Superliquorman Hotels v. Napier C. C. Set I

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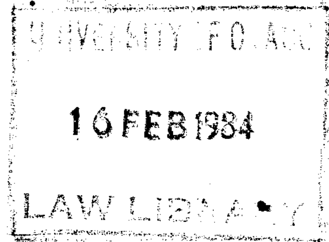
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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

BETWEEN **SUPERLIQUORMAN HOTELS (NAPIER) LIMITED**

Appellant

AND **NAPIER CITY COUNCIL**

Respondent

Appeal against conviction and sentence

Hearing: 2 December 1982

Counsel: C.B. Atkinson for Appellant
L.H. Chisholm for Respondent

Judgment: 14 December 1982

JUDGMENT OF O'REGAN J.

The appellant under its former name of Hawkes Bay Hotel Holdings Limited was charged with three offences contrary to provisions of the Town and Country Planning Act 1977. The informations were set down for hearing on the 24th May 1982 on which date they were adjourned until 8 June 1982. When the cases were called on that date it was made known that the appellant was then known as Superliquorman Hotels (Napier) Limited, it having changed its name since it had made its initial application for planning consent. On the informant's application and in face of opposition from the appellant, His Honour Judge Tucker amended the information by substituting the appellant's new name for its old name. The appellant next pleaded to the three informations. It pleaded guilty to one of them and not guilty to the two

which are the subject matter of the present appeal. The proceedings were then adjourned to 20 July 1982 for a defended hearing.

On 20 July 1982 the appellant applied for a further adjournment on the grounds that Mr Butterfield, a director of the appellant company who was to be called as a witness, was out of the country. The adjournment was consented to by the informant. The presiding Judge, however, stated that the case would be required to proceed on 3 September 1982, the date to which the adjournment was made. There is no record extant of precisely what the Judge said but there is no controversy as to the burden of his remarks.

On 3 September 1982 Mr Thornton, counsel for the appellant applied for a further adjournment on the grounds that Mr Butterfield was unable to be present because of his wife's illness and the necessity that he should care for their three children. A medical certificate as to Mrs Butterfield's health was presented. It was written by Mr Graeme B. Blake, a Plastic and Reconstructive Surgeon as he has himself described in the printed letterhead to his note paper. It reads :

> " To Whom it may concern
> Mrs J. Butterfield underwent surgery on 1.9.82 and will be incapacitated for one week. "

I was told from the bar that Mrs Butterfield had in fact spent two days in hospital and then returned

to her home. The Judge refused the adjournment. His reasons are recorded. In them he records that counsel for the informant had told him that the appellant's solicitors had been notified on 26 July 1982 of the observations which Judge Tucker had made.

When the adjournment was refused, Mr Thornton, counsel for the appellant, sought and was granted leave to withdraw from the proceedings. Mr Atkinson informed me from the bar that in taking the course he did Mr Thornton acted on the instructions of the appellant given in advance of the event.

One of the grounds of the present appeal is that the learned Judge erred in refusing to grant the adjournment. There was not an appeal against the refusal itself. Counsel were seemingly of the view that no appeal lies against such a refusal. I say in passing that having regard to the judgment of the Court of Appeal in The Police v S 1977 1 N.Z.L.R. 1 that it seems to me that a substantial argument could well be offered to the contrary. Be that as it may, Mr Atkinson was content to submit that the refusal of the adjournment was in the circumstances a denial of justice and that, for such reason, the conviction should not be allowed to stand. He submitted that the learned Judge erred in placing too much weight on the observations of Judge Tucker and that such observations should have been considered against the exigencies obtaining at the date of hearing which Judge Tucker, of necessity, could not have anticipated when he so expressed himself. Mr Atkinson also submitted that the Judge refusing the adjournment erred in regarding the incapacity of Mrs Butterfield as not particularly serious and the reason advanced as to

the necessity for Mr Butterfield to care for three school age children as amounting to trifling with the Court. He submitted also that the case was not one in which there was any particular reason or necessity why the case should be heard on that day.

I am disposed to think that the Judge was not at all far from the mark when he said that the Court was being trifled with and having now heard the appellant's case on appeal - and to which I will shortly refer - it is clear that all the matters which have been raised in this Court and would have been pursued in the Court below did not require as a base any oral evidence on behalf of the appellant. All the matters of fact necessary for the submissions offered emerge from the evidence of the prosecution or from documents produced in support of its case. And I am left in no doubt that the application, which I think had a high content of frivolity, coupled with the instruction to counsel to seek leave to withdraw was a mere ploy to enable the appellant to display for as long as possible the proscribed signs.

The relevant part of the appellant's application for planning consent is as follows :

" 1. Applicant : Hawke's Bay Holdings Limited.

2. I hereby apply for consent to a conditional use to permit storage and off sales of liquor accessory to the adjoining premises at 147

Carlyle Street known as the Royal Hotel, Napier.

3. The property in respect of this application is situated at Number 147 Carlyle St, Napier.

4. My interest in the property is as unconditional intending purchaser. "

When the application was made the applicant already owned the Royal Hotel situate on the corner of Carlyle Street and Chaucer Road south in the city of Napier and carried on business there as a hotelkeeper. These premises are described and known as 147 Carlyle Street.

The plan submitted with the application shows the metes of the hotel and its internal layout. It shows also the metes and bounds of the adjoining property in Carlyle Street. From the plan and indeed from the evidence as to the course of events subsequent to the application it is clear that it was in respect of this adjoining property that the consent to conditional use was sought. That property was and is known as 143 Carlyle Street.

At the corner of the hotel building nearest to 143 Carlyle Street and fronting that street was the bottle store of the hotel. The plan submitted with the application shows that the proposal encompassed the creation of doorways on the side of the bottle store and the side of the building erected on 143 Carlyle

Street directly opposite each other and the erection of junctions between the two buildings enclosing a passageway between those doorways.

The building known as 143 Carlyle Street was a supermarket. The appellant's proposal was that the supermarket be closed and the premises converted into a self service bottle store. The bottle store could not lawfully be operated on its own. It must needs be part and parcel of a duly licensed hotel. On 30 October 1981 the Chairman and Clerk of the Hawke's Bay Licensing Committee issued a certificate defining the limit of the premises known as the Royal Hotel situate at the corner of Carlyle Street and Chaucer Road. That definition was done by marking in red on a copy of the same plan as was submitted to the Council with the appellant's application for consent. Those markings encompassed the exterior walls of the buildings of the hotel and of the supermarket at 143 Carlyle Street.

The application for consent is expressed in one place to be in respect of 147 Carlyle Street Napier - that is the hotel premises and in another to permit storage and off sales accessory to 147 Carlyle Street in adjoining premises. Reading the application in isolation it is somewhat ambiguous but it is quite clear from the papers the nature and extent of the application.

The area in which both properties is situated is zoned Residential B and the hotel itself has the designation of an existing use in such zone. A bottle store separate and distinct from a licensed hotel is not a conditional use within the city scheme. However "a licensed hotel" which is defined "as a

building in respect of which there is for the time being in force a hotel licence issued under the Sale of Liquor Act 1962" is within that category.

At the date of hearing of the informations the junction between the hotel building and the new bottle store as depicted on the plan, submitted in support of the application, had been completed. In fact, the third information in which the guilty plea was entered, was in respect of the completion of the work without permit. At that date, too, both the hotel building and the new bottle store were one set of premises and were together the premises licensed under the Sale of Liquor Act 1962. The certificate under s 284 of that Act in evidence and to which earlier reference has been made, concludes that point.

In its written decision on the planning application the respondent council recorded that it was satisfied, inter alia, that :

> " (a) The establishment of a bottle store in association with an existing hotel is an ancillary hotel function and is permitted in this zone as a conditional use.
>
> (b) Provided the use is restricted to an ancillary function of the hotel insurers, then the use is unlikely to have any detrimental effects on the existing and future amenities in this locality . . . . "

and went on to consent

> " to the granting of the application for a conditional use in terms of Section 72 of the Town and Country Planning Act 1977 for the purpose of enabling the establishment of a bottle store and storage area in the existing supermarket building in conjunction with the Royal Hotel in the Residential B zone subject to the conditions set out in the attached schedule. "

Of those conditions, the following are relevant :

> " (a) The use shall be restricted to a bottle store in association with the existing Royal Hotel as an ancillary function of that principle use.
>
> (b) The storage of all bottles, crates and other trade waste shall be confined within the existing supermarket building and no other materials shall be stored in other parts of the site.

> (c) The two existing buildings shall be physically linked to the satisfaction of the Council . . .
>
> . . . . . .
>
> (h) No signs shall be erected without the prior approval of the City Planner. "

The convictions against which the appellant has appealed, were both of offences contrary to s 172(a) of the Act, first of failure to comply with condition (b) in that it stored bottles, crates and pallets outside the existing supermarket building and secondly failure to comply with condition (h).

In recording its decision, the respondent Council, under a heading of address and description of property, gave the address at 143 Carlyle Street a feature upon which, as will shortly be seen, the appellant placed a deal of reliance in its submissions.

The appellant, in due time approached the City Planner as to the signs it could display. Of the signs for which they sought approval one was on the corner splay of the hotel at the intersection of Chaucer and Carlyle Streets, others both on the Chaucer Street side and on the Carlyle Street side of the hotel and another on the former supermarket building. A copy of the sketch of such submitted is in evidence. The proposals were not approved. Revised proposals were then submitted. On 12 October 1981 the respondent wrote to the appellant, inter alia, as follows :

> " Council has considered your revised proposal for the erection of signs on the Royal Hotel in Carlyle Street.
>
> Council has decided to approve the revised signs being erected on the Hotel Building, being the Super Liquor man symbol on the corner to replace the Leopard Brewery sign and for one other sign along the Carlyle Street frontage of the building which is not to exceed a total area of 6 square metres. No sign is approved for the Chaucer Road frontage. "

The appellant displayed signs which did not comply with the approval. One such - a large banner strung across the street - was in due time taken down but others which transgressed the approval were in place on the morning of the hearing of the informations.

Mr Atkinson submitted that the approval having been granted in respect of 143 Carlyle Street it was ultra vires the respondent to impose conditions in respect of the hotel premises at 147 Carlyle Street.

Subsection (1) of s 67 of the Town and Country Planning Act 1977 provides that :

> " After any application for the consent of the Council and any objections to it have been considered, the Council may grant or refuse its consent; and in granting consent may impose such conditions, restrictions and prohibitions as it thinks fit. "

The power to impose conditions is in the widest terms but obviously the power is not without limitation. In Lange v Town and Country Appeal Board 1967 N.Z.L.R. 898 at p 901 it fell to Richmond J to consider a like power to the Board contained in s 35 of the 1953 Act - power when giving a consent either unconditionally or "subject to such conditions as the Board thinks fit" and applying principles discussed by Lord Greene M.R. in Associated Provincial Picture Houses Limited v Wednesbury Corporation (1948) 1 K.B. 223 the learned Judge said :

> " In brief, this Court can only interfere if it considers that the conditions now in question are such that no reasonable body could have imposed them. "

See also Fawcett Properties Limited v Buckingham County Council both at first instance and

on appeal - (1959) Ch 543; (1961) A.C. 636.

Lange's case and the other cases referred to were civil proceedings seeking relief by way of prerogative writ. In the present case, the appellants did not choose to appeal against the respondent's determination or seek to have the conditions quashed or declared invalid. Assuming but not deciding that notwithstanding those circumstances, ultra vires and invalidity may be made a ground for appeal in these proceedings I have no doubt that the principles stated by Richmond J in Lange's case to be of application. In all the circumstances of the case and in particular the unity of the two properties as hotel premises, I make no doubt that the conditions are both valid and intra vires.

Mr Atkinson submitted also that even if the consent of the City Planner to the signs to be displayed was validly required it was not validly or reasonably withheld. The issues raised by that submission were not for determination in the criminal jurisdiction of the District Court and are not germane to an appeal from that court from a decision given in that jurisdiction.

In addition to imposing fines and orders as to court costs and solicitors fees the Judge on each Information ordered the appellants "to pay costs on a daily basis as a continuing offence $30.00 per day." The appellant has appealed against these latter orders only.

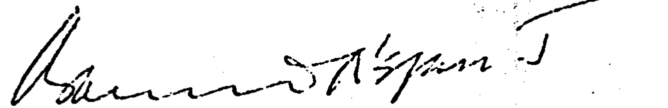
Penalties are prescribed by s 173 which after declaring the maximum fine goes on to provide that if the offence is a continuing one, a further fine not exceeding $100 for every day or part of a day which the offence has continued.

I make no doubt that it was a mere slip on the Judge's part when he ordered costs for the continuing offence. But I make no doubt also that having regard to the language in which he couched the matter that he made an order which he had no jurisdiction to impose.

In both of the informations the informant, after the detailed allegations of the offence added the following words "it being alleged that such an offence is a continuing offence." In that way he brought directly to the notice of the appellant the provisions of the section in that behalf and I am disposed to think notice that it was intended to seek the penalty provided for the continuing offence. So in addition to the presumption of knowledge of the law the appellants had a special notification in the matter. Notwithstanding such, it continued to display the signs right up to the day of the hearing. I do not think, however, that the evidence goes to establishing a continuous breach of the condition as to bottles and crates and in respect of the information as to that offence I merely quash the order made.

The order in respect of breach of the condition as to signs, if valid, would have applied each day from the 13th April 1982, the date of the alleged offence until the 3rd of September 1982, the date of hearing - 143 days. The daily rate was $30.00

so that the total penalty for the continuing offence was $4290. The continuing breach was flagrant. In commercial terms it was cheap advertising until, of course, nemesis descended. It is a heavy penalty but when the maximum prescribed by the statute is considered I find myself unable to hold that the amount is excessive. Accordingly I set aside the order made by the Judge in this behalf and in terms of subs (6) of s 121 of the Summary Proceedings Act 1957 I impose the further fine of $30 per day for the days between 13 April 1982 and 3 September 1982. To that extent the appeal is allowed. The appeals against conviction are dismissed. The appellant is ordered to pay the respondent $120 costs.



Solicitors for Appellant : White Fox & Jones (Christchurch)

Solicitors for Respondent : Lusk Willis & Co (Napier)