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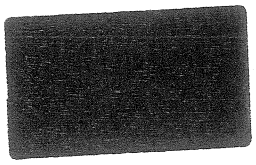
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.748/88



BETWEEN: SUBRITZKY SHIPPING LINE LIMITED

Plaintiff

A N D: THE AUCKLAND HARBOUR FERRY SERVICE DISTRICT LICENSING AUTHORITY

First Defendant

AND GULF TRANS LIMITED

Second Defendant

Hearing: 29 August 1989

Judgment: 1 September 1989

Counsel: H C Keyte for plaintiff
P K Hamlin for first defendant
(abides decision of Court)
R W Worth and G D Palmer for second defendant

JUDGMENT OF HENRY, J

The Plaintiff (Subritzky) seeks judicial review of a decision of the First Defendant (the Authority) given on 2 March 1988 granting an amendment to a harbour-ferry service licence held by the Second Defendant (Gulf Trans). The relevant factual background can be stated quite shortly.

Since about 1981 Subritzky has operated a scheduled harbour-ferry service running vessels between Half Moon Bay (which is on the Tamaki River) and Kennedy

Point on Waiheke Island, pursuant to a licence issued in those terms. It also operates a road goods service licence under which goods are transported from premises at King's Wharf, Auckland, described as a receiving and consolidating depot, to Half Moon Bay for further transport to Waiheke Island.

Gulf Trans is the holder of a harbour-ferry service licence under which it operates a scheduled service to Great Barrier Island, and also on an unscheduled basis throughout the licensing district. It applied to amend the licence by adding a special condition to authorise the operation of a scheduled service between the Auckland Port area and Kennedy Point, Waiheke Island. This application fell to be considered by the Authority on the same criteria as if it were an application for a licence (s.135 (2) Transport Act 1962) and was heard on 15 and 29 February 1988. It was opposed by Subritzky. The formal decision given on 2 March 1988 is recorded in the following terms :

> "Harbour Ferry Service Licence No. 21969 is amended by adding the following Special Condition.
>
> > The licensee is authorised to operate a scheduled route Ferry Service between the Downtown Port of Auckland and Kennedy Point, Waiheke Island."

At the hearing, Subritzky sought to rely in particular on s.123 (5) (b) of the Act. Sub-clause (5) reads :

> "(5) In the case of an application for a passenger-service or harbour-ferry service licence to carry on a scheduled service over a specified route or between or

> through specified localities, the Licensing Authority shall grant a licence to the applicant if, after having regard to the matters specified in subsection (2) of this section, it is satisfied that the service is likely to be carried on in a safe and reliable manner, unless it is further satisfied that -
>
> (a) Existing services on that route or between or through those localities are adequate to meet the reasonable public demand; and
>
> (b) The grant of the application would affect materially the economic stability of any passenger-service licensee or harbour-ferry service licensee authorised to carry on a service on that route or part of that route or between or through some or all of those localities, and who is carrying on his service in a manner that is at least as efficient as that proposed by the applicant.

The Authority held that Subritzky did not have status under paragraph (b) enabling it to mount the economic objection therein set out, and it is that finding which is now under challenge on the ground that in reaching it the Authority misconstrued s.123 (5).

In the course of its reasons for decision the Authority made reference to the respective routes of the operators, discussed the term "localities" and then made what I consider to be a critical finding in these terms :

> "In other words I believe that in order for a scheduled route operator to claim protection the points of pick up and set down must be relatively close so that from a common sense interpretation the routes are similar and serve

> the same localities notwithstanding the actual pick up and set down points may be physically separated. In other words the destinations at both ends must be similar despite a variation of actual route."

The application as recorded was to authorise "a scheduled timetable route service between the Auckland Port area and Kennedy Point landing for the carriage of general freight vehicles and passengers" and was granted in the terms earlier set out. Both s.119, which deals with procedural matters, and s.123 refer to "a scheduled service over a specified route or between or through specified localities". I do not think this service could be said to be a scheduled service "over a specified route" - the actual route, although obviously dictated by practical considerations, was largely irrelevant and was not specified in the application which did however specify terminal but not intermediate points. It was in my view a "scheduled service ... between ... specified localities", no intermediate locality or area being concerned. The real question for determination was whether Subritzky operated a service between or through some or all of "those" localities, being the localities between or through which Gulf Trans proposed to operate as specified in its application. The Authority determined that issue adversely to Subritzky, so the question for this Court is whether in so doing it misdirected itself in holding that in the context of the application Half Moon Bay is in a different "locality" from the Auckland Port area as that term is used in s.123 (5).

In respect of this issue Mr Keyte made two broad submissions. He first submitted that paragraph (b) applied if there was one locality common to the applicant and the objector, as was the position here in respect of the Waiheke Island terminus. I am unable to read the provision in that way. It is concerned with a transport service and in particular the area or areas which it services. One terminal point on its own and in isolation has no relevance to a competing or alternative service because the area of service and the need or lack of need for the proposed service cannot be ascertained. This application was concerned only with terminuses, and it is the commonality of both which required consideration.

The second submission was that the Authority had given the term "locality" in relation to the Auckland terminus a meaning which was too restrictive and inconsistent with the true intendment of the legislation. Mr Keyte stressed the importance of possible economic effect on Subritzky. It must however be borne in mind that paragraph (b) does not operate in every case where the economic stability of an existing service would be affected materially. The service affected must also be one which is carried on (here) between the same localities as the proposed service. It is the latter requirement which the objector must fulfil if the paragraph is to be invoked - a licensee who does

not come within that description cannot call it in aid, even if there is a likely economic impact.

The term "locality" is not defined in the Act and must therefore be given its ordinary meaning in the context of the legislative provisions. What it embraces in a particular case will be a question of fact. Mr Keyte referred to Metropolitan Property Holdings Limited v Finegold & Others [1975] 1 ALL ER 389. That case concerned a fair rent assessment under legislation which required regard to be had, inter alia, to scarcity in the "locality". Lord Widgery said the test was to be taken over the locality as a whole, which was a broad area, as opposed to what he described as being an extremely limited area adopted by the committee whose assessment was under challenge. The judgment is of minimal assistance here, although I accept that the term in s.123 (5) is to be construed not narrowly but sensibly. Counsel also referred to the judgment of Heron J. Guthrey's Coachlines Limited v Microbus Services (1983) Limited and Another (CP.471/87 Wellington Registry, 17 November 1987), which concerned passenger services between Wellington airport and Wellington city. Heron J. expressed the view in considering s.123 (5) that services operating betweem the airport and the central business district could be described as services between the same specified localities. At p.11 the Judge said :

> "The use of the word 'locality' suggests that a slavish adherence to a pre-destined route is not required, but what is being considered is the movement of people between two clearly recognised areas."

Applying that approach, it is still necessary to identify the areas in question as being the same. The areas or localities here are the Auckland Port area on the one hand and Half Moon Bay on the other. It must also be borne in mind that the identification of a locality must be made in the light of what constitutes the particular service district, which in this instance is the Auckland Harbour, and in the light of the definition of the services to which the Act applies (Transport (Auckland Harbour Ferry Services) Order 1977 S/R 1977/251).

In holding that the respective Auckland terminal points were in different localities the Authority noted that they were some 24 kilometres (half an hour travelling time) apart, and observed that they could serve different catchment areas. Mr Keyte in the course of his submissions drew attention to passages in the reasons which could be said to refer to a need for the respective routes to be similar, but when taken in context and in the light of the express consideration of the locality issue, including the specific finding I have quoted, no error of approach is demonstrated in this respect. Similarly, I am of the view that the submitted failure to have regard to the phrase "part of that route" when the facts show

that both operators were concerned with a very similar route between Kennedy Point and Motuihe Island (but not otherwise) is of no significance. That particular fact could not in the circumstances of this case give Subritzky status under paragraph (b).

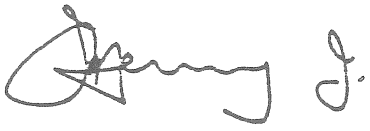
Mr Keyte submitted that the locality for present purposes should include the whole of greater Auckland, extending perhaps from Albany in the north to Papakura in the south. In my view such a conclusion was not one incumbent on the Authority to have made, and indeed is one which itself would have been open to attack. "Locality" for the purposes of a harbour-ferry service in this licensing district could not be so extensive. The fact that Subritzky, which has a monopoly on the particular Waiheke service, presently draws customers from throughout the greater Auckland area does not determine the bounds of one of the localities between which its service operates.

I can see no error in the general approach adopted by the Authority. Recognition of the fact that areas geographically separated may nevertheless constitute the same locality was given in the decision when discussing Waiheke Island, by accepting that Kennedy Point and Matiatia although some five kilometres apart could be so described. Attention was also given to the source of

customers and to the area or areas of service generally. Overall I am satisfied that the decision was open on the evidence presented to the Authority and that in reaching it s.123 (5) was not misconstrued or misapplied.

The grounds for review not having been established it is unnecessary to consider the effect the right of appeal vested in Subritzky under s.154 (but apparently not exercised) might have had on the grant of discretionary relief, as discussed for example in Wardle v Attorney-General [1987] 1 NZLR 296.

The application is accordingly dismissed. Costs are reserved.



Solicitors:

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Simpson Grierson Butler White, Auckland, for second defendant

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