

Petrol and Pilsner

A talk given at Terra Firma Chamber's Local Government Conference

on 24th May 2010 by Graham Dunlop, Advocate

Obtaining a licence to sell alcohol from a shop which also sells motor fuel was considered by the Nicolson Report in anticipation of the new Licensing (Scotland) Act 2005. There was a perceived concern that the sale of alcohol from a shop which also sold motor fuel may encourage drink driving. Accordingly the Licensing (Scotland) Act 2005 prohibits the granting of a licence for the sale of alcohol from such premises.

In order to protect small rural communities, where the local petrol station may be the only local convenience store, an exemption was provided within the Act. The exemption is found in section 123(5) of the 2005 Act. The exemption applies where *"persons resident in the locality in which the premises are situated are, or are likely to become, reliant to a significant extent on the premises as the principal source of: (a) petrol or derv, or (b) groceries (where the premises are, or are to be, used also for the sale by retail of groceries)."* This exemption has been the subject of some scrutiny by the Courts over the past 18 months.

In *Co-operative Group v Aberdeen City Licensing Board* the Court held that the existence of other shops or supermarkets within the locality was not the test, but whether the particular premises were the principal source of fuel or groceries. The Court further held that *"persons resident in the locality"* did not involve looking at the community as a whole. It was only necessary that some persons were reliant as a matter of fact. Residents of a sheltered housing scheme were used by way of example. This decision suggested that the number of persons may be low but still meet the test in the Act.

Following this decision BP appealed against a decision of the City of Glasgow Licensing Board in respect of two petrol stations and associated convenience stores which had been refused licenses to sell alcohol. BP had provided market research to the Licensing Board that seventeen persons were reliant upon the two stores. Once again the Court came to the conclusion that Licensing Boards should not consider the community but rather *"persons resident in the locality"* in accordance with the test within the Act. The Court highlighted that it is the reliance which requires to be significant, not the number of persons.

So why are Licensing Boards considering the 'community'? This is due to Scottish Executive Guidance issued under the Act. The Guidance uses "*local community*" rather than "*persons resident in the locality*" as found within the Act. This places licensing boards in an unenviable position as the Act requires licensing boards to have regard to any guidance issued, and the guidance sits uneasily alongside the test in the Act.

Sheriff Principal Bowen considered the issue further in an appeal by BP against a decision of City of Edinburgh Licensing Board. In that case the Sheriff Principal observed the difficulty of interpreting the terms of the exemption within the Act. He gave the example of a person buying their fuel from the local garage for reason of convenience rather than reliance. In the circumstances the Sheriff Principal came to the conclusion that the Guidance should be used as an aid to interpreting the Act. On this occasion the Court held that Licensing Boards should consider persons in the locality when viewed as a group. Accordingly it appears the required number of reliant persons is likely to be higher than suggested in the earlier cases.

In a further appeal against City of Edinburgh Licensing Board by ROC UK Limited Sheriff Principal Bowen followed his earlier approach in *BP v City of Edinburgh Licensing Board*. It was held that the focus is not on a handful of individuals, but rather on the premises. It is whether persons resident in the locality are reliant when viewed as a group, on those premises. It also held that the existence of other stores was not conclusive in the refusing of a license, and that reliance was a lower benchmark than 'total dependence'.

Accordingly the current position appears to be that a license should be granted when persons in the locality when viewed as a group are reliant on the premises for either fuel or groceries.

Finally with the exception of the decision in *Co-operative Group Ltd v City of Aberdeen Licensing Board* the other three decisions have been appealed to the Inner House of the Court of Session. Hopefully the outcomes of these appeals will provide some certainty as to the approach that licensing boards should follow.