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<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 23/66390
	Delivered: 27/01/2025

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING’S BENCH DIVISION
—————

BETWEEN:

LIDL NORTHERN IRELAND LIMITED
Applicant/Respondent

and

PHILIP RUSSELL LIMITED
Objector/Appellant

—————
Mr Stewart Beattie KC (instructed by DWF (NI) LLP) for the Applicant/Respondent
Mr Liam McCollum KC with Mr Richard Shields (instructed by Mills Selig) for the
Objector/Appellant
—————

COLTON J

The proceedings

[1] This is an appeal against the decision of His Honour Judge Marrinan whereby he granted an application by Lidl Northern Ireland Limited (“the applicant”) for the provisional grant of a licence pursuant to Articles 2, 5(1)(a), 7, 9 and Schedule 1 of the Licensing (Northern Ireland) Order 1996 (“the 1996 Order”) for premises at Unit 2, Dunlady Road, Dundonald. The appeal is brought by the objector, Philip Russell Limited, pursuant to the County Court (Northern Ireland) Order 1980. Although the appeal is conducted by way of a rehearing, the parties and the court have the benefit of a detailed written judgment from HHJ Marrinan. I am grateful to counsel for the marshalling of the evidence in this application and for their subsequent helpful written submissions.

The application

[2] The application is for the provisional grant of an intoxicating liquor licence for premises in which the business to be carried on under the licence is the business of

selling intoxicating liquor by retail for consumption either on or off the premises as provided for in Article 5(1)(a) of the 1996 Order.

The relevant statutory scheme under the 1996 Order

[3] The requirements for the grant of a licence under Article 5(1)(a) are contained in Article 7 of the 1996 Order. It provides:

“Grant of licences

7.-(1) An application for the grant of a licence shall be made to a county court.

(2) The procedure for applications for the grant of licences is set out in Part I of Schedule 1.

(3) On an application for the grant of a licence, the court shall hear the objections, if any, made under Part I of Schedule 1.

(4) A court shall refuse an application for the grant of a licence unless it is satisfied -

- (a) subject to paragraph (5)(a), that the procedure relating to the application set out in Part I of Schedule 1 has been complied with; and
- (b) that the applicant is a fit person to hold a licence; and
- (ba) that the applicant is aware of the responsibilities under any code of practice which the Department has approved under Article 76F (and from which it has not withdrawn its approval); and
- (c) that the premises are of the kind specified in the application; and
- (d) subject to paragraph (5)(b), that the premises are suitable to be licensed for the sale of intoxicating liquor by retail; and
- (e) where the premises are of a kind mentioned in Article 5(1)(a) or (b) –

- (i) subject to paragraph (6), that the number of licensed premises of the kind specified in the application which are in the vicinity of the premises is, and having regard to any licences provisionally granted under Article 9 or any sites approved under Article 10 will be, inadequate; and
- (ii) subject to paragraph (7), that a subsisting licence for premises of either such kind, or a subsisting licence in respect of which the note and record mentioned in Article 5(5)(a) have been made, has been surrendered to the clerk of the court or will be so surrendered before the licence is issued; and
- (iii) where, under any statutory provision, the applicant is or will be entitled to compensation for the loss of goodwill which attached or attaches to the business carried on under the licence proposed to be surrendered, that he has abandoned his claim to so much of that compensation as is equivalent to the value of any of that goodwill which is likely to be attracted to the business proposed to be carried on under the new licence; and

(f) either -

- (i) that there is in force planning permission to use the premises as premises of the kind specified in the application for the period during which the licence would be in force; or
- (ii) that the premises may be used as such premises for that period without such permission.

(5) A court may grant a licence notwithstanding -

- (a) that the procedure relating to the application set out in Part I of Schedule 1 has not been complied with if, having regard to the circumstances, it is reasonable to do so; or
- (b) that the premises are not suitable to be licensed for the sale of intoxicating liquor if they will be made suitable in consequence of an order under Article 8.”

The parties

[4] Lidl is owned by Schwarz Group who have four core businesses including Kaufland, Schwarz Produktion and PreZero. Schwarz Group are the fourth largest retailer in the world with a turnover of €133.6 billion, 6.1 billion customers and 550,000 employees over 32 countries. It trades in the USA and 31 European countries including England, Scotland, Wales and Ireland with over 11,000 supermarket premises, more than 150 regional distribution centres and over 10 million customers per day. The wider Lidl group of companies is the largest retailer in Europe and the fourth largest in the world. Other businesses within the group include Bon Presso (coffee manufacturing), MEG (a bottling plant), XM Cyber (cyber security) and STACKIT (internal shipping and logistics).

[5] The directors of Lidl Northern Ireland consist of individuals based in Northern Ireland and the Republic of Ireland who are directly responsible for all matters pertaining to property transactions and licensing applications in Northern Ireland.

[6] It now trades from approximately 800 supermarkets in England, Scotland and Wales. All these premises sell alcohol.

[7] The Lidl brand entered the Northern Ireland supermarket business in 1999, initially as the corporate entity Lidl Northern Ireland GmbH. In 2019 the company was restructured into a newly incorporated company, Lidl Northern Ireland Limited. The applicant company employs around 1,300 people and trades from 41 supermarkets in Northern Ireland.

[8] The objector is a well-established and successful company involved in the wholesale and retail sale of wine, beer, spirits and other alcohol beverages. It operates several off-licences in Northern Ireland, including in the vicinity relevant to this application.

The issues

[9] I am obliged to counsel for their helpful written and oral submissions.

[10] The statutory procedural proofs are all in order. No issue was taken in relation to these at the hearing. The statutory notice parties, the PSNI and Lisburn and Castlereagh Borough Council have confirmed they have no objection to the application.

[11] The title and company documents of the applicant are in order.

[12] The relevant planning permission for the proposed premises is in place and is not the subject matter of any dispute.

[13] The “vicinity” is agreed, namely the electoral wards of Dundonald, Graham’s Bridge, Ballyhanwood, Enler and Carrowreagh.

[14] The licence to be surrendered as part of the application is the Article 5(1)(a) licence at 793 Upper Newtownards Road, relating to premises known as Rubys (and formerly “the Elk”). It is within the “vicinity” for the purposes of this application.

[15] Having set out the above matters I now turn to the issues in dispute.

[16] These can be summarised as follows:

- (i) The applicant has failed to establish “inadequacy” as required by Article 7(4)(e) of the 1996 Order. This raises an issue as to the correct statutory test for inadequacy. In particular a question for this court is whether in assessing inadequacy it should take into account the licence which it is proposed will be surrendered. Further the question arises as to whether the court should include the existence of off-sales premises in assessing inadequacy.
- (ii) The court should dismiss the application, essentially on the basis that it is in effect an application for an off-licence. The objector says that it is an impermissible attempt to circumvent the 1996 Order.

Summary of the evidence

Mr Speers

[17] The court received a written statement of evidence from Mr Speers, the property director of the applicant company. He gave oral evidence at the hearing and adopted that statement as his evidence in chief. He elaborated on matters in the statement and was cross-examined in the normal way.

Background leading to the application

[18] That evidence sets out the background to this application in the following way:

- The applicant received planning permission for a supermarket at 2 Dunlady Road, Dundonald in 2001 and opened for trade in 2002.
- An off-licence application was made in October 2003 but was not successful.
- The supermarket was closed in 2011 following a review of the applicant's Greater Belfast stores which also saw Lidl Glengormley close in 2010. Instrumental in this decision was the fact that Lidl Dundonald did not provide the full range of offers to its customers including an off-licence. This decision was made in the knowledge that Lidl had stores nearby in Newtownards and on the Castlereagh Road which provided the full range of offer.
- In 2012, the retailer B&M was granted a 5-year lease for the Dundonald premises until 15 October 2017.
- In early 2017 Lidl decided to take the necessary steps to repossess the property for its own occupation, initially with a complete rebuild in mind. Whilst it pursued planning permission for a rebuild store it granted two further extensions to the B&M lease before taking possession of the property in January 2019 a matter of weeks after planning permission was granted.
- In February 2019 the applicant learned that the Lewis Public House on the Upper Newtownards Road (formerly known as "The Moat") situated at 933 Upper Newtownards Road, Dundonald, had been destroyed in a fire. At this stage Lidl began to explore if this misfortune represented an opportunity for it to operate a public house.
- The applicant made a further off-licence application around this time but this was later withdrawn on 15 May 2019 following objection from Philip Russell Limited.
- In or around this time while the concept of Lidl operating a pub continued to be considered, the Lidl board decided to reopen Lidl Dundonald without a liquor licence. In doing so, Mr Speers said that Lidl recognised that the brand was now well understood and was in an entirely different place than it had been when it took the decision to close Lidl Dundonald in 2012. This represented a change from the view that Lidl should not trade stores without an alcohol offering. Thus, Lidl Dundonald was reopened in 2019 and Lidl Crumlin Road in 2020, neither of which had a liquor licence.

- In August 2019 following a detailed design of the building and completion of the tender process the project and associated costs received formal approval. Around the same time the concept of Lidl operating a public house was approved but it was clear that the timeline for this, if granted, would follow after the supermarket opening.
- On 28 November 2019, the Lidl Dundonald supermarket was reopened by the applicant company. The modernisation of the existing building cost £1,140,000 with a further £685,000 spend on tills, chillers, freezers and other merchandising equipment to fit out the store. Mr Speers stated that this decision has been justified with strong trading and transaction figures, presently around 6,750 transactions per week.
- On 26 February 2020 a planning application was made for a public house at the premises. Planning permission was granted on 24 August 2020.
- In March 2020 the applicant entered into an agreement with the licensee of the Lewis Public House to surrender that licence pursuant to an application for the premises at 2 Dunlady Road, Dundonald.
- On 28 August 2020 an application for the provisional grant of a public house on/off-licence was submitted to the court.
- On 24 September 2020 Philip Russell Limited lodged an objection.
- On 11 September 2020 Mr Ian Newell lodged an objection.
- On 19 October 2020 representatives for Mr Newell approached Lidl's solicitors to advise that he had been a party to alterations to the Lewis premises that should properly have been the subject of an application for alterations to the County Court. He was seeking a "negotiated solution" not to reveal this.
- Lidl decided that it would not be a party to such a proposal. As a consequence, in February 2021 the provisional grant application was withdrawn.

History of the current application

[19] Turning to the current application, Mr Speers stated that Lidl remained determined to pursue a public house application for on/off-sales. Thus, it entered negotiations for the acquisition of the licence for the public house premises trading as "Rubys" (and formerly known as "The Elk") situated at 793 Upper Newtownards Road, Dundonald. In August 2021, having secured the agreement to surrender this licence, the application was made to the court.

[20] The applicant engaged experienced architects for the purpose of developing the style of public house that it sought to develop. Planning permission has been obtained. The court has seen a copy of the licensing plan and indicative schematics of the proposed interior.

[21] The public house will comprise an area of 165 m² containing a public bar, off-sales, customer toilets, ancillary staff areas, storage and an office. 85.5 m² of this is sought to be licensed; 61 m² for the bar and 24.5 m² for the off-sales. (These figures are taken from the plan submitted by Mr Reilly, Architect. They differ slightly from figures provided by Mr Shanks, but nothing turns on this difference). The proposed public house and off-licence will be located within the existing site. His evidence was that the public bar could seat 45 customers.

[22] Mr Speers stated that the applicant had the project costed, with the main contractor's cost estimated to be £326,496 including fittings but excluding IT and other direct trades. The estimated cost has now risen to £410,000.

[23] He gave evidence about the product range which was to be offered to customers at the proposed premises. In doing so he analysed the product range on offer at Rubys.

[24] He also consulted the Lidl purchasing department and other experts in the field to advise on wine product selection and quality for the premises. He produced a proposed product list which included, draft beer, bottled beer, cider, coolers, gin, vodka, rum, Irish whiskey, Scotch whisky, Tennessee whiskey, bourbon, tequila, cognac and liquors. Consideration has been given to introducing a guest draft beer from a local brewery.

[25] Further, he stated that a keg room with multi-circ will be built in the rear store to ensure that the draft beer was served at the optimum temperature. Additional shelving, bottle coolers and wine racks will be located in the rear store to ensure the appropriate stockholding of all products. Two further three-door bottle coolers will be located behind the bar, each accommodating 324 bottles (548 in total) of the most popular bottled lines. The coolers can accommodate up to 108 single facings but initially will stock 2-3 facings of bottle beers, ciders, coolers and soft drinks.

[26] The off-sales will stock all permanently listed Lidl off-sales products but with less facings of each than a standard Lidl off-sales due to the space constraints.

[27] In terms of staff recruitment he stated that a current Lidl employee, who has previously managed a JD Wetherspoon public house for over five years will be offered a secondment to this project to assist in the opening of the public house business if approved by the court.

[28] It was his expectation that the public house and off-sales would initially require nine staff, comprising four full-time and at least five part-time staff utilising

approximately 200 hours per week. He expected to advertise for a full-time manager and duty manager if the provisional grant application was successful.

[29] He indicated that prior to any final grant, all staff employed will undertake a comprehensive training and induction programme to equip them for their role. Training will include, though would not be limited to, modules and tools of the trade, bartender terminology, glassware guide, bartender routines and checklists set up in the bar servery, productivity behind the bar, working as a team, tv management, duty to refuse service, NI Licensing laws and/the company's challenge 25 policy. It was also anticipated that potential suppliers would provide training assistance for the on-sales business.

[30] In terms of demand for the public house he noted that the applicant has acquired the last remaining public house licence in Dundonald. From his analysis of Rubys' trade his assessment was that footfall and sales were strong and that the current licensee has a significant Dundonald customer base. He highlighted that this was in the context of the other previously licensed premises in the Dundonald area namely the Lewis ceasing trading.

[31] He pointed to the fact that the supermarket currently has over 6,750 transactions per week and is located next to a 500-space park and ride facility and the Glider bus. The presence of an Asda supermarket, a betting shop, the busy Spar and neighbourhood parade of shops were relevant in his view.

[32] His evidence was that the business will trade for 362 days per year, and 363 days per year in a leap year. The business would not trade on Christmas Day, New Year's Eve or New Year's Day. On Christmas Eve the public bar will sell alcohol from 11.30 to 18.00 hours. The off-sales area will sell alcohol from 08:00 to 18:00 hours.

[33] The public bar will trade from 12:30-23:00 hours on Sunday, 12:00-23:00 hours on Monday-Saturday. The off-sales from 08:00-21.00 hours Monday-Saturday and 13:00-18:00 hours on Sundays.

[34] If the provisional grant application is successful the intention would be to apply for permission for extended hours. If late hours were permitted it would be intended to provide live music on a Friday and Saturday night and remain open until 01:00 hours.

[35] In addition to the range of alcoholic drinks the public house will offer non-alcoholic drinks and pub snacks such as crisps and nuts. On the issue of the absence of the provision of food, he gave evidence of his visits to drink sales only public houses at Neds, Holywood and Bittles, Belfast which appear to be successful drink sales only public houses.

[36] He concluded by indicating that Lidl had an unblemished track record of alcohol sales in Northern Ireland and were excited at the prospect of offering a unique on-sales premises in Dundonald. National and international approval had been secured for what he described as an exciting venture. Funding was available. If granted the applicant will provide quality public house premises for customers using the facility in Dundonald but at a location which was closer to the main retail and transport hub of the vicinity.

[37] Mr McCollum tested the circumstances in which Lidl decided to pursue this application. He pointed out that Lidl had no previous experience of running public bars. He pointed to previous experiments of licensed premises in supermarkets which proved to be unsuccessful. In particular he referred to a public bar in a substantial shopping centre in Springhill, Bangor, which closed down.

[38] Mr Speers denied that the premises were unsuitable in terms of access and location. In relation to the proximity to the loading bay and waste disposal area, he pointed out that at no stage was waste stored outside.

[39] Importantly, Mr Speers conceded that had the original application for an off-licence been successful this application would not have been brought. However, he remained adamant that Lidl was determined to run a profitable public bar if this application was successful.

Ms Thompson

[40] Ms Thompson, who is an expert Town Planning Consultant, gave evidence on behalf of the applicant. As is customary she provided a detailed proof of evidence which she adopted as her evidence in chief at the hearing. She elaborated on the proof and was cross-examined in the normal way.

[41] On the question of inadequacy she gave evidence on several matters she considered relevant. The first related to those resident in the vicinity. The total registered number of voters within the vicinity as of December 2022 was 13,985 an increase of 2,662 or 23.5% since December 2012. She noted that there was a consistent pattern of growth across each of the electoral wards comprised in the vicinity with the most marked increase occurring in the Carrowreagh ward as a result of housing developments at Millmount. This new housing area is about 1 mile away from the applicant site.

[42] Recognising that some of the electoral wards extend into the surrounding countryside her analysis was that the total adult population in the vicinity was 11,085.

[43] In addition to those resident in the vicinity she gave evidence concerning those “resorting” to the vicinity.

[44] Referring to the emerging local development plan she notes that the site is identified for inclusion with the local centre which is the central commercial focus for Dundonald. It contains significant attractors of footfall including the Lidl store, the Asda superstore and the Cherryhill neighbourhood shopping complex. Lidl is achieving 6,750 weekly transactions. Asda is a long-established supermarket that is on the opposite side of the road to the applicant site. It is the largest supermarket in the area. Based on financial returns it is her estimate that it is maybe attracting in the region of 21,000 customer transactions per week, indicative of a very busy supermarket with substantial footfall.

[45] The Cherryhill complex and petrol filling station is located beside the applicant site and is anchored by the Eurospar supermarket. She referred to a recent marketing brochure which suggests that the Eurospar attracts an average weekly footfall of 12,000 people. It has an instore Post Office, a local butchery counter and a Subway sandwich franchise. Within its forecourt there are seven retail units including a Winemark off-licence, an optician, a hairdressers and hot food takeaway. Also within this retail site is a wallpaper and paint shop and an electronic cigarette retailer. She also noted that the Henderson Group has lodged a planning application to extend the Eurospar's sales floor space by around 40% (from 465 sq m to 645 sq m). If this extension is approved, the footfall at the Cherryhill complex is expected to increase from 12,824 to 15,673 persons per week, thus further consolidating the hub of the vicinity as a place to which people resort.

[46] In her view the location of the Post Office is significant as it is consistent with the commercial identity of this part of the vicinity. It reinforces the popularity and accessibility of the Cherryhill complex as part of the commercial and public transport hub that people resort to within the vicinity.

[47] She referred to the Lisburn and Castlereagh City Council (LCCC) Planning Authority which is in the process of drafting a new local development plan that will supersede the previous dBMAP. The LCCC has published a retail catchment for Dundonald. The research carried out by the LCCC suggests in her opinion a conservative estimate of 13,964 footfall into the local centre on a weekly basis.

[48] The draft plan strategy published in October 2019 confirms that:

“Dundonald status as a possible town centre and its associated designation will be considered at the Local Policies Plan stage.”

The strategy was adopted in September 2023. It is reconfirmed that Dundonald's status as a possible town centre and its associated designation will be considered at the Local Policies Plan stage. Ms Thompson argues that this assessment points to Dundonald as a single, distinct vicinity with the commercial hub as a key draw attracting persons into the vicinity and also as a focal point for those who reside within the vicinity.

[49] Her evidence was that there were at least 5,985 employees coming into the vicinity on a regular basis.

The evidence of Mr Noble

[50] Mr Noble is a Director of Rubys. In summary he gave evidence that the public house was open 7 days a week. It provides basic food on the ground floor and has a more formal dining provision in a restaurant on the first floor. He indicated that there had been no change in the situation regarding Rubys since he gave evidence in the County Court. His Honour Judge Marrinan recorded Mr Noble's evidence in the following way in his written judgment:

“He felt that 90% of the trade was local with the remainder coming from Stormont, the Newtownards Road, Comber, Newtownards and Tullycarnett. He said that the figure of £15,000 represented alcohol takings including alcohol sold at the disco. It also included a figure for VAT. Leaving aside VAT the figure was £13,100 which included the restaurant. He indicated that 25% of the alcohol sales were made in the restaurant. The witness indicated that he owned other licensed premises and was not sure if the restaurant would be kept going in the event that the public house licence was surrendered. He accepted that trading figures of less than £10,000 a week would mean a public house business might be in trouble and that what he called add-ons are important.

He confirmed that he had acquired premises in Larne which would be drinks only.”

The reference to the figures above relates to the turnover of Rubys.

[51] In cross-examination by Mr McCollum he accepted that the turnover had decreased to approximately £10,600 per week and that the overall trend was downwards. It was put to him that Rubys was struggling and that it was not by any means a busy public house/bar.

[52] The figures of those attending the premises on the various visits by Mr Shanks (see below) was put to him. Mr Noble insisted that the numbers were sufficient for it to trade.

[53] His evidence was that the food element of the business was difficult and that if it was a bar only business it would be more profitable. In fact Mr Noble has acquired control of a drink sales only public house in Larne that he advised the court is trading well. “Wet sales” (drinks only) for Rubys for the period between 1

February 2023 and 31 January 2024 indicated a weekly turnover of £10,569.68 exclusive of VAT.

Evidence of Mr Cathal Reilly

[54] The court heard from Mr Reilly, an experienced qualified Architect, who prepared the plans for the premises. His evidence was that the absolute capacity for the premises was 136 persons. He was challenged about this by Mr McCollum but stood by his analysis.

[55] On this issue I conclude that the people who would comfortably fit into the premises for the purposes of consuming drinks would be well below 100 persons. I consider that the proposed premises would seat between 35 customers (Mr Shanks) and 45 customers (Mr Noble), although there would be room for some additional persons standing. Mr Reilly accepted that he was applying the worst-case scenario for the purposes of fire regulations.

[56] In relation to the off-licence I accept his evidence that it would accommodate 12 persons maximum at a given time.

[57] Overall I am satisfied from the plans and photographs I have seen that the proposed premises, though small, are well-appointed and designed. The proposed furnishings are of high quality and the ambience presents as comfortable for visitors.

Mr Shanks

[58] The appellant/objector called evidence from Mr Clyde Shanks, who is a Director of the Planning Consultancy Clyde Shanks Ltd. He is a Chartered Town Planner with some 20 years' experience. He has acted as an expert planning witness and presented planning evidence in licensing cases before both the County Court and the High Court in this jurisdiction.

[59] Mr Shanks did not give evidence in the County Court.

[60] He provided a detailed proof of evidence upon which he elaborated at the hearing.

[61] The thrust of his evidence was to suggest that the proposed site was completely unsuitable for a on/off-licence/public house.

[62] He comments that if the application is successful Lidl will be reducing its sales area from 1420 m² to 1,009 m², which he suggests sits uncomfortably against the evidence of strong trading presented to the court.

[63] In the context of the premises themselves he points out that the proposed public house will be adjacent to a servicing ramp where HGV delivery lorries deliver

goods and products to the store. It is also adjacent to a storage yard used for rubbish and waste product associated with the store.

[64] He suggests that the physical layout of the premises and its carpark are not conducive to a viable licensed premises. The store is at a different level from the Upper Newtownards Road. Pedestrian access is provided for by sets of steps at either end of the carpark. The extensive carpark to the premises is not accessed directly from Upper Newtownards Road but from the adjacent Dunlady Road. I have visited the location myself. I consider that there is ample and suitable access to the site both for pedestrians and for vehicles.

[65] Overall he suggests that the locus is both physically and visually separate from the wider public realm. He describes it as having a “harsh and hard landscaped appearance.”

[66] He suggests that the reality is of a self-contained supermarket site.

[67] He argues that there is very little pedestrian or vehicle movement entering the Lidl site from the direction of the Glider or the park and ride site.

[68] Arising from a site visit at night, his evidence was that during the hours of darkness the location of the public house is in the part of the store carpark which is generally the quietest.

[69] He presented photographs of the location at night and states the carpark is generally empty close to the location of the proposed public house.

[70] He argues that it presents a bleak prospect for a licensed premises.

[71] He is critical of what he describes as the lack of service which will be provided to customers of the public house. He suggested that this generally would include the requirement for a spacious internal seating area around a public bar, the opportunity to make provision for food and drink in order to maximise sales revenue, the need for a spacious kitchen arrangement to facilitate that offer and the provision of an attractive external seating area. He said that these key elements are not apparent in the application. His analysis of the planned premises suggests capacity accommodation of between 30-35 being seated.

[72] His evidence was that the proposed licensed bar area at Lidl is almost nine times smaller than the licensed area at Rubys. He argued that the two premises are fundamentally different in terms of the size, form and function of the licensed floor space that forms the offer to the public.

[73] In the context of the location and the description of Dundonald as a town centre he refers to the town centre health check information that was undertaken in

2018 at which point B&M were trading on the site. As part of that health check the following conclusions were reached by the independent consultants:

- Overall, Dundonald local centre has a limited variety of land uses, which is common for a centre with a narrow road.
- It does not have the feel of a town centre, more like part of the wider suburban area.
- The buildings are interspersed with many gaps which limits continuity and form of the built areas.
- The main through road (Upper Newtownards Road) dominates the scene with a significant volume of traffic.
- The extensive store car parks and on-street bays and hard landscaping add a sense of harshness; urban form has gaps and tarmac areas; car orientated.
- Dundonald local centre does not have a distinct character to convey a sense of strong identity – little character and sense of place.

[74] He is critical of the lack of any survey of pedestrian flow counts between the park and ride to Belfast and the stores. His own surveys suggest an extremely low pedestrian flow from the Glider/park and ride to the store.

[75] Looking at inadequacy his conclusion was that:

“In this case, despite all the purported ‘demand’ statistics and suggestions, the population numbers, the employment attached to the vicinity, the traffic flows and public transport users offers to deliver the smallest application for a public house that I have ever encountered. The proposed offer is hugely underwhelming. It is certainly not innovative nor attractive in its form, function or aspect to the wider public realm.

There is no need or demand for an extremely small public house which has a limited offer in this location. It is difficult to conceive why anyone would want to come to this location and the proposed facility.”

[76] In looking at Rubys public house he notes that it is a longstanding established bar/restaurant located on a prominent site at the junction of the Upper Newtownards Road/Comber Road.

[77] Its food offer is available for lunch/evening meal in the ground floor bar as well as offering other more formal dining experience on the first floor. It has a large beer garden with temporary covering connecting into the ground floors by its double doors in its Upper Newtownards Road elevation.

[78] He indicated that he has visited Rubys on several different times over a sustained period of recent weeks both at lunchtime and evenings. His evidence was that the premises are not particularly busy with attendances ranging from 8-30. The court heard disputed evidence about the extent of attendees in Rubys, with Ms Thompson and Mr Noble presenting a rosier picture.

[79] In short, he says that trading in the ground floor bar is at best modest.

[80] His opinion is best summed up in the following paragraphs in his report:

“3.28 The proposed premises will sit adjacent to a Lidl food store which opens for trade between the hours of 8.00am-10.00pm Monday to Saturday and 1.00pm-6.00pm on Sunday. The most popular drinking times generally sit outside of these hours on Fridays and Saturdays and evenings during the week.

3.29 It is difficult to understand how a proposal of this type, form and location meets any demand. In my experience applications for new public houses follow a well-researched template and seek to offer a quality mix of food and drink to attract maximum trade and meet unmet demand. This proposal plainly does not attempt to follow that business template.

3.30 My experience of public house applications is a commercial desire for a minimum level of seating capacity with this focussing on a capacity of c.100 as a minimum as well as providing for a very high quality of appointment and the quality of the internal and external furnishings and the ambiance that is created for customers to enjoy. Invariably it is also involved in delivering a floor space and licence area for maximising sales for return opportunity with a food and drink offer essential to meet the discerning requirements of the public at large.”

[81] On the issue of drinks only licences Mr Shanks accepted that in respect of the six public house applications in which he had been retained as the Planning Consultant one was brought to the court and granted as a “drink sales only” public house.

The statutory test for inadequacy/should the court take into account the proposed subsisting licence in assessing inadequacy?

[82] The subsisting licence which it is proposed to surrender in this application lies within the vicinity of the proposed new licence. The question arises as to whether that subsisting licence can be taken into account by the court in assessing inadequacy.

[83] As set out above Article 7(4)(e) requires a court to refuse an application unless it is satisfied:

“that the number of licensed premises of the kind specified in the application which are in the vicinity of the premises is, and having regard to any licences provisionally granted under Article 9 or any sites approved under Article 10 will be, inadequate;”

[84] Mr McCollum argues that the terms of the statute are clear and unambiguous. The court must look at the present and current provision in the vicinity, which means in this case that it must take into account the contribution of the licensed premises at Rubys in assessing inadequacy.

[85] This very point was considered by Morgan J in *Lidl (NI) GmbH v Winemark, the Wine Merchants Ltd* [2008] NIQB 146:

“The subsisting licence

[39] There is one further peculiarity which arises in respect of this application. Article 7(4)(e) of the 1996 Order introduces particular obligations in respect of the grant of licences under Articles 5(1)(a) and 5(1)(b). The question arises in this application as to the method by which the court is required to carry out the exercise of determining whether the number of licensed premises of the particular type is inadequate in the vicinity. In particular by virtue of Article 7(4)(a)(ii) the applicant must surrender either at the time of the application or before the licence issues a subsisting licence. In this case it is proposed to surrender the licence at Lifford Road Strabane which, of course, lies within the vicinity of the subject premises. It cannot be in dispute that if the licence were surrendered prior to the hearing of the application the test of inadequacy would have to be determined leaving out of account the formerly subsisting licence. That is consistent with the underlying policy of the

statute which is directed towards the control of the number of licensed premises within any vicinity.

[40] I consider that the approach is the same where it is proposed to surrender the subsisting licence prior to the issue of the new licence. The court is enjoined under Article 7(4) to refuse an application for the grant of a licence unless it is satisfied that the number of licensed premises of that kind which are in the vicinity of the premises is inadequate. The subsisting licence which it is proposed to surrender cannot possibly contribute to the satisfaction of the demand in the vicinity upon which the applicant relies to support the application. This is an obvious case in which to adopt a purposive construction to achieve the aim identified by Lord Steyn in *A-G's Reference (No 5 of 2002)*:

'No explanation for resorting to purposive interpretation of a statute is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation.'

The assessment of inadequacy must, therefore, ignore the contribution of those premises subject to the subsisting licence to the satisfaction of the demand in the vicinity."

[86] Mr McCollum submits that this is not a correct statement of the law. He argues that the words of the statute can legitimately bear only one meaning and that no ambiguity arises. He cautions the court to be careful before resorting to purposive construction. As per **Bennion Statutory Interpretation** at 12.2:

"Limits on purposive construction

As mentioned above, regard is had to the legislative purpose in order to understand the meaning of the words used. What the interpreter may not do is rely on purpose in order to adopt a different legislative scheme."

[87] He argues that it would have been open to Parliament to provide for excluding account of the subsisting licence which it is proposed to surrender in assessing inadequacy if it is in the same vicinity if that was the statutory intention.

[88] Contrary to the views of Morgan J, it is argued that taking into account the licence in Rubys in this case is entirely consistent with the statutory scheme and purpose. He argues that what the statute does is place a threshold against the movement of licences within a single vicinity.

[89] Mr McCollum draws the court's attention to two authorities in support of his submission. The first is *McKeown Vintners Ltd v N Agnew & Co Ltd* [1983] NI 18.

[90] In that case the applicant sought to take advantage of the provisions of Schedule 2 of the (then) Licensing Act (NI) 1971, which is replaced verbatim in the present 1996 Order.

[91] By that provision the requirement to prove inadequacy does not apply where a licence falls under Schedule 2.

[92] The applicant sought to relocate his licensed premises within the same vicinity by claiming he came within the provisions of Schedule 2 by virtue of his own surrender of a lease.

[93] Analysing the general intention of Schedule 2 Kelly J said:

“... this must be to restore as far as possible, to a licensee who has lost the use of his premises, his previous trading position in the vicinity. I cannot think the intention was to go further and give him any additional advantage or privilege by allowing him to move his premises from place to place in the vicinity, at his own volition, until he found the best trading spot. For if the applicant's argument is sound then a licensee for trading advantage could move his business from place to place within the vicinity, at his own volition, by taking short leases and terminating them, without the burden of proving inadequacy. On the other hand a licensee who held his premises in fee simple could not. He would be obliged to prove inadequacy if he left his own premises and decided to move to other premises in the vicinity. While it may be said there is no real abuse of the overall policy and object of the statute, in a tenant-licensee voluntarily moving from one place to another in the vicinity because the number of off-licence premises is not thereby increased, it is difficult to see why this possible advantage is not available to the licensed owner in fee simple.”

[94] Self-evidently the scenario in *McKeown* is very different from the one here. The mischief the court was concerned about there was the voluntary termination of

the lease, which in the view of the court did not bring the applicant within the terms of Schedule 2.

[95] In terms of Kelly J's comments in relation to the difference between a tenant-licensee voluntarily moving from one place to another and the fee simple owner of a licence, assuming his analysis of the law to be correct, this still does not avail the objector in this case. This is not a case where the licensee in Rubys is seeking to move his licence to another premises under his control within the same vicinity. Importantly in respect of a fee simple owner all that Kelly J said was that that person would still be obliged to establish inadequacy, unlike the tenant whose lease is terminated. His judgment is silent on whether in seeking to prove inadequacy his own premises would be taken into account if that licence was to be surrendered. In any event, the scenario here is different in that the fee simple owner of Rubys is surrendering his licence to a third party. He is not seeking to open a different licenced premises in the same vicinity.

[96] The second case is *Re Hughes' Application* [1997] NI 133. In that case, a bookmaker applied for a new bookmaking office licence in respect of premises located further along the street from his existing office, promising to close his existing shop should the application be successful.

[97] The Court of Appeal held that Article 12(4)(j) of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985, required the court to be satisfied at the time of granting a licence that there was an inadequate number of bookmakers premises in the locality to meet the demand for bookmaking facilities. It mattered not that the applicant had promised to surrender his licence because this would have meant that the licence was granted at a time when, by implication, the number of offices was adequate to meet demand.

[98] Mr Beattie counters that the legislation in relation to bookmakers differs significantly from that in respect of licensed premises in that it does not make express provision for the surrender of the bookmaker's licence. Thus, Kerr J in *Hughes* says:

“For the reasons that I have given earlier, I do not consider that a transfer is possible if that involves the retention of the existing licence until the new licence has been granted. For my part, however, I am not convinced that there are strong policy arguments against allowing the transfer of a licence. On the contrary I think there is much force in the suggestion of counsel for the applicant that it is invidious that the applicant should be required to surrender his licence before being assured that he would be granted a new one. I am satisfied, however, that this is not possible under the 1985 Order. It appears to me that legislation would be required to permit an

existing licence to survive until the grant of a new one. With proper safeguards, I can see no reason that such a facility should not be introduced. ...”

[99] This is precisely what has been provided for in the statutory scheme concerning liquor licensing.

[100] In light of the obvious differences between the cases I do not consider that they assist the court in determining the issue in this case.

[101] I return therefore to the statute itself and how it should be interpreted in the circumstances of this case. Understandably Mr Beattie relies on the dicta of Morgan J quoted above. Strictly speaking those dicta are obiter since Morgan J determined that the applicants had failed to establish inadequacy even excluding the subsisting licence.

[102] That said, the principle of judicial comity points to this court adopting the reasoning of Morgan J.

[103] In determining this issue I bear in mind the comments of Keegan J in *Winemark v Hagan* [2016] NIQB 90 that the restrictive effect of the concept of inadequacy is a key component in licensing legislation. To that end the underlying policy of the statute is directed towards the control of the number of licensed premises within any vicinity.

[104] If the application is granted and the licence subsequently issues the subsisting licence will not be trading within the vicinity. Thus, it cannot possibly contribute to the satisfaction of the demand in the vicinity upon which the applicant relies to support the application.

[105] Because the statute requires the surrender of a subsisting licence before a final grant can issue, the subsisting licence in this case cannot contribute to demand. It is incapable of doing so.

[106] Requiring the court to take into account a licence which it knows will not be trading should the application be granted involves indulging in a fiction which borders on irrationality or absurdity.

[107] Morgan J relied on the dicta of Lord Steyn. In similar vein a year later, Lord Bingham said in *R (on the application of Quintavelle) v Secretary of State* [2003] UKHL 13 at [8]:

“8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation

given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

[108] Taking all these matters into account I agree with the analysis of Morgan J and conclude that his interpretation is within the permissible bounds identified by Lord Bingham.

[109] I therefore conclude the assessment of inadequacy in this case must ignore the contribution of Rubys to the satisfaction of the demand in the vicinity.

Should the court include existing off-sales premises in assessing inadequacy?

[110] In *Lidl (NI) GmbH v Winemark, the Wine Merchants Ltd* [2008] NIQB 146 the court was dealing with an application for an off-sales licence only.

[111] Nonetheless, the court determined that it was entirely legitimate and appropriate to take into account "on-off facilities" in addressing inadequacy. The court said, at [33]:

"Another feature which arises in this case is how to deal with the facilities available at Farmers and Christie's public houses. These are both licensed on/off facilities but each has a separate and distinct area of the premises set aside for off sales activity. This issue was the subject of consideration in *Hynes v McAlinden* [1974] NI 166 and *Hunt v Magill* [1974] NI 238. There is no dispute between the parties that in considering the question of demand one must take into account the availability of any off sales facilities in on/off licensed premises and further whether

those off sales facilities are arranged so as to present a unit distinct from the on sales activity. Each of these factors may be relevant to the issue of whether the number of off-licence facilities available within the vicinity is inadequate.”

[112] Mr McCollum argues that the reverse must logically hold, particularly as in this case the only premises that would be impacted upon by the grant of the application are the off-sales providers already in the vicinity.

[113] To a large extent this argument has to be seen in the context of the appellant’s case that this application for a pub licence is in effect an application to secure an off-sales facility. It is argued that this brings into focus the requirement to consider whether the existing provision of off-licences in the vicinity is inadequate.

[114] I will consider the arguments concerning the true purpose of this application later. In the absence of any specific authority on the point I turn to the statute.

[115] Self-evidently a public house/on/off-sales licence is a different licence to an off-licence.

[116] Article 7(4)(e)(i) states:

“(e) where the premises are of a kind mentioned in Article 5(1)(a) or (b) -

(i) subject to paragraph (6), that the number of licensed premises of the kind specified in the application which are in the vicinity of the premises is, and having regard to any licences provisionally granted under Article 9 or any sites approved under Article 10 will be, inadequate; ...”
(emphasis added).

[117] Neither Articles 9 or 10 are in play.

[118] An off-licence cannot provide on-sales as a matter of law and are manifestly not premises of the “kind specified” in the application. I note that in *McBrien, the Liquor Licensing Laws of Northern Ireland* at para 4.85 the author states:

“Although there are no authorities on the point, it would not seem possible to argue that off-licences be taken into account, for example, in the way public houses are when off-licence applications are in issue. The public house is the ‘greater’ including the ‘lesser’ off-licence. The reverse

would, therefore, not be appropriate. However, hotel licences have been taken into consideration.”

[119] I agree with the author and conclude that in assessing inadequacy in this application I should not take into account the existing provision of off-licence facilities in the vicinity.

Assessment of inadequacy

[120] In assessing inadequacy I bear in mind the principles enunciated and summarised above. On this issue I note Mr Beattie’s submission that even if Rubys is taken into account in this assessment, the applicant establishes inadequacy.

[121] I am satisfied that the applicant/respondent has established inadequacy. In doing so as per the discussion above I do not take into account the subsisting licence it is proposed to surrender in support of the application. I have come to this conclusion for the following reasons:

- If the application is successful it will mean that there will be only one/off licensed premises in the vicinity.
- This has to be seen in the context that there were two functioning/trading public houses previously in the vicinity. The Lewis public house traded until February 2019, when it was destroyed by fire. According to Ms Thompson the turnover was £6,000 per week. The court also heard directly from Mr Noble that Rubys continues to trade successfully.
- The proposed new premises are located in the very centre of the vicinity in the established core of shopping and transport facilities.
- Numbers support the applicant/respondent -
 - The adult population in the vicinity is 11,085 (an increase of 23% in the last 10 years).
 - There are at least 5,985 employees working in the vicinity.
 - There are three supermarkets for a resident adult vicinity population of 11,085. It is estimated that Asda has 21,000 customer transactions per week; Cherryhill Spar has over 12,000 such transactions (with the possibility of a significant increase) and Lidl has approximately 7,000 such transactions. The Post Office has been relocated to this area.
 - The new Glider bus terminus, the Park and Ride facility is beside the applicant’s proposal. A total of 155,185 passengers get off the Glider

terminus at this site and 120,464 passengers entered from the same location. The carpark has 521 carparking spaces.

- Although less relevant there are 24,000 vehicles per day on the Upper Newtownards Road.
- Thus, there is a significant loss of public house floor space against the background of increasing population and numbers resorting to the vicinity.
- There is anecdotal evidence of a demand for more public houses in the vicinity (even with Rubys trading).
 - Following the fire which destroyed the Lewis public house the BBC carried interviews where it was noted: “There are a lot of pensioners who go and spend their time in the bar. Now they have nowhere to go – there is nothing up here.”
 - In December 2020 a planning application was lodged to demolish the Rubys public house and construct a new drive-through coffee and bakeshop restaurant. Some of those objecting to the planning application complained that this would mean there would be no public houses in the Dundonald area. The proposal was withdrawn. Similar objections had been raised to undetermined planning applications that seek permission to develop apartments on the site of the former Lewis pub and at Rubys.
 - Research carried out for the new area plan in October 2019 reported that 10% of those surveyed identified the need for “more pubs.” This was at a time when there were two public houses available in the vicinity.
 - Mr Speers has discussed the application with a local community representative (ex MLA Mr Drysdale) who confirmed strong support for the application. He also met directly with local soccer clubs who have stated that they would be willing to use the proposed premises. One of those clubs presently uses public house premises in Comber. He gave evidence that the Lidl management team at the Dundonald store had received queries from the public on when the public house was opening and strong support for the proposal.

[122] In this context I conclude that the applicant easily establishes inadequacy. Ultimately, the proposal will provide a public house facility that is located within the commercial/retail and transport hub of the vicinity and where significant numbers of people are attracted daily from within and from outside the vicinity. It will replace the existing licensing facility within the vicinity. It will not result in any increase in public house provision. Indeed, the contrary is the position. It may well

be that it will not meet the full demand for licenced premises within the vicinity given its size and lack of food provision. That however does not mean that the applicant fails to establish inadequacy.

Other grounds upon which the court is invited to dismiss the application

[123] In truth, my assessment is that the substantive objection to this application is based on the assertion that this is really an application for an off-licence by the back door with no serious intention of offering an on-sales facility. Mr McCollum asserts that the application is a blatant and impermissible attempt to circumvent the liquor licensing legislation and to operate an off-sales facility at a location where there is no prospect of demonstrating that there is inadequacy of off-sales provision.

[124] Whilst the arguments relating to this submission overlap to an extent with the question of inadequacy, I propose to consider it separately as Mr McCollum did in his submissions.

[125] As is apparent from this judgment I have concluded that the applicant meets the statutory requirements set out in the 1996 Order. That being so, in what circumstances could the court refuse the application?

[126] Mr McCollum submits that when the mandatory criteria are satisfied the court still retains a discretionary power to decline an application. Thus, Carswell J in *Donnelly v Regency Hotel Ltd* [1985] NI 144 said:

“The applicant has thus satisfied all the statutory tests, but the objectors have contended that I should nevertheless exercise my discretion to refuse the licence, for a number of reasons put forward in evidence and argument. The existence of such a discretion has to be implied from the wording of the Licensing Act (Northern Ireland) 1971, and its limits and subject matter, as McGonigal said in *Magill & Anor v Bell & Ors* [1972] NI 159, are difficult to define. I have the authority, not only of that decision, but of all three judgments of the Court of Appeal in *Hynes v McAlinden* [1974] NI 166, for the existence of such a discretion to refuse a licence on sufficient grounds, notwithstanding the fact that the applicant may have satisfied all the tests set out in section 5(2) of the Licensing Act (Northern Ireland) 1971. Refusal is mandatory if he does not satisfy all those tests, but in section 5(1)(a) of the Licensing Act (Northern Ireland) 1971 it is provided that the court, after hearing any objections, if the application was duly made, may grant the licence. Moreover, section 5(2) which sets out the tests which it is compulsory for the applicant to satisfy,

commences with the much debated words “without prejudice to its power to refuse to grant a licence on any ground.”

[127] Mr McCollum highlighted the exercise of this discretion by Nicholson LJ in the case of *Lidl UK GmbH v Curleys (Dungannon) Ltd & Anor* [2001] NIJB 330. Quoting from the judgment:

“The issue in this appeal as in so many of these cases arises from Art 7(4) of the Licensing (Northern Ireland) Order 1996 which reads:

‘(4) A court shall refuse an application for the grant of a licence unless it is satisfied ... that the number of licensed premises of the kind specified in the Application which are in the vicinity of the premises is, and having regard to any licence provisionally granted under Article 9 or any sites approved under Article 10 will be, inadequate.’

If the number of licensed premises of the kind specified in the application is shown to be inadequate, the court has a discretion to refuse an application otherwise the article would read:

‘The court shall grant an application for a licence if it is satisfied that the number of licensed premises ... is ... inadequate.’

Normally a licence will be granted if it is established the number of licensed premises is inadequate. But there are exceptions.

For example, there are a number of public houses or on/off-licence premises in Cookstown with off-licence facilities of a kind which, in my opinion, should not be taken into account, where one is considering inadequacy. If one of those on/off-licence premises sought to separate the off-licence in order to increase artificially the number of off-licence premises, the court would be entitled to exercise its discretion to refuse the application.

A court is also entitled to take into account premises of a similar kind which are not in the vicinity, when

exercising its discretion. For example, in the case of the application for the off-licence at Safeways, it seems to me that the court would have been entitled to take into account the off-licence at Winemarket, if the court took the view that the vicinity of Safeways off-licence premises has its northern boundary at Cemetery Street/Fountain Road.”

[128] Mr McCollum places considerable emphasis on the conclusion of Nicholson LJ at 336:

“I propose, in fact, to make no finding about inadequacy in general but to exercise my discretion in refusing the application on the grounds that the applicant’s very limited range of ‘own label’ products, the manner in which it is proposed to set them out (in cartons), the lack of trained staff to offer advice to customers on alcoholic produce purchases, the terms of opening and the failure to undercut significantly other off-licences, when one compares their cheaper but equally drinkable products, render this application inappropriate. To add the proposed premises at Lidl’s Unit 1, Station Square, to the number of off-licence premises in Cookstown would, in my view, be a disservice to Cookstown.”

[129] It is for this reason that Mr McCollum argues that the court is entitled to take into account “premises of a similar kind” in the vicinity such as the objector’s premises and that of Asda. He invites the court therefore to adopt the approach of Nicholson LJ and conclude that to grant this application would be a disservice to Dundonald.

[130] Before turning to the facts of this case it is important to note that the statutory discretion expressly provided for in the 1971 Act (“without prejudice to its powers refuse to grant a licence on any ground”) was repealed by Article 7(4) of the 1996 Order which removed these words. Thus, the legislative framework being considered by Carswell J in *Donnelly* is different from that under the 1996 Order. This, in my view, represents a significant change.

[131] Nicholson LJ does not appear to have addressed the change in the legislation but took the view that there were exceptions to the norm that a licence would be granted if it was established that the number of licensed premises is inadequate and all other statutory proofs were in order. On the facts of the case before him he made no finding about inadequacy in general but exercised his “discretion” to refuse the application.

[132] The fact that this licensed premises might not meet all of the demand for this vicinity is not a reason for refusing the application. It may well be that even if this application is granted and the applicant subsequently trades as an on/off-licence that a further application may be brought by a different party claiming that the provision remains inadequate.

[133] Turning to the facts of this case I accept that the inability of Lidl to obtain an off-licence at this site is a factor in the motivation behind the current application. Indeed, Mr Speers accepted in cross-examination that had the off-licence application been successful this application would not have been brought. It undoubtedly resulted in a change of approach by the applicant.

[134] That said the court must look at whether the statutory requirements are met, arising from this change of approach.

[135] It will be noted that this approach has been several years in the making. Initially the proposal was to rely on the Lewis licence as a subsisting licence, back in 2019, but this was withdrawn in the circumstances explained earlier in this judgment.

[136] In approaching this issue I bear in mind that the 1996 Order is restrictive in its effect in terms of inadequacy. I also bear in mind that this application is a novel one. The concept of a licenced premises attached to a supermarket is undoubtedly a new development. That said, Ms Thompson pointed to the Poet's Pub at King's Road Shopping Centre. In addition, Mr Speers gave evidence that Morrisons supermarket has opened a public house in a supermarket in West Yorkshire. Such public houses are common throughout Europe. The restrictive nature of the 1996 Order does not mean that it prevents innovation and development of new ways to run licensed premises.

[137] The fact that the application is a novel one is not a reason for refusing it. Mr Speers points out Lidl has always been alive to new opportunities and changes in its business model. He gave the example that since its foundation it has developed its business to include cyber security, shipping and coffee manufacturing.

[138] It was clear to me from Mr Speers' evidence that the applicant has carefully considered the application. Planning permission has been obtained. Consideration has been given to both product and price range. The court has seen what is proposed in this regard. It is in marked contrast to the limited "own label" products in cartons as considered by Nicholson LJ.

[139] Mr Speers in his evidence indicated that the applicant has made an analysis of turnover, estimated spend and has noted the competitive advantages of low overheads and margins compared to those encountered by Rubys. His view was that the public house would be "highly profitable."

[140] Commercial entities are permitted to alter or change their model. Having heard all the evidence in this case I am satisfied that the applicant's true intention is to open a public on/off-licence. It will invest a significant sum of money – at least £410,000 into fitting out the public house. I accept that it has concluded that the public house will be profitable, knowing that if it closed through lack of profitability then an evitable consequence would be that the off-licence permission would lapse following any such decision.

[141] I am satisfied that this is a bona fide application and that the applicant fully intends to operate the premises as a public on/off-licence.

[142] I am satisfied that it meets the statutory requirements and there is no good reason for refusing the application.

[143] Accordingly, the appeal is dismissed. The court therefore grants the application for the provisional grant of a licence pursuant to Article 5(1)(a) of the 1996 Order.