

Neutral Citation No: [2013] NIQB 56

Ref: **GIL8734**

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

Delivered: **03/05/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

PHILIP RUSSELL LIMITED

Appellant;

-and-

D W RETAIL

Respondent.

GILLEN J

Appeal

[1] This is an appeal from the decision of His Honour Judge Smyth when he granted an application for the provisional grant of an intoxicating liquor licence for premises at 91 High Street, Portaferry pursuant to Article 5(1)(b) of the Licensing Order (Northern Ireland) 1996 ("the Order").

[2] Mr Beattie QC appeared on behalf of the respondent/applicant with Mr McAteer (hereinafter called the applicant) and Mr Comerton QC appeared on behalf of the appellant objector Philip Russell Limited with Mr O'Connor (hereinafter called the objector). At the outset I pay tribute to counsel in this matter who had clearly overseen with brisk efficiency the pre-hearing directions that I had given in this case and who have provided well pitched expositions of the law and skilfully presented skeleton arguments on all the relevant issues. This has served to shorten appreciably the hearing of this case and to crystallise the issues to be determined by me.

Background

[3] The applicant in this case comprises a Centra store essentially owned and managed by Mr Watson at the north end of Portaferry, a small town in the Ards Peninsula.

[4] That store is 5,400 square feet gross including 2,850 square feet retail sales space. Its services include a hot food and deli department, a chilled, fresh food and grocery area with about 3,000 lines of produce, a staff of 32 full and part-time employees and transaction figures of approximately 8,000 per week (10,000-11,000 customers) as of 2008, the figures now being reduced to something in excess of 7000. The proposed off-sales facility is approximately 335 square feet.

[5] The premises of the objector are found at The Square in Portaferry approximately 450 metres from the applicant's premises. It has approximately 700 square feet of off-licence.

Inspection by a Judge

[6] Order 35 rule 5 of the Rules of the Court of Judicature (Northern Ireland) provides as follows:

“5.-(1) The judge by whom any cause or matter is tried may inspect any place or thing with respect to which any question arises in the cause or matter.”

The practice dates back for some seven centuries to the old trials by inspection, which was the appropriate means of determining certain questions e.g. age, identity, the genuineness of records, mayhem, pregnancy etc. A decision to inspect is a matter of judicial discretion and neither party can compel or prevent the trial judge from holding a view should he decide in his discretion to do so, even where the parties are united in opposing such a course (see Tito v Waddell [1975] 3 All ER 997).

[7] Different opinions, however, have been expressed as to the status of a viewing by judge hearing a case. Such differences emerged in the leading authority of Goold v Evans & Co [1951] TLR 1189. In that case a County Court Judge, in the course of the hearing of an action for damages for injury to a workman alleged to have been due to the negligence of his employers, viewed the premises and saw an operation which purported to be the same as that which the workman had been engaged on at the time of the accident. Owing to a mistake the workman was not notified of the date of the inspection and was not present at the view.

[8] At p1191 Lord Denning said of the concept of viewing:

“It is a fundamental principle of our law that a Judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both

parties, or, at any rate, each party must be given an opportunity of being present. Speaking for myself, I think that a view is part of the evidence, just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or photograph of it. But even if a view is not evidence, the same principles apply. The judge must make his view in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. The only exception is when a judge goes by himself to see some public place, such as the site of a road accident, with neither party present."

[9] In the same case, Hodson LJ put the matter somewhat differently in the following terms:

"(Counsel) has, I think rightly, contended that a view is not in itself evidence. A view does not do away with the necessity for evidence."

[10] For my own part, I consider that the approach advanced by Denning LJ is the preferable one. That certainly was the stance adopted by Megarry J in Tito & Ors v Waddell & Ors [1975] 3 All ER where he said at p1002a et seq:

"What a judge perceives on a view is itself evidence, in the same way as what he sees and hears in the courtroom. Just as a portable object may be brought into court and, being made an exhibit, becomes real evidence, so if the judge duly views a place or object which cannot be brought into court that place or object provides real evidence through the medium of the judge's eyes, ears, touch, tongue or, as in one recent case before me, nose."

[11] In substance, a view is the substitution of the eye for the ear in the reception of evidence. Judges must be wary not to act in breach of natural justice in carrying out a viewing. I respectfully endorse the extract in "the Supreme Court Practice" 1999 at 35/8/2 where the author states:

"It is therefore undesirable, although not improper, for the trial judge to hold a private view of a public place without the consent of the parties and in their absence, because unknown to him the circumstances and the surroundings affecting the locus in quo might have changed between the accident and the trial." (See also Salsbury v Woodland (1970) 1 QB 324).

[12] It seems to me, therefore, that in licensing cases, some caution should be exercised in judges visiting the scene of the application. Appropriate precautions ought to include:

- It should not be done without the parties being informed that the judge intends to do so at some stage and he should listen to the submissions of counsel on the matter in the absence of his inviting the parties to attend the viewing with him. In the instant case, I did inform the parties that I intended to view the applicant's premises and the general area of the Ards Peninsula. Before attending, I invited the legal representatives to express a view as to whether they wished to attend with me. In each case the invitation was declined.
- The judge should carefully consider whether or not, if a viewing is necessary, it should be carried out before the final submissions in the case so that he may make any views that he has formed clear to the parties to enable them to deal with them. This will avoid the danger that occurred in Evans v Aspinall May 9, 1974 where, during the luncheon adjournment, the judge visited, without the parties, the steps on which the plaintiff was said to have slipped and relied heavily on this inspection. The Court of Appeal ordered a new trial referring to the inspection as a most unfortunate and unwitting irregularity about which the plaintiff might feel a grievance.
- If the viewing is done after the end of the case, the judge must assure himself that the locus in quo has not changed since the evidence before him. Thus, for example, he must ensure that a new line of wines etc. has not been added thus enhancing the case of an objector without ensuring the matter has been raised with counsel. If he observes any material matter which has not been fully canvassed by counsel, he must afford them the opportunity to address him before giving judgment.
- In the event that a viewing does take place, for example on the basis that maps and photographs may not be as helpful as an actual viewing, it is important that that viewing should not feed some new theory on the matter not canvassed with counsel (see R (on the application of Broxbourne BC v North & East Hertfordshire Magistrates' Court [2009] EWHC 695). Justice must be seen to be done in all instances.

[13] In the event, in the present case, my visit to the applicant's premises and to the Ards Peninsula served to add nothing to the evidence which I had already heard save that it underlined the impression I had formed that Mr Watson runs an extremely well organised and thoroughly impressive Centra store.

[14] I consider that a review of this matter and these authorities provides a timely reminder of the importance of procedural fairness and the impact that this can have on the substantive rights of the parties.

Licensing cases

[15] Both senior counsel in this case drew my attention to their concerns about the processing of licensing cases in the County Court. Making it absolutely clear that they ascribed no fault whatsoever to the County Court judges hearing these cases, they asserted that such hearings are often conducted over disparate and scattered hearings on occasions taking up many weeks before completion. The reason often lies in the failure to allocate blocks of dates sufficiently lengthy to ensure that these cases can be completed and determined in an uninterrupted, efficient, timely and just manner. Availability of counsel also plays a role in the delay.

[16] Inordinate delay in the hearing of licensing cases and the spread of evidence over weeks and months retards the process of justice, inconveniences the public, counsel and the court and potentially carries grave economic and commercial implications for the parties.

[17] This is not the first time that such a complaint has come to my notice about these hearings. It is important that those tasked with responsibility for allocating time for such hearings approach this task with a realistic appraisal of the needs of the parties and the demands of justice. Steps need to be taken to ensure such hearings are not punctuated with unacceptable delay and fractured hearings in the future. Wherever possible, blocks of time should be allocated so that the cases can be completed over immediately sequential days or, if this is not possible, that breaks in the hearings are short and kept to a minimum.

The decision of His Honour Judge Smyth

[18] Paragraph 31 of the written judgment of Judge Smyth summarised the reasons of the learned Judge for granting the application in the following terms:

“I am satisfied that given the location and topography of Portaferry, the extent to which people have recourse to it, the benefit in these circumstances of actual, and in these circumstances within the vicinity, competition on choice, range and prices and having regard to such matters as the distance between Centra and the Square and ease of access, that a conveniently located, well-run facility will not simply split an existing demand but will be necessary to meet the

reasonable demand of the shopping public who both live in and who have recourse to Portaferry.”

Statutory proofs

[19] No objection was taken to the formal proofs in this matter and I was satisfied they were proven appropriately. The required notices had been served, posted and published, there was no police objection, and a valid subsisting licence was to be surrendered by Mr McAuley from Draperstown. The premises were suitable for the sale of alcoholic liquor, the applicant company was a fit person under the Order, relevant planning permission existed, the site is currently trading and if a licence were granted it would be an “in-store” licence subject to the regulations that regulate mixed trading.

Matters not in dispute or which I have found to be proven

[20] In the course of pre-trial meetings arranged between experts in the case pursuant to my directions a number of matters had helpfully been agreed. These included:

- The adult population of Portaferry ward is 2,386, Portavogie 3,291, Kircubbin 2,339 and Ballywalter 2,839.
- The Strangford ferry carried 148,423 vehicles for the year 2011/12. There were 554,909 passenger tickets issued. It is common case that the ferry traffic contributed only about 10% to traffic movements in or about the relevant area and has made no great difference to business in Portaferry.
- Portaferry has a number of services including a local library (the nearest alternative library facilities on offer being Newtownards, Bangor, Downpatrick), a Credit Union with 3,608 adult members and 15,006 minor accounts, a health centre with two practices with three doctors in each.
- The vicinity is agreed as the village of Portaferry.
- There is a population on the Electoral Roll of 1,700/1,800 people.
- There are very few caravans or holiday homes of significance in Portaferry.
- It is 450 metres by foot and directly by car from Centra to the objector’s premises.

[21] Mr Foster, the planning expert on behalf of the applicant, agreed in cross examination that on a purely planning basis, a planner would accept that a catchment area for Portaferry would extend from the tip of the peninsula embracing Portaferry ward up to a line drawn between Cloughey and Castlehill. It was agreed

that this would include a population jointly of about 3,100 people. Mr Foster had agreed this in the lower court but he did indicate that it would be subject to other evidence of a different nature in this hearing. Whilst, therefore, this matter was not conceded by the applicants, I consider that this normally represents an appropriate catchment area in planning terms.

The applicant's case

[22] Mr Beattie on behalf of the applicant called to give evidence Mr Foster, a planning consultant, Mr Bradley, a traffic expert, and Mr Watson who owns the business. Through them Mr Beattie made the following points.

Demand

- This will arise not only within the existing residential population of Portaferry, but from within the residential population of the surrounding rural catchment area whose residents he contended looked to Portaferry for the provision of daily services and facilities. In addition it would include the transit population and seasonal visitors visiting and passing through Portaferry during the summer months, those using the Strangford ferry on a regular basis all year round and people drawn to the vibrancy of Portaferry from outside the catchment area. In short, because of its unique position at the southern end of the Ards peninsula, Portaferry enjoys a much wider catchment area for its services than might otherwise be expected.
- Mr Watson had opened his new store on 11 April 2006 constituting a 350 per cent increase on the old store of 1600 square feet. The store traded very well recording growth of 40 per cent in the first week, over the last week of the old shop. By 2008 growth had increased by a further 10 per cent and transaction figures were approximately 8,000 per week. Between 2008 and 2011 the transaction count fell from an average of 8,000 per week to an average of 7,120 but this had to be seen in light of a trend of a marked increase in the amount customers were spending on visiting the store.
- Portaferry is a vibrant village. The presence of the Ferry / the local library/Credit Union (employees of whom spoke to Mr Foster, the planning expert)/doctor's surgery (Mr Foster was informed by a receptionist that there are 10000 patients in the two surgeries / Health Centre in Portaferry)/three supermarkets/50000 vehicles per week etc. cumulatively contribute to draw members from all of the Ards Peninsula south of a line from Greyabbey in the west to just north of Ballyhalbert on the east side. The nearest library facilities on offer are Newtownards/Bangor/Downpatrick. The Portaferry Credit Union has some 3,608 adult members, 1,506 minor accounts and membership increasing at the rate of 500 new members per annum.
- The catchment area is all of postal code area BT22. This area includes the entire Ards Peninsula as far north as Carrowdore and Millisle. The Portaferry

Health Centre, with two practices and six doctors, has a catchment area extending north to Kircubbin and Ballywalter.

- Insofar as the library and Credit Union deal with the electoral wards of Ballywalter (2,839), Kircubbin (2,339), Portavogie (3,291) and Portaferry (2,386) this equates to a population of approximately 14,925 persons.
- The Northern Ireland Aquarium Exploris, facilitating the viewing of diverse marine life in Strangford Lough, had an annual visitor level of 96,500 in 2011. A marketing campaign is being launched with the target of increasing visitor levels to between 120,000 and 140,000 per annum.
- There was something “going on in Portaferry” that singles it out from other nearby villages. Mr Watson claimed to know his customers very well and he had been told that not only were some customers uninterested in going to Russells for their alcohol but a large number were coming from outside the Portaferry vicinity. He found no connection between his custom and those obtaining services in the Square. Mr Beattie asserted that the photographs produced of people walking up the hill from the Square towards the Centra property revealed no Centra bags or Russell bags thus illustrating that there was no common customer base. Two draws organised by Mr Watson in his own store illustrated that his customer base stretched far beyond the conventional catchment area.

Traffic flow movements

- The traffic flow past the applicant’s site on High Street for a seven day period was 20,834 vehicles two-way. This was the highest two-way flow into Portaferry representing almost 59% of the traffic (14,930 on Coach Road). Of the traffic entering Portaferry from the north almost 69% passed the applicant’s site
- There are three existing grocery outlets within Portaferry. Centra is located at the northern end of Portaferry accessible on foot to the residential population of housing developments surrounding the site and decanting on to Anne Street, Ballyphilip Road and the northern section of Ashmount Drive.
- Mr Foster, a planning consultant on behalf the applicant, contended that the outlets located around the Square would draw their pedestrian trade on the other hand from the developments decanting on to Windmill Hill leading directly to the Square.
- 74 per cent/76 per cent of Centra’s customers are car borne. The pattern of movement, including traffic movement, indicated that that traffic was drawing substantially on a customer base outside Portaferry. It is thus a destination store

- Over a seven day period between 6 September 2012 and 12 September 2012 the store had a total footfall of 8,029, total pedestrians of 2,215 and total vehicle customers of 5,814. This revealed the average percentage of pedestrians was 27.8% of the total

Untapped demand

- In an attempt to identify unfulfilled off-sales demand existing in Portaferry figures were extracted from off-sales provisions in a similar store in Cloughey controlled by Mr Watson's brother. These figures suggested that of the total number of transactions per week some 15% of these were related to alcohol off-sales.
- Extrapolating this 15% figure to the three grocery outlets in Portaferry, where estimates of transactions were 2,500/3,000 for the Spar shop in the Square and 6,000/7,500 for the Spar shop in High Street with Centra 7,646 transactions weekly, would give figures of between 2,421 and 2,646 for off- sales facilities.

The objector's case

[23] Mr Comerton called on behalf of the objector Dr Murray, chartered town planner, Mr Toner, a traffic engineer, and Mr Stacey, the commercial manager of Russell Cellars. Through them Mr Comerton made the following points.

Demand from outside the vicinity

- Mr Foster conceded that as a planner he could see that the catchment area for Portaferry would be based on postal code BT22 which would include south to the end of the peninsula and north to a line directly between Cloughey and Castlehill. This being so, the population within that would be 3,000/3,100 people. This catchment area would be based on the likely trade coming to Portaferry bearing in mind the draw of Kircubbin to the area north of the Cloughey line.
- People living in Ballyhalbert and Greyabbey are more likely to gravitate towards Newtownards than to Portaferry.
- There are off licences in Kircubbin, Cloughey, Ballywalter and Carrowdore in addition to Portaferry. Ballywalter ward has a population of 2,839, Kircubbin 2,339, and Portaferry 2,386.
- There are grocery shops in Greyabbey, Portavogie, Carrowdore, Ballyhalbert and Cloughey.

- There are petrol stations in Cloughey, Donaghadee (2), Carrowdore and Newtownards.
- Kircubbin is the main services hub for the middle and lower peninsula. In contrast with Portaferry, Kircubbin has a bank, dental surgery, travel agency, estate agency and optician. It also has a branch of the Credit Union, post office, butchers, doctor/dentist and chemist. There are three supermarkets in Kircubbin carrying out similar transactions to Portaferry.
- Cloughey is also a vibrant area.
- The Credit Union and public library in Portaferry have limited opening hours hence there is no evidence as to the numbers of people coming from three miles north of Portaferry to either of these facilities.
- Mr Comerton strongly challenged the finding of Judge Smyth that Portaferry has a vibrancy that villages lack. In particular, he challenged the assertion that Portaferry cannot be compared with Cloughey or Kircubbin because of “their limited facilities”.
- Portaferry has been for some time suffering from the recession and a falloff in facilities over recent years. It has witnessed a steady decline in prosperity with a large number of derelict properties. Thus there are a number of vacant premises in the High Street, the Square, Ferry Street, Castle Street and Church Street. The bank has recently closed down, a butchers and furniture shop recently closed and there are no fashion shops. Brewers Yard, designated as a regeneration unit, has seen six units close there with five in the upper floor to let and currently only an engineering supply business there (although this was strongly challenged by Mr Watson). The Exploris has seen a reduction in visitors between 2006-2011 from 136,372 to 96,500. The tourist office has recorded a similar drop off in tourist figures from 2006 9,402 to 6,791 in 2011 which is reflected in the number of passengers and vehicles using the ferry.
- The evidence that there is a customer base outside the Portaferry vicinity is purely an instinctive response by Mr Watson unverified by objective evidence. In terms it amounts to anecdotal evidence. To suggest that the Centra store is a destination shop is to ignore common sense and deny the real meaning of a destination store.
- The 7,000 plus transactions relied on by Mr Watson are no more than normal, as evidenced by numerous judgments in other cases. These transactions have to be diluted to take effect of children, who will obviously not be making alcohol purchases, customers purely seeking fuel, and the evidence from Mr

Stacey that alcohol is rarely bought between the hours of 8 am and 11am, i.e. these are purely grocery transactions.

- It is bad law to assert that inadequacy can be established by virtue of creating a demand in a shop.
- The increase suggested by Mr Watson in the first week of his new store i.e. 40 per cent had to be purely local trade.
- There is no reason why, if there is any demand outside the Portaferry vicinity, it would not be met by the existing facilities given that there is no problem with car parking or distance between Centra and the Square in Portaferry.
- The draws organised by Mr Watson were seriously flawed and in any event merely served to show that the vast bulk of his trade was locally based inside the vicinity of Portaferry.

Traffic movements

- The traffic movements in Portaferry reflected numbers which did no more than account for internal movements accommodating local residential traffic flows from housing within Portaferry.

Untapped demand

- There was no untapped demand in Portaferry. No realistic argument was raised by the applicant that suggested there was any inadequacy issue in the context of competition, prices, service, parking i.e. the objector's off licence met all demands.
- The suggested 15% extrapolation was unfounded attempting as it did to argue from the particular to the general in circumstances where there were crucial differences between the suggested exemplar in Cloughey and the Centra store in Portaferry.
- Mere convenience is not a criterion of inadequacy

Legal Principles

[24] Before turning to a discussion of the salient issues in this case I must set the legal context. The legal issues in this case were not seriously in dispute between counsel. Much judicial ink has been spilt in licensing cases. Comme d'habitude in such cases, a large number of authorities, in excess of 30, were produced to me notwithstanding that the essential principles were common to both parties. In this corner of the law, the results of decided cases are very often fact sensitive. Precedent is a valuable stabilising influence in our legal system but comparing the facts and outcomes of cases in this branch of the law can on occasions amount to a misuse of

the only proper use of precedent viz, to identify the relevant rules to apply to the facts as found. (See Lord Steyn in Jolley v Sutton Borough Council PIQR 2000 Part 15 p43.

[25] Whilst the authorities cited always repay study, I do not intend to burden this judgment with extensive citation from cases which are now well trammelled and routinely produced in licencing cases. It will suffice for me to set out some established general principles relevant to this case as follows:

- The restrictive effect of the concept of inadequacy is a key component in licencing legislation. The legal curb is thus the obligation placed on the applicant to prove inadequacy.
- Demand can be generated from both inside and outside the vicinity. I can take into account the demand not only from persons residing in the vicinity but also from persons who work there, who resort to the vicinity for the purpose of recreation or shopping etc.
- The statutory test is inadequacy of numbers, not suitability or convenience. The fact that the public would find the presence of an off licence in a particular location convenient is not proof of such inadequacy.
- That is not to say that convenience conceptually cannot be a facet of adequacy. Thus in the context of accessibility it is relevant. If other premises in the vicinity are difficult to reach because of distance or the topography, car parking around them is poor, the character of the area where they are found is not conducive to all members of the public, or they are well off the beaten track etc. a court can take these into account. In particular, in the context of this case, distance between off licences is fact sensitive. There is no maximum or minimum set distance which will determine whether or not there is an inadequate supply in the vicinity. The nature of the accessibility together with the general topography and character of the area will all influence the impact that distance between premises will have on any case. In short, convenience in terms of accessibility and location are proper considerations and may have a particular bearing where members of the public are attracted into a particular location from outside the vicinity.
- Similarly, issues of appearance, range of goods, pricing, competition, service and choice are all proper components of the judicial probe of the concept of inadequacy in each case.
- The need for a proper competitive supply and range, choice and service does not, of course, mean that every village must have more than one off licence. To so conclude would drive a coach and horses through the concept of inadequacy. As in this case, each application must be judged on its merits.

- The advantages of integration in a mixed trading shop cannot by itself be a factor pointing towards the grant of an application for an integrated off- sales facility.
- A significant level of trade and large numbers of customers at particular premises do not necessarily lead to a conclusion that inadequacy of off licence provision has been proven. The court must go back to the legislation and recognise that the test is inadequacy in the vicinity. Demand for an off licence cannot be created simply by illustrating that large numbers of people come to a particular store. If this was to be the case, virtually every large filling station or supermarket with evidence of increasing sales could successfully apply for an off licence.

Application for a direction and the concept of election

[26] At the end of the applicant’s case, Mr Comerton submitted that the applicant had not reasonably made his case that there was inadequacy and that accordingly there was no case to answer.

[27] The test for such an application is that found in the judgment of Carswell LJ in O’Neill v DHSS (No: 2)[1986] NI 290 at 292(a) where he stated:

“The issue at this stage of the case is whether there is any evidence upon which a reasonable jury, consisting of persons of ordinary reason and firmness could have been properly directed to find in favour of the plaintiff.”

[28] In the event, taking the applicant’s case at its height, I refused the application.

[29] I pause to observe, however, that Mr Beattie had submitted that I should put Mr Comerton to his election at that stage of the proceedings.

[30] In Magill v Ulster Independent Clinic and others [2009] NIQB 81 at paragraph [11] I concluded that the issue of election must remain a question of discretion for the judge in each individual case to decide. He/she must strike a balance between not discouraging a submission in an appropriate case and thereby saving expense if the submission is allowed and not incurring more expense if subsequently an appeal is successful and the case has to be remitted for a new trial.

[31] I indicated at paragraph 13 that the position in the Republic of Ireland was similar.

[32] There is no doubt that the position in England and Wales is quite different. The general rule is that the judge should not permit a defendant to make such a submission unless he elects to rely on the submission alone and, whatever the

outcome of the submission, he will call no evidence of his own. That general rule may be traced as far back as Alexander v Rayson [1936] 1K.B.169.

[33] In Benham Ltd v Kythira Investments Ltd [2003] EWCA 1794 the Court of Appeal stated that:

“Rarely, if ever, should a judge trying a civil action without a jury entertain the defendant’s submission of no case to answer without requiring the defendant to elect not to call evidence.”

[34] The rationale is that if a defendant is not put to his election there is a risk that, if the claim is dismissed and there follows a successful appeal, a retrial could result leading to greater delay and more expense.

[35] The traditional use of such a remedy in Northern Ireland, and indeed in the Republic of Ireland, has been more sparing and to date greater weight is given to the discretion of the judge in all the circumstances of the case. I consider that in licensing cases, whilst the discretion of the court remains unfettered, courts should tread carefully before imposing such a stricture in circumstances where there is a statutory obligation on the court to make certain findings without which the plaintiff simply cannot succeed. It is important that the court has all available evidence in such matters in order to perform its inquisitorial statutory role. For that reason, therefore, this may be an added factor in a court refusing to put an objector on his election. Whilst this clearly does not exclude the concept of election in all such cases, in this particular instance I decided not to put Mr Comerton on his election because I was anxious not to exclude any relevant factual matter which could assist me in determining the question of inadequacy under the statute.

Discussion

[36] Many of the conventional grounds around which licensing cases often revolve were not in issue in this case. Thus whilst competition is obviously a good thing in principle, in the instant case there was no evidence of lack of range, poor service, over pricing or need for more competition before me. The evidence of Mr Stacey, the commercial manager for Russell Cellars, that he had not experienced any crowding or queuing in the course of 1000 transactions per week at the objector’s premises and believed their stock provided a competitive brand was not seriously challenged. Mr Watson did suggest that he had evidence of people going to the Cloughey store rather than Russells after having left his store. I am not quite clear why that should be so and it may be that there is some difficulty in pinning down where such people originated. Thus wisely Mr Beattie did not adopt those aspects of the learned County Court Judge’s decision which focused on these issues as reasons for his decision.

[37] I have already recorded that I found other statutory proofs in order (see [18] above)

Convenience

[38] At the outset I make it clear that I found Mr Watson a thoroughly sincere witness. I do not believe that he deliberately overstated his case. He gave his evidence with a relentless visceral quality which reflected total dedication to his store and the service he strives to give. I have no doubt that it is correct that Mr Watson said that it would be convenient for people in his shop to buy their liquor within the weekly or daily shopping. I also accept that generally there may well be an expectation on the part of the public that shops such as his will carry liquor as part of the lines that they offers. However my admiration for his efforts and my sympathy with that view must be constrained by the law. As I have earlier said, convenience per se is not itself sufficient to demonstrate inadequacy. Otherwise virtually every extensive store or filling station with food would be entitled to a licence.

[39] Convenience must take its place amongst the elements in this case. However, the constructive aspects of convenience which can be brought into the equation do not aid the applicant in this instance. The majority of his shoppers are car borne and given the relative ease of parking in the Square or close by, I do not find the 450 metre gap between the objectors and the applicant's shop an inconvenient distance. Moreover, within the context of the overall village of Portaferry I did not find that distance even on foot to be an impediment to those in his shop thereafter seeking to obtain their alcohol in the objector's premises.

[40] Car parking was not a credible issue in this case. It is, of course, convenient to have outside parking available on the site as it is in the applicant's case. Equally, however, I found no inadequacy of the car parking around the objector's site. Meeting House car park which was relatively adjacent is clearly rarely full. Mr Foster, on behalf of the applicant, found no difficulty parking in the Square and Mr Bradley made the same point when he gave evidence.

Traffic evidence

[41] Mr Bradley produced figures showing substantial traffic flow from the direction of Kircubbin and the A20/Coach Road into Portaferry. Between 7.00 am and 10.00 am seven day vehicular traffic amounted to 9,729 vehicles of which 4,639 turned into Demesne View. 12,624 vehicles travelled in the direction of High Street past the applicant's premises. In the opposite direction from Demesne View 4,609 turned left with 3,583 turning right, back along the A20 direction. From the A2 Cloughey Road 7,429 vehicles came up to the junction with High street. 2,622 turned into the Centra premises from the direction of the Ballyphilip Road/Demesne View junction. Mr Watson contended that these figures supported his belief that many out of town visitors came to his store thus making it a "destination shop". A total of

4,697 vehicles turned into the Centra store i.e. 2,622 turning left from High Street and 2,075 turning right from High Street.

[42] Mr Bradley added to the weight of these figures by asserting that people coming out of the store might be dissuaded from turning right because of the flow of traffic and therefore might turn left into High Street, right into Ann Street and right again up to the Coach Road. I pause to observe that whilst that may happen, I find it difficult to accept that such a route would be the conventional approach rather than what would seem to be the shorter turn right at the High Street, left into Demesne Road and then right at the Coach Road.

[43] Mr Bradley made a valid point, however, in asserting that the Ballyphilip/Cloughey Road/High Street junction is an extremely busy one and he compared it to the main road from Belfast to Kircubbin and Coach Road.

[44] However I found the effect of these figures greatly diluted in terms of the case made by Mr Watson for the following reasons:

- It has to be borne in mind that a considerable volume of unquantified traffic will be generated by Portaferry housing i.e. passing through the A20/Coach Road/Demesne View and A2 Cloughey/Demesne View junction to reach daily destinations. The Ballyphilip Road is bound to contain traffic from the hinterland of the Portaferry ward. The Cloughey Road traffic is likely to contain traffic from houses in the east of that ward.
- Mr Toner made a telling point when he drew my attention to the TRICS database which indicates an 85th percentile daily trip rate of seven trips per dwelling. With approximately 955 dwellings in Portaferry village, this will in itself generate 46,795 trips per week on the local road network. Due to the geographical location of Portaferry as the last settlement on the coast at the end of the peninsula, and its small size, it is likely therefore that a significant proportion of those trips will be expected to pass through these junctions. Accordingly on that basis the volumes presented by Mr Bradley are not out of the ordinary in catering for local traffic in the context of the geographic location and village size.

[45] Accordingly, the traffic evidence did not satisfy me that it provided support for Mr Watson's contention.

The draws

[46] In order to fortify his contention that there was a substantial inflow from outside the vicinity of Portaferry to his premises, Mr Watson relied upon two customer draws he set up containing in the first instance 607 names and in the second 732 names. Whilst some of the entries contain multiples from a single household, and on occasion there were multiple entries from individuals, some of

which might have been in children's writing on the entry cards, this did not deflect from the general thrust of the numerical figures in my view.

[47] The two draws organised by Mr Watson were made on the basis of a free draw provided people gave their name and address for a prize. The purpose was to ascertain where the customer base was coming from. The draw on the first occasion was made prior to the County Court hearing and on the second occasion in October 2012. His conclusions were similar. On the first occasion, he found that 64.5% of people (392) came from Portaferry town and below the peninsula with 55.52% (337) coming from Portaferry itself. Half way to Cloughey there was a further 5.43% i.e. 33 people. From Portavogie to this notional line across the map from Cloughey, there was almost 16% i.e. 97 people. From Portavogie up north to Ballyhalbert and Kircubbin there was almost 10% (60 people). From the rest of the peninsula up to Newtownards and Belfast there were 2.8% (17 people). On the Strangford side there was 1.31% i.e. eight people.

[48] In the second draw in October 2012, 732 separate persons entered the draw with over 60% living inside the town of Portaferry and almost 40% living outside the town of Portaferry. Mr Watson contended that this showed an on-going and significant level of trade from outside the town, attracted into Portaferry to shop in his store.

[49] Dr Murray's analysis of these draws drew somewhat different conclusions. Relying on his assertion that the catchment area was up to a line drawn from Cloughey directly westwards, he calculated that approximately 82% of entries in the first draw were recorded as being located within what he described as the convenient shopping catchment area of Portaferry. So far as the second draw is concerned, it showed a total of 86% of entries being within that convenient shopping catchment area and, if one discounted the infrequent entries from outside the Ards Peninsula, the share of entries drawn from that area rose to 89%. In terms, therefore, he said that the draws illustrated that the Centra at Portaferry operates essentially in relation to the convenient shopping catchment area of Portaferry with merely a residual penetration of customer markets beyond that convenience shopping catchment area, for reasons which could include temporary visits on rare occasions.

[50] There is no doubt that there were flaws in this draw concept. No attempt had been made to survey how often the people came, whether they felt there was a need for an off licence or whether or not they were satisfied with existing facilities in Portaferry.

[51] This was two snapshots in time. There was no evidence of regularity. There was no list of customers provided by Mr Watson of people coming regularly from outside the catchment area.

[52] I did not find that this draw provided any convincing material to corroborate Mr Watson's assertions. The flaws in the draw were significant and it was clear that

Dr Murray was right in asserting that the Centra premises operated essentially in relation to the catchment area of Portaferry. So far as the residual figures were concerned, one has to discount those coming from very far afield since I could not believe that they would travel all that distance to Portaferry just for Mr Watson's store and there was no evidence of any regularity of visits by those who were coming from north of the Cloughey from other parts of the Ards Peninsula.

The vibrancy of Portaferry?

[53] I found it difficult to accept on any rational basis Mr Beattie's submission that "something was going on in Portaferry". The trade of the objector Russells had dropped apparently 8% whereas Mr Watson's had dropped 4%. The opening of Tesco's in Newtownards in 2012 therefore had had an effect on Russells but seemingly not on Mr Watson's trade. The contention made was that the demand for an off licence began with the opening of a new store when his sales went up about 40%. This may well have been local people coming back as well as people coming there from other stores locally. I simply did not have the information before me to justify an alternative conclusion.

[54] Portaferry has clearly been affected, as have most towns and villages in Northern Ireland, by the economic crisis. There has been a steady decline in prosperity in the village for a number of years. Although there was dispute as to some particular vacancies and Mr Watson gave evidence that 5 business units have opened in the Square in recent times, the fact of the matter is that in the High Street, the Square, Ferry Street, Castle Street, Church Street and Shore Road there are all vacant premises. Significantly there is no longer a Bank; there is no estate agent or dental surgery. Data from the Portaferry Tourist Information Centre shows a visitor decline from 9,402 in 2006 to 6,791 in 2011. Northern Ireland's only aquarium (Exploris) shows a visitor decline from 136,000 in 2006 to 96,000 in 2011. Ferry traffic has also declined during recent years. There has been no population increase or additional housing in Portaferry. On the contrary, the population seems to have gone down over the last three years notwithstanding the evidence of Mr Watson that planning permission for housing has been given to the builder's yard near his store. Particularly hard hit has been the construction industry which had been an important aspect of this village's economy.

[55] Counsel relied on the fact that in Portaferry there are three sustainable grocery outlets despite the limited population. First, the Spar in the Square which is 1800 sq. ft. and which, according to Mr Stacey, has approximately 2,500 grocery lines largely based on confectionary, tobacco and news agency. Secondly a Spar store in the High Street of 3,500 square feet which is more grocery orientated with a larger range, namely approximately 3,500 lines and thirdly the Centra store, which has 2,850 sq ft and carries about 3,000 lines.

[56] However, in Kircubbin, according to Mr Stacey, there are three similar stores. First the Russell's shop which is 2,900 sq. feet with 510 sq. feet of off licence with

6,102 transactions on average per week. Secondly there is the Spar shop which is 2,500 sq. ft. with an estimated 8,000 transactions per week and thirdly there is Costcutter which is 650 sq. ft. with a predicted 1,000 transactions making an overall total of about 15,000 transactions per week. These figures are not materially different from the figures that were produced for the stores in Portaferry and therefore I think there is some merit in Mr Stacey's suggestion that there is nothing particularly unusual about three convenience stores being established to this degree in a village like Portaferry.

[57] Mr Beattie relied also on the evidence of 10,000 patients in the Health Centre. Whilst this is an interesting figure it would have required fleshing out in order to make any effective use of it. How many of these patients are current? Does this list contain patients over the years who have now moved or died? Where do they live? How often, if at all, do they come to the surgery or are they are on mere nodding acquaintance with it?

[58] Mr Watson asserted that he had a trade wholly independent of the Portaferry Square centre. There was little or no evidence of any such phenomenon. I found nothing of any consequence in the fact that Mr Watson found his trade unchanged on a Sunday when the Spar was closed. The Spar has been traditionally closed for a long time and therefore there really is no reason why there should be a crossover on a Sunday. Mr Watson adduced evidence that his lottery sales were not affected by the advent of another lottery operator opening beside the Square. I do not consider this is compelling evidence because it seems to me unlikely that customers to convenience or grocery stores would be deflected from their normal shopping habits by the presence of a lottery outlet elsewhere.

[59] Set in this context I found it difficult to accept Mr Watson's assertion that his store constitutes a grocery destination shop with the fuel trade being largely local. Whilst I accept immediately that the shop will enjoy a reputation for high standard and value, I do not accept that "destination" shopping is a proper description of his trade. It seems to me that common sense dictates that such nomenclature must be confined to what Dr Murray described as a multi-functional venue with a range of shops and entertainment/leisure related facilities such as Victoria Centre in Belfast.

[60] I can find no logical or rational reason why, for example, people would bypass Kircubbin or Cloughey in order to perform "destination shopping" in the Centra store at Portaferry. Kircubbin, on the evidence before me, has a similar level of vibrancy to Portaferry. It has two banks, a post office, an estate agent, butcher, chemist, petrol filling station, three food shops, one of which contains the only off licence in the village. It thus has a wide range of services and shops. I believe Dr Murray makes more than a glancing insight when he describes Kircubbin as being a "travel to place" from across the middle and lower Ards Peninsula as evidenced by the estate agency containing properties for sale in Kircubbin, Portaferry, Portavogie, Cloughey and Ballyhalbert. In Cloughey there is a relatively new off licence at the Centra shop and a filling station 4.5 miles from the premises of Mr Watson.

Ballyhalbert is 10.5 miles from Portaferry, and Ballywalter is 14.3 miles from Portaferry. I find difficulty in understanding why there would not be a greater draw to Newtownards from these places than towards Portaferry. Off licences are found in Kircubbin, Cloughey, Portaferry, Ballywalter and Carrowdore. Grocery shops are found in Greyabbey, Portavogie, Carrowdore, Ballyhalbert and Cloughey. In short, I find it impossible to accept that the lure of this attractive shop of Mr Watson or the excellent service that he doubtless provides will be sufficient to bring many people to Portaferry beyond their own catchment area. Whilst there may be some small exceptions to that principle, partly perhaps because of the drive and efficiency of Mr Watson, it is not a sufficient number to generate a demand that shows an inadequacy in off licence provision in Portaferry.

Unfulfilled Demand?

[61] The applicants made the argument that up to 15 per cent of the transaction figures of a similar sized grocery store such as that of the applicant's brother in Cloughey would amount to alcohol transactions. Accordingly, the suggestion made was that taking 15 per cent of the transactions overall in Portaferry, demand would be between 2,421 and 2,646 transactions or thereabouts. These figures varied during the course of examination and in cross-examination and it is unnecessary for me to go into a detailed analysis of the ebb and flow of the strength of these various figures.

[62] I confess that I did not find them particularly helpful. In the first place, it really is impossible to move from figures assessed in one store in Cloughey and logically suggest that this would represent a more general figure for all grocery stores or indeed Portaferry in particular. My doubts spring not only from the conceptual difficulty of generalising from the particular but also because Cloughey and Portaferry may well be different in terms of the presence of second homes, caravan sites, income etc. all of which would influence transaction levels in alcohol in the two different areas.

[63] In any event I thought there was merit in the point made by the objector that the pattern of a convenience store does not reflect the pattern of an off licence. Sales figures from Cloughey Centra and from Mr Stacey indicated that not much alcohol is generally sold between 8 am - 11 am or on a Sunday after 9 pm. This is not the pattern in any convenience store and therefore does not correlate directly to sales of alcohol. Similarly, one cannot take into account the sales to children which probably form at least ten per cent of transactions in the convenience store setting.

Conclusion

[64] I have come to the conclusion, therefore, that I must depart from the decision of his Honour Judge Smyth and reverse his finding. I am not satisfied that there is sufficient evidence to establish that there is an unmet demand for alcohol in Portaferry or that Portaferry in this context is attracting sufficient people from

outside to justify a finding of inadequacy under the statutory terms. In my view the evidence falls far short of establishing any inadequacy in the vicinity or beyond. I therefore reverse the finding of the County Court and refuse the application.