[2014] NZARLA PH 872

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 **PORTAGE LICENSING TRUST** for renewal of an off-licence for premises situated at 4055-4059 Great North Road, Glen Eden, Auckland, known as "West Liquor – Kelston"
BETWEEN	**PORTAGE LICENSING TRUST** Appellant
AND	**TIM COURT** (Auckland District Licensing Inspector) Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

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

HEARING at AUCKLAND on 6 October 2014

APPEARANCES

Ms S Masoud-Ansari – for appellant
Mr T Court – Auckland District Licensing Inspector – respondent
Senior Constable M D Wilson – NZ Police – to assist

RESERVED DECISION OF THE AUTHORITY

Facts

[1] By application dated 9 May 2014, the appellant applied for the renewal of its off-licence issued in respect of premises situated at 4055-4059 Great North Road, Glen Eden, Auckland, known as "West Liquor – Kelston".

[2] In accordance with ss.103(2) and 129 of the Act the respondent enquired into the application and forwarded a report dated 26 May 2014.

[3] The executive summary of that report concluded:

> *"Neither of the reporting agencies have opposed this application. I do not oppose this application."*

The respondent's attitude to the application was confirmed in paragraph 7.1 of the report:

> *"I have enquired into the application, and based on the information provided, the application meets the criteria in the Act. Subject to new or contrary evidence being presented, I do not oppose this application."*

[4] Paragraph 7.2 of the respondent's report recommends a number of conditions. Among the proposed conditions are the following paragraphs:

> *"The applicant has requested that the premises remain undesignated, and their reasoning is attached to this file in an e-mail dated 26 May 2014 from Simon Wickham, Chief Executive, West Auckland Licensing Trust Services Limited. That e-mail also requests that the designation of these premises be determined by way of public hearing. Given that this application has attracted no opposition, it is not a legislative requirement that this application is determined in that way, however I am happy to assist the Committee at a public hearing if this application is determined that way.*
>
> *In LLA PH 328/2003 s.[20], the Liquor Licensing Authority discussed a stand-alone bottle shop within a suburban shopping centre, stating:*
>
> *"Why should a premises such as this, devoted almost solely to the sale and supply of liquor, not be designated? We do not think it is appropriate for unaccompanied minors to be on such premises."*
>
> *Therefore, I also recommend the following condition*:
>
> *"(f) The whole of the premises are designated as a supervised area".*

[5] The Auckland District Licensing Committee ("The DLC") issued "an on the papers" decision on 16 June 2014. After recording that it was satisfied as to the matters to which it should have regard and that the application met the purpose and object of the Act, it granted the application for the renewal of the off-licence for three years. In its decision it then stated:

> *"[6] It is noted that the applicant has requested that the premises remain undesignated having considered LLA PH 328/2003, s.[20], where the Liquor Licensing Authority discussed a standalone bottle shop within a suburban shopping centre, stating:*
>
> *"Why should a premises such as this, devoted almost solely to the sale and supply of liquor, not be designated? We do not think it is appropriate for unaccompanied minors to be on such premises".*
>
> *I believe it is appropriate to [impose a] condition the whole of the premises are designated as a supervised area."*

The DLC then imposed the following condition: *"The whole of the premises is to be designated as a supervised area."*

[6] In a notice of appeal dated 2 July 2014 the appellant appealed against the DLC's decision "*to impose a condition requiring that the whole of the premises be designated as a supervised area*". In terms of s.156 of the Act, it is only part of the decision that is the subject of this appeal: in other words it is only a condition attaching to the decision that is appealed against.

Grounds of Appeal

[7] In its notice of appeal, the appellant specified three grounds of appeal. They were:

(i) Failure to comply with the due process.
In this regard the appellant complains that the DLC failed to grant the appellant a right to be heard and to provide evidence in respect of the proposed condition.

(ii) Failure to provide reasons for decision.
This ground speaks for itself.

(iii) Failure to take into relevant consideration/taking into account irrelevant consideration.
This ground states that the citation of case law without relating it to the facts is an error of law. It submits that the granting of the application for the renewal of licence involved the exercise of a discretion and that the DLC was required to act reasonably taking into account the criteria set out in s.105 of the Act.

Respondent's Response

[8] The respondent considered that the imposition of the condition was reasonable and accorded with usual practice. He referred to the decision *Lytton West Liquor*, NZ LLA PH 328/2003 as providing a reason for the decision.

The Authority's Decision and Reasons

[9] In accordance with s.157 of the Act the appeal was heard by way of rehearing. No evidence was adduced.

[10] Section 27(1) New Zealand Bill of Rights Act 1990 provides:

> **"(i) Every person has the right to the observance of the principles of natural justice by any Tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."**

[11] Section 201 of the Sale and Supply of alcohol Act 2012 states (inter alia):

> ***"(1) Within the scope of its jurisdiction, the licensing authority and every licensing committee must be treated as being a Commission of Inquiry under the Commissions of Inquiry Act 1908; and that Act, with any necessary modifications, applies accordingly.***

(2) Subsection (1) is subject to this Act."

[12] Section 4A of the Commissions of Inquiry Act 1908 states (inter alia):

(1) Any person shall, if he is a party to the inquiry or satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry.

(2) Any person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter.

[13] Arguably, one of the sections in the Act which qualifies s.4A of the Commissions of Inquiry Act 1908 is s.134. This reads:

"The licensing committee may decide an application for renewal of a licence on the papers if there are no reports opposing renewal, or objections."

[14] The respondent's report did not oppose the renewal application *per se*. However, it recommended the imposition of a condition which had not previously attached to the licence. As a result, the appellant sought a hearing in order that it could argue against the imposition of such a condition. That request was denied and the DLC issued its decision (imposing the condition) on the papers. It treated the application as unopposed.

[15] A similar situation arose in "*The Liberty Lounge"* decision (NZLLA PH 954/2009). This was a case decided under the Sale of Liquor Act 1989 but the principle remains the same. In that case the grant of an on-licence was recommended by the reporting agencies although the Inspector sought a condition reducing trading hours. The Authority held the District Licensing Agency was entitled to grant the application and impose the condition on the papers. It considered that the Inspector had not opposed the application.

[16] It reached this conclusion because in that case the Dunedin City Council had set out its expectation as to hours in a Sale of Liquor Policy. That policy provided a means of resolving situations where proposed conditions were disputed.

[17] That is not the case here. There is no Council alcohol policy in existence. Apart from a public hearing, there was no formal method of resolving the obvious dispute between the appellant and the Inspector as to the proposed imposition of the condition.

[18] In terms of s.4A(1) and (2) of the Commissions of Inquiry Act 1908 the appellant was entitled not only to be heard, but also to be heard in respect of the imposition of a possible condition that might adversely affect its interest. Thus, the effect of s.4A(1) and (2) of the Commissions of Inquiry Act 1908 is that where there is no Council alcohol policy in existence providing for an alternative disputes resolution mechanism and a DLC wishes to impose a condition which might adversely affect the interest of any party, then a public hearing should be held.

[19] It follows that the DLC's decision imposing the disputed condition was reached in breach of the rules of natural justice and the appeal should be allowed.

[20] The appellant is also correct when it submits that there was no evidential basis for the imposition of the condition. In the respondent's opinion, the application complied with the criteria set out in s.105 of the Act. The respondent had no complaint with the manner in which the applicant had sold and supplied, displayed, advertised or promoted alcohol – see s.131(1)(d) of the Act. Had it been able to, evidence would have been adduced on behalf of the appellant confirming the Inspector's opinion in this regard.

Conclusion

[21] The Authority has limited powers when determining an appeal. It does not have the power to remit a matter back to the DLC. In terms of s.158 of the Act, all it can do is to "*confirm, modify, or reverse the decision under appeal*".

[22] Whilst the Authority confirms the principle established in *Lytton West Liquor* (supra), in this case the fact that there was evidence from the Inspector that the premises are operating satisfactorily satisfies the Authority that there was no need to designate the premises.

[23] It is only the condition designating the premises that is appealed against. Accordingly, the Authority concludes that it is only the offending condition that should be treated as a nullity.

[24] In accordance with s.158 of the Act, the decision of the DLC is modified by the deletion of the condition reading "*the whole of the premises is to be designated as a supervised area*". In all other respects the decision of the DLC is confirmed.

DATED at WELLINGTON this 13th day of November 2014

A E Cannell
Deputy Secretary

Portage Licensing Trust.doc(jeh)