IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

8|12

AP 119/95

IN THE MATTER of the Sale of Liquor Act 1989

AND

IN THE MATTER of an appeal pursuant to s138 of the Sale of Liquor Act 1989 by **KENNETH SHEARD**
Appellant

Hearing: 23 November 1995

Judgment: 29 NOV 1995

Counsel: I G Hunt for Appellant
JAL Oliver for Liquor Licensing Authority
P Mitchell for Christchurch City Council and Burwood Pegasus Community Board
Mrs I Scott as a resident and representing the Avondale Residents' Association
Mrs P M Holt a resident

RESERVED JUDGMENT OF HOLLAND J

The appellant appeals against a decision of the Liquor Licensing Authority delivered on 18 May 1995 refusing his applications for an on licence and off licence under the Sale of Liquor Act 1989 in respect of premises at 32 Breezes Road, Avonside, Christchurch.

The applications were refused principally on the grounds that the Licensing Authority held that the applicant was not a suitable person for

the granting of a license. The decision also declined the applications on another ground. At page 7 it is said:-

> "There are two legs of s(13)(1) upon which we are not satisfied, on the evidence adduced at the hearing, that the present application should be granted. They are: s13(1)(a) - the suitability of the applicant; and s13(1)(e) - the applicant's proposal relating to the sale and supply of non-alcoholic refreshments and food."

The Authority refers very briefly to the proposals relating to the sale and supply of non-alcoholic refreshments and food, and expresses no doubt that given the opportunity the applicant could present satisfactory alternate proposals. The decision went on to say:-

> "Accordingly less weight is attached to our finding that proposals for the provision of food are inadequate than to our finding in relation to the applicant's suitability to hold the on and off licences sought"

The final sentence of the decision, however, is:-

> "For the reasons set out above the applications by Mr Sheard for on and off licences in respect of premises situated at 32 Breezes Road, Avonside, Christchurch are refused.

The notice of appeal is described on its backing sheet as being an appeal pursuant to s138 of the Sale of Liquor Act 1989 but the actual notice simply and broadly says:-

> "Take notice that the above named appellant appeals against the decision of the Liquor Licensing Authority dated 18 May 1995 refusing an application for the grant of a licence."

Appeals from decisions of the Licensing Authority to the High Court are governed by ss138 and 139 of the Act. S138 provides for an appeal by way of a rehearing on matters of fact as well as law, but is limited to where the Licensing Authority "refuses any application ... on the grounds of the suitability of the applicant". There is further provision for appeal under s138 against orders cancelling or suspending any licence or manager's certificate on the same ground.

S139 of the Act gives any party dissatisfied with any determination of the Licensing Authority as being erroneous in point of law a right of appeal to the High Court, but there is no right of appeal in respect of issues of fact.

The appeal was argued by counsel on the basis that it was solely against the finding of unsuitability of the applicant. It was not argued by counsel for the respondents, or any person on behalf of the respondents, that the appeal must fail because even if the appellant succeeded in establishing that the Licensing Authority's decision was wrong on that issue there was still an order dismissing the applications on other grounds. This is understandable because, reading the decision there must be some doubt that the Licensing Authority would have dismissed the applications on the sole ground of not being satisfied as to the proposal relating to the sale and supply of non-alcoholic refreshments and food. It was submitted that if this Court should allow the appeal as presented, the only proper order to make was to refer the matter back to the Licensing Authority for reconsideration.

Although that might have been a commonsense consequence it would result in a substantial prejudice to the appellant. It was necessary to establish before the Licensing Authority that the premises complied with the Resource Management Act 1991 and the requirements of the Christchurch City Council, the local authority concerned. The planning certificate to that effect was supplied by the applicant at the hearing and it is acknowledged that at the date of the hearing before the Licensing Authority the premises so complied and that the certificate was valid.

There is now evidence before this Court from the City Council that some six weeks after the decision of the Authority the City Council gave public notice of its proposed city plan. That proposed city plan has not been adopted and is likely to take months or years before that happens. However, it contains provisions requiring the supply of parking places for taverns which

do not form part of the appellant's proposal. Indeed it is recognised that the supply of such provision by the applicant is well nigh impossible and he would be required to apply for special resource management consent involving advertisements, hearings, and possible appeals to the Planning Tribunal before he could operate a tavern from the premises.

The appellant has a conditional contract to purchase the property and it is obvious that if he is required to make application for a formal resource management consent with accompanying hearings his application will fail because of inadequate funds to enable him to last the distance of the protracted hearings that would inevitably follow. It was likewise conceded that if the matter went back to the Licensing Authority for reconsideration on any basis other than a totally artificial basis that it was rehearing the matter as if it were still May 1995 no valid certificate could currently be given by the Christchurch City Council as to resource management provisions without requiring the applicant to provide parking facilities at any hearing after the publication of the plan in June 1995.

S138(11) of the Act provides:-

> "On hearing the appeal the High Court may confirm, modify, or reverse the decision appealed against ..."

S139(2) of the Act provides that:-

> "... every appeal under the section shall be dealt with in accordance with the rules of Court".

This appeal was brought under s138 and there is no reference to s139. However, I would, if necessary, have inferred that the power under s138 to reverse a decision dismissing an application for a licence gives jurisdiction to the Court to order the issue of a licence in an appropriate case. Because of the consequences of a rehearing to the appellant I was attracted to consider the appeal as being properly brought under s138 but also being stated to be against the whole of the decision. I invited some argument as to

the validity of the decision declining to grant a licence on the grounds that the Authority was not satisfied as to the appellant's proposals relating to the sale and supply of non-alcoholic refreshments and food.

The difficulty that arises is that on this issue an appeal is restricted solely to an error of law. If I had been confident that in allowing the appeal and ordering the issue of licences as sought and directing that the orders speak from the date of the original decision of the Licensing Authority, the appellant would have been entitled to commence business without further resource management applications, I might have been tempted to hold that the decision refusing the licence on this ground was so lacking in supporting evidence as to amount to an error of law. Reluctantly, however, I have accepted that whether I allow the appeal or not the appellant would still have to obtain a further resource management consent to commence business because there would have been no "existing use" or its equivalent prior to the publication of the new city plan, merely because a licence had been authorised but not used. I have accordingly decided that it would not be proper for me to decide the point relating to supply of non-alcoholic refreshments and food which I recognise can be a matter of policy for a specialist tribunal, and in respect of which no counsel was able to present prepared argument.

I would, however, comment that while no-one could reasonably question the wisdom of the Authority's decision, in accordance with the general principles of the Act, to insist that persons licensed to operate taverns should, as a condition of such licence, have adequate food available I question whether the Act goes sufficiently far to say that the food should in all cases be the equivalent of a proper meal. I mention this because it appears from reported decisions that the Licensing Authority has regarded it as inadequate provision for the supply of non-alcoholic refreshments and food to do so by means of food not cooked or prepared on the premises but supplied,

where heating is required, to be heated by way of microwave oven. If the object of the exercise is to ensure that food is available at all times that liquor is for sale in a tavern I should have thought that a much more satisfactory and healthy supply of food would be by way of properly packaged and prepared food, including, if necessary, heating in a microwave oven, than expecting someone to be on the premises for the entire period which a tavern is entitled to be open actually preparing food on those premises.

In this respect I draw attention to the difference between s13(1)(e) where the word "food" is used and the provisions under s7 authorising the supply of liquor on Sundays or indeed at any time to any person present on the premises for the purpose of "dining". It appears to me to be obvious that the Act contemplates and authorises the primary purpose of a tavern as supplying liquor with a provision if the Licensing Authority considers appropriate that food should always be available. Where a tavern licensee wishes to supply liquor beyond the hours authorised for the ordinary tavern, on a Sunday, for instance, dining is the operative word. In the event of the Authority's decision being intended to authorise the supply of liquor in a tavern beyond the ordinary hours of the tavern then adequate dining facilities must be available. If, however, it is merely a matter of supplying liquor all that is required to be supplied is food. I mention this because I can well recognise in this day and age the desirability of suburban taverns supplying meals on Sundays and being authorised to supply liquor with those meals. That appears to me to be a different purpose from the food that is required to be supplied as an adjunct to the supply of liquor during ordinary hours for the opening of a tavern from Monday to Saturday.

I mention this because I cannot see how the proposals of the applicant for food put forward before the Authority by the applicant at the original hearing could not be regarded as sufficient food to allow a tavern

licence to be granted as distinct from the lunch, dinner, or evening meal that might be expected as an excuse for serving liquor in a tavern on Sundays.

I am quite satisfied that the Authority erred in finding that the appellant, on the evidence before it, was not a suitable person to hold the on and off licences sought. Although, in this respect, I would allow the appeal I am satisfied that without also reversing the decision of the Authority as to the proposals for supply of non-alcoholic refreshments and food, which I am not willing to do, I am unable to reverse the decision made by the Authority dismissing the application. Without reversing that second ground of dismissing the application, there is no ground on which I can refer the matter back to the Licensing Authority for reconsideration or substitute the decision of this Court for that of the Authority.

The applicant may, however, again in respect of similar or different premises apply for a licence. I accordingly consider it right that I should give reasons why I will allow the appeal by way of modifying the decision of the Licensing Authority on this ground.

The Authority in its decision refers to the fact that there is no special statutory meaning of "suitability". That does not surprise me. Suitability is a word commonly used in the English language and is well understood. In an earlier decision the Authority has adopted the definition in the Concise Oxford dictionary as "well fitted for the purpose, appropriate".

I do not find it helpful to refer to other decisions on different facts as to the meaning of that word. Where a statute uses an unambiguous and well understood word or expression and choses not to enlarge on the ordinary definition of the word or expression by a special interpretation in the statute it is usually unwise for a Court to add to the ordinary meaning of the word as a general guide for all cases, as distinct from applying the word to the particular facts before it.

In this case the applicant has been declared unsuitable, primarily because of his previous convictions and record in managing licensed premises.

Obviously the applicant's past conduct will be very relevant to the consideration of suitability. The real issue is whether the evidence of that past conduct will indicate a lack of confidence that the applicant will properly carry out the obligations of a licensee. He has already been punished for his offending

The report of the Liquor Licensing Inspector before the Authority showed that the applicant had had a long history in the liquor industry, being first involved working in a Christchurch hotel in 1972, he then managed a city hotel in Dunedin for two years after which he returned to Christchurch where he was manager and a shareholder in a company owning the Cantabrian Tavern in Christchurch. In December 1976 he was convicted in the Supreme Court in Christchurch on a charge of being party to receiving stolen property. He was fined $1,000. The report discloses that his tavern keeper's licence was suspended for three months following this conviction. Counsel for the applicant very properly drew my attention that this was an error. His manager's licence was cancelled. The tavern licence was suspended for three months. Some time shortly after this the applicant applied to the Canterbury Licensing Committee to regain his licence but was advised by the Judge to reapply in twelve months time. He was granted a general manager's certificate some time just under two years after his licence had been cancelled. During that period he had served as an employee in licensed hotels in Rangiora and Hawera.

In 1980 he became licensee manager of the Marine Tavern, Sumner, Christchurch and remained in that position until the hotel was badly damaged by fire in 1986. The applicant at that stage was forced to quit the premises because of financial difficulties and from 1987 to the date of the

application he had worked on a part-time basis as a barman in two hotels in Christchurch.

The charge of receiving was obviously a serious crime, and it was no doubt appropriate that following his conviction on that crime he should lose his right to manage licensed premises. What is significant, and did not appear to be significant to the Licensing Authority, was that after a period of just under two years the same Judge who had suspended the tavern licence for three months allowed him to regain his licence to manage premises. That was presumably in 1979, some 16 years ago.

The appellant has one other conviction on 7 May 1984 for exposing liquor for sale after hours in respect of which he was fined $50.

Although there are no doubt many holders of liquor licences who have not ever been convicted of breaches of the Licensing Act or Sale of Liquor Act, the fact that this applicant with over 20 years almost continuous working in the licensed industry has only one licensing conviction, and that a minor one, is not an indication that as a licensee he is unlikely strictly to observe the terms of his licence. Similarly the fact that following his conviction for receiving he was subsequently granted a licence and he has not committed any other crime under the Crimes Act or its equivalent should be sufficient for the previous convictions not to be held against him in 1995.

In fairness to the Authority it did not purport to decline the application solely because of the two convictions. It referred to a judgment of the Canterbury Licensing Committee dated 1 October 1982 in relation to the operation of the Marine Tavern at Sumner. With respect the Authority has been somewhat selective in the passage it has quoted from that decision.

The application before the Committee was for a variation of hours, seeking an extra hour of opening time on Fridays, Saturdays and Christmas Eve, and the right to open until 30 minutes after midnight on the

morning of New Years Day. The application was strongly opposed by local residents. The Committee concluded that:-

> "The truth of many issues lay somewhere between the two extremes, one as presented by the applicant and its witnesses, and the other by the objectors".

Nevertheless the Committee concluded, as mentioned by the Authority, "that in general terms the tavern is well run by Mr Sheard". It also concluded that for some time local residents had been complaining about the conduct of persons in the Sumner area usually affected by liquor and occurring during the evenings. The Committee also found:-

> "It could not be shown with certainty that the perpetrators of these incidents all came from the Marine Tavern, or were patrons of the Marine Tavern, but it is likely, in the Committee's view, that a majority of them were from that tavern and were affected by liquor".

The Authority, in its decision, referred to the Committee's finding that:-

> "there had been 30 to 40 complaints over a period, particularly in the Christmas/New Year period of 1981 concerning the conduct of patrons leaving the Marine Tavern",

but did not quote the commencing words of that sentence:-

> "that there have been no substantial complaints about the running of the Marine Tavern."

While I agree with the Authority's comment that the relevance of previous convictions is for the Authority rather than the Police and that the Police should have drawn the Authority's attention to those previous convictions it must be borne in mind that the convictions were clearly drawn to the Authority's attention by the report from the Inspector of Licensed Premises.

The Authority's decision refers to the fact that the Police offered no objection to the granting of the applications but does not refer to the concluding sentence of the Inspector's report under the heading "Recommendation":-

> "I recommend the granting of an on and off licence as sought by the applicant and reserve the right to be heard should the situation change."

Obviously the Authority is not bound by the recommendation of the Inspector, nor is it bound by the decision of the Police not to oppose. Both are, however, significant factors in favour of the applicant and ones which the Authority cannot simply ignore.

The Authority referred to the fact that the applicant had not chosen to apply for a general manager's certificate under the 1989 Act and said:-

> "It would have been a factor in Mr Sheard's favour in relation to the on and off licence applications if he had held a current general manager's certificate."

I am unable to understand this reason. The applicant was operating in the licensed industry in an occupation where he had no need for a general manager's certificate. It is obviously material as to whether he had the eligibility to obtain such a certificate but the mere fact that he did not have one does not appear to me to be a valid ground to use against him, unless it can be demonstrated that for some good reason he was unlikely to be able to obtain one.

The Authority has criticised the appellant for the manner in which he presented his case. He was not represented by legal counsel. Obviously there were some difficulties that arose and, in particular, with copies of his evidence and submissions. I understand that they were explained by his having left his copies with the Inspector rather than presenting them to the Authority direct. The lack of attention to the requirements of the Authority was no doubt an irritant to the Authority. I do not believe that the Authority was much influenced against the applicant on this ground, but if it had been it was not a serious issue.

A more serious criticism of the appellant was that he had publicly advertised his application as being one for a tavern cafe or a cafe bar, when it was clearly his intention to apply for a tavern licence. There is room for some confusion because of the new term "on licence" in the Act and the form of application which requires the applicant to describe the general nature of the business to be conducted if the licence is granted.

The applicant was no doubt motivated to describe his application in the way he did in the hope that he would avoid opposition from local residents. He failed in this respect because public meetings of residents were held prior to the hearing. It must have been apparent to those present at the public meeting that the application was essentially for a tavern. The residents were represented at the hearing.

In the end the Authority had to determine the issue on the suitability of the applicant, because under the law as it now is there is no obligation on an applicant to show a need for the licence or that the positioning of the premises on which the licence is to be granted is appropriate if it complies with Resource Management Act provisions.

The fact that the applicant may have misled members of the public in his advertisement is material. I suspect that he was badly advised. However, he must take the responsibility for that. In the end the Authority was required to decide whether the licence should be granted and I do not consider that this conduct was such as to find the appellant to be unsuitable. All that the Authority said in this respect was:-

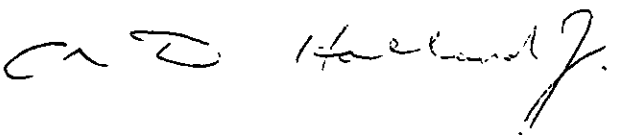
> "In assessing Mr Sheard's suitability we also feel some weight has to be given to submissions from objectors that they were misled as to the type of liquor outlet Mr Sheard was proposing to operate."

At page 10 of its decision the Authority says:-

> "... the way in which he has managed licensed premises in the past dissuades us from determining that he should be given the privilege of holding the on and off licences sought.

I was told by counsel for the Authority that this is the first occasion on which it has refused an application on the grounds of suitability. I am unable to agree with the Authority that the evidence in this case supported its conclusion. As I have earlier said previous conduct is very relevant and I do not wish it to be thought that persons with previous convictions can expect licences to be easily granted, nor, however, should licences be refused merely because of previous convictions. The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of a licence.

That part of the decision of the Licensing Authority finding that the applicant is not a suitable person to hold a licence is modified by deleting that finding and substituting a finding that on the evidence the applicant is a suitable person to hold the licences which he sought. As, however, the applications for licences were dismissed on other grounds the appeal against the decision refusing the applications is very reluctantly dismissed.



Solicitors:
Young Hunter, Christchurch for Appellant
Crown Law Office, Wellington for Liquor Licensing Authority