



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2008: No. 20

BETWEEN:

JAMES HAIRE

Appellant

and

LIQUOR LICENSING AUTHORITY

Respondent

Date of Hearing: 16 September 2008

Date of Judgment: 16 September 2008

Anthony Cottle for the Plaintiff;
Richard Horseman for the Licensee; and
Leighton Rochester for the Respondent

JUDGMENT (Extempore)

1. I have considered this matter and I am going to give a short judgment now. I do not think that the allegations of equitable fraud which are made by Mr. Haire were relevant to the Liquor Licensing Authority's consideration of this application. However, I do think that the provisions in the leases and in particular paragraph 1 of the Fifth Schedule were a relevant factor when considering the question of whether any noise was 'undue' within the meaning of Section 15 (1)(a)(iv)(aa), and also, when considering whether the premises were 'suitably located' within the meaning of Section 15 (1)(a)(iii). The leases were, therefore, in my judgment one factor for the Liquor Licensing Authority to consider when considering those issues which are postulated by the statute. They were not necessarily determinative on either issue, but it was for the Authority to look at them and take them into account as they saw fit.

2. The real problem in this case is that, in the absence of reasons, I cannot see how the Liquor Licensing Authority dealt with those questions, namely whether the premises were suitably located and whether the noise that was involved was undue or not. In particular I cannot see how they set about balancing Mr. Haire's interests as an adjacent residential owner with that of the Licensee. This is no small problem. Indeed, this is a material irregularity as reasons are required by Section 8(2) of the Act which says that:

“Where the licensing authority –

...

(b) grants, or transfers a license in a case where objection is made by any person to the grant or transfer under section 12, the licensing authority shall state at the hearing of the application the reasons for its decisions and shall include in the record of the proceedings a statement of all the facts relevant to its decisions and the reasons for its decision.”

3. This need not be an elaborate thing, but the Authority needs to say how they arrived at the conclusion they did. That should not have been difficult to do in this case, as they adjourned for several days, it appears, to consider the matter. As it is, all the record does is record that the two lay members of the panel were in favour of the grant of the renewal. That was not something that in fact needed to be recorded - the voting of the Liquor Licensing Authority does not have to be on the record. What does need to be on the record are the reasons that led them to their conclusions. As it is, all the record says is –

“The panel finds that the application for renewal is granted.”

That is not a finding - that is an outcome. What was required was their findings that led them to that outcome.

4. Because the statute requires reasons; because none were given; and because in the absence of reasons I cannot assess whether the panel properly discharged its functions, I think that the failure to give reasons is fatal to the license. It is not for me to substitute my judgment on the issues or facts for that of the Liquor Licensing Authority. The grant

or refusal of licenses is a task given to them by statute, and, notwithstanding some of the wording of the statute itself, I do not think that it is for this Court to usurp those functions, except perhaps in the clearest of cases. I therefore think that the matter should be remitted to the Liquor Licensing Authority for consideration by another panel pursuant to subsection 24(2) of the Act.

5. In remitting the matter so, I give the following further guidance:

(i) In my judgment the order of witnesses was a matter for the Liquor Licensing Authority and the order adopted in this case was not necessarily wrong, and I would not have interfered on that ground.

(ii) I think that the laptop recording that Mr. Haire attempted to enter into evidence should have been admitted, and, given that he was not represented, it should have been admitted at the late stage at which he attempted to put it in. Once admitted, it is of course for the panel to evaluate that evidence. It is for them what they make of it and, not having heard it, I say nothing further about what weight should be given to it.

(iii) It is plainly in the interest of all the parties that this be resolved swiftly, I therefore order that the hearing should be expedited.

(iv) The hearing should be chaired by the Senior Magistrates as required by section 4(1) of the Act, or by the appropriate Deputy Chairman as is also dealt with in sections 4(2) and 4(3) of the Act. If the Senior Magistrate is absent it is the Deputy Chairman who should act as Chairman, not an Acting Magistrates.

(v) I respectfully reject the submission made by Mr. Rochester that section 15(1)(a)(iv) is limited by the list of particular matters. I do not think that it is so limited. I think that it is framed in broad terms and the consideration of whether or not there is a sustainable objection should not be restricted to things like noise, traffic

flow, trash and disturbance from alcohol consumption, but should extend to all relevant licensing considerations. I cannot give a comprehensive definition of what are relevant licensing considerations. I can say, however, that (as indicated above) the alleged equitable fraud in the grant of the lease of 6 January 2007 to Mr. Lopes for \$1 is not a relevant licensing consideration. It may be relevant to some other action or dispute between the parties before some other tribunal, but I say nothing about that.

6. So, I remit the matter. Having read the statute, it does not permit me in remitting the matter to quash the existing license. If one looks at the powers of the Court in section 24 it says:

“(2) In determining an appeal under this section the Supreme Court may dismiss the appeal or may allow the appeal; and where the Court allows an appeal it shall remit the matter to the licensing authority with a direction, as the case may be —

- (a) to grant or transfer the licence which the licensing authority have refused to grant or transfer; or
- (b) to grant or transfer the licence subject to such conditions as the Court may direct; or
- (c) to cancel the grant or transfer of the licence which the licensing authority have granted or transferred,

and the licensing authority shall comply with any such direction:
Provided that where an appeal is allowed on the ground that the licensing authority erred on a material question of law, the Court may remit the matter to the licensing authority with a direction to rehear according to law the application for the grant or transfer of the licence.”

7. I consider failure to give reasons is an error on a material question of law. It is on that basis that I remit the matter. It does not appear from the statute that in doing so I can tell them to cancel the license. It seems to me therefore that the license stands until the authority has re-heard the matter.

8. [*Following argument on costs*] I want to ascertain what the past practice has been before I make a final decision on costs. I am going to postpone a decision for seven days. During that period if any of you wish to make short submissions, and I mean

short, in writing, citing authority, you may do so provided you copy it to everyone else. At the conclusion of seven days I will deliver a decision. I only want submissions if you have authority to refer to - I have already heard your general arguments. But if there is any authority, either here or abroad, that you want to draw to my attention you may do so within the next seven days. Is that acceptable to everyone? I will then rule in writing and send it out to you.

Dated the 16th day of September 2008.

Richard Ground
Chief Justice