

**IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY**

CIV 2009-442-202

UNDER the Sale of Liquor Act 1989

IN THE MATTER OF an appeal against the reserved decision of
the Liquor Licensing Authority No.
PH410/2009 dated 22 April 2009 and
issued following a hearing of the Authority
held at Nelson on 3 April 2009

BETWEEN SPRIG AND FERN MILTON STREET
LIMITED
Appellant

AND T A MONCK-MASON
First Respondent

AND NELSON DISTRICT LICENSING
AGENCY INSPECTOR
Second Respondent

Hearing: 11 September 2009

Counsel: S E England for Appellant
No appearance for First and Second Respondents
J A L Oliver on behalf of Liquor Licensing Authority

Judgment: 16 September 2009

JUDGMENT OF RONALD YOUNG J

Introduction

[1] The Sprig and Fern Tavern in Nelson (the appellant) sought, from the Liquor Licensing Authority (“the Authority”), a variation of their on-licence to allow patrons at the Tavern to use two deck areas to consume alcohol. The first respondent

objected to the application and a hearing was undertaken before the Authority. A variation was granted but in limited terms.

[2] The appellant, dissatisfied with the Authority's decision, appeals to this Court under s 139 Sale of Liquor Act 1989 ("the Act") alleging the following errors of law:

- (a) The Authority lacked jurisdiction to impose restrictive conditions relating to the existing licensed outside covered area (which notably includes the entranceway to the building) which was not part of the area covered by the original application;
- (b) The Authority has reached conclusions regarding noise emanation without evidence or on the evidence available unreasonably;
- (c) The Authority has reached conclusions regarding the maximum consented occupancy of the outside area without evidence and in error;
- (d) The Authority has taken into consideration matters regarding the location of smoking and non-smoking patrons which it ought not to have taken into account;
- (e) The Authority has taken into consideration matters regarding the potential for increase in noise and the appropriate mechanisms for controlling the same which it ought not to have taken into account;
- (f) The Authority has reached conclusions regarding the amelioration of environment effects to which it could not have reasonably come;
- (g) The Authority has failed to take into account matters regarding the location of the main entranceway to the building which it ought to have taken into account.

First ground of appeal

[3] The first ground of appeal is essentially a jurisdictional point. Some history regarding the appellant's on-licence is necessary to understand the submission and provide general background to this appeal.

[4] When the original on-licence application was made and granted for the Tavern it related solely to the indoor area. The hours of trading for the on-licence were Sunday to Thursday, 10.00 a.m. to 10.00 p.m. and Friday and Saturday, 10.00 a.m. to 11.00 p.m.

[5] A second application to the Authority soon followed seeking to extend the area covered by the licence to the roof overhang of the building on the south deck known as Deck A. As the Authority said:

This area was licensed primarily to cater for smokers.

The application to extend the area was therefore granted.

[6] In 2008 the applicant applied to extend the area covered by the licence to the whole of Deck A (on the southern side of the Tavern entrance) and all of Deck B (on the northern side of the Tavern entrance). The appellant sought to have the whole of Deck A licensed for the same hours as the Tavern. However, it was accepted by the appellant that Deck B which adjoined the first respondent's house should have restricted hours finishing at 7.00 or 8.00 p.m. each night.

[7] The Authority, after hearing evidence from Mr Barrett on behalf of the appellant, the local licensing agency inspectors, and Mr Monck-Mason the objector, granted the application on the following terms as follows:

[36] For the sake of completeness and clarity we confirm that the application to redefine licensing premises to include both decks (known as Plan A and Plan B) is granted as at 1 May 2009. Our intention is that there will be no activity on the Northern deck after 3.00 p.m. and no activity on the Southern deck after 8.00 p.m. The days in which liquor may be consumed is seven days a week. The hours during which liquor may be consumed are Plan A (including existing covered area) 10.00 a.m. to 7.30 p.m., Plan B 10.00 a.m. to 2.30 p.m.

[8] The essence of the appellant's first ground of appeal is that the Authority had no jurisdiction to alter the trading hours relating to the existing deck area licence, that is, part of Deck A because the only application before them was to add part of Deck A and all of Deck B to the on-licence.

[9] One of the problems identified by the appellant, which it said supported its application to the Authority to extend the licensed area to include all of Deck A, was that the existing licence created an artificial situation. Patrons could smoke and drink on a small part of Deck A covered by the roof overhang but were prohibited from stepping over an imaginary line onto the uncovered part of Deck A if they were

consuming alcohol. This, Mr Barrett said, caused confusion and difficulty in enforcing the terms of his licence. Thus, Mr Barrett asked that all of Deck A be included in the licence within the trading hours 10.00 a.m. to 10.00 p.m.

[10] Section 16 of the Sale of Liquor Act 1989 provides as relevant as follows:

16 Variation of conditions

(1) The holder of an on-licence may at any time apply to the District Licensing Agency for the variation or cancellation of any condition of the licence imposed by the Licensing Authority or District Licensing Agency.

...

(3) Any person ... who has a greater interest in the application than the public generally may object to the grant of the application.

...

(5) No objection may be made in relation to any matter other than one specified in section 13(1) of this Act and relevant to the application.

(6) Sections 11 and 12 of this Act shall apply, with any necessary modifications, in respect of applications made under this section.

(7) In considering the application, the [Licensing Authority or District Licensing Agency, as the case may require, must] have regard to such of the matters specified in section 13(1) of this Act as are relevant to the application.

[11] Section 13 (1) of the Act provides as follows:

13 Criteria for on-licences

(1) In considering any application for an on-licence, the [Licensing Authority or District Licensing Agency, as the case may be, must] have regard to the following matters:

(a) The suitability of the applicant:

(b) The days on which and the hours during which the applicant proposes to sell liquor:

(c) The areas of the premises or conveyance, if any, that the applicant proposes should be designated as restricted areas or supervised areas:

(d) The steps proposed to be taken by the applicant to ensure that the requirements of this Act in relation to the sale of liquor to prohibited persons are observed:

- (e) The applicant's proposals relating to—
 - (i) The sale and supply of non-alcoholic refreshments and food; and
 - (ii) The sale and supply of low-alcohol beverages; and
 - (iii) The provision of assistance with or information about alternative forms of transport from the licensed premises:
- (f) Whether the applicant is engaged, or proposes to engage, in—
 - (i) The sale or supply of any other goods besides liquor and food; or
 - (ii) The provision of any services other than those directly related to the sale or supply of liquor and food,—

and, if so, the nature of those goods or services:
- (g) Any matters dealt with in any report made under section 11 of this Act.

[12] Section 11 of the Act deals with reports from police and licensing inspectors and s 12 with unopposed applications. Neither section is of relevance in this case.

[13] Although not specifically incorporated into a s 16 application by the Act, it is clear the grant of any variation of an on-licence must also be subject to s 14. Section 14 provides as follows:

14 Conditions of on-licences

- (1) It shall be a condition of every on-licence that the licensee has available for consumption on the premises or conveyance a reasonable range of non-alcoholic refreshments.
- (2) It is a condition of every on-licence granted in respect of a hotel or tavern that no liquor is to be sold or supplied on Good Friday, Easter Sunday, Christmas Day, or before 1 pm on Anzac Day to any person other than—
 - (a) Any person who is for the time being living on the premises, whether as a lodger or an employee of the holder, or otherwise; or
 - (b) Any person who is present on the premises for the purpose of dining.

- (3) Nothing in subsection (2) of this section shall affect the sale or supply of liquor pursuant to and in accordance with any special licence granted in respect of the hotel or tavern.
- (4) On granting an application for an on-licence in respect of a hotel or a tavern, the Licensing Authority or District Licensing Agency, as the case may be, must designate the whole or 1 or more parts of the premises as restricted areas or supervised areas.
- (5) On granting an application for an on-licence, the Licensing Authority or District Licensing Agency, as the case may be, may impose conditions relating to the following matters:
 - (a) The days on which and the hours during which liquor may be sold:
 - (b) The provision of food for consumption on the premises or conveyance:
 - (c) The sale and supply of low-alcohol beverages:
 - (d) The provision of assistance with or information about alternative forms of transport from the licensed premises:
 - (e) Any other matter aimed at promoting the responsible consumption of liquor:
 - (f) The steps to be taken by the licensee to ensure that the provisions of this Act relating to the sale of liquor to prohibited persons are observed:
 - (g) The designation of the whole or any part or parts of the premises or conveyance as a restricted area or supervised area:
 - (h) The persons or types of persons to whom liquor may be sold or supplied.
- (6) Different conditions may be imposed under subsection (5)(a) in respect of different parts of the premises or conveyance.
- (7) In determining whether to impose conditions under subsection (5)(a) and, if so, what conditions, the Licensing Authority or District Licensing Agency, as the case may be, may have regard to the site of the premises in relation to neighbouring land use.
- (8) Subsection (5)(h) applies subject to the Human Rights Act 1993.

[14] Section 14 provides for the fundamental conditions applicable to an on-licence grant. For example, it authorises the identification of restricted or supervised areas and it entitles the Authority to impose conditions on the days and hours during which liquor may be sold from an on-licence outlet. In this case the

original application for a variation assumed s 14 conditions would apply because it sought restrictions as to trading hours and indeed accepted that there should be different hours for Deck A and Deck B.

[15] Without the application of s 14 to a variation application under s 16 such applications could effectively ignore the on-licence restrictions set out in s 14 on the sale of liquor. That cannot be what Parliament intended. Section 14 gives the statutory authority for conditions to be imposed on a s 16 variation application. Section 14 is therefore the statutory authorisation for conditions to be imposed on a s 16 application.

[16] Section 14(5) therefore authorises, on an application for variation under s 16, the Authority to impose conditions on the days and hours during which alcohol can be sold. And imposing such ss 5(a) conditions the Authority can take into account the ss (7) matters. In this case the ss (7) matters are the effect of noise from the premises on the neighbours of the Tavern. This illustrates why, in deciding whether to grant a variation the Authority will often need to consider existing license provisions. Here the noise from the small deck area already licensed was not in the Authority's view sufficient to justify early closure of the area. However, when the rest of Deck A and all of Deck B were to become licensed then the noise of the whole area did justify restricting the hours.

[17] It would have been unrealistic to have had different hours for different parts of the Decks as Mr Barrett for the appellant said in his application. It needs to be kept in mind this is an application to vary an existing license and as such is likely to raise issues about the conditions of the existing license where the variation and the existing license terms intersect.

[18] The Authority therefore must have reached the conclusion that it would not be appropriate to grant an extension to the licensed area in Deck A unless an earlier finishing time was provided for. The appellant's submission was that in those circumstances the Authority could only refuse the application or grant the application with a 7.30 p.m. finish for the second part of Deck A. It could not grant the application and limit all of Deck A to a 7.30 p.m. finish. Such an arrangement

would be hopelessly confusing for patrons and impossible to adequately police by the licensee or licensing inspectors.

[19] The Authority was correct when it observed this was effectively a new application for an on-licence for the particular area. The application was going to add a significant area to the licensed premises. This application for variation of the on-licence had many of the features of a s 9 application. Given the applicability of s 14 to a s 16 variation application, there is nothing to suggest the Authority lacked jurisdiction to alter the terms of the existing license where there is, as here, an intimate connection between the variation application and the existing license. The existing licence needed to be changed to give proper overall effect to the Authority's conclusion.

[20] It would however be beyond the Authority's powers, when faced with a variation application, to change existing licence conditions unrelated to the variation application. Consideration of such changes would be properly left to the renewal process (ss 18 to 23).

[21] Further, s 14 itself anticipates the orders made by the Authority. Subsection (5)(a) empowers the Authority to impose conditions on the days and hours of the sale of liquor and ss (6) authorises different conditions in respect of different parts of the premises. Where as here there is a connection between the existing license conditions and the variation sought then there is no reason to doubt the Authority has jurisdiction when considering a s 16 application to consider and vary existing s 14 conditions to give full and proper effect to its decision relating to the variation application.

[22] For the reasons given, therefore, I am satisfied the Authority did have jurisdiction to adjust the trading hours with respect to the existing licensed area in Deck A as a result of the application for variation of the licence. No error of law has been shown.

[23] The second part of the challenge relating to the terms of the order alleges that in varying existing on-licence conditions the Authority breached natural justice

because it failed to advise the appellant it was considering reducing the hours for the existing Deck A arrangement. The transcript of the hearing before the Authority makes it clear that such a possibility was discussed. I accept as the appellant said that the discussion about restricted hours for the existing covered deck was in the context of having smokers smoke at the back of the premises or on the street outside.

[24] In my view it should have been obvious to the appellant that a reconsideration of the hours for the on-licence covered area of the deck was inevitably part of their application. The application was based in part on the proposition that Deck A, including both the covered area and that part of the deck which was the subject of the variation application, should be covered by the same hours. The appellant's application was for the licensing hours to be until 10.00 p.m. or 11.00 p.m. for both the uncovered area and the rest of Deck A. I have concluded the Authority had jurisdiction to reconsider the whole of Deck A, including the uncovered part, and identify the appropriate hours for the whole of that area. The appellant could not have required the Authority, in granting an extension of the licence for the remaining part of Deck A, to be bound by the 10.00 p.m. time for the uncovered portion of the deck.

[25] I am satisfied therefore that, in the circumstances, there was no breach of natural justice, even if such a principle could be applied in these circumstances.

[26] I note the appellant's position is that it would now prefer to abandon the licensing grant with respect to Deck B and the remaining portion of Deck A, and return to the position before the application for variation where the covered area only was licensed until 10.00 p.m. Given that view, it is difficult to understand why a further application for variation has not been made to the Authority to return to the original position. There seems to be no reason why that would not be allowed in the circumstances. As I pointed out to counsel, that approach seems a simpler solution to the problem faced by the appellant than an appeal to this Court. However, for reasons given, I do not consider that there was any breach of natural justice.

[27] I therefore reject the first ground of appeal.

Second ground of appeal

[28] The second ground of appeal relates to “noise emanation”.

[29] The Authority concluded that if it granted an expansion of the on-licence area to Deck A and Deck B then more patrons would be allowed on the deck and thus the noise produced from the premises would increase. It said:

In our view there is no question but that there will be an increase in the noise levels if more patrons are allowed on the deck.

[30] This conclusion hardly seems surprising, nor is it one which required any form of expert evidence. The existing licence authorised only a small area for smokers who wished to drink on Deck A. The expanded licence allows all of Deck A and Deck B to be used. This will increase the number of patrons able to use the area and thereby self evidently increase the noise.

[31] Further, the appellant’s case was that the Authority erred in law when it took into account the noise which might emanate from the expanded licensed area. The appellant says that noise concern should have been properly left to the local authority to monitor, and if in breach of the resource consent obtained by the tavern for appropriate enforcement procedures. It relies upon the observations of Chambers J in *K & J Fraser Ltd v Major & Ors* [2002] NZAR 466. There, the Frasers applied for an on-licence. The application was refused and the Frasers appealed. Part of the issues related to the question of noise emanating from the premises proposed for the on-licence. As to this, the Judge said:

[38] I turn now to the second issue, that of noise. The question of noise is largely a resource management issue, not a liquor licensing issue. That is reflected in the fact that it is not possible to have a noise condition to an on-licence: see s 14(5). On the other hand, the Frasers’ resource consent contains detailed conditions as to noise levels.

[32] In *Sheepys Ltd v Manukau District Licensing Agency* [2002] NZAR 603, O’Regan J considered an appeal where a renewal of an on-licence was granted, but with reduced opening hours. As to noise, he said:

[16] The second ground of appeal was that noise is a matter more properly dealt with by a local authority and ultimately the Environment Court under the relevant provisions of the Resource Management Act. This was really an amplification of the first point of appeal, and little more needs to be said about it. In my view, the fact that there are provisions in the Resource Management Act which deal with noise control and place certain responsibilities on the local authority in that regard, does not necessarily mean issues relating to noise are irrelevant to the jurisdiction of the Authority. The Authority's jurisdiction is determined by the Act, and I am satisfied that the impact of the operation of the licensed premises on neighbours (including noise), is a relevant consideration under both s 22(c) and s 23(1)(b), by virtue of its incorporation of the requirements of ss 14(5) and 14(7). This ground of appeal therefore fails.

[17] I note that in *K & J Fraser Ltd v Major* [2002] NZAR 466 which was argued and decided after the hearing in this case, Chambers J said:

The issue of noise is largely a resource management issue, not a liquor licensing issue.

[18] That case concerned an application for an on-licence which had been declined. One of the reasons given was excessive noise. Chambers J found that the occasions of excessive noise in the past did not cause sufficient disquiet to render the Frasers unsuitable to hold a licence.

[19] This case concerns the conditions attaching to a licence, particularly hours of opening, which distinguishes it from *K & J Fraser*. That was concerned with the issue of whether the applicant was a suitable person to run a tavern. The Authority is entitled, when considering hours of operation to consider the interests of neighbours under s 14(7), and noise is a relevant factor in that consideration. I do not believe that *K & J Fraser* should lead me to a different conclusion.

[33] This case equates with the circumstances in *Sheepys Ltd* rather than in the circumstances described by Chambers J in *K & J Fraser Ltd*.

[34] Section 14(7) provides as follows:

(7) In determining whether to impose conditions under subsection (5)(a) and, if so, what conditions, the Licensing Authority or District Licensing Agency, as the case may be, may have regard to the site of the premises in relation to neighbouring land use.

[35] I am satisfied that the broad language used in subs (7) easily encompasses the right of the Authority to consider noise when deciding, under s 14(5)(a), what days and hours liquor may be sold.

Smokers and non-smokers

[36] The appellant alleges that the Authority wrongly took into account the mixing of smokers and non-smokers in its decision. The Authority said:

[30] The proposal to mix smokers with drinkers is a serious concern and needs to be addressed in a principled and step by step way. In the present case we believe that the application to extend the licensed premises should be granted. However, as far as Plan A is concerned any decision must include consideration of the existing covered area as well. There is no way that we would allow drinking on the southern deck until 11.00 pm. If we had different times for different parts of the same deck we would receive even more assertions of being 'ridiculous'. In our view the same times should apply to the existing covered area and the deck known as Plan A.

...

[32] It is accepted that allowing the half deck to be used by smokers has created a difficult situation for drinkers and licensees alike. The proposal to allow more people on the deck and to allow no separation from smoking patrons has required us to review the way that the deck is used. To some extent the proposal must be seen as experimental.

[37] The appellant says it was taken by surprise by this concern and the Authority breached natural justice by failing to give the appellant time to consider this issue. The question of the mix of smokers and non-smokers and the observations of the Authority arose from the circumstances under which the initial licence was granted. The reason for the limited use of Deck A in the original licence was to enable smoking outside the premises away from non-smokers, but with the right still to consume alcohol. The variation application, if granted, would therefore have mixed smokers and non-smokers in conflict with the original licensing arrangement. It was hardly surprising therefore to see this concern expressed. However, there is nothing to suggest that this concern in fact influenced the Authority's decision. There is nothing to suggest this mix was relevant to the decision to limit the outside patrons to a 7.30 p.m. closing time in Deck A. This limitation was clearly driven by noise considerations and not by any considerations relating to smokers and non-smokers mixing. This ground of appeal must therefore fail.

Maximum occupancy of outside areas

[38] At paragraph [28] of its decision, the Authority said:

[28] The ability to consume liquor on the decks by up to 30 patrons has been accepted by the Council as a permitted activity. It seems to us that the issue is akin to a further grant of a licence. In our view there is no question but that there will be an increase in the noise levels if more patrons are allowed on the deck.

[39] The appellant was concerned that the final line of [28] suggested that more than 30 patrons could be allowed outside on the deck area. I do not read paragraph [28] of the Authority's decision in this way. The additional patrons it refers to in the final sentence are those who will be attracted to the deck as a result of the expansion of the licensed area in Deck A and Deck B. The maximum will still remain 30 patrons. There is nothing to this appeal point.

Amelioration of environmental effects

[40] The appellant complained about the Authority using the phrase "environmental effects" indicating that it was venturing into the resource management area rather than the liquor licensing area. I do not read the decision of the Authority in this way at all. The observations covered two points. First, the Authority acknowledged that the development of the two decks had been carried out tastefully, mitigating the potential impact of those who were drinking on the public who were passing by. The area of concern was the increased noise that would inevitably occur as a result of more patrons using the two decks once they were licensed. There, the Authority had to balance, as it was required to by statute, the interests of the licensee and the interests of those in the immediate community. It did so in granting the licence but limiting the hours. That was an unobjectionable balance of those competing interests.

Tavern entrance

[41] The final point relates to the problem of the covered entrance area to the tavern. It seems that the licence granted with respect to the covered area of Deck A also included the entrance to the tavern itself. With the change therefore from 10.00 p.m. to 7.30 p.m. in that area, the tavern entrance also has licensing hours which end at 7.30 p.m. The concern of the appellant was that in terms of the Sale of Liquor Act, no person would be allowed “on the main entranceway” to the premises after 8.00 p.m. No doubt the Authority can fix this concern when it reviews the decision after 12 months. In the meantime, I am sure there will be no difficulty in patrons using the main entranceway to get to and from the licensed premises between 8.00 p.m. and the end of the licensing hours inside tavern area.

Conclusion

[42] For the reasons given the appeal will be dismissed. If the Crown who appeared on behalf of the Authority as the only available opposer seeks costs they should do so within fourteen days.

[43] The appellant has a further fourteen days in which to respond.

Ronald Young J

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