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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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17 JUL 1996
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AP 280/94

BETWEEN BUZZ & BEAR LIMITED

Appellant

AND JOHN WOODROFFE

First Respondent

AND ERIC D BRYAN

Second Respondent

Hearing: 28 June 1996

Counsel: J W Maassen for Appellant
No appearance for First Respondent
G L Burston for Second Respondent
J A L Oliver for Liquor Licensing Authority

Decision: 8 July 1996

RESERVED JUDGMENT OF McGECHAN J

Solicitors:

Cooper Rapley, Solicitors, Palmerston North for Appellant
Luke Cunningham, Solicitors, Wellington for Second Respondent
Crown Law Office, Wellington for Liquor Licensing Authority

The Appeal

This is an appeal on points of law under s139 Sale of Liquor Act 1989 against a decision of the Liquor Licensing Authority ("Authority") delivered 7 October 1994 imposing restrictive hours upon the appellant's on-licence as a condition of renewal. I will term appellant "Licensee", first respondent "Inspector", and second respondent "Police". The Authority (at times termed by appellant the "Tribunal") appeared and presented argument.

The Background

The Licensee is holder of a "tavern-type" on-licence in respect of premises at 38-40 Fitzherbert Avenue Palmerston North known as the "Cork 'n' Fork". The licence first issued on 19 September 1991, not long after the coming into effect of the present liberalising Act on 1 April 1990. It was a 24 hour licence. On first issue it was for the standard one year period. When the Licensee sought to renew under s18 for three years from 19 September 1992, Police reported concerns over the manner of operation, and the licence by consent was renewed for only 12 months to 19 September 1993. At the latter date the Licensee again applied for a renewal for three years. It is that application which is in issue on this appeal, now nearly three years on.

As required by s20(2), the District Licensing Agency ("DLA") Inspector, and Police, filed reports. The reports themselves are not before the Court. No application was made under s142 for a direction same be lodged. Application was

made by counsel for Police in course of hearing to submit a copy of the Police report. Counsel for the Licensee objected, being taken unawares, and being without ability to produce relevant cross-examination. The application was disallowed. The Authority's decision records:

> "A Police report accompanying the present application for renewal again recommends renewal for a further *'probationary'* period of one year with trading hours being reduced from 24 hours to a 1.00am closing time."

No more is before me, although there is an inference open as to reasons for this police attitude from the Authority's later summation of police evidence. The Authority's decision further records:

> "I do note that there has been a measure of concern in Palmerston North over the effect of 24 hour licences, and in particular anti-social behaviour in public places. I cannot attribute specific incidents to any premises, but I do note a public concern at extensive licensing hours."

It may be that the Inspector's report went on to recommend a 3am closing time. There is reference late in the decision to such a "recommendation" without clarity whether such arose in the report or simply in course of evidence or submissions.

There were no public objections. However, in view of the two reports the matter was placed before the Authority for public hearing in terms of s22 and s23. As with the reports, I do not have the benefit of transcripts of the evidence presented. Working from the face of the decision, it emerged the premises did not in fact operate over the full authorised 24 hours. Usual opening hours were between 4 and

7.30pm. Early in the week, closing would be 3 or 4am; later in the week 5 or 6am; with closing Saturdays (ie on Sunday mornings) 3am or when diners finished. There was evidence, which the Authority appears to have accepted, that clientele was made up primarily of students and hospitality industry staff; the Licensee claiming that "because we are open longer than some of the other hotels and bars in the city" the Cork 'n' Fork was a popular place for those groups. Evidently, the premises had not always been peaceful. There was Police evidence of incidents "associated" with the premises over renewal periods expiring August 1993 and August 1994, and the three months November 1993 to January 1994. Incidents included underage drinkers, fighting outside, blood and breath alcohol convictions of patrons, warnings to the licensee, and one occasion of damage to a patron's car. There had been a decline in incident numbers, and was evidence of improved management, from around September 1993. There was evidence some incidents had arisen from persons "who were already drunk arriving at the Cork 'n' Fork and being refused admission". There were no objections from neighbours; to the contrary, they regarded the premises as well run. It is not a residential area. The decision records however:

> "Senior Sergeant Bryan told us that a meeting of representatives of the Police, the District Licensing Agency Inspectors and the Palmerston North Branch of the Hotel Association of New Zealand (HANZ) had agreed that leaving nightclubs to one side, if all the hotels, taverns and bars in Palmerston North closed no later than 3.00 am problems of the *'migratory drinker'* would be reduced. In answer to a question from the authority Mr McQueen said he was not a member of the HANZ."

Authority's Decision

The Authority quoted s22 criteria for renewal, and stated:

> "We accept (counsel for Licensee's) submission that the Police could not prove that all of the incidents detailed by the Police resulted from people drinking at the Cork 'n' Fork and that some incidents may have resulted from management correctly refusing admission of intoxicated people. However having regard to all evidence adduced at the hearing we accept the recommendation of both the Police and the Agency that the trading hours of the Cork 'n' Fork should be reduced. As between the 3.00am closing time recommended by the Agency and 1.00am recommended by the Police in our view 3.00am is the appropriate closing time for this particular tavern. To allow for the occasional *'champagne breakfast'* an opening time of 7.00am will be included in the renewal licence.
>
> We note Mr Woodroffe's advice that at this stage the Palmerston North City Council has not considered having a district policy on trading hours for licensed premises.
>
> As both the Police and the Agency concede that there has been an improvement in the manner in which Buzz & Bear Limited - in reality Mr McQueen - has conducted the sale and supply of liquor pursuant to the licence, and the suitability of the licensee is not challenged, the term of renewal will not be restricted to 12 months for a second time.
>
> In all other respects we are satisfied as to the matters to which we must have regard as set out in s.22 of the Act. We renew the licence for a period of three years from the date of this decision and authorise the issue of a replacement licence. A copy of the licence setting out the conditions to which it is subject is attached to this decision."

I note in passing the copy of the licence said to be attached to the decision was not made available to this Court, and has not been viewed.

Grounds of Appeal/Points on Appeal

The notice of appeal filed states:

"3. THE appellant alleges that the Liquor Licensing Authority made an error of law in that:

(a) It failed to consider or adequately consider the matters it was required to consider pursuant to S.22 of the Sale of Liquor Act 1989;

(b) It considered matters which were not relevant to S.22 of the Sale of Liquor Act 1989;

(c) It concluded that the licence hours should be less than those which previously applied which was not a conclusion the Authority could reasonably have reached having regard to its findings of fact.

5. THE grounds of appeal are as follows:

(a) The Tribunal found that the licence had improved his management of the licensed premises.

(b) The licensee's suitability was not challenged.

(c) There was no evidence that the licencee's 24 hour licence should be reduced as a result of his poor management of the premises.

(d) The licence had a legitimate expectation that his licence would be reviewed (sic) on the same terms and conditions as previously issued unless it was shown that he did not manage the premises properly.

(e) The Police and District Licensing Inspector relied on a joint policy to reduce the hours of licensed premises which was made without consultation and was not endorsed by the District Licensing Agency.

(f) In light of the finding of the Tribunal that the licencee's management of the premises had improved it was unreasonable to reduce his hours."

The points on appeal as argued at hearing were as follows:

"1. The Authority erred in law in that it relied on the report of the District Licensing Inspector that 24 hour licences caused difficulties and that the Appellant's hours should be reduced when:

   (a) That opinion was a personal tentative opinion which did not have any formal backing from either the District Licensing Agency or the Palmerston North City Council; and

   (b) The opinion did not purport to draw any connection between the reasons for the opinion and the particular operation of the Appellant's premises.

2. The Authority erred in law in that it relied on a so-called agreement referred to by the Police relating to the reduction in hours of licensed premises when the reasons for that agreement were not related to the particular operation of the Appellant's premises.

3. The Authority over-rigidly and inflexibly applied the policy of the Police and the Inspector in that neither had any relationship to the operation of the Appellant's premises.

4. The reports under s.20(2) of the Sale of Liquor Act which the Authority shall have regard to pursuant to s.22 of the Sale of Liquor Act should focus on the extent to which the operation of the premises continues to meet the objectives of the Act. To the extent that the reports did not purport to do this and were nevertheless relied upon the Authority erred in law.

5. The Authority made a decision which on the evidence was insupportable.

6. The Authority failed to have regard to the Appellant's legitimate expectation that the focus of the Authority's inquiry would be on the extent to which the Appellant's operation of the premises including hours of operation met or failed to meet the objectives of the Sale of Liquor Act."

The points on appeal as filed perhaps go somewhat beyond the text of the notice of appeal, but no objection was raised. I will deal with the matter in their terms.

Submissions for Licensee

I had the benefit of detailed submissions from counsel for the Licensee.

With no disrespect to the first four points on appeal, it can be said all turn on a contention that s20(2) reports, and renewals in general, must in law focus on the operation of the particular premises involved, as opposed to wider opinions or policy as to what is or is not desirable. (A secondary theme was that the reports, and evidence, were of insufficient weight to provide the necessary foundation; a point I will return to as an aspect of submissions on the fifth point on appeal). It was submitted that s20(2) required reports to be directed to an applicant's conduct of the premises concerned; and its conformity with s4 objectives. The role of Police and Inspectors was to monitor individual premises. On a wider plane, the Act did not contemplate consideration of broad policy divorced from the particular premises concerned. It would "offend natural justice" to grant a licence with wider hours, and then to reduce hours in response to vagaries of opinion or policy. Applications under s13 for new licences, or for variation of hours, specifically allowed attention to hours; and were distinguishable. Once granted, it was proper to assume on renewal that licence hours were proper. Changes based on policy, without regard to individual operations, were over rigid. References to such policy matters in reports were irrelevant; and reliance upon such matters was wrong.

In support of the fifth point, counsel stigmatised the Inspector's view 24 hour licences caused difficulties, and hours should be reduced, as personal and tentative opinion, without the backing of the DLA or local authority. Counsel put Police evidence on the question of hours as going no further than reference to a meeting of

representatives of Police, Inspector and HANZ which had agreed closing no later than 3am would reduce problems from migratory drinkers. There was nothing more established. There were unresolved questions as to vested interests; and such agreement in itself was not evidence of a migratory problem. The total evidence was so weak that the decision had been made without evidence; and was one no reasonable Authority could have made, invoking Wednesbury principles.

The sixth point, asserted legitimate expectation, has some affinity to the first four. It was submitted the Licensee had a right to be dealt with fairly on the renewal. Economic decisions were made on the strength of the hours previously granted, and a legitimate expectation of renewal. If there was to be change, more was needed than a mere hearing: there must be regard to evidence as to the particular activity, and its compliance with the statutory framework. Counsel cited generally Hodgson "Licensing and the Legitimate Expectation" (1985) 9 Adelaide Law Review 465, 476 and in particular ***FAI Insurances Ltd v Winneke*** (1982) 56 ALJR 388.

There was also, at least tacitly, an attempted seventh point. I note that further under the next subheading.

Authority

I am indebted to Robertson J for his complaint in ***Ole Forge Ltd v Papakura DLA*** (unreported, HC Auckland, 20 February 1996, HC115/95) at being "inundated with a mass of previous decisions" of the Authority. I respectfully endorse his

observation that it "can be dangerous and misleading to become mesmerised with past decisions" and the Court must not "elevate what are no more than decisions on their particular facts to some higher plane of absolute application". These decisions are intensely factual.

Perhaps saved by Robertson J's remarks, I encountered less an inundation than a mist. I record reference to the following: ***Applications by Clarendon etc Hotels*** (1992) NZAR 488, ***Andrew Watson Rae & Co Ltd ("Far North")*** (27 May 1992, Dec No 1710/92-1754/92), ***Gardiner v Hepburn*** (5 May 1993, Dec No 756/93), ***Sophisticate Holdings Ltd*** (13 December 1993, Dec No 2341/93), ***Chef & Brewer Bar & Cafe Ltd v Police*** (1995) NZAR 158, Blanchard J, ***Application by Burton*** (1996) NZAR 30, ***Donaldson Banks Holdings (Palmerston North) Ltd*** (2 October 1995, Dec No 2299/95), ***The Ole Forge Ltd v Papakura DLA*** (unreported, HC Auckland, 20 February 1996, HC115/96, Robertson J). None has worthwhile factual similarity, and while grateful for the industry involved I am not much assisted.

It emerged, however, that this body of authority was put forward with rather more in mind. Read as a whole, it tends to show a progression in Authority thinking from relative liberality over hours when the Act first came into force through to a more restricted recent approach under which closing hours of 3am have come to be regarded as a norm for premises in non-residential areas, with later hours viewed as exceptional and requiring justification at least where local authority opposition emerges. Submissions for appellant, noting particularly the ***Far North*** and ***Ole***

Forge decisions *supra*, suggested the Authority had been following that agenda in this present decision. Submissions for other parties suggested there was nothing wrong in such a general approach, as long as it was not applied inflexibly, which it was not. I do have some difficulty in finding a suitable allegation or even implication of abdication of discretion by importation of a fixed policy of its own within the points on appeal filed, as opposed to reliance on Police and DLA reports and evidence. However, for completeness, I will take the point as open.

Decision

I am unable to accept the essential theme underlying submissions 1-4.

There is no doubt that upon renewal the Authority, which is obliged to consider conditions and reports, and to confirm on same or altered conditions (or to refuse renewal), can consider whether existing hours are appropriate and alter those hours. The restraint, and safeguard against ill informed tinkering, is that such can occur only in response to Inspectors' or Police reports, or at request of the Licensee itself.

I am satisfied there was (just) sufficient in this case within the reports filed, as distinct from evidence later given, to raise the issue of shortened hours, and permit the Authority's intervention if considered appropriate. The Authority's action can be regarded as a "response" within s23(2).

I am satisfied it was within powers, and proper, for the Authority to take into account not only the specifics of the Cork 'n' Fork operation but also more general community concerns which had been made known to it. Quite simply, why not? Of course the Authority must be closely concerned with the actual operation of the actual licensed premises, here the Cork 'n' Fork. One does not renew a licence without thinking about the Licensee and his operations. That is directed by s22(a) and (c). However, there is no logical or policy need to stop at that, as the Licensee urges. 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.

The Authority did not err in law when it took account not only of the Licensee's own operation, but also expressions of view as to social desirability of Palmerston North on-licence premises closing by 3am. I think it quite likely the Authority in doing so found it easier to give weight to those views in light of its own developing view that 3am was a desirable general approach for non-residential areas;

particularly in the light of some remarks in ***Sophisticate Holdings*** *supra* determined only some ten months previously. It is unlikely the Authority operated in some mental vacuum. However, there was material in the reports and evidence upon which, in its own right, the Authority could act; and there is nothing in the decision which supports concerns it may have acted simply of its own volition, or otherwise promoting an independent agenda of its own.

I do not accept evidence the evidence on which the Authority acted was weak to the point of non-existence, or irrationality, so as to be error of law. The requirement is a stringent one, and is not met. There was evidence before the Authority of concerns on the part of the Inspector personally (and the report is his own function), and more significantly on the part of the Police and local branch of the HANZ. There was an inference available, as a matter of common sense, that different closing times can lead to migratory drinkers, traipsing from one on-licence to another, with the trail of traffic, safety, and nuisance problems which result (and have resulted for centuries). There was evidence indeed, from the Licensee itself, that some problems at the Cork 'n' Fork had been caused by intoxicated persons arriving from elsewhere; a tacit confirmation of the migratory potential. There was evidence of a general social problem, and even some specific involvement by the Cork 'n' Fork, albeit without fault. The Authority is not bound by strict rules of evidence, and is to be allowed the benefit of specialist expertise in weighing up material placed before it: ***Goldsmith v Liquor Licensing Authority*** (unreported, HC Wellington, 19 October 1993, AP234/92, Greig J). There was no error in law.

I accept the Licensee had a legitimate expectation he would be accorded natural justice before any commercially damaging reduction in hours was adopted. He was entitled to be heard in an objective way, and (extending the concept to one of fairness) perhaps to be given an opportunity, if practicable, to remedy any soluble problems. The Licensee was afforded that hearing; and there is no question of further remedial activity. The problems are larger than the business. I do not believe the Licensee, who was represented by counsel, would be so naive as to think general problems of late migratory drinkers would not arise and be regarded as relevant. I do not accept legitimate expectation, at best for the appellant on authority cited, can somehow amount to an enforceable indefinite right to carry on a present business immune from change. Legitimate expectation doctrine does not run so far. Times and thinking have changed, and the Licensee must adjust.

Timing of decision

This appeal has allowed the Licensee to continue to operate within the freedom of a full 24 hours licence since 7 October 1994. I do not think it necessary to inflict upon the appellant the severe prejudice of an immediately effective dismissal, rendering those extended hours illegal from the moment of pronouncement. It can take some time to re-adjust business hours without unacceptable damage. There can be a need for advertising, re-organisation of staff, and similar house keeping matters. With that in mind, the effect of decisions made on this appeal will be stayed until the end of the present month.

Decision

The questions of law posed are answered as follows, this decision being stayed in its effect until the end of 31 July 1996:

(a) Did the Tribunal err in law in failing to consider or give adequate consideration to s22(a) and (b) of the Act?

Answer: No

(b) Did the Tribunal err in law in taking into account matters not covered in s22 of the Act and in particular a policy which the Police have adopted whereby they oppose the sale of liquor in Palmerston North after 3.00am?

Answer: No

(c) Was the Tribunal's decision erroneous in law because its decision to reduce the hours during which the Appellant was entitled to sell liquor was not a decision it could reasonably have reached having regard to its findings of fact?

Answer: No

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R A McGechan J