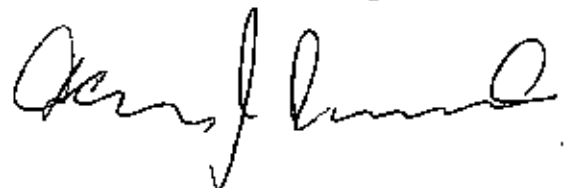


B390/13

Paul Nelson v Renfrewshire Licensing Board

Paisley, 29th April 2013

The Sheriff, having resumed consideration of the cause sustains the 1st, 2nd and 3rd Pleas in Law for the Pursuer; *Quoad ultra* repels parties' pleas, and in terms thereof, sustains the appeal by the Pursuer against the decision of the Defenders dated 29 April 2013; quashes the decision of the Defenders finding the grounds of review established and quashes the decision of the Defenders to suspend for a period of 14 days the Pursuer's licence for the premises situated at and known as The Kelburne Bar, 4 Glasgow Road, Paisley PA1 3QA; finds the Pursuer entitled to the expenses of the appeal; allows an account thereof to be given in and remits same when lodged to the Auditor of Court to tax and report.



NOTE

This Summary Application is an appeal by Mr Paul Nelson ("the Pursuer") against a decision of Renfrewshire Licensing Board ("the Defenders") on 29th April 2013 in relation to the licence of premises known as The Kelburne Bar, 4 Glasgow Road, Paisley in respect of which the Defenders had ordered the suspension of the Premises Licence for a period of two weeks from Tuesday, 30th April 2013.

On 1 May 2013 Sheriff Douglas recalled *ad interim* the suspension of the licence pending determination of the Appeal.



I heard argument on 10th September 2013 when the Pursuer was represented by Mr Hunter, Solicitor, while the Defenders appeared by Mr Campbell, Solicitor. It was agreed that the hearing before me would be a submission-based hearing.

The background circumstances to this Appeal are not in dispute. The Pursuer is the Premises Licence holder for the public house known as The Kelburne Bar, 4 Glasgow Road, Paisley. He was granted a lease of the subjects in November 2012. They had been closed for about a year prior to that date. He spent four weeks or so renovating the premises before opening them to the public. The Pursuer, being the holder of a Personal Licence, was initially named as the Premises Licence manager although it was agreed that his senior employee, David Walker, would act as manager and supervisor, that he would obtain a personal licence and in due course would become nominated on the Premises Licence.

Mr Walker completed a Scottish Personal Licence Holder's training course in January 2013, as he was required to do, and an application for a personal licence was made by him to Glasgow Licensing Board, being the authority for the area in which he resided.

On 6th March 2013 a "lock-in" took place. This occurred when Mr Walker and another employee, Mr Marshall Porter, locked themselves into the premises along with several customers and drank alcohol well after the normal public house closing time. As a consequence of this incident Mr Walker and Mr Porter were dismissed and Mr Walker's application to Glasgow Licensing Board for a personal licence was withdrawn.





The Pursuer was not present at said "lock-in" nor, apparently, was he aware in advance that it was to take place. He took swift action when the incident was brought to his attention. Not only did he dismiss Mr Walker and Mr Porter but on 8th March he appointed Mrs Anne White, an experienced licensed trade person, as the manager of the premises.

Following upon this incident the then Chief Constable of Strathclyde Police lodged with the Defenders a letter dated 22nd March 2013 seeking a review of the Premises Licence in terms of Section 36(3)(a) and(b) of the Licensing (Scotland) Act 2005. A copy of said letter for review is Item 5/1 of Process.

In the said letter the then Chief Constable founded on three incidents in support of his application. Firstly, there was an incident on 4th January 2013 when, during a routine licensed premises visit by Police Officers, cocaine misuse was evident in the Gents' toilets.

On 1st February 2013 during a routine police licensed premises visit there were two members of bar staff on duty and when asked to produce either their personal licences or training records, only one member of staff was able to do so. The male member of staff, Marshall Porter, could not produce his training records. On this visit and the said visit on 4th January 2013 the Pursuer was not present and Mr David Walker was on duty.

The "lock-in" on 6th March 2013 was the third ground for review. Again the Pursuer was not present.

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The review application by the then Chief Constable was intimated to the Pursuer by letter from the Defenders dated 5th April 2013 and on 29th April 2013 a hearing of the Licensing Board was convened to consider the review application. The Pursuer was represented at said hearing by Mr Hunter.

Following on the application for review by the then Chief Constable the Defenders' Licensing Standards Officer was required to prepare a report for the Defenders, which he did by letter dated 3rd April 2013. His report is Item 5/1.2 of Process.

It was noted by the Licensing Standards Officer that when he had visited the said premises on 15th January 2013 Mr Marshall Porter was able to produce his training record.

The said application for review by the then Chief Constable submitted, firstly, that in terms of Section 36(3)(a) of the said Act one or more of the conditions to which the Premises Licence is subject had been breached, namely that at the time Mr Marshall Porter was working in said premises his training record was not on the premises.

The second ground of application was that in terms of Section 36(3)(b) of the Act, of the five licensing objectives specified in Section 4(1) of the Act, there were grounds relative to four of these, namely preventing crime and disorder; preventing public nuisance; securing public safety; and protecting and improving public health. In support of this aspect of the application reference was made to the three incidents to which I have referred above.

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At the said Board meeting on 29th April 2013 the Defenders determined that the grounds for review were established in terms of Section 39(1) of the Act and that it was necessary and appropriate for the purposes of licensing objectives, in terms of Section 39(1) and (2) of the Act, that the Premises Licence be suspended for a period of two weeks from Tuesday, 30th April 2013. It is in relation to this decision that the present appeal was lodged.

The Defenders' Board upheld the grounds of review on the basis that there had been a breach of the mandatory conditions of licence and, separately, that there were grounds relative to four of the five licensing objectives.

A statement of reasons by the Defenders dated 17th May 2013 was issued to the Pursuer. This forms Item 6/1.1 of Process.

At this stage I should say that I am most grateful to Mr Hunter who prepared very detailed written submissions, which I have lodged in Process.

The first submission for the Pursuer was that in determining to find that the grounds for review were established on the basis of the four licensing objectives the Defenders had erred in law *et separatim* exercised their discretion in an unreasonable manner.

The first incident referred to in then Chief Constable's letter was the incident of 4th January 2013 where it is alleged that cocaine use was detected in the Gents' toilet. There is no


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mention of this incident in the Reasons for Decision and it was agreed by Mr Hunter and Mr Campbell that this matter could therefore be ignored.

The second incident referred to in the letter by Strathclyde Police was the failure by Mr Porter to have his training records available at the routine Police inspection on 1st February 2013. It was accepted by Mr Campbell that while it was a breach of the Act, Mr Porter had indeed undergone the appropriate training and had a training record.

The third incident was the "lock-in" on 6 March 2013.

As Mr Hunter pointed out in his submissions, the lock-in was not authorised by the Pursuer; the Pursuer had no knowledge in advance that the lock-in was to take place; Mr Walker had had 20 years' experience in the licensed trade and had previously managed his own premises in Lanark without any difficulties, so far as the Pursuer was aware. The Pursuer was therefore entitled to rely on Mr Walker to comply with the Licensing Act; following upon the lock-in taking place the Pursuer had taken decisive action in dismissing Mr Walker and Mr Porter; that he had almost immediately thereafter appointed Anne White as Manager of the premises; that there had been no further incidents between 7th March and 29th April; that all staff had been retrained and Mrs White had met with the Licensing Standards Officer who had reported favourably; and that the premises were now operating normally again and were not the source of any concern. This same submission was accepted by the representative of the then Chief Constable at the meeting on 29th April 2013.




Mr Hunter also submitted, and this was accepted by Mr Campbell, that it was highly unlikely that there would have been an application for review by the then Chief Constable had it not been for the incident of 6th March 2013.

Having regard to these positive features it was submitted that the Licensing Board, in finding the grounds of review established, had erred in law and the decision to suspend the Pursuer's licence for 14 days was an error in law, an unreasonable exercise of their discretion and it was also disproportionate.

It could not be said that Pursuer personally had done anything wrong. It could not be said that he was at fault when an experienced and previously responsible member of staff had acted of his own volition to breach the licensing laws.

Mr Hunter submitted this was tantamount to the Board applying a "strict liability" approach. The Statement of Reasons provides:-

"In this regard the Board considered that Mr Nelson, as premises licence holder and premises manager had been responsible for the management of the premises (notwithstanding he was not required to be physically present on the Premises) in terms of the Act and had failed to discharge this responsibility, having left the *de facto* running of them to Mr Walker, who was not a personal licence holder, following upon which the incident of 6th March 2013 had occurred. The Board considered that it was appropriate for the purposes for the four said licensing objectives to take some step or steps in terms of




Section 39 of the Act given the particular seriousness of the incident of 6 March 2013 and having regard also to the incident in early February 2013 (insofar as it related to the keeping of training records) in that it, although of a less serious nature and which may not in itself have required such steps to be taken, showed there had been another difficulty in the management of the licensed premises since the recent transfer to Mr Nelson of the premises licence and while he was the designated premises manager for the premises”.

Mr Hunter submitted that it was clear from this passage from the Statement of Reasons that the Board had applied a strict liability view in determining failure on the part of the Pursuer in upholding the grounds for review. It was clear, he said, from the Statement of Reasons that the Board regarded the fact that the lock-in incident of 6th March 2013 had occurred *ipso facto* constituted grounds for the review to be upheld. This constitutes an error in law and an unreasonable exercise of discretion, particularly since only the incident of 6th March 2013 could be described as serious.

Mr Hunter submitted that it would have been a serious matter had Mr Porter not had the relevant training (in terms of mandatory conditions fixed for the Premises Licence) but it is clear from the Licensing Standards Officer's report that he had seen the training records for Mr Porter and there was only a technical breach in that Mr Porter did not have his training records on the premises when the Police attended on 1st February 2013.

Consequently, the only matter which the Board could have relied upon in upholding the grounds for review was the “lock-in”.



Mr Hunter referred me to *Sohal v City of Glasgow Licensing Board (1999) SLLP 12* and the passage at page 22 of Sheriff Kearney's judgement, "*By adopting the premise that error by the pupil should generally be attributed to incompetence of the teacher, the Board were making an unwarrantable inference and therefore exercising their discretion in an unreasonable manner*".

Mr Hunter submitted that that is what the Board has done in this case. The error of Mr Walker in hosting a lock-in is attributed to the Pursuer as a larger management failing, notwithstanding that there was no challenge to the Pursuer's own assertion that Mr Walker's action was unauthorised and was known by him to be unlawful. Accordingly, submitted Mr Hunter, before the grounds for review could properly be established for the purposes of Section 39 on the licensing objective, the Board ought to have had regard to what the Premises Licence holder did or failed to do to prevent such an event occurring, and further, what steps had been taken by him to address the matter once the concern arose.

In support, Mr Hunter also referred me to the decision in *Lidl UK GmbH v City of Glasgow Licensing Board (2013) CSIH 25* and in particular to paragraph 35.


Having quoted part of paragraph 35 Mr Hunter submitted that the Board did not apply this test in considering whether or not to uphold the grounds of review as their determination was wholly concerned with past events. While he accepted that the Board was entitled to assess the information before it, attach weight to it and then exercise their discretion in reaching a decision, the Statement of Reasons disclosed that the Board failed to apply the test correctly. In particular the Statement of Reasons discloses that the Board did not have



regard to the submission that the Pursuer had taken decisive action, including the appointment of an experienced Bar Manager, and the information from the Police that there had been no subsequent incidents until after they had determined to uphold the grounds of review on the basis of the licensing objectives. The Board were entitled to have regard to these points only insofar as they were considering what the "necessary and appropriate" course of action was to take in terms of Section 39(1). The approach taken by the Board is not the correct approach and by doing so the Board erred in law.

Separately, the Board exercised their discretion unreasonably by failing to attach any or sufficient weight to the material facts, namely the steps taken by the Pursuer, in their consideration of the grounds of review as opposed to only considering them during the course of their consideration of what steps were "necessary and appropriate" in the light of the decision they had made.

It was also submitted that the Board had erred in law in upholding the grounds of review on the basis of the four licensing objectives; (a) preventing crime and disorder, (b) preventing public nuisance, (c) securing public safety; and (d) protecting and improving public health as the Statement of Reasons disclosed no attempt to identify the particular concerns and decisions of the Board in finding inconsistencies with each of the four licensing objectives referred to. Each of the licensing objectives is different and their considerations may not always overlap.



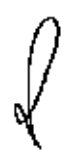
It was submitted that the decision of the Board was not one which a reasonable Board would have reached (*Latif v Motherwell District Licensing Board, 1994 SLT 414*).

Mr Hunter's second submission was that in determining to find the grounds for review established on the basis of breach of conditions of the Premises Licence the Defenders erred *et separatim* exercised their discretion in an unreasonable manner.

The Statement of Reasons disclosed that the Board upheld the grounds of review on the basis of a breach of condition of the Premises Licence under reference to the mandatory condition 6(2A) only, that is to say the failure to exhibit a training record for Mr Porter on 1st February 2013.

It was agreed that this was a minor or technical breach of the legislation since there was no suggestion before the Board that Mr Porter had not been trained and it was clear from the Licensing Standard Officer's report that the training record had been produced previously.

The Board essentially said in their Statement of Reasons that they would not have proceeded to grounds for review based on this matter alone. The breach of the condition however is stated as an individual finding in establishing the grounds for review and on the basis that a "forward looking" test should be applied in review hearings (as per the decision in *Lial*), this ground for review is not made out.




The third submission by Mr Hunter was that *esto* the Defenders were entitled to determine that the grounds for review were established, the Defenders erred in law *et separatim* acted in a disproportionate manner by suspending the Pursuer's licence for a period of two weeks from 29th April 2013.

In support of this submission Mr Hunter suggested that it was impossible to conclude that the determination of the Board to suspend the licence was anything other than an intention to impose a financial penalty on the Pursuer.

He pointed out that the any sanction imposed by the Board under Section 39(2) of the Act must be "necessary or appropriate" as set forth in Section 39(1). He then referred me to paragraphs 41 and 42 of *Lidl*.

Perhaps anticipating Mr Campbell's argument, Mr Hunter submitted that there was no suggestion in the opinion of the Court in *Lidl* that the Court's view of suspension should be limited to cases of "one failed test purchase". Paragraphs 41 and 42 are clearly intended for wider application and he submitted that the *ratio* of this case, in relation to suspensions, is that the Board must have in mind a corrective purpose to achieve and that suspension could be "necessary and appropriate" for the furtherance of the licensing objectives if the Board disclosed what the rationale behind it is. In the present case they do not do so and therefore fall into error.




Mr Hunter also submitted that the *ratio of Lidl* suggested that suspension of a licence might be appropriate to give the licence holder time to remedy those matters which were of concern. In the present case, however, no matters were identified to the Board during the course of the review hearing which might have required to be remedied during the period of suspension. Mr Walker and Mr Porter had been dismissed, a responsible manager in the person of Anne White had been appointed and the Chief Constable accepted that there were now no matters of concern.

Mr Hunter said that in the course of his submission to the Board he had pointed out that even a closure of two weeks was likely to result in the permanent closure of the premises and this would certainly be a disproportionate outcome in all the circumstances.

Separately, Mr Hunter also submitted that the decision to suspend the licence was disproportionate in all the circumstances of the case. The Pursuer has a proprietary right in the licence which is to be protected in terms of Article 1 of the European Convention of Human Rights and that that right may only be interfered with if the interference is proportionate.


Suspension can be proportionate. If there is a corrective purpose to be achieved and if it were in the public interest that the premises were not trading while this purpose is achieved, suspension might be a proportionate response. In this case, however, no such purpose is identified by the Board.



The premises had required to be closed for a period of one day until the Pursuer's agents had appeared before Sheriff Douglas and had the suspension recalled *ad interim*. Mr Hunter referred me to Sheriff Principal Stephen's decision in *Tesco Stores Limited v Midlothian Licensing Board*, 2012 SCLR 575 where at paragraph 75 (in discussing the need for immediate suspension of a licence) Sheriff Principal Stephen stated "I accept that there may be instances where an immediate suspension of the licence is necessary for the purpose of dealing with public protection and public order concerns. However, these issues were entirely absent in the present case and are likely to be absent in a significant number of cases heard by the Board".

Finally, Mr Hunter submitted that the Defenders had erred in law in providing Reasons which were inadequate and which provided no adequate explanation of the basis of their decision. He referred me to the well-known case of *Wordie Property Company Ltd. v The Secretary of State for Scotland*, 1984 SLT 345, and, putting this case into a licensing context, *Ritchie v Aberdeen City Council*, 2011 SC 570.

Mr Campbell for the Defenders referred me to the said decisions in *Tesco Stores Limited v Midlothian Licensing Board* and *Lidl UK GmbH v City of Glasgow Licensing Board*. He stressed these are not close to being in point on the facts since both of these cases arose from test purchases. Furthermore, Lidl was a massive company which had spent a lot of money putting safeguards in place regarding the sale of alcohol. They provided training for staff, both internal and external training, and also provided refresher training. They had a "Challenge 21" policy in place. The only problem had been that on the day in question there had been a glitch when one employee did not follow the correct procedure. Mr Campbell




submitted that selling alcohol to a 16 year old is not a deliberate flouting of the law (although I assume he meant that in the circumstances of that case there was no suggestion that the employee had deliberately flouted the law). Even the Licensing Board had accepted that Lidl's procedures were adequate.

He pointed out that in the present case the Pursuer at the time of the "lock-in" on 6 March was the licence holder and the Premises Manager. While he accepted that the Pursuer did not require to be in the premises all of the time, the Pursuer had decided to put in place a duty manager who did not hold a Premises Licence at the time and, accordingly, the Pursuer should not have relied on Mr Walker for the day-to-day running of the business. This point is made by the Board at the foot of page 4 of the Statement of Reasons. The Pursuer had been responsible for the management of the premises and had failed to discharge this responsibility having left the *de facto* running of the premises to Mr Walker.

Mr Campbell accepted that Anne White did hold a Personal Licence and also that the information before the Board was that the premises were now operating satisfactorily.

Referring again to the decision in *Lidl*, Mr Campbell suggested that it was clear that the licence holders had done everything they could to ensure there was no underage drinking and that it was accepted there was no fault on the part of the licencees.

Mr Campbell submitted that the decision in *Sohal* was of no assistance as there was no due diligence defence available.




He noted that Mr Hunter had taken the view that the Board could not have founded on material before them and found that the grounds for review were established. He pointed out, however, that the Board were given a letter from the Police which had set out four of the five licensing objectives and if the premises were being used as a "lock-in" on 6 March, then four of those five objectives had been breached. Clearly, therefore, grounds for review were established in view of the information from the Police.

Referring to Section 36(3) of the 1995 Act, Mr Campbell submitted it was clear that one or more of the licensing objectives had been breached, and he pointed out that the Pursuer had accepted that the absence of the Training Record for Mr Porter on 1 February 2013 was a licensing breach, albeit a minor breach.

Referring to Section 39 of the Act, Mr Campbell accepted that the Statement of Reasons had to be intelligible. He referred me to the said case of *Ritchie v Aberdeen City Council, supra*, and to *Mirza v City of Glasgow Licensing Board, 1996 SC 450*.

He submitted that where there has been a serious incident and where there is the issue of future proofing your decision, *Lidl* is of no assistance as it is restricted to test purchase cases only.

Mr Campbell suggested that Mr Hunter's approach that *Lidl* should be applied universally had several implications. He submitted that, hypothetically, if a licence holder allowed a number of serious incidents to occur on the premises, on there being an application for




review, the licence holder would be able to bring in a new manager and say that the place had been cleaned up. Any such corrective action would mean that a Licensing Board had no power to impose any of the sanctions in Section 39. He said it was not uncommon for licence holders to say to the Board that they were accepting that there had been a problem in the past and that those problems had now been sorted out.

Again, hypothetically, he suggested that if the Pursuer had been involved in the "lock-in" and had then resigned as Duty Premises Manager and left the running of the business to Mrs White, it would be wrong that the Board would have its hands tied and would not be able to take steps to deal with the transgressions which had occurred.

He suggested that if I held that the steps taken by the Board were excessive and I decided that the appropriate step would have been to give a written warning, then, if Mr Hunter's argument were correct, that would also be open to challenge.

Mr Campbell referred to Answer 6 of the Record and the averments regarding the breach of Condition 6(2A) of the Mandatory Conditions set out in Schedule 3 to the Act. He submitted that this incident, along with the "lock-in", were matters which entitled the Police to apply for a review and the Board's response was not disproportionate, although he did accept that it was unlikely that the Police would have asked for a review if the absence of Mr Porter's Training Record was the only incident.



In conclusion, Mr Campbell submitted that in the event of my deciding the Appeal should succeed, I should refer the matter back to the Board. In support of this submission he referred me to the decision in *Ranachan v Renfrew District Council*, 1991 SLT 625.

DECISION

It is accepted that the Statement of Reasons makes no mention of the incident of 4 January 2013 when, apparently, there was evidence of Cocaine use in the Gent's toilets. By agreement of the parties, this alleged incident falls to be ignored, although it is the first ground for review in the letter from the then Chief Constable of Strathclyde Police.

It is also agreed that the absence of Training Records for Mr Porter when the Police visited the premises on 1 February 2013 could be treated as a technical breach of the Premises Licence, and by itself would not have prompted an application for review.

The "lock-in" on 6 March 2013 was a very serious matter and there is no doubt that it was this incident which prompted the application for review from Strathclyde Police.

The first submission by Mr Hunter was that in determining to find the grounds for review established on the basis of the four licensing objectives, the Defenders erred in law *et separatim* exercised their discretion in an unreasonable manner.



Entitlement to apply for a review of a Premises Licence is found in Section 36 of the 2005 Act, the relevant sub-sections of which are:-

"(1) Any person may apply to the appropriate Licensing Board in respect of any licensed premises in relation to which a premises licence has effect for a review of the licence on any of the grounds for review.

(3) The grounds for review referred to in sub-section (1) are:-

- (a) that one or more of the conditions to which the premises licence is subject has been breached, or
- (b) Any other ground relevant to one or more of the licensing objectives".

The Licensing Objectives are to be found in Section 4(1) of the Act which states:-

"(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".

The letter applying for the review of the Premises Licence from the then Chief Constable, No.5/1 of Process, claims that in terms of Section 36(3)(a) of the Act, one or more of the conditions to which the Premises Licence is subject has been breached by the failure to have




Mr Porter's Training Record on the premises at the time of the Police visit on 1 February 2013.

The said letter also makes application for review in terms of Section 36(3)(b) of the Act, on grounds relative to licensing objectives (a) to (d) inclusive. In support of this ground, reference is made to the failure to display Mr Porter's Training Record and the "lock-in" on 6 March 2013 and also, the alleged incident on 4 January 2013.

Section 39(1) of the Act states:-

"(1) At a review hearing in relation to any premises licence, the Licensing Board may, if satisfied that a ground for review is established (whether or not on the basis of any circumstances alleged in the premises licence review proposal or application considered at the hearing) take such of the steps mentioned in subsection (2) as the Board considers necessary or appropriate for the purposes of any of the licensing objectives".

The decisions in *Tesco Stores Ltd v Midlothian Licensing Board* and *Lidl UK GmbH v City of Glasgow Licensing Board, supra*, arose from a failed test purchase. The Pursuers in both cases had thorough and satisfactory measures in place designed to prevent the sale of alcohol to underage purchasers. Notwithstanding these thorough safeguards, there was one incident in each store of a sale to an underage person caused by a failure on the part of an employee.



In the present case it seems to be accepted that the Pursuer was not aware that the "lock-in" had taken place until after the event, when he moved swiftly and decisively to sack the two offending employees and to put in place a very experienced manager.

It seems to be accepted that between 6 March and 29 April 2013 the premises had been run properly and within the licensing laws. The Licensing Standards Officer had no criticism of the way in which the premises were run after Anne White became manager.

It also seems to be accepted (in the sense that Mr Campbell did not contradict the Pursuer's submission) that up until 6 March 2013 Mr Walker appears to have been a competent and reliable licensed trade employee and there was nothing in his past, so far as the Pursuer was concerned, which would have prompted any criticism of the Pursuer for employing him.

It might well be said that the incident of 6 March 2013 was "an aberration" on the part of Mr Walker for which, clearly, the Pursuer could not be held directly responsible.

I should stay at this stage that I disagree with Mr Campbell's submission that the decision in *Lidl* is "fact restricted" and that it only applies to cases where there has been a failed test purchase. It is clear from the decision, that it is not so restricted.

The cases of *Tesco* and *Lidl* to which I was referred have one major aspect in common, that there was no criticism of the Pursuers. They, themselves, had done nothing wrong. In each case the fault or error was that of an employee. The same point could be made in relation to

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the case before me. The Pursuer was not present at the "lock-in" and he was not present when either of the earlier incidents occurred. It was accepted by the Board that he did not require to be present and, therefore, it was clear that there should have been no criticism whatsoever of the Pursuer.

Paragraph 10 of the Statement of Reasons states:-

Decisions taken:

"The Board found the ground for review under Section 36(3)(a) of the Act established in that mandatory condition 6(2A) of the licence relating to the keeping on the premises of training records had been breached and also found the ground for review under Section 36(3)(b) of the Act established in that a ground relevant to the licensing objectives of preventing crime and disorder, preventing public nuisance, securing public safety and protecting and improving public health had been made out. The Board suspended the premises licence for a period of two weeks as appropriate for the purposes of these licensing objectives".

Putting to the side for the moment the lack of specification in the paragraph above the Board has ignored the accepted position that the Pursuer was not present when any of the three matters referred to in the application for review occurred. The Board obviously considers that the Pursuer has been in some way at fault in letting these incidents occur when, in fact, they had occurred while the premises were under the control of Mr Walker, who was at the time apparently a trusted employee.



In the third paragraph of the Reasons for Decision it is stated "However, the Board were concerned that the management of the premises since Mr Nelson had taken them over, particularly in relation to the events of 6 March 2013 as detailed in the review application, had fallen well below the standard expected of premises licensed for the sale of alcohol in Renfrewshire. The Board considered that the failures in the management of the premises which had allowed the events of 6 March 2013 to occur were serious".

Later in paragraph 3 of the Reasons for Decision it is stated "In relation to Mr Hunter's particular submission that Mr Walker's character had changed since early 2013, the Board did not accept this as a reason for not taking any steps under Section 39 of the Act. In this regard, the Board considered that Mr Nelson, as premises licence holder and premises manager, had been responsible for the management of the premises (notwithstanding he was not required to be physically present upon the premises) in terms of the Act and had failed to discharge this responsibility having left the *de facto* running of them to Mr Walker, who is not a personal licence holder, following upon which the incident of 6 March 2013 had occurred".

I agree with Mr Hunter that it is clear from those parts of the Statement of Reasons which I have quoted above, that the Board has adopted a "strict liability" or "absolute liability" approach.

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It is clear from the decision ~~with~~ *Lidl* that this is not the correct approach. "While a Licensing Board necessarily has to consider the earlier factual allegations upon which the


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application or proposal for review is made, the process of review is essentially forward looking. It involves examining whether the continuance of the premises licence in issue, without taking any of the steps listed in Section 39(2), would be inconsistent with endeavouring to achieve the licensing objective in question. The process of review is not directed to imposing a penalty in respect of some past event, which is not likely to recur to an extent liable to jeopardise the licensing objectives in question" (*Lidl paragraph 35*).

The Board did not apply this test when considering the grounds for review. The Board concentrated solely on past events and determined that the incidents of 1 February and 6 March 2013 were the fault of the Pursuer for which he should be punished.

The first step in the process is for the Board to determine whether a ground for review has been established. In circumstances where it is agreed that the failure to display Mr Porter's training record on 1 February 2013 was a technical breach and which would not have prompted an application for review I consider that the Board's treatment of the incident of 6 March 2013 discloses an error of law in the interpretation of the Act and I therefore accept the first submission by the Pursuer that the Defenders have erred in law *et separatim* exercised their discretion in an unreasonable manner. It cannot be said that the Pursuer by any act of omission or commission on his part compromised any of the four licensing objectives specified in the application for review by the then Chief Constable.


Mr Campbell supported the approach of the Board when it was said in the Statement of Reasons (at page 4) that the Pursuer had been responsible for the management of the



premises and failed to discharge this responsibility since he had left the running of the premises to Mr Walker. This, of course, completely ignores the fact that up until 6 March 2013 the Pursuer, apparently, had no reason to doubt Mr Walker would be anything other than a responsible manager, and the Board certainly had no information to suggest prior to 6 March 2013 that the decision to appoint Mr Walker as manager was a bad decision.

Each case must turn on its own facts and circumstances, but Mr Campbell's hypothetical situation proceeds on a false premise. He submitted that, hypothetically, if a licence holder allowed a number of serious incidents to occur, he might be able to bring in a new manager and say that he has undertaken corrective action. The distinction between that hypothetical situation and the case before me, of course, is that it cannot be said that the Pursuer allowed any serious incident to occur. It was not the Pursuer but Mr Walker who had been involved in the "lock-in".

Another difficulty for the Defenders, and this relates also to the fourth submission by Mr Hunter and his reference to the decision in *Wordie Property Company Ltd. v The Secretary of State for Scotland, Supra*, is that the Board do not make clear whether it is one or all of the four licensing objectives which were compromised by the incident on 6 March 2013. Certainly, the letter from the then Chief Constable specifies four of the five objectives from Section 4(1) of the Act but in the Statement of Reasons the Board do not look at these objectives individually and then state if, and in what way, the objective was breached or compromised.



I have dealt with Mr Hunter's second submission in dealing with his first submission.

Esto, I am wrong in the view I have expressed and the Defenders were entitled to determine that the grounds for review were established, it is perfectly clear from the decision in *Lidl* that the suspension of the Pursuer's licence for a period of two weeks was disproportionate.

Paragraphs 41 and 42 of the decision in *Lidl* support the Pursuer's submissions that the purpose of suspension is to give the licence holder the opportunity of rectifying any defects or taking steps to promote compliance with licensing legislation which can be remedied during the period of suspension. There are no such issues in this case. The issues which required to be remedied were remedied by the Pursuer taking the steps which have been identified on 7th and 8th March 2013 and there was nothing outstanding which he required to do. In any event, the Board erred in law by failing to identify any purpose or matter which required to be remedied during the period of suspension.

Sheriff Principal Stephen in *Tesco Stores Ltd.*, was critical of the Licensing Board imposing suspension with immediate effect. As a matter of general practice I think it is wrong that a Board should order suspension immediately or even, as in the present case, the following day. In this case the Pursuer suffered one day's loss of trading but if a Licensing Board were to meet, for example on a Thursday, before a long holiday weekend it might be difficult, if not impossible for the licence holder to make an application immediately for an *interim* recall of the suspension of the licence. In that situation a licence holder might not be able to trade for a period of four or five days which could be a draconian penalty, particularly in a



situation where, ultimately, an appeal to the Sheriff Principal or Sheriff against the Board's decision is successful.


The fourth submission by Mr Hunter related to the inadequacy of the reasons.

In paragraph 3 of the Reasons for Decision the Board stated that the failures in the management of the premises were serious without actually specifying what those failures were.

The reasons do not disclose why any or all of the events which occurred at the premises bring into play any of the four licensing objectives referred to. There has to be a clear link between the failures and which, if any, of the licensing objectives become engaged. It cannot be assumed that each of the three incidents (assuming, for the moment, that all three were deemed to be sufficiently serious to justify the application for review) engage all four objectives.

Since the purpose of suspension is a corrective purpose then no such corrective purpose is specified in the Statement of Reasons. This might entitle the reader to conclude that the purpose of the suspension was a financial penalty but that has not been made clear.

Section 131(5) of the Act states the three options open to the Sheriff Principal or Sheriff when upholding an appeal against a Licensing Board's decision. These are (a) remit the case back to the Licensing Board for reconsideration of the decision, (b) reverse the decision, or (c)



make, in substitution for the decision, such other decision as the Sheriff Principal or Sheriff considers appropriate, being a decision of such nature as the Licensing Board could have made.

Unsurprisingly Mr Campbell invited me, in the event of my sustaining the appeal, to remit the case back to the Licensing Board for reconsideration. I do not think that would serve any useful purpose. I have therefore allowed the appeal, quashed the finding that the grounds of review were established and quashed the decision to suspend the Pursuer's licence for a period of 14 days.

Ranachan does not apply in this situation. I have held that the Defenders erred in law *et separatim* exercised their discretion in an unreasonable manner. I have also held that the Statement of Reasons is inadequate. This is entirely different from the situation in *Ranachan*.

It was agreed that expenses should follow success and I have awarded the expenses of the Appeal to the Pursuer.

