

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

**C.I.C.A. NO. 14 OF 1998
(GRAND COURT CAUSE NO. 44 OF 1998)**

BETWEEN:-

JACQUES SCOTT & COMPANY LIMITED

Appellant

- and -

RENARD MOXAM

Respondent/
Plaintiff

- and -

THE LIQUOR LICENSING BOARD

Respondent/
Defendant

BEFORE: The Rt. Hon. Edward Zacca, President
The Rt. Hon. Telford Georges, and
The Hon. James Kerr, Justices of Appeal

Pierre Lamontagne QC for the appellant instructed by Messrs. Charles Adams Ritchie & Duckworth.

Raymond Alberga QC and James Chapmann for the respondent Renard Moxam instructed by Messrs. Ian Boxall and Company.

The respondent, The Liquor Licensing Board, did not appear and was not represented.

Heard on the 10th, 11th and 12th days of August 1998. Decision delivered on the 30th day of November, 1998.

JUDGMENT

This is an appeal from a judgment of the Grand Court setting aside a decision of the Liquor Licensing Board (the Board) refusing to grant an application by the respondent,

Renard Moxam, for a package licence in respect of an outlet in the Anchorage Centre. The application was remitted to the Board for rehearing.

The package licence sought was for the sale of unopened packages of alcoholic beverages duty-free to tourists only. Customers would select purchases from samples at the outlet and the purchases would be delivered to them on board ship from a bonded warehouse operated by the applicant. The applicant did have a licence to operate a bonded warehouse.

Before the Board there were some 18 objectors opposing the grant of the licence (including the appellant). The basis of their objections is substantially set out in an affidavit dated 25th August, 1997 by Charles Adams Ritchie & Duckworth, attorneys-at-law for the appellant.

In essence it was contended –

- (1) Mr. Moxam's application was in actual fact an application on behalf of Island Companies Ltd. (ICL).
- (2) ICL was a foreign controlled company. Mr. Moxam owned 24% of the shares and Nuance International Trading Ltd. owned 51% of the shares.

Additionally the objectors stated that Nuance was the duty-free merchandising subsidiary of Swiss Air. As such it had a bulk purchasing power which would enable it to purchase stock at prices much lower than its competitors – individual Caymanian enterprises. Nuance could as a result sell at prices with which they could not compete. The retail trade in the Caymans should be reserved for local traders and not opened up for entry to large foreign conglomerates.

Mr. Moxam, the applicant, gave evidence in support of the application. He was extensively questioned as to his ownership of other retailing businesses particularly those in which ICL was concerned. It was not suggested that he was not of good character but

it was suggested that ICL had operated businesses in circumstances in which, as a foreign controlled company, it had been in breach of the Immigration and Business Licence laws.

His principal witness was Nadine Anne Marie Erskine who testified as to a survey she had conducted among cruise ship passengers to determine whether they

“would visit with the intention of purchasing alcohol products such as Rums, Wines, Whiskeys and Cognacs and various liqueurs on a DUTY-FREE basis is such products were made available to you from a convenient location such as the Anchorage Shopping Centre.”

Miss Erskine was not a statistician. She had had no training in the conduct of such surveys. She had not drafted the question nor did she know who had. The Board concluded that it could only give little weight to the survey as evidence that the premises were situated at a location where they would be of service to the public. Using their detailed local knowledge of the existing duty free package licences on the waterfront they were satisfied that neighbourhood of the Anchorage Centre in particular needed no more premises for duty free package licences. It followed that they were not satisfied that the premises in respect of which the application had been made was situated at a location where they would be of service to the public. Accordingly they refused the application.

From this decision Mr. Moxam sought relief by way of judicial review from the Grand Court. He was successful in having it removed to the Grand Court and quashed. The application was remitted to the Board for continuation of the hearing.

In his judgment the Grand Court Judge concluded that the substitution of the word “may” in the Liquor Licensing Law 1996 Revision (the Law) for the phrase “in the entire discretion” of the Board in section 12(1) Liquor Licensing Law 1955 must have been intended to restrict the discretion conferred in Section 12(1) of that Law. Emphasis was placed on the statement by Lord Bramwell in Sharpe v Wakefield [1886- 90] All E.R. 651 at p. 655 that

“Houses of public entertainment and for the sale of drink have been in this country and in many others the subject of regulation for police purposes: not for what may be called economic purposes, like the fixing of the price of bread, or the wages of labour. Normally the buildings themselves, their character, their number and their neighbourhood have been considered as well as the persons who should be permitted to carry on the trade of business.”

The judge cites section 9(2) of the Law –

“in considering the suitability of premises for service to the public, Boards shall have regard to any representations made by or on behalf of the Commissioner, the Chief Medical Officer, the Chief Fire Officer and the Executive Secretary of the Central Planning Authority as well as members of the public who may be directly affected by the grant of a licence.”

He held that the Board’s discretion could not go beyond the criteria set out in that subsection in considering the suitability of the premises for service to the public.

He concluded that the Board had inserted the concept of “need” into its decision which was a fatal error.

In his view Mr. Moxam was shown by the record to have satisfied all the criteria set out in section 8. He was shown further to have satisfied the criteria set out in section 9(1)(a)(b)(c) and (e). This was a finding contrary to that made by the Board.

The obtaining of a licence authorising the selling or bartering of intoxicating liquids has been the subject matter of statutory control since 1955. The Liquor Licensing Law passed in that year is to be found in Volume 2 of the Revised Laws of the Cayman Islands (1963) Chapter 87.

The relevant sections are section 4(1), 12(1) and (13) and 14(1). These read –

“4(1) Any person who desires to obtain a licence under this law shall apply for a certificate of his fitness to hold a licence and as to the suitability of the premises sought by him to be licenced, and such application shall be heard in open Court at a Licencing Session.

12(1) Subject to the provisions of this Law, the granting of a certificate shall be at the entire discretion of a Licensing Board and upon such conditions as the Board may determine...

13 The Licensing Board shall not grant a certificate unless the applicant therefore satisfies the Board –

- (a) that the applicant is of good character;
- (b) that the applicant is not disqualified from holding a licence;
- (c) that from the general nature of the locality in which the premises sought to be licensed are situated, it is not for any reason undesirable for a licence to be granted in respect thereof; and
- (d) the said premises are suitable for the purpose.

14(1) Any person who has obtained the approval of the Licensing Board for the issue to him of a license under this Law shall, on application to the Administrator, and on payment of the fee prescribed in this Law be granted a licence.”

Such is the language of section 12(1) above that it was not and indeed could not be contended that the granting of a certificate under that Law was not in the entire discretion of the Board. That is clearly correct. The fact that section 13 specified certain prerequisites on which the Board had to be satisfied before it could issue a certificate did not in any way limit the discretion conferred by section 12(1). If the prerequisites set out in section 13 were not complied with, then the question of exercising the discretion

conferred in section 12 would not arise. If they were satisfied, then the grant of the certificate would be in the “entire discretion of the Board”.

The current law governing the issued of liquor licences is The Liquor Licensing Law (1996) Revision (“the Law”). The relevant sections are sections 5(1), 8(1)(2)(3) and 9(1) and (2). Section 8(2) and (3) deal with vessels and need not be set out. The other sections read –

- “5(1) A Board shall hear and deal with all applications and matters relevant thereto and may grant, renew, vary or revoke any licences. [emphasis supplied]
- 8(1) A Board may not grant a licence to any person unless it is satisfied that such person is –
 - (a) of good character, and exhibits to the Board a certificate signed by the Commissioner showing his record of criminal convictions, if any, over the preceding fifteen years;
 - (b) over the age of twenty-one years;
 - (c) of sufficient business capability to understand and comply with this law; and
 - (d) has paid the fee prescribed for the grant of a licence.
- 9(1) A Board may not grant a licence unless satisfied that the premises in respect of which the application is made-
 - (a) have exits plainly marked and lighted;
 - (b) have an adequate fire extinguishing system;
 - (c) comply with the laws and regulations affecting building, town planning and public health;
 - (d) are situated at a location where they will be of service to the public; and
 - (e) will not cause inconveniences to the occupiers of neighbouring property.
- (2) In considering the suitability of premises for service to the public, Boards shall have regard to any representations made by or on behalf of the Commissioner, the Chief Medical Officer, the Chief Fire Officer and the Executive Secretary of the Central Planning Authority as well as members of the public who may be directly affected by the grant of a licence.”

The language of section 12 of the 1955 law differs obviously from that of the 1996 Revision. In the 1955 Law the fact that the Board has a discretion is set out in dramatic language. The granting of a certificate “shall be at the entire discretion” of the Board. The language of the 1996 Revision is spare – “The Board may grant” any licence. The

effect is however the same – the conferment of a discretion. As has been noted that the apparently broad discretion conferred by section 12(1) of the 1955 Act arises only if the prerequisites set out in section 13 of that Act have been met.

The construction of the word “may” and the phrase “it shall be lawful” was discussed and settled in Julius v Lord Bishop of Oxford and Another [1874 – 80] All E.R. Rep. 43.

The words under consideration in that case were “it shall be lawful” but the conclusion applied equally to the word “may”. The head note reads –

“The words “it shall be lawful” in a statute are plainly and unambiguously merely permissive, empowering and conferring on the person named a right to do a specified thing, but where the object of the enactment is to effectuate a legal right, whether public or private they are to be construed as compulsory. This is equally the case where the enabling power is given by the word “may”.

Accordingly, in our view, the sections of the 1955 Law and the 1996 Revision produce precisely the same result. A general discretionary power is conferred by the empowering sections and the later sections impose limits on that discretion by prescribing prerequisites of which the Board has to be satisfied before the power can be exercised. It is not the case that once the prerequisites have been satisfied then the Board must grant the licence. The discretion remains and can be exercised on appropriate grounds, subject of course, to judicial review.

There are circumstances in which the word “may” will be interpreted as imposing a duty to act. In Julius v Lord Bishop of Oxford and another (supra). Earl Cairns L.C. stated at page 47 –

“But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.”

The principle is again stated at p. 49 -

“The cases to which I have referred appear to decide nothing more than that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised.”

The grant under the Act of a licence to sell spirituous liquor does not fall into that category. There is a duty on the Board to hear the application but merely a discretion to grant it.

Although there was reference to the legislation in England governing the grant of licences, our attention was not drawn to any sections comparable to section 13 of the 1955 Law set out above or sections 8(1) and 9(1) of the Law (the 1996 Revision). This is not surprising. The requirements under section 8(1) are so basic that it is inconceivable that anyone who fails to fulfill any of them could nonetheless be granted a licence on the judicial exercise of any discretion to grant a licence. The applicant must be of good character and produce a certificate showing his record of criminal over the preceding 15 years; the person must be over the age of 21 years; be of sufficient business capability to understand and comply with the law and must have paid the prescribed fee for the grant of the licence. Evidence establishing these matters would be simple and raise no serious problems of evaluation.

Section 9 of the Act deals with matters relating to the building being licensed. Subsections (a)(b)(c) deal with issues of physical layout – plainly marked and well lighted exits, an adequate fire extinguishing system and compliance with the laws and regulations effecting building town planning and public health. None of these would be likely to raise difficult questions of proof.

It is otherwise with subsection (d) and (e) – that the premises are situated in a location where they would be of service to the public and would not inconvenience occupiers of neighbouring property. These are difficult matters involving evaluation of evidence and exercise of judgment. The applicant correctly appreciated that he would have to satisfy the Board that at their location the licensed premises would be of service to the public. He led evidence of a survey to establish this. The Board did not accept that evidence for reasons that seem sound. It had not been carried out in a scientific manner.

Mr. Moxam testified that the volume of the cruise ship trade was steadily increasing and could be expected to continue to do so. A publication by the government outlining Tourist Management Policy 1995 – 1999 stated that it was necessary to continue the policy that limited cruise ship passengers 5,500 to 6,000 berths per day “in order to ensure that the greater George Town area is not adversely effected (sic)”.

On that evidence the Board concluded –

“Taking into account the evidence and the reported cases quoted the Board members are satisfied that the neighbourhood of the Anchorage Centre in particular needs no more premises for duty free package licences (s.10(3)L.L. Law) other than those already licensed and it follows that the Board is not satisfied that the premises in respect of which the application is made are situated at a location where they will be of service to the public. Accordingly the application is refused.”

This was a process of judicial review not one of appeal involving a rehearing. The Board was the body in which the Legislature had vested the power to deal with the licensing of outlets for the disposition of alcoholic beverages. Once there was evidence to support a factual decision which the Board had reached there could be no justification for reversing it. Findings of fact were the domain where a tribunal could fairly expect to be master in its own house. It seems clear on a reading of the judgment that the Grand Court judge substituted his evaluation of the evidence for that of the Board.

A great deal of argument was addressed to the purposes intended to be served by liquor licensing laws. In that regard there was reference to the history of the liquor licensing laws in England. An extract from Patterson's Licensing Act (1998) 10th Edition was among the authorities in the bundle. The earliest legislation there was in 1495 and a system for licensing ale houses was created in 1552. The earliest legislation in the Cayman Islands was in 1955 and applicable to a very small community in which the seeds of the present development had not yet shown signs of sprouting. The likelihood is that drawing any such analogy would be misleading. The provisions of section 13(c) give some indication of the purpose intended to be served –

“that from the general nature of the locality in which the premises sought to be licensed are situated it is not for any reason undesirable for a licence to be granted in respect thereof.”

A major revision was carried out in 1974. The Memorandum of Objects and Reasons reads –

“The Liquor Licensing Law has been amended six times since revision and some of the provision thereof have become too complicated for effective control to be maintained, having regarded to the limited law enforcement services available in the Islands.

The law provides for the compulsory use of common capacity measure in all bars, the labelling of containers containing certain spirits to show the specific gravity of the contents and to make the clear display of price lists obligatory. Where liquor is sold on draught, it would be required to be sold in drinking vessels of recognized capacity, measures being based on the imperial pint.”

The second paragraph is clearly concerned with consumer protection and revenue collection. Although there is reference in paragraph 1 to “law enforcement services” the emphasis is on the policing of the Law itself rather than general law enforcement.

The purpose for the regulation of the grant of licences can be gleaned from section 9(1) of the Law which reads in part –

“The Board shall not grant a licence with reference to any premises unless satisfied that the premises to be licensed are situated at a location where they will be of service to the public and will not cause inconvenience to the owners or occupiers of adjoining property.”

The emphasis again is not on maintenance of general public order which was one of the factors underlying the early English legislation but rather on ensuring that there was no proliferation of licences and no nuisance to neighbours. This is a factor to which Lord Bramwell referred in the passage cited above. After stating that the regulation of houses of public entertainment and for the sale of drink were imposed for purposes of maintenance of public order he continued –

“Naturally the building themselves, their character, their number and their neighbourhood have been considered.” [emphasis supplied]

This is supported by a regulation made in 1979 – the Liquor Licensing (Distribution of Licences) Regulation 1978 paragraph 3 of which sought to prescribe a rigid mathematical standard. In considering whether a licence would be of service to the public –

“the Board shall determine that such premises are not so situated if at the time of application of the number of licences [other than distributors licences and hotel licences] in force in respect of premises in the electoral district which the premises referred to in the application are situated exceeds one for each 250 persons shown on the Register of Voters for the time being in force for that district.”

This was repealed in 1955 but its enactment indicates that the executive authorities considered the concept of being of service to the public to involve the number of licences in relation to the population of the area. The phrase remains unchanged in the 1996 Revision.

The Board accepted Captain Hamaty's evidence as to the locations of duty-free package licences on the waterfront. They were aware of the number from their own knowledge having granted them or reviewed them. They were satisfied that no more were needed and concluded that an additional licence would not be of service to the public because the area was adequately served.

It was unfortunate in this case that the objectors raised objections of importance to them but totally irrelevant in relation to the consideration which could be taken into account in deciding on the grant of a licence. There is nothing in the reasons given by the Board which could indicate that the Board took these matters into account or allowed them to affect its decisions.

The appeal will be allowed and the decision of the Board restored.

The respondents will pay to the appellants the costs of this appeal and of the proceedings in the Grand Court.


ZACCA, P

GEORGES, J.A.


KERR, J.A.