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Note on 18/3.

1986

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

A. 143/82

Special Consideration

IN THE MATTER of Part 1 of the Judicature Amendment Act 1972

- a n d -

IN THE MATTER of an application for review by the ELLESMERE COUNTRY CLUB (INC.)

BETWEEN THE ELLESMERE COUNTRY CLUB (INC.)

APPLICANT

A N D THE LICENSING CONTROL COMMISSION

FIRST RESPONDENT

A N D DEREK GEORGE SURRIDGE

SECOND RESPONDENT

- a n d -

M. 227/82

IN THE MATTER of an appeal pursuant to Section 229(7) of the Sale of Liquor Act 1962

BETWEEN ELLESMERE COUNTRY CLUB (INC.)

APPELLANT

A N D THE LICENSING CONTROL COMMISSION

FIRST RESPONDENT

A N D DEREK GEORGE SURRIDGE

SECOND RESPONDENT

Judgment: 3 Nov 82

Hearing: 30 September 1982

Counsel: W.G.G.A. Young for Applicant
G.K. Panckhurst for Respondents

JUDGMENT OF CASEY J.

The Ellesmere Country Club holds a Club Charter under Part V of the Sale of Liquor Act 1962. Mr Surridge (the Second Respondent) is an Inspector of Chartered Clubs duly appointed under that Act and on 20th November 1982 he applied to the Commission (the First Respondent) for revocation or suspension of the Charter upon the following grounds:-

> "(a) The club has permitted breaches of the conditions subject to which the charter was renewed in that liquor has been sold or supplied to visitors contrary to the provision of section 166(2)(h) on 25 April 1981, 9 July 1981, 4 August 1981, 3 November 1981 and 4 November 1981.
>
> (b) The club has permitted breaches of the conditions subject to which the charter was renewed in that the club has not been conducted in good faith as a club in that the free access of visitors has been permitted on a considerable number of days during the period 1 April 1981 to 5 November 1981."

The relevant basis of the application is s.172 of the Act from which I quote the following extract:-

> "1. The Commission may at any time on the application of any inspector appointed under section 170 of this Act revoke the charter of any club or suspend the charter for any period not exceeding 3 months, on being satisfied that:... (c) Any breach is permitted of the conditions subject to which the charter was granted or renewed, as the case may be; or (d) The club does not comply with or conform to any such conditions as aforesaid."

The hearing took place on 5th April 1982 and was fully defended with evidence being called by both sides and in a reserved decision of 1st June the Commission found the Applicant's case proved and suspended the Club's Charter for a period of 13 days. The latter promptly appealed to the Administrative Division and also filed an application for review on grounds common to both which I detail later. An interim order was made by Jeffries J.

on 3rd June suspending the operation of the Commission's order, on the Club's undertaking that if it is unsuccessful in these proceedings it will serve out the period.

Generally the Club's reaction was not to deny the allegations of unauthorised supply to visitors on the dates specified, but to explain the system in force at the time, confessing to inadequacies in control of the premises and in keeping the visitors' book. The President and Vice-President gave evidence and denied that they were aware of any problems with unauthorised visitors or in fact that there was any significant problem in this area. For the Inspector it was accepted that a mere finding these breaches had occurred would not be sufficient to justify the charge; it had to be established that they were permitted by the Club, involving either actual knowledge by the persons having effective control, or turning a blind eye to the obvious. Knowledge of a Club servant was not to be imputed to the management in the absence of delegation of control in the area concerned to him.

The first point taken by Dr Young on behalf of the Club related to the second ground in the application - namely, that it had not been conducted in good faith. The Inspector relied on s.172(1)(c) involving a breach of the conditions "subject to which the Charter was granted or renewed." These are set out in s.166 (1) (as amended in 1976), providing that no Charter shall be granted or renewed unless the Commission is satisfied "that the following conditions are or will be met", and four conditions follow, relating to premises, facilities, the keeping of accounts and the conduct of the Club in good faith as a Club.

Subsection (2) goes on to say:- "Every Charter, and every renewal of a Charter, shall be deemed to be granted subject to the following conditions" which are then set out under nine sub-paragraphs, (h) dealing with the supply of liquor to visitors. As amended in 1980, this is forbidden unless he is present on the invitation of a member and is in his company, or has produced evidence to an officer or staff

member of the Club that he is a member of an affiliated Club. Dr Young accepted that this sub-paragraph constitutes a condition to which the Charter is subject, but submitted that the requirement of good faith in the conditions set out in subsection (1) of s.166 is relevant only to the grant or the renewal of a Charter, and it is accordingly not subject to them during its currency within the meaning of s.172(1). Consequently that ground could not be relied upon by the Inspector to base an application for revocation or suspension of the Charter. This argument was put to the Commission and answered by Mr Panckhurst that the conditions in s.166(1) are imported as continuously applying to the Charter because its form prescribed in the Sale of Liquor Regulations 1963 provides that it is issued "subject to the provisions of Part V of the Act".

The Commission dealt with this point in these terms:-

> "In our view it would be an anomaly if breach of a condition which must exist before a charter may be granted or renewed could not be considered under section 172 in between renewals and an interpretation with that result is not one we are disposed to adopt unless compelled by the wording of the Act to do so. We do not think that we are. Having regard to the wording in the form of charter mentioned and to section 165(6) which requires the Commission, on considering an application for renewal of charter, to consider whether "all the conditions specified in section 166 of this Act have been or are being complied with", we consider the requirement that a club be conducted in good faith as a club is available for review at any time. In our view the provisions of section 166(1) set out conditions which must exist not only when the matter of grant or renewal of a charter is before the Commission but which attach as conditions which must continue to exist throughout the currency of the charter and they are conditions subject to which the charter is granted or renewed. Accordingly, we do not accept Mr Davidson's submission in this regard."

I agree with this reasoning and add that the conditions in s.166(1) relate to the preliminary question of whether any Charter will be granted or renewed, and the Commission must

be satisfied about them before exercising its discretion to do so under sections 163 to 165. The Charter then becomes subject to the conditions itemised in s.166(2) plus any others the Commission sees fit to impose under subsection (4). The division of the two sets of conditions between subsections (1) and subsection (2) simply marks the fundamental importance of the first four, which otherwise are so clearly appropriate to the proper functioning of a Club that they must be intended as conditions to which its Charter is subject. This is borne out by the wording of s.165(6), which makes no distinction between the two sets of conditions in authorising the Commission to adjourn an application for renewal to enable them to be complied with. The intention of the Legislature is clear from these provisions in this context, and I am satisfied the Charter is subject to the four conditions enumerated in subsection (1), including the requirement that the Club be conducted in good faith as a Club.

The next ground was that the Commission had failed to act in accordance with natural justice. The Rules of the Club required that visitors should sign their name in the book at the Club's entrance and these visitors' books were produced at the hearing in accordance with a request made by the Inspector's solicitors. After reserving its decision the Commission examined them and made the following comments at p.12 of its decision:-

> "The visitors books show that an inordinate number of visitors have been using the club. That there should be 15,887 visitors at least, in the 1981 year we find incredible and incompatible with the concept of a club catering for the private social intercourse, convenience and comfort of its members. We do not find it believable that the committee could have been unaware of visiting in these numbers. That they were not more aware of the possibility of unauthorised entry we find culpable. We think that they closed their eyes to that possibility."

It is common ground that the contents of the books were never put to Club witnesses in this way for explanation or comment, nor were they cross-examined about the numbers. Dr Young

submitted this was a critical factor in the Commission's assessment of the Club Committee's knowledge or state of mind in relation to unauthorised visitors because, at the most, the matters proved by the Inspector and relied on by the Commission demonstrated no more than a lack of care, falling short of actual knowledge or the turning a blind eye by those in charge. Elaborating this ground he made a number of detailed submissions emphasising the judicial nature of the proceedings, the seriousness of the consequences to the Club and to the reputation of the individual members, and to the fundamental obligation to ensure that they had a fair opportunity to correct or contradict any relevant statement. He also made the point that the general rule of practice in all litigation is that cases are to be determined on the pleadings, evidence and submissions, and in general a Judge should not deal with new matters without referring them back to the parties.

I agree that the Commission should not set up a completely new case on matters which have never been raised, but that is not what happened here. The nature of the Inspector's case was perfectly obvious to the Club from the outset, and particulars in respect of the specific breaches alleged were given by letter to its solicitors well before the hearing. In that correspondence Counsel for the Inspector asked on two occasions that the visitors' books be produced. Nobody could have been under any illusion that on the bad faith allegation, the Inspector was charging the Club with virtually running an open house. In his opening address Mr Panckhurst said that among other matters he would be relying on the visitors' book; the tenor of his cross-examination all pointed in the same direction. Accordingly I find the Commission did not base its finding on a case that was never put forward at the hearing.

On the broader issue of natural justice Dr Young accepted that while the general principles were straightforward, their application to particular circumstances was not so simple. I refer to the comments of Woodhouse P. and McMullin J. in re Erebus No. 2. (1981) 1 NZLR 618 at p.627:-

> "This Court has had to examine and apply the principles concerning natural justice and fairness quite often in recent years. In translating the ideals of natural justice and fairness into current operation in New Zealand we have been influenced as to general principles mainly by decisions of the Privy Council and the House of Lords but, of course, we have had New Zealand conditions and practicalities very much in mind. The result has been a pragmatic approach."

Similarly in N.Z. Police Association and Others v. Taylor and Others (Thomas) (C.A. 154/80, judgment 30th July 1982) it was said at p.39 by the Court of Appeal that the requirements of natural justice and fairness must depend on the circumstances of the particular case and the subject matter under consideration. The Licensing Control Commission is a specialised tribunal charged with important functions in the administration and operation of the Sale of Liquor Act and under s.46 is deemed to be a Commission of Inquiry. Like other tribunals and bodies operating in a specialist field, it has acquired a relevant body of knowledge and experience which it can be expected to bring to bear on matters it is required to decide in carrying out its functions under the Act. I am sure this is something that is understood by all parties and Counsel appearing before it, making a special environment in which the principles of natural justice are to be applied. While a Court may not be justified in reaching the conclusion that 15,887 visitors in a year were incredible and incompatible with the concept of a Club of this type, it is a conclusion that I think the Commission was fully competent to reach as a result of its special experience and status.

The fundamental question is whether the Club had a fair opportunity to deal with the situation disclosed by the books and the conclusions that could be drawn from them. I would find it hard to say that there has been a breach of natural justice if a party, through failure to grasp its importance, or by oversight or mistake, does not take the opportunity available to him to explain or answer a critical point in the case against him. He is entitled to "a fair

crack of the whip", but he cannot complain if the whip is put into his hands and he fails to crack it. I think that is very much what happened here. The importance of these visitors' books was clearly signalled to the Club by the two separate requests for their production made by the Inspector's Counsel. It was also obvious that the whole tenor of the Inspector's case was the unrestricted admission of visitors. Nobody needed to count the names in the books for a year to be struck with what I think the Commissioner quite rightly described as their inordinate number. Reflecting its language, I find it remarkable that members of a supposedly responsible Club management had either not looked at the books at all in this light; or having done so, failed to realise the implications that could be drawn from such numbers attending a Club of this size and location. Its own Rules over this period limited the occasions when a visitor who was not a member of an affiliated Club could be introduced by a financial member - namely, once a month if he lived outside a ten mile radius, and once a year if he lived within that radius. In my view this material which the Commission took into account was available to the Club and its relevance had been clearly signalled by the whole case against it. I am satisfied that in these circumstances there has been no breach of natural justice in the way the Commission dealt with the matter. I should add that Mr Panckhurst explained that these books were only produced at the hearing through the last witness for the Inspector (Mr Elliott), and he had no opportunity to analyse them with a view to cross-examination along these lines, although he certainly did ask questions of the Club's witnesses about specific entries e.g. the Akaroa Bridge Club and the 49 Halswell Scouts.

The final ground relied on by the Club was that there was no evidence to justify a finding that it had permitted breaches of the relevant conditions subject to which the Charter was renewed, or that it had not been conducted in good faith as a Club. Dr Young accepted that the four breaches relied on by the Inspector had been established. He also accepted the evidence relating to the signs outside the lounge and in the foyer, merely intimating that all visitors had to

sign the book, and submitted that management had never had its attention drawn to inadequacies in these areas prior to the Inspector's application. He made it clear that he was not saying more steps to control admissions could not have been taken; but it was not a case of "open slather" winked at by the Committee. The evidence discloses they took some steps after the Commission's earlier criticism on their application to increase membership, when the Club had given an undertaking through Mr Newton that its Rules would be strictly implemented and no unauthorised person would be admitted to the premises.

In considering whether there was sufficient evidence to justify the finding that the Club "permitted" breaches of its Charter, that earlier criticism and undertaking show that the Committee was under clear notice of the nature of its obligations. The evidence in the current application must be assessed against that background. In its judgment the Commission summarised its salient points and I do not propose repeating them. In my view they lead inevitably to the conclusion that there was no serious attempt to exercise proper control over visitors' entry, to such a degree as to justify the findings that the breaches were "permitted" and the Club was not being conducted in good faith. It goes well beyond establishing only negligence, submitted by Dr Young. In this context I note that the figures extracted from the visitors' book by the Commission were only one of a number of factors upon which it relied. Even without these, there was ample evidence to justify its findings.

The Club has therefore failed in its appeal and on the application for review, and both are dismissed, with costs reserved, at Counsels' request. I will hear further submissions on them if required. Counsel may be able to agree on the commencing date for the period of suspension, but if not I will hear them and make an appropriate order.

K.J. Casey J

Solicitors:

R.A. Young Hunter & Co., Christchurch, for Applicant
Crown Solicitors Office, Christchurch, for Respondents

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