

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

**CIV 2009-419-141**

**CIV 2009-419-142**

BETWEEN	TE AWAMUTU WINES AND SPIRITS (1988) LIMITED AND J L REED Appellants
AND	CHRISTOPHER RON GREENWOOD First Respondent
AND	KARL JASON TUTTY Second Respondent

Hearing: 17 March 2009

Appearances: D Allan for appellants  
P Cornege for First Respondent  
K McDonald for Second Respondent

Judgment: 3 April 2009

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**JUDGMENT OF ALLAN J**

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*In accordance with r 11.5 I direct that the Registrar endorse this judgment  
with the delivery time of 4.30 pm on Friday 3 April 2009*

*Solicitors/counsel :*  
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[1] These are related appeals from a decision of the Liquor Licensing Authority given at Hamilton on 18 December 2008, in which the Authority cancelled the off-licence held by Te Awamutu Wines and Spirits (1998) Limited (the company) and declined an application by Ms Reed for the renewal of her General Manager's Certificate. The Authority stipulated that each decision was to take effect from Sunday 1 March 2008.

[2] On 18 February 2009 I granted a stay of the Authority's orders, pending resolution of these appeals. At the conclusion of the oral hearing of the appeals I further extended the stay until the delivery of this judgment.

### **Background**

[3] The company holds an off-licence which permits the sale of liquor seven days a week between 9 am and 10 pm. It has held an off-licence for about 11 years. The company's business is substantial: the company's turnover for the financial year ended 31 March 2008 was \$2.79 million. The company's directors and shareholders are Mrs Janice Reed (the appellant in the second appeal) and her husband Mr John Reed.

[4] The proceedings before the Authority resulted from two controlled purchase operations in which under-age volunteers purchased liquor from the company. There had been two earlier similar incidents. On 7 July 2006 an employee of the company made a sale to an under-age volunteer at a time when Mrs Reed was on duty. On that occasion the Authority suspended the off-licence for 24 hours and suspended Mrs Reed's certificate for 14 days. Mr Reed's certificate was suspended for two months. The Authority then said that the sanctions imposed were more lenient than they might otherwise have been by reason of the fact that the company had retained a licensing consultant. At that time Mrs Reed expressed herself as being fully supportive of the Police enforcement action, and indicated that the company would be instituting new procedures to ensure that persons appearing to be under 25 years

of age were the subject of identification requests. There were also to be increased warning signs at the counter.

[5] There was a further controlled purchase operation on 26 October 2006, three and a half months later. On that occasion the volunteer was aged 16 years and three months. She was served by Mr Reed who sold her a four-pack of RTDs, (ready to drink beverages) without being asked for identification. Mrs Reed was on duty at that time but the Authority was uncertain where she was at the moment of the sale.

[6] Following that controlled purchase operation, the Authority suspended the company's off-licence for three days and cancelled Mr Reed's general manager's certificate.

[7] Against that background, the Authority was required to consider the two most recent controlled purchase operations. The first was conducted on Friday 6 June 2008 when Mrs Reed was on duty and managing one of the tills. Mr Reed, who was at another till, sold a four-pack of raspberry flavoured "vodka cruiser" RTDs to a 17 year old female volunteer, without asking for identification.

[8] In consequence of that incident, the Police made an application to the Authority for the suspension or cancellation of the company's off-licence, and for the cancellation of Mrs Reed's general manager certificate. The application in respect of the off-licence was based upon the ground that the licensed premises had been conducted in breach of the provisions of the Act. The application in respect of Mrs Reed's general manager's certificate was based upon the ground that she had failed to conduct licensed premises in the proper manner, and that her conduct had been such as to show that she was not a suitable person to hold a certificate.

[9] While the Police application was pending, a further controlled purchase operation was conducted on Saturday 16 August 2008. A 17 year old female volunteer purchased a four-pack of passionfruit flavoured "vodka cruiser" RTDs from a sales person employed by the company, without being asked for identification. That sales person was also the duty manager at the time. She has subsequently relinquished her employment.

[10] In consequence of the 16 August operation, the Police filed two further applications:

- a) For the cancellation of the company's off-licence; and
- b) Suspension of the employee's general manager's certificate.

[11] The ground for the former application was that the licensed premises had been conducted in breach of the provisions of the Act by serving or supplying liquor to a minor. The ground for the suspension application was that the employee concerned had failed to conduct the licensed premises in a proper manner. The District Licensing Agency Inspector also filed an application for the cancellation of the company's off-licence, upon the grounds that the licensed premises had been the subject of breaches of s 155 of the Sale of Liquor Act 1989 (the Act).

[12] These applications were made in reliance on ss 132 and 132A respectively of the Act. They provide:

**132 Variation, suspension, or cancellation of licences other than special licences**

- (1) Any member of the Police or any inspector may at any time apply to the Licensing Authority in accordance with this section for an order—
  - (a) Varying or revoking any condition of a licence, other than a special licence, imposed by the Licensing Authority or a District Licensing Agency, or imposing any new condition (relating to any matters specified in section 14(5) or section 37(4) or section 60(2) of this Act); or
  - (b) Suspending the licence; or
  - (c) Cancelling the licence.
- (2) Every application for an order under this section shall—
  - (a) Be made in the prescribed form and manner; and
  - (b) Contain the prescribed particulars; and
  - (c) Be made to the Licensing Authority.
- (3) The grounds on which an application for an order under this section may be made are as follows:

- (a) That the licensed premises have been conducted in breach of any of the provisions of this Act or of any conditions of the licence or otherwise in an improper manner;
  - (b) That the conduct of the licensee is such as to show that he or she is not a suitable person to hold the licence;
  - (c) The licensed premises are being used in a disorderly manner so as to be obnoxious to neighbouring residents or to the public.
- (4) The Secretary shall—
- (a) Send a copy of the application to the licensee; and
  - (b) Fix the earliest practicable date for a public hearing of the application; and
  - (c) Give at least 10 working days' notice of the date, time, and place of the hearing to the applicant and the licensee.
- (5) The applicant and the licensee shall be entitled to appear and be heard at the hearing, whether personally or by counsel, and to call, examine, and cross-examine witnesses.
- (6) If the Licensing Authority is satisfied that any of the grounds specified in subsection (3) of this section is established and that it is desirable to make an order under this section, it may, by order,—
- (a) Vary or revoke any condition of the licence imposed by the Licensing Authority or a District Licensing Agency; or
  - (b) Impose any new condition (relating to any matter specified in section 14(5) or section 37(4) or section 60(2) of this Act); or
  - (c) Suspend the licence for such period not exceeding 6 months as the Licensing Authority thinks fit; or
  - (d) Cancel the licence.
- (7) Instead of making an order under subsection (6) of this section, the Licensing Authority may adjourn the application for such period as it thinks fit to give the licensee an opportunity to remedy any matters that the Licensing Authority may require to be remedied within that period.

**132A Suspension or cancellation of licences by Licensing Authority in respect of certain offences**

- (1) This section applies in respect of an offence committed—
- (a) By a licensee or manager against section 155(1), section 165, section 166(1), or section 167; or

- (b) By a person (not being a licensee or manager) against section 155(2) or section 166(2).
- (2) A member of the Police must, immediately after the licensee or manager or person has been convicted of the offence, send a report to the Licensing Authority.
- (3) The report must include—
  - (a) A certificate of the conviction from the Registrar of the court concerned; and
  - (b) A summary of the evidence on which the conviction was based; and
  - (c) A statement by the Police as to whether or not the licensed premises concerned have been conducted in breach of any other provisions of this Act or of any conditions of the licence or otherwise in an improper manner and, if so, a statement of the circumstances; and
  - (d) A statement by the Police as to whether or not the conduct of the licensee is such as to show that the licensee is not a suitable person to hold the licence and, if so, a statement of the circumstances; and
  - (e) A recommendation by the Police as to whether the licence of the licensee should be suspended or cancelled; and
  - (f) The reasons for the recommendation.
- (4) Immediately after receiving the report, the Licensing Authority must consider it.
- (5) If, after considering the report, the Licensing Authority considers that it should hold a public hearing into whether the licence held by the licensee should be suspended or cancelled, the Secretary must—
  - (a) Advise the licensee accordingly; and
  - (b) Send a copy of the report of the Police to the licensee; and
  - (c) Fix the earliest practicable date for a public hearing of the matter; and
  - (d) Give at least 10 working days' notice of the date, time, and place of the hearing to the Police and the licensee.
- (6) At the hearing, the Police and the licensee (whether personally or by counsel),—
  - (a) Are entitled to appear and be heard; and
  - (b) May call, examine, and cross-examine witnesses.

(7) A certificate of the conviction included in the report of the Police under subsection (3)(a) is conclusive evidence that the licensee or manager or person committed the offence referred to in the certificate.

(8) At the conclusion of the hearing, the Licensing Authority may make an order under subsection (9) if it is satisfied that—

- (a) The licensed premises concerned have been conducted in breach of the provisions of this Act or of any conditions of the licence or otherwise in an improper manner; or
- (b) The licensee is not a suitable person to hold a licence; and
- (c) In either case, it is desirable to make an order under that subsection.

(9) An order made under this subsection is an order to—

- (a) Suspend the licence for such period, not exceeding 6 months, as the Licensing Authority thinks fit; or
- (b) Cancel the licence.

(10) Instead of making an order under subsection (9), the Licensing Authority may adjourn the hearing for such period as it thinks fit to give the licensee an opportunity to remedy any matters that the Licensing Authority may require to be remedied within the period.

[13] The Authority also had before it a related application by Mrs Reed for renewal of her general manager's certificate.

[14] The volunteers who made the 2008 purchases each gave evidence to the Authority. A police witness, Sgt Greenwood, said that the volunteer who was served by Mr Reed had visited eight licensed premises in Te Awamutu on the night in question, but only the company had made a sale to her. She had just turned 17 years of age at the time of the purchase, and the Authority considered that she looked her age.

[15] Sgt Greenwood said he visited the company's premises within an hour of the controlled purchase and spoke to Mr Reed, who indicated that he remembered the sale but offered no other relevant comment. Mrs Reed was the nominated duty manager at the time of the sale but was not present at the interview. She had left to care for a sick member of her family. Her subsequent explanation was that the company was very busy at the time of the sale, that another employee had left the till for a short period, and that Mr Reed had stepped in to fill the gap. Mrs Reed herself

had been busy on the other till but paid little attention to what her husband was doing at the time. She was somewhat preoccupied with her sister's ill-health.

[16] The second volunteer was 17 years eight months at the time of the controlled purchase on 16 August 2008. She was served by an employee acting as duty manager, who made no request for identification. This under-age volunteer had visited about nine premises that evening, most of them in the Cambridge area. Again, the company was the only licence holder to make a sale to her. Again, Sgt Greenwood visited the premises within an hour of the sale. He spoke to the employee, who acknowledged that she thought the purchaser might have been under-age, but was apparently unaware that the company was already facing an application to the Authority involving the previous controlled purchase operation. Mrs Reed seems not to have been on the premises at the time of this sale, although it appears that she may have been sitting in her car outside the premises at the time of the sale. She was somewhat dismayed about the last sale. She thought the employee had a good understanding of the company's legal obligations.

### **The Authority's decision**

[17] The Authority regarded this as a bad case. In neither instance had any question been asked as to the age or identity of the purchaser. Mr Reed ought not to have been serving at all. His general manager's certificate had earlier been cancelled because he was thought to be unsuitable. Despite that, he was permitted to serve by Mrs Reed, who was at the adjoining till. The later controlled sale was made by an employee who appeared to have an inadequate appreciation of the company's obligations, and no apparent knowledge of the earlier controlled purchase and the associated difficulties facing the company.

[18] Moreover, each of the two volunteers chose RTDs. That should, the Authority said, automatically send out alarm signals. It concluded that Mrs Reed showed no sign of "any understanding of the Act, or concern about its principles".

[19] The Authority considered the objects of the Act and the requirement that it exercise its powers in the manner most likely to promote those objects: see s 4(2).



It considered that some form of sanction was essential, and turned to the question of whether the company's licence should be cancelled or suspended. In that regard it observed:

We have not dealt before with a worse situation where there have been so many serious and similar breaches of the Act. What aggravates the situation is the way the sales have been made and the clear evidence that the previous lessons have not been learnt. There have been no attempts to engage the volunteers in conversation or test their ages in any way despite claims that improved procedures have been adopted. As long as such apathy exists in Te Awamutu then the young people in the community are being placed at risk. It is not as if the company has not had previous warnings.

[20] The Authority concluded that four controlled purchase sales within two years called for severe consequences, and that cancellation of the company's off-licence was the appropriate sanction. There was a brief reference in the decision to the alternative of a suspension period. It seems that the Authority believed that any alternative period of suspension would need to be at, or near, the maximum of six months, and that the company would be unlikely to recover from such a long suspension period.

[21] The Authority's decision was given on 20 January 2009. The order of cancellation was stipulated to take effect from Sunday 1 March 2009, some six weeks later. The deferral was granted at the request of the company, which sought time, in the event of cancellation, within which to dispose of its stocks to an associated company which carried on a similar business at Raglan.

[22] The Authority then turned to Mrs Reed's application for renewal of her general manager's certificate, noting that she carried the onus of establishing her character and reputation and that the Authority was required to have regard to the matters set out in s 126 of the Act. It concluded that, while it was impossible not to feel a degree of sympathy for her, it was left with the basic impression that:

... it has all become too much for her. As far as the renewal is concerned there are now three occasions in the last two years when she has been on duty and illegal sales have been made. We believe that she has failed to satisfy us that her certificate should be renewed.

[23] Accordingly, Mrs Reed's application was declined. It was therefore unnecessary for the Authority to consider the application for cancellation of her certificate.

[24] The Authority's orders in respect of Mrs Reed were likewise to take effect on Sunday 1 March 2009. The Authority also suspended for three months the general manager's certificate of the employee who was involved in the last of the controlled purchase operations.

### **The approach on appeal**

[25] The appeals are brought in reliance on s 138 of the Act, which provides that every appeal shall be by way of rehearing (subs 7) and that on hearing the appeal, this Court may confirm, modify or reverse the decision appealed against (subs 11). In *Karara Holdings Ltd v Police* [2002] NZAR 997 at [45] McGrath J, in delivering the judgment of the Court of Appeal, remarked that there appeared to be limited scope for appeal from decisions of the Licensing Authority, other than on questions of law, or where questions of a licensee's suitability or character were involved. That was because the Act puts responsibility for enforcement decisions largely in the hands of the Authority, so reflecting Parliament's view of its central importance to the licensing system.

[26] But this Court is nevertheless bound to reach its own independent conclusions. It may give such weight as it thinks fit to the opinion of the Authority, but must not regard itself as bound by the Authority's opinions, simply because it is a specialist Tribunal: *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437 at 440 and *Austin Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [5], [16].

### **Discussion**

[27] Mr Allan's argument is that the Authority's decision effectively sets a tariff of cancellation where a licensee fails a fourth controlled purchase operation. The

company's off-licence was suspended for three days in consequence of the second incident. No separate penalty was imposed upon the third, because it was dealt with along with the fourth. Mr Allan submits, however, that in his experience, seven days suspension is common for a third controlled purchase and that to impose the ultimate penalty of cancellation for a fourth, is to move too rapidly from a moderate penalty to a severe one. He does not challenge the Authority's reasoning, but simply argues that the company ought not, without warning, have been subjected to the cancellation of its licence, given the prevailing practice of imposing seven days suspension for a third controlled purchase. He says that the Authority ought to have imposed a significant period of suspension, say one to two months, but deferred for a period in order that the company might trade until a date closer to the time at which its current lease of the Te Awamutu premises will expire in any event, in July 2009.

[28] This argument faces formidable difficulties. The Authority has characterised this as the worst case it has encountered, by reason of the number and seriousness of similar breaches of the Act. The Authority members are vastly experienced. It sits on circuit and so is able to gain a national perspective upon matters relevant to its jurisdiction. Clearly, the members of the Authority regarded this as an extremely serious case of its type. That conclusion is borne out by Mrs Reed's own representative at the hearing before the Authority, who in the course of questioning her said:

Janice you're looking, we discussed this even right back at the beginning before we had our meeting today, that there's not too many precedents for a fourth, I couldn't find any and talking to the others before, there isn't really any. So you're setting a little bit of a, you're unfortunately stuck with a little bit of a national precedent here. I believe, and you can understand that the Authority are possibly looking at a lengthy suspension, quite a few days, maybe even cancellation of your licence, what's your attitude to that, what do you think about that?

[29] That lengthy question came from Mr Murphy, an experienced agent, who is routinely involved in appearing in liquor licensing matters. It is plain enough that this was indeed a bad case of its type, and that the Authority was entitled to make an assessment of the appropriate penalty in that light.

[30] In the *Mill Liquorsave Ltd v Verner* [2004] NZAR 263 Gendall J, when speaking of the role of the Authority, said:

I have no doubt at all general deterrence (ie to discourage) others from selling to minors, as well as special deterrence to the licensee before the Authority, is a relevant consideration and squarely within the objects of the Act. A reasonable system of control of the supply of liquor includes the need to be able to secure compliance with licence conditions and the law, through the exercise of discretionary disciplinary powers specifically given to the Authority by Parliament.

[31] Gendall J was plainly correct. The disciplinary powers found in the Act are intended to serve as a vehicle, not only for the punishment and deterrence of an individual licensee, but also as a means of deterring others from selling to minors.

[32] In *Re Onehunga Wines and Spirits Co Ltd* [2002] NZAR 218, the Authority cancelled an off-licence and a related general manager's certificate in a case where there were at least ten unauthorised sales to minors between July 2000 and March 2001. The Authority held that the company (through its owners) had allowed a system to develop where minors were not asked for their identification. It held that the company and its managers had ignored their responsibilities to the law and that, while suspension might be appropriate for "one-off" breaches of the law, where there had been a consistent failure to control the supply and sale of liquor in a satisfactory manner cancellation was appropriate.

[33] Mr Allan says that case is worse than the present one. In a sense it is because there were at least ten separate breaches there. However, here, the company had been the subject of enforcement action on two previous occasions and, moreover, had failed a fourth controlled purchase operation when on notice of enforcement action for the third. Although Mrs Reed had indicated her support of the liquor legislation and her determination to improve controls, it seems that ultimately her efforts counted for little.

[34] The *Onehunga Wines and Spirits* decision made it clear that systemic failures by a licensee, leading to multiple supplies to minors, would be likely to lead to cancellation. There is little substance in Mr Allan's complaint that the cancellation order in the present instance was unexpectedly severe.

[35] The Authority referred in the present decision to its remarks in the *Onehunga Wines and Spirits* case, in which it noted that there was widespread concern throughout the country about the ability of young people to obtain alcohol. It took the view that when Parliament reduced the age limit to 18 years, but doubled the penalties, it was sending a message to the public that those who breached the law in respect of the sale of liquor to minors must expect rigorous enforcement and severe consequences.

[36] The Authority's present decision simply reflects its consistent approach to cases of this type. Mrs Reed's own representative conceded that the case was among the worst to come before the Authority. There was ample justification for the Authority's decision to cancel the company's off-licence.

[37] I turn to the second appeal, against the cancellation of Mrs Reed's manager's certificate. On an application for renewal, it is for the applicant to satisfy the Court that he or she is an appropriate candidate for renewal. *In re Sheard* [1996] 1 NZLR 751, Holland J said that the test in refusing an application was whether the character of an applicant has been shown to be such that he is unlikely to carry out properly the responsibilities that go with the holding of a licence.

[38] Mr Allan submits that the Court should take account of the following factors:

- a) Mrs Reed herself has not been involved in any of the four controlled purchases made from the company;
- b) Her personal circumstances at the time of the third and fourth controlled purchase operations were difficult in that she was involved in the on-going care of a terminally ill sister;
- c) The Court ought not to draw any adverse inference about Mrs Reed, as to her day to day management of the business, from the fact that there were four separate controlled purchase operations, especially in the light of the fact that the company had traded for 11 years, and that its turnover was very significant;

- d) The Court should take into account the fact that some seven months have passed since the fourth incident and there have been no further issues raised (as to that Mr Cornege submits that his instructions are there have been no further controlled purchase activities in Te Awamutu over that period);
- e) The Court should take account of the fact there have been no difficulties over the recent busy Christmas-New Year holiday period;
- f) The Te Awamutu lease is to be terminated by the landlord in any event with effect from 31 July 2009. Renewal of her certificate, and/or an order quashing the cancellation, would enable her to retire from the business “ ... with her integrity intact”;
- g) If Mrs Reed is able to retain her certificate, she will be able to manage the business and the sale of remaining stock to the Raglan company.

[39] Mr Cornege opposes renewal. He points out that:

- a) Mrs Reed was the duty manager on three of the four occasions on which the Act was breached by the company in the past two years;
- b) She must bear some personal responsibility for the June sale in which a minor was supplied by her husband when she was at the adjoining till;
- c) It appears that she had failed to advise her staff of the third controlled purchase operation and of the need for special vigilance and care – the employee who sold liquor to a minor on the fourth occasion was unaware of the third;
- d) There is little evidence that Mrs Reed has taken any concrete steps to improve compliance systems in the company’s business. In particular there is no evidence of any significant staff training;

- e) While Mrs Reed's personal circumstances entitle her to considerable sympathy, these cannot excuse breaches which have a direct impact on public welfare;
- f) Mrs Reed's plans to retire from the industry following the sale of the Te Awamutu and Raglan businesses is not a basis for allowing her to continue to operate.

[40] In my view, given the nature and scale of the company's defaults and Mrs Reed's responsibility for them, there is no proper basis upon which the Court could countenance the renewal of Mrs Reed's certificate. The Authority reached the right conclusion for the right reasons; its decision was largely inevitable.

### **Decision**

[41] The Authority's order deferring the effective date of cancellation of the company's off-licence and Mrs Reed's general manager's certificate is varied by deleting the expression "1 March 2009" and substituting "15 May 2009". The appeals are otherwise dismissed.

**C J Allan J**