SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2023] SC GLA 29

GLW-B1427-22

JUDGMENT OF SHERIFF S REID

in the cause

CERTAS ENERGY UK LTD

Pursuer

against

SOUTH LANARKSHIRE LICENSING BOARD

Defender

Pursuer: S Blair, Advocate; Harper McLeod LLP, Glasgow
Defender: G Dunlop, Advocate; South Lanarkshire Council Legal Services, Hamilton

GLASGOW, 5 September 2023

The sheriff, having resumed consideration of the cause, Repels the pleas-in-law for the defender; Sustains the first, second and third pleas-in-law for the pursuer; Upholds the pursuer's appeal against the decision of the defender made on 1 September 2022 to refuse the pursuer's application for a provisional premises licence in respect of the premises known as Gulf Cambuslang Service Station, 144 Hamilton Road, Cambuslang, G72 7PD ("the premises"); Reverses the said decision; Grants the pursuer's said application for a provisional premises licence; Remits to the defender to issue the said provisional premises licence forthwith to the pursuer in the prescribed form and content, subject to (i) such mandatory conditions as must be attached to a licence of this nature, and (ii) such discretionary conditions as may lawfully and are ordinarily attached by the defender to a licence of this nature, all pursuant to section 27 of the Licensing (Scotland) Act 2005; Finds

the defender liable to the pursuer in the expenses of process, as taxed; Allows an account thereof to be given in and Remits the same, when lodged, to the Auditor of Court to tax and report.

SHERIFF

NOTE

Summary

[1] In this appeal under section 131 of the Licensing (Scotland) Act 2005, the pursuer challenges a decision of South Lanarkshire Licensing Board to refuse the pursuer's application for a provisional premises licence. The application relates to a petrol station and convenience store known as Gulf Cambuslang Service Station, 144 Hamilton Road, Cambuslang. The premises are located within the defender's self-styled "locality" of "Cambuslang East".

[2] The application was refused on the ground that, if it were to be granted, there would as a result be overprovision of licensed premises in that locality. (Overprovision is one of the permitted statutory grounds on which such an application can be refused.) In reaching that decision, the defender founded upon its licensing policy statement ("the Policy"), which identified Cambuslang East as a locality in which there was such overprovision. The effect of the Policy was to create a rebuttable presumption against the grant of an off-licence application within that "overprovided" locality. The defender having concluded that there were no "exceptional circumstances" to justify a departure from its Policy, the application was refused.

[3] The pursuer challenges the decision on a raft of grounds. An interesting feature of the case is that the pursuer challenges the lawfulness of the Policy itself (so far as relating to overprovision). The pursuer submits that the Policy is unlawful because the defender failed to follow the correct statutory procedure when consulting upon and formulating the Policy. In my judgment, this and other grounds of appeal are well founded for the reasons explained below.

[4] Accordingly, I have upheld the appeal, reversed the defender's decision, granted the pursuer's application, and remitted the case to the defender with an ancillary direction forthwith to issue a provisional premises licence in the prescribed form and content, subject to such mandatory conditions as must be attached to a licence of this nature, and such discretionary conditions as may lawfully and are ordinarily attached by the defender to a licence of this nature, all pursuant to section 27 of the Licensing (Scotland) Act 2005.

Factual summary

[5] The defender is the licensing board for South Lanarkshire. On 2 June 2021, the pursuer applied to the defender for the grant of a provisional premises licence for the Gulf Cambuslang Service Station, 144 Hamilton Road, Cambuslang ("the premises"). The premises operate as a petrol filling station and adjacent "Spar" convenience store. The application sought permission for the sale of alcohol from the premises, for consumption off the premises only. The application was considered by the defender at a hearing on 26 August 2021. It was refused because the premises fell within the locality of Cambuslang East and, applying the defender's Policy, there was considered to be overprovision of licensed premises in that locality.

[6] The pursuer appealed to the sheriff against the refusal of the application. On joint motion, the appeal was upheld, the refusal was quashed, and the case was remitted to the defender for reconsideration.

[7] On 1 September 2022, the defender reconsidered the pursuer's application. Again, the defender applied its Policy. Again, the application was refused. In summary, the defender's reasoning was that the premises were situated within a locality that was identified in the Policy as having an overprovision of off-licence premises; the effect of the Policy was to create a rebuttable presumption that such an application should be refused on the ground of overprovision in terms of section 23(5)(e) of the 2005 Act; and there were "no exceptional circumstances" in the application which would justify a departure from the Policy.

[8] The defender appealed a second time to the sheriff. In exercise of delegated authority from the sheriff principal, I heard parties' submissions and reserved judgment.

The parties' submissions

[9] The parties lodged detailed written submissions, supplementary submissions, speaking notes, and a substantial joint list of authorities, supplemented by oral submissions over a two day hearing. It was a pleasure to consider them. I am grateful to counsel and agents for their meticulous legal research and preparations.

[10] For the pursuer, it was submitted that, in reaching its decision, the defender had erred in law, acted contrary to natural justice, and exercised its discretion in an unreasonable manner (2005 Act, sects. 131(3)(a)(i), (iii) & (iv)). The specific lines of attack were wide-ranging and, at times, overlapping. I hope I do not do a disservice to the submissions of the pursuer's counsel if I collate them into the following broad categories. First, the pursuer

challenged the lawfulness of the Policy on the grounds that: (i) the pre-Policy consultation process did not comply with the prescribed statutory procedure (2005 Act, s.7); (ii) the Policy failed to comply with statutory guidance, both in its formulation and articulation (2005 Act, s.142); (iii) the pre-Policy consultation process was inadequate at common law; (iv) insofar as the Policy departed from the statutory guidance, the defender failed to give due notice to the Scottish Ministers of that derogation, in further breach of the prescribed statutory procedure (2005 Act, s. 142(4)); (v) the Policy had no adequate basis in fact; and (vi) the Policy failed to disclose adequate reasons for its conclusions on overprovision, in further breach of the statutory guidance and common law duties of fairness. Second, the pursuer submitted that the reasons given by the defender (in its "Statement of Reasons") for the refusal of the application were inadequate. Third, the pursuer submitted that the defender acted irrationally by granting a separate application for other premises (known as "Super Save") on the same day. Fourth, the pursuer submitted that the defender acted irrationally in failing to make an exception to its Policy, having regard to the individual merits of the defender's application. Given the protracted history of the application, I was invited to reverse the defender's decision, and to substitute my own decision.

[11] For the defender, I was invited to refuse the appeal, which failing to remit the case to the defender for reconsideration. The multiple lines of attack were refuted. Specifically, the defender submitted that the pursuer's challenge to the lawfulness of the Policy was incompetent as it involved too great a scrutiny of the "finer detail" of the consultative process. A challenge involving such "intensity of scrutiny" was said to fall within the exclusive supervisory jurisdiction of the Court of Session by way of judicial review.

The legal context

[12] I pause to consider the legal context in which the Policy came to be formulated and published, specifically the nature of the defender's duty to "consult".

[13] Every licensing board must publish a "licensing policy statement". This is a statement of its policy concerning the exercise of its various functions under the 2005 Act. The board must "consult" specified persons when preparing the policy. In exercising its functions, a licensing board must have regard to that policy (2005 Act, s. 6). Each such policy must include a statement as to the extent to which the board considers there to be overprovision of licensed premises (or of licensed premises of a particular description) in any "locality" within the board's area. It is for the board to determine the "localities" for this purpose. (A board may, if it wishes, determine that the whole of the board's area is a locality (2005 Act, s. 7(2)). Importantly, in considering whether there is overprovision in any locality, the board "must" have regard to the number and capacity of licensed premises in the locality; it "must" consult with certain specified persons, including such persons as appear to the board to be "representative of the interests of… persons resident in the locality"; and it "may" have regard to such other matters as it thinks fit (2005 Act, s. 7(3) & (4)).

[14] The Scottish Ministers may issue guidance to licensing boards concerning the exercise of their functions (2005 Act, s.142). Board must "have regard to" any such guidance. Where a board decides not to follow any such guidance, the board must give notice to the Scottish Ministers of that decision, together with a statement of the reasons for it (s.142(4)). The guidance relates, in part, to the consultation process preceding the formulation and publication of a licensing policy statement. (This case is concerned with the section 142 statutory guidance that was in force as at 1 September 2022, referred to herein as

"the Guidance". The Guidance was superseded by revised guidance issued by the Scottish Ministers on 13 January 2023, with which this case is not concerned.)

[15] A preliminary question arises. What is the status of this kind of statutory guidance? Clearly, "guidance" means something less than "direction". It does not have the binding effect of primary or secondary legislation. But statutory guidance cannot be ignored; it must be taken into account. This involves a "conscious approach and state of mind" (*R (on the application of Brown)* v *Secretary of State for Work & Pensions* [2008] EWHC 3158; *Highland Council* v *School Closure Review Panel* 2016 SLT (Sh Ct) 207). The duty to "have regard" to statutory guidance involves more than "mere form or box-ticking": it must be performed "with vigour and with an open mind" (*R (Domb)* v *Hammersmith & Fulham London Borough Council* [2009] EWCA (Civ) 941, Brown J, paragraph 52).

[16] Nor do matters end there. Crucially, having duly considered statutory guidance, the decision-maker is not then at liberty simply to take it or leave it on a whim. Such a construction would put statutory guidance on a par with the many forms of non-statutory guidance that are issued by departments of state. Instead, statutory guidance of this nature is imbued with an enhanced potency: a decision-maker is free to depart from it, even substantially, but only for a cogent reason, articulated in the course of some identifiable decision-making process. In the absence of such cogent reason, articulated and disclosed, a deviation from the statutory guidance would constitute an error of law.

[17] In this case, section 142(4) of the 2005 Act (which compels a licensing board to give to the Scottish Ministers notice of, and reasons for, any decision not to follow the guidance) reinforces its enhanced status. The guidance has "forensic bite"; its very purpose is to be influential (*R on the application of Letts*) v *The Lord Chancellor & Others* [2015] EWHC 402 (Admin), paragraph 111). A minor departure from the letter of the guidance, while

remaining true to its spirit, may well be easy to justify, or may not even be regarded as a departure at all; but the greater the deviation, the more compelling must the reason be (*R on the application of X*) v *London Borough of Tower Hamlets* [2013] EWHC 480 (Admin), paragraph 35); and the cogent reason for not following the guidance should be disclosed and articulated within the decision-making process.

[18] Lastly, common law principles have evolved concerning the adequacy of a statutory consultation. These principles, developed in English jurisprudence, were approved by the Supreme Court (in the context of an English appeal) in *R* (*on the application of Moseley)* v *Haringey London Borough Council* [2014] UKSC 56. Given the stature of this authority, and the extent of overlap between Scots and English law in this area of administrative law (underpinned by the duty of fairness), I conclude that the same principles apply in Scots law. In *Moseley*, the Supreme Court approved the so-called "Sedley criteria", which had emerged in the case of *R* v *Brent London Borough Council ex parte Gunning* [1985] 4 WLUK 200. (Stephen Sedley QC was lead counsel for the applicant.) There, the court quashed an administrative decision to close two schools on the ground that a prior consultation with parents had been unlawful. The "Sedley criteria" comprise four "basic requirements" which were said to be "essential" if a statutory consultation process is to have "a sensible content" (*supra*, 189). The four "basic requirements" are:

> "First, that the consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, that adequate time must be given for consideration and response and finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

The Supreme Court (in *Moseley*) endorsed these four criteria as "a prescription for fairness" (approving dicta of the Court of Appeal in *R (on the application of Royal Brompton & Harefield*

NHS Foundation Trust) v *Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472). The Supreme Court also approved the following dicta of Lord Woolf MR in *R* v *North & East Devon Health Authority ex parte Coughlan* [2001] QB 213 (paragraph 112):

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

[19] Drawing these strands together, in this case, in order for the statutory consultation process to be lawful (i) it must follow the consultative procedure prescribed by the 2005 Act; (ii) it must "have regard to" the statutory guidance issued under section 142 of the 2005 Act, a duty which, in effect, creates a legitimate expectation that the guidance will be followed, absent good reason (articulated and disclosed) to justify a derogation therefrom; and (iii) it must comply with the "basic requirements" of adequacy at common law (*Moseley, supra)*. I now turn to consider the multiple grounds of challenge.

Statutory appeal or judicial review?

[20] The pursuer challenged the legality of the defender's Policy on the ground that the preceding consultation process was defective. A preliminary issue arose as to the extent to which it was competent for the pursuer to advance such a challenge in the context of a statutory appeal to the sheriff under the 2005 Act, rather than by way of judicial review in the Court of Session. The defender accepted that a challenge to the legality of the Policy was competent in certain circumstances, subject to limitations, but that a challenge that sought to

"look under the terms of the Policy", or involved any "intensity of scrutiny", or enquiry into the "finer details", was not competent.

[21] On this preliminary issue, I am satisfied that the pursuer's attack on the lawfulness of the Policy (including a challenge to the adequacy of the preceding statutory consultation on which it was formulated) is competent. If a licensing board, in refusing an application, founds its decision upon a policy (or part thereof) which is unlawful, such a decision would be tainted by an "error of law" and would therefore be expressly susceptible to challenge in an appeal to the sheriff (2005 Act, s.131(3)(a)(i); *Brightcrew* v *City of Glasgow Licensing Board* 2012 SC 67, [18], [22]-[23]). Likewise, if, in refusing an application for a licence, a licensing board has relied upon a policy (or part thereof) which is based on an incorrect material fact, or contrary to natural justice, or involves an exercise of a discretion in an unreasonable manner, such tainted decisions are also expressly susceptible to challenge on appeal to the sheriff (2005 Act, sects. 131(3)(a)(ii)-(iv)). The pursuer's attack upon the Policy takes various guises, but all of them are capable of being characterised as permitted appeal grounds falling within the statutory appellate jurisdiction of the sheriff. Aside from the binding authority of *Brightcrew*, similar challenges to licensing board policies have competently been advanced in, for example, *Aldi Stores Ltd* v *Dundee City Licensing Board*, Dundee Sheriff Court, Sheriff K. Veal, 12 August 2016, unreported, and *Martin McColl Ltd* v *City of Aberdeen Licensing Board* 2018 SLT (Sh Ct) 322. Indeed, since the supervisory jurisdiction of the Court of Session is generally regarded as a remedy of last resort (*Gray* v *Braid Logistics (UK) Ltd* 2015 SC 222) and cannot be invoked if the matter at issue can be determined by an "appeal or review" available under statute (RCS, rule 58.3(1)), a judicial review petition would be refused as premature and incompetent unless the pursuer had first exhausted its statutory appeal remedy under the 2005 Act (*Shanks* & *McEwan (Contractors)*

Ltd v *Mifflin Construction Ltd* 1993 SLT 1124, 1129; *Tarmac Econowaste Ltd* v *Assessor for Lothian Region* 1991 SLT 77, 78-79; *MIAB* v *Secretary of State for the Home Department* 2016 SC 871, [73]).

[22] Therefore, the defender's argument (that it is not competent to "look under" the Policy or to examine its "finer detail") runs contrary to the plain wording of section 131 of the 2005 Act. It also has echoes of the discredited notion that the acts or decisions of subordinate decision-making bodies remain valid and effective for all purposes unless quashed, which in turn led to the development of often impenetrable distinctions between substantive and procedural invalidity. Much of this baggage has been swept aside. Ultra vires is the central principle of administrative law. True, there are circumstances, perhaps difficult to define prescriptively, where judicial review is the exclusive and only appropriate remedy to determine the vires of administrative decision-making. However, when, in civil litigation, a pursuer is truly seeking to vindicate his own private law rights which cannot otherwise be determined without an examination of the validity of the disputed act or subordinate legislation of a decision-making body, he is at liberty to enter upon that examination in the litigation *(Ruddy* v *Chief Constable, Strathclyde Police* 2013 SC (UKSC) 126), *a fortiori* where, as here, the pursuer is expressly permitted to found his civil claim upon an "error of law" in a preceding decision-making process. The fact that a claim based on a private right has a public law dimension does not mean that it is an abuse of process to proceed by private action. Likewise, a defender in a civil case is entitled to defend himself by questioning the validity of the act, decision or subordinate legislation of a public decision-making body that is being wielded against him. Such a collateral or defensive challenge would also be open to an accused in a criminal prosecution (*Boddington* v *British Transport Police* [1991] 2AC 143, 171F). To require such a civil litigant or accused person to

first pursue a judicial review to set aside the offending subordinate legislation or administrative decision would involve an unacceptable derogation from the constitutional principle of the rule of law and a "cumbrous duplicity of proceedings" (*Boddington, supra*, 173C-D and 175B, citing *Chief Adjudication Officer* v *Foster* [1993] AC 754, 766-767).

Failure to follow the statutory procedure

[23] The pursuer's challenge to the Policy is multi-faceted and overlapping.

[24] The first ground of challenge is that, in refusing the application, the defender erred in law by applying a licensing policy statement which was unlawful (insofar as it relates to overprovision in the locality of Cambuslang East), in respect that, in its formulation, the Policy failed to comply with the statutory consultation procedure prescribed by section 7(3) of the 2005 Act. In my judgment, this first ground of challenge is well-founded.

[25] The duty imposed upon a licensing board to assess overprovision is focused heavily upon a territorial area known as a "locality". Thus, a licensing board must include in its policy a statement as to the extent to which there is overprovision in "any locality" within the board's area (2005 Act, s.7(1)); in deciding whether there is any such overprovision, the board "must" have regard to the number and capacity of licensed premises in that locality (s.7(3)(a)); and, in addition to the Chief Constable and relevant health board, the board "must" consult with persons who appear to be representative of the interests of premises licence holders "within the locality" (s.7(4)(b)(i)) and with persons who appear to be representative of the interests of "persons resident in the locality" (s.7(4)(b)(ii)).

[26] In other words, to a material extent, the consultation process is directed at gathering evidence about the locality, from persons within the locality.

[27] The Guidance reiterates the importance of "locality" in the consultative exercise. It states that a licensing board should "determine those localities" which it proposes to examine; and, having made this "initial assessment", it should identify the number of licensed premises in those localities, determine their capacities, and then proceed to fulfil its consultation obligation (Guidance, paragraphs 44 and 53). Licensing boards are then enjoined (Guidance, paragraph 47) to evaluate the results of the consultation:

> "… to identify robust and reliable evidence which suggests that a saturation point has been reached or is close to being reached, *always provided that a dependable causal link can be forged between that evidence and the operation of licensed premises in a locality*".

[28] The problem for the defender is that, in the consultation preceding the formulation of the Policy, (i) the defender failed to disclose to consultees the "locality" or "localities" in respect of which evidence was sought, and (ii) it failed to consult with one of the prescribed consultees, namely, such persons as may be said to be "representative of the interests of… persons resident in the locality" (s.7(4)(b)(ii), 2005 Act). These conclusions can be drawn from the undisputed materials before me.

[29] The history of the consultation process can be summarised as follows. In summary, in December 2017, the defender participated in a so-called "pre-consultation exercise", but received no responses. Accordingly, the defender then sent an email to all employees of South Lanarkshire Council who had email addresses (then numbering approximately 3,000), inviting them to complete a survey. The same survey was made available on-line, and at Council offices, for members of the public to complete, if they wished. The defender concluded that only 67 responses were "relevant" to "the Rutherglen and Cambuslang area". The content of the survey (and the 67 responses) are produced in paper format (defender's first inventory of productions, item 6/5 of process). Of those 67 responses, the defender concluded that 38 were relevant to the "Cambuslang area". Those 38 responses

(and the related survey content) are also produced in separate paper format (pursuer's second inventory of productions, item 5/9 of process). This summary, and the content of the related productions, were not disputed by the defender at the Hearing before me. It derives, in large part, from paragraph 9.2 of, and Appendix 2 to, the defender's own Policy, which expressly purports to record the "[i]nformation taken into account by the [defender] when drawing up the overprovision policy". In turn, that account can be seen to derive from paragraph 50 of the Guidance, which requires that a licensing policy statement should be expressed in such a way that interested parties are left in no doubt as to the reasons for its adoption "including the evidence upon which the board relied and the material considerations that were taken into account".

[30] By way of preliminary observation, the reference (in Appendix 2 of the Policy) to the defender's participation in a so-called "pre-consultation exercise in December 2017" is irrelevant and can be discounted. The selection of a locality (or localities) is an essential preliminary to a lawful consultation; but the defender did not select the "localities" for the purposes of carrying out this statutory consultation until 27 June 2018, as evidenced by the Minute of the Meeting of South Lanarkshire Licensing Division No 4 (Rutherglen and Cambuslang area) (first inventory of productions for the defender, item 6/3 of process). Evidently, the so-called "pre-consultation exercise" in December 2017 preceded the selection of any localities for the purposes of the statutory consultation on the formulation of *this* Policy. Since a licensing board cannot proceed to "fulfil its consultation obligation" on a draft policy without first selecting the localities on which to consult (Guidance, paragraph 44; *Aldi Stores Ltd* v *Dundee City Licensing Board*, *supra*), the December 2017 "pre-consultation exercise", which preceded that selection (or "initial assessment", as it is called in the Guidance, paragraph 44), is *ex facie* irrelevant. In any event, no information is

disclosed in the Policy as to the form or content of that "exercise", or the persons to whom it was directed.

[31] The defender's counsel sought to argue that the localities selected for the purposes of this Policy were the same localities that featured in the defender's preceding policy. In other words, nothing had changed, and consultees would have been aware of the existing localities. The argument fails because the important issue is the timing of the defender's decision to retain the pre-existing localities. That decision was not made until 27 June 2018. Only then could a lawful consultation commence to assess overprovision within those selected (retained) localities.

[32] Having discounted the nebulous "pre-consultation exercise", the discharge of the defender's statutory duty to consult is then periled, in large part, upon the adequacy of the defender's "survey" (which was sent to 3,000 or so employees, and made available on-line and in Council offices).

[33] Two material defects are apparent from this element of the consultation.

[34] First, the survey was flawed because it did not seek to elicit evidence about any of the specific "localities" selected by the defender for the purpose of formulating its overprovision policy. On 27 June 2018, the defender had identified the following "localities" for the purposes of its consultation on overprovision: (1) Main Street, Cambuslang, from Silverbank to Croft Road; (2) Halfway, including the whole of Hamilton Crescent; (3) Rutherglen Central and North Ward; (4) Rutherglen South Ward; (5) Cambuslang East Ward; (6) Cambuslang West. None of these localities is defined by reference to a single postcode. None of these localities appears, or is mentioned, in the survey. Indeed, the survey neither refers to, nor defines, any "locality" on which the views of consultees are sought. Instead, the consultees were invited to express views on licensing-related issues in

"your local area", a meaningless term, highly subjective in its definition, amorphous in its geographical extent, which may or may not have correlated to any "locality" on which the defender was obliged to ingather evidence. The survey offered no scope for consultees to clarify or define what they understood to be their "local area". The consultees' understanding of their "local area" might have been wider or narrower than the defender's selected localities. Confusion is added to the muddle because the survey also asked consultees to specify what "neighbourhood" they lived in (items 5/9 & 6/6 of process) and what "area" they lived in, "or closest to" (item 6/5 of process). It is unclear whether "neighbourhood" and "local area" are intended to be synonymous. In any event, none of these terms can safely be regarded as co-extensive with any of the six specific "localities" that had been selected by the defender, and on which the defender should have been consulting.

[35] To address this deficiency perhaps, by process of reverse engineering, the defender sought to attribute each consultee's response (on their "local area", or "neighbourhood") to a more specific (and relevant) geographical area by means of the consultee's postcode as disclosed in each response. But that takes the defender nowhere, because the consultees' Royal Mail postcodes also do not correlate to any of the defender's selected "localities". They might overlap to some extent; they may even intersect with multiple localities; but the postcode areas and the defender's selected "localities" are certainly not co-extensive. Presumably in recognition of this limitation on the postcode references, Appendix 2 to the defender's Policy records that some of the consultees' responses were attributed by the defender merely to "the Cambuslang area", others to "the Rutherglen area" (paragraphs 2 and 3), both of which are inadequately defined geographical areas, and neither of which is locality-specific.

[36] Ironically, this problem was entirely foreseeable. Interestingly, the Minute of a meeting of the defender on 18 April 2018 (defender's inventory of productions, item 6/2 of process) records the board members' agreement that, before the draft Policy was issued for consultation, "locality maps" should be "created in line with the new Council wards, as the ward boundaries have changed". No such "locality maps" were ever created. As a result, it is difficult to see how consultees on the draft Policy could have had any clear understanding of the precise geographical extent of the "localities" on which their views were being sought.

[37] The second flaw in the consultation is that the survey was not directed at a relevant statutory consultee. As previously discussed, the defender was obliged, under statute, to consult *inter alia* such persons as appear to be "representative of the interests of… persons resident in the locality" (2005 Act, sects. 7(3)(b) and (4)(b)(ii)). Instead, the defender chose to consult with its own employees. By its own admission (Answer 14) most of its 3,000 employees do not reside in Cambuslang East. Only a postcode connects each survey response to a geographical area, but that postcode does not correlate exclusively to (and is not co-extensive with) any of the defender's six defined localities, still less to the particular locality of Cambuslang East. By use of the postcode, the defender sought to attribute 38 of the survey responses to "the Cambuslang area" (pursuer's second inventory of productions, item 5/9 of process; Appendix 2, Policy, paragraph 2), but it could plainly be no more specific than that. The defender cannot properly or safely attribute any of those 38 responses to "persons resident in the locality" of Cambuslang East. The defender was, of course, at liberty to consult with "such other persons" as it thought fit, which might well extend to its own employees (wherever they might live), but that does not absolve the defender of the primary statutory duty to consult with persons who are representative of the interests of "persons resident in the locality". A consultee's postcode might indicate that he

or she lives "close to" one or more of the defined "localities", but that would not be sufficient to discharge the primary obligation to consult with a representative sample of "persons resident in the locality". (The survey appears to acknowledge that consultees may have nothing more than a tenuous connection to a particular locality when it asks: "What area do you live in, *or closest to*?": defender's first inventory of productions, item 6/5 of process).

[38] For these reasons, the defender's consultation failed to comply with the statutory procedure prescribed by section 7 of the 2005 Act. That failure constitutes an error of law; that error is material in nature (because it relates to core elements of the consultation procedure prescribed by primary legislation); that material error vitiates the defender's published Policy (so far as relating to alleged overprovision *inter alia* in Cambuslang East); and, insofar as the defender's refusal of the pursuer's application was founded upon that flawed element of the Policy, that decision is likewise vitiated by error of law. The defender's decision to refuse the application is the fruit of a poisoned tree.

[39] The present case has echoes of *Aldi Stores Ltd* v *Dundee City Licensing Board*, *supra*. There, the licensing board failed to follow the statutory consultation process because it failed to identify any locality that was the possible subject of overprovision *prior to* going out to consultation. In contrast, here, the defender had correctly selected "localities" in respect of which it sought to assess overprovision. But, in then proceeding to consultation, it failed to direct consultees to address those specific localities. Instead, consultees were invited to opine on licensing issues within an ill-defined, subjective "local area" or "neighbourhood". Further, the defender failed to take steps to elicit evidence from one of the mandatory statutory consultees (namely, representatives of the interests of "persons resident in the locality"). The defender sought evidence from persons in geographical areas definable only

by a postcode, which is not co-extensive with, and traceable exclusively to, any single locality.

Failure to follow Guidance when formulating the Policy

[40] The second ground of challenge is that, in refusing the application, the defender erred in law by applying a licensing policy statement which was unlawful (insofar as it relates to overprovision in the locality of Cambuslang East), in respect that, in formulating the Policy, the defender failed to "have regard to" paragraph 47 of the statutory Guidance issued by the Scottish Ministers, in breach of section 142(3) of the 2005 Act. This second ground is also well-founded.

[41] As previously discussed, paragraphs 40 to 50 of the Guidance (notably, paragraphs 44 and 53) reinforce the conclusion that the selection of a locality by a licensing board is an essential preliminary to a lawful consultation. Moreover, according to the Guidance (paragraph 47), the responses from relevant consultees:

> "…should be evaluated to identify robust and reliable evidence which suggests that a saturation point has been reached or is close to being reached, *always provided that a dependable causal link can be forged between that evidence and the operation of licensed premises in a locality*".

[42] In my judgment, the defender's disclosed evaluation of the survey responses (which formed a material part of its consultation) failed to "have regard" to paragraph 47 of the Guidance, and was inconsistent with it. Whether viewed individually or cumulatively, the survey responses could not, on any reasonable view, be said to constitute "robust and reliable evidence" to support a conclusion that a saturation point has been reached, or is close to being reached, in any specific locality, because none of the responses was locality-specific. For the same reason, on no reasonable view could it properly be concluded that "a

dependable causal link" could be "forged" between the survey responses and the operation of licensed premises "in a locality". The consultees were, at best, associated with postcodes; those postcodes are not co-extensive with any of the defender's selected localities; therefore, the consultees cannot reliably be assumed to be resident in any single locality. In any event, each consultee's response was expressly referable, not to a postcode area, but to their "local area" or "neighbourhood" of indeterminate extent, definable only by the subjective understanding of the consultee. Despite these flaws, Appendix 2 to the Policy discloses that the defender was indeed materially influenced by the responses to the survey. It records (paragraph 2):

> "In the Cambuslang area 87% of those responding felt that there were either 'too many' or 'just right' number of licensed premises in that area".

Note the vague reference to "the Cambuslang area". In truth, given the failure to pin down the consultees (or their opinions) to any specific locality, the responses elicited from the survey were worthless in evidential terms, and certainly did not constitute "robust and reliable evidence" to support a conclusion of overprovision in any identifiable locality.

[43] Similarly, I also observe that Appendix 2 also records the defender's conclusion that a "connection between alcohol availability and injury to health" is "borne out" by "the various surveys and reports which it has studied". Since this "survey" (of its 3,000 or so employees, and of those who responded on-line or at Council offices) is the only relevant survey to form part of the defender's consultation process, the responses to it can be seen to have been a material factor in the formulation of the Policy, whereas they ought to have been evaluated as irrelevant and evidentially unreliable because they were not locality-specific.

[44] For these reasons, the defender's consultation failed to have regard to the statutory Guidance, in breach of section 142 of the 2005 Act. That failure constitutes an error of law; that error is material in nature (because it relates to a core element of the consultation procedure, namely the proper evaluation of consultation evidence); that material error vitiates the defender's published Policy (so far as relating to alleged overprovision *inter alia* in Cambuslang East); and, insofar as the defender's refusal of the pursuer's application was founded upon that flawed aspect of the Policy, that decision is likewise vitiated by error of law.

[45] The same criticism can be made of the defender's evaluation of three other material adminicles of evidence in the formulation of its Policy, namely (i) a report from a body called "Alcohol Focus Scotland" ("the AFS Report"), (ii) a joint report from Alcohol Focus Scotland and a body called the Centre for Research on Environment, Society and Health ("the CRESH Report"), and (iii) a report entitled "Briefing on Licensed Premises in South Lanarkshire April 2018" ("the Briefing Report") (pursuer's second inventory of productions, items 5/11, 12 and 13 of process, respectively). The AFS Report is entirely generic in content. It does not address overprovision within any locality. The authors of the AFS Report acknowledge this limitation on their evidence. The Report states:

> "As a national organisation, we do not have sufficient local knowledge of the South Lanarkshire and Licensing Division Areas to enable us to comment in detail on some of the specific localities and premises concerned".

Likewise, the data in the CRESH Report, on which the Board specifically relied in formulating its Policy, is generic. It relates to the whole of South Lanarkshire, not to the defender's territorial area, still less to any of the defender's selected localities within that territorial area. None of the data in the two Reports is locality-specific.

[46] Notwithstanding the foregoing, throughout Appendix 2 to the Policy, the defender records that it relied upon the statistical data in the AFS and CRESH Reports concerning alcohol-related deaths in (undefined) "neighbourhoods". There is no data in either Report vouching alcohol-related harms in any locality (or attributable to the operation of licensed premises in any locality). The Cambuslang East locality is not even identified in the AFS or CRESH Reports as one of the "neighbourhoods" exhibiting alcohol-related harm. The upshot is that the terms of these Reports, however impressive at a generic level, cannot be regarded as "robust and reliable evidence" indicative of a saturation point having been reached, or close to being reached, in any locality. Nor can a "dependable causal link" be "forged" between that generic evidence and "the operation of licensed premises in a locality" (Guidance, paragraph 47).

[47] Similarly, Appendix 2 to the Policy discloses that the defender relied upon statistical data in the Briefing Report as supporting a link between alcohol availability and rates of death and hospital admission. However, again, the Briefing Report is not locality-specific. It addresses "data zones", not localities. Curiously, the locality of Cambuslang East does not even feature in the Briefing Report as a "neighbourhood" or a "data zone" of concern.

[48] However impressive and interesting the statistical data may be in the AFS, CRESH and Briefing Reports, on a proper evaluation, it is generic in nature. The Reports do not address any of the defender's selected "localities"; they do not address overprovision on a locality basis; they do not correlate the availability of alcohol in any locality with the occurrence of any alcohol-related harm in that or any other locality. Therefore, on a proper evaluation of that evidence, consistent with the statutory Guidance (paragraph 47), none of the statistical data could properly be said to constitute "robust and reliable evidence" to suggest that a state of overprovision existed (or was close to being reached) in any specific

locality, or otherwise to forge a "dependable causal link" with the operation of licensed premises in a specific locality. Despite this, the data in these Reports clearly formed a material part of the defender's formulation of the Policy, and the identification of Cambuslang East as an area of alleged overprovision. Appendix 2 to the Policy records that the Reports "raise concern with the Board" and that "all of the statistics needed to be looked at in conjunction with the [defender's] own local knowledge". (The "local knowledge" is not disclosed in the Policy, an issue to which I shall return later.)

[49] For these reasons also, in breach of section 142 of the 2005 Act, the defender failed to "have regard" to paragraph 47 of the Guidance in the formulation of its Policy (specifically, in the evaluation of consultation evidence available to it); that failure constitutes a material error of law vitiating the defender's published Policy (so far as relating to alleged overprovision *inter alia* in Cambuslang East); and, insofar as the defender's refusal of the pursuer's application was founded upon that flawed aspect of the Policy, that decision is likewise tainted.

Failure to comply with common law principles of adequacy

[50] The third ground of challenge is that, in refusing the application, the defender erred in law by applying a licensing policy statement which was unlawful (anent overprovision in the locality of Cambuslang East), in respect that the statutory consultation which the defender carried out on that overprovision policy was inadequate at common law. This third ground of challenge is well-founded.

[51] According to dicta endorsed by the Supreme Court in *Moseley*, *supra,* a consulting authority must give sufficient reasons for any proposal "to permit of intelligent consideration and response" (per *Gunning, supra,* 189). The obligation of the defender, as a

consulting authority, is to let those who have a potential interest in the subject matter know in clear terms what the proposal is, and exactly why it is under positive consideration, telling them enough (which may be a good deal) "to enable them to make an intelligent response" (per *Coughlan, supra,* 112).

[52] In my judgment, the defender's consultation failed to meet these "basic requirements" of adequacy and fairness at common law. Firstly, it was for the defender to identify the locality (or localities) on which the consultees' views were sought. As explained above, it failed to do so. Secondly, a critical objective of the statutory consultation was to elicit evidence (on overprovision in the defender's selected localities) from representatives of "persons resident in the locality" (s.7(4)(b)(ii), 2005 Act). The objective of the consultation is not to allow Tom, Dick and Harry, wherever they might reside (whether within, outwith or merely "close" to a selected locality), to express views on alcohol-related issues within a locality, still less within their own ill-defined "neighbourhood" or "local area". Thirdly, it was for the defender to tell its consultees enough (which may be a good deal) to permit of intelligent consideration and response. In the present case, at a minimum, that obligation required that the defender should have (i) directed consultees to address their minds to a particular locality (or localities) and (ii) provided consultees, in clear terms, with basic data on alcohol-related issues in that locality (such as the existing number, capacity and style/type of operation of licensed premises within the selected locality; perceived alcohol-related harms occurring in or emanating from that locality; and why that locality had been selected for consultation). Absent such information, the defender's statutory consultation was inadequate at common law.

[53] For these reasons, the defender's Policy, which was preceded and informed by that inadequate consultation, was vitiated by a material error of law; and, insofar as the

defender's refusal of the pursuer's application was founded upon that flawed aspect of the Policy, that decision is likewise vitiated.

No proper basis in fact for the Policy

[54] The fourth ground of challenge is that, in refusing the application, the defender erred in law by applying a licensing policy statement which was unlawful, in respect that the Policy (insofar as it relates to overprovision in the locality of Cambuslang East) has no proper basis in fact. This fourth ground of challenge is well-founded.

[55] For the reasons set out above, it cannot be said that the evidence gathered by the defender in its consultation process was sufficient to support a conclusion that a state of saturation had been reached, or was close to being reached, in any particular "locality". None of the (disclosed) evidence relied upon by the defender addresses overprovision, or alcohol-related harm, on a locality basis. The statistical data in the AFS, CRESH and Briefing Reports, though impressive and well-informed, is entirely generic in nature. Accordingly, there is no proper basis in fact for the Policy (insofar as it relates *inter alia* to alleged overprovision in the locality of Cambuslang East).

[56] For this reason, the defender's Policy (anent alleged overprovision in the locality of Cambuslang East) is vitiated by a material error of law; and, insofar as the defender's refusal of the pursuer's application was founded upon that flawed aspect of the Policy, that decision is likewise vitiated (2005 Act, s. 131(3)(a)(i)). *Separatim,* for the same reason, it may be said that the defender's decision to refuse the pursuer's application proceeded upon an incorrect material fact *et separatim* that it was contrary to natural justice *et separatim* that it constituted the exercise of a discretion in an unreasonable manner (2005 Act, sections 131(3)(a)(ii) to (iv)).

Inadequate reasons for the Policy

[57] The fifth ground of challenge is that, in refusing the application, the defender erred in law by applying a licensing policy statement which was unlawful, in respect that the Policy is not supported by adequate reasons. That failure constitutes an error of law because it comprises a failure to "have regard" to the Guidance (specifically, paragraph 50 thereof) in breach of section 142(3) of the 2005 Act *et separatim* a breach of natural justice. In my judgment, this fifth ground is also well-founded.

[58] To explain, paragraph 50 of the Guidance states:

> "The licensing board's policy should be expressed in such a way that interested parties are left in no doubt as to the reasons for its adoption including the evidence upon which the Board relied and the material considerations which were taken into account".

The defender must "have regard" to that Guidance in formulating and publishing its Policy (2005 Act, s.142). As earlier discussed, the obligation to "have regard" to such statutory guidance translates, in law, to a duty to follow it, unless cogent reason is disclosed and articulated for not doing so.

[59] The defender has failed to "have regard" to the Guidance because it has explicitly applied "local knowledge" in formulating that Policy, but neither the nature nor the content of that "local knowledge" has been disclosed. This omission means that, contrary to paragraph 50 of the Guidance, interested parties are left in doubt as to the reasons for the adoption of the Policy, including the "evidence" and "material considerations" which were taken into account. No reason is articulated for failing to disclose the nature and content of the alleged "local knowledge".

[60] The use and materiality of this "local knowledge" is revealed in Appendix 2. It states:

> "All of these figures [*from the AFS, CRESH and Briefing Reports*] raise concern with the Board although the Board found that all of the statistics needed to be looked at *in conjunction with the Board's own local knowledge*" (my emphasis);

and thereafter:

> "*The Board members have considerable local knowledge of the area and any statistics require to be applied along with that local knowledge. The Board having looked at all the statistics in the reports believes that there is a connection between alcohol availability and injury to health. It is in the Board's view also related to various crimes and anti-social behaviour.* The Board believes that this conclusion is borne out by the various surveys and reports which it has studied prior to reaching a decision on localities and which of those localities are overprovided" (my emphasis).

The use of local knowledge to determine "localities" (or to draw inferences from locality-specific material already available to it) is the sort of local knowledge which has secured judicial approval (*Mirza* v *City of Glasgow Licensing Board* 1996 SC 450), albeit such local knowledge ought still to be disclosed at common law (*Pagliocca* v *City of Glasgow District Licensing Board* 1995 SLT 180). Where a board has private information which is not otherwise available to parties or the public, the rules of natural justice require its disclosure (*Freeland* v *City of Glasgow District Licensing Board* 1980 SLT 101). Here, the "local knowledge" that is founded upon relates not merely to the determination of the localities (or to the drawing of inferences from available locality-specific evidence) but to other material issues, namely, to establishing a supposed connection between particular localities and generic data on alcohol availability, injury to health, criminality, and/or anti-social behaviour. But what is this magical "local knowledge"? The Policy is silent. It is not disclosed. That omission is significant because it renders it impossible for interested parties to assess whether there truly is any such local knowledge of any substance; whether any dependable causal link exists between that alleged knowledge and any particular locality;

and whether any dependable causal link exists between that alleged knowledge and supposed alcohol-related harm, criminality, anti-social behaviour, and/or overprovision in any particular locality. As a consequence, the essential objective of transparency in administrative decision-making is frustrated.

[61] For these reasons, the Policy is not supported by adequate reasons. This failure constitutes an error of law, in respect that it constitutes a failure to have regard to Guidance, in breach of section 142 of the 2005 Act. Separately, the same omission constitutes a breach of natural justice at common law (*Pagliocca, supra; Freeland supra*). The omission vitiates the Policy (so far as relating to overprovision in Cambuslang East) and, insofar as the defender's decision to refuse the application was founded upon that flawed Policy, the decision is similarly vitiated.

Miscellaneous grounds of challenge

[62] A number of other grounds of challenge were advanced for the pursuer which I have not sustained.

[63] First, there was said to be an error of law in that the defender failed to give notice to the Scottish Ministers of its decision to depart from the Guidance. It is correct that a licensing board is obliged to give notice to the Scottish Ministers if it chooses not to follow the guidance (2005 Act, s.142(4)). This provision underlines the importance of transparency in administrative decision-making and the discipline of providing a publicly-available reasoned decision. However, in this case, the defender asserts that it did not decide to depart from the Guidance at all. In my judgment, therefore, the statutory obligation to give notice does not arise. The obligation to give notice arises only when there is a conscious positive decision by a board not to follow the Guidance (See 2005 Act, s.142(4): "…where a

licensing board *decides* not to follow any guidance…"). The obligation of notification does not arise merely by a failure to comply with the Guidance which is not attributable to a positive decision to depart from it. In the former scenario, the board has made a positive conscious decision to depart from the Guidance; it is entitled to do so; but it must give notice of that decision to the Scottish Ministers (disclosing its reasons for doing so) in the interest of transparency. In contrast, in the latter scenario, the board has made no conscious positive decision to depart from the Guidance at all; it believes (albeit erroneously) that it is complying with the Guidance; logically, there can be no obligation to give notice of a decision to depart from the Guidance (because the board has not consciously chosen to depart from it at all); but, the sting in the tail is that, absent such a notice, a legitimate expectation arises that the Guidance has been followed, with the result that the board's decision will be periled upon a comparison with that Guidance.

[64] Second, the pursuer submitted that the defender had acted irrationally *et separatim* in error of law by granting a similar application (by a third party called "Super Save"), while refusing the pursuer's application. It was argued that the defender's purported explanation for the grant of the third party "Super Save" application was inadequate and did not justify treating the pursuer's application differently. I rejected this ground of challenge. Whether the defender was right or wrong to grant the "Super Save" application is irrelevant to the treatment of the pursuer's application. If the defender was wrong to have granted the "Super Save" application, that error would not have justified a similarly erroneous treatment of the pursuer's application. Similarly, even if the defender's reasons for granting the third party "Super Save" application were inadequate, that error would not be a legitimate basis for quashing the defender's decision in relation to the pursuer's separate application. The two applications were quite separate. Two wrongs would not make a

right. The defender was entitled, indeed obliged, to consider both applications independently on their own merits. Even if the defender went wildly wrong in having granted the "Super Save" application, or in its articulation of the reasons for doing so, the defender was entitled (and obliged) to consider the pursuer's application on its own merits and to reach and articulate a correct decision on that separate application. True, there ought to be consistency in administrative decision-making on comparable matters. Arbitrary and capricious decisions are to be deprecated. But the circumstances in which an aggrieved applicant should be entitled to open up and scrutinise the merits of separate decisions, involving different parties, premises and applications, must be limited. On practical grounds, it is also unattractive because it necessarily embroils the court in scrutinising a multiplicity of decisions. In extreme cases, a blatant or recurring inconsistency in administrative decision-making across different applications, readily verifiable as otherwise related in circumstance, may well go to support a challenge based on irrationality. But those circumstances are likely to be exceptional. Ultimately, here, all that the defender can say is that the Super Save application should not have been granted and that the defender made an error in doing so. So what? At best, even if the defender granted the Super Save application in error (which remains to be seen), that would not oblige it to do likewise with the pursuer's application, merely to achieve consistency in bad decision-making.

[65] Third, the pursuer submitted that the defender's failure to treat the pursuer's application as an exception to its Policy was a discrete error because, in so doing, the defender exercised its discretion in an unreasonable manner (2005 Act, s. 131(3)(a)(iv)). When a Licensing Board adopts an overprovision policy, the effect of that policy is to create a rebuttable presumption against the grant of an application for a new premises licence (or variation of an existing licence) in that locality (Guidance, paragraph 54). However, it is

recognised that there may be exceptional cases in which an applicant is able to demonstrate that the grant of the application would not undermine the licensing objectives which the overprovision policy seeks to achieve or advance. So, the application still requires to be considered on its merits. However, the test, here, is whether no reasonable licensing board, properly directing itself on the facts and the law could have reached the decision to apply the Policy, and to decline to treat the application, on its merits, as an exception to that Policy. That is a high hurdle to overcome. In my judgment, the pursuer fails to pass the threshold.

[66] There were a number of disparate elements to the pursuer's submission. It was argued that the defender failed to have regard (or to attach sufficient weight) to the "filling station" style of operation of the pursuer's premises; to the fact that it was a unique style of operation within the locality; to the fact that its clientele would significantly (even predominantly) reside outwith the locality, with the result that any alcohol-related harms would significantly (even predominantly) occur outwith the locality; that the proposed capacity of the premises was "modest"; that the premises were on the "margins" of the allegedly overprovided locality; that the premises would supply alcohol on an off-sales basis only as part of a general but limited grocery and fuel provision; and that the premises served a wider and growing community which included a significant new housing development in the locality. All of these factors might reasonably be said to be relevant factors, albeit in varying degrees, and attracting varying weight. However, the difficulty for the pursuer is that, on the face of the defender's Statement of Reasons, they were expressly considered. In concluding that these factors, individually or cumulatively, did not justify an exception to the Policy, the Statement of Reasons discloses that the defender expressly considered, for example, the style of operation of the pursuer's premises, the transient nature of the clientele at the pursuer's premises, and the presence of the relative proximity of

the new housing development. It simply reached a different conclusion as to whether these factors were so significant and compelling as to justify an exception to the Policy. The defender considered that they did not do so. In my judgment, while the pursuer may disagree with those balancing assessments, they cannot properly be said to be conclusions that no reasonable licensing board, properly informed, could have reached. What we have here is a decision by a board (as to whether to grant an exception to its Policy) which fell within a range of reasonable responses that would have been available to a reasonable licensing board, properly informed on the facts and law.

The remedy

[67] For the reasons explained above, I uphold the appeal. Having done so, I have a discretion to remit the case back to the board for reconsideration of the decision, or to reverse the decision, or to make, in substitution, such other decision as I consider appropriate, provided it is a decision "of such nature" as the board could have made (2005 Act, s. 131(5)). The pursuer invites me to substitute my own decision; the defender invites me to remit the case to the board.

[68] I conclude that it is appropriate that I reverse the board's decision, and to substitute my own decision for that of the defender.

[69] I do so, firstly, because this is the second appeal against the defender's refusal of this application. The first appeal was conceded by the defender, and the case was remitted back to it for reconsideration. Having reconsidered the matter, the board has again fallen into error. Secondly, the appeal is upheld on a single but substantive issue, not a mere technicality. The defender's decision was founded entirely upon its Policy, which has been found to be fundamentally flawed. There is no other statutory basis to support the refusal of

the application. There is nothing else of substance that points persuasively to the refusal of the application. The objections add little, being vague in content and not locality-specific. Standing my conclusion on the unlawfulness of the Policy, it follows that there is no longer any presumption against the grant of the pursuer's application. On that basis, the defender would be duty-bound to grant the application. Thirdly, I recognise that Parliament has decided that the defender is ordinarily the appropriate body to make licensing decisions of this nature within its territorial area, and that it also has specialist knowledge of, among other things, local conditions, which qualify it to make an informed decision on such matters. However, I also recognise that there is a realistic risk that attitudes among the component members of the defender's licensing board may have hardened against the pursuer, having regard to the protracted history of this troubled application and the nature of its refusal on two separate occasions (*Matchurban Ltd* v *Kyle & Carrick District Council* 1995 SC 13; *Botterills of Blantyre* v *Hamilton District Licensing Board* 1986 SLT 14). In those circumstances, ordinary practice must give way to natural justice. Fourthly, there has been a significant delay in finally disposing of the application, not least due to the original flawed decision-making process, which resulted in a remit to the board for reconsideration, followed by protracted procedure in the present appeal. In the interests of efficient justice, the matter should be brought to an end without further delay caused by a remit. The defender has (twice) already had its opportunity to determine whether a valid ground of refusal exists, but has failed to do so.

[70] Accordingly, having upheld the appeal, I have reversed the defender's decision; substituted my own decision to grant the pursuer's application; and remitted to the defender with an ancillary direction forthwith to issue to the pursuer a provisional premises licence in the prescribed form and content, subject to such mandatory conditions as must be

attached, and such discretionary conditions as may lawfully and ordinarily be attached by the defender to a licence of this nature, pursuant to section 27 of the Licensing (Scotland) Act 2005.

[71] Expenses shall follow success. Sanction for the employment of junior counsel was not opposed and is granted, with retrospective effect from the date of commencement of the appeal proceedings (to include the drafting of the writ).