

applicant company was concluded and Mr. Parker wrote on that day to inform the Chairman of the Board and to foreshadow a formal application for transfer of this licence. That letter was followed on 16th December 1986 by another letter from Mr. Pairaideau to the Chairman advising that the closing of the agreement was scheduled for 19th December 1986 and saying:-

" In view of this we hereby apply to have the package licence transferred to the following: Graham Thompson & Associates Ltd. trading as Red Rabbit Liquor Store, Brian Pairaideau General Manager".

To that application no reply was received until a letter dated 4th May 1987 from the Chairman to Mr. Pairaideau informing him that the matter had been considered at the quarterly meeting of the Respondent Board held on 26th March 1987 and that the application was not approved.

In his affidavit of 2nd December 1987 Mr. Pairaideau has deposed that, although no reply had been received from the Chairman on 19th December 1986, the parties to the agreement proceeded to complete the sale upon the understanding that for the time being Mr. Parker would continue as licensee and that, if for any reason the transfer was not approved, the parties would be entitled to rescind the sale. It is clear that no very long delay was anticipated by either Mr. Parker or the Applicant and the reason for that lies in the wording of S. 13 of Law No. 8 of 1985. This section invests the Chairman of a Licensing Board with authority in his discretion to grant an application to transfer an existing licence to a new licensee, subject nevertheless, to reconsideration by the Board at its next meeting of any such decision by the Chairman to grant such an application. Mr. Parker and Mr. Pairaideau seem to have proceeded on the erroneous assumption that the Chairman would exercise and indeed had exercised this power in respect of their application, whereas it appears from the affidavit of the Chairman, Mr. John Hurlston, that instead he caused the application to be published and put onto the Board's agenda for its next quarterly meeting and he did not at any time deal with it under the provisions of section 13.

Following that publication the Board received a letter of objection signed by four individual holders of other liquor licences under

Law No. 8 of 1985 objecting to the transfer of retail liquor licences generally to firms such as JAYSCO who are large wholesalers in the business and to the alleged unfair competition which this was said to generate: it referred to the proposed transfer of the Red Rabbit Licence as one instance of this practice. In paragraph 6 of his affidavit Mr. Hurlston frankly admits that the Board did take into account the subject matter of this letter at its meeting on 26th March 1987 at which the Applicant was neither present nor represented. It was, he said, a factor in the Board's decision to refuse the application although not the only one. Another factor to which the Board gave weight at the meeting was its perception that the Applicant had in fact been carrying on the business since the previous December without any transfer of the licence having been effected on an apparent assumption that the transfer would be "rubberstamped" by the Board instead of approaching the Board for approval in principle before completion of the sale of the business.

It is common ground that at no time prior to 26th March 1987 did the Board inform the Applicant of the terms of the letter of objection or afford it an opportunity to respond. Nor did the Board inform the Applicant of the adverse view which it took of the conduct of the Applicant in taking over the running of the business prior to consideration of its application. The applicant was afforded no opportunity of making representations to the Board concerning either of these factors adverse to its application. It is abundantly clear from a long line of authority stemming from the decision of the House of Lords in *Ridge v Baldwin* (1964) A.C. 40 that the requirements of procedural fairness, which is one of the rules of natural justice, require that a tribunal exercising statutory authority of the nature invested in the Cayman Islands Liquor Licensing Board are under a duty, firstly, to notify an applicant before it of the case made against his application and, secondly, to afford him a reasonable opportunity of answering it. That this is indeed the state of the law was rightly acknowledged by the learned Attorney General and conceded at the hearing of the Notice of Motion.

Subsequent to the receipt of the Chairman's letter of 4th May 1987 Mr. Pairaideau enquired of the Secretary to the Board, Mr. Rudy Selzer, as to the position of the licence in question, and according to his affidavit of the

2nd December 1987 which has not been contradicted, he was told that the premises were still licensed in the Receiver's name and the business could be continued pending a re-application. A second such application was in fact submitted and it was this second application which was considered and refused at the Board's next meeting on 26th June 1987. In the last paragraph of his affidavit Mr. Hurlston makes it clear that the same two adverse factors, the aspect of alleged unfair competition and the conduct of the Applicant in continuing to trade before a transfer had been approved, formed the underlying basis of the Board's second decision to refuse this application.

Although on this occasion the Applicant was represented at the hearing it does ^{not} appear that even by this date the applicant had either been furnished with a copy of the letter of objection to its earlier application or had been informed of the adverse view which the Board members had formed as to its conduct with regard to the carrying on of the business, a course of conduct which had been recommended to them by the Board's own secretary. I was therefore satisfied on the evidence and it was expressly conceded by the learned Attorney General that the Applicants on this occasion also were not ^{given} a fair opportunity to respond to the adverse factors operating on the minds of the Board members at that time in regard to the second application. In these circumstances it was apparent that a rule of natural justice binding on the Board had not been observed and that accordingly their decision could not stand.

It was for this reason that the orders of certiorari and mandamus sought by the Applicants were directed to issue at the conclusion of the hearing.

That, however, was not the end of the matter because, perhaps, with an eye to the future rehearing, Mr. Alberga for the Applicants relied upon a wholly separate ground involving the ambit of the authority of the liquor Licensing Board under Law No. 8 of 1985 upon which I was invited to give guidance as to the legal principles involved. Mr. Alberga submitted that upon an examination of the scheme and of specific provisions of Law No. 8

of 1985 the only matters which should concern a Board exercising jurisdiction under it are the qualifications of the applicant for a licence as specified in section 8 and the requirements for a licensed premises as specified under section 9. Once satisfied upon these two points, he submitted, a Board has no further discretion vested in it to take account of other matters such as those factors which motivated the Board in considering both of the Applicants present applications before it.

The Attorney General on the other hand drew attention to the permissive words "may grant" used in section 5 of the Law as well as to the fact that both sections 8 and 9 are couched in negative language which, on its face, only inhibits the Board from granting a licence if it is not satisfied of the specific qualifications and requirements without enjoining it to grant one if they are so satisfied. He drew attention to the similarity of the scheme and wording of this Cayman Islands statute to earlier legislation in the United Kingdom which the courts there have construed as conferring a wide if not unfettered discretion upon the licensing Justices to grant or refuse liquor licenses. Although that discretion must be exercised judicially, such Justices are not limited in the kind of objection which they can take into consideration such as a perception that there are already enough licensed houses in their district, or that the premises are too far removed from police supervision: see *Sharp v Wakefield* (1891) A.C. 173. In his speech at p. 182 of that report however Lord Bramwell stated the purpose of the discretion as being "regulation for police purposes; not for what one may call economic purposes like the fixing of the price of bread or the wages of labour, but for the maintenance of order". The width of the discretion was affirmed by their Lordships' House in *Boyle or Walsh v Wilson* (1907) A.C. 45.

I have carefully considered the language and arrangement of Cayman Law No. 8 of 1985 and have reached the conclusion that it was the the intention of the Legislature thereby to invest the 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 Bramwell's exposition of the purpose for which that discretion is conferred as being the maintenance of public order rather than for any economic purpose. While it is true, as was held in *R v Torquay Licensing Justices Ex parte Brockman* (1951) 2 K.B. 784 and in *R v Torbay Licensing Justices ex parte White* (1980) 2 A. E. R. 25, that a Board may lawfully adopt and apply a general policy with regard to the grant or withholding of licences, that policy in order to be valid, must relate to the purpose for which the discretion is conferred by the applicable statute.

It follows in my view that it is not part of the function of a Board exercising discretion under Law No. 8 of 1985 to have regard to the desirability or otherwise of restricting 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 the appropriate licence under sections 8 and 9. That would be an economic and social, not a public order, purpose and I hold it to lie outside the ambit of the discretion vested in these Boards even when applications for the initial grant of a licence are under consideration. Such considerations are equally irrelevant to the proper exercise of the discretion of a Board concerned with an application for transfer as in the instant case. I accept Mr. Alberga's submission that, if the Legislature had intended considerations of that nature to be taken into account by these Boards, it would have expressly so provided in the statute and it has not done so. Accordingly upon the reconsideration of the application made to it which this Court has directed the Respondent Board should take no account of the views which its members may have formed as to the desirability or otherwise of large wholesale concerns engaging in retail trade of intoxicating liquor in competition with others who are not wholesalers.

It remains to examine the legitimacy or otherwise of the Board having had regard to the view which they had formed of the conduct of the Applicant in carrying on the business of the Red Rabbit Store from 19th December 1986 without waiting for the grant of the transfer of the package licence which it had applied for and in reliance upon the cloak of the existing licence in the name of Mr. Parker, the Receiver. I did not understand Mr. Alberga to contend at the hearing that this was ever a lawful line of conduct and it is abundantly

clear that it is indeed unlawful under section 3 of Law No. 8 of 1985. A consideration of Halsbury's Laws of England 4th Edition, Vol. 26 para.351 and the wording of that section is sufficient to lead confidently to that conclusion. That being so it can hardly be contended that it is outside the scope of the wide discretion which I have held is vested in the Boards by the terms of the statute to have regard to the conduct of an applicant before it for the transfer to him of a licence in 'jumping the gun' and thereby for practical purposes evading the requirement of the Law for him to obtain the Board's approval of his application before the business is transferred to his management.

I have no doubt that there are mitigating factors present not least of which is the recommendation of the Board's own Secretary given after refusal of the first application. That was clearly erroneous and the Applicant cannot be criticised for having followed it. With regard to the conduct between December 1986 and March 1987 it can be contended that the Chairman of the Board contributed to the obvious misunderstanding which took place by failing to respond to the letters of 1st and 16th December 1986 sent to him. On the other hand it is a little difficult to understand why the Applicants were content to rely upon his silence in this respect over a period in excess of three months without following up their application by an inquiry to find out how it had fared at the chairman's hands.

Having held as I must do as a matter of law that the conduct in this respect was a relevant consideration for the Board in the exercise of its discretion in the present case, it is not for this Court to presume to dictate to the Board what weight, if any, they ought to place upon it when the application is duly returned to them for further consideration. The discretion is that the Board - not the Court - and it is right that with these observations in mind its members should approach the matter as far they are able to do so with quite open minds.

I would merely add in conclusion that the case law indicates what is I think quite logically evident, that upon an application for a transfer of an existing licence to a new licensee, the relevant considerations are likely

to be considerably narrower than upon an application for the grant of a new licence. The recent decision of the English Divisional Court in London Borough of Haringey v Sandhu and Another (Times Newspaper of 6th May 1987) is a good instance of that principle. I commend it as well as the other legal principles I have just discussed for the guidance of the Board.



G. Collett

Handed down on Thursday the 7th day of January 1988.