Queenstown Lakes District Licensing Agency Inspector v Turnbull Group Ltd

High Court Dunedin CIV-2010-425-641
12 May; 23 June 2011
Whata J

Liquor licensing — Review of off-licence — Appeal from decision of Liquor Licensing Authority — Mistake of fact — Application of wrong facts to statutory assessment — Sale of Liquor Act 1989, s 36(1)(d)(ii); High Court Rules, r 20.19

The first respondent applied to renew the off-licence held by a "Night 'n Day" store in Queenstown. In her report, the Licensing Agency Inspector indicated that she was not convinced the premises was a grocery store, with the principal business being the sale of "main order household foodstuff requirements", pursuant to s 36(1)(d)(ii) of the Sale of Liquor Act 1989. However, the Liquor Licensing Authority granted the application to renew the off-licence, concluding that the store was a grocery store, as its principal business was the sale of main order household foodstuff requirements. On appeal to the High Court, it was contended the Authority had erroneously compared the appellant's turnover percentage in drink and confectionary of all spending against the turnover percentage in drink and confectionary of main order spending in a previous case. The implication claimed by the appellant is that the Authority grossly overestimated the turnover percentage of drink and confectionery as a proportion of main order spending. The appellant argued that the Authority had, therefore, proceeded on a serious error of fact, and, in doing so, erred in law by taking into account an irrelevant matter, and failing to have regard to the correct, and, therefore, relevant, consideration.

Held (dismissing the appeal)

1 Given the totality of the Authority's decision, there was a suspicion of error. However, there was not a reviewable or material error. It was available to the Authority to find that the percentages in the previous case were for a significant portion of the total main order sales, and the percentages in the present case were not a significantly large proportion of the total turnover for main order items.

Zafirov v Minister of Immigration [2009] NZAR 457 (HC) considered.

2 The error complained of was not that the Authority erred in a finding of fact, but that the Authority applied the wrong facts to the statutory assessment. It might be said that this is not a mistake of fact at all, but an alleged mistake in the evaluation of the primary facts.

Cases referred to in judgment

Bryson v Three Foot Six Ltd [2005] NZSC 34, [2005] 3 NZLR 721.
CH and DL Properties Ltd v Christchurch District Licensing Agency HC Christchurch CIV-2009-409-2906, 27 July 2010.
Chef and Brewer Bar and Cafe Ltd v Police [1995] NZAR 158 (HC).
Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 (HC).
Daganayasi v Minister of Immigration [1980] 2 NZLR 130 (CA).
E v Secretary of State for the Home Department [2004] EWCA Civ 49, [2004] QB 1044, [2004] 2 WLR 1351.
Jay & H Company Ltd, Re LLA Decision No PH 155/2001, August 2000.
MK Devereux Ltd, Re LLA Decision No PH 1532/2008, 11 November 2008.
Progressive Enterprises v North Shore City Council HC Auckland CIV-2008-485-2584, 25 February 2009.
Progressive Enterprises Ltd v North Shore City Council [2006] NZRMA 72, (2005) 11 ELRNZ 421 (HC).
R (Assura Pharmacy Ltd) v National Health Services Litigation Authority [2007] EWHC 289 (Admin).
R (Assura Pharmacy Ltd) v National Health Services Litigation Authority [2008] EWCA Civ 1356.
Sai (NZ) Ltd, Re LLA Decision No PH 18/2009, 14 January 2009.
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, [1976] 3 All ER 665 (HL).
TAG Ltd v Police [2008] NZAR 132 (HC).
Woodward Group Ltd, Re The LLA Decision No PH 1415/2008, 3 October 2008.
Zafirov v Minister of Immigration [2009] NZAR 457 (HC).

Text referred to in judgment

Hanna Wilbert *Substantive Grounds of Review: Mistake of Fact* (paper presented to Judicial Review in Commercial Cases conference, Auckland, April 2011).

Appeal

This was an appeal from a decision of the Liquor Licensing Authority.

TJ Mackenzie for the District Licensing Agency and the Police.
TJ Shiels for Turnbull Group Ltd.

WHATA J.

Introduction

[1] The Liquor Licensing Authority reviewed an off-licence held by Church Street Night ‘n Day. The Queenstown Lakes District Licensing Agency Inspector appeals against that decision on the basis that the Authority made a mistake in the evaluation of primary facts. She says that the Authority applied the wrong percentages of drink and confectionery to

the assessment of whether the principal business of the store is the sale of main order household foodstuff requirements.

Background

[2] On 17 March 2009, Turnbull Group Ltd applied to the District Licensing Agency to renew the off-licence held by Church Street Night 'n Day, Queenstown. It was due to expire on 17 April 2009.

[3] The application was publicly notified in the *Otago Daily Times* and no objections were lodged against it.

[4] In her report, the Liquor Licensing Inspector indicated that she was not convinced that the premises were a grocery where the principal business was the sale of "main order household foodstuff requirements" as required by s 36(1)(d)(ii) of the Sale of Liquor Act 1989 (the Act).

[5] The certified turnover sales accounts considered by the Inspector were from June to July 2008, and December 2008 to January 2009. These were broken down into certain categories. Sales concerning grocery take home items amounted to 35.23 per cent and 38.11 per cent respectively.

[6] The Inspector concluded that this was insufficient to be considered a grocery, drawing upon previous rulings from the Liquor Licensing Authority in doing so.[1] Her report to this effect is dated 27 April 2009.

Decision of the Authority

[7] The Liquor Licensing Authority heard the application on 21 October 2010 and issued its ruling on 18 November 2010. It noted the confusion generated by s 36(1)(d)(ii) of the Act and the changing interpretations in respect of it. The current literal interpretation to the grant of off-licences is seen in *Re The Woodward Group Ltd*[2] and *Re MK Devereux Ltd*[3] and subsequent cases. The High Court in *CH and DL Properties Ltd v Christchurch District Licensing Agency*[4] said that these principles apply to applications for the renewal of off-licences as well.

[8] New certified accounts from August 2010 were supplied for the hearing. Sales of "main order items" amounted to 49.71 per cent in these figures. The Authority said that while they did not exceed 50 per cent, they almost did and unquestionably constituted the principal business of the store.

[9] Drinks and confectionery were included within this percentage. The Authority said that they did not comprise a significantly large proportion of the total turnover percentage for main order items and were thus appropriately placed within it.

[10] Other factors were also considered relevant, drawing upon the guidelines from *Re Jay & H Company Ltd*:[5]

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1 *Re Jay & H Company Ltd* LLA Decision No PH 155/2001, August 2000, *Re The Woodward Group Ltd* LLA Decision No PH 1415/2008, 3 October 2008, *Re MK Devereux Ltd* LLA Decision No PH 1532/2008, 11 November 2008 and *Re Sai (NZ) Ltd* LLA Decision No PH 18/2009, 14 January 2009.

2 *Re The Woodward Group Ltd* LLA Decision No PH 1415/2008, 3 October 2008.

3 *Re MK Devereux Ltd* LLA Decision No PH 1532/2008, 11 November 2008.

4 *CH and DL Properties Ltd v Christchurch District Licensing Agency* HC Christchurch CIV-2009-409-2906, 27 July 2010.

5 *Re Jay & H Company Ltd* LLA Decision No PH 155/2001, August 2000, affirmed by *CH and DL Properties Ltd v Christchurch District Licensing Agency* HC Christchurch CIV-2009-409-2906, 27 July 2010.

(a) The store offered a large number of varieties of different food items.

(b) The premises were not large, but there were 128 shelves and eight display bins of main order household foodstuffs. About a quarter of the area was used for takeaway purchases. The alcohol was located in the rear instead of near the entrance which indicated that it was not the store's "main raison d'etre".

(c) Parking was available for customers, this being street parking and a public car park within close walking distance.

(d) There was a mixture of customers which included those finishing work, regular elderly shoppers and night or shift workers.

(e) There was no evidence that the premises were close to schools or that students comprised a significant proportion of the customers. Any such evidence might have indicated that the dairy portion of the business was more extensive, and that issues of liquor abuse were of greater concern.

(f) The store shut at 11.30 p.m. and there was no issue about liquor being sold for consumption immediately in a public place.

(g) While it had previously been listed in the telephone book as a dairy, it was also listed as a grocery store.

[11] The Authority said that endeavouring to apply the yardstick of s 36(1)(d)(ii) was fraught with difficulties. It was difficult to evaluate turnover figures when they covered short periods of time, but it was likely unrealistic and uneconomic to expect applicants to keep detailed annual accounts.

[12] On balance it was found that the store was a grocery store with its principal business being the sale of main order household foodstuff requirements. The application was therefore granted.

Points of appeal

[13] The appellant, supported by the second respondent, brings this appeal to raise what it describes as four questions of law, namely:

(a) the Authority proceeded on a serious and proven error of fact by comparing two incomparable sets of sales figures from different premises and in doing so erred in law by taking into account an irrelevant matter which should not have been taken into account;

(b) the Authority erred in law by failing to take into consideration the proportionality of sales of items within the first respondent's main order turnover figures, which it ought to have taken into account in determining the principal business of the premises;

(c) the Authority erred in law by taking into consideration public car parking in determining the principal business of the premises; and

(d) the Authority erred in law by taking into consideration the first respondent's classification in a telephone book in determining the principal business of the premises.

Jurisdiction

[14] The powers of this Court on appeal are set out in r 20.19 of the High Court Rules. Longstanding authority has set the frame for appeals on point of law as follows:[6]

> *Approach to Appeal*
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> We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
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> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
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> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
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> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.
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> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81–82.

[15] While that particular passage relates to a different context, it was expressly endorsed as the proper approach by Blanchard J in the present liquor licensing context in *Chef and Brewer Bar and Cafe Ltd v Police*.[7]

[16] The appellant did not dispute that this was the proper basis for an appeal on a point of law.

Sale of Liquor Act 1989

[17] The context for this appeal is s 36 of the Sale of Liquor Act. Section 36(1)(d)(ii) contains the test to be applied, namely:

> **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 —
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> (a) To the holder of an on-licence in respect of a hotel or tavern, in respect of the premises conducted pursuant to that licence; or
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> (b) To the holder of a club licence, being a club that is entitled under paragraph (i) or paragraph (j) of section 30(1) of this Act to hold an off-licence, in respect of the premises conducted pursuant to that licence; or

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6 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153 (Full Court).

7 *Chef and Brewer Bar and Cafe Ltd v Police* [1995] NZAR 158 (HC).

(c) In respect of premises in which the principal business is the manufacture or sale of liquor; or
(d) In respect of —
(i) Any supermarket having a floor area of at least 1000 square metres (including any separate departments set aside for such foodstuffs as fresh meat, fresh fruit and vegetables, and delicatessen items); or
(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.

[18] The history of the application of this section is fully explained in *CH and DL Properties Ltd v Christchurch District Licensing Agency*.[8]
[19] It will be seen from that case, and numerous decisions of the Authority, that there has been and remains some dispute as to the proper basis for determining whether or not, in accordance with s 36(1)(d)(ii), "the principal business of the store is the sale of main order household foodstuff requirements".
[20] Thankfully, I am not invited to engage in that debate. Rather, as will be set out below, the relevant errors of law are more case specific and relate to whether or not the relevant proper proportions were in fact assessed and compared by the Authority in this case.
[21] I note for completeness that the first respondent did seek to impress upon me that there is no requirement at law for there to be any such comparison between cases and what might be significant in one case may not be significant in another. I am prepared to accept that as a general proposition, but I also accept the appellant's basic contention that, if a comparison is to be made, it should be made correctly.

Errors
Point 1: error of fact, relevant/irrelevant considerations
[22] The appellant submits that the key issue is:

> Whether the Authority proceeded on a serious and proven error of fact (by comparing two incomparable sets of sales figures from different premises; being the percentage proportion of confectionery and drink sales out of the first respondent's total turnover figures, with the percentage proportion of confectionary and drink sales from within the main order sub group of another premises (*CH & DL*), those figures not being that premises total turnover figures) and in doing so erred in law by taking into account an irrelevant matter which should not have been taken into account.

[23] The core complaint of the appellant is that the Authority applied the wrong facts to the statutory assessment. It says that the Authority, having undertaken a comparison between sales figures in *CH and DL Properties Ltd v Christchurch District Licensing Agency*[9] and the sales figures in this case, the Authority was required to compare the correct sales data. The appellant says that the Authority clearly did not do

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8 *CH and DL Properties Ltd v Christchurch District Licensing Agency* HC Christchurch CIV-2009-409-2906, 27 July 2010 at [11]–[18].
9 *CH and DL Properties Ltd v Christchurch District Licensing Agency* HC Christchurch CIV-2009-409-2906, 27 July 2010.

this. The appellant contends that the Authority compared the percentage turnover in drink and confectionery (etc) of *all* spend (6.05 per cent and 6.29 per cent) in this case against the percentage in drink and confectionery (etc) turnover of *main order* spending in the *CH and DL* case (17.78 per cent and 18.67 per cent).

[24] The implication, it says, is that the Authority grossly underestimated the percentage of turnover of drink and confectionery as a proportion of "main order" spending.

[25] It follows, on the appellant's analysis, that the findings at [15]–[16] of the decision were manifestly wrong. That is, contrary to the findings at [15]–[16]:

(a) the case is analogous to the *Victoria Night 'n Day* case (also known as *CH and DL*);

(b) the drink and confectionery etc items do comprise a significantly large proportion of the turnover percentage for main order items; and

(c) those items have not been appropriately placed in the main order category.

[26] In summary, the appellant says that the Authority erroneously assumed that drink and confectionery only comprised 6.05 per cent and 6.29 per cent of total turnover of main order items. The correct figures were approximately 12 per cent for each.

[27] The appellant therefore puts to me that the Authority should reconsider its comparison to *CH and DL* based on the correct figures.

The law

[28] The appellant cited the decision of *TAG Ltd v Police*,[10] as authority for the proposition that an error of fact can constitute an appealable error of law. In that case Asher J observed:

> [12] Where an Authority acts on evidence that is weak to the point of nonexistence, or irrationality, that can amount to an error of law (*Buzz & Bear Ltd v Woodroffe* [1996] NZAR 404 at 411). The high threshold must be strictly observed. The court must not substitute its view of the available evidence for that of the Authority
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> ...
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> [13] I am satisfied that acting in reliance on a serious and proven error of fact can amount to an error of law in that in so doing, the decision-maker took into account an irrelevant matter which should not have been taken into account.

[29] The appellant contends that there is a reasonable analogue between the erroneous assumption about hours of operation in the *TAG* case and the assumption about the turnover in drinks and confectionery etc as a proportion of main order shopping in this case.

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10 *TAG Ltd v Police* [2008] NZAR 132 (HC).

[30] As with the *TAG* case, the appellant contends that the alleged factual error meant that the Authority had regard to an irrelevant consideration and did not have regard to a relevant consideration, namely the correct level of drink and confectionery (etc) turnover as a proportion of main order turnover. The error was compounded by the comparison to the correct, and much higher, proportions in *CH and DL*.

Respondents' case

[31] The respondents (the applicants in this case) contend that:

(a) there is no obvious error – at most there is a suspicion of an error;

(b) the Authority was not bound by the *CH and DL* decision;[11] and a comparison (correct or otherwise) was not required;

(c) an erroneous comparison is not an error of law, there being no requirement in law to make such a comparison;

(d) the comparison was simply one of several factors taken into account; and

(e) any error in making the comparison is not significant enough to qualify as an error of law and/or is not material.

Discussion

[32] It is exceptional for this Court on an appeal of law to review the factual findings or the evaluation of primary fact. Unfettered inquiry into the facts would defeat the entire purpose of confining appeals to appeals of law only.

[33] The Supreme Court in *Bryson v Three Foot Six Ltd* asserverated the threshold test for mistake of fact amounting to an error of law in this way:[12]

> [25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

[34] The Supreme Court further added relevantly for the purposes of this case:

> [28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence". It could nonetheless lead or contribute to an outcome which is insupportable.

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11 *Progressive Enterprises v North Shore City Council* HC Auckland CIV-2008-485-2584, 25 February 2009.

12 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

[35] A review of the authorities on "error of fact" further confirm that care must be taken when invited to examine facts on an appeal of law. The following elements should normally be present:[13]

(a) the error should be an obvious mistake as to existing fact;[14]

(b) the error is one of verifiable or established fact[15] – that is, the error can be objectively identified and verified (and it helps if it is beyond dispute);[16] and

(c) it must be material to the legality of the overall decision.[17]

[36] I would add further that even on full rehearings, this Court would ordinarily afford a margin of appreciation on technical assessments within the competence of a specialist tribunal, especially if that tribunal has heard and evaluated evidence. In this case, further caution is warranted given the full factual assessment undertaken by the Authority, including a site visit.

[37] I approach the analysis with these basic cautions in mind.

Assessment

[38] The key passage in the decision is worth repeating:

> [15] The turnover percentages in this case differ quite significantly from those which were submitted to the Authority and referred to at first instance in the *Victoria Night 'n Day* decision. There, 18.67 percent of the total main order food items comprised confectionery and a further 17.78 percent of the main order food lines comprised drinks. In this case, the drinks referred to in the main order food items totalled 6.05 percent and the confectionery, chocolate and sweets totalled 6.29 percent. As Fogarty J mentioned at paragraph 34 of *C H and D L Properties Ltd*, what impressed the Liquor Licensing Authority was that you would not expect a grocery store.s bigger sales of generic products to be drinks, confectionery, tobacco products, liquor and takeaway food. He pointed out that the decision did not depend on whether it was right or wrong to exclude confectionery or drinks. The point was that if it could be claimed that the confectionery or drinks should be included in the main order items then they should not constitute a significant part of them. In *Victoria Night 'n Day*, they did constitute a significant portion of the total main order sales.

[39] The appellant accepts that none of the percentages as expressed by the Authority are erroneous. More specifically the observation at [15]

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13 Consider *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] 2 WLR 1351, followed in New Zealand in *Zafirov v Minister of Immigration* [2009] NZAR 457 (HC). Note in *E*, the Court of Appeal also added that the appellant or advisers must not have been responsible for the mistake. I am not convinced about this. It might be a matter that better goes to discretion. For a helpful academic discussion, see also Hanna Wilberg *Substantive Grounds of Review: Mistake of Fact* (paper presented to Judicial Review in Commercial Cases conference, Auckland, April 2011).

14 *E v Secretary of State for the Home Department* at 1375, *Bryson v Three Foot Six Ltd* at [25].

15 *Secretary of State for Education and Science v Metropolitan Borough Council of Tameside* [1977] AC 1014 (HL) at 1030; *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) per Cooke J.

16 See also *Progressive Enterprises Ltd v North Shore City Council* (2005) 11 ELRNZ 421, [2006] NZRMA 72 (HC).

17 *Bryson v Three Foot Six Ltd* at [26].

that "the drinks referred to in the main order food items totalled 6.05 percent and the confectionery, chocolate and sweets totalled 6.29 percent" is factually correct.

[40] The percentage figures recited at [15] in relation to the *Victoria Night 'n Day* decision are also factually correct.

[41] The upshot of this is that the error complained about is not that the Authority erred in a finding of fact. Rather, the complaint is that the Authority applied the wrong facts to the statutory assessment. It might be said that this is not a mistake of fact at all. Rather, it appears to be in the category of an alleged mistake in the evaluation of the primary facts.[18]

[42] This is unhelpful and helpful to the appellant. I am not being invited to correct factual findings. I am invited to correct an apparent application of erroneous facts to the statutory assessment.

[43] The difficulty the appellant faces is that there is no overt finding that the Authority has assumed that the 6.05 per cent and 6.29 per cent represent the turnover as a proportion of "*main order*" spending. The specific factual finding does not say that. It correctly refers to main order food item "totals".

[44] I agree that there is a suspicion of an error given the totality of the decision on this point. It commences with total percentage of main order items of the total turnover. It then refers to the percentage of main order food items comprising drinks and confectionery (etc) in the *Victoria Night 'n Day* case. This is immediately followed by reference to total percentages of drinks and confectionery in the main order food items in this case. The conclusion is then made that this case is not like *Victoria Night 'n Day*, where drink and confectionery did constitute a significant overall proportion of the main order sales.

[45] But a suspicion, even a strong one, is not enough in my view. On the material before me, I could equally surmise that the Authority had a realistic appreciation of the significance of drinks and confectionery in the subject shop. The following passages in the decision are apposite:

> [17] When determining if a business comes within s 36(1)(d)(ii) of the Act, not only are the turnover figures relevant. *C H and D L Properties Ltd* confirmed that the approach adopted in *Jay & H Company Ltd* NZLLA PH 155/2001 is appropriate.
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> [18] Mr Turnbull, one of the directors of the applicant, deposed that in the store there were 63 different varieties of packets of biscuits, 63 different varieties of bottled/canned sauces, 33 different varieties of meats, 21 different varieties of milk, 90 different varieties of frozen meals/pizzas, 46 different varieties of frozen vegetables, 49 different varieties of packet/canned soups, 77 different varieties of bread and 153 different varieties of packets and canned meals. Photographs produced in evidence also indicated a reasonable variety of main order household foodstuffs.
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> [19] The premises are not large. The retail area contains 160 square metres and the entire internal area of the store is 232 square metres. It is intended to enlarge this; although little weight is given to this proposal as it may not

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18 A description employed by Wilberg op cit at 3 in reference to *R (Assura Pharmacy Ltd) v National Health Services Litigation Authority* [2007] EWHC 289 (Admin); *R (Assura Pharmacy Ltd) v National Health Services Litigation Authority* [2008] EWCA Civ 1356.

> happen. There are 128 shelves of main order household foodstuffs and the shelves are mainly .9 metre long. There are eight display bins of main order household foodstuffs.
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> [20] Significantly, the liquor is kept to the rear of the store and nowhere near its entrance. This, in the Authority.s experience is unusual and indicates that it does not constitute the main raison d.etre for the store.
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> ...
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> [22] The Authority viewed the premises. The store was certainly not a dairy. About a quarter of the area of the premises was used for takeaway purchases. The balance was for grocery items (including non-food items).

[46] Set against these findings, I am not prepared to infer from the decision that the reference to 6.05 per cent and 6.29 per cent in comparison to 17.78 per cent and 18.67 per cent involves a reviewable and or material error. It was available to the Authority to find that the percentages in the *Victoria Night 'n Day* case were a significant portion of the total main order sales. It was also available for the Authority to find that "the drinks referred to in the main order food items [totalling] 6.05 percent and the confectionery [(etc) totalling] 6.29 percent" were not a significantly large proportion of the total turnover for main order items.

[47] I also agree with the first respondent that the Authority included an experienced member, Mr McHaffie. He was also a member of the Authority in *CH and DL*. I am not prepared to assume that he made the basic error of conflating the percentage of all items with the percentage of main order items only.

[48] In these circumstances I am not prepared to find that there has been a reviewable and material error of fact.

Other alleged errors

[49] I do not propose to address the remaining alleged errors in detail. The appellant quite properly accepted that the second alleged error relating to the proportionality of sales within the main order items was linked to the first alleged error. As I found against him on the first alleged error, the discussion on the second error becomes moot.

[50] Errors 3 (number of car parks) and 4 (telephone book classification), dealing with assessments of fact, cannot properly be described as irrelevant considerations, given the breadth of the Authority's evaluative discretion, and the appellant accepted that as so.

[51] Accordingly, I decline to grant the appeal.

Costs

[52] The parties agreed that any costs should be set at 2. I propose that they be set at 2B in favour of the first respondent, together with the normal disbursements. If counsel cannot agree, memoranda may be filed within seven days of the date of this judgment with any reply seven days thereafter.

Reported by: Zannah Johnston