716

N.Z. Law Reports

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

M.563/83

591

IN THE MATTER of the Sale of Liquor Act 1962

AND

IN THE MATTER of an Appeal pursuant to Section 226 of the Act

BETWEEN THE TAUMARUNUI COSMOPOLITAN CLUB INCORPORATED at Katarina Street, Taumarunui

Appellant

AND TAUMARUNUI HOTEL LIMITED

First Respondent

HOTEL ASSOCIATION OF NEW ZEALAND

Second Respondent

J & J MAGILL LIMITED (OWHANGO HOTEL)

Third Respondent

S L ELLIOT (INSPECTOR OF LICENSED PREMISES)

Fourth Respondent

Hearing 28 May 1984

Counsel C Anastasiou and G Sanders for Appellant
A Dormer for First Respondent
J J McGrath and A J MacCuish for Second and Third Respondents

Judgment 29 May 1984

(ORAL) JUDGMENT OF DAVISON C.J.

This appeal comes to the Court by way of case stated. It arises in the following circumstances. The Taumarunui Cosmopolitan Club Incorporated is the holder of a Club charter issued under s 163 of the Sale of Liquor Act 1962. It was granted on 3 July 1950 and restricts sales of liquor for consumption on the Club's premises.

In February 1980 the Club applied to the Licensing Control Commission pursuant to s 164(2) of the Sale of Liquor Act for extension of the Club charter to authorise the sale of liquor for consumption off the Club's premises. The application was heard by the Commission on 17 June 1980 and the Commission gave a decision in writing on 16 October 1980. It refused the Club's application.

The Club was dissatisfied with that decision and applied to the High Court in June 1981 for a review. In the meantime, however, the Act had been amended by the Sale of Liquor Amendment Act 1980 which came into force on 1 April 1981. Counsel for the Club considered that the amendments may have had some effect upon the decision of the Commission and asked by agreement with counsel for the other parties, that the Commission re-hear the original application on the basis of the evidence originally adduced but taking into account any possible effects of the Amendment Act 1980. A re-hearing on that basis took place on 22 June 1983 and the Commission gave a decision in writing on 27 July. It again refused the Club's application.

The Club then appealed to this Court by way of case stated on questions of law and the case sets out the questions of law in paragraph 4 as follows:

> " (a) Whether the Commission erred in law by wrongly interpreting in a restrictive way the meaning of the word 'club' by:
>
> (i) failing to recognise that the express language of Section 162 of the Sale of Liquor Act 1962, which Section defines the word 'club' does not include premises as an ingredient of the definition.
>
> (ii) being influenced in its decision by its previously expressed view that a club exists for the pleasure of its members on club premises.
>
> (iii) failing to accept that club activities extend beyond the four walls of the club's physical premises.

(b) Whether the Commission erred in law in holding that the provisions of Section 164(2) of the Act as amended were subject to the constraints and limitations of Section 166(2)(h) of the Act as amended.

(c) Whether the Commission erred in law by fettering its discretion by:

(i) determining the application by inflexibly applying tests applied to previous applications and treating these as binding precedents. The tests referred to here are those of remoteness and of unavailability of supplies.

(ii) determining the application by applying previously created general rules in pursuit of consistency at the expense of the merits of individual cases and in particular at the expense of the merits of this case.

(d) Whether the Commission erred in law by ruling that:

(i) it is unable to grant an extension to a club's charter empowering the club to operate an 'off sales' facility subject to conditions one of such conditions being that the extension does not take effect until the grant of a renewal of the club's charter.

(ii) the power of the Commission to impose conditions under Section 166(4) of the Act arises only on grant or renewal of charter.

(e) Whether the Commission's decision was one which the Commission could not reasonably have come to on the evidence, law and submissions made to it in that:

(i) it failed to take account of the convenience of members;

(ii) it failed to take account particularly of the needs of members who are shift workers;

(iii) it appears to expect members to use facilities which were accepted in evidence as being actually or apparently perilous by virtue of the nature of their patronage.

(f) Whether the Commission's decision erred in point of law in that it failed to take into account relevant considerations or it failed to give sufficient weight to such considerations, in particular:

(i) the submission and evidence that many club activities are carried on outside club premises.

(ii) the submissions and evidence that club activities extend into members homes.

(iii) the submissions and evidence that clubs are more involved in community activities than previously.

(iv) the fact that drinking hours have been generally extended and the increasing grant of ancillary licenses.

(v) the remoteness of the club and its members from alternative liquor supplies.

(vi) the non-availability or difficulty of supply of certain liquors including beer in the area.

(vii) the submissions and evidence that members who are shift workers have difficulty in obtaining liquor supplies elsewhere.

(viii) the submission that an 'off sales' facility will enhance the convenience of members which convenience is an objective specified in Section 162 of the Sale of Liquor Act 1962.

(ix) the submission that the grant would not result in large quantities of liquor being sold to club members for consumption off the premises.

(x) the submission that profit was not a consideration but that on the contrary the intention was to enhance the amenities of the club.

(g) Whether the Commission erred in law by wrongly construing the provisions of and the effect of the relevant provisions of the Sale of Liquor Amendment Act 1980 in particular by failing to accept that the 1980 Amendment constitutes a legislative recognition of the wider scope ambit and concept of a chartered club importing with it an indication that a more liberal approach should be adopted by the Commission to the granting of 'off sales' licences. "

The appellant already had a Club charter limited to sales for consumption off the premises and what it has in effect done is apply for what is commonly called an "off-sales licence". That application is made pursuant to s 164(2) of the Act.

The Act provides:

s 164(2) " Where any charter (whether granted before or after the commencement of this Act) is limited to the sale of liquor... for consumption only on the premises of the club, the club may at any time apply to the Commission for the extension of the charter to authorise the sale of liquor... for consumption on or off the premises. In any such case the Commission shall hold a public sitting (of which it shall give public notice) and may in its discretion, after hearing the applicant and any other interested person who appears, grant or refuse the application. "

When the Commission hears an application under that subsection it is given a very wide discretion as to the way in which it will deal with the application. I have already discussed that matter in Ohakune Club Incorporated v Hotel Association of New Zealand (Wanganui Branch) (High Court, Wellington, M.171/80, 24 September 1980).

On behalf of the Club at this appeal hearing it is claimed that the Commission has made a number of errors of law in arriving at a decision and those are enumerated under six general heads and I deal with them under the various heads.

(a) WRONG INTERPRETATION OF THE MEANING OF 'CLUB'

"Club" is defined in the Act in s 162 in these terms:

" In this Part of this Act, unless the context otherwise requires, the term 'club' means any voluntary association of persons (whether incorporated or not) combined for promoting the common object of private social intercourse, convenience, and comfort, or for promoting the sport of big-game fishing, and providing its own liquor, and not for purposes of gain. "

The Commission in its decision has said:

" The Commission has on a number of occasions considered and expressed its view as to the concept of a club within the definition

> contained in s.162 and in the context of applications for 'off sales rights'. In brief it has said that a club exists for the pleasure of its members on the Club premises. The concept of a club was considered by McMullin J. in the Ponsonby Old Boys Club (Inc) and while that decision was concerned with the question whether a sporting club could qualify for a charter we think it is of relevance to the present application. It was submitted by counsel for the appellant in that case that the Commission had been too restrictive in the meaning it gave to the word 'club' and it should now be given a wider meaning to meet 'the social concerns of 1979' and the 'felt necessities of the time'. That is what was really put to us for the applicant in this case. It was rejected by the learned Judge; he said he inclined to the view that, on the interpretation given to the legislation in a number of cases over a period of years, he should be hesitant at this late hour to confuse a situation which is otherwise relatively settled. Albeit that this decision was concerned with a different issue we think it is of relevance to this case in so far as it rejected the notion that the concept of a club within the Sale of Liquor Act may have changed with social change. We add that, as we have already held, in our view there has been no social change justifying a view by the Commission as to the question of sale of liquor by chartered clubs for consumption off the premises different to that expressed in earlier decisions. We see no reason to depart either from the view of a club or the approach to 'off sales rights' expressed in those decisions and we adopt them."

That was a view which was arrived at by the Commission on its interpretation of the definition of "Club" in s 162. The interpretation adopted is consistent with Part V of the Act as a whole and is consistent with the following provisions of Part V. It is consistent with s 164, 165(4) and (4)(A), s 166(1)(a) and (c), s 166(1)(A) and s 166(2)(h).

In the Ponsonby District Old Boys Club Inc appeal [1979] 2 NZAR 149 McMullin J. examined in some detail

the various definitions or interpretations of definition of "Club" and at p 153 he said:

> " It is sometimes difficult to detect in the amendment to the Sale of Liquor Act 1962 any legislative philosophy. But I incline to the view that, on the interpretation given to the legislation by the Commission in a number of cases over a period of years, one should be hesitant at this late hour to confuse a situation which is otherwise relatively settled by giving the word 'club' a definition which would include a sporting club simpliciter. "

Although His Honour was there referring to a sports club and to changing a definition in relation to such a club, it appears to me that there is good sense and reason for the Commission to adopt a consistent approach to this definition of "club" so long as it properly interprets and applies the provisions of the Act in so doing.

I have considered the submissions of the appellant that the definition of "club" should be widened but that is a policy matter for the Commission. The Commission's responsibility is to properly interpret and apply the statute and within that interpretation and application the Commission is free to adopt such policy as appears to it as the expert body administering the licensing laws, to be appropriate. It is entitled to take the view of a club that it does for the purposes of the Act and I refer to R v Port of London Authority [1919] 1 KB 176, 184.

The Commission accepted that the Club carried out activities beyond the confines of its premises but not for the purposes of taking liquor off those premises for consumption. That was an interpretation which was perfectly open to the Commission.

Having considered the various submissions on behalf of the appellant as to "club", I find that the Commission has not erred in law in any of the respects set out in question 4(a).

(b) SECTIONS 164(2) and 166(2)(h)

The case asks whether the Commission erred in law in holding that the provisions of s 164(2) as amended were subject to the constraints and limitations of s 166(2)(h) of the Act as amended.

s.164(2) " Where any charter (whether granted before or after the commencement of this Act) is limited to the sale of liquor ... for consumption only on the premises of the club, the club may at any time apply to the Commission for the extension of the charter to authorise the sale of liquor ... for consumption on or off the premises. In any such case the Commission still hold a public sitting (of which it shall give public notice) and may in its discretion, after hearing the applicant and any other interested person who appears, grant or refuse the application. "

s.166(2)(h) " No liquor shall be sold or supplied to a visitor on the club's premises unless -

(i) The visitor is present on the invitation of a member, and is in the company of a member; or

(ii) He has, on admission to the premises, produced sufficient evidence to an officer of the club, or a member of its staff, that he is a member of an affiliated club, -

and the liquor is supplied for consumption on the premises. "

First let me say I can find nowhere in the decision of the Commission any such statement of law as is claimed to be in error. But, in any event, an off-sales extension under s 164(2) must be subject to the provisions of s 166(2)(h) for this very simple reason: although s 166 relates to the grant and renewal of a charter and includes, of course, subs 2(h), the next time the charter comes up for renewal the conditions of s 166 must be complied with. So that even if for the purposes of granting an off-sales licence under s 164(2) the Commission were to ignore the provisions of s 166(2)(h) it could not ignore them when

the renewal came up the next time round. So that, in my view, the answer is quite plain that the provisions of s 164(2) are subject to s 166(2)(h).

(c) WAS THERE A FETTERED DISCRETION?

The principles relating to the fettering of discretion are well established. I am going to do no more than refer to the text of de Smith's Judicial Review of Administrative Action (4th ed) in two passages. The first is at p 256 where the author says:

> " Members of tribunals exercising discretionary regulatory powers will normally be entitled, indeed expected, to adopt and follow general policy guidelines. These guidelines will influence their decisions in individual cases. But by announcing their intention to follow those guidelines they ought not, in general, to be regarded as disqualified for likelihood of bias unless they have committed themselves so firmly as to make it impracticable for them to deal fairly with subsequent cases on their merits. "

And at p 312 the author says:

> " Again, a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases. "

The Commission in the present case dealt with a submission which was made to it that it had in earlier decisions fettered its discretion on the circumstances under which it will grant off-sales licences and the Commission said:

> " We do not accept that the Commission in earlier decisions has fettered its discretion. It has said its discretion will be exercised on the lines that 'off sales rights' will be authorised only if the circumstances of the case so require (Putaruru decision para 22); that it conceives the public

> interest is that the sale of liquor is inextricably linked with the provision of accommodation and that is bound to weigh heavily in the exercise of its discretion in granting 'off sales rights'. (Putaruru decision, paragraph 38). The Commission's approach and, with respect, we think the correct approach is summed up in the Manurewa decision, 13 MCD 305 at 308: 'As we see it the true position is that the Commission has a wide general discretion which it must exercise judicially having regard to the facts and circumstances affecting the particular club with which it is dealing. In exercising its discretion it should or is entitled to have regard to the various matters which are discussed in the earlier decisions referred to'. And again at p 311: 'As the discretion vested in us is a general one and we are not enjoined to have regard to any particular circumstance we consider it would be wrong for us to attempt to formulate rigid rules for the guidance of future applicants. We would be simply applying fetters to our own discretion which the legislature has not elected to impose. We note that in the previous decisions referred to the Commission has not attempted to do this. What it has said is that in fact up to the stage at which it was speaking it had not had its attention drawn to any factor justifying the grant of sales rights, except the unavailability to club members of any reasonably accessable source of supply due to the remoteness of the club from such facilities. We are in the same position, but we wish to guard against any impression that we are saying that this is the only consideration which could ever induce the Commission to grant off sales rights'. "

It is quite apparent from the nature of the Act and the Commission's operations that any decision under s 164(2) to grant off-sales licences must have a policy content in it. But so long as the Commission does not close its mind to other factors relevant to a particular application it does not so fetter its discretion that this Court will interfere.

On looking at the decision of the Commission and the way in which it has been arrived at, I am satisfied it has not fettered its discretion in relation to this particular matter.

(d) CONDITIONS

The case asks whether the Commission has erred in law in finding that it is unable to grant an off-sales licence subject to conditions. The Commission has been given power on the grant of a charter to impose conditions and also to do so on renewing a charter: see s 166(4).

It was submitted on behalf of the appellant that the Commission had power to impose conditions on the grant of an off-sales licence by limiting quantities and restricting hours for the operation of that licence. It decided that the imposition of conditions as to hours of sale and quantities to be sold would be inconsistent with the provisions of the Act. I agree with that view.

The Act in Part V sets out in s 164 an unrestricted right to sell quantities under s 164(1), and in s 168 it sets out clearly what the closing hours of the Club for sales are. That being the case, the Commission could not properly impose conditions which went against the statutory provisions in that regard. In Winton Holdings Limited v Licensing Control Commission [1979] NZAR 113, Beattie J. at p 120 dealt with just this question and came to the conclusion that conditions could not be imposed contrary to statutory provisions.

(e) DECISION COULD NOT REASONABLY HAVE BEEN ARRIVED AT

Consideration of any legal issue involved in this question must take into account what the evidence was before the Commission and the way in which the Commission dealt with it. As I indicated at the hearing, I have not before me any transcript of that evidence and, although reference is made in the decision to certain quotations from it, I am not prepared to draw any inferences or conclusions on this matter unless I have the benefit of the

examination of the whole of the evidence, so that I propose to answer that question No in those circumstances.

(f) RELEVANT CONSIDERATIONS OR WEIGHT

Under this head there are listed a large number of matters in respect of which it is suggested that the Commission failed to give sufficient weight or failed to take properly into account. These are questions of fact. It is the weight or relevance that is for the Commission to determine.

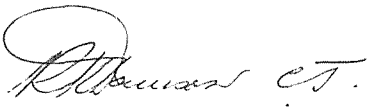
An examination of the decision fails to bring me to the point where I am unable to hold that the Commission has erred in point of law in any of the respects set out.

(g) THE 1980 AMENDMENT

It was submitted on behalf of the appellant that the 1980 amendment should have resulted in a different interpretation or a different policy being adopted by the Commission towards the grant of off-sales licences. I have just looked at the amendment but I fail to see that such is the case.

The result is that each of the questions asked in the case must be answered NO. But I would add this. It is quite clear that what the appellant is seeking to do is to have the Commission change the policy that it applies in the administration of the Act relating to off-sales licences. That is a perfectly legitimate attempt but the policy is essentially a matter for the Commission. So long as it applies that policy in accordance with the legal principles of the Act then that is a matter completely within the ambit of the Commission's activities. It is a specialist body entrusted with administering the Act and all matters of policy should properly be left to it. If persons such as the appellant wish a different course to be followed then they must persuade the Commission to change the policy or else take steps to endeavour to have statutory amendments effected.

The respondents are entitled to costs. There are two counsel involved but, as Mr McGrath bore the burden of the argument, I allow the sum of $500 and any necessary disbursements, and Mr Dormer the sum of $250 and any necessary disbursements.



Solicitors for the Appellant	Simpson Grierson (Wellington)
Solicitors for the First Respondent	Nicholson, Gribbin & Co (Auckland)
Solicitors for the Second and Third Respondents	Buddle Findlay (Wellington)