[2014] NZARLA PH 881

IN THE MATTER	of the Sale and Supply of Alcohol Act 2012
AND	
IN THE MATTER	of an appeal by **MASTERTON LIQUOR LIMITED** pursuant to s.154 of the Act against a decision of the Masterton District Licensing Committee in respect of an application for an off-licence for premises situated at 81 Dixon Street, Masterton, known as "Masterton Liquor"
BETWEEN	**MASTERTON LIQUOR LIMITED**
	Appellant
AND	**K N JAQUIERY** (Masterton District Licensing Inspector)
	First respondent
AND	**MEDICAL OFFICER OF HEALTH**
	Second respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole
Member: Mr R S Miller

HEARING at WELLINGTON on 6 November 2014

APPEARANCES

Mr J H Wiles – for the appellant
Mr K N Jaquiery – Masterton District Licensing Inspector
Mrs A J Pazin – for Medical Officer of Health

RESERVED DECISION OF THE AUTHORITY

Introduction

[1] On 11 June 2014 the Masterton District Licensing Committee (the DLC) refused an application brought by the appellant for an off-licence in respect of premises

situated at 81 Dixon Street, Masterton to be known as “Masterton Liquor”. It was intended that the principal purpose of the business would be that of a bottle store.

[2] The DLC’s decision records that the principal reason that the application was refused was that, in terms of s.105(1)(h) of the Act, 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 granting of the application. In particular, pursuant to s.106(1)(a)(iii) of the Act, it took into account the number of premises for which off-licences are already held in the Masterton district and concluded that an additional off-licence would have the effect of reducing the amenity and good order of the locality, to more than a minor extent. In addition, the DLC considered that to grant the application would be contrary to s.4 of the Act.

Notice of Appeal

[3] The Notice of Appeal records that the appellant appealed the decision upon the grounds that:

> *“(a) The amenity and good order of the locality is not likely to be reduced to more than a minor extent by the issue of this licence.*
>
> *(b) There was no reliable evidence before the Committee that any reduction of amenity would be more than minor having regard to the number of existing off-licences in Masterton.*
>
> *(c) The decision was wrong in fact and in law.”*

[4] Counsel for the Medical Officer of Health argued that the grounds specified in the Notice of Appeal contravened s.155(3)(b) of the Act as they were not specified in sufficient detail to fully inform the Authority and other parties of the issues in the appeal. The Authority disagrees. It is apparent from the Notice of Appeal that the appeal is centred around s.105(1)(h) and, in particular, s.106(1)(a)(iii) of the Act. Indeed, when analysed, the argument for the appellant was that there was insufficient evidence for the DLC to reach its decision.

[5] The concern of the Medical Officer of Health is understandable. In their submissions, counsel spent a considerable amount of time commenting on evidence adduced during the hearing before the DLC; rather than recognising that the appeal was brought against the DLC’s decision and not against the quality of the evidence adduced at the first instance hearing. Of course the quality of the evidence accepted by the DLC is relevant. However, evidence adduced which was not relied upon by the DLC is not relevant.

[6] Neither counsel limited their submissions to the issues disclosed in the Notice of Appeal. The purpose of pleadings is to adequately inform the other side of the issues in contention. A party is not entitled to raise issues as being relevant outside those pleaded. The Authority deals with this appeal on the basis of the Notice of Appeal.

Suitability

[7] Counsel for the Medical Officer of Health argued that the comments made by the DLC in its decision indicated that there was concern that the object of the Act would not be achieved on suitability grounds. At paragraph [30] of the decision, the

DLC stated: "*Under s.105(1)(a) there was no reason to doubt the suitability of the applicant*." That is an absolute affirmation of the appellant's suitability. The subsequent qualification that "*he did not take cognisance of the wider implications of owning an alcohol outlet in this very high decile Masterton community which already has a high density of liquor outlets*" and "*did not show any insight into the direct or indirect harm caused by excessive consumption of alcohol in this community*" is merely comment. It is evident from the decision that the DLC applied the recognised test as to suitability in *Re Sheard* [1996] 1 NZLR 751 at 758:

> *"The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that are to go with the holding of a licence."*

To satisfy that test, an applicant does not necessarily have to have the social conscience suggested on behalf of the Medical Officer of Health.

DLC's Decision

[8] In reaching its decision that the granting of the application would be likely to reduce the amenity and good order of the locality to more than a minor extent, the DLC made the following points:

1. The adjacent Rogers Lane, even if well lit, is not in a liquor ban area and it accepted the evidence that some people are likely to drink there. The unstated implication was that this activity would contravene s.4(1)(a) of the Act to the effect that the consumption of alcohol acquired at the premises would not be undertaken safely and responsibly. There was evidence to support this conclusion.

2. The proposed bottle store would be immediately adjacent the socially deprived Masterton East community. The DLC accepted the evidence of Dr Palmer who stated that his personal experience confirms his research to the effect that people in high deprivation areas are vulnerable to alcohol-related harm.

3. Sergeant Basher stated that the proposed bottle store in an area described as a "*second level hotspot*" would change the demographics and behaviour in the area. The second level hotspot indicated that alcohol-related violent offending occurs at times in the area. Notwithstanding this, however, he noted that the Police were not opposed to the application.

4. The DLC, with reservations, accepted some of the academic research which was referred to at the hearing by both the Inspector and the Medical Officer of Health. Correctly, the DLC recognised its limited weight and was only prepared to accept those aspects of the research which were supported by Dr Palmer's personal experience. Dr Palmer did not indicate that he had personal experience of the East Masterton environment.

5. The DLC accepted the undisputed evidence that there are presently 29 off-licences in the Masterton district and 12 of those are within 1.2 kilometres of the proposed bottle store. It also accepted that the number of people per licence was significantly lower than the national average. At

the hearing, the appellant did not contradict this evidence although it purported to link that with a suggestion that Masterton's population has increased since the 2006 census by 6%. However, there was evidence from a newspaper report tabled at the hearing that in 2006 Masterton's population was 22,623 persons whereas in 2014 it was 23,352 persons. That constitutes an increase of 729 persons which is just over 3% of an increase over an eight year period. The DLC was entitled to conclude that Masterton's population is relatively static.

6. The DLC referred to comments in *Hari Om (2013*) *Limited*, [2014] NZ ARLA PH 159 and *Tony's Liquor (Upper Hutt) Limited*, [2014] NZ ARLA PH 171 which place an obligation on an applicant for a licence to prove its case.

Authority's Decision and Reasons

[9] There was limited evidence adduced at the hearing to the effect that the location of the proposed bottle store would be in an area where alcohol-related harm is prevalent. In this regard, the evidence largely came from academic research where the researchers did not give evidence at the hearing. On its own that evidence attracted little weight. However, some aspects of the research were supported by the evidence of Dr Palmer, the Inspector and Sergeant Basher. There was just enough evidence for the DLC to conclude that the Masterton East community is an area where alcohol-related harm prevails.

[10] Likewise, the DLC accepted Dr Palmer's conclusion to the effect that Masterton is saturated with off-licences. The very significant difference between the number of off-licences in the district (presently one for every 806 persons) compared with the national average (one for every 1,000 persons) is telling. An additional off-licence (resulting in one for every 780 persons) would accentuate the difference. It is not a quantum leap to conclude that with so many off-licences in the district and with another proposed to be located in a socially deprived area where alcohol-related harm exists, that increased alcohol-related harm might occur. This is the antithesis of what the object of the Act is intended to achieve.

[11] In terms of s.207 of the Act the DLC was entitled to receive as evidence such information as in its opinion would assist it to deal effectively with the application, notwithstanding that such information might not be admissible in a Court of law. Notwithstanding some of the emotive evidence given by Dr Palmer (which the DLC largely ignored), the DLC did accept that there was sufficient evidence for it to reach the conclusion that it did. In these circumstances there was an obligation on the appellant at the hearing before the DLC to satisfy the DLC 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, having regard to the number of premises for which licences were already held. *Hari Om (2013) Limited* and *Tony's Liquor (Upper Hutt) Limited* (supra) both indicate that an applicant must prove its case. Even if this proposition is incorrect (and this is not accepted by the Authority), at the hearing before the DLC the evidence adduced by the respondents led to the inevitable conclusion that the DLC reached. The appellant failed to counter that evidence to any significant degree, either because it had failed to undertake appropriate research or because such evidence was not available.

[12] Had the Authority been hearing the application at first instance, it would have reached exactly the same conclusion as that reached by the DLC; and for the same reasons.

[13] Accordingly, the appeal is dismissed and the decision of the DLC is confirmed.

DATED at WELLINGTON this 19th day of November 2014

A E Cannell
Deputy Secretary

Masterton Liquor.doc(jeh)