

[1999–00 Gib LR 540]**TRADE LICENSING AUTHORITY v. TEZIANO LIMITED**

COURT OF APPEAL (Neill, P., Glidewell and Staughton, JJ.A.):
September 25th, 2000

Trade and Industry—retail licensing—refusal of licence—Trade Licensing Authority may refuse only if ground for refusal under Trade Licensing Ordinance, s.16(1)—to consider separately each category of goods for which licence sought

Trade and Industry—retail licensing—refusal of licence—needs of community—evidence of other traders relevant to whether community's needs adequately provided for in practice—fierce competition between retailers and low profit margins may be sufficient evidence to refuse licence under Trade Licensing Ordinance, s.16(1)(f)

The respondent appealed to the Stipendiary Magistrate against the Trade Licensing Authority's refusal to extend its trading licence.

The Authority refused the respondent an extension of its trading licence to enable it to sell wine, spirits, tobacco, confectionery and soft drinks in addition to its existing trade in clothing. The refusal was on the statutory ground that the needs of the community in the geographical trading area, or Gibraltar generally, were adequately provided for in respect of the relevant goods (s.16(1)(f) of the Trade Licensing Ordinance).

On appeal, the Stipendiary Magistrate upheld the Authority's decision. He gave significant weight to the evidence of objectors in the relevant trades, and found, *inter alia*, that the majority of customers for the goods in question were tourists, that the profit margin on tobacco in particular was very small, and that customers would shop around for the cheapest price even though there was little difference between different traders. Notwithstanding that there was a high level of trade at weekends when not all businesses were open, he found that the needs of the community in the immediate area were adequately provided for.

On the respondent's further appeal, the Supreme Court (Pizzarello, A.J.) reversed the Stipendiary Magistrate's decision, on the legal basis that since there was insufficient evidence from which he could properly have concluded that s.16(1)(f) was made out, he had lacked the discretion to refuse an extension. In particular, the court rejected the conclusion that the low mark-up on tobacco products reflected the saturation of the market. It ordered that the respondent's licence be extended as requested.

On appeal, the Authority submitted that (a) the lower court had erred in finding as a matter of law that there was insufficient evidence for the Magistrate's finding, and had placed too great an emphasis on its own evaluation of the evidence; (b) having warned himself as to their partiality, the Magistrate had been entitled to rely on the evidence of rival traders as to the fierce competition in tobacco trading, as evidence that the community's needs were adequately provided for in relation to those products; and (c) similarly, the needs of the community in relation to wines and spirits were already met, and licences for the sale of these products usually coincided with tobacco retail licences.

The respondent submitted in reply that (a) the court should construe the "needs of the community" as broadly as possible, since the circumstances in which the Ordinance now operated were different from when it was first enacted, when the border with Spain had been closed; (b) the appellant's figures for the annual number of visitors to Gibraltar were unsubstantiated, and there was no established method by which to judge the balance between supply and demand; and (c) the lower court had properly found that the low mark-up on tobacco products was indicative of customers' desire to obtain the best possible price, and not of market saturation.

Held, allowing the appeal in part:

(1) The parties were agreed and the lower courts had properly proceeded on the bases that (i) the "community" included tourists and day trippers as well as residents, (ii) the relevant "area" was that immediately surrounding the respondent's premises, and not Gibraltar generally, (iii) the evidence in relation to each category of goods must be considered separately, and (iv) an applicant was entitled to a licence unless one of the grounds for refusal set out in s.16(1) of the Ordinance was made out (para. 14; para. 23).

(2) Since the Trade Licensing Authority had to decide, in the context of s.16(1)(f), whether the demand for each type of goods was in practice adequately catered for in the area, the evidence of other traders in the area was particularly relevant, although no doubt susceptible to exaggeration in some cases due to fear of competition (paras. 24–26).

(3) The Supreme Court had erred in its assessment of whether there was sufficient evidence on which the Magistrate could refuse a tobacco licence, in that it had dismissed as fallacious his reliance on the low mark-up on those goods and on customers' willingness to shop around for the best price. Whilst neither showed conclusively that the community's needs were met, they did give some indication that a number of other outlets offered goods at broadly comparable prices. There was evidence of fierce competition, from which the Magistrate had been entitled to decide as he did, and it was not the role of the Supreme Court or the Court of Appeal to decide on appeal whether s.16(1)(f) applied. Similarly, there was evidence from traders indicating that competition was high and

profit margins tight in the wines and spirits trade. The Magistrate had properly refused licences in respect of both these types of goods (paras. 21–22; paras. 27–29; paras. 32–35).

(4) However, there had been no evidence presented in relation to soft drinks, and the evidence regarding confectionery was insufficiently cogent to justify refusing a licence. Accordingly, the appeals relating to these goods would be dismissed (para. 36).

Case cited:

(1) *Cepsa (Gibraltar) Ltd. v. Stipendiary Magistrate*, Supreme Ct., Civil Appeal No. 9 of 1991, unreported, *dicta* of Fieldsend, P. applied.

Legislation construed:

Trade Licensing Ordinance (1984 Edition), s.11(1): The relevant terms of this sub-section are set out at para. 4.

s.12(1): The relevant terms of this sub-section are set out at para. 4.

s.16(1)(e): The relevant terms of this paragraph are set out at para. 4.

(f): The relevant terms of this paragraph are set out at para. 4.

s.20(2): The relevant terms of this sub-section are set out at para. 5.

s.22(1)(a): The relevant terms of this paragraph are set out at para. 6.

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

S.V. Catania for the appellant;

J.J. Neish, Q.C. and *D. Bossino* for the respondent.

1 NEILL, P.:

Introduction

This is an appeal by the Trade Licensing Authority against the decision of Pizzarello, A.J. dated May 5th, 2000, whereby he allowed an appeal by Teziano Ltd. from the decision of the Stipendiary Magistrate, dated December 7th, 1999, refusing an application by Teziano Ltd. for an extension of its trading licence.

2 Teziano Ltd. (“Teziano”) carries on business at 205 Main Street in Gibraltar. At these premises its main business is as a retailer of clothing, although it also carries a wide range of other goods. On April 27th, 1999 Teziano made an application to extend its trading licence so as to enable it to sell by retail wine, spirits, tobacco, confectionery and soft drinks. The application relating to tobacco included an application for the retail sale of cigarettes.

The legislation

3 Before I come to consider the subsequent history of this application, I propose to refer to the relevant legislation. In Gibraltar, any person

C.A. TRADE LICENSING AUTH. V. TEZIANO LTD. (Neill, P.)

buying or selling any goods by way of business, whether by wholesale or retail, requires a licence to do so. This restriction on trading in goods is imposed by the Trade Licensing Ordinance. The principal Ordinance is that of 1978 (which replaced an earlier Ordinance of 1972) and it has been subsequently amended. Licences are issued by the Trade Licensing Authority established under s.26 of the Ordinance.

4 By s.11(1) of the Ordinance, “any person who intends to apply for a licence, unless the application is for the renewal of a licence currently in force” has to give notice of his intention, and, by s.12(1), “any person who wishes to object to the issue of such licence” is entitled to do so. Section 15 contains provisions as to the powers of the Licensing Authority when considering applications. Section 16 contains provisions setting out the general principles affecting the issue of licences, and s.16(1) sets out the main grounds on which “the licensing authority may in its discretion refuse to issue a licence . . .” I should refer to two of these grounds. By s.16(1)(e) it is provided that the Licensing Authority may in its discretion refuse a licence if it is satisfied that “the issue of such licence would operate against the public interest . . .” By s.16(1)(f) it is provided that the Licensing Authority may in its discretion refuse a licence if it is satisfied that “the needs of the community either generally in Gibraltar or in the area thereof where the trade is to be carried on are adequately provided for . . .”

5 Section 20 contains provisions relating to the cancellation of licences. By s.20(2) it is provided:

“Where a licence has been issued in respect of trade and such trade has not been carried on for a period of two years or has not been carried on in respect of all the types of goods for which it was issued, the licensing authority may, after giving the licence holder the opportunity to be heard, cancel the licence or cancel the licence in respect of such types of goods in which trade has not been carried on as the case may be.”

6 Section 22 contains provisions relating to appeals. By s.22(1)(a) “any person who is aggrieved by . . . the refusal to issue him with a licence . . . may appeal to the Stipendiary Magistrate.” By s.22(2) it is provided that a further appeal lies “from the Stipendiary Magistrate to the Supreme Court” but only “on a point of law.”

7 The 1978 Ordinance also contains provisions relating to the making of Regulations. It seems, however, that the relevant Trade Licensing (Appeal) Regulations in force are those which were made under s.25 of the 1972 Ordinance. However that may be, it is common ground that under the Trade Licensing (Appeal) Regulations, dated April 19th, 1974,

the hearing before the Stipendiary Magistrate is a re-hearing and the Stipendiary Magistrate has to consider the matter on its merits.

The decision of the Licensing Authority

8 Two objectors opposed the application for the extension of the licence. Stag Brothers Ltd. gave notice of objection on two grounds: (a) that the needs of the community, either generally in Gibraltar or in the area where the trade or business was to be carried on, were adequately provided for; and (b) that the grant of an extension to the licence would operate against the public interest. The second objector, Craven Enterprises Ltd., gave notice of objection on the first ground alone.

9 On June 30th, 1999 the Trade Licensing Authority held a hearing at which representations were made both on behalf of Teziano Ltd. and on behalf of the objectors. After hearing these representations the Trade Licensing Authority refused the application. The formal refusal signed by the Chairman of the Licensing Authority was dated August 3rd, 1999. The refusal was on the ground set out in s.16(1)(f).

10 Teziano Ltd. appealed to the Stipendiary Magistrate.

The decision of the Stipendiary Magistrate

11 The hearing before the Stipendiary Magistrate took place on November 18th, 1999. The Magistrate heard five witnesses. Mr. Khemani, a director of Teziano Ltd., gave evidence in support of the appeal. Evidence was given for the Licensing Authority on behalf of the two objectors and by Mrs. Sheriff, the secretary of the Licensing Authority, and Mr. Risso, a member of the Licensing Authority. In addition Mr. Risso tendered a letter which he put forward as notes of the evidence which he wished to give. The Magistrate also heard submissions on behalf of Teziano Ltd. and on behalf of the Licensing Authority. It seems clear that notwithstanding the terms of the refusal in August, the Magistrate was addressed by counsel for the Licensing Authority on the basis that the extension of licence would be against the public interest.

12 The Stipendiary Magistrate gave his ruling in a written decision dated December 7th, 1999. He began his decision by giving a summary of the evidence given by the five witnesses whom he had heard. He said that in his view the evidence of the secretary and the member of the Licensing Authority were of limited evidential value, but that more weight could be given to the evidence tendered by those in the trade. He referred to the judgment of Fieldsend, P. in *Cepsa (Gibraltar) Ltd. v. Stipendiary Magistrate* (1), where, with reference to the evidence of objectors and persons in the trade, Fieldsend, P. said: “They are the people most likely to know of the requirements of the market and the way in which they are

C.A. TRADE LICENSING AUTH. V. TEZIANO LTD. (Neill, P.)

being met.” The Stipendiary Magistrate added, however, that the objectors would, of course, be competitors of the appellant and that therefore he could not simply accept their opinion as fact without looking at the substance of their testimony.

13 A little later in his decision, the Stipendiary Magistrate set out his eight findings of fact. They were as follows:

“(1) There are 340 tobacco retail licences; 130 wines and spirits licences and 250 confectionery licences.

(2) There are 47 shops in Main Street licensed to retail tobacco of which some 26 have this product as one of their main lines and 13 sell it as a side line. There are also 3 shops in Governor’s Street; 1 in Bell Lane; 5 in Cornwall’s Lane and some 10 shops in Irish Town trading in tobacco.

(3) Most shops in Main Street retailing tobacco also retail wines and spirits.

(4) Between the beginning of Main Street and Cathedral Square there are some 24 shops selling tobacco, wines, spirits and confectionery. If the area is restricted further, between the area of the junction of Market Lane/Main Street to Cathedral Square there are some 10 shops trading in these products.

(5) There is disparity between the opening days and hours of traders, and when some businesses are closed there can be a significant influx of custom to those that keep their shops open.

(6) The profit margin on the best selling brands of tobacco, particularly on American cigarettes is minuscule and to a degree is to be considered a loss leader.

(7) The mainstay of businesses trading in tobacco, wines and spirits are the day trippers visiting from Spain or coming on cruise liners.

(8) Many customers will shop around for the cheapest price notwithstanding that the difference may be very small indeed.”

14 The Magistrate then dealt with the meaning of the word “community” in the Ordinance. He accepted that in the context the word “community” should be construed as including tourists and day trippers. But the Magistrate added that he could not accept as accurate the figure of 6m. visitors to Gibraltar per year (a figure which had been mentioned in the course of the hearing), as he had no substantive evidence to that effect. However, he said that he could take judicial notice of the fact that many of the visitors who come to Gibraltar came on a daily basis and that tobacco, wines, spirits and confectionery were amongst the most popular products purchased by them.

15 A little later the Magistrate continued:

“The evidence before me did not so much address the needs of the community ‘generally in Gibraltar,’ but rather was directed at the needs of the community ‘in the area.’ On the evidence before me, I am satisfied that whether I define the ‘area’ as ‘from the beginning of Main Street to Cathedral Square and the side streets thereto,’ or adopt a more restricted definition, namely, ‘from the area of the junction of Market Lane/Main Street to Cathedral Square,’ the needs of the community are adequately catered for. This is established not only by the number of shops but by the evidence of Mr. Stagnetto [the manager of Stag Brothers Ltd.] and, to a lesser degree, Mr. Nanwani [who has a small shop adjoining Teziano’s shop] and, indeed, also Mr. Khemani, as to how the market in these products operates. I attach importance to the very low mark-up on some of the products and the fact that many customers will shop around for the cheapest price notwithstanding the very small differential in price between shops.”

16 Having made the finding that in the relevant area the needs of the community were adequately provided for, the Magistrate then considered the exercise of his discretion. He said:

“The only evidence which militates towards my granting the licence is that of the level of trade at weekends when not all businesses are open. I am balancing this with the factors which have led me to conclude that the needs of the community in the area are adequately provided for and, in the exercise of my discretion, I refuse the application for the extension of the licence.”

17 On January 5th, 2000 Teziano appealed to the Supreme Court. In the memorandum of appeal, five grounds of appeal were set out but in essence the basis of the appeal was:

(a) The Magistrate had erred in law in dismissing the appeal when there was no or no sufficient evidence that the needs of the community were provided for (Ground 1).

(b) The Magistrate had wrongly exercised his discretion by not attaching any or sufficient weight to the need of Teziano to acquire an additional trade licence for its commercial viability (Ground 5).

18 The appeal came before Pizzarello, A.J. on March 10th, 2000 when he heard the submissions of counsel. On May 5th, 2000 the learned judge handed down his reserved judgment allowing the appeal. He ordered the Licensing Authority to grant Teziano the extension to its licence for which it had applied. I understand, however, that this order and the judge’s subsequent order of June 9th, 2000 as to costs have been stayed pending the result of the appeal to this court.

19 Pizzarello, A.J. concluded his judgment in these terms:

“The learned Stipendiary sets out the facts and, in my view, there is nothing in the findings of fact recorded by him under (1) to (8), having regard to the foregoing and taking account of Mr. Pitto’s submissions, from which there may be drawn the inference that there is adequate provision to satisfy the needs of the community in respect of each of the items applied for. Nor am I able, on the review of the appeal record, to say that I am satisfied on the evidence advanced therein that the needs of the community are adequately catered for. Therefore, there is no discretion to refuse the licence applied for and the Stipendiary Magistrate should have allowed the appeal against the refusal of the Licensing Authority.”

The appeal to the Court of Appeal

20 The memorandum of appeal by the Trade Licensing Authority was dated July 13th, 2000. It will be seen from the history I have set out that the application by Teziano had already been considered by the Licensing Authority, by the Stipendiary Magistrate and by the Supreme Court before the matter came before this court on Tuesday, September 12th, 2000. For the purpose of this appeal, however, I can direct my attention to the evidence before the Stipendiary Magistrate and his decision and to the judgment of Pizzarello, A.J. It will be remembered that the hearing before the Stipendiary Magistrate was by way of a re-hearing and that the appeal to the Supreme Court was on a point of law alone. And I would also add that where an appeal is only on a point of law an appellate court, at whatever level, should be very slow to interfere with the exercise of a discretion by the tribunal of fact.

21 The critical question for our determination is whether Pizzarello, A.J. was correct in deciding that, as a matter of law, there was no sufficient evidence on which the Stipendiary Magistrate could find that the needs of the community in the relevant area were adequately provided for. The finding of fact was for the Stipendiary Magistrate. The question of law was whether there was evidence on which the Stipendiary Magistrate could properly base his finding.

22 With respect to the judge, I am not sure that he confined his examination of the evidence and of the specific findings made by the Stipendiary Magistrate within these limits. Thus, towards the end of his judgment he said: “Nor am I able, on the review of the appeal record, to say that I am satisfied on the evidence advanced therein that the needs of the community are adequately catered for.” These words are at least capable of suggesting that the judge placed undue emphasis on his own evaluation of the evidence.

23 Three matters are not in dispute:

(a) The relevant area for the Magistrate to consider was the area from the beginning of Main Street to Cathedral Square and the side streets thereto. This is not a case in which the needs of the community “generally in Gibraltar” have to be considered.

(b) In considering the needs of the community, the tribunal of fact must examine the evidence in relation to each category of goods separately.

(c) An application for a licence to trade can be refused only on one of the grounds set out in the Ordinance. In the absence of a proper ground for refusal the applicant is entitled to a licence.

24 It was argued by counsel for Teziano that in construing the Ordinance it was important to bear in mind the circumstances in which the 1972 and 1978 Ordinances were introduced. At the time when the border was closed, it was desirable to introduce measures to safeguard the position of businesses and traders and to prevent the undue proliferation of shops dealing in particular goods. But the position today was quite different. The needs of the community should be construed as liberally as possible.

25 I see the force of this argument but it is to be remembered that the concluding words of s.16(1)(f) are “adequately provided for.” I would stress the word “adequately.” In my judgment, the task of the tribunal of fact is and always has been to examine the evidence as to how the demand in the area is catered for in practice. The question for the tribunal to answer is a practical question where the experience of traders in the area will be of particular relevance, though it will be necessary to guard against the possibility of exaggeration due to fear of competition.

26 It was further argued on behalf of Teziano that the case for the Licensing Authority was defective because there was no admissible evidence of the number of visitors coming to Gibraltar nor of the actual number of cigarettes and other goods sold. There was therefore no relevant method by which the balance between supply and demand could be judged. In my opinion, however, the right approach to the question of supply and demand is, as I have already indicated, to look at how the demand for a particular type of goods is provided for in practice. As Fieldsend, P. said in the *Cepsa* case (1), the question of adequacy is to be tested by the way the licences in respect of particular goods are operated and “whether their operation adequately provides for the needs of the community.”

27 One of the factors which influenced the Stipendiary Magistrate was the low mark-up on some products. As I understand it, he recognized (in finding (6)) that a low mark-up might be indicative of a loss leader, but it

C.A. TRADE LICENSING AUTH. V. TEZIANO LTD. (Neill, P.)

might also show that competition was keen. The learned judge was clearly justified in drawing attention to the fact that the evidence of low mark-up was limited to tobacco brands and did not relate to other goods, but, subject to this qualification, I think the judge erred in treating the Stipendiary Magistrate's reliance on the low mark-up as completely fallacious. It was not a "pillar" which collapsed completely.

28 Another factor which influenced the Stipendiary Magistrate was the evidence that many customers shopped around for the cheapest price notwithstanding that the price differences might be very small indeed: see finding (8). The judge criticized this approach of the Stipendiary Magistrate. I should quote his criticism:

"I do not understand why he attaches special (special is my word, not his, but in the context I think I am justified in the emphasis) importance to the fact that many customers will shop around for the cheapest price notwithstanding the small differential in prices between shops. That seems to me to bear not at all on the question whether the needs of the community are adequately met. I should have thought that was indicative of market forces and a customer's desire to get the lowest price possible to himself, and not that there is saturation."

29 I am not satisfied that this criticism is justified. The fact that customers shop around for the cheapest price is, of course, in no way conclusive. It is, however, *some* indication that there are a number of available outlets in particular goods at broadly comparable prices. A shortage of suppliers would be likely to lead to queues in a few outlets rather than to customers going from shop to shop looking for marginal differences in price.

30 I come now to the evidence relating to the particular categories of goods, which I shall examine in conjunction with the Stipendiary Magistrate's findings of fact and taking into account, to a limited extent, the two factors of low mark-ups and "shopping around" which influenced him.

Tobacco and cigarettes

31 Although the evidence of low mark-ups related in particular to some American brands, Mr. Stagnetto's evidence was that competition was fierce. And it was also established that there are some 10 shops in the area of the junction of Market Lane, Main Street and Cathedral Square trading in tobacco products. Mr. Stagnetto's evidence was supported by Mr. Nanwani, who was particularly concerned by the prospect of competition from an adjoining and larger shop.

32 It is not for me to say whether I would have been satisfied on this evidence that the needs of the community in the area were adequately

provided for. It seems to me, however, that there was evidence on which the Stipendiary Magistrate could base his finding in relation to tobacco and cigarettes. Mr. Stagnetto said the competition was tremendous and Mr. Nanwani said that if the extended licence were granted he would have to close. This evidence was, of course, the evidence of competitors, but, in my judgment, a tribunal is entitled to conclude, if satisfied that competition is fierce, that the needs of the community are “adequately” provided for.

33 In relation to these goods I would allow the appeal.

Wines and spirits

34 The evidence relating to wines and spirits was less clear, though Mrs. Sheriff said that tobacco licences and wines and spirits licences usually went together. However, it seems clear that the evidence of Mr. Stagnetto was directed not only to tobacco but also to wines and spirits. In re-examination he said that trade was tight and the overall number (presumably of traders) was far too many.

35 I am satisfied that there was evidence before the Stipendiary Magistrate from which he could come to the conclusion that the needs of the community for wines and spirits (which can be considered together) were adequately provided for. I would allow the appeal in respect of these goods also.

Confectionery and soft drinks

36 I cannot see that there was any evidence directed specifically to the sale of soft drinks. If such an extension to the licence is required by Teziano I can see no ground on which it could be properly refused. The position with regard to confectionery is less clear, because some of the evidence treated confectionery as in the same category as wines and spirits and, perhaps, tobacco. On balance, however, I consider that the evidence relating to confectionery was not clear enough to justify a refusal. If a licence in respect of confectionery is wanted by Teziano I see no good grounds for refusal.

Conclusion

37 For the reasons I have endeavoured to outline, I would allow this appeal to the extent indicated. I see no reason to interfere with the exercise by the Stipendiary Magistrate of his discretion.

GLIDEWELL and STAUGHTON, J.J.A. concurred.

Appeal allowed in part.