C H & D L Properties Ltd v Christchurch District Licensing Agency

High Court, Christchurch (CIV-2009-409-2906) 28 April;
Fogarty J 30 April 2010

Appeals from other Courts and Tribunals — Liquor Licensing Authority — Application to adduce further evidence on appeal — Whether leave appropriate — High Court Rules, r 20.16.

Evidence — Appeal — Application to adduce new evidence in appeal on question of law — Jurisdiction to admit further evidence — Whether leave appropriate — High Court Rules, r 20.16; Sale of Liquor Act 1989, ss 36, 139; Sale of Liquor Regulations 1990, reg 8.

The Liquor Licensing Authority allowed a renewal of the appellant's licence for a limited period. The appellant appealed to the High Court arguing that the Authority had erred in law. It applied under r 20.16 of the High Court Rules for leave to adduce further evidence on appeal falling into three categories: legislative materials, statistics, and substantive evidence relating to the subject-matter of the appeal.

Held, (1) rule 20.16 allows the possibility of evidence being adduced in an appeal on a point of law. The former r 718 referred only to further evidence in general appeals. In *Schier v Removal Review Authority* (cited below), the Court of Appeal recognised an inherent jurisdiction to consider the admission of new evidence in appeals on point of law in very special circumstances. (paras 12, 13)

Schier v Removal Review Authority [1999] 1 NZLR 703, (1998) 12 PRNZ 477 (CA), referred to

(2) Rule 20.16 has not displaced the reasoning of the Court in *Schier*; it recognises the inherent jurisdiction of the Court to admit evidence in appeals on points of law in very special circumstances. The High Court has permitted evidence in appeals on point of law relating to contextual background, rather than as a means of challenging the decision under appeal. (paras 33, 34)

Schier v Removal Review Authority [1999] 1 NZLR 703, (1998) 12 PRNZ 477 (CA), followed

(3) The legislative materials would be accepted not as evidence, but to resolve problems of statutory interpretation. Evidence in the second category would be admitted subject to the Court's decision on relevance. The remaining evidence, apart from a schedule containing statistical data, would not be admitted. (paras 45, 46)

Cases referred to

Carr v Ambler Homes (2009) 19 PRNZ 422 (HC)

Complaints Committee No 1 of the Auckland District Law Society v P (2007) 18 PRNZ 760 (HC)

H v Chief Executive Ministry of Social Development [2008] NZFLR 1069 (HC)

H v M-P HC Auckland CIV-2007-404-6512, 13 December 2007

Legal Services Agency v McDonald-Wright HC Wellington CIV-2009-404-6356 16 February 2010

Schier v Removal Review Authority [1999] 1 NZLR 703, (1998) 12 PRNZ 477 (CA)

Terrace Tower (New Zealand) Pty Ltd v Queenstown Lakes District Council [2001] 2 NZLR 388, (2000) 15 PRNZ 441 (HC)

The Woodward Group Ltd, Re LLA Wellington PH1415/2008, 3 October 2008

Reference

McGechan on Procedure para HR20.16.03

Application

This was an application for leave to adduce further evidence on an appeal.

G D S Taylor for appellant
K G Smith and *V Tuck* for first respondent
T J Mackenzie for second and third respondents

Cur adv vult

FOGARTY J

[1] The appellant operates a business in Christchurch trading as Victoria Night 'n Day Foodstore. It holds an off-licence under the Sale of Liquor Act 1989. The licence fell due for renewal on 5 September 2008. The licence permits trading at any time on any day. Renewal of the licence was opposed by the Christchurch District Licensing Agency inspector and by the New Zealand Police.

[2] The licence had been originally granted on the basis that the business was a grocery store meeting the requirements of s 36(1)(d)(ii) which provides:

> **36. Types of premises in respect of which off-licences may be granted**
>
> (1) Except as provided in subsections (2) to (5) of this section, an off-licence shall be granted only—
>
> …
>
> (d) In respect of—
>
> …
>
> (ii) Any grocery store, where the Licensing Authority [or District Licensing Agency, as the case may be,] is satisfied that the principal business of the store is the sale of main order household foodstuff requirements.

[3] The Liquor Licensing Authority concluded:

> [57] In our view the company is not a grocery whose principal business is the sale of main order household foodstuff requirements. It has no entitlement to having its off-licence renewed. However, given the extent of the opposition, and the consequences of a refusal, we have decided that the "reasonable" approach is to renew the licence for 18 months. This means that the licence will next fall due for renewal on 5 March 2010.
>
> [58] The company will be aware that any further renewal may attract opposition both as to the existence of the licence as well as the hours of operation. We are conscious that by taking this course of action we may be depriving the company of appellate rights. On the other hand the time may give the company the opportunity either to change the nature of the business, or accept what might be seen as a likely refusal to renew the licence, in which case there will be no further

renewal. The company may of course decide to re-argue the matter next year. At least it has now had a formal warning of the probability, that given present conditions, the application will be declined.

[59] Accordingly, and for the reasons we have attempted to articulate, the off-licence issued to CH & DL Properties Limited is renewed for 18 months to 5 March 2010.

[4] The appellant has appealed to the High Court arguing that the decision of the Licensing Authority is erroneous in point of law. Section 139 provides:

139. Appeal against decision of Licensing Authority on question of law

(1) Where any party to any proceedings before the Licensing Authority under this Act is dissatisfied with any determination of the Licensing Authority in the proceedings as being erroneous in point of law, that party may appeal to the High Court on that question of law.

(2) Subject to sections 140 to 146 of this Act, every appeal under this section shall be dealt with in accordance with rules of Court.

[5] By way of an interlocutory application pending the hearing of the appeal, the applicant has now applied to adduce further evidence on this appeal. The applicant relies on High Court Rule 20.16 which provides:

20.16. Further evidence

(1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal.

(2) In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.

(3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.

(4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[6] The applicant seeks to admit three categories of evidence.

[7] The first category is a collection of legislative materials not normally categorised as evidence for the purpose of the Evidence Act 2006. There is no issue taken with those. The second category is a collection of statistics issued by Statistics New Zealand. They cover the following topics:

(i) Industrial classification 2006.

(ii) Retail trade surveys July 2008 and November 2009.

(iii) Comparison of household spending patterns 1980 and 2008 CPI baskets.

(iv) Average weekly expenditure on food 1990 and 2001.

(v) Consumer expenditure 1990 and 2001.

(vi) Household economic survey years to June 2004 and 2007.

(vii) Housing statistics 1996 and 2001, household composition 2006.

[8] In addition to those statistics are some further statistics exhibited to the affidavit of Mr Timothy Morris.

[9] There is opposition to the use of the statistics.

[10] The third category is five affidavits described in the application as follows:

(a) Timothy Morris as to the changes over the last few decades in the structure of New Zealand food retailing, the types of outlets found in food retailing, and the pattern of purchasing at these different classes of outlets and, in particular,

the changes in types of outlets that are not supermarkets as defined in s 36(1)(b)(i) over the period since the Sale of Liquor Act 1989, the changes in purchasing patterns at food retail outlets, and the market identification of what are "grocery" sales outlets and "main order household foodstuff requirements".

(b) Andrew Peter Lane as to the Night 'n Day Foodstore franchise.

(c) Karina Kim Duthie as to the appellant's store (photographs).

(d) Murray George Devereux as to Octagon Night 'n Day Foodstore (photographs).

(e) Grant Hughes as to the operation the subject of the "Woodward" decision.

[11] Rule 20.16 dates from 2003. It likely follows upon the decision of the Court of Appeal in *Schier v Removal Review Authority* [1999] 1 NZLR 703, (1998) 12 PRNZ 477 (CA). There the Court of Appeal held that r 718, the predecessor to r 20.16, contained a power to receive new evidence but restricted to general appeals and did not extend to appeals on points of law only. The relevant reasoning of the Court of Appeal in the judgment of the whole Court, delivered by Keith J, provides at 705-706, 479:

> Part X of the High Court Rules governs appeals from the authority to the High Court; see s 115A(5) of the 1987 Act. Rule 718 regulates the hearing of the appeal and contains rules about the bringing of evidence before the Court. Some subclauses of the rule apply to "every appeal" while others relate only to "every general appeal". "General appeal" is defined in r 702 as excluding an appeal on a question of law only. Under r 718(3) and (4) the express power of the Court to rehear the original evidence or to receive new evidence is restricted to general appeals. That power does not extend to the present case being an appeal on a point of law only.
>
> That, says Mr Zindel for the appellants, is a gap which should be filled by the exercise of the power conferred by r 9 or in the exercise of the inherent jurisdiction of the High Court. We do not agree. There is no gap. Rule 718, along with the rules associated with it (such as r 715), deals in a comprehensive manner with the material and especially the evidence to be considered by the High Court on appeal. In particular, it distinguishes in a clear and principled way between the evidence relevant to an appeal confined to a question of law and that relevant to the broader range of matters which can arise when fact and discretion are in dispute on an appeal. In an appeal on a point of law the alleged error must be found in the reasoning of the Authority based on the evidence before it. A form of procedure *is* prescribed by the Rules for appeals on law only and r 9 cannot apply. As well it would be inconsistent with the Rules and the limited character of appeals confined to errors of law to apply the inherent jurisdiction to consider the admission of new evidence, in the absence at least of very special circumstances.
> (emphasis added)

[12] It may be noted that the last sentence recognises an inherent jurisdiction to consider the admission of new evidence in very special circumstances. That may be the reason why the rule was redrafted so that it included appeals on points of law.

[13] There is no doubt that r 20.16 allows the possibility of evidence being adduced in respect of appeals on a point of law. This has been done in two cases: *Terrace Tower (New Zealand) Pty Ltd v Queenstown Lakes District Council* [2001] 2 NZLR 388, (2000) 15 PRNZ 441 (HC); and in *Legal Services Agency v McDonald-Wright* HC Wellington CIV-2009-404-6356 16 February 2010.

[14] In *Terrace Tower* the Environment Court had imposed a requirement on a Frankton site in respect of which none of the parties had been given an opportunity to be heard. Chisholm J was asked to accept evidence from a landscape architect limited to describing the height and position of the landscaped earth mounding, and secondly, expressing opinions of the environmental effects. The Judge allowed

evidence only of the first of these two topics being the estimated maximum height of a mound above ground level. This was clearly simply to enable the Court to understand the nature of the requirement.

[15] In the *McDonald-Wright* case the issue was about a refusal of the Legal Services Agency to provide civil legal aid for Mr McDonald-Wright for the purposes of a Parole Board hearing. The Legal Aid Review Panel had reversed a refusal to decline legal aid by the Agency. The Agency was appealing the Panel decision to the High Court.

[16] The Judge allowed a backgrounding affidavit of Judge Carruthers explaining the workings of the Parole Board, providing a helpful context for the legal issues that the Agency now raised on the appeal. He allowed in an affidavit by Ms Fyfe, a Wellington barrister specialising in representing offenders before the Parole Board, although he had difficulty with its relevance but it might be a help understanding the context of the appeal, and he allowed an affidavit by Mrs Handy appending the Agency's own guidelines for the grant of civil legal aid for Parole Board proceedings.

[17] The issues raised by this application are significantly different than those confronted by Chisholm J and Clifford J in *Terrace Tower* and *McDonald-Wright*.

[18] Here in parts 2 and 3 of the application the appellant is seeking to place before the Court material which could have been placed before the Licensing Authority at the time of the application. Secondly, if the affidavits are to be allowed in then the first respondent wants to file competing affidavits, and will seek leave to cross-examine Mr Morris on his affidavit. Mr Taylor has indicated that if that is the situation he will seek to cross-examine Mr Heath the proposed deponent whose evidence is to be lodged to contradict the opinions of Mr Morris.

[19] Accordingly, if the appellant's application is successful this Court will on an appeal limited to questions of law receive evidence and have to make findings of fact on matters not canvassed before the Licensing Authority although they are matters very similar to the matters considered by the Licensing Authority in a series of decisions dating back eight years.

[20] Before going any further it is useful to explain the difficulty which has been facing the Licensing Authority and which will confront the High Court on appeal, as to the meaning and application of s 36(1)(d)(ii).

[21] This is a longstanding provision. It was first enacted 21 years ago, I am told by Mr Taylor. It is useful, however, to go even further back to the retailing of foodstuffs after the Second World War. At that time mothers commonly stayed at home. They did not work. They did not have cars. Family units typically had vegetable gardens. Meat was bought from butcher shops. Milk and bread were delivered daily. Mothers baked. They purchased foodstuffs from the grocer by telephone. The grocer's boy cycled a carton of foodstuffs to the house. Ice cream, milkshakes and small lines of confectionery were bought from dairies, which were originally licensed to sell milk. Grocery and dairy shops were the two categories for the retail sale of foodstuffs.

[22] As social conditions changed supermarkets began to appear. Eventually the ubiquitous corner grocery shop, usually the Four Square or IGA either closed down or turned into some kind of convenience store.

[23] We now have in New Zealand large supermarkets, small supermarkets, and a variety of other stores one could loosely call convenience stores.

[24] The problem is that the Sale of Liquor Act recognises only three categories: supermarket, grocery store, and dairy, (s 36(1)(d)(i), (ii) and s 36(3)(b)).

[25] To get an off-licence under s 36(1)(d)(ii) it is necessary for Victoria Night 'n Day foodstore to qualify as a "grocery store".

[26] Mr Taylor intends to argue that it does, using "ambulatory" statutory interpretation techniques.

[27] In recent times as I understand the case law so far, the Liquor Licensing Authority has been more restrictive in its grant of off-licences in respect of convenience stores, making it harder for such stores to qualify under s 36(1)(d)(ii). I also understand that so far the policy has been confined to not granting new licences and stores with existing licences have retained their licences.

[28] In this particular case, Mr Taylor argues that it came as a surprise to the licensee that there would be no further renewal, see [58] of the decision.

[29] He submits that had this outcome been predictable as a possibility, far more resources would have been thrown at the case than were.

[30] A lot of statistics of the turnover of the particular store were provided, pursuant to the Regulations, reg 8(2)(j). Requests for further information were received. But the applicant did not identify that this case was going to be treated by the Licensing Authority as to some extent a benchmark or test decision.

[31] It is a matter for Parliament whether or not there are appeals from statutory agencies. Typically Parliament provides one of three forms of appeal:

(1) An appeal on the merits, in either of two ways:

1.1 From the record of the evidence before the Agency; or

1.2 By hearing the evidence afresh.

(2) An appeal limited to questions of law.

[32] The High Court Rules are a form of subordinate legislation, inferior to a statutory provision. They cannot be construed to override Parliament's intention as to the scope of appeal. The decision of Parliament in the Sale of Liquor Act was that appeals would be limited to questions of law. Plainly, subs (2) of s 137 was designed to facilitate the application of that directive. It cannot be interpreted in any way to override it. Subsection (2) cannot be used to achieve a merit review of the decision of the Authority.

[33] The two decisions of *Terrace Tower* and *McDonald-Wright* are instances merely where the Court has allowed in contextual background to assist it understanding the decision that has been made, not as a means of challenging that decision.

[34] For that reason I am of the view that there have to be very special reasons why any evidence would be allowed on an appeal on a question of law. I do not see r 20.16 as attempting to displace the reasoning of the Court of Appeal in *Schier*. Rather, to the contrary, it simply recognises the presence of the inherent jurisdiction of the Court to admit evidence in appeals limited to errors of law in very special circumstances.

[35] There is no doubt that the evidence of Mr Morris and the proposed competing evidence of Mr Heath is evidence that could have been considered by the Authority. In that sense it is relevant and cogent to the issues that they were grappling with. I can say that without having read the affidavits, because the summary of Mr Morris' evidence in the notice of motion set out above can be compared with the content of various decisions of the Agency that I have been referred to in oral argument, by way of example, the decision *Re The Woodward Group Ltd* LLA Wellington PH1415/2008, 3 October 2008. Further, the Sale of Liquor Regulations 1990, reg 8(2)(j) provides:

8. Application for off-licence

(1) An application for an off-licence shall be in form 6.

(2) Every application for an off-licence shall be accompanied by the following:

…

(j) (*where the application relates to a grocery store*) particulars of the principal business of the store, including evidence and certified accounts showing the percentage of turnover that is derived from the sale of main order household foodstuffs:

[36] It is immediately apparent that the requirements of that regulation overlap the content of the affidavit sought to be adduced from Mr Morris and then in reply from Mr Heath.

[37] Mr Taylor did not argue the case on the basis that there had to be special reasons, let alone, very special reasons. Rather, he argued that the discretion should not be fettered by the standard test, that normally the Court will not allow evidence which could have been placed before the Tribunal at first instance. He relied on a number of dicta to this effect by Duffy J in the decisions *Carr v Ambler Homes* (2009) 19 PRNZ 422 (HC) at [16], [17]; *Complaints Committee No 1 of the Auckland District Law Society v P* (2007) 18 PRNZ 760 (HC) at [18]-[21]; *H v M-P* HC Auckland CIV-2007-404-6512, 13 December 2007 at [8]-[10] and the decision of Potter J in *H v Chief Executive Ministry of Social Development* [2008] NZFLR 1069 (HC), following Duffy J.

[38] I would be the first to agree that the standard test (written into the rule) cannot fetter the discretion. It does not follow, however, that if the standard test is not met that it is just as easy to obtain an order admitting further evidence.

[39] Mr Taylor was not able to provide any case in any way similar to this one where a court would entertain affidavit evidence on an appeal on a question of law, let alone where the deponents would be cross-examined.

[40] In appeals from some jurisdictions updating evidence is regularly allowed. Appeals from the Family Court are a good instance. It is often inevitable that some updating evidence as to family circumstances, which have changed from the time of the earlier hearing, need to be presented to the Court.

[41] It is notable that updating evidence, by reason of changed circumstances, has a natural application where a general right of appeal is given.

[42] I remain of the view that the reasoning of the Court of Appeal in *Schier* remain apposite for appeals on questions of law. Very special reasons have to be advanced as to why it should be admitted.

[43] In the course of oral argument I observed to counsel that in difficult problems of statutory interpretation I have no problems with a Brandeis brief. But by that I understand, being referred to reliable independent data on changing circumstances appearing either from official government publications or in peer-reviewed academic articles. It is quite another thing to receive data prepared for and bearing upon the particular subject matter of the hearing before the government agency under appeal.

[44] The more general data on social circumstances is a way of making more reliable the inherent ability of the High Court to take judicial notice of social conditions, as being the broadest context within which the litigation is being pursued.

[45] For that reason I am prepared to admit the second category of documents. There is, however, a qualification. I do not think it is appropriate for the Court to endeavour to manipulate the data in any way at all. Manipulation of statistics requires expertise and to that end evidence. Secondly, the Court reserves completely the question as to the relevance of this material. It is premature for the Court to decide whether any of the statistical material will at the end of the day have relevance to the case.

[46] For these reasons I dispose of this application in the following way:

(1) Volume 1 of legislative materials is admitted not as evidence but as legislative materials already allowed to be used to resolve problems of statutory interpretation, where such materials prove to be useful. If they are not, they will be disregarded.

(2) The set of statistical data, together with the New Zealand statistics data attached to the affidavit of Mr Morris will be admitted with the same qualification.

(3) None of the affidavits, apart from that statistics schedule to Mr Morris' affidavit, will be admitted.

(4) Costs are reserved.

Application allowed in part

Reported by Andrew Beck