CJ
26.5.98

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 44 OF 1998

IN THE MATTER OF AN APPLICATION BY MR. RENARD MOXAM AND IN THE MATTER OF THE LIQUOR LICENSING LAW (1996 REVISION)

BETWEEN: RENARD MOXAM
Applicant

AND: THE LIQUOR LICENSING BOARD
Respondent

APPEARANCES: Mr. R.A. Alberga Q.C., and Miss Sherri Bodden of Ian Boxall and Company for the applicant Renard Moxam.

Mr. Pierre Lamontagne Q.C., instructed by Charles Adams, Ritchie & Duckworth for Jacques Scott Limited.

Mr. Peter Broadhurst of Collins Broadhurst & Furniss for Mr. Robert Hamaty of Tortuga Rum.

Mr. Steven Hall-Jones, Senior Crown Counsel for the Liquor Licensing Board.

THE FACTS

1. On the 5th August, 1996 Renard Moxam, the applicant, applied to the Liquor Licensing Board for the grant of liquor license under S10(1)(b) of the Liquor Licensing Law (1996 Revision). The application was for a "package license" that is to say, a license to sell sealed packets of alcoholic liquor on a retail basis to cruise ship passengers. That

limitation on the terms of a normal liquor license was accepted by the applicant and arises under S10 (1)(b) of the law.

2. The premises sought to be licensed are situated in the Anchorage Center, George Town, Grand Cayman. This is a modern and impressive location in a prime part of the waterfront region of George Town, ideally designed to serve cruise ship passengers in their perambulation round the many shops which sell prestigious and expensive duty-free items of all descriptions. Objections to the application were lodged before the Board under S17(1) by a considerable number of trade competitors and other local business people. Due to a number of circumstances, great delays took place including an adjournment pending the decision of the Grand Court on an appeal against the Immigration Board's decision to grant a license to the Island Companies Limited in respect of a wholly owned subsidiary company with whom it was alleged this applicant was associated. In the event, this application was not heard until the 5th September, 1997, 1 year after the application was made. This was most unfortunate.

3. It was claimed by the objectors that the applicant's character was inappropriate for him to be granted a license. S8(1)(a) of the law defines "character" as, in effect, of the absence of previous convictions for fifteen years prior to the making of the application. His "bad" character, in the sense that he had committed undetected crimes within the fifteen year period could, of course, be established by strictly admissible evidence but, such a claim would have to be very carefully dealt with remembering that a higher standard than that of the "balance of probabilities" would have to be observed. I respectfully adopt the dicta of Lord Nichols of Birkenhead in **Re H minors [1986] AC pp 586 & 587** in which the standard of proof in non-criminal proceedings is dealt with in an authoritative and helpful manner. Only evidence that was strictly admissible could be received. Despite that he was assailed by counsel, two particular counsel, as being the representative of a foreign owned company which was seeking to take over large portions of the Cayman economy. How these objections were even considered by the Board is a matter of concern. Objector after objector gave sworn evidence of that type. In particular Mr. Pierre Lamontagne Q.C. on behalf of Jacques Scott Ltd. and Mr. Wade DaCosta on behalf of eighteen applicants constantly attacked Mr. Moxam under the guise of a legitimate inquiry into his character.

I have already defined the limited nature of character under S8(1)(a) of the law. A good example of this type of evidence was "we do not want to be hopeless strangers in our own land like Native Americans". The learned chairman made no attempt to restrain this type of evidence nor of counsel seeking to present it. I will say more in relation to that topic at the end of my judgment. I will further make suggestions as to how such events may be prevented in the future. The real group of objectors were of the more traditional kind, such as Mr. Robert Hamaty and Mr. Stanley Wight. They had both interests in duty free "package" outlets. They gave evidence as to the level of cruise ship landings and the possible decline of such trade. They further gave evidence to the effect that the existing outlets for duty free liquors on the waterfront already met a saturated demand. This evidence was often couched in terms of the fear of further competition but was evaluated by the Board and in the written judgment of the legally qualified chairman as demonstrating that the premises sought to be licensed were situated at a location where they would or would not be of service to the public. It was entirely within the province of the chairman of the Board and it's members to interpret that evidence in whatever manner they chose to do so, so long as it complied with S9 of the law. The Board heard the

evidence of Nadine Ann Marie Erskine who carried out a survey on a number of cruise ship passengers from the end of 1995 to the early part of 1996. They were asked if they might find it convenient to shop at the Anchorage Center and to buy packaged intoxicating liquors from that location. Two thousand one hundred and twenty-nine said "yes", and ninety-three said "no". The Board were not satisfied with her evidence as she did not record the age or sex of the respondents, she had no previous experience in market research and, crucially she did not record the number of "don't knows". In the event, the Board rejected her evidence as unsatisfactory as, having seen her, they were entitled to do. Had the evidence been better presented and more fully researched they might have found that a significant number of cruise ship passengers would have found the proposed premises to be of service to them; they being the relevant "public to be condsidered. The final passage of the chairman's judgment dated the 24th October, 1997 reads:-

> "The premises in respect of which the application is made at the Anchorage Center have not been previously licensed. Taking into account the evidence and the reported cases quoted, the Board members

are satisfied that the neighborhood of the Anchorage Center *needs no more premises for duty free package licenses or package licenses (S10 (3) Liquor Licensing 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 dismissed."

A letter was addressed to the Chairman on the 4th April, 1997 asking for "...written reasons for the decision reached". This letter was written by Miss Sherri Bodden the attorney for the applicant. The chairman, rather surprisingly, replied to that letter instead of rejecting that request. He had delivered his judgment in full but chose to answer the letter from Miss Bodden in the following terms. That letter is dated 6th November, 1997.

"The reason that the Board found that the premises in respect of which applications were made were not:

S9(1)(d) situated at a location where they will be of service to the public:

And they refused it for the reason and for no other than they thought the neighborhood does not need it. See Lord Bramwell's speech in **Sharpe v Wakefield and others (1996-90 All ER 651)** which Senior Counsel Mr. Ramon Alberga Q.C. submitted applied to the Cayman Islands". This letter revealed the intellectual basis for the conclusion reached by the Board.

It is that decision which is the subject of this application by Mr. Moxam for judicial review. On the 21st January, 1998 I granted leave to seek such a review. The relief sought in the application is:

(1) An order for *certiorari* to remove into the Grand Court of the Cayman Islands to quash the said decision of the Liquor Licensing Board whereby the Board refused the application for the grant of a package license to the applicant.

(2) An order for *mandamus* to oblige the Board 'to formally reconsider' that decision in accordance with the Liquor Licensing Law (1996) Revision.

(3) A declaration that the refusal to grant the license is void and/or unlawful and/or:

(4) A declaration that in the light of the only reason given by the Board for refusing the license the applicant was and is entitled to the grant of a package license.

(5) Damages.

(6) Costs.

(7) Further and other relief.

4. THE LAW

The Liquor Licensing Law (1996 Revision) has a very different parentage to the English Licensing Legislation as I will seek to demonstrate in this judgment. It is the history of this legislation which provides the Court with the most reliable guide to its interpretation in the absence of any preamble or memorandum of objects and reasons contained in the law. The first relevant piece of legislation is Chapter 87, the Liquor Licensing Law, promulgated on the 6th March, 1955.

Section 12(1) provided:-

> "Subject to the provision of the law, the granting of a certificate (in effect the License) shall be *at the entire discretion of a Licensing Board and upon such conditions as the Board may determine.*

Section 13 provided:-

"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 license:

(c) That from the general nature of the locality in which the premises sought to be licensed are situate it is not for any reason undesirable for a license to be granted in respect thereof, and,

(d) That the premises are suitable for the purpose.

By Section 3 of Law 17 of 1968 (e) was added to Section 13 reading:-

(e) "That the general public is not adequately served with licensed premises within the area in which license is sought."

In other words the concept of "need" was specifically brought into the statute for the first time. This amendment and its later repeal has obvious significance for the proper interpretation of the present law. Section 5(1) of the Liquor Licensing Law of 1974 provides:-

> The Board shall hear and deal with all applications for licenses and matters relevant thereto and *may grant, renew, vary or revoke such licenses.*

The present legislation dates from the Liquor Licensing Law of 1974. Sections 8 and 9 of that law were in terms which are to all intents and purposes identical with the modern sections also so numbered. Those sections appear in the Liquor Licensing Law of 1995 and the Liquor Licensing Law (1995 & 1996 Revision). It is important to note that the wide-ranging discretion, as I find it to be, which appeared in S 12(1) of Chapter 87 was repealed. The present sections of the 1996 Revision first appear in Section 5 of the Liquor Licensing Law of 1974. It provides:-

(1) A board shall hear and deal with all applications and matters relevant thereto and may grant, renew, vary or revoke any license.

(2) In hearing an application a board shall:

(a) Sit in a place open to the public

(b) Hear on oath every person who desires to be heard on any matter relevant to an application, and

(c) Record a summary of the evidence given before it.

The words "may" and "shall" have obviously different meanings "may" is *prima facie* permissive, "shall" is *prima facie* mandatory. I not that the word "may" appears in S9(1) of the 1996 Revision but attribute that to a drafting error. The key question posed by this application is the degree of discretion permitted to the Board by the use of the permissive "may" in Section 5. It is plain that the legislature must have intended a restricted meaning to be attached to the discretion conferred in the event that its emergence in the legislation is coterminous with the abolition of the wide-ranging discretion contained in S 12(1) of Chapter 87. That it cannot encompass the question of "need" is demonstrated by the repeal of the new

paragraph (e) in the 1974 legislation. It is impossible to accept the proposition that the legislature intended the concept of "need" to re-emerge by use of the permissive "may" in view of the specific repeal of Section 13(a). The learned Chairman of the Board had the case of **Sharpe v Wakefield and Another [1886-90 All E.R. reprint] p 651** cited to him as representing the state of the law as to the Board's discretion. This was a decision of the House of Lords in which the licensing Justices had refused the renewal of a license under S 1 of the Alehouse Act 1828 which provides:-

> It shall be lawful for the Justices...to grant licenses ... as the said Justices shall, *in the execution of the powers herein contained and in the exercise of their discretion, deem fit and proper.*

> The equivalent provision of Section 3 of the Licensing Act 1964 reads:-
>
> The Justices may "grant a justices license..."as they think fit and proper."

The licensing Justices were given a very wide discretion by S1 of the Alehouse Act 1828 and may or may not have as wide a discretion under S3 of the Licensing Act of 1964; that is not

for me to say. What is patent is that the degree of discretion given to the Licensing Justices is very much wider than that envisaged by the present Cayman Legislation. Their Lordships in **Sharpe v Wakefield** held that the licensing Justices had a complete discretion in deciding whether to renew a license provided that discretion was exercised judicially. To quote Lord Bramwell:-

> "Houses of public entertainment and for the sale of drink have been in this country and in many others been the subject of regulation for police purposes. Not for what one may call economic purposes like the fixing of the price of bread, or the wages or labour, *but for the maintenance of order*. Naturally 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 or business. That certainly has been the case in England; and it is undoubtedly so now with respect to licenses granted to sell drink on premises for the first time. This is so clear that learned counsel for the appellant have not contended to the contrary. If an application is made for a license to sell drink on premises

not before licensed it is certain that the Magistrate may refuse it and may refuse it, for the reason and no other than that they think the neighborhood does not need it – that none is needed, or none in addition to the houses already licensed."

The concept of the off-license did not then exist. His Lordship was not clearly envisaging the concept of the sale of sealed packages of intoxicating liquor to cruise ship passengers for consumption on ship or without the Cayman Islands in 1997! Lord Hannon said, referring to

R v The Lancaster Justices Re Tysons Appeal (1870 L.R. 6 QB 40)

"It was long ago decided, I think rightly decided, that the justices were entitled and bound to consider the needs of the neighborhood on an application for an license to a person seeking to keep a house for the sale of excisable liquors and that their discretion is equally wide in the case of a person already keeping such a house as in one where the application is by a person not before licensed."

His lordship did not define what he meant by the "needs of the neighborhood" and did not dissent from the views from Lord Bramwell whose speech was delivered after that of the Lord Chancellor and before his speech. I therefore conclude that the relevant words of the English statute dating from the old Alehouse Act up until the modern times, using as it does, the words "as they think fit and proper" confers a far wider jurisdiction on the licensing Justices in England and Wales than does S 5 of the Cayman Law. It is in that context that the oft quoted words of Lords Halsbury, Bramwell and Hannon must be considered when seeking guidance as to the interpretation of the words "may" in S 5 of our law. In **Graham Thompson and Associates v The Liquor Licensing Board and the A-G (1988-99 CLR at page 31)** Collett C.J., as he then was, following **Sharpe v Wakefield** said at page 31:

> "I have carefully considered the language and arrangement of the Liquor Licensing Law of 1985 and have reached the conclusion that it was the intention of the legislature thereby to invest the Grand Cayman Liquor Licensing Board with a *wide discretion analogous to that vested in the*

United Kingdom licensing Justices by their comparable legislation. At the same time I respectfully adopt Lord Bramwells exposition of the purpose for which the discretion is conferred as being the maintenance of public order rather than for any economic purpose".

He continued:

"It follows that in my view that it is not part of the function of a board exercising discretion under the 1995 law to have regard to the desirability or otherwise of restraining the exercise of free competition in the provision of intoxicating liquor by retail to the public between persons who and whose premises qualify for the grant of an appropriate license under S8 & 9. That would be an economic and social not a public order purpose and I hold it to lie outside the ambit of discretion invested in these Boards."

While accepting the major part of His Lordships comments I must, with great respect to His Lordship, dissent from the views he expressed as to the degree of discretion he believed was

conferred on the Cayman Board. He found it to be analogous to that of the United Kingdom licensing Justices. His view was, in any event *obiter*; in that the decision of the Board was quashed by him due to breaches of the rules of natural justice and the purported exercise of a discretion for a purely economic purpose with which I respectfully agree. His Lordship's views on the extent of the Board's discretion are not binding on me as those of a Judge of equivalent jurisdiction and with great respect I find that the discretion of the Board in the Cayman Islands is very limited indeed. It is to be noted that sub- section (2) of Section 9 provides:

> "In considering the suitability of premises for a service to the public Boards shall have regard to any representations made 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 the License."

It is plain that the Board's discretion cannot go beyond the criteria set out in that sub-section in "*considering the suitability of premises for service to the public*"

Matters such as traffic, public health, planning considerations and public safety are specifically to be considered together with any nuisance likely to be caused to nearby traders and residents provided such representations are made to them. It is striking to re-read the dicta of Lord Bramwell in **Sharpe v Wakefield** in the light of the language of Sub-Section 2 of Section 9 of the Cayman Law.

At the hearing of this matter the applicant Mr. Moxam was shown by the record to have satisfied all the criteria set out in S8. He was further shown to have satisfied the criteria set out in S9 (1)(a), (b), (c) and (e). What the Board purported to do was to insert the concept of "need" into it's decision as to whether or not the applicant had established that the premises were "situated at a location where they will be of service to the public". In doing so the Board fell into serious error and fatally misdirected themselves as to the law in this regard. The rejection of the application was therefore wrong in law. They misled themselves as to the effect of the dictum of Lord Bramwell and the extent of their discretion. I have been urged by

Mr. Lamontagne Q.C. and Mr. Hall-Jones to interpret S5 in such a manner as to permit the Board to consider the concept of "need" when interpreting whether or not the location would be of service to the public. I find such an approach wholly illegitimate for the reasons I have already indicated and I decline to do so. Accordingly, I find that the judgment come to by the Board was fundamentally flawed and must be quashed. I order that the Board rehear the matter according to the criteria set out in this judgment. I shall hear submissions to what further and consequential orders I should make after the delivery of this judgment

5. **Procedure**

I now wish to turn to another topic, and I do so at the specific request of senior crown counsel, Mr. Hall-Jones to assist as a guide for further hearings of the Liquor Licensing Board. I am bound to say that with very great regret, I find that the proceedings before the Board were conducted in far too permissive a manner. Two counsel in particular were permitted to mount an attack on Mr. Moxam and his financial backers under the guise of the character rubric in S8(1)(c) of the law. It was the duty of the learned chairman to define the law in the

appropriate manner and to rule that such an attack on Mr. Moxam was wholly illegitimate and improper; he failed to do so. This must never happen again. It is of course for the Board to regulate it's own procedure, but in view of its failure so to do on this occasion, I propose to make some special recommendations as to how these matters may better be conducted in the future. I recommend to the Board that written submissions should be served whether by attorneys or lay objectors seven days before the hearing so that there can be a preliminary hearing, conducted by the legally qualified chairman, in which preliminary views as to admissibility are expressed. Of course decisions can only be made by a quorum of three, but it would be open to the legally qualified chairman to tell attorneys or lay objectors that on the face of it their objections do not comply with the criteria in S8 & 9 and are consequently inadmissible. The chairman has power to impose costs in certain conditions under S17(2) and it is my judgment that he should have at least considered making such orders in this case. He failed to do so. I strongly recommend some such procedure to be adopted to see to it that the events which took place in these proceedings never happen again. Many objectors dealt with their legitimate concerns that Cayman companies were being taken over by rich foreigners. The court understands such concerns but that is a matter for the legislature to change the law

if it thinks that that is appropriate. The Liquor Licensing Board is not to be permitted to be used as a forum for the debate of matters which are purely political. It is essential that proceedings of this nature are conducted in an orderly and fair manner as Mr. Moxam must have thought that the proceedings were very unfair indeed. It is essential that the lay members of the Board are not misled by inadmissible evidence and that applicants, especially those whose applications have been properly rejected, do not consider that their case has not properly been considered whatever the actual terms of the judgment. It is in that spirit that I have made these recommendations to the Board and more make the following orders.

1) An order of *certiorari* in terms of Sub-paragraph one of the prayer.

2) An order for mandamus requiring the Board to reconsider their decision on Sections 9(1)(b) of the Law in the light of the judgment of this court.

3) The matter is remitted to the Board for its continued hearing and determination at its next session in compliance with 2) supra.

4) The Respondents will each pay one-third of the applicants costs, to be taxed if not agreed.

The Hon. Mr. Justice Graham
Judge of the Grand Court

Dated this 26th day of May, 1998