[2014] NZARLA PH 627-628

IN THE MATTER	of the Sale and Supply of Alcohol Act 2012
AND	
IN THE MATTER	of an appeal pursuant to s.154 of the Act against a decision of the Auckland District Licensing Committee in respect of premises situated at 1/18 Wickman Way, Mangere, Auckland to be known as "Thirsty Liquor Wickman Way".
BETWEEN	**MANGERE-OTAHUHU LOCAL BOARD** First appellant
AND	**SOUTHERN CROSS CAMPUS** Second appellant
AND	**LEVEL EIGHTEEN LIMITED** Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole
Member: Ms J D Moorhead

HEARING at AUCKLAND on 7 August 2014

APPEARANCES

Mrs L Sosene – Chairperson of first appellant
Dr D J Hewison – Agent for second appellant
Mr J D Young – for respondent
Sergeant M J Tearnie – NZ Police – to assist
Mr A Wilkinson – Auckland District Licensing Inspector – to assist

DECISION OF THE AUTHORITY

Introduction

[1] Appeals have been lodged pursuant to s.154 of the Act against a decision of the Auckland District Licensing Committee dated 11 June 2014 ([2014] ON 406). An application for an off-licence by the respondent in respect of premises situated at

1/18 Wickman Way, Mangere, Auckland to be known as “Thirsty Liquor Wickman Way” had been granted.

[2] The original application recorded the respondent as applicant. Its directors are Ms Balbinder Kaur Janjua and Mr Jagjit Singh Janjua. The premises are on the first floor of a building owned by the respondent. Access is through a doorway on the ground floor and up a flight of steps to the first floor. The respondent presently has an off-licence in respect of grocery premises known as “Price Cutter” in the building. If this appeal is refused, the off-licence issued in respect of the Price Cutter grocery store will not be renewed. Adjacent the building is the Southern Cross Campus which is a large decile one school providing education from year one to year thirteen. The building is also adjacent the St Therese Catholic Parish Church. Neither the school nor the church objected to the application although the school’s principal, Mr Staples, gave evidence for the appellant at the original hearing.

Southern Cross Campus Appeal

[3] The respondent filed an application to strike out the appeal filed by Southern Cross Campus upon the grounds that Southern Cross Campus was not an objector to the original application. For Southern Cross Campus, it was argued that Mr Staples appeared at the original hearing by virtue of s.204(2)(c) of the Act and that he was representing Southern Cross Campus. There is no record that Mr Staples or Southern Cross Campus sought the leave of the Chairperson of the Licensing Committee to appear and be heard at the original proceedings. In any event, the submissions made by the agent for the Mangere-Otahuhu Local Board (‘the Board”) at the original hearing (who at the appeal hearing represented Southern Cross Campus and not the Board) state quite explicitly that Mr Staples gave evidence for the Board as one of its witnesses.

[4] The legislation does not authorise an appeal by anyone who is not a party to the original proceedings. Neither Southern Cross Campus nor Mr Staples were a party to the original proceedings as neither of them objected to the original application. Whilst Mr Staples was a witness, that did not confer party status on him. Even if leave had been granted to either Southern Cross Campus or Mr Staples to appear and be heard in terms of s.204(2)(c) of the Act, that would not have conferred party status on either of them.

[5] Accordingly the application by the respondent is granted and the appeal by Southern Cross Campus is struck out.

Extension of time

[6] The Auckland District Licensing Committee (“the DLC”) delivered its decision on 11 June 2014. Any appeal against it had to be filed by 25 June 2014 in terms of s.155(1) of the Act. On 23 June 2014, pursuant to s.155(2) the Board applied to the Authority for an extension of time for the filing of its notice of appeal. It sought an extension for 10 more working days. The Board did not serve a copy of the application on the respondent. Likewise the Secretariat of the Authority did not notify the respondent of the application for extension of time. Thus, without the respondent being aware of the application for extension of time, it was granted. In these circumstances the respondent applied for the Board’s appeal to be struck out; and, pursuant to s.201(4) of the Act sought a rehearing of the application for the extension of time. The grounds are that the respondent was not notified of the original application; and that the application for the extension did not establish in terms of

s.155(2) of the Act that there was a reasonable cause for the inability to give notice within the prescribed time.

[7] The first ground (lack of notice) is sufficient for the Authority to grant a rehearing. Indeed, the Authority notes that the respondent was unaware of a pending appeal when the 10 working day period expired. It assumed, wrongly, that there would be no appeal against the DLC's decision and that it was entitled to start work on the fit out of the premises. Another possible consequence of the failure to give notice (which does not apply in this situation) is that, not having received any indication of a possible appeal within the requisite time, the respondent could have declared a conditional contract unconditional. The legal ramifications of this are obvious.

[8] Having granted the rehearing, the Authority now considers whether there was reasonable cause for an extension of time. The Board claim that there was insufficient time for it to obtain appropriate advice, call the Board together to pass an appropriate resolution and then file the notice of appeal. The respondent points out that s.46(4) and (5) of the Local Government Official Information and Meetings Act 1987 provides for exactly the contingency which arose in this case. In such circumstances meetings of the Board can be called at short notice.

[9] The new procedures in the Sale and Supply of Alcohol Act 2012 are in their infancy. It is understandable that the Board thought that it would be unable to file an appeal within the requisite time. It was important for the Board (and this Authority) that any notice of appeal filed would set out fully and explicitly the grounds for the appeal and comply with s.155(3)(b) of the Act. Accordingly, the Authority concludes that the Board has established "reasonable cause" justifying the extension of time sought and originally granted. In the circumstances the application to strike out the appeal is refused.

[10] Nevertheless, the time constraints contained in s.155(1) of the Act are strict and potential parties to an appeal should take no comfort from this decision, or that the Authority in the future will take such a benign approach to the interpretation of "*reasonable cause*".

Appeal Procedure

[11] This is the first decision of the Authority in respect of an appeal against an application for an off-licence granted by a DLC. Accordingly, it is appropriate that the principles applicable to the hearing of such an appeal be stated.

[12] Section 157 of the Act applies. The appeal is by way of rehearing. As was pointed out in *Eden Park Catering Limited* [2012] NZLLA 135 there is a difference between an appeal *de novo* and an appeal by way of rehearing. In an appeal by way of rehearing, judgment may be given as it ought to have been given if the case came at that time before the Court of first instance. An appeal by way of rehearing does not mean that there is a complete rehearing and the powers of parties to an appeal to adduce evidence are strictly set out in s.157 of the Act. Whilst s.157(4) of the Act gives the Authority a discretionary power to hear and receive further evidence on questions of fact, the Authority takes notice of the High Court's approach as stated in *Hayford v Christchurch District Licensing Authority*, HC Christchurch AP 201/92. Further evidence should only be adduced "*in exceptional circumstances*".

[13] When the appeal is determined, the appellate body must consider for itself the issues which had to be determined at the original hearing and the effect of the evidence then heard. However, the appellate body applies the law as it is when the appeal is heard.

[14] Whilst the appellate body is not bound to accept original findings of fact, it must give due and proper weight to expressions of opinion where specialists are involved at the original hearing.

[15] The onus lies on an appellant to satisfy the appellate body that the decision in the original hearing was wrong. Often the ultimate issue is whether or not the error complained of resulted in a miscarriage of justice.

[16] In *Austin Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 the Supreme Court had to determine if an appellate court had to defer to an assessment of the first instance tribunal if the conclusion reached is one on which reasonable minds might differ. The Court held that a general appeal requires the appellate court to come to its own view on the merits; and the weight it gives to the decision at first instance is a matter of judgment: *"If the High Court is of a different view from the Commissioner and is, therefore of opinion that the Commissioner's decision is wrong, it must act on its own view"* (p.146 at para [3]). At p.147 para [5] the Court stated: *An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its assessment of the merits of the case."*

[17] Thus it is important for an objector, if it wishes its objection to succeed, to make sure it presents as good a case as it can before the DLC. The Authority will be slow to draw different factual conclusions from a DLC as the DLC will have had the advantage of hearing the evidence at first instance.

Criteria

[18] It is apparent from considering the notice of appeal and submissions made in support of it that the Board accepts that the correct criteria were considered in the decision. In this respect, some of the criteria contained in s.105 of the Act are not at issue. Thus, there is no necessity to consider this appeal in terms of the criteria mentioned in s.105(1)(b), (c), (d), (e), (f), (g), and (j).

[19] The Authority notes in terms of s.105(e) that the design and layout of the premises was mentioned by the Board. However, it was only mentioned in terms of the extent of the premises and a condition attaching to the decision relating to disabled persons being able to purchase alcohol. The extent of the premises was canvassed at the hearing and it is accepted that the premises will accord with a plan submitted with the application. For the avoidance of doubt, the premises include the existing upper floor shown as "proposed liquor shop" (including staff area, storage, a main shop area, and a shop display area). In addition the premises include the "covered deck" and the stairwell and stairs. With that matter having been clarified, the Board's concern relating to s.105(1)(e) dissipates.

[20] At issue are the criteria contained in s.105 (1)(a) (object of the Act), (h) (amenity), (i) (amenity) and (k) (reporting agency's reports). In addition s.106(1)(a)(iii) (number of premises in the locality) and s.106(b) (compatibility with neighbouring premises) are relevant.

Notice of Appeal

[21] Section155(3) of the Act requires that the notice of appeal specify the grounds of appeal in sufficient detail to inform the Authority and other parties of the relevant issues. An appellant is confined to those issues and may not raise others.

[22] The Board's notice of appeal contains a summary together with more detailed submissions. The summary states that the DLC erred in its decision because:

(a) There is already a proliferation of off-licences in the locality;

(b) The Mangere-East community is one of the most socially deprived and vulnerable communities in New Zealand;

(c) There is already an extremely high number of alcohol related crimes occurring in the locality; and

(d) The proposed premises are directly across the road from the Southern Cross Campus school.

Proliferation of Off-licences in Locality

[23] Section 105(1)(h) states that one of the criteria to which the DLC and Authority must have regard to is:

> "*whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence*".

In reaching that opinion, regard must be had to s.106 of the Act; and insofar that it relates to this appeal, s.106(1)(a)(iii) and s.106(1)(b) are applicable. Section 106(1)(a)(iii) requires the DLC or the Authority to have regard to "*the number of premises for which licences of the kind concerned are already held*". From a perusal of the whole section it is clear that it refers to the locality in which the premises are situated.

[24] The Board submitted that there is already a proliferation of off-licences in the locality. In addition it claimed that the DLC erred by taking into account the undertaking given by the respondent that if the new off-licence were issued, the off-licence pertaining to the respondent's grocery business would be surrendered.

[25] At paragraph [66] of its decision, the DLC stated "*Combined with s.105(1)(h) it is difficult to see how this application could succeed if 'proliferation' was to be the only consideration*". It noted at paragraph [71] that the surrender of the grocery's off-licence was desirable as those premises attracted a large number of children. At paragraph [72] of the decision the DLC recognised that the type of off-licence applicable to the grocery store was more limited than that applied for (where RTDs and spirits could be sold). It noted the evidence to the effect that the nearest similar off-licence is over one kilometre away from the premises and that the surrender of the grocery off-licence would reduce the exposure and opportunity of children to alcohol to an extent "*that is both desirable and beneficial*". The DLC decision did not define "*locality*". However the Police evidence did in a somewhat equivocal way by inferring that the locality was either that area of land within 500 metres of the

premises or within 1000 metres of the premises. The Board, on the other hand, considered that "*locality*" included the whole of the area within the Board's jurisdiction. Determining what is meant by "locality" in any given case will vary depending on the evidence adduced. Generally, however, locality will be that area of land that is likely to be affected by the operation of the licence. In this case, the only evidence as to the extent of the locality was from the Police. With no other off-licensed premises within that locality an argument claiming that there will be a proliferation of licences if the application had been granted has no substance. Indeed, in these circumstances the non-renewal of the grocery's off-licence ensures that within the one kilometre range there will remain only one off-licensed premises. Accordingly, on proliferation grounds, it cannot be argued in terms of s.105(1)(h) that "*the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence"*.

Socially Deprived and Vulnerable Community

[26] It was argued that the DLC erred in that it failed to take into account the socially deprived and vulnerable nature of the community in which the premises are situated. At paragraph [58] of its decision the DLC did consider this issue. It referred to the evidence of the Medical Officer of Health's witness, Miss Ham. It also referred to the evidence of the principal of the South Cross Campus, Mr Staples. At paragraph [60] it noted the Police evidence to the effect that there are no significant hotspots for alcohol-related crime in the immediate area. The conclusions reached by the DLC were open to it on the evidence adduced. The evidence for the Board, in this regard, was of a general nature and did not relate specifically to the premises. It was the sort of evidence that would be useful to a territorial authority preparing a local alcohol policy. In terms of the criteria set out in s.105(1) of the Act, it was of little assistance to the DLC in determining an application for an off-licence affecting specific premises.

Alcohol-Related Crime

[27] The same comments apply to the concern of the Board that the DLC had erred in failing to take into account the evidence of alcohol-related crimes in the area. The DLC decision considered the Police evidence in some detail. It recognised that the general locality is one where alcohol-related crime is of concern. However, the evidence (and the Police did not oppose the application) indicated that it was unable to directly link alcohol-related crime in the general area with the premises or, indeed, the grocery off-licence in the same building. If the Police were not concerned about alcohol-related harm, then the DLC was entitled to prefer the Police's expert opinion in preference to the hypothetical concerns of the Board and its witnesses.

Southern Cross Campus school

[28] The Southern Campus School is within 50 metres of the premises. It is a large decile 1 school and alcohol-related problems occur in it. The Board was concerned about the proximity of the premises to the school.

[29] The DLC in its decision did take into account the proximity of the school to the premises and the likely effect of the premises on the schoolchildren. Whilst it did not refer specifically to s.106(1)(b), it took into account the *"purposes for which the land near the premises concerned is used*" (namely a school and a church) and the proposed off-licensed premises. This was done, again impliedly, in the context of forming an opinion in terms of s.106(1) as *"to whether the good order and amenity would be likely to be reduced, by more than a minor extent by the effects of the issue*

of a licence": see paragraphs [70] and [71] of the decision. It was for this reason that it imposed restricted hours to the intent that the premises would close when schoolchildren were likely to be in the vicinity. Further, it imposed a condition preventing persons in school uniform from entering or remaining on the premises. Finally, in this regard, it is evident from the decision that the fact that the premises were to be on the first floor of the building with restricted access was central to the DLC's decision. It meant that the children who presently frequent the grocery business would find it much harder to enter the new premises. Indeed, given the restrictions on advertising contained in s.237 of the Sale and Supply of Alcohol Act 2012, the upstairs premises would be more discrete than the current grocery business.

[30] Arguably (as, indeed, the Board did) the measures taken by the DLC in its decision in respect of the school and its children were inadequate. Nevertheless, it is clear from the decision that the DLC considered this matter carefully and reached a conclusion that was open to it on the evidence.

Object of the Act and its Purpose

[31] In the notice of appeal, the Board alleged that the DLC had erred by giving emphasis to s.3(2)(a) of the Act rather than s.4 of the Act. The Authority agrees with the Board that the DLC in its decision placed undue emphasis on s.3 which relates to the purpose of the Act. Indeed, the requirement for the DLC to act reasonably comes not so much from s.3 (which is about establishing a new system of alcohol licensing and reforming the law generally) than from the common law: see, for example, *Christchurch District Licensing Agency v Karara Holdings Limited* [2003] NZAR 752 (CA) and *Meads Brothers Limited v Rotorua District Licensing Agency* [2002] NZAR 308 (CA).

[32] More important is the object of the Act as set out in s.4. This is referred to in s.105(1)(a) of the Act as one of the relevant criteria. Rather than concentrating on s.3 of the Act, the focus of the DLC's decision should have been on the Act's object. Whilst the DLC in its decision did not specifically emphasise the Act's object, it is clear from the tenor of the decision that the Act's object was appropriately considered.

Amenity

[33] Paragraph [10] of the notice of appeal alleges that the DLC erred by failing to consider the evidence relating to the amenity and good order of the locality (s.105(1)(h) and (i)). As indicated previously, the DLC did consider the appellant's evidence in this regard and noted the absence of problems associated with the grocery off-licence (held by the respondent). In this regard, the Board's evidence and that of the opposing reporting agencies (particularly the Medical Officer of Health) was vague and unspecific to the premises.

Dr Cameron's affidavit

[34] Concern was expressed by the Board about the DLC's refusal to permit an affidavit by Dr Michael Cameron to be adduced as evidence. In terms of s.207 of the Act the DLC had a discretion as to whether or not it should admit the affidavit. There was no obligation for the DLC to admit the affidavit. The Authority considers that the DLC exercised its discretion correctly. The affidavit contained generalised statements which were not specific to the premises. Further, with Dr Cameron not

being available for cross-examination, any weight which could have been given to the affidavit (were it admitted) was negligible. The same generalised comments can be made in respect of paragraphs [3], [4] and [5] of the notice of appeal and the documents mentioned in those paragraphs.

Mr Staples and Consultations

[35] Mr Staples, the principal of Southern Cross Campus School did give evidence. He was called by the Board to do so. Whilst there is comment in the decision (attributed to counsel for the respondent) relating to an "*ambush*", that did not affect the DLC's consideration of his evidence. It is clear it considered the evidence as to who consulted with whom prior to the application as irrelevant. There is no obligation on the part of an applicant to discuss an application with potential objectors. Sometimes a failure to do so can result in an inference being taken that an applicant might not treat its neighbours well. However, Dr Staples admitted in evidence that there had been at least one discussion between him and the director for the respondent. This is not an issue that can be taken further.

Conclusion

[36] It can be determined (in some instances inferred) from the DLC's decision that it considered all the admissible evidence and submissions when reaching its decision. The DLC considered that the object of the Act could be achieved by the granting of the application. Proliferation issues did not arise. The existing grocery off-licence would cease to operate. The upstairs nature of the premises coupled with restricted hours reduced their impact on the amenity of the locality. The evidence of social problems in the locality was too generalised to be of assistance as it did not relate specifically to the premises. The Board's submissions do not satisfy the Authority that the DLC's decision was wrong.

Approach of DLC when Considering Licence Applications

[37] At paragraph [31] of *Otara-Papatoetoe Local Board v Joban Enterprises Ltd* CIV-2011-404-7930; [2012] NZHC 1406 Heath J considered how the Authority should determine whether or not to grant an off-licence. His suggestions, with minor changes, are appropriate to the determination of all applications for licences by DLCs. An appropriate framework could involve a consideration of:

(a) The criteria set out in ss.105 and 106 of the Act;

(b) The reports of the reporting agencies directed to the ss.105 and 106 criteria; and

(c) The public objections that fulfil the statutory criteria set out in s.102(3)

[38] Then the DLC, mindful of the statutory object of the Act, should weigh all the evidence and submissions to determine whether the application should be granted or not. This would involve forming a view on whether there is evidence to suggest that the grant of the application would achieve the safe and responsible sale, supply and consumption of alcohol and that any harm caused by the excessive or inappropriate consumption of alcohol would be minimised.

Result

[39] The decision of the DLC is confirmed and the appeal is dismissed.

DATED at WELLINGTON this 16th day of September 2014

A E Cannell
Deputy Secretary

Mangere Local Board.doc(jeh)