

FALKIRK COUNCIL LICENSING BOARD

**Subject:** GARAGE SHOP APPEALS  
**Meeting:** FALKIRK COUNCIL LICENSING BOARD  
**Date:** 26 OCTOBER 2011  
**Author:** CLERK TO THE LICENSING BOARD

**1. BACKGROUND**

- 1.1 Members will recall that in terms of Section 123 of the Licensing (Scotland) Act 2005, premises used as a garage or which form part of premises which are used as a garage (i.e a garage shop) cannot be granted a premises licence as they are "excluded premises". However, in terms of subsection (5) of Section 123, there is an exemption in favour of premises used for the sale by retail of petrol or derv (or which form part of the premises so used) if 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 of groceries).

- 1.2 There have been a number of "garage shop" applications for a premises licence made to the Board, in which the applicant has attempted to persuade the Board that the exemption under Section 123 (5) applies and that accordingly their premises can be considered for grant of a premises licence (subject to meeting the normal tests under the Act, such as consistency with the licensing objectives). The Board has refused in all these applications to hold that the Section 123 (5) exemption applies. The majority of the unsuccessful applicants have gone on to appeal to the Sheriff Principal. The purpose of this report is to present the current situation in these appeals, and to give a view on the present state of the law in this area.

**2. APPLICATIONS CURRENTLY UNDER APPEAL**

- 2.1 There are at present appeals in five "garage shop" applications for the following premises:-
- (i) Mohammed Arshad, Filling Station, Grangemouth Road, Falkirk;
  - (ii) Tesco Stores, Springfield Service Station, Camelon Road, Falkirk
  - (iii) Pace Petroleum, Pace BP Spar Shop, Haughs of Airth, by Falkirk
  - (iv) DMS Partners, Spar Shop, Glasgow Road, Camelon
  - (v) BP Oil UK Ltd, BP Earls Gate Service Station, Falkirk Road, Grangemouth
- 2.2 These cases were all at various dates between March 2010 and April 2011 "sisted" (suspended) by the Sheriff Principal to await the outcome of two "garage shop" appeals against decisions of the Glasgow and Edinburgh Licensing Boards. The appeals were being considered by the Inner House of the Court of Session. The Inner House gave its decision on 5 April 2011 (discussed below).
- 2.3 To date the five appeals detailed in paragraph 2.1 remain sistred but in the case of the Earls Gate Service Station appeal there are clear indications that the Appellant wishes to have the sist recalled (the suspension removed) and to seek a final hearing before the Sheriff Principal.

### 3. THE INNER HOUSE APPEALS DECISION

- 3.1 It should be noted that the grounds of the Inner House decision (to uphold the appeals against the Glasgow and Edinburgh Licensing Boards) rested on factors peculiar to the decisions of these Boards. The Inner House held that both Boards had misinterpreted the legislative provisions bringing Section 123 into effect in full. In both appeals, the Inner House also held that the Boards had failed properly to interpret the market research placed before them in support of the applications.
- 3.2 Of greater relevance to the five appeals referred to above is the interpretation the Inner House has placed on the phrase "reliant to a significant extent on the premises as the principal source" which is contained in the exemption in Section 123 (5). The Inner House considers that Boards have to steer a course between interpreting the phrase as "absolute dependency" and as "subjective preference". The Court instanced as a (rather colourful) example of the former the dependency of an Antarctic expedition in past times on the arrival of a supply ship. It is highly unlikely that in an era of 24-hour home deliveries any citizen in Scotland requires to rely absolutely on the survival of any particular retail premises. However, Boards should not go to the other extreme and accept a statement of personal preference for a particular garage shop as equivalent to "reliance to a significant extent". What is required to satisfy the statutory exemption is evidence that there are persons living in the locality of the premises who would suffer "material disadvantage and/or inconvenience" were the premises not available as a source of petrol, derv or groceries.
- 3.3 Your officers consider that the test of "material disadvantage and/or inconvenience" requires more than simply a response to a survey questionnaire where that survey is only carried out over a short period of time of customers attending a filling station or a garage shop. Such a survey can only be a "snapshot" of certain customers' views on the premises and in your officers' view does not necessarily equate to evidence (a) that the person interviewed does in fact reside in the locality (as defined by the Board for the purposes of Section 123(5)) – most surveys to date placed before the Board have not stated the addresses of respondents to the survey; (b) of what specific personal circumstances of the person interviewed might place him/her in a position of reliance on the premises in question – e.g. elderly or infirm, disabled, low income, no access to a car; (c) of what are in fact the shopping habits of the person interviewed as obtained over a reasonable period of time (to check whether reliance is as a matter of fact placed on the particular premises and is not diffused over a number of premises); and (d) of other similar retail premises in or in the vicinity of the locality the existence of which might cast doubt on expressions of 'reliance' on the application premises. It is considered that the Inner House decision still leaves a considerable measure of discretion to Boards, using their knowledge of the localities they serve and of previous licensing applications, in assessing whether the test of "material disadvantage or inconvenience" is satisfied to enable the Section 123 (5) exemption to be applied to a particular application. The guiding principles (a) to (d) set out above are considered to be of assistance in the exercise of the Board's discretion. Your Officers do not consider the Inner House decision prevents Boards from seeking from applicants evidence of any specialities attaching to the application premises or persons resident in the locality thereof, to determine whether in the absence of the application premises there would be material disadvantage or inconvenience suffered by local residents.
- 3.4 The Inner House decision also affirmed the well established principle that a Statement of Reasons issued by a Board should deal properly and intelligibly with the information placed before it. For example, if it wishes to discount the importance of market research, or it wishes to base its decision on what it considers to be nearby alternative retail outlets, it should explain precisely why it is giving weight (or not) to these matters in deciding whether the statutory exemption applies (or not).
- 3.5 Your officers consider that, on the basis of the law in this area as so far developed, all five appeals are still defensible.

#### 4. RECOMMENDATION

- 4.1 That Members note the current position in the appeals referred to in paragraph 2.1 above;
- 4.2 That it be delegated to myself as Clerk to defend the above appeals on the basis of the principles set out in the Inner House decision and this report, and to agree where appropriate settlement terms for any appeals which in my view cannot be defended on the basis of further development and refinement of the law in this area.
- 4.3 That Members instruct a further report on these appeals in approximately six months' time.

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Clerk to the Licensing Board

Contact Officer: Peter Gilmour, Solicitor (Ext 6095)

#### LIST OF BACKGROUND PAPERS

- 1. Litigation files in relation to the appeals referred to in para 2.1 hereof.
- 2. Decision of the Inner House of the Court of Session (XA6/10, XA143/09 and XA 142/09) 5<sup>th</sup> April 2011.