[1999–00 Gib LR 58]

CHAINANI TRADING LIMITED v. ATTORNEY-GENERAL

COURT OF APPEAL (Neill, P., Waite and Glidewell, JJ.A.):
March 4th, 1999

Tobacco—licensing—retail—revocation—Collector of Customs to consider only matters on which licence-holder given opportunity to be heard—revocation not inevitable following conviction for breach of licence condition—other factors, e.g. seriousness of offence, likelihood of re-offending and effect of revocation on business may be relevant—formal reasons for final decision desirable

Civil Procedure—appeals—appeal against administrative decision—statutory appeal to be by rehearing unless statute expressly or impliedly limits evidence to be considered—court required to consider relevant matters whether or not adduced before decision-maker—reasons needed to indicate factors weighed

The respondent appealed from a decision of the Collector of Customs to revoke his company's tobacco retail licence.

The respondent was convicted on a guilty plea of selling a single quantity of cigarettes in excess of the quantity permitted by his tobacco retail licence, contrary to s.4(3) of the Tobacco Ordinance, 1997. He was fined £600. The Collector of Customs then notified him that he had no

option but to revoke the licence under s.7(4) of the Ordinance, in view of the breach of the licence, but that the respondent would be given an opportunity to make representations on the matter.

The respondent attended a meeting with the Collector at which his legal adviser made submissions as to the nature of the Collector's discretion under s.7(4), the details of the offence, and the potential effect of the revocation on the respondent's business and family. The Collector nevertheless revoked the licence. Affidavits sworn for the purposes of the appeal showed that the Collector had taken into account sales figures supplied by a wholesaler who had supplied the respondent, but that these had not been put to him or his legal adviser for comment at the meeting. From this information, the Collector appeared to have drawn the conclusion that the respondent's arrest had put an end to a long-standing practice of over-selling.

On the respondent's appeal, the Supreme Court (Pizzarello, Ag. C.J.) reversed the Collector's decision on the basis that he had fettered his own discretion by taking the approach that once a conviction had been recorded there was no alternative but to revoke the licence. The Collector had failed to take into account that his response to the offence should be proportionate to the severity of it. The fact that the magistrates' court had the power to fine the respondent up to £10,000 and impose a sentence of six months' imprisonment, and yet had fined him only £600, should have been considered. The proceedings in the Supreme Court are reported at 1997–98 Gib LR 363.

The Attorney-General appealed to the Court of Appeal. He submitted that (a) the Collector had not fettered his discretion by informing the respondent of his intention to revoke the licence, since there had been a full hearing attended by the respondent and his representative; (b) since the appeal to the Supreme Court had been by way of rehearing, the court should have taken into account the information contained in the Collector's affidavit; and (c) by simply quashing the Collector's decision, the court had failed to consider the issues afresh, to weigh all relevant factors and to give reasons for its conclusions.

The respondent submitted in reply that (a) the Collector had not only fettered his discretion but had failed to give proper reasons for his decision to revoke the licence; (b) the Supreme Court had properly found that the Collector erred in considering evidence which was not put to the respondent at his hearing, and the respondent's affidavit had now adequately addressed the concerns arising from it; and (c) it was clear that the court had reconsidered the issues and concluded that the licence should not have been revoked.

Held, allowing the appeal:

(1) The Supreme Court had properly found that the Collector erred in deciding to revoke the retail licence on the basis of the conviction alone. On the evidence, it was clear that the Collector had regarded a conviction for a breach of the licence as leading, almost inevitably, to its revocation

under s.7(4), whereas in fact he was obliged to consider all the material before him at the hearing, including the seriousness of the offence, the likelihood of re-offending, the effect on the licence-holder's business, and any other pertinent matter (paras. 11–12).

(2) Moreover, the court had properly concluded that the Collector had taken into account irrelevant material by considering the matters referred to in his affidavit to the court. Since he had been permitted to decide only on matters before him at the hearing, he could justify his decision only on the basis of reasons given in his notice of intention to cancel the licence (*i.e.* matters relating to the conviction). If other information had come to his attention after notice had been given, the licence-holder would have had to be given an opportunity to respond at the hearing (para. 11; para. 13).

(3) In any event, the Collector should have made the basis for his decision clear. Although written reasons were not a formal requirement, it would be helpful and prudent in future for the Collector to state whether his decision was made on the basis of the reasons given in the original notice or on the basis of new material (para. 14).

(4) However, the Supreme Court may have failed properly to exercise its appellate function in the context of an administrative appeal. Since the Tobacco Ordinance, 1997 did not expressly or impliedly limit the matters to which the court could have regard on an appeal against revocation under s.8(1), the appeal had to be by rehearing. The court was required to consider all relevant material whether or not it had been put before the Collector, and to substitute its own decision for that of the Collector if necessary. As the Acting Chief Justice had merely quashed the Collector's decision, the Court of Appeal could not be sure that he had considered the matter afresh, and in particular, whether he had considered the contents of the Collector's affidavit and the respondent's affidavit in reply. He should have stated which of the parties' arguments he preferred, and given reasons to indicate that he had carried out the necessary balancing exercise. The appeal would be remitted to the Supreme Court for rehearing (paras. 15–21).

Cases cited:

(1) *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.*, [1948] 1 K.B. 223; [1947] 2 All E.R. 680.

(2) *Sagnata Invs. Ltd.* v. *Norwich Corp.* [1971] 2 Q.B. 614; [1971] 2 All E.R. 1441, applied.

Legislation construed:

Tobacco Ordinance, 1997 (No. 34 of 1997), s.4(1): The relevant terms of this sub-section are set out at para. 1.

s.4(3): The relevant terms of this sub-section are set out at para. 1.

s.6(1): The relevant terms of this sub-section are set out at para. 1.

s.6(4): The relevant terms of this sub-section are set out at para. 1.
s.7(4): The relevant terms of this sub-section are set out at para. 1.
s.8(1)(c): The relevant terms of this paragraph are set out at para. 1.
(2): The relevant terms of this sub-section are set out at para. 1.
(3): The relevant terms of this sub-section are set out at para. 1.

H.K. Budhrani, Q.C. for the appellant;
L.E.C. Baglietto for the respondent.

1 **GLIDEWELL, J.A.:** The Tobacco Ordinance, 1997 was enacted, amongst other reasons, to combat cigarette and tobacco smuggling. The Ordinance has established a regime for the licensing of persons selling tobacco, both wholesale and retail. Section 4(1) of the Ordinance makes it unlawful for any person "to sell tobacco by retail save under the authority of a licence . . . issued by the Collector of Customs under section 6 below." Section 4(3) makes it an offence for any person to be "in any way knowingly concerned in the sale of tobacco by retail in breach of any condition subject to which a retail licence under section 6 below has been issued." Section 6(1) provides:

> "The Collector of Customs may . . . in his absolute discretion issue a wholesale or retail licence, subject to such terms, conditions and restrictions as he considers necessary or expedient."

Section 6(4) reads:

> "Every retail licence shall be issued—
>
> (a) subject to the condition that it authorises the sale of no more than 1000 cigarettes to the same individual at any one time. . ."

Section 7(4) reads:

> "Where the Collector of Customs has reasonable grounds to believe that the holder of a retail or wholesale licence has breached any of the terms and conditions subject to which the licence has been issued, he may after informing the licence holder of his intention to do so and the reasons therefor and after giving the licence holder the opportunity to be heard, cancel the licence."

Section 8 reads:

> "(1) Any person who is aggrieved by—
>
> . . .
>
> (c) the revocation or cancellation of a wholesale or retail licence issued to him save when such revocation or cancellation has been made under section 7(1) above,
>
> may appeal to the Supreme Court.

(2) Where any appeal is heard by the Supreme Court, an appeal shall lie only on a point of law from the Supreme Court to the Court of Appeal.

(3) The Chief Justice may make rules of court governing appeals under subsection (1) and (2) above."

And finally, s.15 provides that the penalty for the offence constituted by s.4(3), amongst other sections, is, on summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding £10,000 or three times the value of the tobacco in respect of which the offence was committed, whichever is the greater, or both such imprisonment and such fine.

2 The present respondent, Chainani Ltd., which trades under the name "Satyam," has a retail shop at 303 Main Street, from which it sells cigarettes and tobacco amongst a wide range of articles. On January 19th, 1998, the Collector of Customs ("the Collector") issued a tobacco licence to Chainani. It was issued specifically subject, as the Ordinance required, to the terms and conditions specified in the Ordinance, including of course, the prohibition of the sale to any one person at any one time of more than 1,000 cigarettes. Printed at the bottom of the licence were the words: "*Warning*: The Collector of Customs may cancel this licence if he has reasonable grounds to believe the holder has breached any of the terms and conditions subject to which it has been issued."

3 On July 24th, 1998 in the magistrates' court, Mr. Chainani, a director of the company, pleaded guilty to a charge of being knowingly concerned in the sale of tobacco in breach of a condition of the tobacco licence, *i.e.* the condition that no single sale to an individual should exceed 1,000 cigarettes, by selling 8,600 cigarettes to a named person. He was fined £600. On July 28th, 1998, the Collector wrote to Mr. Chainani giving notice of his intention to cancel the licence. After referring to the terms of the licence and the warning on it, the letter said:

"I am informed that on Friday, July 24th, 1998 you appeared before the magistrates' court where you were convicted of knowingly being concerned in the sale of tobacco in breach of a condition of a retail licence, and that you were fined £600.

In the circumstances I have no alternative but to inform you—

(a) of my intention to cancel Licence No. 83/98;

(b) of your right to be given an opportunity to be heard as to why the licence should not be cancelled."

4 Mr. Chainani took the opportunity of being heard as to why the licence should not be cancelled and, after a certain amount of correspondence, a

hearing was arranged which took place on August 7th, 1998 before the Collector. Mr. Chainani attended and was represented by Mr. Budhrani, Q.C., who has represented the company before us today.

5 On August 12th, 1998 the Collector wrote both to Mr. Chainani and Mr. Budhrani referring to the hearing, saying:

> "I have written to Mr. Chainani advising him of my decision to revoke his retail tobacco licence.
>
> I cannot emphasize enough that I have given very careful and detailed consideration to all the relevant matters which were brought to my attention in the submission made by you at the hearing.
>
> I would also assure you that this Department is aware of the need to assist traders generally but I trust you will understand that it also has a responsibility to society to ensure that breaches of any Ordinance are dealt with fairly but firmly."

6 Mr. Chainani appealed to the Supreme Court. The appeal was heard by Pizzarello, Ag. C.J., who gave judgment on September 11th, 1998, allowing the appeal (reported at 1997–98 Gib LR 363). The learned judge simply reversed the Collector's decision, which meant, of course, that the licence remained in being. The Collector, by the Attorney-General, now appeals to this court. As has already been made clear, he is only entitled to do so on a point of law.

7 Before I go to the arguments, it is necessary to refer to some of the other documents. The Collector's letter of July 28th—the initial letter in which he gave notice of his intention to cancel the licence—contained two matters about which it is desirable to comment. First, the only reason given in the letter for cancelling the licence was the conviction of Mr. Chainani in the magistrates' court and, secondly, the last paragraph began with the words: "In the circumstances I have no alternative but to inform you . . . of my intention to cancel [the licence]." But it also told Mr. Chainani of his right to be given an opportunity to be heard as to why the licence should not be cancelled.

8 When the appeal to the Supreme Court came before the learned Acting Chief Justice, the material before him included an affidavit sworn by the Collector, Mr. Lima, on August 28th, 1998. Much of the Collector's affidavit dealt with arguments for Mr. Chainani which had been raised at the hearing before him on August 7th, and which had been helpfully contained in a written skeleton argument prepared by Mr. Budhrani. However, in addition to seeking to rebut what had been put to him, the Collector said in his affidavit:

> "I was particularly concerned at certain figures that I had in my possession regarding the number of boxes sold by Chainani which

illustrated a substantial discrepancy in the number of boxes of tobacco sold by Chainani Trading Ltd. during the year. Wholesalers provide the Collector of Customs with a return of boxes that they sell to each retailer, and the figures with respect to the sale of boxes of tobacco to Chainani Trading Ltd. were as follows:

> 227 boxes, each box containing 10,000 cigarettes, for the month of May, 223 boxes for the month of June and only 75 boxes for the month of July.

I found it indicative that the defendant had been arrested in mid-July for the above-mentioned criminal offence and the sale of boxes of tobacco to him had drastically reduced in that month."

9 That is not a matter, nor are those facts, to which any reference had been made by the Collector before or at the hearing on August 7th, and so until that affidavit was sworn, it was not a matter to which Mr. Chainani or his company had any opportunity to reply. However, once he saw that affidavit, he then of course did have an opportunity to reply, if he so chose, and he did so in a second affidavit sworn by him immediately before the hearing of the appeal to the Supreme Court. He said in that affidavit:

> "The matters deposed in para. 12 of the Collector's affidavit were not brought to my attention either at my meeting with the Collector on July 28th—that is an earlier meeting to which I have not so far referred—nor at the hearing which took place on August 7th, nor was I invited on either occasion to offer any comment or explanation."

Mr. Chainani's affidavit then went on to seek to rebut the implied suggestion that the figures to which the Collector had referred in some way showed that Mr. Chainani was probably in the habit of selling more than 1,000 cigarettes to any one person at any one time. Then Mr. Chainani also took the opportunity to say that although it was perfectly true that he traded in other goods, he did not trade in all the goods specified in his licence to trade. He also repeated what he had said at the hearing on August 7th; that the effect of cancelling his tobacco licence would be to reduce his business to a state in which it would be unprofitable to carry it on at all. He sought to contradict an assertion by the inspector that the premises where the business was carried on "are in a prime site in Main Street." In other words, Mr. Chainani said in his affidavit that although the premises are in Main Street, it is not the best part of Main Street and they are not all that attractive.

10 In his judgment, Pizzarello, Ag. C.J. set out the relevant facts and referred to such correspondence as was necessary. He then summarized the respective submissions made to him by Mr. Budhrani on behalf of Mr.

Chainani and by Mr. Trinidad for the Attorney-General. He did so in some detail; altogether that summary of both arguments occupies very nearly four pages of his judgment. Then he said (1997–98 Gib LR at 373): "In my view, the Ordinance gives the Collector an unfettered discretion, and if the Collector blinkers himself from that position he is wrong and his decision can be overturned." The judge set out a passage from the well-known judgment of Lord Greene, M.R. in *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.* (1) ([1947] 2 All E.R. at 685), and said: "The question is: Did the Collector take matters into account which he ought not, or neglect to take into account matters he ought to have taken?" Then he said (1997–98 Gib LR at 373–374):

> "I agree with Mr. Budhrani that the Collector appears to have essentially taken the position that once a conviction is recorded there is little else to say. And that is the position as I see it of Mr. Trinidad's approach when he asks rhetorically: What else can the Collector look at to revoke a licence when there is a conviction if he can do so on reasonable grounds? He is not just perilously close to divesting, but indeed divests himself of any discretion and so he will approach the application in the wrong way. In my view, that was his approach as reflected in his letter of the 28th: 'I have no alternative but to inform you. . .' Well, there *was* another alternative and that is not to revoke. That approach was wrong and it puts the whole of his decision in jeopardy. It may have led to his not taking into sufficient consideration the facts as put forward by the appellant and so I can look at the matter anew and substitute my own decision.
>
> I note the concerns of the Collector as contained in his affidavit and they are valid ones, but the legislature has not seen fit to punish the offence committed with mandatory cancellation and that has to be weighed in the balance in the exercise of the discretion. Public policy is said to be an unruly horse. Mr. Trinidad makes the point that if this case may not lead to a cancellation, what can? Well, I think a point to bear in mind is: Where is the proportionality, the punishment to fit the crime, if a trader who is fined £10,000 or sentenced to six months' imprisonment suffers the same consequence? It goes almost without saying that while the Collector may cancel a licence on reasonable grounds to believe there has been a breach of the terms and conditions of the licence, those must be very firm grounds indeed, but of course each case has to be decided on its own merits."

And he therefore said in the next paragraph (*ibid.*, at 374): "I will allow the appeal and reverse the Collector's decision."

11 It will be seen that the learned judge arrived at his decision on two bases, that is to say, first, that the Collector had fettered his discretion by,

as he put it, essentially taking the position that "once a conviction is recorded there is little else to say," and secondly, that the Collector had taken into account irrelevant matters, in particular the material contained in para. 12 of his affidavit which was not put to Mr. Chainani at the hearing to enable him to respond. I agree with the learned judge on both these issues.

12 Mr. Baglietto, for the Collector, today challenged the judge's conclusion in the first ground in his memorandum of appeal, but he really concentrated on his second ground of appeal, to which I shall come shortly. As I say, on the material before him the judge was entitled to conclude that the Collector appeared to have taken the view that a conviction should inevitably, or perhaps almost inevitably, lead to cancellation of a licence. The Collector was wrong to do so. He is obliged to weigh all the material before him. The fact of the offence is, of course, very important. The fact of the conviction is important. But the seriousness of the offence is important, and that is why the fact that in this case Mr. Chainani was fined only £600 when the maximum fine could have been £10,000 is significant. The likelihood of the offence being repeated is obviously relevant. The effect on the trader's business is another relevant factor. There may well be others, and they all, if put before the Collector, have to be taken into account by him.

13 As for the judge's conclusion that the Collector appeared to have taken into account irrelevant material, particularly the matters referred to in para. 12 of his affidavit which had not been discussed at the meeting before him on August 7th, again I agree with the learned judge. The Collector is only entitled to decide on material before him at his hearing. Normally, on his part, that would entitle him only to rely on the matters referred to in the reasons in the original notice of intention to cancel the licence. In the context of this case, that means the conviction and nothing else. But there may be cases in which, when the Collector has given notice of intention to cancel the licence, some further information comes to his knowledge on which he wants to rely when the applicant appears before him and argues that the licence should not be cancelled. If that is the case, then clearly the Collector must give the licence-holder at a hearing before him a proper opportunity to comment on that new material and to seek to rebut it. If necessary he might even have to adjourn the hearing. I am not trying to lay down any specific procedure to be followed, but fairness requires that if anything new is going to be relied upon, the person affected by it, the licence-holder, must be given a proper opportunity to deal with it.

14 Mr. Budhrani also submitted to us that although the Ordinance does not require this in terms, the Collector ought to give reasons for his decision after his hearing. It is not good enough for him simply to

announce his decision. In my judgment, although I do not see any formal requirement for reasons, it is obviously desirable that the basis on which the Collector has decided should be clear. Often it will be sufficient for him to say something like: "For the reasons given in my original notice, I will adhere to my decision to cancel the licence." But if he relies on new material then he ought, at least briefly, to spell that out. Certainly it will be sensible for him to do so.

15 That brings me to another matter which was canvassed before us. That is to say: What is the nature of the rehearing before the Judge of the Supreme Court? Mr. Baglietto drew our attention to the decision of the Court of Appeal in England in *Sagnata Invs. Ltd.* v. *Norwich Corp.* (2). That was a licensing case. It related to a permit under the Betting, Gaming and Lotteries Act for an amusement arcade. The local authority was the body charged in the first place with making up its mind whether or not to grant a permit. It stood in much the same position as the Collector in the present case. There was a right of appeal from the local authority to quarter sessions. The Recorder at quarter sessions allowed the appeal, the Divisional Court in England upheld his decision and, by a majority, the Court of Appeal also upheld it. Edmund Davies, L.J., one of the majority in the Court of Appeal, said ([1971] 2 All E.R. at 1454–1455):

> "For my part, I cannot see how it is practicable in cases such as the present for an appeal to quarter sessions to be other than by way of a complete rehearing. Having no record before him of what transpired before the local authority, how could the recorder otherwise begin to judge the cogency of the written reasons placed before him? Counsel for Sagnata usefully culled from Archbold's Quarter Sessions a variety of examples of appeals to quarter sessions from the decisions of magistrates in respect of what he described as the exercise of administrative functions and which, he submitted, clearly established that such appeals were also by way of a rehearing. He understandably placed great reliance on *R. v. Pilgrim* . . . where Lush J. said:
>
> > 'It is only in cases in which the particular statute giving the appeal limits the inquiry to the same evidence, that the quarter sessions are precluded from going into fresh evidence . . . but where there is no such limitation, expressly or by implication, the matter is at large, and the quarter sessions are to rehear the whole matter, and give their judgment upon all the evidence that is brought before them.'"

16 In my judgment, that principle applies exactly to the present situation and the present form of appeal to the Supreme Court under this legislation. The appeal is by way of rehearing. Evidence or arguments

other than those which were put before the Collector at the hearing before him may be admitted on either side if necessary. If there is any question of anybody being taken by surprise there might have to be some short adjournment, but the judge of the Supreme Court is not only entitled but required, in my judgment, to take account of any material, whether it is new or whether it was put in front of the Collector in the first instance.

17 It follows that, in my view, the acting Chief Justice in this case should have considered the material in para. 12 of the Collector's affidavit to which I have referred and the material in Chainani's affidavit in reply. In other words, in that sense, the court is in a wholly different position from that of the Collector, who, as I have already emphasized, can only base his decision upon material which is before him at the hearing and to which the licence-holder has an opportunity to respond.

18 In the present case it is not clear to me, from his judgment, whether or not the judge did take those matters into account. It is true that he set out the arguments dealing with them when dealing with the submissions both of counsel for Mr. Chainani and of Mr. Trinidad, then appearing for the Attorney-General, but whether he did take it into account in his decision-making process, as I have said, is not clear.

19 This brings me to the second ground of appeal as set out in the memorandum of appeal, which, as I have already said, is the main point upon which Mr. Baglietto relies before us. That is put in the memorandum as follows:

> "If the learned judge was entitled to look at the matter anew and to substitute his decision for that of the Collector, he failed properly to do so in that he merely quashed the Collector's decision on the grounds that he had approached the matter wrongly, and failed to go further and consider the matter afresh on the merits and/or properly to weigh all relevant factors before deciding to allow the appeal and to reverse the Collector's decision."

If I may say so, that sets out very succinctly the point that Mr. Baglietto seeks to make. The judge having, in effect, criticized the Collector for not taking all relevant matters into account and for taking irrelevant matters into account, then fell, Mr. Baglietto submits, into precisely the same trap himself. At least he did not make it clear that he was not falling into the trap, because it is not clear from the wording of his judgment whether he did carry out the exercise of weighing all the evidence and reaching a decision on balance after that weighing process.

20 Mr. Budhrani submits that as the learned judge carefully set out the arguments on either side, it is hardly likely that having done so, he did not take into account all the matters which he had so carefully rehearsed. But

even if that be correct, and I must say that I am tempted to believe that it must be correct, what the judge even then did not do was to say which of the arguments on either side he accepted and which he rejected, or what weight he gave to the factors which he did accept. One other way of putting this is that he did not give proper reasons for his decision as, sitting in the Supreme Court, he was undoubtedly required to do.

21 I have concluded that this submission on behalf of the Attorney-General is correct. Although I agree with the judge's finding as to the ways in which the Collector's decision-making process was deficient, I cannot discern where and in what way the judge carried out the balancing exercise, what factors he put into the scales, or what weight he gave to them. On a rehearing he was, in my judgment, obliged to carry out that exercise. Because I cannot be satisfied that he did so properly, I would allow the appeal and remit the appeal for rehearing to the Chief Justice.

NEILL, P. and **WAITE, J.A.** concurred.

Appeal allowed.
