

Judicial Communications Office

27 January 2025

COURT DISMISSES APPEAL AGAINST GRANT OF ALCOHOL LICENCE

Summary of Judgment

Lidl Northern Ireland Limited

v

Philip Russell Limited

Mr Justice Colton, sitting today in the High Court in Belfast, dismissed an appeal by Philip Russell Limited (“the appellant”) against the provisional grant of a licence to sell intoxicating liquor by retail consumption to Lidl Northern Ireland Limited (“the respondent”) for premises at Unit 2, Dunlady Road, Dundonald.

The licence to be surrendered as part of the application was that relating to premises known as Rubys (and formerly the Elk) which is within the “vicinity” for the purpose of the application. The issues in dispute in the appeal were that:

- The respondent has failed to establish “inadequacy” as required by the Licensing (Northern Ireland) Order 1996 (“the 1996 Order”). This raised an issue as to the correct statutory test for inadequacy and, in particular, whether the court in assessing inadequacy, should take into account the licence which it is proposed will be surrendered and also the existence of off-sales premises.
- The court should dismiss the application essentially on the basis that is in effect an application for an off-licence which the appellant states is an impermissible attempt to circumvent the 1996 Order.

Summary of the evidence

The respondent opened a supermarket on the site in 2002. It made an unsuccessful application for an off-licence in 2003. The supermarket closed in 2011 following a review of the respondent’s Greater Belfast stores. In January 2019, the respondent took repossession of the property with planning permission for a rebuild approved. In February 2019, the respondent learned that the nearby Lewis public house had been destroyed in a fire and began to explore if this represented an opportunity for it to operate a public house. An application was made around this time but withdrawn in May 2019 following objection from the appellant. On 28 November 2019, the Lidl Dundonald supermarket reopened without alcohol being sold. In August 2020, a planning application was granted for a public house on the premises and the applicant entered into an agreement with the licensee of the Lewis public house to surrender that licence. That month an application for the provision of a public house on/off licence was submitted to the court by the respondent but was again objected to by the appellant. In February 2021, the respondent withdrew its provisional grant application.

That same year, the respondent secured the agreement of the owner of Rubys public house to surrender the licence, and an application was made to the court. The proposal was for a public

Judicial Communications Office

house comprising a public bar which could seat 45 customers and an off-sales. The public house would sell draft and bottled beer, wine, cider and spirits. The off-sales would stock all permanently listed Lidl off-sales products. The respondent noted that it had acquired the last remaining public house licence in Dundonald and that footfall and sales were strong. It was conceded that had the original application for an off-licence been successful, this application would not have been brought however the respondent remained adamant that Lidl was determined to run a profitable public bar if this application was successful.

The statutory test for inadequacy

The first question for the court was whether it should take into account the subsisting licence for Rubys which it is proposed to surrender in assessing inadequacy. It referred to the case of *Lidl (NI) GmbH v Winemark the Wine Merchants Ltd*¹ where the court held that the assessment of inadequacy must ignore the contribution of the subsisting licence to the satisfaction of the demand in the vicinity. Counsel for the appellant submitted that this was not a correct statement of the law and that taking into account the licence in Rubys is entirely inconsistent with the statutory scheme and purpose.

The court considered that the underlying policy of the 1996 Order is directed towards the control of the number of licenced premises within any vicinity. It said that 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. 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. 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.”

The court concluded that 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?

The court said that 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 was argued that this brings into focus the requirement to consider whether the existing provision of off-licences in the vicinity is inadequate. The court said that a public house/on/off-sales licence is a different licence to an off-licence as an off-licence cannot provide on-sales as a matter of law and are manifestly not premises of the “kind specified” in the application. The court concluded that in assessing inadequacy in this application it should not take into account the existing provision of off-licence facilities in the vicinity.

Assessment of inadequacy

¹ *Lidl (NI) GmbH v Winemark the Wine Merchants Ltd* [2008] NIQB 146

Judicial Communications Office

The court was satisfied that the respondent has established inadequacy. It came to this conclusion for the following reasons:

- If the application is successful, it will mean that there will be only one 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 proposed new premises are located in the very centre of the vicinity in the established core of shopping and transport facilities.
- Numbers support the respondent: the adult population of 11,085 has increased by 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; the new Glider bus terminus is beside the respondent's proposal with a total of 155,185 passengers getting off at this site and 120,464 passengers entered from the same location.

The court said there was therefore a significant loss of public house floor space against the background of increasing population and numbers resorting to the vicinity. It also said there was anecdotal evidence of a demand for more public houses in the vicinity (even with Rubys trading). In this context the court concluded that the respondent easily established 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 [respondent] fails to establish inadequacy.”

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

The court commented that the substantive objection to this application was based on the assertion 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. The appellant argued that even though the court had concluded that the respondent meets the requirements set out in the 1996 Order there were circumstances in which it could refuse the application.

Counsel for the appellant submitted that case law exists which states that when the mandatory criteria are satisfied the court still retains a discretionary power to decline an application. The court rejected this saying that one of the cases cited was based on the legislative framework under the Licencing Act (Northern Ireland) 1971 which has now been repealed. In the other case, the court 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 that case, the judge made no finding about inadequacy in general but exercised his “discretion” to refuse the application.

The court said 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 said it may well be that even if this

Judicial Communications Office

application is granted and the respondent subsequently trades as an on/off-licence that a further application may be brought by a different party claiming that the provision remains inadequate:

“This is not a ground for refusing this application. 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, [it was] 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 [respondent]. That said the court must look at whether the statutory requirements are met, arising from this change of approach.”

The court noted that this approach has been several years in the making with the respondent initially planning to rely on the Lewis licence as a subsisting licence back in 2019, but this was withdrawn. In approaching this issue, the court said it must bear in mind that the 1996 Order is restrictive in its effect in terms of inadequacy. It also bore in mind that this application is a novel one as the concept of a licenced premises attached to a supermarket is undoubtedly a new development in this jurisdiction: “The fact that the application is a novel one is not a reason for refusing it.”

The court noted that Lidl has always been alive to new opportunities and changes in its business model. It said it was clear that the respondent had carefully considered the application, planning permission has been obtained and consideration has been given to both product and price range. The respondent has also made an analysis of turnover, estimated spend and has noted the competitive advantages of low overheads and margins compared to those encountered by Rubys with the view that the public house would be “highly profitable.”

The court said that having heard all the evidence in this case it was satisfied that the respondent’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. 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. I am satisfied that it meets the statutory requirements and there is no good reason for refusing the application.”

The court dismissed the appeal.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://www.judiciaryni.uk/>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Judicial Communications Office

Alison Houston
Lady Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: LCJOffice@judiciaryni.uk