Neutral Citation No: [2019] NIQB 13	*Ref:* McA10871
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 8/2/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

ON APPEAL FROM THE DECISION OF THE COUNTY COURT JUDGE FOR THE DIVISION OF CRAIGAVON

IN THE MATTER OF AN APPLICATION FOR THE PROVISIONAL GRANT OF AN INTOXICATING LIQUOR LICENCE PURSUANT TO ARTICLE 5 (1)(B) OF THE LICENSING (NORTHERN IRELAND) ORDER 1996

_____

BETWEEN:

DENMIN LIMITED

Applicant/Respondent;

AND

JOHN HUGHES AND SINEAD HUGHES

Objectors/Appellants.

_____

McALINDEN J

Introduction

[1] This is the second judgment to be delivered in this matter; my earlier judgment on the preliminary issue of the locus standi of the Appellants having been delivered on 30 January, 2019. In that judgment, I held that Mrs Sinead Hughes had locus standi to object to the application by the Applicant/Respondent for a provisional grant of a section 5(1)(b) intoxicating liquor licence in respect of premises situated at Units 2, 3 and 4 of the Colin Centre, Pembroke Loop Road, Belfast but that Mr John Hughes did not have locus standi.

[2] Following delivery of the judgment on 30 January, 2019, the matter proceeded with the Applicant/Respondent adducing further evidence in the form of oral evidence from Mr Maurice Maguire, Planning Consultant, who adopted his report dated June, 2018, Mr Rogers, Architect, who proved his plan dated November, 2017,

Mr Frank Denny, a Director of Denmin Ltd, and Mrs Horner, the proprietor of the Brown Cow Inn, Woodburn Road, Carrickfergus, the licensed premises to which the licence to be surrendered in this case relates. These witnesses were cross-examined by Mr Gibson, on behalf of Mrs Hughes. Following the completion of the Applicant/Respondent's case, Mr and Mrs Hughes were re-called to complete their evidence and to deal with the specific issues relevant to the objections raised by Mrs Hughes. By reason of the manner in which the preliminary issue was dealt with in this case, the bulk of the oral evidence in this matter was heard during that phase of the hearing and the additional evidence which was adduced during the second phase of the hearing was completed in two days on 30 and 31 January, 2019.

[3] Having heard all the evidence in this case, it became clear that there was one crucial issue which required judicial determination, that being the issue of the validity of the licence which it was intended to surrender in this case. If this issue were to be determined in favour of the Applicant/Respondent, the Court would then be required to determine the issues commonly raised in contested licensing cases including vicinity, adequacy, suitability and fitness. However, if the issue of the validity of the licence to be surrendered were to be determined in favour of the one Objector/Appellant with locus standi to object, then it would be neither necessary nor appropriate for this Court to adjudicate upon any other issue, on the basis that such matters would have to be addressed and adjudicated upon in any fresh application before the lower Court.

Validity of licence to be surrendered

[4] Before considering the substance of this issue, the Court was asked to determine whether Mrs Sinead Hughes, the one remaining objector in this case with locus standi under the 1996 Order, was entitled to raise an objection in relation to the validity of the licence to be surrendered. In his book "The Liquor Licensing Laws of Northern Ireland", Mr E J D McBrien at 4-42 of the revised edition (page 84) queried whether an objector who qualified as such under paragraph 4 of Schedule 1 to the Licensing (Northern Ireland) Order 1996 ("the1996 Order") was restricted to objecting on the grounds set out in Article 7(4)(a) to Article 7(4)(e)(i); the corollary being that only an objector who qualified under paragraph 5 of Schedule 1 could object on the ground set out in Article 7(4)(e)(ii).

[5] In *Crazy Prices (NI) Ltd v RUC* [1977] NI 123 at page 128 F, Lowry LCJ giving the majority judgment in the Court of Appeal, indicated that objectors having locus standi under paragraph 4 of Part 1 of Schedule 1 to the Licensing Act (Northern Ireland) 1971 ("the 1971 Act") were not limited to the grounds set out in that paragraph but could object in relation to matters which go to the jurisdiction of the Court to make a grant of a licence. In *re O'Loughlin's Application* [1985] 1 NIJB 44 at page 46-47, Carswell J, again discussing the provisions of the 1971 Act, stated as follows:

> "Paragraph 4 sets out the grounds which may be advanced by objectors, who may include any person owning, or residing or carrying on business in, premises in the vicinity of the premises for which the licence is sought. Paragraph 5 gives a right of objection to the surrender of the subsisting licence to a person having an estate in the premises specified in that licence. Other objectors are not necessarily limited to the grounds of objection set out in paragraph 4. It was held in *Crazy Prices (Northern Ireland) Ltd v Royal Ulster Constabulary* [1977] NI 123 that in matters going to jurisdiction, which the identity of the applicant was in that case, an objector is entitled to put forward contentions against the validity of the application….Whether this extends to objecting to the sufficiency of the existing licence which the applicant proposes to surrender seems to me arguable. I was informed by counsel in argument that this has been the practice for objectors to be permitted to cross-examine on this issue; but if the sufficiency of the subsisting licence is one of the matters which the Court has to decide when reaching its decision on the application under section 5 or section 7 of the Act, rather than a component of the matters to be proved in order to give the Court jurisdiction – which seems to me to be likely to be correct – then it is a ground for objection which lies outside paragraph 4 of Schedule 1 and which an objector is not entitled to pursue."

[6] Even if it is accepted that the issue of the validity of a subsisting licence is not an issue that has to be proved to give the Court jurisdiction to hear the application for the grant of a licence, that does not, in my view, necessarily prevent a paragraph 4 objector from raising an issue about the validity of the subsisting licence. Article 7(4)(a) permits an objector to challenge whether "the procedure relating to the application set out in Part I of Schedule 1 has been complied with". Paragraph 3(2)(c) of Part 1 of Schedule 1 concerns the contents of plans to be submitted in the case of some subsisting licences. More importantly, for present purposes, it is not difficult to envisage circumstances in which the validity of a subsisting licence may be a matter which has a bearing on the issue of the fitness of the applicant under Article 7(4)(b) and possibly even on the issue of the number of licenced premises in the vicinity under Article 7(4)(e)(i), if the subsisting licence relates to premises in the vicinity.

[7] In order to enable paragraph 4 objectors to meaningfully exercise their right to object to an application for the grant of a licence under the 1996 Order, I consider that although such objectors may be required to focus their objections on matters set out in Article 7(4)(a) to Article 7(4)(e)(i) and/or on matters which go to the jurisdiction of the Court to make a grant of a licence, that does not prevent such an objector from cross-examining on the validity of a subsisting licence or from adducing evidence on the validity of the subsisting licence, if that matter is either directly or indirectly relevant to any of the issues set out in Article 7(4)(a) to Article 7(4)(e)(i) or to a matter which goes to the jurisdiction of the Court. If information comes to light during the hearing by this means which only has a bearing on the issue of the validity of the subsisting licence and does not impact on fitness, or any other matter set out in Article 7(4)(a) to Article 7(4)(e)(i), the Court cannot ignore that evidence but must have proper regard to it, when considering whether Article 7(4)(e)(ii) has been complied with. Therefore, Mrs Sinead Hughes, as an objector under paragraph 4 of Part 1 of Schedule 1, within the limitations described above, was allowed to both cross-examine the Applicant/Respondent's witnesses and adduce evidence on the issue of the validity of the subsisting licence to be surrendered in this case.

[8] The Court heard from Mrs Diane Horner, a director of Diane Emma Paul Ltd, the licence holder of the Brown Cow Inn, Woodburn Road, Carrickfergus. The Court also had an opportunity to inspect the licence granted in respect of the Brown Cow Inn on 3 April, 2006, including the plans approved by the Court on that date. The Court also heard further evidence from Mr Hughes, on behalf of Mrs Hughes, and considered print outs of online social media advertising purporting to relate to the Brown Cow Inn and aerial "Google Map" photographs of the Brown Cow Inn together with ground-based photographs taken by Mr Eugene Hughes in February 2018 and photographs showing Mr Sean Hughes drinking alcohol purchased in the Brown Cow Inn on 7 June, 2018. The Court was also referred to a Folio Map relating to a strip of land, identified as AN175449, situated at the rear of the Brown Cow Inn which was purchased by Mrs Horner for £2,000 on 3 August, 2009. A number of important facts emerged from the evidence-in-chief and cross-examination of these two witnesses and the consideration of the documentation and photographic evidence referred to above.

[9] The present licence for the Brown Cow Inn was granted on 3 April, 2006. This was a new licence for the premises because significant work was done to the premises and it was considered appropriate to proceed by way of Article 9 rather than to proceed by way of Article 31. The plans submitted with the application were prepared by Lucas Designs Consultancy and are to a scale of 1/50 and are dated 9 December, 2005. In relation to the ground floor of the licensed premises, the plans show a lounge bar, a public bar and a pool room. These are the three areas on the ground floor of the licensed premises in which it was proposed that intoxicating liquor could be sold and consumed. It is clear from the plans that it was proposed that alcohol could only be sold in the central public bar, but could be consumed in that bar and in the two other areas. The curtilage of the premises is also shown on

the plans, and it is clear that the ground floor curtilage, in addition to the three areas described above, included one entrance leading to a stairwell, with stairs leading to the upstairs part of the premises, two other vestibule entrances to the premises from the public footpath, four store rooms and the ladies' and gents' toilets. The pool room was to the right, rear of the premises and there was a fire escape leading from the pool room, presumably to an area at the rear of the premises.

[10] Mrs Horner gave evidence that she also owns 3 houses beside the Brown Cow Inn; 13, 14 and 15 Fairview Terrace, Woodburn Road, Carrickfergus. Her evidence was that these houses were regularly affected by flooding as a result of poor drainage in an area of ground behind the Brown Cow Inn and the adjacent houses. Following protracted discussions with the Northern Ireland Housing Executive, Mrs Horner bought a strip of land, Folio AN175449, behind the Brown Cow Inn and the houses on 3 August, 2009 for the sum of £2,000. Thereafter, Mrs Horner engaged a contractor to put in a proper drainage system which resolved the flooding issue. However, the work went beyond land drainage work.

[11] It is clear that the smoking ban which came into effect in Northern Ireland on 30 April, 2007, impacted upon the customers of the Brown Cow Inn and, initially, smokers were catered for outside the front of the licenced premises with the provision of a powered retractable awning and some tables and chairs. However, this was clearly unsatisfactory and, therefore, at some stage after the drainage work was completed, a decision was taken to create a smoking area out at the rear of the premises with tables and chairs being provided for customers and some cover from inclement weather being provided by the removal of the awning from the front of the Brown Cow Inn and its repositioning at the rear of the premises.

[12] However, it is clear from the photographs that have been provided to the Court that this "smoking area" was either initially intended to be or over time was transformed into a "beer garden" where customers could sit outside and consume alcohol bought in the Brown Cow Inn. Further, a covered shelter was erected in which a disc jockey could set up equipment or a barbecue could be set up and operated. The photographs of the premises show a plaque at the front of the premises advertising the existence of the beer garden as does the social media material that was produced to the Court. The beer garden was accessed through the fire escape door which led from the pool room. The photographs of the beer garden, when it was used as such, show a well-maintained area with decorative paving and fencing, large plant pots filled with palms and other plants, barrels for use as tables and other outdoor pre-assembled combined tables and bench seats.

[13] Mrs Horner accepted that the beer garden was completed and in use before 2012 and remained in use until sometime in 2018 when she was advised by her solicitor that she could no longer use this area for this purpose. Her evidence was that since that time, a sign has been put up in the premises instructing customers not to take drinks out into the area at the rear of the Brown Cow Inn and that the plaque advertising the beer garden had been removed. However, having regard to the

photographs that have been provided to the Court it is clear that on 7 June, 2018, the plaque was still in place and Mr Sean Hughes was able to take alcohol that he had purchased in the Brown Cow Inn out into this area and sit in it at a table while he consumed his drink. He stated that he asked the bar staff if he could do so and was informed that he could and he also stated that he did not see any sign instructing him not to do so.

[14] The significance of the dates referred to in the previous paragraph becomes apparent when one discovers that the licence as granted in 2006 was renewed by the clerk of Petty Sessions on 4 September, 2012 under Article 14 of the 1996 Order and thereafter renewed out of time by the Court under Article 17 on 19 October, 2017. On neither occasion did Mrs Horner or anyone acting on her behalf inform the clerk of Petty Sessions or the Court that a beer garden had been constructed at the rear of the Brown Cow Inn in which customers could sit and consume alcohol purchased in the main bar of the Brown Cow Inn. In each instance, whoever completed the application for renewal of the licence would have been required to complete a Notice stating that "no alteration such as is specified in Article 31…has been made to the premises since the licence was last granted." No explanation was given by Mrs Horner as to why in 2012 the clerk of Petty Sessions and in 2017 the Court were not appraised of the existence of the beer garden when applications were made to renew the licence for the Brown Cow Inn. Mrs Horner was specifically asked whether it was the Applicant's solicitor or her own solicitor who advised her to stop using the area at the rear of the Brown Cow Inn as a beer garden and her unchallenged evidence was that it was her own solicitor. Nothing emerged in the evidence which was given by Mrs Horner or Mr Hughes which would in any way adversely impact upon the Applicant's fitness to hold a licence or which would have any bearing on any other relevant issue dealt with under Article 7(4)(a) to Article 7(4)(e)(i). However, having heard this evidence, it became abundantly clear that there was a question mark over the validity of the licence which it was intended to surrender and that the Court would have to consider whether the requirement to surrender a subsisting licence under Article 7(4)(e)(ii) had or could on the present evidence be complied with in this case.

[15] For the Objector/Appellant, Mr Gibson called in support the decision of the Northern Ireland Court of Appeal in *Wine Inns Ltd v Lavery Ltd* [1985] NI 427 as clear authority for the proposition that the Court can look behind the licence to ascertain whether it has been properly obtained and renewed. If a licence is wrongfully renewed, then it may later be held to be a nullity, for example, on a surrender or a subsequent renewal or transfer. See also the authorities listed in Mr E J D McBrien's licensing textbook at paragraph 5-26 at page 123.

[16] Three other authorities were called in aid by Mr Gibson. These were *Re Doherty and Others' Application* [1988] NI 14, a decision of the Northern Ireland Court of Appeal; *Re Denmin Ltd* [2018] NIQB 53, a decision of McCloskey J and an extempore decision given by her Honour Judge Crawford in the *Belfast Wetherspoons* case given on 9 January, 2018.

[17] The headnote of *Re Doherty* is instructive. It states: "it is a precondition for renewal of a licence under the 1971 Act that the premises are the same physical premises, or substantially the same, for which the original licence was granted…" See the judgment of Kelly LJ at page 22A. Later in the judgment at page 27F, Kelly LJ makes the following clear statement:

> "That the licence to be renewed must be in respect of the same premises is in my opinion a situation which must exist before a magistrate or clerk of Petty Sessions begins to consider whether the licence should be renewed. It is a necessary premise to the exercise of their jurisdiction to grant renewal under section 11 of the Act and an error made at this stage, in this preliminary matter, is, in my opinion, one made in want of jurisdiction or in excess of jurisdiction."

[18] In *Re Denmin Ltd*, the present Applicant/Respondent brought judicial review proceedings seeking an order quashing the renewal of a licence where the party seeking renewal of the licence had failed to inform the clerk of Petty Sessions that part of the licensed premises had been converted into an e cigarette/vaping shop. McCloskey J had no hesitation in finding that the licensed premises had "been altered since the last previous renewal of the licence (or, where the renewal applied for is the first renewal of the licence, since the licence was granted)" and that it was a requirement that the renewal application be made to and determined by the Court under Article 14(4)(c) of the 1996 Order.

[19] At paragraph [13] of his judgment, McCloskey J stated as follows:

> "The critical provision in the statutory matrix is Article 14(4)(c) of the 1996 Order. The effect of this is that where an application for the renewal of a licence is made, this may be granted by the CPS concerned unless the licensed premises have been altered since the last previous renewal. Where this is the case, the CPS is disempowered from renewing the licence and, rather, shall require the renewal application to be made to the Court and shall notify the applicant and the objectors, if any, accordingly."

[20] He then went on to consider the interplay between Article 14 and Article 31 of the 1996 Order and observed that neither of these two discrete provisions makes reference to the other. He then went on to state at paragraph [14]:

> "…While Article 14(4) purports to be exhaustive of the grounds upon which the CPS shall refuse to make a renewal order on paper and shall require the application to be made to the Court, with due notification to specified parties, it is striking that the 7th in the menu of grounds upon which the CPS shall take this course is one which invests the CPS with a discretion of demonstrable breadth –
>
> "*Where … the clerk is of the opinion, for any other reason, that an application for the renewal of the licence should be made to the Court …*" [My emphasis.]
>
> This is the first – and clear – statutory indication that the CPS was undoubtedly empowered to take this course vis-à-vis the Dairy Farm licensee's renewal application giving rise to the impugned order."

[21] He continued at paragraph [15]:

> "The second of the statutory indicators to like effect is a little more subtle. Article 31 of the 1996 Order prohibits four specified types of alteration to premises having a licence in force. Article 31(1), in its formulation of the four expressly prohibited alterations, is silent on the type of alteration with which these proceedings are concerned. However, I would highlight two features of Article 31. First, it does not purport to prescribe unauthorised alterations in exhaustive terms. Second, it does not purport to limit Article 14(4)(c) to the list of alterations described in Article 31(1). Third, Article 14(4)(c) is not expressed to be "subject to" or otherwise limited or qualified by Article 31(1). None of the familiar statutory drafting devices which could have achieved this with facility and clarity has been deployed. Furthermore, I can identify no warrant for implying qualifying words which would either dilute or confound the second and third components of this analysis."

[22] McCloskey J concluded at paragraph [19] by stating that:

> "…the impugned decision of the CPS is unsustainable in law applying two separate, though inter-related, prisms. The first is that it is vitiated by a failure to

> take into account a self-evidently material fact, namely the significant structural alterations and associated change of business activity within the licensed premises in question. The second is pure illegality, the CPS having no power to make the impugned order having regard to the foregoing. Given the significant alterations to the Diary Farm licensed premises, I consider it clear that the impugned order of the CPS was *ultra vires* his powers."

[23] The *Belfast Wetherspoons* case in which Her Honour Judge Crawford gave an extempore judgment on 9 January, 2018 arose out of a set of facts not dissimilar to the facts of the present case. In the *Wetherspoons* case the licence which it was intended to surrender related to rural licensed premises in Magherafelt which had undergone alterations which had not been notified at the time of renewal. The alterations in that case involved the creation of a beer garden within the existing curtilage of the premises in an area which had previously not been licensed for the consumption of alcohol; whereas, in the present case, the beer garden was created outside the curtilage of the original licenced premises on adjoining land which had been purchased after the licence had been granted and which was not licensed for the consumption of alcohol.

[24] Because there was no official note of Her Honour Judge Crawford's judgment, the digital recording of her judgment was retrieved and played in Court to enable the parties to make submissions on this decision as they saw fit. In essence, her Honour Judge Crawford, relying on earlier authority, held that the licence which was put forward for surrender was invalid because the creation of a beer garden had not been notified to the clerk of Petty Sessions when the application for renewal was made and that the premises were not the same or substantially the same as the premises for which the licence was originally granted.

[25] Relying on these authorities, Mr Gibson argued that the Brown Cow Inn licence was not a valid licence and had not been a valid licence since 2012 and as a result the Applicant/Respondent in the present case could not satisfy the requirements of Article 7(4)(e)(ii).

[26] On behalf of the Applicant/Respondent, Mr McCollum QC argued that irrespective of what was happening or had happened on the more recently acquired strip of land contiguous to the rear of the Brown Cow Inn, the Brown Cow Inn licence is and at all material times was a valid licence in that the premises described in the licence had not changed in any material respect.

[27] The renewal by the clerk of Petty Sessions in 2012 was a valid renewal. Article 14(4)(c) did not mandate that the renewal application should have been referred to the Court because the licensed premises had not been altered since the

grant/last previous renewal of the licence. No application was required under Article 31 because no alteration was done to the existing premises:

> (a) which gave increased facilities for drinking in a public or common part of the premises; or
> (b) added to the premises a public or common part in which intoxicating liquor was sold, or substituted one such part for another; or
> (c) concealed from observation a public or common part of the premises in which intoxicating liquor are sold; or
> (d) affected the means of passage between the public part of the premises where intoxicating liquor is sold and the remainder of the premises or any road or other public place.

[28] Mr McCollum QC called in aid, the interpretation provisions of the 1996 Order and he noted that in Article 2 (2) the phrase "licensed premises":

> "except in the case of an hotel, means the part or parts of the premises for which a licence is in force which are delineated in the plan kept under Article 34(2) as the part or parts of those premises in which intoxicating liquor is permitted to be sold by retail"

He also referred to the provisions of Article 2 (3) of the 1996 Order where it is stated that "references to premises include references to their curtilages" and he argued that this makes it abundantly clear that when considering whether a renewed licence is void or is a nullity as a result of alleged alterations or changes, one had to consider the premises delineated in the plans submitted at the time of the original grant and if there were no substantial changes to those premises, the licence was still valid, irrespective of any developments on other premises or land.

[29] Having given this matter careful consideration, I do not regard these arguments as being sustainable for the following reasons.

[30] They ignore the reality of the situation on the ground. The reality of the situation in this case is that Mrs Horner purchased land contiguous to and at the rear of the licensed premises and developed that newly acquired strip of land into a beer garden. The effect of this development was that the area made available for customers who purchased alcohol in the Brown Cow Inn where these customers could consume their drinks was increased to include a beer garden but that area was not licenced for that purpose.

[31] It would be very surprising if the word "premises" and the phrase "licensed premises" in the 1996 Order were to be interpreted in such a way that significant alterations within the curtilage of the original premises which were not brought to

the attention of the clerk of Petty Sessions or the Court on a renewal application could result in the licence being subsequently rendered void and a nullity whereas the unnotified purchase and development of contiguous lands in a renewal application which in effect resulted in a significant extension in the area where alcohol purchased on the licenced premises could be consumed would have no impact on the validity of the licence.

[32] Mr McCollum's arguments do not take into account the decision of the Court of Appeal in England and Wales in the case of *R v Weston Super Mare Licensing Justices ex parte Powell* [1939] 1 KB 700 where the Court had to interpret similar provisions in licensing legislation then in force in England and Wales. The judgment of Du Parcq LJ at pages 720-721 is instructive in this respect:

> "The question for our decision may be stated as follows: Do the words contained in s. 71, sub-s. 1, of the Licensing (Consolidation) Act, 1910 , "an alteration in any licensed premises in respect of which a justices' on-licence is in force," include an alteration of such premises by their extension beyond their existing bounds, or is their application limited to internal changes within the four walls of the existing structure? Inasmuch as the Act of 1910 is a consolidating Act, the question may be considered with reference to s. 11, sub-s. 2, of the Licensing Act, 1902, and it becomes necessary to take into account the state of the law when the Act of 1902 was passed. Before its enactment no application to licensing justices to sanction alterations was necessary, and such an application was possible only in the sense that a practice had grown up by which justices, though without any statutory authority so to do, sometimes indicated their approval of plans submitted to them. If a licensee chose to make changes in the licensed premises, he ran two risks. First, he might be convicted of selling liquor on unlicensed premises on the ground that the premises, as altered, were no longer substantially the same as those licensed. Secondly, the licensing justices might refuse to renew the licence when application was made for a renewal. It is obvious that this state of things was inconvenient and unsatisfactory, whether considered from the point of view of public or of private interest.
>
> The Act of 1902 first made it obligatory upon the licensee, before he made "any alteration in" the

> licensed premises which came within the categories now set out in s. 71 of the 1910 Act, to obtain the consent of the licensing justices. He might still make any alteration in the licensed premises which did not fall within those categories without their consent. If the judgment of the Divisional Court is right, no jurisdiction was conferred on the licensing justices to deal with an application to alter the premises when one effect of the alteration would be to enlarge their boundaries. The appellant contends that under the Act of 1902 and the Act of 1910 the justices have jurisdiction to entertain such an application, provided that the proposed extension is not such as will (in the words of Field J. in *Reg. v. Raffles*) "destroy the identity" of the licensed premises.
>
> I have come to the conclusion that the appellant's contention is right, and that the judgment of the Divisional Court is based upon an erroneous construction of the section. In my opinion there is no difficulty about giving to the words "alteration in premises" the same meaning which the words "alteration of premises" or "alteration to premises" would bear. I believe it to be in accordance with common and correct usage to speak of changes or alterations "in" a house, though the reference is not to a diminution or internal remodelling, but to an enlargement of the premises, and to an enlargement, it may be, which has necessitated the acquisition of some part of the adjoining land. I think that few people would say except for controversial purposes that the addition of a bay-window or a porch, if it entailed an extension beyond the original boundary of the premises, was not an alteration "in" premises. The strictest of purists would hardly maintain that it should rather be described as an alteration "outside" the premises."

[33] Mr McCollum's arguments do not appear to be supported by Mr E J D McBrien in his licensing text book in section 5-117 at page 149 where the following views are expressed:

> "5-117 As regards the use of a provisional grant in respect of alterations to existing premises, it would appear to have become the established practice that

> Article 9 rather than Article 31 should be used where there are to be substantial alterations to licensed premises. Unfortunately, it would appear that there is a divergence in attitudes on the County Court Bench as to when either is appropriate in a given factual situation. As a guideline, it is suggested that a provisional grant is sought where:
>
> (a) the licence holder wishes to de-licence part of the licenced premises;
>
> (b) the licensed premises are to be extended beyond the existing external walls; and
>
> (c) the licensed premises are to be altered in a material way."

Nor do they find support in the decision of *Re Denmin* where McCloskey J stated in respect of Article 31 that:

> "… it does not purport to prescribe unauthorised alterations in exhaustive terms. Second, it does not purport to limit Article 14(4)(c) to the list of alterations described in Article 31(1). Third, Article 14(4)(c) is not expressed to be "subject to" or otherwise limited or qualified by Article 31(1)."

[34] In light of the above analysis of the relevant law and applying this analysis to the facts of this case, the Court is compelled to conclude that by reason of the failure by the licence holder of the licence relating to the Brown Cow Inn to notify the clerk of Petty Sessions of the construction of the beer garden when the application for a renewal of the licence was made in 2012, the order renewing the licence in 2012 is a nullity and void and, therefore, in the context of the present application, the requirements of Article 7 (4) (e) (ii) of the 1996 Order relating to the surrender of a subsisting licence are not met and the Applicant's application for a licence fails.

[35] In the circumstances, it is strictly unnecessary for the Court to proceed to consider the other issues raised in this case including vicinity, adequacy, suitability and fitness as these matters will have to be considered afresh in any new application brought by Denmin Limited before a lower Court at first instance. However, by reason of the manner in which this Appeal was prosecuted, it is necessary for the Court to address two other matters in this judgment and in addressing those matters, it is necessary to express some views on the evidence given on the issue of vicinity.

Recusal application

[36] On the afternoon of 25 January, 2019, Mr Gibson indicated to the Court that he was instructed to make a recusal application. The matter was then adjourned and the application grounded on apparent bias was formally made on the morning of 28 January, 2019. Mr Gibson referred the Court to the case of *Re Marcail (a pseudonym) Application for Judicial Review* [2012] NIQB 68, a decision of Stephens J, as he then was, that set out the test to be applied when a recusal application has been made. In short, the test to be applied is whether or not, having considered all the circumstances bearing on whether the judge could be biased, those circumstances would lead a fair-minded and informed observer, adopting a balanced approach, to conclude that there was a real possibility that the tribunal was biased.

[37] Mr Gibson stated that he based the application on three grounds. He stated that on 11 January, 2019 I made a comment that I considered that there was a smell about this case. Secondly, he stated that I had made comments which were critical of his instructing solicitor and had raised concerns about the professional integrity of the said solicitor. Thirdly, he stated that I had made comments which were critical of counsel and had raised concerns about the professional conduct of counsel. He argued that taken together, these circumstances would lead a fair-minded and informed observer, adopting a balanced approach, to conclude that there was a real possibility that the tribunal was biased. I proceeded to deal with each of these matters in turn.

[38] In relation to my comment that there was a smell about the case; this comment was made when Mr Hughes was being cross-examined by Mr McCollum QC. Mr Hughes initially stated that the grounds for his objection were that there was no need for licensed premises in the Poleglass estate and he and his wife were concerned about anti-social activity in the vicinity of any off-licence. The evasive manner of his responses to Mr McCollum's questioning, his initial denial of knowledge of the progress of this case in the Court below and his reluctance to admit to having knowledge of the approach adopted by other objectors in the Court below, led me to have significant concerns that I was being told the whole truth by Mr Hughes about his reasons for objecting to the grant of a licence in this case. I specifically expressed my concerns at that stage of the evidence that I was not being provided with the full picture in this case.

[39] During subsequent cross-examination of Mr Hughes by Mr McCollum QC, it became abundantly clear that my initial concerns were very well founded. Mr Hughes accepted and, in fact, volunteered that his family had owned a pub called the "Old Mill Bar" in Poleglass, quite close to the proposed off licence which was the subject of this application. The company owning and operating the pub had ceased trading due to financial difficulties and the pub was subsequently burnt down. However, it was his and his family's fervent desire and intention to resurrect this enterprise and re-open a pub and off licence on the site of the "Old Mill Bar" and this formed the real basis for Mr Hughes' and his wife's continued objection to the grant of a licence to the Applicant/Respondent in this case.

[40] In relation to the issue of the concerns I raised about the conduct of Mr Hughes' instructing solicitor in this case; these concerns were raised in the following context. During the course of Mr Hughes' cross-examination, the matter was adjourned so that Mr Hughes could produce documentation relating to applications to lower Courts made by and on behalf of companies controlled by the Hughes family relating to the licence under which the "Old Mill Bar" was previously operated.

[41] When these documents were produced, Mr McCollum QC continued his cross-examination of Mr Hughes in relation to the contents of same and put to Mr Hughes that the lower Courts had been misled by the lawyer who had made the said applications, namely, an application for the provisional grant of a licence on 6 November, 2014 and an application for a temporary continuance of a licence on 27 April, 2017. Mr Declan Rogers, the solicitor with carriage of the present case on behalf of Mr and Mrs Hughes, was identified as the lawyer in question and Mr Hughes was asked a number of questions about his and Mr Rogers' actions in making these applications. Following an exchange between Mr Hughes and Mr McCollum QC, it was put to Mr Hughes that a lawyer when making any sort of application before the Court is supposed to know the law; that this is part of the lawyer's duty. It was then put to Mr Hughes that in answering Mr McCollum's questions about these applications what he was, in effect, saying was that it was not that Mr Rogers was dishonest in trying to obtain a court order on the basis of false information, it was that he was incompetent, to which Mr Hughes replied: "It would appear to be the case." When asked to confirm this he then stated: "I don't know if I would use the word incompetent. I would say he probably was not advised."

[42] Upon hearing this evidence, I indicated that I perceived a clear conflict of interest situation arising between the client and the solicitor in circumstances where a client appeared to accept such criticism of his solicitor. I also indicated that in light of the matters raised, I would be minded to make a report of an allegation of misconduct (misleading a Court when making two applications in respect of the licence under which the Old Mill Inn was formerly operated) so that this serious allegation could be properly investigated. I questioned whether it was appropriate for this matter to proceed with Mr Rogers acting as Mr Hughes' solicitor. I rose for some time to allow the concerns I had expressed to be considered. When the hearing resumed, it became clear that despite me raising such concerns, Mr Rogers was intent on continuing to have direct carriage of the case on behalf Mr and Mrs Hughes.

[43] In relation to the issue of the concerns I raised about the conduct of counsel in this case; these concerns were raised in the following context. During the cross-examination of Mr Hughes, the Court was informed by Mr McCollum QC, following an interjection by Mr Gibson, that Mr Gibson had acted for another objector to the grant of a licence in this case when the matter was before the County Court. In fact, it transpired that Mr Gibson had been instructed on behalf of the owners of the Laurel

Glen licensed premises who had initially argued that the Laurel Glen was located within the vicinity of the premises which were the subject of the present application. The owners of the Laurel Glen might have had a common interest with Mr and Mrs Hughes in objecting to Denmin's application but it is obvious that such common interest would not be preserved in circumstances where the Hughes family was intent on opening a pub and off licence in relatively close proximity to the Laurel Glen.

[44] Mr McCollum QC informed the Court that Mr Gibson had negotiated directly with him before the hearing of the application before the Learned County Court Judge and as a result of those negotiations, the owners of the Laurel Glen had withdrawn their objection to Denmin's application. Upon being informed of this, I immediately queried whether a conflict of interest situation did or did not exist in such circumstances.

[45] The issue which concerned the Court was whether during the course of this Appeal, Mr Gibson whilst representing Mr and Mrs Hughes, did or could reasonably be perceived to have used information which he had obtained either from his former client (the owners of the Laurel Glen when he acted for them in the lower Court) or during the course of his negotiations with Mr McCollum when Mr Gibson was representing the owners of the Laurel Glen before the lower Court. I left Mr Gibson in no doubt that I considered that it was inappropriate for him to continue to act for Mr and Mrs Hughes in such circumstances. Mr Gibson argued that there was no actual or perceived conflict of interest and on that basis the matter proceeded.

[46] It then transpired that Mr Gibson had also acted for another company, Frescobon Ltd, when this application was before the County Court. Mr Gibson, on behalf of Frescobon Ltd, had sought to argue that it was entitled to the status of objector before the County Court on the basis that it was the owner of the lands where the "Old Mill Inn" previously stood and this site was clearly within the vicinity of the premises for which Denmin Ltd were now seeking a licence.

[45] Mr McCollum QC rightly pointed out in cross-examination of Mr Hughes that the Hughes family's case in proceeding with their applications to obtain a grant of a provisional licence and their application for a temporary continuance in respect of the licence under which the "Old Mill Inn" was previously operated hinged upon the assertion that his family's corporate structures owned the lands on foot of a lease of which there was no evidence of its existence. In evidence, Mr Hughes positively asserted that his family's corporate structures did have good title to the lands in question. Following this assertion, I again raised the question of conflict of interest with Mr Gibson. How could he represent one entity at the lower Court that asserted ownership of lands in order to obtain locus standi to object to the application by Denmin and on appeal represent another objector who claimed that his family's corporate structures had long leases of the lands in question? I rose for a short adjournment to obtain a copy of the Code of Conduct of the Bar of Northern Ireland

and on my return to Court, I specifically referred to two provisions of the Code. Section 5.6 of the Code states:

> "5.6 A barrister must not give advice, draft pleadings or accept instructions or a brief in any case where he has previously advised or acted for another client in connection with the same matter. When a barrister becomes aware that he is breach of this requirement, he should return the papers forthwith."

Section 13.5 of the Code states:

> "13.5 Where a barrister has advised or acted for a client in relation to any proceedings he must, before accepting a brief in any other proceedings arising out of the same transaction or circumstances, ensure that there is no actual or apparent conflict of interest."

[46] I directed Mr Gibson to carefully consider his position in light of the content of the provisions of the Code of Conduct set out above and, again, Mr Gibson stated that he saw no actual or perceived conflict of interest. The matter was adjourned to allow Mr Gibson to seek advice from the Professional Conduct Committee.

[47] The Court was subsequently provided with correspondence which indicated that the Professional Conduct Committee would not be in a position to consider this matter until it met on 29 January, 2019. In the meanwhile, Mr Gibson had sought informal advice and informed the Court that in light of that advice he intended to continue to represent Mr and Mrs Hughes in these proceedings. In further correspondence from the Objector/Appellant's solicitors, the Court's attention was also directed to the speech of Lord Millet in the case of *Bolkiah v KPMG* [1998] UKHL 52 and the English Court of Appeal decision in the case of *Duncan v Duncan* [2013] EWCA Civ 1407 where Macur LJ stated at paragraphs 17:

> "17. The part of Lord Millet's speech in Bolkiah which deals with the law at page 233G to page 237F remains good and is the leading authority on points of principles arising in this and similar cases. In my view, they amount to this:
>
> 1) counsel is not absolutely precluded from acting in litigation against a former client;
>
> 2) counsel may be restricted from acting, if necessary, to avoid significant risk of disclosure or misuse of confidential information belonging to the former client;

3) the Court's right of intervention is based not on the avoidance of perception of possible impropriety but on the protection of confidential information;

4) counsel has no obligation to defend and advance the interest of a former client;

5) counsel has a duty to preserve the confidentiality of information imparted by a former client;

6) counsel's duty of confidentiality is unqualified. The Court, if asked, will intervene unless satisfied that there is no risk of inadvertent or accidental disclosure to those with adverse interest. This is a matter of perception as well as substance;

7) obviously counsel cannot act for and against the same client in the same case. This would produce the inescapable conflict of interest inherent in the situation.

I regard the reference to "perception as well as substance" in 6) as being of the utmost importance in the context of this case.

[48] The matter proceeded but at regular intervals, issues re-emerged about an actual or perceived use of information obtained by Mr Gibson as a result of his former instruction in this case on behalf of the owners of the Laurel Glen licensed premises. Matters came to a head when Mr Gibson was cross-examining Mr Maurice Maguire, the Planning Consultant retained on behalf of the Applicant/Respondent in this case. On 25 January, 2019, during cross-examination, Mr Gibson suggested that Mr Maguire had chosen boundaries of his vicinity with a view to ensuring that the Laurel Glen licensed premises and another set of licensed premises known as "the Cellars" were outside his suggested vicinity. Mr Maguire denied that the location of these two sets of licensed premises influenced his views on the issue of vicinity.

[49] Mr McCollum QC raised objection to this line of questioning on the basis that he had been engaged in direct negotiations with Mr Gibson who had been instructed on behalf of the owners of the Laurel Glen before the lower Court and that as a result of these negotiations, the owners of the Laurel Glen had withdrawn their objection to the application on the basis that the Laurel Glen was not within the vicinity of the premises for which Denmin Ltd sought a licence; and now, on appeal, Mr Gibson was arguing the point on behalf of Mr and Mrs Hughes that the Laurel Glen was within the vicinity of the premises for which Denmin Ltd sought a licence. I, again,

raised the issue of actual or perceived conflict of interest with Mr Gibson and in order to ensure that there was no doubt in Mr Gibson's mind as to how seriously I regarded the matters which had emerged during the entirety of this prolonged hearing, I informed him that I would be giving a written judgment in this case and I would be dealing with these matters in my written judgment and I would be making the appropriate referrals to the relevant disciplinary bodies. I, again, gave Mr Gibson some time to consider his position and upon his return to Court, having consulted with his instructing solicitor and his lay clients, Mr Gibson informed me that he was instructed to make a recusal application.

[50] In refusing this application on 28 January, 2019, I was at pains to emphasise the importance I attach to the maintenance of high professional standards in both branches of the legal profession. I provided a full explanation in respect of the three matters which Mr Gibson had raised in support of his application and I concluded that the test set out in the *Marcail* case was demonstrably not met. I also stated that I was concerned that this application had not been made until after I made it abundantly clear that I was intent on ensuring that the matters which had greatly concerned me during the hearing would be dealt with in a detailed written judgment and would be brought to the attention of the relevant disciplinary bodies.

[51] Following the rejection of the recusal application, Mr Gibson's cross-examination of Mr Maurice Maguire continued. Mr Maguire's evidence was subjected to very rigorous and at times vigorous forensic scrutiny by Mr Gibson and I would expect no less from able counsel. However, a line was crossed when, on 28 January, 2019, Mr Gibson put it directly to Mr Maguire that his evidence including his report was "abject nonsense". When Mr Gibson's cross-examination was complete, Mr McCollum QC again raised the issue of Mr Gibson's conduct by referring to section 9.4 of the Code of Conduct which requires a Barrister to act with due courtesy in any appearance in Court. He submitted that Mr Gibson's treatment of Mr Maguire and his use of the phrase "abject nonsense" offended this provision.

[51] I reminded the parties that the importance of treating witnesses including expert witnesses with respect and courtesy had recently been addressed by Colton J in the case of *Sands v Hamilton* [2016] NIQB 44 in which a highly respected Forensic Accountancy expert had been the subject of inappropriate cross-examination. At paragraph [80] of his judgment, the learned Judge specifically criticised counsel for an unwarranted attack on the witness's competence and integrity. I informed counsel that I would deal with this issue in my judgment.

[52] I have stated earlier in this judgment that I did not consider it appropriate or necessary to make any specific findings on vicinity as this issue will have to be addressed in any fresh application before a lower Court. However, having regard to the manner in which Mr Maguire was cross-examined, the Court is compelled to make the following observations on the evidence of Mr Maguire. Mr Maguire's evidence was subjected to prolonged, rigorous and at times robust cross-examination. My assessment of Mr Maguire and his evidence, which was thoroughly

and effectively tested, is that his evidence on vicinity was well-reasoned, well researched, supported by substantial background and independent material, was logically propositioned and was compelling. If it had been necessary for me to make a finding on vicinity, I would have had no hesitation in accepting Mr Maguire's evidence on this important issue. I note that the learned County Court Judge who heard this matter at first instance also accepted Mr Maguire's evidence. I, therefore, regard it as inappropriate for counsel to put to an expert witness that his evidence is "abject nonsense" when there is no basis for such an assertion. This at the very least demonstrates an abject lack of courtesy towards a professional witness doing his best to assist the Court.

[53] In summary, the Applicant/Respondent's application is refused on the basis of a failure to comply with the mandatory provisions of Article 7(4)(e)(ii) of the 1996 Order. Because of the serious matters highlighted above, I have decided that it is necessary for me to refer issues relating to the conduct of the Objector/Appellant's solicitor and counsel to their respective professional disciplinary bodies.