JUDGMENT OF
SHERIFF PRINCIPAL EDWARD F BOWEN QC

in the appeal
in the cause

THE CITY OF EDINBURGH COUNCIL

Pursuers and Appellants

against

DAWN SALTER1

Defender and Respondent

Act: Armstrong QC, instructed by The City of Edinburgh Council

Alt: no appearance

EDINBURGH, 24 MARCH 2006

The Sheriff Principal, having resumed consideration of the cause, refuses the appeal and adheres to the Sheriffs interlocutor complained of dated 17 October 2005.

NOTE:

1. This is an appeal against an interlocutor pronounced on 17 October 2005 refusing an application by the City of Edinburgh Council brought under the provisions of section 3(2) of the Civic Government (Scotland) Act 1982. Part 1 of the Act makes general provisions in relation to Licensing and Licensing Authorities. Section 3(l) provides:

"For the purpose of the discharge of their functions under this part of this Act, every Licensing Authority shall consider, within three months of its having been made to them under paragraph 1 of schedule 1 of this Act, each application so made, and subject to the following provisions of this section, reach a final decision on it within six months".

In terms of section 3(2) of the Act a Sheriff has a discretionary power to extend the period of six months on a summary application being made to him within that period.

2. In the present case the respondent submitted an application to the applicants for a taxi licence on 22 March 2005. The application for an extension of time was lodged 12 September 2005. It was dealt with summarily by the Sheriff at its first calling on 17 October.

3. The first question which calls for determination is whether the appeal is competent, the Sheriff having expressed the view that it is not. He observes that: "The application to the Sheriff in terms of section 3 is a creature of the Statute and there is no appeal from that decision within the Statute".

4. The starting point in an issue of this type is "the constitutional principle that every judgment of an inferior court is subject to review, unless such review is excluded expressly or by necessary implication": Harper v inspector of Rutherlgen 1903 6F 23 per Lord Traynor at page 25. There is no question of express exclusion of appeal from the disposal of applications made under section 3(2) of the 1982 Act. The Sheriff appears to have considered that an express right of appeal would be necessary to make this appeal competent. In my view that was an error or approach. If he had expressed the view that the effect of the provision of sub-section 4, whereby a licence is deemed to be granted if not dealt with within the six months or any extended period provided for, introduced a "finality" which implied that there was no right of appeal, I would have been sympathetic. That was, in part, my own approach to the time limited provisions of interim exclusion orders under section 76 of the Children (Scotland) Act 1995 in Glasnow Citv Council v D H 2003 SCLR, but it was an approach which was rejected by the First Division. It is only proper to accept that the constitutional right of appeal will only be excluded by implication in the clearest of circumstances. They do not exist here. Appeals against decisions under section 3(3) of the 1982 Act have been regularly entertained without question as to their competency: Cunningham District Council v Payne 1998 SLT (Sh Ct) 2 1 ; Monklands Disrrict Council v McGhee 1995 SLT (Sh Ct) 52. In my view the present appeal is directed against a final interlocutor and is competent by virtue of section 27 of the Sheriff Court (Scotland) Act 1907.

5. I accordingly turn to the merits of the matter. I pause to observe that this appeal was heard along with two other appeals which arise in identical circumstances. The applicants were represented by senior counsel. The respondents were not represented and indeed they had not sought to formally oppose the application. In two instances they have indicated that this was for financial reasons and it was not to be taken as an indication that they consented to the application. Extensive written submissions were lodged on behalf of this appellant and whilst I have taken these into account so far as I consider it proper to do so it will be appreciated that in so far as relevant these answers lack the immediate impact of a formal response to counsel's submissions.

6. The Sheriffs reasons for refusing the application appear to fall under three heads. First, he commented on the brevity of the proceedings before him and the absence of any attempt to lead evidence on the applicants' part. He commented that the applicants' agent "was approaching the matter as he would with an ordinary action seeking decree in absence". Second, he indicated that there were certain matters of which he expected to learn more. Lastly, he was critical of the date on which the present application had been made, observing that delay in making it had itself caused the need for a lengthy extension of the six month period laid down by Parliament.

7. 1 am bound to say that I consider that the Sheriff was wrong to indicate disapproval of the fact that the applicants' agent moved that the application be granted at the first calling, relying only on the averments in the application. This was an unopposed summary application. Even if it had been opposed it could have been dealt with on the basis of ex purte submissions provided that there was no factual dispute on matters of materiality. The present application was not opposed, a factor which the Sheriff ought to have taken into account, although it was a perfectly proper observation to say that the absence of opposition did not automatically entitle the applicant to succeed. The Sheriff ought in my view to have simply dealt with the application taking the applicants' pro veritate. It does not of course follow that he was bound to grant it, because it was necessary for him to be satisfied that the application was soundly based in law and that there was proper material on which to base the exercise of his discretion.

8. In point of fact as matters stood before the Sheriff there was very good reason for not granting the application. Section 3(1) of the 1982 Act requires a License Authority to consider an application for a licence within three months and reach a final decision on it within six months. Only the six month period is susceptible to extension under section 3(2). The application as presented to the Sheriff made no mention of consideration being given to the licence application within three months; indeed there are no averments of anything having happened to it after it was lodged on 22 March. What is said is that a new survey of demand for taxis was commenced on 22 March 2005, the last official survey having been completed in January 2002. The new report, it is averred, was put to a meeting of the Hire Car Licensing Consultation Group on 2 September. Thereafter the applicants' averments indicate that following a series of references between the Taxi and Private Hire Regulatory Committee and the Full Council the most likely date for the application to be dealt with, following the grant of an extension of the six month period, would be 18 January 2006.

9. It is perhaps because of the lack of specific focus in the pleadings on the history of this particular licence application that the Sheriff was led into making a number of general comments, for example, about the absence of averments or a sudden increase in demand for taxi licences in the course of 2005 and the reasons for that, which I consider to be irrelevant and immaterial to the issues before him. I am therefore persuaded that there is merit in the applicants' first ground of appeal, the thrust of which is that in disposing of the application the Sheriff took irrelevant considerations into account. The second and fourth grounds of appeal relate to those matters to which I have referred in paragraph 7 above, and I consider that there is force in these also. I am less convinced by the terms of the third ground of appeal and the argument advanced in support of it. This was to the effect that before refusing the application the Sheriff should have taken into account the effect of the provisions of section lO(2) of the 1982 Act. These provisions prohibit a Licensing Authority from granting a taxi licence unless they are satisfied that the vehicle to which the licence is to relate is suitable in type, size and design for use as a taxi and that there is in force an appropriate policy of insurance. It was pointed out that the applicants averred that the respondent had not provided details of the vehicle for which the licence was sought and indeed it was likely that she had not purchased a taxi. It was contended, as I understood the argument, that this provision conflicted with the "deemed grant" provisions of section 3(4), and that the Sheriff should have taken into account the practical implications of refusing the application. I am far from persuaded that this is a relevant consideration for a Sheriff faced with an application under section 3(2); the consequences of a Licensing Authority failing to reach a final decision in respect of a licence application have been clearly spelled out by Parliament. If the Authority seeks to have the relevant statutory period extended it must advance positive reasons in support of the application, and not found on the consequences of its own failure.

10. Whilst it is not clear to what extent the Sheriff was influenced by the irrelevant considerations above referred to, or to the fact that the applicants led no evidence and relied simply on the terms of the application, I am persuaded that the errors in these respects are sufficient for me to take the view that I should consider the application of new. The issue as to whether the licence application was "considered" within three months from the date on which it was made was not highlighted before the Sheriff, and he did not deal with it. That issue appears to me to be fundamental. As I have indicated nothing is said about it in the pleadings. Counsel for the applicants contended that they had "considered" the application. He produced for the purposes of the appeal proceedings an inventory of productions which showed that the licence application had been registered, that it had been acknowledged by letter to the applicant dated 5 April 2005, and that on the same date an application for a report had been made to Lothian and Borders Police Taxi Examination Centre.

This was followed by a report from the police on 28 April 2005 which indicated that the license applicant was not a licensed taxi driver and had no convictions recorded against her. Counsel contended that the term "consider" simply meant looking at the licence application and causing investigation to be made into it.

11. Whilst there was a superficial attraction in the argument presented by counsel, and I have not had the benefit of hearing competing argument, I am not satisfied that this argument is sound. "Consideration" of a licence application appears to me to involve more than merely registering it and setting in motion the administrative machinery to deal with it. I consider it significant that section 3(1) of the 1982 Act imposes a requirement to "consider" and thereafter reach a "final decision". That appears to me to contemplate some form of initial deliberation by the Licensing Authority within the first three months. On the applicants' own averments their Regulatory Committee meets every four to five weeks. There is no obvious reason why a licence application could not be placed before it within three months of it being lodged. One of the matters which the Committee would require to consider would be whether there was sufficient information to deal with the application at that stage or whether it was necessary to continue to a later date within the six month period. If there was good reason for believing that the application could not be dealt with within the time limit that may well be the point at which it would be appropriate to instruct an application for an extension under section 3(2).

12. In the present case the Sheriff was, I consider, rightly critical of the fact that nothing appeared to have been done until the summary application was lodged some ten days before the six month period was about to expire. If the matter had been properly "considered" by the applicants within the three month period the extension could have been sought much earlier. In these circumstances I am not minded to allow this appeal.