[2014] NZARLA PH 871

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 relation to an application by **MOBY'S BAR LIMITED** for renewal and variation of an on-licence for premises situated at 330 New North Road, Eden Terrace, Auckland, known as "Shooter's Saloon"
BETWEEN	**MOBY'S BAR LIMITED**
	Appellant
AND	**TOM RIDDELL**
	Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole
Member: Mr D E Major

HEARING at AUCKLAND on 9 October 2014

APPEARANCES

Mr K Piahana – agent for appellant
Mr T E Riddell – respondent
Mr G S Whittle – NZ Police – to assist
Mr M M Moodie – for Auckland Council – to assist
Mr D Haddy – Auckland District Licensing Inspector – to assist

RESERVED DECISION OF THE AUTHORITY

The Facts

[1] By application dated 30 January 2013 the appellant sought the renewal of its on-licence in respect of premises known as "Shooter's Saloon" situated at 330 New North Road, Eden Terrace, Auckland. The application also sought a variation in the conditions applying to the on-licence.

[2] By the date of hearing of the application by the Auckland District Licensing Committee (the DLC) none of the reporting agencies continued to oppose the application.

[3] The respondent, who is the owner of a neighbouring residential property, objected to the proposed hours affecting a new elevated deck area of the premises upon the grounds of potential noise. The respondent had raised concerns about excessive noise emanating from the premises in the past.

[4] There was evidence before the DLC that excessive noise had emanated from the premises over quite a long period of time. This had been the subject of many noise complaints to the Auckland Council. The last excessive noise direction was served in June 2013 although the last noise complaint that was upheld was in November 2013.

[5] In its decision dated 18 June 2014 the DLC granted the application subject to a number of conditions.

The Appeal

[6] The appellant has appealed against three of those conditions:

(i) The limitation of the hours pertaining to the upstairs deck area Sunday to Thursday 12.00 noon to 10.00 pm;

(ii) The limitation of the hours pertaining to the outdoor courtyard Sunday to Saturday 12.00 noon to 12.00 midnight;

(iii) A one-way door restriction to operate from 10.00 pm.

The Authority's Decision and Reasons

Trading Hours

[7] In respect of the appeal pertaining to the trading hours in respect of the upstairs deck area and outdoor courtyard, the appellant referred to a considerable amount of evidence adduced on its behalf at the hearing indicating that since 22 November 2013 measures had been taken by it to eliminate most noise problems. There had been no noise complaints since 22 November 2013. In particular, the outdoor courtyard had been operating over that time and noise issues had not arisen from its operation.

[8] There is no necessity to detail the appellant's submissions. It is evident from the DLC's decision that they were carefully considered.

[9] However, the DLC also considered the evidence of Mr Riddell and the evidence pertaining to the persistent noise complaints emanating from the premises over a period of time up to 22 November 2013.

[10] In reaching its decision, the DLC was entitled to apply the precautionary principle referred to by the Court of Appeal in *My Noodle Limited v Queenstown Lakes District Council*, [2010] NZAR 152, paragraph [74]. This is usually effected by curtailing trading hours upon the basis that if no problems emerge then upon renewal they can be reviewed.

[11] Whilst no particular problems have emerged in respect of the courtyard recently, it is of significance that the noise complaints did not stop until November

2013. The upstairs deck area has not been completed. How much noise will emanate from it remains an open question.

[12] The DLC was required to consider the criteria in ss.105 and 106 of the Act and current and possible future noise levels are relevant to determining whether the amenity and good order of a locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence. The DLC did exactly that.

[13] The appellant has not satisfied the Authority that any error of law occurred. Further, the Authority is satisfied that there was considerable evidence supporting the DLC decision. The decision was one that was available to the DLC after a consideration of all the evidence including that adduced by the appellant.

[14] Whilst the proposed conditions will have a detrimental effect on the appellant's commercial enterprise, in terms of *Meads Brothers Limited v Rotorua District Licensing Agency*, [2002] NZAR 308 the proposed conditions are not so unreasonable as to warrant amendment. Indeed, as the Court of Appeal stated in *Meads Brothers Limited* the policy of the Act is that licensing decisions are not made for the purpose of giving licensees economic protection. This remains the case under the new Sale and Supply of Alcohol Act 2012.

[15] In the circumstances, this aspect of the appeal is disallowed and the decision of the DLC is confirmed.

One way door condition

[16] The condition imposing the one-way door restriction was made contrary to the provisions of s.4A(2) of the Commissions of Inquiry Act 1908. Section 4A(2) states:

> *"Any person who satisfies the Commission that any evidence given before it may adversely affect its interests shall be given an opportunity during the enquiry to be heard in respect of the matter to which the evidence relates."*

[17] Section 201(1) of the Sale and Supply of Alcohol Act 2012 states a DLC must be treated as being a Commission of Inquiry under the Commissions of Inquiry Act 1908. Accordingly that Act applies, subject to any contrary provisions in the Sale and Supply of Alcohol Act 2012 – see s.201(2) of the Act.

[18] At the DLC hearing there was virtually no evidence upon which the DLC could make a decision imposing the one-way door restriction. Witnesses for the appellant did indicate that on occasion the appellant operated a voluntary one-way door restriction. However, there was no discussion at the hearing before the DLC as to the likelihood of a compulsory one-way door condition being imposed. The only possible indication that this could have been contemplated comes from page 4 of the transcript where a member of the DLC (Jason Welsh) asked about a voluntary one-way door condition to which he received a response that one was operated on a casual voluntary basis starting at about 10.00 pm and that it did work for functions and events.

[19] In this case, the appellant has not been treated fairly. If it had known that the DLC were seriously considering imposing a one-way door condition, then it could have presented argument in respect of that proposal. It did not know that the DLC was contemplating imposing such a condition and there is nothing in the reports from the reporting agencies suggesting such a condition. Likewise, the respondent did not

suggest such a condition. It follows, that s.4A(2) of the Commissions of Enquiry Act 1908 was breached.

[20] Further, there was no evidential basis to support the imposition of the condition in the terms in which it was framed. As Woodhouse P stated in the minority decision in *Re Erebus (No. 2)*, [1981] 1 NZLR 618 at 629:

> *"If a party seeks to show not only that he did not have an adequate hearing but also that the evidence on which he was condemned was insubstantial, the Court is not compelled to shut its eyes to the state of the evidence in deciding whether, looking at the whole case in perspective, he has been treated fairly."*

[21] Accordingly, the decision of the DLC needs to be modified by the amendment of the one-way door condition (as agreed to by the appellant at the hearing before the Authority).

Conclusion

[22] The DLC's decision is modified by amending the one-way door condition so that it only applies from 1.00 am on Fridays, Saturdays and Sundays. In all other respects the DLC's decision is confirmed.

DATED at WELLINGTON this 13th day of November 2014

A E Cannell
Deputy Secretary

Moby's Bar Limited.doc(jeh)