

Neutral Citation No.: [2008] NIQB 146

Ref: **MOR7353**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **15/12/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

**ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF
FERMANAGH AND TYRONE**

BETWEEN:

Lidl (Northern Ireland) GmbH

Applicant/Appellant;

-and-

Winemark the Wine Merchants Ltd

Objector/Respondent.

MORGAN J

[1] This is an appeal from a decision of the County Court judge for the division of Fermanagh and Tyrone who refused the appellant's application for the grant of an intoxicating liquor licence pursuant to article 5 (1) (b) of the Licensing (Northern Ireland) Order 1996 (the 1996 Order) for the sale of intoxicating liquor by retail for consumption off the premises. The appellant was represented by Mr Beattie QC and the respondent by Mr Comerton QC and Mr O'Connor. I am grateful to all counsel for their helpful oral and written submissions.

The appellant

[2] The appellant is a successful supermarket chain trading from over 6000 stores throughout Western Europe. It expanded into the United Kingdom in 1997 and established itself in Northern Ireland in 1999. It trades from 425 stores in England, Scotland and Wales all of which sell alcohol as part of the integral offer and a further 77 stores in the Republic of Ireland all of which are licensed to sell the full range of alcoholic products to customers. It has 35

supermarket outlets in Northern Ireland of which 21 are licensed to sell alcohol by retail for consumption off the premises. It also has a further separate off sales facility at Lifford Road Strabane.

[3] When originally established in Northern Ireland the appellant company sold no recognisable UK brands. The concept underlying the company has been to buy mainstream products in bulk as competitively as possible and pass the savings directly to the customer. As a result of customer demand some UK brands have now been included. The appellant provides approximately 1200 lines of convenience goods. This compares with some 15/20,000 lines provided by large stores such as Asda. The style of offer is sometimes called limited range discounting and the appellant markets itself as a no-frills shop. The appellant is happy to trade beside most Northern Ireland retailers, particularly the larger stores. It considers that it complements other supermarkets.

[4] This style of trading applies also to its off-licence facilities. It provides what was described as a focused alcohol product range consisting of 48 wines ranging in price from £1.49 to £12.99, 15 beers and ciders and 23 further lines consisting of liqueurs, spirits and fortified wines. The respondent is a company which owns a large number of stand-alone off-licence facilities. By comparison its offer in its Strabane shop consists of more than 60 beers, more than 500 wines and more than 130 spirits. This is broadly typical of the range one might anticipate from many stand-alone off-licence facilities and off-licence facilities established within large supermarkets.

[5] The appeal concerns a freestanding Lidl supermarket at Bradley Way Strabane which opened in February 2002. It has a sales area of 10,700 ft.² and approximately 155 car parking places. The proposal is to dedicate a defined area of 527 ft.² within the store for the sale of alcohol, availing of the Licensed (Mixed Trading) Regulations 1997. The subsisting licence which the appellant proposes to surrender is that relating to the separate off sales facility at Lifford Road Strabane.

The statutory background

[6] Article 5 (1) (b) of the 1996 Order provides for the licensing of premises to sell intoxicating liquor by retail for consumption off the premises.

"5. - (1) Without prejudice to Article 80, the premises in which the sale of intoxicating liquor is authorised by a licence shall be premises of one of the following kinds-

(b) premises in which the business carried on under the licence is the business of selling intoxicating liquor by retail for consumption off the premises;"

The requirements for the grant of a licence are set out in article 7.

"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

(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....

(6) Without prejudice to paragraph 6 of Schedule 3, paragraph (4)(e)(i) shall not apply where-

(a) the subsisting licence which is proposed to be surrendered is for premises to which paragraph 2(a) of Schedule 2 applies and which were or are on the site or in the vicinity of the premises for which the licence is sought; "

[7] It is common case that the proofs in relation to the fitness and character of the appellant and the formal proofs as to planning permission and procedural matters are satisfied. The only remaining issues in this appeal concern matters arising from article 7(4)(e)(i) of the 1996 Order.

(1) The proper determination of the vicinity of the appeal premises

(2) The determination as to whether the number of licensed premises of the kind specified in the application in the vicinity of the premises is inadequate.

Although the appellant maintains that the subsisting licence which it proposes to surrender is within the vicinity of the appeal site it concedes that paragraph 2(a) of Schedule 2 to the 1996 Order does not apply to those premises.

Vicinity

[8] Strabane is a market town serving north Tyrone and east Donegal. Census returns show steady growth from 10,340 in 1981 to 13,456 in 2001. The town is bisected by the Mourne River which runs southeast to northwest and joins the River Foyle. The northern part of the town contains the town centre shopping area which is bounded by the river with the usual mixture of convenience and comparison shopping including off-licence provision. Approximately one third of the population lives on the northern side and the preponderance of growth in housing has been on the southern side.

[9] The relevant road system is best described by travelling into Strabane from the North. This takes one onto phase 1 of the bypass which was built in 1992. At the first roundabout there is a left turn along Railway Street which takes one in towards the city centre. At this junction is located the new Asda supermarket with approximately 17000 ft.² of convenience shopping and a 1200 ft.² freestanding off-licence. This site has approximately 160 car parking places. Asda is approximately 500 m from the appellant's premises.

[10] Travelling along Railway Street from the roundabout one encounters on the left-hand side Farmers public house after about 300 m. This has a separate off sales facility of approximately 900 ft.². A couple of hundred metres further one enters the town centre which contains Christie's public house with a separate off sales facility of 600 ft.² and a Supervalu supermarket with an off sales area of 1200 ft.². There are two further public houses with small off sales facilities in the town centre but their size is such that I do not need to consider them in the context of this application. The town centre is approximately 1.2 km from the proposal site using the bypass bridge and approximately 1km from the proposal site using Bridge Street.

[11] Travelling directly on from the first roundabout at phase 1 of the bypass takes one over the bypass bridge to its junction with Bradley Way. Turning left at this junction into Bradley Way the proposal site is situated on the left-hand side beside a Kentucky Fried Chicken with the bus station to the proposal site's rear. Housing has been built on the opposite side of Bradley Way. At the opposite end of Bradley Way from the roundabout there is a junction which provides the option of turning left along Bridge Street back into the town centre or right along Melmount Road which leads south. The area to the south comprises housing and civic uses and approximately 800 m from the proposal site along Melmount Road there is a local centre comprising a 14,000 ft.² supermarket, the objector's 1275 ft.² off sales facility and various other uses.

[12] If one travels directly through the second roundabout the phase 2 bypass which was built in 2003 takes one south towards Omagh. Returning to the first roundabout if one turns right one travels along Lifford Road towards the border with the Republic of Ireland. Shortly before reaching the border there is a small parade of shops comprising a 2000 ft.² convenience shop, a restaurant and other mixed uses and a small off sales facility with a selling area of approximately 350 ft.². The off sales facility was originally owned by Stewarts Supermarkets Ltd but was sold to the applicant in summer 2004. It is just under 1.2 km from the proposal premises by road and approximately 850 m on foot.

[13] There was no material difference between the parties about the legal test to be applied in determining the vicinity and I find considerable assistance in the decision of Carswell J in *Donnelly v Regency Hotel Ltd.*

[1985] NI 144. He approved a passage of McGonigal J in *Magill v Bell* [1972] NI 159 where he said that vicinity, while not limited to premises immediately surrounding the proposed premises, is limited to premises in the neighbourhood in the sense in which one speaks of being a neighbour of another. Carswell J then set out some of the features of importance at 153G.

"I think that it is of importance to look both at the physical features of an area and any natural boundaries, and also at the established dwelling patterns and geographical allegiances of those who live, work or shop there. A vicinity accordingly seems to me to connote more than the area plotted on a map; its determination has to take into account the habits and movements of people in the area, and the directions in which those habits take them in the course of their daily lives. "

He also adopted an excerpt from the judgment of Judge Higgins in *Cormican's* case.

"I think it is impossible to lay down any general rule as to the extent of the area indicated by the word 'vicinity'. In country districts people are said to be neighbours, that is to live in the same neighbourhood, who live many miles apart. The same cannot be said to dwellers in a city, where a single square may constitute a neighbourhood. Physical features may determine the boundary or boundaries of a neighbourhood as, for example, a river, a railway or a range of hills. In an urban area lacking such physical features the lay out of the streets and the nature, character and use of the buildings need to be looked at, as well as the size and distribution of the population, whether residing or working in the area."

[14] In applying these principles Carswell J inclined to the view that one should look individually at each of the other licensed premises near the proposed premises and decide if each counts as being in the vicinity of the proposed premises. That is the approach which I propose to adopt in this case.

[15] The northwest of Strabane is dominated by the new road system which has been built to facilitate the bypass. Such a system operates as a disincentive to pedestrian traffic in the area but readily facilitates car borne activity. The Asda supermarket is approximately 500 m from the proposal along the new road system and takes about three minutes in a car. Although

Mr Burroughs for the applicant contended that the river operated as a natural boundary for the vicinity he recognised that the road system provided such convenient access to Asda that it should be accepted as being in the vicinity. In my view that concession was properly made.

[16] The Winemark off sales facility is approximately 800 m from the proposed site to the south. It again takes approximately 3 minutes by car and in my view it is clear that the housing to the north and south of the shopping parade in which the off sales facility is located is within the vicinity of the appellant's supermarket. There was no dispute between the parties about this.

[17] Access to the town centre from the proposal site is constrained by the Mourne River. Using the bypass road system it is necessary to travel along Bradley Way to the roundabout junction with the bypass, travel over the bridge to the Branch Road roundabout and then travel into the town centre using Railway Street. This takes one past Farmers and shortly thereafter one enters the one-way system into the town centre. The total distance to the town centre is 1.2 km. The alternative is to travel in the opposite direction along Bradley Way to Bridge Street. One then takes a left turn over Strabane Bridge and then into the town centre, a distance of 1 km.

[18] The appellant contended that Strabane town centre was busy and congested. At the hearing a CD of the possible trips to the town centre was played showing a busy Saturday afternoon. There was very limited available on street parking. The appellant contends that car parks convenient to the town centre are generally very busy and that the substantial Canal Basin car park is approximately 500 m from some of the facilities within the town centre such as Supervalu. I accept that it might take 10 minutes to travel from the subject site to Supervalu allowing for car parking on a busy Saturday afternoon. I accept that the Council are concerned about the absence of convenient car parking near Strabane Town Centre. I further accept that there was conflict between taxis and buses close to the town centre producing congestion although this has been considerably eased by the relocation of the bus station.

[19] Mr Burroughs referred me to the vicinity established in two licensing applications in 1999 and 2000. The objector substantially extended its premises in 1999 and the court accepted a vicinity bounded by the Mourne River and including the housing and civic users to the south of it. The following year an application was made to extend the Supervalu premises. In that case the Mourne River was accepted as the southern end of the vicinity. In my view one has to be extremely careful about the manner in which one takes into account vicinities found in respect of entirely different premises. I do not accept that these applications establish that there is a firm boundary indicated by the river. These applications arose in respect of a completely

different road system as phase 2 of the bypass was not open at that stage. The much wider range of shops located at Melmount Road including access to a post office and pharmacy would have been highly relevant in the objector's application and if the Donnelly principle was applied in the Supervalu case that case merely decided that the Winemark off licence was not within the vicinity of the Supervalu application.

[20] Mr Burroughs also referred me to a previous grant of planning permission in respect of a site which included the subject premises but was substantially larger. Planning permission for a superstore was granted on the basis that two bridges should be available for pedestrian traffic connecting to the town centre over the river. He contended that this demonstrated the detachment of the subject site from the town centre in the absence of those bridges. I do not accept that argument. I entirely accept that the bridges would have been necessary to facilitate reasonable pedestrian activity between the appeal site and the town centre and that there is a very little pedestrian activity in Bradley Way but 93% of those attending the appeal premises do so by car and it is relevant to take this into account in the determination of vicinity.

[21] The appellant properly pointed to the fact that the journey into the town centre involved moving into an area of a different character. That change of character is almost inevitable in any town centre but it does not in my view follow that the town centre is outside the vicinity of the urban areas close to it. In fact the very function of the town centre is to provide that range of uses which is critical to the support of the urban dwellers. That is the area in which one would expect many of those dwellers to work and shop.

[22] I am satisfied that the town centre is within the vicinity of the subject site. It is a relatively short distance from the proposal site on a reasonably good road system. I accept that congestion may occur from time to time particularly on crossing the Strabane Bridge in either direction but I do not consider that the congestion, when it occurs, creates more than a few minutes delay. On a busy Saturday one may well have to avail of a car park such as Canal Basin but I do not consider that this is an impediment of significance to access. Some of those shopping at the appellant's premises will do a substantial shop typical of one-stop shopping but many will not. The town centre provides the range and choice of facilities which those people require. The presence of the bus station at the rear of the appellant's premises also supports the view that the town centre is within the vicinity of the site as many of those using the bus station will be working and shopping in the town centre.

[23] The Lifford Road off licence is just over 1 km from the subject site by car and 850 m by foot. There is evidence of very considerable car use on Lifford Road particularly in the morning and evening peaks by those

travelling from Donegal to Northern Ireland to work in the morning and the same people returning in the evening. There is little evidence of any significant pedestrian use. Outside the peaks the journey takes approximately 2 minutes by car from the subject site to the Lifford Road off licence. It is common case that the off-licence and shops associated with it are right on the periphery of Strabane.

[24] The character of this area is quite different from that at Bradley Way. On the northern side of Lifford Road there is a tyre depot, builders merchants, car related users, one house and the parade of shops in which the off licence stands. The shops include a 2000 ft.² convenience shop, cafe, a florist, a bureau de change and a petrol facility. On the southern side of Lifford Road the land is low-lying and liable to flooding and it is, therefore, open space. The evidence before me indicates that there is a proposal to develop a site to the west of the Lifford Road off licence for substantial commercial mixed-use activity.

[25] The survey evidence tends to indicate that 40% of the customer base for the off-licence comes from the Republic of Ireland. This is marginally greater than the customer base emanating from Strabane. Like all border towns Strabane does a substantial amount of business with customers from the Republic of Ireland. The town centre survey tends to indicate that 25% of shoppers in Strabane town centre come from the Republic of Ireland and the Lidl survey suggests that the same is true for its supermarket premises. The higher figure for the off-licence reflects its proximity to Lifford and the fact that alcoholic products are cheaper in Northern Ireland than in the Republic of Ireland.

[26] I am informed that the County Court judge came to the conclusion that the Lifford Road off licence was outside the vicinity of the subject premises. In reaching that conclusion I am advised that he took into account in particular a survey in May 2004 suggesting that 8% of those surveyed within the vicinity had last used that off-licence. The appellant relied on the fact that the most recent figure for that usage was now 18%.

[27] I consider that these figures have to be treated carefully before they are taken into consideration. In May 2004 the off-licence premises were owned by Stewarts Supermarkets Ltd who were in the process of withdrawing from Strabane. It appears that they were in the process of selling the off-licence to the appellant who became the effective owner in July 2004. I know nothing about the manner in which the off-licence was conducted during this period or the extent of advertising or promotion. The survey evidence clearly suggests a substantial increase in user when the premises were taken over by the appellant. In the course of the appeal I had been shown promotion material issued by the appellant in promoting their products. I am satisfied that like any other business they would have wished to promote each of their

outlets in the other. That may explain in part the increase in user. I am also careful about the weight that I attribute to the raw figures. The three sampling points used by the appellants for their survey evidence were the Lidl supermarket premises, the Asda premises and the parade of shops in which the off-licence is situated. One might have expected the Asda premises to be the busiest of those locations, the Lidl supermarket to be less busy and the off-licence shops to be considerably less busy and this is supported by survey evidence introduced by the objector. In fact equal numbers were surveyed at each location and in my view this creates a risk that the use of the Lidl off-licence is overrepresented in terms of the vicinity as a whole. The survey figures for the town centre suggested considerably less usage by those frequenting that location.

[28] I have found this a finely balanced issue. The off-licence premises are on the periphery of Strabane and separated from it by users of a quite different character from those at Bradley Way. The survey evidence suggests a substantial Republic of Ireland focus in the activity conducted at the off-licence site. On the other hand cross-border trade is a two-way street. Those residing in or close to Bradley Way have ready access to Lifford. In making that journey the only shops they would directly pass in Northern Ireland containing branded confectionery, newspapers, cigarettes, flowers and alcohol for consumption off the premises would be this local centre. Petrol is also available at this centre or alternatively at Lifford if it is cheaper. I entirely accept that such trips for petrol, when they occurred, cannot mean that these premises are within the vicinity of any location in Strabane but I see force in the argument that this local centre is functionally related to those who reside in Bradley Way and on balance I conclude that the off-licence premises are within the vicinity of the appeal premises.

Adequacy

[29] As appears from the legislation the legal test is whether the number of licensed premises of the type specified in the application is inadequate. The test is expressed by the use of everyday English words which do not need redefinition. The point was succinctly put by Kelly J in *Woods v Mayne* (1982) 16 NIJB 9 in a passage subsequently relied upon by Hutton J. in *Stewarts Supermarkets v Sterrit* [1985] NI 159

“In this jurisdiction the legal curb is adequacy. Adequacy remains the paramount consideration and selection and competition are subordinate matters to be taken into account.”

[30] In *Belfast Cooperative Society v Tohill* [1975] NIJB 5 Mac Dermott J. considered the meaning of "inadequate" and posed the question "inadequate for what?". He concluded that in the context of this subsection inadequate

means inadequate to meet the requirements of the public. It is clear from his subsequent application of the test that he was concerned with the reasonable requirements of the public. It is important to appreciate the element of need captured by the use of the terms "inadequate" and "requirement". Issues of preference, desire and convenience may well inform a judgment about whether a reasonable requirement has been established but must not be substituted for the statutory test.

[31] It is also clear that matters of choice, price and competition are relevant to the determination of whether an applicant has established inadequacy. The context in which these matters can properly be taken into account is helpfully set out in the decision of Higgins J. in *Co-Operative Group v Phillip Russell* (unreported)

“Thus the question of adequacy remains the court’s paramount consideration but it will be informed by other relevant factors. These may include selection, competitiveness and pricing. Those as Kelly LJ and MacDermott LJ have observed, are not determinative factors. In the *Stewarts Supermarkets* case supra MacDermott LJ said that when considering the increase in the varieties of beers and wines now on offer:

‘It seems to me that this development is something which should be borne in mind when considering "adequacy" though as I have already said selection and competition are not all determining matters’.”

[32] It is well established that in considering the question of demand one is obliged to take into account demand not only from persons living and working in the vicinity but those who may be attracted to it. Authority for this can be found in the observations of Lowry LCJ in *Crazy Prices v RUC* and others [1977] NI 123.

“The question which was common to both applications is whether, in applying section 5 (2) (c) (i), the court ought to consider the demand created by persons coming from outside the vicinity of the premises or merely the needs of those residing in the vicinity. I have no difficulty with this question and agree with the learned judge that the first view is the

right one. The word “inadequate” is not qualified by any such words as “to satisfy the needs of persons residing in the vicinity of the premises.” There is no necessity, and therefore no excuse, for adding such words and thereby changing the meaning of the provision.”

This is particularly relevant in this case because of the substantial amount of cross-border trade attracted to Strabane.

[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.

[34] Although there was agreement between the parties on the issues set out above there was some measure of distinction between them on the manner in which convenience should be taken into account in determining the question of inadequacy. The starting point is the decision of Hutton J. in *Stewarts Supermarkets Ltd v Sterrit* [1985] NI 159. That was a case in which the applicant sought to obtain an off-licence in respect of a shop unit in the newly built Connswater Shopping Centre. The applicant relied on the large number of shoppers attracted to the premises then totalling 60,000 visits per week and adduced evidence demonstrating that a significant percentage of those using the centre would purchase alcohol from an off-licence if able to do so. The objector adduced evidence that there was one off-licence on the Beersbridge Road side of the development approximately 310 m from the site and two others on the Holywood Road side of the site approximately 500 m from it. The court held that although the applicant had demonstrated that an off-licence would be convenient for shoppers using the centre and that such an off-licence would be commercially successful that fell far short of proving that the number of existing off licences in the vicinity was inadequate. It further concluded that the fact that the public would find the presence of an off-licence in a particular location convenient fell short of proving that the off-licence was reasonably required by the public if that indeed was the appropriate test.

[35] This area was revisited by a Girvan J. in *FA Wellworth v Phillip Russell Ltd* [1997] NI 175. The application concerned a large superstore with over

30,000 ft.² sales area and 316 car parking spaces. The evidence established that the store attracted shoppers from a wide catchment area and had a footfall of about 17,500 customers per week. There were three off-licences in the vicinity. One was located on an urban clear way. As a result there was limited on-street parking. A second was located on a very busy road making on street parking relatively difficult. The premises were described as fort-like and there were markings on the footpath of a Loyalist nature making the area unattractive to some shoppers. There was a finding that the stock of wine carried at those premises would be relatively low. The third facility was very limited with no display of product, no member of staff dealing only with off sales and a very limited quantity of off sales.

[36] In considering the question of adequacy Girvan J. recognised that there was a degree of elasticity attached to the concept which had to respond to changes in shopping patterns, working hours and practices and general social behaviour. These matters are highly relevant to the determination of the reasonable requirements of the public. He then went on to say that although mere convenience had been held not to be a justification in itself for the granting of a new off-licence, convenience was a factor to be taken into account. The inconvenience involved in resorting to the existing premises was a factor in considering whether the existing premises were adequately serving the demand in the vicinity. He found that relatively few of the shoppers coming into the area would shop in the alternative off-licence facilities and that many of them would not even know where the alternative premises were to be found.

[37] Kerr J touched on this issue of convenience in the appeal of Phillip Russell Ltd (unreported 2000). In that case he found that there were two other off-licences within the vicinity. They were close together in an area well removed from much of the housing in the hinterland of the shopping area where the proposed premises were located. Parking facilities at those premises were severely limited. The court found that there was a demand for conveniently located premises where customers had the opportunity to park their vehicles without undue difficulty and to carry out their purchases with relative ease.

[38] In my view these cases tend to suggest that issues of accessibility such as car parking, traffic congestion, the road system and the character of the area will be material to the question as to whether the existing facilities are inadequate for the reasonable requirements of the public and indeed in some cases may decisively answer the question as to whether the number of off-licence premises in the vicinity are inadequate. The decision of Pringle J. in *Crazy Prices t/a Tesco v Wine Inns Ltd* (unreported 4 February 1999) where he rejected a submission that the convenience of and therefore demand for an integrated off sales facility was a factor to be taken into account by him in determining that application needs to be placed in context. I consider that this

establishes no principle but merely reflects the fact that the position of an applicant under the Mixed Trading Regulations is likely to be no different from the applicant with a separate proximate unit because the difference is unlikely to impinge on the question of whether the number of existing off-licence premises is inadequate. I conclude, therefore, that convenience in terms of accessibility and location are entirely proper considerations in the assessment of inadequacy and that these may have a particular bearing where members of the public are attracted into a particular location from outside the vicinity.

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.

Price, quality, choice and competition

[41] The appellant's wine offer is very much focused on the lower end of the price range. The offer varies a little from time to time but the percentage of wines below four pounds can be as high as 80%. By comparison the percentage of wines within that price bracket in Winemark is approximately 10% and within Asda is approximately 40%. In the higher price brackets the applicant occasionally provides offers consisting of one off purchases which can constitute exceptionally good value. The offer ends as soon as the consignment is sold. Having regard to the limited number of wines on offer the applicant provides little or no sustained competition in the higher price bracket.

[42] The style of offer is consistent with the applicant's retail approach. Although the number of wines is modest the applicant seeks to cover the range by providing one example of different types of grape. Because of the limited number of wines on offer Winemark still provides a greater number of wines under four pounds in its shop and Asda provides approximately 4 times as many wines at that price level. I accept, however, that a good number of the wines on offer at the applicant's premises are well priced. This is based on a comparison between price levels at the applicant's premises and those at the objector's premises. Within the lower price range the difference might be as much as 10% but I have to bear in mind that there was no attempt made to compare the applicant's prices with those available at Asda or the town centre outlets.

[43] The initial tasting of wines from the applicant's premises by way of trial showed a disappointing level of wines that were of poor quality. The applicant subsequently indicated that a batch of Rose d'Anjou was withdrawn for quality reasons. This may have been because of some failure prior to the supply to the applicant and I am not, therefore, prepared to find that it arose as a result of any failure of handling on the part of the applicant's staff. In general I find that the quality of wines offered by both the applicant and objector are of a reasonable standard having regard to the price bracket within which they fall. I am also satisfied that staff at the applicant's premises are properly trained so as to enable them to offer assistance to those purchasing wine.

[44] The applicant offers unlimited supply of beers including individually priced cans of some brand beers. I am satisfied that the individual prices are generally cheaper than those on offer elsewhere but that within the industry there are competitive offers of six packs and other linked offers which are also

very competitive. The applicant provides no discount on its individual price for multiple purchases.

[45] The applicant provides a limited supply of spirits and other alcohol. I am satisfied on the evidence that this is a market in which brands generally play a big part but that the applicant does not provide any such brands. I accept that the prices for those spirits sold by the applicant are generally below the equivalent spirit offered by the objector. Having regard to the importance of brands in this market one has to be careful to compare like with like. I am also conscious of the fact that there was no attempt to compare with Asda or the town centre outlets all of which have a full spirit offer. The other thing of note in this area is that the applicant generally provides the full bottle size whereas in this market spirits are often sold in smaller sizes. This observation applies in a more limited way to sales of wine.

Convenience

[46] In an earlier part of this judgment I noted the evidence that a Wellworths store approximately 3 times this size attracted 17,500 transactions per day on average. The transactions at this store are proportionately lower. I was given the figure in the course of the evidence but do not need to repeat it here. Some of those transactions represent repeat visitors. Having regard to the multiple attractions offered by Strabane town centre and the Asda store it is not possible to draw any conclusion that a material number of those transactions consist of people who would not otherwise be attracted into the vicinity.

[47] Those coming from the Republic of Ireland who appear to constitute 25% of the total will almost certainly pass the Asda supermarket with its extensive car parking either travelling to or from the subject premises. Those engaged in linked trips to the town centre will have access to the town centre outlets. I bear in mind that on busy Saturdays one has to take into account the possibility of congestion and limited car parking. For those travelling south along Melmount Road there is again extensive car parking at the Winemark premises. All of these outlets are in prominent locations which would be well known to any regular or even casual visitor to Strabane.

[48] It is common case that there has been substantial additional space devoted to off licences in Strabane since 1999. Supervalu has added 200 ft.² of selling space. Wine market has added 700 ft.² of selling space. Farmers now provide a separate off licence facility of 900 ft.² and Christies a similar facility of 600 ft.². There is no suggestion of overcrowding in the existing off licence facilities.

[49] For the reasons indicated above it is necessary to leave out of account the contribution that the existing Lifford Road off-licence makes to the

satisfaction of demand. The evidence suggests that this small off-licence has a proportionate custom but that 40% of that custom comes from the Republic of Ireland. The effect of the surrender of this existing licence will be to make Asda the first off licence facility encountered by those travelling directly from the Republic of Ireland for the purpose of purchasing alcohol. Farmers would then become the next closest off-licence with the subject premises around the same distance. If the subsisting licence is closed it is intended to keep supermarket hours as a result of which the trade enjoyed by the subsisting licence on Thursday, Friday and Saturday evenings will in any event have to be picked up by Farrens, Christies and other similar smaller facilities.

Survey

[50] In connection with this application there has been an unprecedented level of public opinion survey information gathered in respect of Strabane. Between August 2003 and May 2006 a total of four surveys were carried out. In connection with the appellant's proposed facility street interviews were carried out at Bradley Way, Branch Road close to Asda and the parade of shops at Lifford Road. A survey was also carried out at Winemark and at two locations within the town centre.

[51] The survey associated with this application was a street survey consisting of 11 questions. It was estimated that it would take approximately 13 to 15 minutes to complete. It was accepted on the part of the applicant that this was probably at the outer range of what was acceptable within a street survey. The survey initially sought to exclude those involved in advertising, marketing or retailing of alcohol. It sought to establish the frequency with which people shopped at the applicant's stores and whether they ever bought alcohol. It then sought to identify those places from which people had purchased alcohol within the last two weeks and the last place from which the person purchased alcohol. It then sought to establish the reason why the person interviewed had not shopped in one of the other off-licence premises. The interviewer was warned not to prompt.

[52] There then followed 3 questions seeking to establish the quality of the off licence last used, the expected quality of an off-licence within the Lidl store and the weighing of those factors that the person interviewed considered important in deciding at which particular off licence to shop. In order to achieve answers to each of these questions the interviewer had to ask about:

- (i) the overall shopping experience;
- (ii) the opening hours;
- (iii) the ease of getting through the traffic to get to the store;
- (iv) the ease of finding convenient car parking;
- (v) the competitiveness of the prices;
- (vi) the ease of movement into and around the store;

- (vii) the ability of staff to provide advice about wines;
- (viii) the range of branded goods on sale;
- (ix) the ability to buy groceries and of sales at the same time;
- (x) the range of own label goods on sale.

The person interviewed was expected to provide a rating from 0 to 10 in respect of each of these matters beginning with the off-licence last visited having first had an opportunity to consider this list. The person interviewed was then provided with some information about the applicant's proposal and based on their expectations as a result of this were asked to rate such an off-licence against the same factors. Finally in this section the person interviewed was asked to allocate marks out of 100 to each of these 10 factors representing the importance that each of them had to his selection of an off-licence. All those interviewed were asked if they felt that there was a need for an off-licence at the applicant's store in Bradley Way.

[53] It is clear that this represented a challenge for interviewers trying to engage the attention of members of the public for such a prolonged period. There was obviously a real danger that those taking part might have decided to answer the questions without a great deal of thought in order to bring the interview to an end. There was also the danger that the interviewers might themselves take shortcuts in order to avoid difficulties. For that reason it is necessary to look at the extent to which the outcomes are internally consistent and to assess any direct evidence as to how the interviews progressed.

[54] The first question related to opening hours. The applicant's proposal would sell alcohol from 9 a.m. until 9 p.m. from Monday to Saturday and from 1 p.m. until 6 p.m. on Sundays. The objectors premises were open from 9 a.m. until 9 p.m. from Monday to Wednesday, from 9 a.m. until 10 p.m. on Thursday, from 9 a.m. until 11 p.m. on Friday and Saturday and from noon until 8 p.m. on Sunday. Despite this one of the pieces of survey evidence provided a score of 87% for the appellant's premises at a rating of five or more and a rating of 48% for the objector's premises at the same score. The respondent also pointed to the outcome of a survey in September 2004 which gave the appellant a very high score for branded goods as compared to the objector. Given the absence of branded goods from the applicant's offer at that time the result is inexplicable.

[55] In relation to opening hours it appears that those interviewed were not told the opening hours of either Asda or Winemark as apparently the interviewers expected that people would know these. They were, however, told about the Lidl opening hours although not about the fact that by closing the existing Lifford Road store the evening hours would in fact be reduced. In relation to branded goods 39% of those interviewed within the applicant's vicinity rated Lidl at six or better despite the fact that Lidl had approximately 30 branded goods in grocery and approximately 5 in the off-licence. This

suggests a certain misunderstanding on the part of those being interviewed. The May 2006 survey also shows that 56% of those interviewed at Branch Road gave the Lidl proposal six or more for branded goods which again is inexplicable if those interviewed understood the question. This is not in any sense a criticism of the applicant but a recognition that the applicant's trading style is to provide quality other than through dependence on brands. I also recognise that some of these figures in any event have to be treated with caution because of the small numbers involved.

[56] There were two witnesses who had been interviewed who gave evidence. The first was a student who had been working part-time with the respondent. She was interviewed on 4 May 2006 outside the supermarket premises close to the respondent's licensed premises. She says that she was not asked the qualifying question but was asked the questions about the purchase of alcohol and the reasons why she had not bought at Lidl. She could see the interviewer's sheet at all times. She says that she was not shown a showcard for question 7, 8 or 9 although she says that questions 7 and 8 were read out to her and she answered. She has no recollection of being asked question 9 and does not believe that she gave the answers recorded by the interviewer. The interview lasted five minutes. She made a few notes the following day to assist her memory.

[57] The second person interviewed was the general manager of Winemark, Mr Caulfield. He was interviewed at 4:30 p.m. on 27 April 2006. He was able to record his interview. The interviewer started by agreeing that he was doing the interview on behalf of Lidl. The interviewer did not apparently ask any qualifying questions. When asked if the interview would not take long the surveyor said it would take a "wean of minutes". He was asked the questions about the premises from which he had purchased alcohol. He was not shown a showcard for question seven but was asked from 1 to 10 how he would rate Winemark as regards parking, choice, all that sort of stuff. The witness did not give the answers that were recorded on the form. He was given a list of Lidl products at which he looked for about 12 seconds and when asked what he thought of the choice he said it looked all right. There were a series of answers in relation to each of these 10 matters which were recorded on the form but not given by the witness. He was not asked anything about question 9 although he was asked if there was a need for an off-licence. The interview lasted three minutes. There is no apparent basis at all for the answer recorded by the interviewer to question 9.

[58] I accept the evidence of the two witnesses about the conduct of the interviews. I further accept that there are substantial internal inconsistencies in the answers given in relation to opening hours and branded products. That suggests that those interviewed did not properly understand questions or that those interviewing misunderstood the answers. It was in my view always ambitious to think that members of the public could be asked to wait for 13

minutes or more to properly conduct a questionnaire such as this and the evidence indicates to me that it is difficult to place any material reliance on the survey conclusions depending on the answers to questions 7, 8 or 9.

[59] The final question related to the need for an off-licence facility at the applicant's supermarket premises. 65% of those who responded in the appellant's chosen vicinity indicated that there was such a need although only 49% of those in the town centre and Melmount Road shops were of the same view.

[60] Survey evidence in this type of case can be helpful in establishing patterns of behaviour and assisting in understanding the reasons for those. Where, as here, the survey proposes to ask members of the public to evaluate the role that 10 different factors might play in their decisions about the use of certain types of retail premises the court will inevitably look closely to ascertain whether the answers are the product of a proper period of consideration on the part of the person interviewed. In order to be so satisfied an applicant would have to demonstrate that the average person would be expected to be able to come to such conclusions within the time allowed for reflection and that the interviewer did allow the appropriate time. Where answers are recorded which appear to inexplicably conflict with the known facts the weight to be given to the survey is likely to be considerably diminished.

[61] As well as helping in relation to patterns of behaviour surveys may also be of assistance in demonstrating that there is an unusual factor at play which it is necessary for the court to take into account. Where, however, the matter at issue concerns the way in which ordinary people are likely to make judgments about how to proceed with their everyday activities it seems to me unlikely that a survey will have much to contribute.

Conclusion

[62] In order to seek to prove that the existing facilities are inadequate the applicant relies on a range of factors. The first is the demand from those in the vicinity who presently use the Lifford Road off-licence. This is a small off-licence with a proportionately modest trade. A substantial proportion of it comes from the Republic of Ireland and for the reasons indicated earlier this is likely to be significantly catered for by Asda and Farmers. The town centre, Asda and Winemark will be available to those within Northern Ireland. I recognise that some at least of that trade has chosen not to use these alternatives.

[63] Many of the wines sold by Lidl are keenly priced and the evidence also satisfies me that there are a small number of individual spirits and occasional wine products at higher prices which are good value. It is clear, however,

that the appellant does not cater for the large range of branded products and those wine products broadly over four pounds. A keen pricing policy over a small range of wine products where there already exists competition over the same price range is unlikely to be a significant factor pointing towards inadequacy within a given vicinity.

[64] The appellant points to the continuing increase in housing within the vicinity and in particular to that housing which has been generated since the substantial increase in off-licence facilities which began in 1999. I accept that there has been some increase in housing but it has been modest and of limited assistance to the appellant.

[65] The appellant does not contend that the numbers of shoppers who use the premises is of itself a reason for concluding that inadequacy has been established. In some circumstances it is possible to demonstrate that large numbers of people are attracted to a vicinity who would otherwise not be there. That is more difficult in circumstances such as these where the same people may in any event have visited or be visiting the vicinity in order to enjoy the attractions of the town centre or the more extensive retail offer at Asda. Unless the attraction to the vicinity has increased, the inadequacy argument is likely to rest on issues of inaccessibility or location. I have accepted that there is a degree of congestion at times in the town centre and some difficulty with car parking but I do not consider that these are at a level which ought to contribute significantly to a case for inadequacy.

[66] Taking all of these factors into account I do not consider that the appellant has established that the number of licensed premises in the vicinity is inadequate and the appeal must, therefore, fail.