14/9

NZLR

Special Consideration

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A No.887/84

1080

IN THE MATTER of the Judicature Amendment Act 1972

BETWEEN THE CLONBERN ROAD TAVERN ACTION COMMITTEE

First Applicant

Plaintiff

AND THE REMUERA CITIZENS ANTI TAVERN COMMITTEE

Second Applicant

AND LORRAINE CARR of Remuera, Housewife

Third Applicant

AND MARY JACKSON

Fourth Applicant

AND THE LICENSING CONTROL COMMISSION

First Respondent

AND KNITWIT FABRICS (NZ) LTD

Second Respondent

AND MAURICE ISAAC THOMPSON, BEAU GERARD SAYES, FRANCIS HAYDN HARRIS RODWAY and NEIL LAWRENCE ALEXANDRE BARLOW

Third Respondent

Hearing: 20-21 August 1984

Counsel: Messrs Cowper and Keene for first applicant
Mrs Hinde for first respondent
Mr Atkinson for second respondent
Messrs Salmon QC and Mr Jones for third respondent

Judgment: 21 August 1984

ORAL JUDGMENT OF HILLYER J

This is a notice of motion for an interim order pursuant to S.8(1) of the Judicature Amendment Act 1972, prohibiting the first respondent, the Licensing Control Commission, from hearing or continuing to hear the applications of the second and third respondents for a tavern premises licence, or from otherwise determining such applications until the further order of this Court.

The history of this matter goes back some years, and I have yesterday and today been assisted by careful argument from counsel, particularly Mr Cowper for the applicants and Mr Salmon QC for the respondents.

It is proposed that the first respondent continues with a hearing to determine the question of whether the tavern premises licence should be granted tomorrow, and it is therefore necessary for me to give a decision immediately.

In November 1978 a review was conducted by the first respondent to determine whether the issue of any new tavern premises licences was necessary or desirable in the eastern suburbs of Auckland, and in January the following year a decision was handed down, authorising seven new licences in those suburbs. In November 1979 a public sitting was held, pursuant to S.83 of the Sale of Liquor Act, 1962, to determine whether the Licensing Control

Commission should direct the taking of a poll. In the result it was found that a poll should be held in five areas, of which the Remuera/One Trea Hill area was one.

In October of 1980, I gather in conjunction with local body elections, a poll was taken pursuant to s.84 of the Act and of the total number of valid votes recorded, 67 percent in the Remuera/One Tree Hill area were against the grant of licences. The number of votes cast however, in that area, was only 39 percent of those eligible to vote. In May 1981 the Licensing Control Commission held a public sitting to decide whether, notwithstanding the results of the polls, there were special circumstances which made it desirable and in the public interest that tavern premises should be granted. In September of that year, the Commission decided that licences should be granted in a number of areas, including the Remuera/One Tree Hill area.

That decision was put on the basis that the percentage of valid votes against the grant of any licence to the number of electors entitled to vote in the Remuera/One Tree Hill area was only 26.22 percent. Further, at the public sitting held to determine whether there were special circumstances, representation of residents wishing to support the poll results was minimal. There was only one in the case of Remuera. The Commission decided that the public interest, particularly to ease the problems of

overcrowding and consequent disorder in larger taverns, and the desirability of persons who wished to consume liquor doing so in reasonable comfort by walking to their local tavern, or travelling a reduced distance by car, was sufficient to require that licences should be granted, regardless of the result of the poll.

The Commission therefore in March 1982 gave notice under S.86 of its intention to consider applications for tavern premises licences for various areas including Remuera.

From that time onwards a Mr Rendall who was proposing to make application for a tavern premises licence, made a number of applications for extension of time within which to apply. He was having difficulty in obtaining premises, and the Licensing Control Commission from time to time extended the period within which an application could be made. Those extensions purported to be pursuant to the provisions of S.87 of the Sale of Liquor Act 1962. Sub-section (1) reads :

> "Applications to be made within 60 days:
>
> (1) Within 60 days after the last publication of the said notice (the notice inviting applications for a licence) or within such further time as the Commission may allow, any person entitled under this Act to apply for the licence may apply in writing to the Commission therefore, in accordance with this part of the Act."

Eventually however, in February 1983, Mr Rendall advised the Commission that he was unable to proceed further with

his application and the matter apparently rested there until in November of the same year a further letter of application for an extension of time was received from him, and the Licensing Control Commission again approved an extension of time under S.87 for an application for the licence.

In December 1983, an application for a tavern premises licence was lodged by the third respondents. These were trustees for a trust which owned land at 3 Norana Avenue, Remuera, at which premises Mr Rendall was proposing to conduct his tavern. The application of course had to be made by the owners of the land, but the moving force behind the application was still Mr Rendall.

On 2 March 1984 a further application for extension of time was made by the second respondent Knitwit Fabrics (NZ) Ltd, which proposed to apply for a tavern premises licence at 5A Clonbern Rd, Remuera. That application again was granted by the Licensing Control Commission, and on 24 May 1984 an application for such a licence was duly filed by the second respondent.

On 18 July 1984, public notice was given of the Licensing Control Commission's intention to hold a public sitting to hear the applications of the second and thirdrespondents for tavern licences, and at that time and only then, the applicants in their motion before me realised that the

possibility of tavern licences which they had considered had passed away, was still real. They had in effect 21 days to prepare their opposition to the applications being made at the hearing by the second and third respondents.

On 8 August 1984 the hearing of applications for tavern premises licences commenced before the Licensing Control Commission, and after a brief hearing, was adjourned until 22 August, which is tomorrow.

When the matter came before the Licensing Control Commission on 8 August, counsel on behalf of the applicants in this motion for review made submissions to the Licensing Control Commission along the lines that have been made to me, that the Commission no longer had power to hear the applications, but the Commission decided that it did, and proceeded with the hearing. In those circumstances, application has been made to this Court to review the Licensing Control Commission's exercise of its statutory powers in receiving and extending the period for making application, for receiving applications and for hearing the applications.

The motion before me as I have said, is an interim application pending the hearing of the substantive application for review. It is made under S.8(1) of the Judicature Amendment Act 1972, which provides:

"8. Interim orders

(1) Subject to sub-section (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes

(a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:

(b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for a review relates."

On behalf of the applicants, Mr Cowper submitted that there were a number of steps taken by the Licensing Control Commission which were not authorised by the Legislation or were otherwise invalid.

He said first that the Commission in purporting to give public notice of its intention to consider applications for the tavern premises licences at the end of March 1982, had delayed for a period of 6 months from the time when it issued its decision, over-riding the polls at the beginning of September 1981. There was, he said, no justification for such a delay, and the Commission, having failed to give public notice of its intention to consider applications for that period, should be deemed to have abandoned its intention and be prohibited from so proceeding.

He pointed to S.86(1) which provides that the Commission should cause public notice of its intention to consider applications for a licence to be given as soon as practicable after it has decided to invite applications. Six months, he said, was not as soon as was practicable in the absence of any explanation for that delay, and the Commission was therefore acting without authority under the legislation in calling for applications for the licence in March 1982.

He then went on to say that the most serious delay, however, occurred through the Commission granting extensions of time, first to the third respondent, then to the second respondent. He pointed to the period of 60 days referred to in S.87 of the Sale of Liquor Act 1962, and said that although the Commission had power to allow further time, such further time had to bear some relationship to the period of 60 days mentioned.

It is clear from the case of Johnsonville Licensing Trust v Johnsonville Gospel Hall Trust Board & Ors (1972) NZLR.655 that where a Commission is given power to extend time, where the power is in terms similar to those in S.87 the Commission may extend the time even after the 60 day period has expired. He said however, that only one extension was justified by the wording of the section, and even more that such an extension could perhaps be a further period of 60 days or even 120 days, but that in

the case of the second respondent, the extension was made 710 days after the 60 day limit had expired. In the case of the third respondent, the extension was for a further 646 days.

It may well be that the Commission did have the right to grant a number of extensions of time, and I do not consider that Mr Cowper would be on particularly strong ground with that submission, but I am of the view that his submission that there must be some limit to the period after which the Commission may grant an extension of time, is a valid one. Once the Commission has determined that it will consider applications for a licence, that determination cannot in my view, continue indefinitely. There must be a period when eventually the Commission's right to extend time will have come to an end.

In this application however, I do not have to decide whether the Commission was acting in excess of its powers in granting the further extensions. I am called on only to determine whether there is a real question to be determined on the substantive hearing. If of course I came to the conclusion that there was nothing in the argument put forward by the applicants, I would not consider the matter further, but it is clear in my view, that there is a serious question to be considered as to whether the Commission had power to go on extending time indefinitely in the way that it did, so that in effect the limit was extended from 60 days to over 600.

That determination would be sufficient to deal with that aspect of the applicant's case, but for the sake of completeness, I go on to comment on the other grounds put forward by Mr Cowper. He said that the extensions were granted more than 3 years after the public opinion polls were conducted on 11 October 1980. S.85(2) provides that in the case of a negative poll, and where the Commission does not decide to over-ride the poll, the Commission should not take any further steps relating to the issue of any such licence in that area for the period of 3 years from the date of the poll. S.85(3) then provides that the Commission may then at any time after the expiration of three years, hold a public sitting under S.74 of the Act and commence the whole procedure again.

Mr Cowper submitted that it was a necessary implication that licences lapsed three years from the date of a negative poll. I have some doubt about that argument because the Commission clearly determined that the poll was an unsatisfactory one and the scheme of the Act seems to me to be that where the Commission has been directed by a satisfactory poll to refuse the issue of tavern licences in an area, and has accepted that poll as being satisfactory no further steps should be taken for three years. Where however, the Commission has determined that the poll is not a satisfactory one, then the three year limitation on proceeding does not in my view apply.

Again, however as I have said, I do not have to determine that question.

There were a number of other bases on which Mr Cowper submitted that the activities of the Commission should be set aside. He mentioned that it appeared possible that some of the determinations had been made without there being a duly appointed chairman. He said that some of the extensions were granted without there having been a sitting. It may be that when the matter comes to the substantive hearing and the true position in that regard is determined, he will be able to pursue those arguments.

In the meantime, however, it may be that the principle omnia praesumuntur rite esse acta -(everything is assumed to be done properly,) would operate against him. Again however, it is not necessary for me to make a final determination of that matter.

Summing up the arguments therefore put forward by Mr Cowper and replied to by Mr Salmon and Mr Atkinson on behalf of the third and second respondents, I have come to the conclusion that there would be a serious case to answer.

That however, is not the end of the matter because the power to make an order under S.8(1) of the Judicature Amendment Act 1972 may be exercised only if in the opinion

of the Court, it is necessary to do so for the purpose of preserving the position of the applicant. This is similar to the type of consideration with which we are familiar in applications for interim injunctions. There it is called the balance of convenience.

In this case there is a hearing set down for tomorrow and Mr Cowper submits that it is likely to go for perhaps three days, and that there may be 60 objectors who will be put to expense. The applicants will also be put to expense. There will be numerous witnesses and professional advisers arguing the merits of the applications. He submitted that it would be better to determine the question of the jurisdiction of the Licensing Control Commission to conduct the hearings before embarking on such a substantial project.

The contrary argument however, is that the Commission is ready to start tomorrow; the arrangements have been made, the parties are ready to proceed, no doubt witnesses have been warned and the whole machinery for determining the matter has been put in train. To call a halt to that procedure at this stage, should in my view be done only if the effect would be such that the applicants would suffer harm which could not be remedied. I do not think that is the case. If the Licensing Control Commission proceeds with the hearing, it may be that neither applicant will be granted a licence. It may be that only one applicant

will be granted the licence, in which case the other applicant would have no further interest in the matter.

If a licence, or even two licences were granted, the argument that Mr Cowper has addressed to this court, is still available to be addressed on the application for review, on the substantive hearing of that application. If that argument is a valid one, then the court will determine that the Commission had no power to proceed with the hearing, and any determination made as a result of that hearing will be a nullity. In those circumstances the applicants will not have lost any rights that they may possess, other than the expense of appearing before the Licensing Control Commission opposing the grant of the licences.

If they choose to do that because they consider that such submissions have some value, then that would be their choice. There would be no need for them to do so. If they decided instead to rely solely on the grounds that have been put before me which I have mentioned, the grounds of delay, of undue extension of time, they may do so and reserve the position until they come before the High Court to make the application accordingly.

If in the knowledge that these applications are pending, either of the respondents, if they are granted a licence, proceeds with preparation for the use of that licence,

then they would not be able to be heard to complain before the court on the application for review, that they would suffer loss because of the work they had put in in preparation for the commencement of the tavern licence. They would have done that, again with their eyes open and in the knowledge that the application was pending before the Court.

I have therefore come to the conclusion that even though there is a serious question to be tried, the balance of convenience would favour permitting the hearing to proceed and allowing the applicants to come back to the court on the substantive hearing to make again the submissions that have been made to me.

Before me this morning Mr Keene, who was standing in for Mr Cowper who had been called away, submitted that a refusal of this application might give a false impression, either to the applicants in this application or to the respondents. I make it quite clear that I am not in any way determining that there is no merit in the submissions made by the applicants. I am simply saying that at this stage the ends of justice would be best served by allowing the application to proceed, because it is not in my opinion necessary to prevent the Licensing Control Commission proceeding in order to preserve the position of the applicants. That position can be preserved

sufficiently even if the Commission does proceed with the hearing.

In accordance with normal procedure, no order for costs will be made at this stage.

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P.G. Hillyer J

Solicitors

Morpeth Gould & Co for applicants
Crown Law Office for first respondent
Hunt Hunt & Chamberlain for second respondents
Heaney Jones & Mason for third respondents