at the time of a Test Purchase Operation – is continually assessed in their appearance, level of maturity and general character. Importantly, if in the opinion of the lead officer, the young person looks older than 16½ years of age, the young person will not be used in a Test Purchase Operation.

The test purchaser is told that all questions asked by the seller must be answered truthfully. In particular, if challenged, the test purchaser must state their correct age and, if the initial attempt to buy alcohol is refused, the test purchaser must not try to persuade or coerce staff to make a sale.



These steps are taken to minimise the likelihood of a careless mistake which should, in any event, be less likely in licensed premises adhering to a challenge 25 policy and where all staff have received training in accordance with the legislative provisions”.

[7] The Chief Constable’s letter also states:-

“At about 7.25 pm on Friday, 18 February, a Test Purchase was conducted at the subject premises and the Test Purchaser was sold a bottle of ‘Cimarosa Zinfandel Rose Wine (10.5% per ABV) without being asked for identification or being challenged as to their age, notwithstanding the display of ‘challenge 25’ flyers at the point of sale. Consequently, the person who served the test purchaser – Mr Gary Singleton (the Duty Manager and the personal licence holder) – is now the subject of a report to the Procurator Fiscal at Glasgow regarding the contravention of section 102 of the Licensing (Scotland) Act 2005”.

“The test purchaser assisting Strathclyde Police on Wednesday, 2 February 2011 was 16½ years of age and conducted 10 other Test Purchase Operations that evening. In all the other premises, staff refused to sell alcohol to the test purchaser on the grounds that the test purchaser was too young to buy alcohol.”

[8] For completeness it should be noted that the letter continues:-

“At 7.40 pm on Thursday, 3 March 2011, a second Test Purchase Operation was conducted at the premises. On that occasion, the sales assistant asked the test purchaser to provide identification and the sale of alcohol was refused.”

[9] In terms of section 38(1) (b) of the 2005 Act, the defenders fixed a hearing for 16 May 2011 for the purposes of considering and determining the Chief Constable’s application. At this Hearing, the defenders were satisfied that the ground for review was established and that it was necessary and appropriate for the purposes of the licensing objective of preventing crime and disorder to suspend the pursuer’s licence for a period of five days, all in terms of section 39(1) and (2) (c) of the 2005 Act.



[10] The pursuer's solicitors wrote to the defenders asking for a Statement of Reasons for their decision in terms of section 39A of the 2005 Act. This was duly issued on 6 June 2011 and forms no. 6/1 of process. The defenders have also produced a copy transcript of the proceedings on 16 May 2011 (no. 6/2 of process).

[11] On 17 May 2011 Sheriff Principal C A L Scott recalled *ad interim* the suspension of the pursuer's licence pending the outcome of this appeal.

Certain statutory provisions

[12] Section 4 of the Licensing (Scotland) Act 2005 states:-

“4(1) For the purposes of this Act, the licensing objectives are –

- (a) preventing crime and disorder,
- (b) securing public safety,
- (c) preventing public nuisance,
- (d) protecting and improving public health, and
- (e) protecting children from harm.

(2) In this Act, references to the “crime prevention objectives” are references to the licensing objective mentioned in subsection (1) (a).”

[13] Section 102 of the 2005 Act provides:-

(1) A person who sells alcohol to a child or a young person commits an offence.

(2) It is a defence for a person charged with an offence under subsection (1) (referred to in this section as ‘the accused’) to show that –

(a) the accused believed the child or young person to be aged 18 or over and

(b) either

(i) the accused had taken reasonable steps to establish the child's or young person's age, or

(ii) no reasonable person could have suspected from the child's or young person's appearance that the child or young person was aged under 18”.

[14] Section 141(b) of the 2005 Act, as amended by the Criminal Justice and Licensing (Scotland) Act 2010 provides:-



“(1) subsection (2) applies where, on or in relation to any licensed premises, a person commits an offence to which this section applies while acting as the employee or agent of-

(a) the holder of the premises’ licence,

(2) the holder of the premises’ licence...is also guilty of an offence and liable to be proceeded against and punished accordingly.

(3) it is a defence for a holder of a premises’ licence...charged with an offence to which the section applies by virtue of section (2) to prove that the holder of the licence...

(a) did not know that the offence was being committed by the employee or agent, and

(b) exercise all due diligence to prevent the offence being committed.

(4) proceedings may be taken against the holder of the premises licence or the interested party in which of the offence whether or not proceedings are also taken against the employee or agent who committed the offence.

(5) this section applies to an offence under any of the following provisions of this Act – section 102(1)”.

The hearing before the defenders on 16 May 2011

[15] As appears from the transcript (No. 6/2 of process) the solicitor who appeared for the pursuer at the hearing on 16 May 2011 stated, at page 87:-

“In relation to the Chief Constable’s report certainly Lidl (pursuer) will accept there was the failure to satisfactorily pass the Test Purchase on 18 February. One point I would make, however, is that in relation to the paragraph about the incident on 18 February, it is not correct that the premises were displaying a challenge 25 flyers, they were in fact displaying challenge 21, as that was the policy within the premises at that time.”

[16] The solicitor for the pursuer continued:-

“Mr Singleton was the member of staff who was asked to sell alcohol to the individual and although he is not here certainly in relation to this

particular matter I understand that following the review of the CCTV and following disciplinary action taken it was determined that he hadn't followed the correct policy in all the circumstances. Mr Singleton had undertaken initially the mandatory training in terms of the Act as an employee and that was training given by Mr Hall, who is here. Mr Singleton was then promoted to Duty Manager and became a personal licence holder. He had the training in relation to challenge 21. However, beyond his failure to comply with that, not really in a position to explain much further why the error occurred. Disciplinary action was taken, CCTV was reviewed and it was determined that the error which he found himself in was not one which was acceptable for Lidl and his employment was terminated."

Submissions for the pursuer

[17] Counsel for the pursuer submitted that this appeal turned on a single point as to the reasonableness of the defenders' decision. Counsel for the pursuer presented three separate submissions. In the event, he restricted his first submission to contending that the defenders' having erred in law. He did not insist upon that part of his written submission which related to error of discretion on the part of the defenders. Counsel submitted that it was perfectly clear from the Statement of Reasons that the defenders regarded the fact of the sale to an underage person *ipso facto* constituted grounds for review and that they had applied a test of strict liability. Counsel submitted that that approach was an error in law. Counsel stated that this was important because he had been informed that "on no occasion since the coming into force of the 2005 Act had the defenders failed to hold a ground of review established where there had been a sale to an under aged person". I was also informed that "only on one occasion had the defenders failed to suspend the licence".

[18] Counsel for the pursuer submitted that at the time of the hearing before the defenders no crime had yet been established. A defence of due diligence was open to the licence holder charged with a vicarious sale of alcohol to an under aged person. The pursuer had not been charged with any crime and any complaint was now time barred.



As far as the pursuer was concerned no crime on their part had been established. Further, a defence was open to Mr Singleton in terms of section 102(2) (b) of the 2005 Act. He was not represented before the defenders who were not able to establish his position. Counsel made it clear that he was not going as far as to say that the defenders had to await the outcome of any criminal prosecution. His submission was, however, that the defenders must have some information bearing on the facts of the case. The only information was from the police but there was nothing else, for example, a photograph to assist them in establishing their own view as to whether such a defence may be available. Counsel referred to the comments of the Chairman at pages 95 and 97 of the transcript and was critical of what had there been said. Counsel pointed out that by the time of the hearing Mr Singleton had been dismissed. He submitted that the defenders made no criticism of the system operated by the pursuer. The relevant licensing objective was "preventing crime and disorder" and the question therefore arose as to what the premises licence holder did, or failed to do, which compromised that objective and rendered it necessary or appropriate to take action. Counsel submitted that that approach must necessarily focus on the training regime to prevent such sales occurring at the premises. He submitted that it was necessary to look at the adequacy of the system and consider whether, having regard to the quality of that system, the crime and disorder licensing objective was likely to be compromised. In his submission, the question was "Is there a problem at these premises?" In his submission the defenders failed to follow his suggested approach or look at the adequacy of the system. Instead, the defenders had moved seamlessly from the fact of an underage sale to establishment of grounds of review. He submitted that the defenders' failure to consider whether defects existed with the system constituted an error of approach. The defenders had no criticism of the system or at least none was suggested by any member during the hearing or articulated in the Statement of Reasons for the decision. Counsel submitted that the defenders simply took the view that:

"The policies and procedures in place both at the time of the first test purchase and thereafter should have been adequate in order to prevent the test purchase having been failed. That being so, the (defenders) concluded that the failed test purchase, notwithstanding that the second test purchase



was passed, highlighted a failure at the premises to follow the Premises Licence Holder's own policies and procedures and therefore the (defenders) considered it necessary and appropriate to take one or more of the steps outlined in section 39(2)".

Counsel submitted that the defenders took the view that an adequate training system should never fail and in his submission no reasonable Licensing Board could reach this decision in these circumstances. Counsel submitted that no matter how good the system to prevent underage sales, it could not guarantee that such sales would always be avoided. This was because such sales were carried out by human beings who, no matter how well trained, will time to time make mistakes as occurred in this instance. As was said by Sheriff Kearney in **Sohal v Glasgow Licensing Board** [1999] 12 SLLP 12:

"The criminal law does not impose a duty of insurance and it would be odd if licensing law imposed a greater duty".


[19] Counsel submitted that before a ground of review could properly be established for the purpose of section 39(1) of the 2005 Act on the ground of a sale to an under aged person, it must be shown that there is a defect, or are defects, in the premises license holder's system for preventing such sales which might reasonably be said to compromise a licensing objective. In this case none was identified by the defenders. For instance, if there had been repeated sales of alcohol to underage persons at the premises then that might itself point to something in the system not being sufficient or the system not being properly applied. Or more fundamentally, if the instruction was to sell to anyone with the money no matter what age; or if it was established that there had been no training in the sale of alcohol; or only cursory training at the outset of a staff member's employment. However, none of these instances applied here. The second test purchase was passed and it was specifically noted that the defenders "did not consider that there was any information before it of any intelligence or other information to suggest that alcohol had previously been sold to persons under the age of 18 at these premises".

[20] Counsel referred to section 39 of the Licensing (Scotland) Act 1976 and submitted that, although differently worded, it was to the same basic effect with the result that the jurisprudence developed in respect of the 1976 Act was still of relevance in considering section 39(1) of the 2005 Act. He submitted that there had been numerous



cases where courts have overturned decisions of Licensing Boards to suspend a licence based on underage sales where the particular Licensing Board had applied a test of strict liability and there was nothing to suggest a defect in the system to prevent sales to underage persons. He mentioned the cases of **Sohal v City of Glasgow Licensing Board** (*supra*); **Nasir Ahmed v City of Glasgow Licensing Board** 1999, Glasgow Sheriff Court (unreported); **Saleem & Javed v City of Glasgow Licensing Board**, (Sheriff Baird, unreported) 2009; and **Co-operative Group Ltd v Inverclyde Licensing Board** (Sheriff Principal Kerr, reported in summary [2010] 46 SLLP 6). Mention was also made of **Shafiq v North Lanarkshire Licensing Board** [2009] 42 SLLP 24. Counsel submitted that a mere occurrence of a single sale to a person underage was not a proper basis for holding that grounds for review based on preventing crime and disorder were established, at least in the absence of further explanation, for example, inadequacy of system. He submitted that in so holding the defenders had erred in law rather than exercised their discretion unreasonably. Counsel submitted that if there was no proper basis for a finding that the grounds of review had been established then the appeal should be allowed and the decision quashed, as had occurred in **Co-operative Group Ltd v Inverclyde Licensing Board** (*supra*).

[21] The second submission advanced by counsel for the pursuer was that in the event that the defenders were entitled to hold the ground of review established, they erred in holding that it was necessary or appropriate for the purpose of the crime prevention objective to suspend the pursuer's licence. Counsel submitted that the sale took place at the hands of a well qualified member of staff. He was a personal licence holder who had undertaken a personal licence qualification accredited by the Scottish Ministers and who had been responsible for providing training and supervision on alcohol sales to other staff at the premises. He had been dismissed by the pursuer. Counsel submitted that any Licensing Board, including the defenders, determining a licensing review application had to take the proper approach. In the first stage, the defenders had to decide whether they are satisfied that a ground or grounds of review existed. Here, the defenders had to find whether there were any grounds for review "relevant to one or more of the licensing objectives". The defenders had to find that there were circumstances, either admitted or proved, which might justify the reviewing the licence and which facts and circumstances



were relevant to "preventing crime and disorder". These facts and circumstances were the sale of alcohol to the underage person in the first test purchase. In the second stage, the defenders having satisfied themselves that there were grounds of review, required, in terms of section 39(1), to consider whether it was necessary or appropriate for the purpose of the licensing objectives to take any of the steps laid down in section 39(2). In that event, they were entitled, but not obliged, to warn, vary, suspend or revoke. Next, if they decided that they should exercise any of the powers open in terms of section 39(2) the third stage involved determining which one to choose and, in the event, that they decided to suspend, what was the suitable period for such suspension.

[22] Counsel submitted that the first stage looked to the past. Are there things which have occurred which are relevant to the licensing objectives and which may justify a review of the licence? The remaining stages looked to the future. What will be the likely effect of the taking or failure to take action under section 39(2) on the licensing objectives? Counsel accepted that sometimes what has happened in the past will provide a fairly reliable guide as to what is likely to happen in the future. He submitted that here, however, there was nothing to suggest that the system operated at these premises had previously compromised the licensing objectives. There was no likelihood of Mr Singleton repeating the offence because he had been sacked. All the staff had been retrained and the second test purchase passed. Why then was it that the defenders felt that it was necessary or appropriate to suspend the pursuer's licence? The defenders reasons were that "the failed test purchase, notwithstanding that the second test purchase was passed, highlighted a failure at the premises to follow the premise licence holder's own policies and procedures and therefore the Board considered it necessary and appropriate to take one or more of the steps outlined in section 39(2) in order to prevent a recurrence of the commission of an offence under section 102 of the Act in a locality where the police had concerns regarding increased under aged drinking."

[23] Counsel submitted that the reasons given by the defenders did not provide a rational explanation because they left out of account the facts that (a) there was nothing to suggest that there was a defect in the system for preventing such sales; (b) *esto* Mr Singleton was likely to repeat his error, he had departed; and (c) the defenders did not consider that there was any information before it of any intelligence or other information



to suggest that alcohol had previously been sold to persons under the age of 18 at these premises. Counsel submitted that there was no proper basis, or at least no properly explained basis, for concluding that it was necessary or appropriate to take steps outlined in section 39(2) to prevent the recurrence of an offence under section 102. An alternative way of putting it was that the defenders exercised their discretion in an unreasonable manner by failing to take into account above three highly relevant matters: **Loosefoot Entertainments** 1994 SLT 843 at 847. Counsel further submitted that it was difficult to see why a suspension of five days might reasonably be thought to have that effect. If there was a danger of recurrence rendering steps necessary and no proposed changes to the system then the decision was illogical. The suspension would prevent compromise to the licensing objectives only for a very limited period and protect the public for only five days.

[24] The third submission for the pursuer was that, in any event, any suspension was disproportionate in the whole circumstances and that the court should substitute a written warning. In **Co-operative Food Group Ltd v Inverclyde Licensing Board**, Sheriff Principal Kerr QC had indicated obiter that a suspension for any length of time for a casual error leading to a first offence was disproportionate and that a written warning would normally be appropriate. Counsel submitted that "disproportionate" simply meant, according to the shorter Oxford English Dictionary, "lacking proportion; relatively too large or too small". The question was whether the suspension was too large standing the circumstances or whether it was proportionate to protect the public. Counsel submitted that given the particular background and the steps taken after the incident it was disproportionate to take any steps. It was difficult to see what the suspension was designed to achieve. The defenders had to weigh the public interest in the prevention of crime with the substantial inconvenience and loss trade to the pursuer. However, counsel submitted that there was nothing to suggest that there was a crime problem at these premises. There was nothing to suggest that any underage sales was more likely happen at these premises again than at any other premises given the departure of Mr Singleton, the system for preventing such sales, the hitherto unblemished record of the pursuer and the passing of the second test purchase and retaining after the failure. Accordingly, counsel submitted that, in any event, the court should exercise the wide powers given in



terms of section 131(5) (c) and substitute a decision of taking no action, which was an option open to the defenders. Alternatively, counsel submitted that if any action had been appropriate then it should have been written warning.

Submissions for defenders

[25] Counsel for the defenders presented a comprehensive written submission. He reviewed the relevant statutory provisions contained in sections 36-39 of the Licensing (Scotland) Act 2005. He pointed out that Licensing Boards, such as the defenders, can review a premises licence on the application of any person. The grounds for such a review are possible breaches of the licence condition or any other ground relevant to one of the licensing objectives. He pointed out that if a Licensing Board were satisfied that the application was vexatious or frivolous or did not disclose a relevant ground then it could be rejected. Accordingly, there was a filter but it could not be reasonably maintained that this application brought by the Chief Constable of Strathclyde Police was other than properly brought. Counsel pointed out that Licensing Boards required to hold a review hearing to consider and decide on an application of this type. It was clear from the Statement of Reasons that the defenders decided on 18 April 2011 that the Chief Constable's application for review passed the filter.

[26] Counsel reviewed the undisputed facts before the defenders. He pointed out that nothing in the letter dated 8 April 2011 on behalf of the Chief Constable or anything said before the defenders by Inspector Ross had been challenged on behalf of the pursuer. Counsel submitted that the defenders, as a Licensing Board, were entitled to be concerned by such information. Counsel pointed out that the pursuer had advanced no real explanation to the defenders for the sale of alcohol to an under aged person in the first test purchase. He pointed out that no explanation had been given as to whether the failure was one of understanding procedure or due to intentional fault by the manager. He submitted that the defenders were entitled to know why this underage sale had taken place. He submitted that there was a practical onus on the holder of a licence to address concerns which are relevant to the operation of that licence: **Chief Constable, Strathclyde Police v North Lanarkshire Licensing Board** 2004 SC 304. Despite questioning, the pursuer's solicitor had given no explanation at all to the defenders as to



how the pursuer came to the view that Mr Singleton, their Duty Manager, had got things so wrong. Counsel submitted that as the person who had sold the alcohol to the under aged person was the Duty Manager, who held a personal licence, the defenders were entitled to be concerned. The pursuer recognised the need for a personal licence holder to be on the premises when trading in the same of alcohol was taking place. This, of course, reflected paragraph 5 of Schedule 3 to the 2005 Act, (the terms of which are set out at page 11 of the written submission).

[27] Counsel pointed out that in terms of section 4(2) of the 2005 Act, references to the "crime prevention objective" are references to the licensing objective mentioned in subsection (1)(a), namely, preventing crime and disorder. He submitted that the object of prevention of crime and disorder was wide enough to include considerations of deterrence. Counsel mentioned the general approach to enforcement of licensing law and the promotion of objectives set out in Chapter 14 of the defenders' policy, which acknowledged the relationship of crime and disorder and the misuse of alcohol. He submitted that the licensing objectives are what the actions of the defenders were to be judged against for the defenders should seek to achieve the objectives. In his submission, a Licensing Board may not do so, but provided it acted for the purpose of promoting the licensing objectives, it acted within the power given to it. All Licensing Boards must carry out their functions with a view to promoting the licensing objectives, or any of them, set out in section 4. In his submission, provided a Licensing Board was dealing with matters directly or reasonably related to the sale of alcohol, it enjoyed a wide discretion or area of judgment as to what the licensing objectives might require: **Brightcrew v The City of Glasgow Licensing Board** [2011] CSIH 46. Counsel submitted that in this appeal it could not reasonably be maintained that the defenders sought to use the powers which it had to pursue a non-licensing objective. There was a plain link between the sale of alcohol to under aged persons and the crime prevention objective.

[28] Counsel further submitted that the statutory licensing objectives were widely framed and there was very wide scope for matters to be considered by a Licensing Board as falling under an objective. In his submission, the assessment of a Licensing Board and the objectives will engage questions of judgment and impression. He submitted that the



approach, suggested by counsel for the pursuer, that there must be hard edged factual objective evidential basis for each decision which is said to involve a licensing objective was misconceived. Counsel submitted that Parliament had given Licensing Boards a very wide discretion as to matters which they are entitled to take into account in making an assessment as to inconsistency. He pointed out that no particular factors were identified in sections 4 or 23(5) (b) or 39 to guide Licensing Boards as to the content of the objectives. The Guidance from Scottish Ministers made it clear that Policy will need to take into account the needs and circumstances of the whole area of the Licensing Board and that a balance will have to be struck. Paragraph 23 of the Guidance so made the point that a Licensing Board is expected to link in the objectives to wider strategies for the area, including crime prevention.

[29] In this case, the Chief Constable raised as a pressing concern the views of local residents who maintained that under aged drinking and associated anti-social behaviour was on the increase in the area. The test purchase operation took place against the background of those concerns and could be viewed as part of an ongoing police strategy to prevent crime in the locality in response to concerns from residents. It was not suggested on behalf of the pursuer that the concerns of the residents were misplaced. No contrary material was presented. Out of the 10 premises visited no other premises had a failure apart from the pursuer.

[30] Counsel further submitted that the 2005 Act did not require that there had to be a demonstrable or objectively verifiable breach of any of the licensing objectives. The issue was whether an objective was "engaged" not whether it had been breached. Counsel submitted that once engaged a Licensing Board had the option of taking a step if necessary or appropriate. A Licensing Board could also do nothing if having established that an objective was engaged, it was neither necessary or appropriate to take a step. Second, the licensing objective with which this appeal was concerned was "preventing crime and disorder". The concern was preventative. Counsel submitted that a decision can be justified on the basis that a Licensing Board takes action on the basis of a risk of breach. He submitted that the objectives are about the prevention of crime and disorder. No particular threshold of crime and disorder was given. A Licensing Board was entitled to have a view on what that threshold was and how the threshold could be maintained.



The Board was entitled to take such of the steps as the "Board considers necessary or appropriate for the purposes of any of the licensing objectives". Counsel submitted the assessment of whether a particular licensing objective was engaged and, if so, what the consequences of that were in a particular case it does not have absolute objective sense. Counsel submitted that it was a judgment to be made by the Licensing Board. The 2005 Act was silent as to what considerations a Licensing Board could have in view in determining what factors are relevant for the obtainment of the licensing objectives. Counsel submitted that a Licensing Board enjoyed a wide discretion as to what are relevant considerations and where the statute was silent the relevant considerations were primarily a matter for the individual Licensing Board. Counsel submitted that it would only be where no reasonable Licensing Board could have considered the matter to be relevant but the court could interfere. He submitted that a Licensing Board had a wider area of discretion or area of permissible judgment open than formerly under the Licensing (Scotland) Act 1976. Counsel submitted that a Licensing Board had a wide discretion on the assessment of whether a particular step would further a particular licensing objective. An objective was "an end at which to aim, a goal". Reference was made to **Thornby Farms v Daventry District Council** [2002] EWCHA Civ 31 into paragraph 53 of the opinion of the court delivered by Pill LJ. Counsel submitted that providing the licensing objectives were kept in view the decision will be made for the purpose of that objective and either way the decision will be taken for the purpose of securing that objective. Counsel submitted that what is "necessary" or "appropriate" for the purpose of securing a licensing objective under section 39(2) will vary from case to case. Counsel submitted that these tests imported a significant degree of judgment as to what the objectives might require in any given case. The end result, however, should be to promote the licensing objectives whether directly or indirectly such as indirect promotion through encouragement and adoption of strategies that indirectly impact on the licensing objectives. Counsel submitted this was relevant to the question of deterrence.

[31] Counsel submitted that it was for the defenders, as a Licensing Board, acting reasonably, to determine the scope of the licensing objective and what steps could be taken to secure that objective. He submitted that the defenders were entitled to take action to deter both the licence holder concerned but also others from acting in a way



which harms any of the licensing objectives. In that way, the licensing objective was secured and further crime might be prevented. He referred to **R (Bassetlaw District Counsel) v The Worksop Magistrates Court** [2008] EWHC 3530 and the judgment of Slade J at paragraphs 32 and 33 where her Ladyship held that the district judge had failed to bear in mind that where premises had been used for criminal purposes the licensing authority had a duty to take steps in the interests of the wider community. Where crime was involved, wide considerations came into place including prevention of crime and, if not punishment, at least deterrence. Counsel submitted that deterrence was a relevant consideration for the defenders in consideration of what was necessary or appropriate for the licensing objectives. It served to remind other operators of the need to maintain high standards and the possible consequences of a failure to adhere to them. It served to remind others of the need to employ persons who are likely to comply with the law and of the need for vigilance in dealing with the problem of underage sales. It served to reinforce the need for trained staff. Counsel submitted that in an area where underage drinking was a problem sufficiently serious to cause complaints from the community that the imperative of deterrence became all the more relevant. Deterrence encouraged others to look at their staff including the quality of the staff they have and also the training and to assess whether they were doing enough. Counsel submitted that a Licensing Board was entitled to take the view against the background of a case like the present one that the deterrent effect of a sanction made it necessary or appropriate for the sanction to be imposed in the public interest, which was the pre-eminent consideration.

[32] Accordingly, the defenders were entitled to suspend the licence for the purpose of the deterrent effect such a measure would have on other operations, quite apart from the fact they could have on the appellants. Counsel submitted that suspension of a licence for a period of time where sales have been made to children was capable of promoting the crime prevention objective by sending a message to the licence holder that more needed to be done to prevent such sales or that licence holders including the licence holder subject to review need to be careful by way of the aim of deterrence. By way of illustration counsel referred to **Tesco Express v Birmingham City Council and Chief Constable of West Midlands Police** [2007] 70 LR 34, where it was held that suspension of a premises licence for two incidences of sales of alcohol to persons under



18 within a six day period was proportionate as it was in the public interest to do so. In the present case the defenders correctly identified the public interest as a relevant consideration and one to which they gave material weight in determining what was necessary or appropriate. Counsel submitted that it was well established that provided a Licensing Board only had regard to relevant considerations, the weight it attached to them was for them: **Hughes v Hamilton** 1991 SC 251; **Latif v Motherwell District Licensing Board** 1994 SLT 414. Counsel submitted that the views of the police were important and were relevant considerations. The Chief Constable had referred the matter to the defenders unlike the position in **Shafiq** (*supra*) which was very different from the present case. Counsel accepted that the discharge of the objective needed to relate to the prevention of crime and disorder in the premises themselves or in the immediate neighbourhood of them. He submitted that the defenders took the view that either limb was relevant.

[33] Counsel prepared a lengthy submission on proportionality, which is to be found between pages 22 and 35 of the written submissions. I do not propose to refer to it in detail but reference was made to the well known speech of Lord Steyn in **R** (on the application of **Daly**) v **Secretary of State for Home Department** [2001] UKHL 26 at paragraph 27:-

“First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened [Wednesbury] scrutiny test developed in [**R v Ministry of Defence** *ex parte Smith* [1996] QB 517 at 554] is not necessarily appropriate to the protection of human rights”.

[34] Counsel pointed out that earlier in his speech Lord Steyn had stated that:-
“The contours of the principle of proportionality are familiar. In **de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing** [1991] 1 AC 69 the Privy Council adopted

a three stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

‘whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective’.

Counsel submitted that there must be a reasonable relationship for proportionality between the means employed and aims sought to be realised. For a decision to be disproportionate there must be an interference which upset the fair balance between the general or public interest and the interests of the holder of the possession. However, all legal rights and property must be lost before there is deprivation. Counsel submitted that, in licensing law terms, it will be very hard to establish a case of deprivation such as revocation of a licence. He submitted that in most, if not all, licensing cases which involve revocation, suspension or variation of a licence will be regarded as forms of control of property rather than of forms of deprivation. Counsel submitted that the present appeal must be regarded as an example of control of possessions rather than deprivation. The question was whether an excessive burden had been imposed upon the licence holder. In relation to under age sales suspension of a licence for a period of time where sales had been made to children might promote the licensing objective by sending a message to the licence holder that more needed to be done to prevent such sales, for example, **Tesco Express** (*supra*). However, the Licensing Board had a margin of judgment and the Licensing Board was best placed to strike a balance in the public interest. Counsel submitted it was not correct to take the view that in any given set of circumstances there was only one proportionate response. Reference was made to the decision of the European Court of Human Rights in **Tre Traktörer Aktiebolag v Sweden** (1991) 13 EHRR 309. The case related to the revocation of a liquor licence which arose from book-keeping problems. At paragraph 59 the court said that a fair balance embraced the concept of proportionality as:



“There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised”.

[35] European case law made it clear that national legal systems enjoyed a margin of appreciation. The 2005 Act is the expression of how the Scottish legislature considers that liquor licensing should be handled. Counsel submitted that the TTA case made it clear that in field of liquor licensing a Licensing Board will enjoy a wide margin. A Licensing Board was not obliged to set out precise reasoning and why it reached a decision on proportionality. Reference was made to **Belfast City Council v Misbehavin' Ltd** [2007] UKHL 19 where the House of Lords held that in providing reasons for a licensing decision, a licensing authority was not obliged to set out in a mechanistic way how it approached the proportionality test. It was the substance of the decision which matter rather than the decision making process itself and the question for this court was whether a fair balance had been struck. Counsel submitted that here a fair balance had been struck and it was entirely evident by a short period of suspension was imposed as the sanction. The defenders had given sufficient reasons.

[36] In summary, it was reasonable for the defenders to conclude that for the reasons they gave the licensing objective of prevention of crime and disorder was engaged as there had been an offence on licensed premises which related directly to the sale of alcohol to an under aged person. The defenders then went on to consider whether it was “necessary or appropriate” to take one of the five steps listed in section 39(2) of the 2005 Act. The defenders made an express finding that despite the existence of a claimed policy and procedure there had been a clear failure to follow that policy and procedure. The defenders listened to the short submission made on behalf of the pursuer and concluded that a five day suspension was both necessary and appropriate in order to prevent a recurrence of the commission of an offence in a locality where the police had concerns about increased under age drinking. Counsel submitted that there was a strong public interest engaged and that the defenders plainly balanced the need to deter a recurrence of the offence against all that had been said on behalf of the appellant, particularly regarding retraining. Against the background of what was undoubtedly a serious matter, the approach of the defenders had been entirely proportionate. The Statement of Reasons plainly set out the considerations taken into account and displayed



a proper understanding of the law. The Statement of Reasons met the test for adequacy of reasons as set out in **Mirza v City of Glasgow Licensing Board** 1996 SC 450.

Discussion

[37] In my judgment, counsel for the defenders was well founded in his submission that the Licensing (Scotland) Act 2005 takes a different and wider approach to matters of public interest concern than did the 1976 Act. Whilst any observation by Sheriff Kearney merits considerable respect, what he said in **Sohal v Glasgow Licensing Board** (*supra*) was in the context of the relevant provisions of the 1976 Act. So far as the 2005 Act provisions relating to review of premises licences are concerned, this wider approach is about taking action which is necessary or appropriate for the purpose of achieving one or more of the licensing objectives, each of which is an expression of public interest concerns. This new statutory process is part of a regulatory scheme which has been devised in the public interest and is not about the determination of criminal law liability, which remains the function of the criminal courts.

[38] In this case, the Chief Constable of Strathclyde Police sought review of the pursuer's premises licence on grounds relevant to the licensing objective of preventing crime and disorder. This arose for the reasons set out in the Chief Constable's letter dated 8 April 2011 and was against a background of complaints from local residents in respect of increased under age drinking and youth disorder. The local community policing team was tasked with focusing upon these concerns and decided to carry out test purchase operations.

[39] The defenders regulate the sale of alcohol and one of the statutory licensing objectives in doing so is the prevention of crime and disorder. In my judgment, for the reasons advanced by counsel for the defenders, this licensing objective is wide enough to include consideration of deterrence. If under age drinking and youth disorder is taking place in a particular area or locality then the question arises as to whether the licensing objective of preventing crime and disorder is being maintained in that area. In my judgment, any sale of alcohol to a person under the age of 18 years in a test purchase operation at licensed premises should be a matter for concern to the defenders, as it was to the Chief Constable and should be to right thinking members of the public.



[40] At the hearing before the defenders on 16 May 2011, the narrative advanced on behalf of the Chief Constable was only challenged by the pursuer in one respect, namely, that at the material time the premises were actually using "Challenge 21" in accordance with the pursuer's then policy and not "Challenge 25". No issue turned on this point. Accordingly, the material facts advanced on behalf of the Chief Constable were undisputed. There was a sale to someone who did not look older than 16½ years of age and the sale was made by the duty manager, who was the holder of a personal licence. He did not even ask for identification from this very young test purchaser. The undisputed information advanced on behalf of the Chief Constable was plainly relevant to the licensing objective of preventing crime and disorder

[41] In my judgment, the sale of alcohol under test procedure conditions to a person under age 18 years of age constitutes an offence in terms of section 102: that is what section 102(1) states but constitution of the offence does not require that a particular person is found guilty of its commission. In any event, on the undisputed narrative before the defenders, the statutory defences contained in section 102(2) could not have been maintained by the duty manager, who took no steps to establish the age of the purchaser and the police did not use anyone who looked to them to be more than 16½ years of age. In my judgment, counsel for the pursuer was correct not to go so far as to suggest that the defenders had to await the outcome of any criminal proceedings. Counsel submitted that the defenders must have some information bearing on the facts of the case. In my judgment, as a matter of law, the defenders were entitled to proceed on the undisputed information put before them. Counsel was critical of the remarks of the Chairman at the Hearing. If the transcript is accurate, it appears that at page 97 the Chairman suggested that the defenders rather than the police sent out test purchasers. Whilst care must always be taken to ensure impartiality at all times, I do not think that this comment suggests any bias. I note that the defender's solicitor stated that he had to take the police report "as read". If so advised, he could have made any inquiry he considered appropriate prior to the hearing. In the event, he did not challenge the police report as to the age or apparent age of the test purchaser.

[42] In my judgment, the Statement of Reasons for the defenders' decision must be read as a whole and, when so considered, it is clear that the mere fact of an under age sale



at the pursuer's premises was not the sole basis upon which the defenders were satisfied that the ground for review was established. In my judgment, contrary to the submission made on behalf of the pursuer, the defenders did not apply a strict liability test in the sense contended for by pursuer's counsel. I do not accept that the defenders proceeded solely upon the mere occurrence of a single sale to an under age person. In my judgment, it is clear that the defenders considered all the undisputed information referred to in the Statement of Reasons and were satisfied that the ground for review in the Chief Constable's application was established. The fifth paragraph of page 3 of the Statement of Reasons beginning "Having done so..." should not be read in isolation. I do not accept the submissions of counsel for the pursuer that the defenders had no criticism of the pursuer's system or that none is articulated in the Statement of Reasons. And I do not consider that the submission of the appellant's solicitor to the defenders to the effect that "this was not a fundamental system failure on the part of 'Lidl' was correct. In my judgment, the defenders had sufficient information before them to entitle them to reach the conclusion that they did. In my judgment, for the reasons given by the defenders in the Statement of Reasons on the undisputed material before them the defenders were entitled to be satisfied that a ground relevant to the statutory licensing objective of preventing crime and disorder was established.

[43] In my judgment, it is clear from the Statement of Reasons that the defenders did not ignore the fact that the second test purchase was passed and were mindful that they did not consider there was any information of any intelligence or other information to suggest alcohol had been previously been sold to persons under the age of 18 at these premises. When the considerably trained duty manager, who in the pursuer's system was meant to supervise other more junior staff, failed to ask someone who did not look more than 16½ years of age for identification and then sold alcohol to him on licensed premises there was, in my judgment, sufficient material to entitle the defenders to conclude that there was a serious defect in the premises licence holder's system for preventing such sales which compromised the licensing objective of preventing crime and disorder. In my judgment, the defenders reasonably concluded that the failure of the pursuer's system on the occasion of the first test purchase was a serious one. It exposed that when the duty manager personally sold alcohol there was no failsafe check to prevent under age



sales. In my judgment, the defenders did not err in law in holding that the ground of review specified by the Chief Constable was established. Counsel for the pursuer was correct to recognise that the defenders in reaching this decision could not be said to have exercised their discretion unreasonably.

[44] The defenders next had to consider whether it was necessary or appropriate for the purposes of the licensing objective of preventing crime and disorder to take any of the steps laid down in section 39(2). In my judgment, the defenders as a Licensing Board have a wider area of discretion under the 2005 Act than was formerly the position under the 1976 Act. In deciding what was “necessary” or “appropriate” the defenders required to keep the licensing objective of preventing crime and disorder in view and any step they decided upon had to further that goal. The defenders were entitled to consider the matter of deterrence in deciding what steps were necessary or appropriate for the purpose of that licensing objective. I accept the submission of counsel for the defenders that the matter of deterrence serves to remind premise licence holders of the need to maintain high standards in respect of the sale of alcohol and the possible consequences of failure to adhere to such standards. It should serve to remind licence holders of the need to employ staff who are likely to comply with licensing law, the necessity of being vigilant in respect of systems for preventing underage sales and necessary staff training. I also accept that suspension of a premises licence can promote the licensing objective of prevention of crime and disorder by sending a message that more needed to be done to prevent underage sales of alcohol.

[45] Counsel for the pursuer founded strongly upon the recent decision of Sheriff Principal B A Kerr, QC in **Co-operative Food Group Ltd v Inverclyde Licensing Board**, (*supra*) which is noted at [2010] 46 SLLP 6. On the basis of the parties’ note, it appears that the facts and circumstances of that case were that a cashier, in difficult circumstances, had made an error of judgment. I consider that the facts and circumstances there were very different and distinguishable from the undisputed circumstances of this case.

[46] In my judgment, for the reasons advanced by counsel for the defenders, the defenders approached in the proper way the matter of whether it was necessary or appropriate for the purposes of the licensing objective of preventing crime and disorder to



take any of the steps set out in section 39(2) of the 2005 Act. I do not agree with the submission advanced by pursuer's counsel that the reasons given by the defenders do not provide a rational explanation. Contrary to pursuer's counsel's submission, there was something to suggest that there was a serious defect in the system for preventing such sales: there was no failsafe check when the duty manager was selling alcohol to the public. Plainly, since Mr Singleton had been dismissed he would not be repeating the error but the defenders were entitled to have regard to the fact that he was a highly trained and senior member of staff who held a personal licence. All of this did not prevent the sale to the test purchaser. I note that whilst the staff went on a refresher course, it was not contended that the pursuer's system had been improved or changed in any way. The fact that the defenders did not consider that there was any information before it of any previous sale to under age persons at the premises did not mean or have the result that the defenders could not take any of the steps outlined in section 39(2) in respect of what was admitted to have occurred on the first test purchase occasion. Similarly, the fact that the second test purchase failed did not preclude the defenders from taking any steps. Both these facts were considered and weighed by the defenders in reaching their decision, as appears from the Statement of Reasons.

[47] In my judgment, the Statement of Reasons sets out the considerations which were taken into account and displays a proper understanding of the law. In my judgment, the weight to be given to any relevant consideration is for the defenders. The defenders did not consider any irrelevant consideration. The Statement of Reasons meets the test for adequacy of reasons set out in **Mirza v City of Glasgow Licensing Board** 1996 SC 450. In my judgment, it is clear from the Statement of Reasons that the defenders made an express finding that notwithstanding the existence of claimed policy and procedure there had been a clear failure to follow them on the occasion of the first test purchase. The defenders determined that it was both necessary and appropriate to take some step in order to prevent a recurrence of the commission of an offence in a locality where the police had concerns about increased under age drinking.

[48] In determining that a short period of suspension was both necessary and appropriate the defenders decision took into account both the public interest and the measures taken at the premises to prevent under age sales occurring. They decided that a



five day period of suspension was both necessary and appropriate in order to prevent a recurrence of the commission of an offence in an area where the public and the police had concerns about increased under aged drinking. In my judgment, against the background of what was undoubtedly a serious matter, the approach of the defenders was proportionate. The short period of suspension of the pursuer's premises licence did not upset a fair balance between the public interest and the interests of the pursuer and does not impose an excessive burden on the pursuer. In my judgment, the defenders' decision was a reasonable one.

[49] For all the foregoing reasons I refuse this appeal and dismiss the summary application. Both counsels were agreed that I should sanction this appeal as suitable for the employment of junior counsel. They were also agreed that expenses should follow success with the result that the pursuer has been found liable in the expenses of the appeal.

Postscript

[50] As appears from paragraph [17] above, counsel for the pursuer stated that he had been informed that on no occasion since coming into force of the Licensing (Scotland) Act 2005 had the defenders failed to hold the ground of review established where there had been a sale to an underage person and had only one occasion had the defenders failed to suspend the premises' licence for a period. Moreover, counsel stated that he had been informed that the defenders operated some sort of tariff system of suspension which was two weeks for a "first offence"; six weeks for a "second offence" and so on. I am in no position to know the particular facts and circumstances of other cases which have been dealt with by the defenders and so I make no comment on counsel's information. There are no relevant averments to support such assertions in this summary application. It appears to me that if matters of this sort are to be alleged then it would be appropriate to do so by way of averment in the grounds of appeal so that any allegation can be answered and, if necessary, determined by the court. Plainly, however, in this case, no such tariff system as was alleged can have been applied as the suspension was for a period of five days and not two weeks.

