IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008 409 1813

IN THE MATTER OF	an appeal under s 139(1) Sale of Liquor Act 1989
AND IN THE MATTER OF	of the decision of the Liquor Licensing Authority delivered on 11 July 2008 refusing to grant the Appellant an Off-Licence
BETWEEN	COMBINED RURAL TRADERS SOCIETY LIMITED Appellant
AND	ALISON BATCHELER OF TIMARU, DISTRICT LICENSING AGENCY INSPECTOR First Respondent
AND	DOUGLAS CHARLES OLIVER OF CHRISTCHURCH, SENIOR CONSTABLE Second Respondent

Hearing: 10 December 2008

Appearances: N Till QC and M B Couling for Appellant
K Dalziel for Respondents

Judgment: 12 February 2009

JUDGMENT OF CHISHOLM J

---

[1] Combined Rural Traders Society Limited (the Society) sought an off-licence to sell liquor from its *"Farm Centre"* in Ashburton on the basis that the sale of liquor would be an *"appropriate complement to the kind of goods sold in the premises"* in terms of s36(2)(b) of the Sale of Liquor Act 1989. The Liquor

Licensing Authority refused the application. In this appeal the Society alleges that the Licensing Authority's decision was erroneous in law.

Background

[2] The Society is a well established South Island rural agent and retail supplier. It has 30 sites throughout the South Island which stock a wide range of rural merchandise. Ten of those sites hold off-licences for the sale of liquor. There are in excess of 22,000 members and shareholders in the co-operative and its annual revenue is in the region of $500 million.

[3] On 8 February 2008 the Society filed an application with the Ashburton District Licensing Authority for an off-licence permitting the sale of beer, wine and spirits from its new Ashburton premises. The Society considered the sale of liquor from this site would be complementary to its principal business as a rural retail supplier in the same way as it was complementary at its other sites that held off-licences. The proposed use met the requirements of the Resource Management Act 1991.

[4] Both the licensing inspector and the police opposed the application. Opposition by the licensing inspector was on the basis that the sale of liquor would not be an appropriate complement to the kind of goods sold in the premises in terms of s36(2)(b) and was therefore not authorised by the Act. Although the police had no concerns about the suitability of the Society to hold a licence, they were also of the view that the proposal to sell alcohol at the Ashburton site was not authorised by s36(2)(b).

[5] The application was referred to the Liquor Licensing Authority for determination. Following a hearing on 24 June 2008 the Authority issued its decision declining the application on 11 July 2008.

Authority's Decision

[6] Having recorded that it was for the Society to satisfy it that the sale of liquor at its Ashburton site would be an appropriate complement to the kind of goods sold in the premises, the Authority noted that the Acts Interpretation Act 1924 had been replaced by the Interpretation Act 1999 and that:

> *"[31] Although it has been accepted that the established jurisprudence under the old Act continues to apply, it seems to us that it is necessary to look first at the text, and then ensure that the meaning ascertained from that text does not offend against the statute's purpose. It seems to us that it is no longer appropriate to adopt a fair, large and liberal construction and interpretation. Prima facie the words in the statute will bear their plain and ordinary meaning: CIR v Alcan New Zealand Ltd [1994] 3 NZLR 439,443."*

It is alleged by the Society that this analysis contained errors of law which carried through to the final decision.

[7] The Authority then proceeded to consider the meaning of the words *"appropriate complement"* used in s36(2)(b) of the Sale of Liquor Act and concluded that:

> *"[35] Having heard the evidence we are far from satisfied that the sale of liquor is an appropriate or a "fitting" or "proper" or "suitable" complement to the kinds of goods that are sold by the company. We do not believe that the sale of liquor is an appropriate complement or "accessory" to the items in the company store. We do not accept that liquor "goes together" with the goods in the store, nor that it completes the range of goods on display. There may be a link between a hard working farmer and having a drink at the end of a tiring day, but not only is that argument not relevant to the criteria, it could be applied to many vocations."*

Again the Society alleges that these conclusions reflected errors of law on the part of the Authority.

[8] An argument in support of the application that the buying of liquor allowed farmers to *"complete their business"* was rejected by the Authority. It considered that this submission was undermined by the evidence that household goods represented only 2% of the turnover. Those conclusions are also challenged.

[9] The Authority then considered whether its interpretation offended against the purpose of the Sale of Liquor Act set out in s4:

> *"The object of this Act is to establish a reasonable system of control over the sale and supply of liquor to the public with the aim of contributing to the reduction of liquor abuse, as far as that can be achieved by legislative means."*

Having considered that purpose the Authority concluded that this objective did not provide *"much assistance"* when construing s36. As the Society sees the matter, the granting of the licence would be entirely consistent with the purpose of the Act.

[10] Then the Authority turned its attention to licences that had been earlier granted to stock and station agents under s36(2)(b). Having made particular reference to the decision in *Elders Pastoral NZ Limited* (Decision 753/94, 9 May 1994), the Authority decided that the Interpretation Act prevented the adoption of the *"liberal approach"* reflected in that decision. It also expressed the view that if decisions were made solely on the basis of pragmatism, common-sense or the fact that other licences had been issued in similar circumstances, then such decisions would establish a precedent from which other consequences would flow. All of these conclusions are challenged by the appellant.

[11] Sympathy for the position of the Society was expressed. The Authority noted that the Society had meticulous quality control systems, took its responsibilities under the Act seriously, and had a virtually trouble free history in operating the current licences. It also accepted that the sale of liquor would be a minor aspect of the business and that 10 Farm Centres operated by the Society already held off-licences. However, the Authority concluded that the types of premises in which the sale of liquor would be an appropriate complement *"were limited"*. By way of example it referred to souvenir and tourist shops, duty free shops and gift shops. It noted that while in the past off-licences had been issued to delicatessens, the decision of this Court in *Lopdell & Anor v Deli Holdings Limited & Anor* [2002] NZAR 227 now prevented such licences being issued.

[12] In conclusion the Authority expressed the view that when the Sale of Liquor Act was passed in 1989 without any reference to premises such as stock and station agents there was no longer an opportunity for such premises to sell liquor on the footing that the sale of liquor was an appropriate complement to the kind of goods being sold. The application was refused.

Issues

[13] In terms of s139(1) of the Sale of Liquor Act this appeal is confined to points of law. It is alleged by the Society that the Authority erred in the following respects:

(a) In its interpretation and application of s5(1) of the Interpretation Act.

(b) In its interpretation and application of s36(2)(b) of the Sale of Liquor Act.

(c) It misread and misapplied *Lopdell v Deli Holdings Ltd.*

When addressing each of these issues it is, of course, important to keep in mind that the Authority is a specialist tribunal with particular expertise in the field of liquor licensing.

Interpretation And Application Of Section 5(1) Of The Interpretation Act

[14] To the extent that the Authority proceeded on the basis that there was a fundamental difference between s5(1) of the 1999 Act and s5(j) of the 1924 Act, Mr Till QC argued that the Authority had erred in law. On his analysis the Authority's interpretation was a *"make weight to arrive at a conclusion"* (not to follow *Elders Pastoral).* It was well established, he submitted, that there is in fact no substantive difference between the two sections.

[15] In response Ms Dalziel contended that the Authority had correctly applied s5(1). Her fallback position was that even if that submission is not accepted, the Authority had nevertheless applied a purposive approach in accordance with the Interpretation Act and had reached a conclusion that was open to it. Under those circumstances, she submitted, there was no basis on which this Court could or should intervene.

[16] It is common ground that the Authority's observations to the effect that the jurisprudence under the old Act continues to apply and that it is necessary to look at the text and then ensure that it does not offend against the statutory purpose

accurately reflect s5(1). Had the Authority's stopped at that point there would have been no problem.

[17] Unfortunately its further observation to the effect that it is no longer appropriate to adopt a fair, large and liberal construction and interpretation has confused the situation, especially when read alongside the Authority's comment that the Acts Interpretation Act prevented the approach earlier adopted in *Elders Pastoral*. This seems to indicate a belief on the part of the Authority that s5(1) introduced a fundamental change to the interpretation of statutes. It is not easy to reconcile that belief with the observation of the Authority that earlier jurisprudence applied.

[18] In *Jack v Manakau City Council* (High Court, Auckland Registry, M1698/99, 14 December 1999), Randerson J noted the differences in wording between s5(1) and 5(j) but said that he was satisfied that the approach to interpretation in New Zealand before the 1999 Act should continue. The leading text *Statute Law in New Zealand* (3rd ed) by J F Burrows QC expresses the view at 136 that it is unlikely that the alterations to the wording make any difference. In support of that proposition the text refers to the explanatory note in the Interpretation Bill 1997 (which eventually became the 1999 Act) to the effect that s5(1) was meant merely to reproduce the message of s5(j). He also cites authority, including *Jack v Manakau City Council*.

[19] I am satisfied that the Authority erred in law to the extent that it proceeded on the basis that s5(1) of the 1999 Act fundamentally altered the approach that should be adopted to the interpretation of the Sale of Liquor Act. There is force in Mr Till's submission that the Authority seems to have used the perceived change as a make weight to justify its decision not to follow *Elders Pastoral.* Beyond that there is no other reference to the topic or indication that it influenced the Authority's thinking.

[20] The next issue is whether this error, standing alone, is fatal to the Authority's decision. The starting point is that the Authority is not bound by its earlier decisions and was therefore not bound by its decision in *Elders Pastoral*. As McGechan J observed in *Buzz & Bear Ltd v Woodroffe* [1996] NZAR 404 at 410:

> *"Times change. Communities and environments change. Social habits and levels of tolerance change. Obviously it would have been seen by the legislature to be wise to keep conditions imposed under review in light of potential social change. The licensee's submissions would have licence conditions frozen in some time warp while the world marches on; not, even in the arcane world of liquor licensing, a likely legislative intention. Section 4 interpretation directives align with common sense to point towards allowing the Authority to engage in the wider perspective. It can keep its eye on wider trends and needs in a specialist area where it has unique, and uniquely current, expertise. Any licensee takes a licence under risk that conditions may change, and a report may recommend adjustment. There is no asset protected for all time whatever may happen outside."*

McGechan J went on to reject the proposition that earlier Authority decisions gave rise to a legitimate expectation that a licence would be renewed on particular terms.

[21] In my view those observations are equally applicable to new applications for liquor licences. Each application must be decided on its own facts. In this case the Society could not have any legitimate expectation that the Authority would necessarily follow the *Elders* decision (or that the Authority would follow earlier decisions granting off-licences for its other 10 premises).

[22] Given that the Authority's error relating to the interpretation of s5(1) seems to have been confined to its decision not to follow the *Elders* decision, I have not been persuaded that the error, standing alone, is fatal to the decision.

Interpretation And Application Of Section 36(2)(b) Of The Sale Of Liquor Act

[23] This ground of appeal lies at the heart of the matter.

[24] In *Wine and Spirit Merchants of New Zealand Inc v James Gilmour and Co Ltd* [1997] NZAR 134 at 137-38 Tompkins J observed that s36(2)(b) is not easy to apply, that in any application in reliance on that section there would need to be detailed evidence of the kinds of goods sold in the premises, and that:

> *"... The Authority will then need to decide, having regard to the meaning of that phrase, interpreted in the context of the section and the Act and in accordance with the purpose of the provision, whether, in the particular circumstances of the case, the sale of liquor was an appropriate complement to the kind of goods sold. Each case will need to be decided having regard to its own facts. ...".*

More recently Randerson J has commented in *Lopdell v Deli Holdings* at [37] that given the restrictive approach that Parliament had taken in relation to the grant of

off-licences under s36(4), he could understand the concern expressed by the police and the District Licensing Inspector about the potential effects of the grant of off-licences under s36(2)(b).

[25] Well considered and comprehensive and submissions were advanced in support of the underlying proposition that the Authority misdirected itself as to the interpretation of s36(2)(b) and misapplied the section to the evidence before it. In summary Mr Till argued that: *"complement"* should be interpreted by reference to the purposes of the Act (establishing a reasonable system of control over the sale of liquor to the public with the aim of reducing liquor abuse); *"complement"* refers to the sale of goods, not the goods in isolation, and includes the purchaser of the goods; whether the sale of goods is complementary is to be examined primarily at the time of sale, not at the time of consumption; *"appropriate"* provides the opportunity to consider possible restriction in the interests of limiting liquor abuse; and the words *"appropriate complement"* necessarily refer to the sale of something other than foodstuffs (the primary sale of which is dealt with in s36(1)(d)).

[26] In this case, submitted counsel for the Society, there should have been an evaluation of the ways in which the sale of liquor and goods sold on the premises were or were not complementary to each other. If there is a class of customer who would find the purchase of alcohol convenient to his or her purchase of other goods, the sale of liquor will be complementary to the sale of those other goods. Then it is necessary to focus on whether the sale of liquor is an *"appropriate"* complement. Given the licences already issued to Society, its purpose built store in Ashburton, the restricted space for the sale of liquor, the type of products being sold, and the Society's good character, the sale of liquor from the Ashburton premises is appropriate and the licence should have been granted.

[27] Equally impressive submissions were advanced for the respondents by Ms Dalziel. She argued that there was no error in the Authority's interpretation of s36(2)(b) and the Society was attempting to attack the decision *"through the back door"*. She submitted that it is a matter of judgment in each case whether the sale of liquor falls within the statutory provision and that in this case the Authority had taken all relevant matters into account. Nothing in the wording of the paragraph

supported the Society's proposition that the Authority should have considered purchasers or the convenience of purchasers. In the end result the decision reached by the Authority was open to it and there was no error of law.

[28] Obviously the words *"appropriate complement"* in s36(2)(b) are critical. Like the Authority I do not find it necessary to go past the ordinary meaning of those words. The Shorter Oxford Dictionary includes the following definitions:

> *""appropriate": make, or select as, appropriate or suitable*
>
> *"complement": a thing which, when added, completes or makes up a whole".*

Using its expertise as a specialist tribunal the Authority was required to exercise an overall judgment about whether, on the evidence before it, the sale of liquor would be an *"appropriate complement"* to the kind of goods sold in the premises. The statutory comparison is between the proposed sale of liquor and the other goods sold in the premises.

[29] Any attempt to formulate a detailed test beyond the words used in s36(2)(b) would be counterproductive. Each application has to be determined on a case by case basis. This involves the Authority exercising its judgment as a specialist Tribunal. A commonsense consideration of the s4 objective of the Act is required. As the Court of Appeal observed in *Meads Ross Limited v Rotorua DLA* [2002] NZAR 308 at 317:

> *"The stated object envisages that the licensing system should be reasonable. This indicates the intention that the controls that are imposed under it should be neither excessive nor oppressive. The object also reflects a legislative perception that controls provided by the licensing system have the capacity to contribute to the reduction of abuse of alcohol in the community but that there are limits to that limited capacity. Section 4 also requires the agencies involved in the Act's administration, as well as the Courts on appeal from their decisions, to exercise their powers to promote the object."*

While this commonsense application of s4 should avoid the Authority becoming bogged down, it also requires the Authority to act reasonably when discharging the responsibilities conferred on it by Parliament. The Authority was entitled to conclude that the statutory purpose in s4 was not of much assistance in this case.

[30] In terms of s36(2)(b) the only factor specified for determining whether alcohol is an appropriate complement is the kind of goods sold in the premises. I agree with Ms Dalziel that if Parliament had intended customer convenience to constitute an overriding factor, it would have said so. Thus I cannot accept Mr Till's argument to the effect that if there is a class of customer who would find the purchase of alcohol convenient to his or her purchase of other goods, the sale of liquor will be automatically complementary to the sale of those goods. While the Authority was entitled to take all the circumstances into account, including the purchasers of the goods, it was not obliged to allow the convenience of purchasers to dominate its judgment.

[31] Moreover, as mentioned earlier, each case before the Authority needs to be decided having regard to its own facts and the Authority is not bound by its earlier decisions. In reaching its decision the Authority took into account that other licences had previously been granted to 10 of the Society's Farm Centres. But that did not oblige the Authority to grant a licence in relation to the Ashburton premises. It also took into account that licences had been granted to stock and station agents. Again that did not oblige it to grant a licence for the Ashburton premises. As McGechan J observed in *Buzz & Bear Ltd v Woodruffe,* times change and, as a specialist tribunal, the Authority can keep its eye on wider trends where it has unique expertise. Indeed, earlier in his decision McGechan J had noted a progression in the Authority's thinking from relative liberality (over opening hours) when the Act first came into force through to a more restrictive approach (at 409).

[32] At the end of the day it was open to the Authority, as a matter of overall judgment, to decide that a less liberal approach was now appropriate and that s36(2)(b) would only apply in limited situations. I have not been persuaded that in reaching that decision the Authority applied an incorrect legal test or that the conclusion was not reasonably open to it. Nor have I been persuaded that the examples provided by the Authority illustrate errors of law or that the Authority took into account irrelevant matters or failed to take into account relevant matters.

[33] During argument there was a suggestion that the Authority was not entitled to take into account the precedent that might result from the granting of the licence. It

was also suggested that there was no system for rationing licences under the Sale of Liquor Act and that if there was to be a reversal of trends it was for Parliament, not the Authority, to act. I do not accept either of those propositions. It is significant that even if the Authority is satisfied that the requirements of s36(2)(b) have been satisfied in a particular case, Parliament has nevertheless conferred on it (by using the word *"may"*) a residual discretion whether or not to grant the licence. While that discretion must, of course, be exercised on a principled basis, it illustrates that Parliament has entrusted the Authority with wide powers. It has also confined appeals to this Court to questions of law.

[34] This ground of appeal has not been made out.

Lopdell v Deli Holdings Limited

[35] The final ground of appeal alleges that the Authority misunderstood and misapplied *Lopdell v Deli Holdings Limited.* It is alleged that the Authority wrongly viewed that decision as indicating that a licence could not be granted under s36(2)(b) if a small part of the goods sold was food or groceries. It is also alleged that the Authority had misdirected itself to the extent that it had proceeded on the basis that the sale of household goods had to be in excess of 2%.

[36] Those allegations arise from the following observations of the Authority in the penultimate paragraph of its decision:

> *"[50] We accept that the types of premises in which the sale of liquor would be an appropriate complement are limited. Three examples would be souvenir and tourist shops selling New Zealand made wine and the like, duty-free shops, and gift shops. In addition there are one or two large department stores that sell delicatessen items along with wine. In the past, off-licences were issued to delicatessens but the High Court held that s.36(4) of the Act prevents such licences being issued. See Michael John Lopdell and another v Deli Holdings Limited and others AP 97/01 Auckland High Court 10 December 2001, Randerson J."*

[37] I have not been persuaded that any viable point of law arises from this ground. Clearly the remarks in relation to delicatessens are obiter. In any event, they accurately reflected the message Randerson J was sending. As Ms Dalziel noted, the Authority was using them to illustrate a more conservative approach to

s36(2)(b). Finally, I do not accept that the Authority was using the 2% of turnover at [36] of its decision as some sort of pivotal threshold.

[38] This ground of appeal also fails.

Outcome

[39] The appeal is dismissed.

[40] The respondents are entitled to costs (one award) on a 2B basis. If there are any issues as to the calculation of those costs, memoranda should be submitted by counsel.

Solicitors: Anderson Lloyd, Dunedin for Appellant

Crown Solicitor, Dunedin