[2014] NZARLA PH 697

IN THE MATTER of the Sale of Liquor Act 1989

AND

IN THE MATTER of an application by **PENOY SPIRITS LIMITED** for an off-licence pursuant to s.31 of the Act in respect of premises situated at 67 Thames Street, Morrinsville, known as "Noy's"

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

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

HEARING at HAMILTON on 20 August 2014

APPEARANCES

Mr J H Wiles – for the applicant
Sergeant J R Dalziell-Kernohan – NZ Police – in opposition
Mr N A Young – for Medical Officer of Health – in opposition
Mr P R Challis – Matamata-Piako District Licensing Inspector – to assist

Objectors: Mr J J Sharland
Mrs D Van Lierop
Mrs D G Rodgerson
Mr W G Kelly

RESERVED DECISION OF THE AUTHORITY

Introduction

[1] This decision relates to an application dated 18 June 2013 for an off-licence. The proposed premises are at 67 Thames Street, Morrinsville. Initially, the hours sought for the sale of alcohol were between 7.00 am and 11.00 am daily. At the hearing these hours were amended to 9.00 am to 9.00 pm daily.

[2] The application was made under the Sale of Liquor Act 1989. However, the criteria set out in s.105 of the Sale and Supply of Alcohol Act 2012 are applicable.

[3] The proposed premises are part of a building containing a service station and mechanic's workshop. Various plans of the proposed premises have been supplied but the original plans indicated that the entrance to the proposed premises was to be from the forecourt through a door which is presently labelled as a ladies toilet.

[4] At the hearing it transpired that it is intended that the proposed premises will be entered from a door to be created in the wall which faces McCrae Street. There is a telegraph pole immediately outside the proposed location of the entrance. Thus, the proposed entrance has now moved a short distance around the corner to a proposed

entrance from McCrae Street. Whilst parking will be provided to the rear of the building (from McCrae Street) it will be possible for vehicles to park on the service station forecourt and their occupants to walk the short distance into the proposed premises.

[5] The service station is labelled "*Mobil*". It can be seen by motorists travelling from Hamilton to Morrinsville for quite some distance. Whilst signage for the proposed premises would not be as visible from Thames Street (as is the "Mobil" sign), nevertheless it is inevitable that persons looking for the proposed bottle shop would be aware that it is part and parcel of the "Mobil" service station building.

[6] Diagonally across the road from the proposed premises is a bottle store. A short distance from the proposed premises towards Morrinsville is a "New World" supermarket. Both premises hold off-licences. In fact, there are eight off-licensed premises in Morrinsville which has a population of about 6,993 persons (as at the last census).

[7] The Inspector's evidence confirmed the Authority's impression that the application was made at the last minute in a perfunctory fashion. It is clear that the applicant sought to avoid having to be subject to the criteria set out in s.105 of the Sale and Supply of Alcohol Act 2012; in fact, the application was filed one day too late and the s.105 criteria apply. The perfunctory nature of the application is reinforced by the quality of the plans submitted with the original application and the way in which the proposal (and plans) has altered since the original filing. The Authority noted that as at the date of the hearing no plan indicating the layout of the premises had been submitted.

[8] The sole director and shareholder of the applicant, Onil Kumar Gulati, has been involved in operating off-licensed premises for over 10 years. In his evidence, Mr Gulati stated that none of his businesses had been involved with a failed controlled purchase operation. In cross examination he admitted his list of criminal convictions which indicated that on 17 December 2004 he had sold alcohol to someone under the permitted age. He was convicted of this offence on 14 April 2005. The Authority notes that the manager who is intended to be primarily in charge of the premises is Penoy Gulati who is aged 20 and has held a General Manager's Certificate for two years. The applicant's director stated that he has another son, Pranav Gulati who is aged 23 and has held a General Manager's Certificate for three to four years; it was not stated whether Pranav Gulati would be involved in the proposed business. He stated that the applicant would employ other staff "*preferably who will also be GMC holders*".

[9] An associated company owns the building and the premises will be leased from that company. The service station is operated by a third associated company.

[10] Whilst no proposed designation was contained in the application, the applicant agreed that it would be appropriate that the premises be designated as supervised.

[11] The most recent plans submitted with the application indicate that a further "*proposed extension*" to the building is intended. Apparently this would contain other retail shops. Mr Gulati did not know if a resource consent was required for the full proposal. The existing proposal (pertaining only to the proposed off-licensed premises) does not need a resource consent. The Inspector indicated that building issues remain yet to be resolved (in respect of the entire proposal) although the

proposed building in which the premises are situated meets the requirements of the Building Act 2004.

[12] As one of the objectors was concerned about a possible price war occurring, the applicant assured the Authority that it would compete against its opposition by having different and more extensive wines than its competitors. It would have a marketing advantage over the "New World" supermarket as it would be serving spirits. The Authority is often told by prospective off-licensees that its product will be more expensive and wide ranging than competitors; unless specific details are given, the Authority regards such statements with some cynicism.

Reporting Agencies

[13] The reporting agencies opposed the application principally because they considered that the proposal was forbidden by virtue of s.36(3)(a) of the Act. This section provides that no off-licence can be granted in respect of:

> *"(a) Any service station or other premises in which the principal business is the sale of petrol or other automotive fuels."*

Objectors

[14] There is no doubt that at least two of the objectors who made submissions at the hearing were partly motivated by commercial concerns. The Kelly Family Trust owns the building in which the "Black Bull Bottle Shop" (across the road from the proposed premises) is situated. Mrs Van Lierop is associated with one of the applicant's potential competitors: "Liquorland". Notwithstanding this, however, the applicant did not oppose either of these objectors giving evidence although it was possible that at least part of the evidence given contravened s.105(2) of the Sale and Supply of Alcohol Act 2012 which reads:

> *"The Authority or Committee must not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence."*

[15] The principal issue raised by the objectors was that the proposed premises were to be in and associated with a service station. In addition, issues such as the proliferation of off-licences in Matamata, a possible price war developing, and other more esoteric issues were raised.

Written Submissions

[16] Written submissions were received from all parties including the objectors. All of the matters raised are covered in the decision. There is no need to refer to the points raised in those submissions specifically.

Qualification for Off-licence

[17] If the applicant's proposal is encompassed by s.36(3)(a) of the Act, then this is fatal to the application. In this regard the applicant referred to a number of premises where it was apparent that a more blatant breach of s.36(3)(a) of the Act has been allowed to occur than would happen if this application were approved. This fact does not mean that this application should succeed because other applications of a similar nature have succeeded in the past. The issue is whether or not the proposal offends

against s.36(3)(a) of the Act. The most recent decision by the Authority on s.36(3)(a) of the Act is *Graeme Doherty Trustee of the Karu Property Trust,* [2010] NZLLA PH 1492. There, the Authority reviewed previous decisions including *Paramita International Limited,* NZLLA PH 605/2008 and *Ajay's Liquor Store Limited*, NZLLA PH 1365/2009. The cases establish that not only must there be a technical and commercial separation from the service station business but also there needs to be the physical separation from the service station. For example, the original proposal of the applicant that entrance to the premises be through a door from the forecourt would have been fatal to this application. Now, the proposed door is around the corner from the forecourt; but patrons would be able to park their cars on the forecourt and use both premises (the service station and the bottle shop) as a "*one-stop shop*". As in *Graeme Doherty* (supra), here the public perception would be that the service station business and the proposed bottle store would be part and parcel of the same operation. This is reinforced, as in *Doherty*, as the applicant through an associated company owns the whole site and through yet another entity operates the service station. Customers would be aware that the same family are involved in the service station and the off-licensed premises. Whilst the applicant is a separate entity to that which operates the service station, it is unable to achieve the physical separation that would be necessary for the grant of a licence.

Statutory Criteria

Object of Act (s.105(1)(a))

[18] The Authority's opinion as to the application of s.36(3)(a) to the proposal is reinforced upon a consideration of the object of the Sale and Supply of Alcohol Act 2012. Section 4 sets out the object. *Inter alia* it reads:

> *"The object of this Act is that—*
>
> *(a) The sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and*
>
> *(b) The harm caused by the excessive or inappropriate consumption of alcohol should be minimised."*

[19] In this case, the statutory perceived harm is contained in s.36(3)(b) of the Sale of Liquor Act 1989 (and repeated in s.36(a) of the Sale and Supply of Alcohol Act 2012). Obviously, there is a concern (expressed in the statutes) that persons who are able to purchase alcohol in conjunction with petrol or motor fuel may have a propensity to drive whilst alcohol impaired. Alcohol impaired driving leads to crime, injury and possibly death. This is the very harm envisaged in s.4 of the Sale and Supply of Alcohol Act 2012. If this harm is to be minimised (as required by s.4) then a significantly larger separation of the proposed business from the service station is necessary. The object referred to in s.4 of the Sale and Supply of Alcohol Act 2012 is different from that in s.4 of the Sale of Liquor Act 1989. Now the aim is the minimisation of alcohol-related harm; not merely its reduction. Minimisation means *"reduced to the smallest amount, extent or degree"* (New Shorter Oxford English Dictionary).

Suitability (s.105(1)(b))

[20] Whilst the applicant has proved suitable in the past, the evidence supporting the application raised suitability questions. The first is that the applicant's witness and

director was untruthful when he indicated that there had been no previous failed controlled purchase operations. The Authority accepts that the conviction referred to in paragraph [8] occurred many years ago and is not particularly relevant to this application. Nevertheless, this was something within the knowledge of the applicant's witness and should have been mentioned. If the failure to mention it was inadvertent then that merely confirms the Authority's view that the application was hurriedly put together and prosecuted.

[21] It is disconcerting to see that the proposed manager of the premises is a young man aged 20. He may have held a General Manager's Certificate for two years but his youthfulness does not assist the applicant in satisfying the Authority as to its suitability to hold an off-licence in respect of the proposed premises. This is especially the case given that the applicant is attempting to enter an alcohol off-licensed market which is already well catered for. The likelihood of a price war eventuating (and this was not denied by the applicant's witness) is a distinct possibility and a youthful 20 year old manager is unlikely to have either the knowledge or resources to withstand the temptation to enter into such an activity. Price wars lead to a cutting of prices for alcohol. Cutting the price of alcohol leads to a greater demand. A greater demand for alcohol can lead to harm and contravention of the object of the Act as set out in s.4 of the Sale and Supply of Alcohol Act 2012.

Relevant Local Alcohol Policy (s.105(1)(c))

[22] The Matamata-Piako District Council does not have a current Local Alcohol Policy. The Inspector advised that there is a provisional Local Alcohol Policy in existence but that is the subject of appeal. The provisional Local Alcohol Policy seeks to cap the number of off-licences in Morrinsville. If the provisional Local Alcohol Policy had become operative then this application would have infringed against it.

Hours (s.105(1)(d))

[23] The proposed hours (as amended) are unexceptional. They are appropriate to the proposed business.

Design and layout of premises (s.105(1)(e))

[24] No plans indicating the design and layout of the proposed premises have been submitted. This is a matter to which the Authority must have regard in terms of s.105(1) of the Sale and Supply of Alcohol Act 2012. Whilst the failure to submit design and layout plans is not necessarily fatal to the application, nevertheless it detracts from it.

Sale of other goods (s.105(1)(f))

[25] There was no evidence about this. As an afterthought, the applicant did indicate that non-alcoholic and low alcoholic products would be available for sale.

Other services (s.105(1)(g))

[26] This subsection has greater applicability to on-licences than to off-licences.

Amenity and good order of locality (s.105(1)(h))

[27] In its application, the applicant paid little regard to whether the amenity and good order of the locality would be likely to be reduced by the effects of the issue of the licence. This has direct relevance when considering the accompanying s.106(1)(a)(iii) of the Sale and Supply of Alcohol Act 2012. The Authority is required to have regard to the number of premises to which licences of the kind concerned are already held. It must have regard to this factor to determine whether the amenity and good order of a locality would be likely to be reduced by the effects of the issue of a licence. In this case, the evidence of the Inspector assisted the applicant when it became apparent that there are presently eight off-licensed premises serving the population of 6,993 in Morrinsville. This compares favourably against the situation that prevails in Te Araroa where there are nine off-licences serving a population of 3,903. It is similar to the situation prevailing in Matamata where there are presently nine off-licences serving a population of 7,092. There was no evidence either way whether the market would become more saturated as a result of the issue of this off-licence. If so, then the words "*to more than a minor extent*" would become relevant. In this case the Authority concludes that the amenity and good order of the locality would not be likely to be reduced to more than a minor extent by the effects of the issue of the licence.

Amenity and good order of locality already badly affected (s.105(1)(i))

[28] There was no evidence that the amenity and good order of the locality is badly affected at present. The comments made in respect of the discussion of s.105(1)(h) are applicable.

Appropriate systems, staff and training (s.105(1)(j))

[29] There was insufficient evidence from the applicant as to whether it proposed to have appropriate systems, staff and training to comply with the law. Admittedly, there was a statement made by the applicant's witness to the effect that "*other staff preferably will also be GMC holders*", which was somewhat comforting. However, the statement was vague and seemed to permit a degree of latitude should this suit the applicant.

[30] The applicant's witness's evidence did state:

> *"We will have at the proposed premises, till operations that check and monitor age certification to ensure that underaged persons are not served. Needless to say we will also be vigilant in ensuring that intoxicated persons are not served."*

[31] Again, this statement goes some way towards fulfilling the sort of detail that the applicant should have given if the Authority was to have regard to the proposed appropriate systems, staff and training as envisaged in s.105(1)(j).

Reporting agencies' reports (s.105(1)(k))

[32] The reports were principally concerned with whether or not the proposed premises were prevented from having an off-licence issued in respect of them by s.36(3)(a) of the Sale of Liquor Act 1989. There are no other matters contained in the reporting agencies' reports requiring further consideration.

The object of the Act (again)

[33] The Authority specifically referred to the object of the Act when considering the criteria set out in s.105(1) of the Sale and Supply of Alcohol Act 2012. This is obligatory. However, the consideration of the Act's object does not finish there. The principle explained in *Otara-Papatoetoe Board v Joban Enterprises Limited*, CIV 2011-404-007930 [2012] NZHC 1406 still applies. All the criteria referred to in s.105(1) of the Sale and Supply of Alcohol Act 2012 must be considered against the object of the Act as set out in s.4 of the Sale and Supply of Alcohol Act 2012. Ultimately, having considered all the criteria, the decision maker (whether it be a District Licensing Committee or the Authority) must stand back and question whether the object of the Act can be achieved by the grant of a specific application. If the object of the Act cannot be achieved, then the application must be refused.

[34] The foregoing analysis of the statutory criteria contained in s.105 of the Sale and Supply of Alcohol Act 2012 reinforces statements made by the Minister and other Parliamentarians when the legislation was passing through Parliament to the effect that in the future it will be more difficult to obtain on and off-licences than previously. It was also suggested that those on and off-licences that have been obtained will be more easily lost: that has yet to be ascertained in practice.

[35] One of the features of this application was its perfunctory nature. This was reinforced by the applicant's failure to refer to all the various matters contained in s.105(1) to which the Authority was required to have regard. It is axiomatic that if a matter to which the Authority is required to have regard is not mentioned, then, when considering that matter the Authority is unlikely to find favourably in respect of it.

Summary

[36] This application has fallen foul of s.36(3)(a) of the Sale of Liquor Act 1989. The requisite physical separation of the proposed business from the service station business has not been achieved. For that reason, alone, the application is refused.

[37] In addition, for the reasons set out in this decision, when considering the various statutory criteria, the object of the Act cannot be achieved by the grant of this application.

[38] Accordingly, the application is refused.

DATED at WELLINGTON this 23rd day of September 2014

A E Cannell
Deputy Secretary